S069685

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re CURTIS F. PRICE , On Habeas Corpus,	Case No.: S018328 Related Case: S004719

PETITION FOR WRIT OF HABEAS CORPUS

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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EXHIBITS TO PETITION FOR WRIT OF HABEAS CORPUS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	Case No.: S018328
CURTIS F. PRICE ,	Related to No. S004719
On Habeas Corpus,	

PETITION FOR WRIT OF HABEAS CORPUS

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

Petitioner, CURTIS F. PRICE, by his appointed attorneys Karen S. Sorensen and Robert L. McGlasson, respectfully 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 said writ.

I.

Petitioner is unlawfully confined and restrained of his liberty at San Quentin State Prison, San Quentin, California, in the California State Prison at San Quentin, by James Rowland, Director, California Department of Corrections, and Arthur Calderon, Warden.

II.

Petitioner is confined pursuant to a judgment of the Humboldt County Superior Court in case number 9898.

III.

Petitioner was charged by information with one count of first degree murder with two special circumstances (multiple murder and burglary murder); a second count of first degree murder, one count of conspiracy;

one count of receiving stolen property; one count of burglary, four counts of robbery; and enhancements alleging prior convictions and the use of a firearm. Penal Code sections 187, 190.2, (a)(17), 190.2 (a)(3); 182, 211, 459, 496, 459 and 667(a).

IV

Petitioner pleaded not guilty to the charges and denied the special circumstances and other enhancements on June 29, 1984.

V.

Petitioner was tried by a jury in the guilt, special circumstances and penalty phase proceedings. Jury selection in petitioner's trial began on June 17, 1985 and concluded on October 30, 1985. The evidentiary portion of the guilt phase trial lasted six months. Guilt phase jury deliberations began on April 25, 1986 and continued through May 9, 1986. On May 9, 1986, the jury found petitioner guilty of two counts of first degree murder, conspiracy, burglary, receiving stolen property, and one count of robbery. The jury acquitted petitioner on one count of robbery, and was unable to reach a verdict of two counts of robbery. The jury found the multiple murder and murder committed during the commission of burglary special circumstances true. The jury found all alleged sentencing enhanced true. Finally, the jury determined that petitioner should suffer the penalty of death following a penalty phase trial that began on June 9, 1986, and jury deliberations which began on July 1, 1986 and continued through July 8, 1986.

VI.

Petitioner's judgment of conviction and sentence of death was imposed on July 8, 1986. Petitioner was sentenced to death on Count VIII (the first murder of Elizabeth Hickey), to a 25 years to life term on Count XI (the first degree murder of Richard Barnes), and to various terms in state prison on the remaining counts on which petitioner was convicted.

VII.

Petitioner's automatic appeal to this Court was filed on April 26, 1989. Petitioner was represented on appeal by appointed counsel, Mark E. Cutler. Petitioner filed a petition for writ of habeas in this Court in November of 1990. Petitioner filed a supplemental petition for writ of habeas corpus on or about November 12, 1991. This Court denied petitioner's automatic appeal on December 30, 1991. People v. Price, 1 Cal.4th 324 (1991).) This Court denied petitioner's habeas corpus petition on January 29, 1992, and his supplemental habeas corpus petition on January 30, 1992. In re Price on Habeas Corpus, (No. S018328.)

On or about January 14, 1992, petitioner filed a petition for rehearing from the denial of his direct appeal. This Court denied the rehearing petition on February 19, 1992. Petitioner filed a petition for writ of certiorari in the United States Supreme Court in June, 1992. The United States Supreme Court denied the petition in October, 1992. Price v. California, 506 U.S. 851 (1992). Petitioner's attorney, Mark E. Cutler, did no further legal work on petitioner's case after he filed the petition for writ of certiorari in June 1992, and Mr. Cutler did not seek appointment as counsel for petitioner in federal court.

VIII.

On January 25, 1983, petitioner submitted a pro se request in the United States District Court for the Northern District of California for the appointment of counsel to represent him in federal habeas corpus proceedings to challenge his convictions and the death sentence imposed on him by the Humboldt County Superior Court, and for a stay of his execution. Petitioner's federal habeas corpus action was assigned to United States District Court Judge Charles A. Legge. Judge Legge ordered temporary stays of petitioner's execution while counsel qualified and willing to accept appoint in this massive record case could be found. That

process took three and a half years. On June 23, 1994, Judge Legge appointed Karen S. Sorensen as co-lead counsel and appointed Robert L. McGlasson, appearing pro hac vice, as co-lead counsel, to represent petitioner in federal habeas corpus proceedings in federal court. Price v. Calderon, C-93-0277 CAL. Judge Legge continued the temporary stay of execution to permit counsel to review the record and prepare and file a federal habeas corpus petition on Mr. Price's behalf.

After reviewing the state court record and the case files obtained from petitioner's trial and state appellate attorneys, and conducting an extensive factual investigation of potential claims for the federal habeas petition, Ms. Sorensen and Mr. McGlasson filed a timely federal petition for writ of habeas corpus raising 35 claims on petitioner's behalf in the federal court on April 21, 1997. On July 29, 1997, respondent filed a motion to dismiss the petition in its entirety for lack of exhaustion. Respondent's motion came on for hearing before Judge Legge on January 8, 1998.

On February 17, 1998, Judge Legge signed a written order denying respondent's motion to dismiss the petition in its entirety. Instead, Judge Legge ordered 1) ten of the claims in the petition dismissed without prejudice for lack of exhaustion; 2) stayed the dismissal of those claims for 60 days from the date of the order; 3) continued the current stay of execution for 60 days and 4) held the remaining exhausted claims petition in abeyance pending state exhaustion proceedings. Judge Legge further ordered petitioner's federal habeas counsel to seek appointment and compensation from this Court for purposes of preparing and filing the exhaustion petition and handling state exhaustion proceedings, and to prepare and file the state exhaustion petition within 60 days of the date of his order. The sixtieth day falls on Saturday, April 18, 1998, and under

federal and state court rules, the petition is therefore due on the next business day, Monday, April 20, 1998.

IX.

This petition is being filed without undue delay and as promptly as reasonably possible under all of the relevant circumstances in this case. Petitioner demonstrates below his diligence and the timeliness of the filing of this successive state habeas corpus petition. Although California's rules regarding timeliness are not wholly clear as to what constitutes an adequate showing, see In re Clark, 5 Cal. 4th 750, 763, 768 (1993) ("no clear guidelines have emerged in our past cases" regarding timeliness rules in state habeas corpus proceedings; rules have been "discretionary" in past, and merits of many successive petitions have been considered without regard for timeliness rules; past decisions suggest that rules are subject to undefined exceptions); Fields v. Calderon, ___ F.3d ___,(9th Cir. 1997); Calderon v. United States District Court (Bean), 96 F.3d 1126 (9th Cir. 1996); Morales v. Calderon, 85 F.3d 1387 (9th Cir. 1996); Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994), petitioner nevertheless sets forth here why, under any reasonable test for due diligence, the claims in this petition should not, in fairness, be subject to any timeliness procedural impediment. By making this timeliness showing, petitioner does not concede either that the state's discretionary policies against delayed or successive petitions constitute an adequate and independent state ground under relevant federal law, id., or that he should be required to make such a showing in order to have this Court and, if necessary, the federal courts, entertain the merits of each of the claims contained in this petition. This is due in part to the fact that, at the time he filed his initial state petition in 1990, some three years before the Court issued its decision in Clark, the rules were, as this Court itself acknowledged, unclear, undefined, and often treated as discretionary. 5 Cal. 4th at 763, 768. Under those circumstances,

although petitioner believes this petition is procedurally proper under any reasonable test, he submits that it would be unfair to refuse consideration of the merits of his claims because of a determination that his showing is in some way inadequate.

At the outset, several overriding factors unique to this case must be discussed to fully understand the reasonable progression of the litigation in this case since current counsel were appointed in federal court in the summer of 1994. Of paramount importance to the issue of procedural regularity is the overwhelming size and complexity of the case. Indeed, this Court acknowledged in its own opinion on direct appeal that, to date, this was the most voluminous capital case on record. See People v. Price, 1 Cal. 4th 324, 375 n.1 (1991). Thus the investigation, development and presentation of legal claims in the case has required a tremendous effort on the part of current counsel. A brief overview of the massive size of this case is warranted here:

> a. The pre-trial and trial proceedings in this case spanned more than three years; over 170 witnesses testified at the trial; more than one thousand exhibits were introduced. The pre-trial portion of the proceedings alone lasted more than two (2) years, beginning in March, 1983, when petitioner was initially arrested, and concluding in June, 1985 when jury selection began. During that time the court conducted three (3) preliminary examinations lasting a total of more than thirty (30) days, and Mr. Price appeared in hearings in municipal court on more than forty five (45) occasions. Throughout the pre-trial period the trial court conducted numerous motions hearings. Jury selection in the case began in June of 1985, and lasted over four months. In November of 1985, the guilt-innocence phase of trial began, concluding over six months later. After several days of deliberation, on May 9, 1986, the jury returned guilty verdicts on the murder (and related) counts and one of the robbery counts. The penalty phase of trial began in June, 1986, and after several more days of deliberations, the jury returned a verdict of death on July 8, 1986.

b. Consistent with such lengthy and protracted proceedings, the number of court records and case-related documents that undersigned counsel obtained, reviewed, and indexed, is extraordinary. State appellate counsel Mark Cutler furnished undersigned counsel with approximately 28 boxes of court records and case-related files. In addition to Mr. Cutler's files, current counsel also obtained and reviewed over 75 boxes of trial files from trial attorneys Bernard DePaoli and Anna Klay.

c. Current counsel thus were required to review: at least forty-four thousand (44,000) pages of trial record (including Reporter's Transcripts, Supplemental Reporter's Transcripts, Clerk's Transcripts, Augmented or Corrected Transcripts on Appeal; approximately nineteen hundred (1,900) pages of appellate briefing on appeal, and over 100,000 pages of attorney files and, fifteen or more cassette tapes from obtained by defense counsel during the trial.

d. In addition, because a substantial portion of the factual bases for a number of petitioner's claims for habeas relief did not appear from the court record or in the files of Mr. Price's prior attorneys, it was also necessary to review thousands of pages of transcripts, records and files obtained from other cases but relating to petitioner's case as part of the habeas investigation

In summary, this is a case made up of over 150,000 pages of relevant, material transcripts and case-related documents which it was necessary for petitioner's current counsel to review. See Exh. 1 (Declaration of Karen S. Sorensen) at 1-2.

In addition to the documentary aspects of the work in this case, as set forth in more detail below, a tremendous amount of investigative work was necessary to discover, develop and present many of the claims set forth in this petition. See Exh. 1. Such investigations required interviewing scores of witnesses scattered around the entire country. Once most of the information was discovered, analyzed, and organized, and after legal research was done to determine the precise nature of the legal claims such

information gave rise to, counsel was required to prepare and file a federal petition for writ of habeas corpus over 700 pages in length. This was done by order of the federal court. Thus, as this Court reviews the proffer made below regarding the timeliness of the filing of this successive state petition, all of the above must be kept in mind in assessing counsel's diligence and reasonableness under the circumstances.

In general, petitioner's failure to litigate in prior state court proceedings each of the claims set forth herein can be explained by one or more of several reasons. First, the facts supporting several of the claims were hidden by the prosecution from the defense at trial and/or during the direct appeal and initial state habeas corpus proceedings. This is so despite the fact that the prosecution was under an ongoing duty to disclose such information to prior counsel. See Thomas v. Goldsmith, 979 F.2d 746 (9th Cir. 1992). Such prosecutorial secrecy alone justifies any failure on the part of prior counsel to have raised and litigated these claims. As this Court has held, such newly discovered evidence, where it undermines the prosecution's entire case, and where counsel was prevented from discovering such evidence through reasonably diligent investigation, is a sufficient reason to justify any prior failure on the part of past counsel to litigate this claim. In re Clark, supra. at 766, 775. Current counsel learned of some of the factual bases for these newly discovered claims through fortuitous occurrences outside the control of petitioner or his attorneys, and raised the claims at the first available time in filing the federal petition on April 21, 1997. See Exh. 1.

Second, to the extent that the factual bases of some of the claims in this petition were known or could have been discovered by prior counsel through diligent investigation, petitioner was deprived of the effective assistance of counsel either on direct appeal or in state habeas corpus proceedings. Cf. In re Clark, supra, at 766, 779 (in determining timeliness,

if prior habeas counsel failed to afford adequate representation, such failure may justify need to file and have considered on merits a successive petition); see also claim @ infra, incorporated herein by express reference. The same is true with respect to claims which could have been gleaned from the face of the record by competent counsel. Id.

Finally, current counsel raised the claims contained in this petition in a reasonable and timely manner in filing them initially in a federal petition for writ of habeas corpus in April, 1997. Exh. 1 at 1-3. Current counsel did not complete the investigations on some of these claims until shortly before the filing of the initial federal petition. Id. On others, while current counsel discovered some of the facts supporting those claims during the time preceding the filing of the initial federal petition, counsel was under federal court order to file a complete federal petition raising all known claims, whether exhausted or not. To avoid the inefficiency and procedural complexity of piecemeal litigation, current counsel raised all of these claims as an initial matter in the first federal petition. Id. Such avoidance of piecemeal litigation is precisely the intent of the procedural rules discussed in In re Clark. 5 Cal. 4th at 767-775.

Additionally, it is important to note here that the pleading requirements for state court are far more cumbersome than those in federal court. Compare In re Duvall, 9 Cal. 4th 464, 474 (1995), with Rule 2 of Rules Governing §2254 Cases. Thus at the time of filing the federal petition, most of the claims which the federal court later determined were unexhausted were not ready for filing in state court in accordance with the state procedural requirements. Since the federal petition was filed, a great deal of additional work was necessary in order to comply with the more burdensome state pleading requirements. Exh. 1 at 1-9. At the same time, significant litigation occurred in federal court after the federal petition was filed, which only culminated in early February after the federal court

determined which claims in the federal petition were unexhausted and required the state exhaustion petition filed here. Exh. 1 at 4. For these reasons, this state petition is being filed at this time in the context of a reasonable and orderly progression of events that began in federal habeas corpus proceedings. This Court should defer to such a progression in determining that this second state petition has been filed in a reasonable and timely manner.

Turning to the specific claims, with respect to claims I, II, III, and the misconduct portion of IV, as set forth in the body of the claims, the facts underlying these claims were hidden from petitioner and his counsel by the prosecution throughout the trial, appeal, and initial state habeas corpus proceedings. Exh. 5 (Declaration of Mark E. Cutler) at 1. As the claims allege, the prosecution engaged in blatant misconduct, and then hid the facts of the misconduct from petitioner and his counsel. Such intentional concealment on the part of the prosecution excuses and wholly explains any prior failure to perceive or litigate these claims in all prior state court proceedings. See In re Clark, supra. at 766, 775 (where factual basis for claim was unknown to petitioner and he was unable to present claim, court will consider merits despite successive nature of petition). This is especially true where, as in this case, the evidence uncovered by current counsel "casts fundamental doubt on the accuracy and reliability of the proceedings." Id. at 766.

Current counsel only learned of the facts underlying claim I because of the litigation in two unrelated Oregon murder cases which took place almost nine years after petitioner was convicted and sentenced to death. Petitioner fortuitously obtained those facts during his investigation in this case for federal habeas litigation, . Exh. 1 at 3. In those cases, the two principal state's witnesses in the Price trial, Michael Thompson and Clifford Smith, also testified for the prosecution. See State of Oregon v.

not previously litigated in this Court. This is precisely the type of situation contemplated in In re Clark, where this Court held that the merits of a successive petition would be considered when the petitioner was prevented from discovering the factual basis for a claim in the course of developing and filing a prior state petition. 5 Cal. 4th at 775.

It is important to note in this context that, under state law, appellate counsel did not have access to formal discovery mechanisms. See People v. Gonzalez (1990) 51 Cal.3d 1179, 1260-1261. Mr. Cutler was therefore unable under state law to compel respondent or the prosecuting agencies to disclose all relevant information in this case. Exh. 5 at 1. Thus without this Court's cooperation, no amount of reasonable diligence on the part of prior counsel would have led to the discovery of the factual bases for these claims. Id.

With respect to claims II and VIII, former appellate counsel did not have knowledge of all of the information that formed the bases for these claims. Id at 2. His failure to obtain such knowledge was not wholly his fault, as he was unaware of the extensive facts noted above regarding the perjury of the state's chief witnesses, facts which would have highlighted the importance of a factual investigation into Mr. Price's innocence of the Barnes and Hickey murders. With regard to the Barnes murder, he did not conduct an independent investigation into Price's innocence of that crime by speaking with relevant members of organized prison gangs. Id. With respect to the Hickey murder, although Mr. Cutler did argue Price's innocence of that crime in the Appellant's Opening Brief, see AOB at 365-440, 694-708, incorporated herein by express reference, he did not conduct an independent investigation into that crime regarding the bloody fingerprints that were found on her body at the time of her death. Id. If this Court finds that appellate counsel should have conducted his own investigation of these issues, whether or not he had received the kind of

detailed information of state witness perjury uncovered by current counsel, then his failure amounts to ineffective representation which itself should excuse any perceived untimeliness in the filing of these claims in this second state petition. Cf. In re Clark, supra. at 766, 779 (in determining timeliness, if prior habeas counsel failed to afford adequate representation, such failure may justify need to file and have considered on merits a successive petition); see also claim X infra., incorporated herein by express reference.

Moreover, the evidence uncovered by current counsel regarding Mr. Price's innocence of the Barnes murder and the alleged Aryan Brotherhood murder conspiracy satisfies the newly discovered evidence test set forth in In re Clark. For this additional reason, that claim should be held to be timely in this petition. Id. at 766 (when newly discovered evidence undermines entire prosecution's case and points either to innocence or reduced culpability, no timeliness barriers exist). Here, the new evidence establishes through the confession of a different individual that Mr. Price did not commit the Barnes murder. That individual was a member of a different prison gang, the Mexican Mafia. This new evidence completely undermines the prosecution's entire case that Curtis Price, an alleged member of a different prison gang, committed the Barnes murder and the other crimes alleged in the Information as a part of an AB conspiracy. Instead, the new evidence shows that a different gang and individual in it actually committed the Barnes crime. See claim II, incorporated herein by express reference. This is especially true in this case, where, as set forth in claim I, incorporated herein by express reference, the prosecution suppressed records requested by the defense which would have also contradicted critical prosecution evidence of petitioner's alleged involvement in the alleged AB conspiracy to commit the Barnes murder.

Thus the evidence of innocence found in claim II below, alone would have reduced Price's culpability for the Hickey murder, especially where, as here, there is additional evidence that he is innocent of that murder as well. Finally, this Court must assess the merits of these claims of innocence in any event, because the procedural rules require such an assessment in order to determine whether there is sufficient justification for failing to raise the claims in prior proceedings. Where, as here, the merits of the claims stands or falls based on an assessment of the same factors as those required for an establishment of timeliness, then, of course, the Court should consider and decide the merits of the claims.

With respect to claims III and IV, current counsel learned of the prosecutorial/juror misconduct alleged in these claims through a fortuitous conversation between the eyewitness discussed in the claims and a third party who was aware of our representation of Mr. Price, and then interviewed this eyewitness as part of the habeas investigation. Prior counsel was not aware of these facts, and the prosecution failed to disclose them to him despite their knowledge of them. Exh. 5 at 1. Clark is clear that such prosecutorial concealment of information excuses any past failure to have litigated these claims. 5 Cal. 4^{th} at 775.

With respect to the allegations of error arising from juror Zetta Southworth's DUI convictions and the resulting probation proceedings, prior counsel did not conduct an independent investigation of the court records in Southworth's cases. Exh. 5 at 1. Current counsel diligently investigated the misconduct facts and those relating to Ms. Southworth's DUI convictions. These facts were then pleaded as soon as practicable in the federal petition which was filed in accordance with the federal court order. To the extent that prior counsel should have conducted an independent investigation into Southworth's DUI court records, he was ineffective for failing to have done so, which itself should excuse any

perceived untimeliness in the filing of these claims in this second state petition. Cf. In re Clark, supra. at 766, 779 (in determining timeliness, if prior habeas counsel failed to afford adequate representation, such failure may justify need to file and have considered on merits a successive petition); see also claim X infra., incorporated herein by express reference.

With respect to claims V and VI regarding juror Debra Kramer and the conflict of interest under which trial counsel Bernard DePaoli labored in this case, appellate counsel was not aware of the facts providing the bases for these claim. Exh. 5 at 2. Although Mr. Cutler spoke with some jurors by telephone, id. at 1, he did not find out any of those facts from Ms. Kramer regarding her prior involvement with Mr. DePaoli. Mr. Cutler also interviewed Mr. DePaoli about the case, and he failed to tell the truth to Mr. Cutler about his prior relationship with Ms. Kramer. Id. at 2. These facts once again establish that, through no fault of Mr. Cutler's, the factual basis for the claim was not available in the prior state proceedings, thus justifying consideration on the merits here. In re Clark, supra., at 765-66, 775. However, as with the other claims, if the Court determines that appellate counsel should have conducted a more thorough investigation of this issue, then his failure amounts to ineffective representation which itself should excuse any perceived untimeliness in the filing of these claims in this second state petition. In re Clark, supra. at 766, 779 (in determining timeliness, if prior habeas counsel failed to afford adequate representation, such failure may justify need to file and have considered on merits a successive petition); see also claim X infra., incorporated herein by express reference.

Again, current counsel learned of these facts only because Mr. DePaoli chose to tell the truth, and because, having learned of this information from Mr. DePaoli, counsel was able to independently verify it through further investigations. Counsel raised the issue in federal court as

soon as practicable after conducting investigations into the claim, and only recently obtained sufficient evidentiary support for the claim to satisfy state pleading requirements.

With respect to claim VII, this Court did not initially reveal to Mr. Cutler the sealed transcripts which contained the information regarding Judge Buffington's bias that forms the essential factual underpinning for this claim, and he only received some of these transcripts in 1990, over one year after he filed the Appellant's Opening Brief in the case. Under the circumstances, it was not wholly unreasonable for Mr. Cutler to have failed to comprehend the importance of those transcripts noted in the body of the claim which establish Judge Buffington's clear hostility toward trial counsel in this case. Had this Court or the trial court released the transcripts earlier, Mr. Cutler would likely have recognized the importance. This alone justifies his failure to litigate this claim before this Court in prior state proceedings. Alternatively, if this Court determines that Mr. Cutler should have been on notice of the factual basis for this claim, he was ineffective for failing to raise it once he obtained access to the sealed transcripts, and such ineffectiveness should itself excuse any perceived untimeliness arising from such failure. Cf. In re Clark, supra. at 766, 779 (in determining timeliness, if prior habeas counsel failed to afford adequate representation, such failure may justify need to file and have considered on merits a successive petition); see also claim X infra., incorporated herein by express reference. Current counsel raised this issue as an initial matter in the federal petition in order to avoid piecemeal litigation and in compliance with the federal court order requiring them to do so. Moreover, we have presented this claim as promptly as possible after obtaining and assembling the evidentiary material in support of this claim necessary to satisfy state pleading requirements.

With respect to claim IX, appellate counsel was ineffective for failing to raise this claim in the initial appeal in this case, and such ineffectiveness should itself excuse any perceived untimeliness arising from such failure. Cf. In re Clark, supra. at 766, 779 (in determining timeliness, if prior habeas counsel failed to afford adequate representation, such failure may justify need to file and have considered on merits a successive petition); see also claim X infra., incorporated herein by express reference. Current counsel raised this issue as an initial matter in the federal petition in order to avoid piecemeal litigation and in compliance with the federal court order requiring them to do so.

With respect to claim X, appellate counsel was conflicted from raising any ineffectiveness claim against himself. Thus the issue of ineffective assistance of counsel on appeal could not have been raised by Mr. Cutler. Appellate counsel did raise some aspects of ineffectiveness of trial counsel in the state habeas corpus proceeding. With respect to those aspects contained in this petition that were not raised by Mr. Cutler, he was ineffective for failing to conduct the necessary investigations that would have provided the factual bases for these claims. Cf. In re Clark, supra. at 766, 779 (in determining timeliness, if prior habeas counsel failed to afford adequate representation, such failure may justify need to file and have considered on merits a successive petition); see also claim X infra., incorporated herein by express reference. Current counsel raised some of these issues as an initial matter in the federal petition in order to avoid piecemeal litigation and in compliance with the federal court order requiring them to do so.

As a general matter, to the extent that appellate counsel reasonably should have been aware of the factual and legal grounds supporting any of the claims for relief contained in this petition, prior counsel's failure to recognize, investigate and raise those claims violated Petitioner's state-law

entitlement to competent counsel, see In re Clark, supra, 5 Cal.4th at 766, 779 and his Sixth and Fourteenth Amendment rights, and constitutes good cause to excuse any delay in the presentation of these claims.

In any event, petitioner can satisfy several of the exceptions to the timeliness rules set forth in In re Clark. In Clark this Court held that regardless of any showing of diligence or timeliness, it will consider the merits of claims in successive petitions such as this one to avoid a "miscarriage of justice." 5 Cal. 4th at 797. The Court defined miscarriage to include: (1) trial error so egregious that, but for the error, no reasonable juror would have voted to convict; (2) a showing of actual innocence of a crime for which the petitioner was convicted; (3) a showing that the death penalty was imposed by a sentencing jury which had a "misleading profile" of petitioner so off the mark that, but for the error, no reasonable juror would have voted for death; (4) petitioner was convicted or sentenced under an invalid statute. Id. at 797-98. Petitioner here satisfies several of these exceptions, thus providing additional justification why this Court must consider and rule upon his claims on the merits.

First, as an initial matter, the claims set forth in this petition demonstrate that a fundamental miscarriage of justice occurred in this case. When reviewed as a whole, these claims, and those previously litigated before this Court, establish that the petitioner was, through no fault of his own, denied the basic rudiments of a fair trial. Where, as here, the prosecution hid critical exculpatory evidence and allowed their primary witnesses to lie in front of the jury, and the trial judge was secretly engaged in a battle with the defense in which he elicited the assistance of the district attorney's office while the trial was ongoing, and the lead defense attorney was a severe alcoholic who admittedly made numerous poor judgment calls due to his alcoholism, there can be little doubt that a fair trial was denied in this case.

Second, claims II and VIII of this petition establish that petitioner is actually innocent of the crimes for which he was sentenced to death, or, at the very least, no reasonable juror would have voted to convict. The evidence submitted in support of claim II is especially important in this regard, as it demonstrates that another individual has admitted to the Barnes murder. If that evidence had been submitted to the jury, coupled with the evidence of the state's chief witnesses and their motive to lie for their own benefit, it is wholly reasonable to assume that no reasonable juror would have voted to convict.

Third, the jury that sentenced petitioner to death had little information about Mr. Price's severely abused and neglected childhood. The record at trial, when compared with that presented in this petition, makes clear that the sentencing jury was given a "grossly misleading profile" of the defendant in this case. Once again, had the jury been apprised of the mitigating facts set forth in this petition, see claim X, incorporated herein by express reference, in addition to those showing his innocence of the murders and the state's use of witnesses whose testimony was bought and paid for with lavish benefits, there is little doubt a death verdict would not have been entered.

Finally, in claim IX petitioner establishes how the California death penalty statute is being applied in an unconstitutional manner. Thus petitioner's death sentence was imposed under an invalid statute. For all of these additional reasons, petitioner has established that each of the exceptions to the timeliness rules set forth in In re Clark exist in this case.

For all of the above reasons, current counsel have attempted in good faith to comply with the mandate of In re Clark, supra. He has demonstrated the timeliness of this successive petition; he has shown that exceptions to the Clark rules obtain in this case; and he has here attempted

CLAIM I

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1. Petitioner's convictions and sentence of death were unlawfully and unconstitutionally obtained and imposed in violation of his federal and state constitutional rights, including his Fifth and Fourteenth Amendment rights to due process, his Sixth and Fourteenth Amendment rights to a fair trial, to effective assistance of counsel, and to cross-examination and confrontation, and his Eighth Amendment right to a reliable and accurate determination of guilt and penalty, and analogous provisions of the California Constitution by: (1) the prosecution's knowing use of false testimony by three key guilt-innocence phase informant witnesses, Michael Lynn Thompson, Clifford E. Smith, and Janet J. Myers, concerning the benefits promised them in return for assistance against petitioner, and about other relevant matters; and by (2) the prosecution's suppression of constitutionally material evidence.

2. Petitioner has divided this claim, which is actually a series of separate but related claims into different subsections. In subsection A, petitioner provides a factual overview for the claims. In subsections B through G, petitioner alleges the facts in support of each claim of knowing use of false testimony, witness by witness. In subsection H, petitioner alleges the facts in support of the Brady claims, and in subsection I,

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petitioner alleges facts that establish the cumulative impact of the Brady evidence and its constitutional materiality under United States v. Bagley, 473 U.S. 667 (1985).

A. Factual Overview

3. Petitioner was charged in a twelve count Information (No. 9898) in the Humboldt County Superior Court with murdering Richard Barnes and Elizabeth Hickey as part of a conspiracy by the leadership of the Aryan Brotherhood (AB), a prison gang. The information charged the conspiracy as a separate count, and alleged the murders of Richard Barnes and Elizabeth Hickey, and the other crimes in the Information as overt acts. Each of the overt acts was also charged as a substantive offense. CT 3072-3082.[1]

4. There was no physical evidence that linked petitioner to either murder. Petitioner's fingerprints were not found at either murder scene. RT 11853-11854. The fingerprints of an unidentified person however, were found at the Hickey murder scene on various objects, including the telephone in her apartment which was found off the hook shortly after her death, and an empty Pepsi can which was found on the bedstand of the bed right above her body. RT 17477-17478, 14505-14506. The Barnes murder scene and Barnes's car were dusted for fingerprints. RT 11853. However, no fingerprint report was included as part of the Barnes homicide report (RT 11854) or otherwise disclosed to the defense, and the prosecution did

[1] Throughout this petition, the abbreviation "CT" will be used for all references to the Clerk's Transcript on appeal; the abbreviation "RT" will be used for all references to the Reporter's Transcript on appeal, the abbreviation "CCT" will be used for all references to the Corrected Clerk's Transcript on appeal, and the abbreviation "AOB" will be used for all references to the Appellant's Opening Brief.

not introduce any fingerprint testimony at petitioner's trial concerning the Barnes crime scene. There were no eyewitnesses to either the Hickey or Barnes murders. From the outset, petitioner has consistently maintained that he is not guilty of either murder, of the conspiracy and the other substantive crimes that were also alleged as overt acts of that conspiracy. See e.g. CT 1308; RT 22280-1, 22464-22465.

5. As summarized below, the testimony of two prosecution witnesses, Michael Thompson and Clifford Smith, formed the cornerstone and foundation of the State's case as to the existence of the alleged AB murder conspiracy, the alleged goals of that conspiracy, and petitioner's alleged role in the conspiracy, including his alleged perpetration of the Barnes and Hickey murders and the commission of robberies and other crimes in Humboldt County in furtherance of the conspiracy. The testimony of Janet Myers provided essential corroboration for Thompson and Smith's testimony. Thompson, Smith and Myers each had multiple felony convictions and long criminal records. See e.g., RT 16732-35; 17094-95, 17000-2, 14603-14605; 13818-13819.

6. Thompson testified that, prior to September 1983 when he defected from the AB ("rolled") and began cooperating with the State, he had been on what he described as the AB's ruling "council", and was one of the co-conspirators in the alleged AB murder conspiracy charged against petitioner. RT 16772, 16778. Thompson testified that the murder conspiracy was agreed upon during the summer of 1982, at Palm Hall, the maximum security unit at the California state prison in Chino, by members of the AB council. See e.g. RT 16801-16804.

7. Clifford Smith testified that prior to his defection from the AB in October 1985, he had also been on this alleged "council", and was one of

the co-conspirators in the alleged murder conspiracy. RT 14625, 14629, 14650-14654. Smith took personal credit for the decision to have Richard Barnes killed, which he said he made at the end of 1982. RT 14671. Neither Thompson or Smith claimed that petitioner was in the AB council or in a position of leadership in the AB.

8. Thompson and Smith testified that the reason why Richard Barnes was killed was because his son, Steve Barnes, a former AB associate, had turned informant and was a witness or about to become one against several AB leaders, including Robert "Blinkey" Griffin. RT 14651, 16931. According to Thompson and Smith, the AB council wanted to retaliate against Steve Barnes, and also send a clear message to other would-be defectors. Both Thompson and Smith testified that the murder contract on Richard Barnes was awarded to and accepted by petitioner at Palm Hall before his release from prison in mid-September of 1982. RT 16812.[2] According to Thompson, he personally told petitioner about the Richard Barnes murder contract during a conversation on the Palm Hall yard, and he claimed that petitioner accepted the contract at that time. Id.

9. Thompson linked the Barnes and Hickey murders together by suggesting that Elizabeth Hickey's murder was linked to the prior burglary of the home of her parents, the Moores, wherein a number of guns were stolen. Thompson claimed at trial that it was from the Moore burglary that petitioner obtained the gun used to kill Richard Barnes. RT 17088. On cross-examination, he admitted he told the authorities in 1983 that the Barnes murder weapon came from the Hickey residence and may have said

[2] Petitioner was only at Palm Hall for a very brief time in 1982. He was not there by choice. He arrived at Palm Hall from the Montana State Prison on August 26, 1982 and was released from custody on September 14, 1982.

Hickey was killed before Barnes. RT 17086-88. The Barnes murder weapon was never recovered. Bullets which were recovered from Richard Barnes' body were consistent with having been fired from a .22 caliber magnum weapon. RT 12144.[3]

10. Janet Myers testified that she had been Smith's girlfriend at the time of the alleged conspiracy. She denied having any knowledge of the conspiracy but claimed she had gone with petitioner to the location of the Barnes residence in Temple City one night during the week before Richard Barnes was killed. RT 13829. Mr. Barnes was killed inside his residence on early Sunday morning, February 13, 1983, shortly after midnight. Myers also testified that petitioner stayed in her apartment for two weeks in early February of 1983, and that on one occasion during that time period, she saw petitioner cleaning a .22 caliber Western-style revolver. RT 13795-13796.

11. Ms. Myers testified that on Saturday night, February 12, 1983, she and her friend Tammy Shinn, who was the girlfriend of alleged co-conspirator, Robert "Blinkey" Griffin, had gone to play bingo, and that when they returned to Janet's house, petitioner asked Tammy for her car keys and he left Janet's apartment at around 11:00 p.m., and she did not see him again until the next morning. RT 13811-13812. Ms. Shinn was listed on the prosecution's witness list, but was never called.[4]

12. According to Ms. Myers, on February 13, 1983, before petitioner left her home to return to Eureka, she asked him if he had any message for

[3] The prosecution's ballistics expert testified that the four brands of weapons that could have fired these bullets were all fairly common. RT 12144. The Rohm and R & G .22 caliber revolvers were among the cheap handguns commonly referred to as "Saturday night specials."

[4] In her initial statements to the police, Ms. Myers mentioned playing bingo but said she went with her neighbor, Pam Raderink, and did not

the guys at Palm Hall, and he told her to tell them that "everything was okay." Myers claimed that she delivered that message to Clifford Smith during her alleged visit to him at Palm Hall that same Sunday, February 13, 1983. RT 13845. According to Myers, Tammy Shinn had gone to Palm Hall with Myers that Sunday to visit "Blinkey" Griffin. Id. Clifford Smith testified that Myers actually brought him a hand-printed note from petitioner on that date, and that after Janet showed him the note, she passed it to Tammy Shinn, who showed in turn showed it to "Blinkey" Griffin and then handed it back to Myers who destroyed it. RT 14693-14694. The prosecution contended that the message was an admission by petitioner that he had murdered Richard Barnes.

13. Thompson and Smith testified about two other alleged incriminating messages from petitioner. One was a message that petitioner had "sent a girl to the country." Thompson and Smith testified the phrase "send someone to the country" was code for killing the person. RT 14783, 16909. The prosecution contended this was an admission by petitioner that he killed Elizabeth Hickey.

14. Thompson also testified about a secret coded message written in urine that he claimed petitioner had included in a letter he wrote to Thompson. Thompson called this a "hit-or-miss" message. RT 16835. The contents of the message suggested that petitioner wanted to do away with some witnesses, so that he would walk away a free man.

15. Powerful impeachment evidence that would have wholy undermined the credibility of each of these key witnesses existed but was concealed from the defense. Michael Thompson, Clifford Smith and Janet Myers all lied about the benefits they were promised in return for their

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mention anything about Tammy Shinn's having been present that night.

favorable testimony on behalf of the prosecution. For its part, the prosecution suppressed that evidence, and made knowing use of its prisoner informant witnesses' false testimony to obtain petitioner's convictions and sentence of death in violation of petitioner's federal constitutional rights.

B. THE PROSECUTION'S KNOWING USE OF PERJURED TESTIMONY

16. Federal and state law on the use of perjured testimony claims set forth in this petition is well settled. It is a violation of federal due process for the prosecution to use testimony to obtain a conviction that it knew, or should have known, was false. Mooney v. Holohan, 294 U.S. 103, 112 (1935). In Mooney and its progeny, the Supreme Court has made clear that the deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary notions of justice." Id. A conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Pyle v. Kansas, 317 U.S. 213 (1942), Alcorta v. Texas, 355 U.S. 28 (1957), Giglio v. United States, 405 U.S. (1971). In Napue v. Illinois, 360 U.S. 264, 269 (1959), the Supreme Court reaffirmed the expansive scope of this rule, stating that "[t]he same result obtains when the State, although not soliciting false evidence, allowed it to go uncorrected when it appears.."

17. Under Napue and its progeny, it must be shown that the prosecutor had either active or constructive knowledge that the testimony used was perjured. (Id. at 265,269.) Knowledge by law enforcement agents or others involved or cooperating with the prosecution of information showing that the testimony at issue was perjured is imputed to the prosecution. See United States v. Antone, 603 F.2d 566, 569 (5th Cir.

1979); Rivers v. Martin, 484 F.Supp. 162, 164 (W.D. Va. 1980); United States v. Endicott, 869 F.2d 452, 455 (9th Cir. 1989) United States v. Butler, 567 F.2d 885, 891 (9th Cir. 1978); e.g. Carriger v. Lewis, 132 F.3d 463 en banc (9th Cir. 1998,); In re John Brown, 17 Cal.4th 873 (1998).

18. Under California law, a writ of habeas corpus may be granted if false evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration. Penal Code § 1473 (b)(1). Under this statute, prosecution evidence subject to challenge on the ground that it is "false evidence" must be "false" and "substantially material or probative on the issue of guilt or punishment," and there is no obligation to show that the testimony was perjured or that the prosecution and its agents were aware of the impropriety. In re Hall, 30 Cal.3d 408 (1991); In re Wright, 78 Cal.App.3d 788, 809, fn. 5.

19. In petitioner's case, the prosecution violated Mooney, Giglio, and Napue, as well as §1473(b)(1) by using false testimony provided by and solicited from prosecution witnesses Michael Thompson, Janet Myers, and Clifford Smith, concerning the benefits they were receiving and/or were promised for their testimony and concerning other relevant matters, that the prosecution knew or should have known was false, but allowed to go uncorrected. Petitioner alleges the following facts, among others to be presented after access to discovery, to adequate funding, and to an evidentiary hearing, in support of his use of perjured testimony claims.

C. The Prosecution's Knowing Use of Michael Thompson's False Testimony Concerning The Benefits Promised Him For his Assistance to the State in this Case

20. Michael Thompson was the first of the trio of snitch witnesses to begin cooperating with the State of California against petitioner. This occurred in September of 1983, when Thompson officially defected from the AB. RT 16937.

21. By 1983, Thompson had been an inmate in the California Department of Corrections (CDC) for about eight years. He was sentenced to state prison in 1975 at the age of twenty-four or twenty-five to begin serving an indeterminate twenty five year to life sentence for his convictions in Orange County of two first degree murders, conspiracy and kidnapping. RT 16732.

22. As part of CDC's intake process, a psychological evaluation of Thompson was conducted in October 1975, by R. L. Flanagan, M.D., chief psychiatrist with the CDC. In his report, Dr. Flanagan made the following observations about Michael Thompson, whom he estimated to be of bright, normal intelligence, and diagnosed as an anti-social personality: "This man is capable of and may be successful in manipulating others into doing his bidding. . . ." Exh. 14 at 2-3. Dr. Flanagan's comments proved prescient. Thompson successfully manipulated the prosecution and the law enforcement agents involved in this case into "doing his bidding," by such tactics as threatening to cease his cooperation against Mr. Price if his (Thompson's) conditions were not met. See e.g. Exh. 16 at 3. All the while, Thompson distorted the truth, denying that he was cooperating against petitioner to gain any personal benefits for himself, and instead, portraying himself as a person who was helping the prosecution in this case because he believed it was the right thing for him to do. RT 16792-16793.

23. Thus, on direct examination by Deputy Attorney General Ron

Bass at petitioner's trial, Thompson denied that he had been promised any benefits other than immunity for his testimony. RT 16972. Responding to a question by Bass about whether he (Thompson) had been given any rewards or promises by Paul Tulleners, (the Attorney General's case-investigator), or from anyone else in law enforcement involved in the case, including Bass, Humboldt County assistant district attorney Worth Dikeman, or the Los Angeles Sheriff's Office, Thompson stated unequivocally:

> There have been no promises from anyone connected with or associated with law enforcement to me. None. I've not allowed any. I won't allow any. RT 16792.

24. Deputy A.G. Bass then invited Thompson to explain to the jury why he had not allowed and would not allow any promises, and Thompson stated:

> It's very simple. I don't want any. I'm doing what I'm doing because I believe in it. It's very limited, but within that scope, I'm doing it because I want to. RT 16793.

On cross-examination, Thompson reiterated that no promises had been made to him for his testimony. He added that he did not consider witness protection and witness relocation money for his family as promises. RT 16902.

25. Thompson's denials that anyone in law enforcement had made him any promises or given him anything for his testimony other than immunity, and that he had not allowed them to do so, was false. Actually, Thompson was receiving an array of extraordinary benefits, privileges, opportunities, and assistance from law enforcement in return for his

cooperation and testimony against Mr. Price, which allowed Thompson to enjoy a lavish lifestyle for an incarcerated inmate and to engage in activities that were highly unusual for a California inmate, especially during that time period. See e.g. Exh. 20 (Portions of Michael Thompson's written statement to Parole Board, dated 2/24/89.) In fact, the privileges Thompson received, which he referred to in his 2/24/89 written statement to the parole board and during his testimony at his 1989 parole hearing, were so exceptional and so highly unusual that former Parole Board member and hearing officer Joseph Aceto described Thompson's living conditions as " a well-padded lifestyle in prison that's unheard of." Exh. 21 at 62.

26. Anthony L. Casas, a highly qualified prison gang expert, agrees. Mr. Casas is a retired CDC official, who spent 23 years at that agency in various capacities, including as a special agent with CDC's Special Security Unit (SSU), as the organizer of the State Prison Gang Task Force in California, as a departmental representative assigned to inmate classifications, as the Deputy Director and then Assistant Director of CDC, and as the associate warden of the California Men's Colony and of San Quentin State prison. Mr. Casas has devoted most of his professional life during the past 34 years, to working on California prison gangs and related issues, and he is knowledgeable about and very familiar with issues involving ex-gang member inmate witnesses. Mr. Casas' declaration is appended to this petition as Exhibit 2. His qualifications are set forth on pp. 1-5 of his declaration and in his attached curriculum vitae.

27. In his declaration, Mr. Casas addresses the various benefits Thompson received, and then states:

> . . . the special privileges Thompson was receiving at the Los Angeles County jail were extremely unusual. These privileges were not permitted under CDC regulations, or

> for that matter, under regulations at local jail facilities in California. I cannot think of another cooperating witness who received the array of special privileges given to Thompson.

Exh. 2. at 14.

28. A detailed account of those special privileges and of Mr. Casas' observations, conclusions and opinions is set forth below. As petitioner's evidence shows, Thompson began receiving those special benefits, privileges, opportunities, and assistance before he testified at petitioner's trial, and continued receiving them afterwards. Id.

29. Thompson received the majority of those benefits while he was being housed at the Los Angeles County jail. Thompson was taken to the Los Angeles County jail on January 14, 1985. He was removed from CDC's custody at the California Correctional Institution at Tehachapi ("Tehachapi") on that date, pursuant to a removal order (Exh. 16),[5] placed in the custody of the Los Angeles Sheriff's Office (LASD), specifically its Gang Task Force (LASO), and taken by LASO to the Los Angeles County jail, where he was booked under an assumed name. Exh. 21 at 60 . The court order authorizing Thompson's removal contemplated that LASO's

[5] Pages 1 & 2 of a handwritten removal order for Michael Thompson were located by petitioner's current counsel in Thompson's JILT office file. No other pages of the order were contained in that file. The available portion does not include the name of the judge who signed it. A complete copy of the order is not available to petitioner without a subpoena or court order. Petitioner thinks that possibly the removal order may have been signed by the Justice Ronald A. George, now Chief Justice of the California Supreme Court. Law enforcement officials, including SPU case agent Paul Tulleners, knew Justice George, and had asked him to sign a removal order for another Techachipi inmate, Larry Dean House. Exh. 63 (Tullener log page.).

custody of Thompson would end by April 25, 1985, at which time he was to be returned to CDC's custody. Exh. 16 at 1. That did not happen. Instead, Thompson remained housed in the Los Angeles County jail on out-to-court (OTC) status for more than three years, from January 15, 1985 until mid March of 1988. Exh. 19 at 108. Thompson's location in Los Angeles County and his assumed booking name were kept secret, even from CDC officials. Charles Stowell, the associate warden at Tehachapi, and the person in charge of the high security informant housing unit from which Thompson had been removed by LASO attempted to locate Thompson, but was unable to do so until 1988, at which time Thompson was finally returned to Tehachapi and to CDC's custody. Id.

30. Soon after Thompson was placed in their custody and housed outside CDC in the Los Angeles County jail, LASO and LASD began giving Thompson preferential treatment and an array of special privileges and opportunities. These special privileges and opportunities are documented in various appendices to this petition, including but not limited to the Declaration of Patricia Ann Porter, Michael Thompson's former girlfriend, (Exh. 3), Michael Thompson's 2/24/89 written statement to the Parole Board; (Exh. 20), Thompson's testimony before the California Board of Prison Terms (Parole Board) in 1989 and 1991 (Exhs. 21 & 22 respectively), and in other corroborating records and documents. See e.g. Exh. 25 (corporate and business records of Thompson's outside business and financial dealings.). In this petition, petitioner will utilize the term "special benefits" to refer collectively to the Thompson's preferential treatment, special privileges and opportunities.

31. Thompson's trial testimony against petitioner began on March 4, 1986. RT (Index) at pp. xi & xlvi. By that time, he had already been

receiving special benefits at the Los Angeles County jail for a year or more. See e.g. Exh. 3. After giving favorable testimony for the prosecution's case at petitioner's trial, Thompson continued to enjoy and profit from those special benefits. Those special benefits, which were nothing short of extraordinary, were given to Thompson by law enforcement as inducements and rewards for his assistance and continued cooperation against petitioner, among others.

32. The jurors who convicted petitioner and sentenced him to death never heard anything about Thompson's "well-padded" life-style in the Los Angeles County jail or about his unusual activities there – matters highly relevant and material to the question of Thompson's motives to fabricate his testimony against petitioner. The jury was kept in the dark about those matters because 1) evidence of the special benefits Thompson was receiving and/or was promised in return for his cooperation and testimony against Mr. Price was suppressed; 2) Thompson falsely testified that he was not given anything in return for his cooperation and testimony other than immunity and witness protection assistance for family members, and 3) the prosecution failed to correct his perjury for the jury. Rather than correcting Thompson's false and materially misleading testimony, the prosecution instead solicited and used that perjured testimony, which the prosecution knew or should have known was false, to bolster Thompson's credibility and obtain petitioner's convictions and death sentence in this high profile capital case.

33. In petitioner's case, evidence of undisclosed material benefits to Michael Thompson and other inmate witnesses, and other damaging evidence to the prosecution's case, came to light only because Thompson and Clifford Smith were witnesses in an Oregon prosecution (Oregon v.

McClure, C 91-0373) in 1994, and McClure's attorneys obtained much of that evidence through court-ordered subpoenas duces tecum and/or court-ordered discovery, and then provided it to petitioner's federal habeas counsel at our request. Exh. 1 at 1-3.

34. Thompson received many of these special benefits directly from LASD and LASO, its gang task force, including from LASO special agents Haywood Barnett and Roger Harryman. Barnett and Harryman played a dual role in petitioner's case. They were involved in interviews of key witnesses against him, including Michael Thompson and Janet Myers, as part of the investigation of the Barnes murder and the alleged AB murder conspiracy. See RT 11751, 13837, 14810-1, 14984, 16133. They also assisted in this case by acting as Thompson's "handlers" (in other words, they were in charge of Thompson's security, his housing, his access to visitors, his activities, and his transportation to and from court appearances), and were his liaison with the prosecution in Price and its other agents. RT 16431 & Exh. 15 at 2-3. LASO became Thompson's "handlers" because he had made that a condition for continuing his cooperation in this and other cases. See Exh. 15 at 2-3. LASO acted in that capacity with the knowledge and approval officials in the Special Prosecutions Unit (SPU) of the California Attorney General's Office, the unit that was assisting as co-prosecutor in this case. Exh. 63 at 2.

35. Thompson made the demand that LASO act as his handlers because he was unhappy with his treatment by the SSU and by CDC officials at Tehachapi, the prison facility to which he was transferred in early October 1983, shortly after his formal defection from the AB. Exh. 15 at 2-3; & CCT 6212, 6229-6231. Thompson was housed in the Restricted Housing Unit (RHU) 9-West, a maximum security protective housing unit

in Tehachapi for high-profile gang drop outs, from October 1983 until January 14, 1985, when he was transferred to Los Angeles County on OTC status. CCT 6210-6212; 6234-6237, & Exh. 19 at 77-78. Primarily, Thompson was offended by and angry about the visiting policies and visiting conditions for Unit 9-West inmates.[6] He was determined to leave Tehachapi and out from under the custody and control of the CDC, and go to a facility that would be more hospitable for him. The Los Angeles County Jail was Thompson's express choice. Exh. 15 at 2[7]. His girlfriend at the time, Patricia Ann Porter, lived in Los Angeles County, and Thompson's relocation there would make it possible and convenient for her to visit him on a regular basis without interference from or scrutiny by SSU and the CDC.[8]

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[6] In 1984, shortly before his transfer to LA County, Thompson and other RHU 9-West inmates, including Larry House and Steve Barnes, filed a habeas corpus petition in the Kern County Superior Court challenging the visiting policies and other alleged violations of their rights. Thompson et al. v. McCarthy, Kern County Superior Court Case No. 2589. Exh. 18. Notwithstanding Thompson's many complaints, it should be noted that he had many more and far better privileges in Unit 9-West than he had been allowed as an inmate in the Adjustment Center at San Quentin, the maximum Security Housing Unit ("SHU") where he had been confined in 1983 prior to his formal defection from the AB and his cooperation with the State against petitioner.

[7] Thompson told SPU agent Paul Tulleners on September 24, 1984 that he wanted to be relocated to the Los Angeles area. Tulleners advised Thompson there was no facility there. CCT 20: 5704. The defense obtained this log reference, but did not get disclosure of Thompson's further plans and efforts to get a facility in Los Angeles County.

[8] Ms. Porter had met Thompson and they had become friends when he was jailed in Glendale testifying in a case for the prosecution. Ms. Porter communicated by phone and letter with Thompson in 1984, following his return there from the Glendale Substation but did not visit in him person there. Exh. 3 at 1.

36. Thompson in fact told Ms. Porter that he was working with law enforcement on some cases and was making arrangements to be moved to Los Angeles so that he could be closer to her. Exh. 3 at 2. Thompson made those arrangements at the meeting, which was held at his request, with LASO investigators on October 1, 1984. Exh. 15 at 2. At that meeting, Thompson and the LASO investigators discussed the situation at Tehachapi, and Thompson's problems with the policies initiated by the SSU. During that discussion, Thompson said he felt it was very important that he have more time to prepare himself for the upcoming trials in a "quiet, secure atmosphere." He asked to be housed elsewhere than in Tehachapi, and preferably in Los Angeles County, under the custody and control of LASD. Id.

37. The fact and substance of that meeting was memorialized in the internal law enforcement memorandum that is part of the file on Michael Thompson that is maintained by the Los Angeles County District Attorney's Office, and specifically, its Jailhouse Information Litigation Team ("JILT") office.[9] The memorandum and its substance were not disclosed or available to petitioner's trial or to state appellate counsel. As the memorandum reflects, housing outside CDC and preferably in Los Angeles was Thompson's condition for continuing his cooperation against petitioner on the alleged AB conspiracy and Barnes and Hickey murder charges, and against defendants in several other cases:

The common thread running through the fabric

[9] The JILT office was established in the 1990s in the wake of the Los Angeles County jailhouse informant scandal and the Grand Jury investigation that ensued. Petitioner did not have access to those files until his case was over in State court and he was awaiting the appointment of counsel in federal court. Exh. 1 at 6.

> of all of the cases is Michael Lynn Thompson. Proper housing during the trials is tantamount to his success on the witness stand. If adequate measures are provided he is willing to proceed with all the cases. If he is not given some consideration in the situation he will not be a witness in any of the cases. Id. at 3.

Thompson's demands were met a few months later, when he was removed from the custody of the California Department of Corrections, placed on out-to-court status, and transferred by LASO to Los Angeles.

38. Thompson was housed in Los Angeles County in an obscure section of the old Hall of Justice Jail ("HOJJ") in Module 1310. Exh. 3 at 2-3. That module had previously been used to house Sirhan-Sirhan and hence was called the Sirhan-Sirhan module. Exh. 51 at 102. Shortly after he started his three years plus residency in Module 1310, Thompson began to receive, among other special benefits, contact visits with Ms. Porter, among others. See Exh. 3 at 2-5. In fact, as petitioner details below, other than keeping Thompson in custody at HOJJ, which was made necessary by the fact that he was still serving his 25 year to life sentence for two first degree murders, law enforcement essentially treated Thompson as if he were a free man, and Thompson was allowed to function as if he were a free man in a variety of ways. This was possible because of the extraordinary special benefits he was given to ensure his continued cooperation in, inter alia, the prosecution's case against petitioner, and to reward Thompson for his cooperation and for the favorable testimony he provided for the prosecution at petitioner's trial.

39. The special benefits afforded to Thompson in return for his continuing cooperation and testimony against petitioner fall into three main categories: 1) special living condition amenities; 2) special business,

financial and educational opportunities and benefits; and, 3) miscellaneous cash benefits.

1. Thompson's Special Living Condition Amenities

40. During Thompson's stay at HOJJ, he was not confined to a single cell, as were other prisoners, including other informants. Instead, Thompson was given a suite of adjoining cells. Exh. 3 at 3. Thus, his available living space was substantially larger than the small cell he had in RHU 9-West at Tehachapi.[10]

41. Patricia Porter was a regular visitor to module 1310, Thompson's cell suite. In her declaration she describes Thompson's living conditions at HOJJ as follows:

> While Mr. Thompson was in HOJJ, I had an extended relationship with him lasting over two years. He was kept in a unit by himself in a part of the jail that I'm not sure very many people even knew existed. This unit was located on the 13th floor of the jail. During the course of our relationship, Mr. Thompson and I had frequent contact visits in his unit and when we were not physically together, numerous phone conversations.
>
> * * * * *
>
> Mr. Thompson's jail "cell" was actually an entire wing or unit, and was quite extensive for a jail or prison cell. He had two cells together where he lived and went about his business. One cell was where he had his bed and toilet. The adjoining cell was basically Mr. Thompson's "office" and living space. In this cell he had his own refrigerator, a file cabinet, a desk, radio, cassette-player,

[10] Module 1310 was also a substantial improvement over Thompson's cell in the San Quentin Adjustment Center where he was housed prior to becoming a cooperating witness against Mr. Price.

> coffee-maker, television, VCR, books, a typewriter and eventually a computer. It was almost like he had his own apartment up there. He also never dressed in jail clothes. Instead, he wore jeans, sweaters, and various kinds of street clothes. I had given him two shirts on one occasion.
>
> Mr. Thompson also had his own telephone in the unit. It was a pay telephone, and he had unlimited access to it. He could receive calls from anyone at anytime. He could also use a telephone credit card for his outgoing calls, rather than having to call collect. He used my telephone credit card at times on this phone.
>
> Next to his cells was his weight room, which Mr. Thompson used frequently. In the weight room he had free weights and a weight bench. Only Mr. Thompson would use them, or occasionally a deputy would come up and use them too. Sometimes the guard would leave Mr. Thompson alone working out in his weight room while they came down to get me.

Exh. 3 at 2-4.

42. Ms. Porter's account of Thompson's lifestyle is corroborated by Thompson himself in his signed written statement to the Parole Board, dated February 24, 1989. Exh. 20 at 15-16. In that statement, Thompson indicated that he was allowed to access to the entire module 24 hours a day without supervision. Id.

43. In addition to 24-hour access to a phone for both incoming and outgoing calls, the use of a credit card for outgoing calls, being allowed to wear street clothes rather than jail garb, and having his own refrigerator, Thompson also enjoyed other accouterments of a free man. For example, he had a lap top computer in his cell, and used it to access various

databases, including the Sunnyvale patent library to conduct his own personal research. Id.; Exh. 21 at 42. When Thompson was finally returned to CDC custody, he was not allowed to have that computer. See Exh. 33.

44. In addition, unlike other inmates in local or State custody in California, Thompson was allowed to have contact visits in his suite of cells . Exh. 3 at 4. All of Thompson's visitors at HOJJ were approved by LASO. Exh. 52 at 57. As Ms. Porter's declaration indicates, she had regular contact visits with Thompson in his cell at HOJJ. Exh. 3 at 2-4; Exh. 20 at 15. In addition to Ms. Porter, Thompson also had contact visits in his module with other individuals, including an entire family with whom he shared a meal in his cell. Id.

45. Ms. Porter was allowed to visit Thompson in his cell-suite in Module 1310 as often as he wanted, and she visited him there frequently during her relationship with him. Exh. 3 at 2. When she was not visiting Mr. Thompson in person, Ms. Porter and Mr. Thompson talked on the phone, often for hours at a time. Id.

46. Because she was a visitor of Mr. Thompson's, Porter was treated preferentially by jail officials. Rather than having to wait in line with the people visiting other inmates at the jail, Ms. Porter would tell the officer on duty that she wanted to go to the 13th floor, and one of four male guards assigned to Module 1310 would come down and get her and bring her directly up to visit Thompson. Id. at 2-3.

47. Although they were not married, Thompson and Ms. Porter had regular conjugal visits in the bedroom section of his cell suite. Thompson would hang a sheet up in the doorway of the cell where his bunk was located so he and Ms. Porter would have privacy. Id at 4. During their

visits, Thompson and Ms. Porter were often left to themselves by the guards on duty. Many times, Ms. Porter got to stay late into the night with Thompson in his cell. On one occasion, she stayed there with him until 2:00 A.M. On that same occasion, the guard on duty told Thompson and Ms. Porter that he was going out and would be back later. He left them alone together in the unit from 6:00 or 7:00 P.M. until early the next morning. Id.

48. Moreover, Ms. Porter was not required by jail officials to sign in or show identification before she was escorted up to Thompson's module, and she was not even subjected to a search of her person or of anything she was carrying with her. Id. at 2-4. Often when she visited Mr. Thompson, she brought him many food items from the outside. These included special treats such as frozen yogurt, groceries, and even Perrier water in glass bottles. Id. Mr. Thompson was allowed to have these items in his module, and Ms. Porter used a two-wheeled shopping cart to haul them up to him there. One time, she took him an entire Thanksgiving dinner with all the trimmings, and she even brought in a large kitchen knife that they used to carve the turkey. The guard on duty that night was present and ate the Thanksgiving meal with them. Id.

49. As prison gang expert Anthony Casas, who was involved for a number of years at CDC directing security operations at San Quentin State Prison, and earlier at CMF, observes, allowing Thompson to carving knifes and objects packaged in dangerous containers in his cell, to have unmonitored in-cell visits with individuals who were not subjected to any search of their persons or packages, to have unmonitored phone calls, and to wear street clothes rather than jail attire, posed obvious security risks. Exh. 2 at 13. Mr. Casas indicates that these occurrences were surprising and

inappropriate breaches of standard and customary security procedures. Id.

50. The prosecution and various law enforcement agencies and officials, including LASO, resisted the defense's ceaseless efforts to obtain information about any preferential treatment Thompson was given for his cooperation against petitioner, including better housing, food, visiting privileges and the like (see e.g. CT 3777-3784) by claiming privilege under California Evidence Code section 1040, on witness security grounds. See, e.g., CT 289, 294. Petitioner's defense counsel did not know where Thompson was being housed during the year prior to his testimony at petitioner's trial, since that information was not disclosed to them, but they correctly suspected that Thompson was receiving a cushy lifestyle in return for his cooperation. They were also correct in not believing the prosecution's continued denials about any such benefits. See Exh. 9 at 6.

51. Clearly, the special benefits Thompson was receiving at HOJJ during the year immediately preceding his testimony, including his in-cell conjugal visits with Ms. Porter, his prolonged phone conversations with her to ease his solitude when she was not visiting him, and his special meals and even dinner parties in his cell, were not necessary for or legitimately related to witness security concerns. Exh. 3 at 13. Indeed, allowing Thompson to have contact visits with non-law enforcement people in his cell, food items in his cell packaged in dangerous containers, a carving knife for use at his Thanksgiving turkey dinner, and visitors in his cell who were not subjected to any search of their persons or the possessions they brought into the jail, was wholly contrary to the prosecution's professed concerns about Thompson's security. Id. The prosecution's purported witness security rationale was plainly a pretext which was used to keep the rewards and inducements to Thompson hidden, probably even from the trial

judge in this case, and definitely from the defense and the jury.

52. That is the conclusion reached by Anthony Casas. As he states at page 13 of his declaration:

> To the extent that prosecuting officials and law enforcement agencies, who were directly involved with Thompson at the Los Angeles County jail, have claimed witness security concerns as justifying non disclosure of information about the privileges that Thompson was receiving at Los Angeles County jail, any such claim would not, in my professional judgment, be credible under the circumstances.

Because the prosecution was successful in utilizing that rationale, they and Mr. Thompson were able to present a false and/or highly misleading picture at petitioner's trial of Thompson's life as a cooperating witness.

53. For instance, after asking Thompson a series of questions designed to show that mainline inmates had much better privileges than did inmates in segregated housing, prosecutor Ron Bass elicited the following testimony from Thompson about the living conditions of protective custody inmates:

> Bass: Is protective custody a better place to be than the regular general population?
>
> Thompson: No.
>
> Bass: I mean, they have nicer rooms, better TV's, anything like that?
>
> Thompson: No.
>
> RT 16781.

Bass knew his questions and Thompson's responses were materially misleading, with respect to Thompson's own protective housing situation,

because Bass had personally visited Thompson in his module on the 13th Floor of HOJJ on August 21, 1985, long before Thompson's trial testimony in this case. See Exh. 43 at 16.

54. On cross examination, Thompson continued to materially misrepresent his situation at the HOJJ, and the prosecution again stood mute and allowed the deception to be offered into evidence as truth. For example, Thompson had the following colloquy with defense counsel, Bernard DePaoli:

> DePaoli: Where are you housed now?
>
> Bass: Objection
>
> The Court: Sustained.
>
> DePaoli: You're never on the yard wherever you are with any other individuals; is that correct?
>
> Thompson: I don't go to the yard. I don't go outside. I haven't been outside for a year.
>
> DePaoli: Where, on the tier?
> Thompson: I don't come out of the tier. I don't come out of my cage.
>
> DePaoli: By choice?
>
> Thompson: No. Not by choice. Hell no.
>
> DePaoli: Is it your testimony that you are locked down in your cell twenty-four hours a day, seven days a week?
>
> Thompson: That is my testimony.

RT 17020-1, 17020-2.

55. In 1989, in his written statement to the Parole Board entitled "Particular Concerns of the Board of Prison Terms"[11], Thompson proved himself to be a liar in giving the foregoing testimony. In that written statement, Thompson provided the following accurate account of his living conditions at HOJJ during the time he was housed there, which included the time he testified at petitioner's trial. He stated:

> While my housing status at Los Angeles was Maximum in the sense that I did not come into contact with other inmates for my own safety, it was Minimum custody in every other sense. I was allowed access to the entire module on a 24 hour basis without supervision. I had 24 hour access to a telephone for out-going and in-coming calls. I maintained my own kitchen and supplied my own food. I had a television, VCR, stereo in addition to maintaining my own personal library consisting of hundreds of books and tapes. I also had my own electric typewriter and with the proceeds of a number of articles I sold to wildlife publications, I purchased a portable computer system and was allowed to keep it in my module.

Exh. 20 at 14-15.

56. Thompson's testimony to the contrary at petitioner's trial, including his claim of being locked in his "cage" twenty-hours a day, seven days a week, was false and/or materially misleading. The LASD personnel who guarded Thompson at HOJJ, and LASO, who "handled" Thompson

[11] Thompson was responding in that document to the concerns raised by the parole panel at his February 1986 parole hearing - which was the last hearing Thompson had while petitioner's case was still pending.

while he was housed at HOJJ, had actual knowledge of facts showing that Thompson's testimony was false, and their knowledge is imputed to the prosecution. See United States v. Antone, 603 F.2d 566, 569 (5th Cir. 1979); Rivers v. Martin, 484 F.Supp. 162, 164 (W.D. Va. 1980). See United States v. Endicott, 869 F.2d 452, 455 (9th Cir. 1989) United States v. Butler, 567 F.2d 885, 891 (9th Cir. 1978).

2. Thompson's Special Business & Financial, Opportunities and Educational Benefits

57. In addition to giving Thompson special housing amenities, LASO and LASD gave Michael Thompson the opportunity to participate in outside business ventures and financial transactions while housed in his module at HOJJ. He participated in several outside businesses and in outside financial dealings during the time he was housed at HOJJ. He did so with the knowledge and consent of LASO and LASD. See Exh. 23 (Letter of Larry D. Bodenstedt, A/Captain, Special Investigations Bureau, Los Angeles Sheriff's Department) at 2. In fact, Thompson could not have done so without their approval and assistance. Thompson began participating in those activities and also in a special education program, before he testified at petitioner's trial, and he continued to do so afterwards. See infra at 51. The opportunity and the permission to engage in those outside business ventures and special programs were part of the continuing stream of favors and significant special benefits that law-enforcement gave to Thompson as inducements and/or rewards for his cooperation and testimony against Mr. Price.

58. Under CDC regulations, California inmates are generally not allowed to engage in outside business and financial dealings. See 15 C.C.R.

§3024. Michael Thompson's "handlers" made it possible for him to engage in such dealings by keeping him on out-to-court status and out of CDC's custody for over three years. As a result, Michael Thompson managed to reap significant gains for his participation in outside business and financial ventures. As shown below, Michael Thompson began participating in those outside business ventures as early as 1985, a year before he testified at petitioner's trial and denied he was personally getting anything for his assistance against Mr. Price other than immunity.

59. Thompson's testimony at petitioner's trial that he had not been given any rewards or made any promises by anyone in law-enforcement, including LASO, and that he had not allowed any (RT 16792) was a lie. While the special benefits described in subsection 1 above, made Thompson's every day existence at HOJJ more pleasurable, those described in this subsection, including being allowed to engage in outside business and financial ventures from his jail cell, helped to brighten Thompson's future.

60. During his testimony at petitioner's trial, Thompson mentioned that he only recently had been denied a parole date, and would not have another parole hearing for three years. RT 17015. In keeping with his misleading portrayal of himself as having only lofty motives for helping the prosecution against Mr. Price, Thompson averred that he had not and would not accept any help from either the prosecution or from law enforcement with parole. Id. That representation was false and/or materially misleading. Thompson was already in the process of receiving indirect assistance from LASO and LASD in his efforts to gain release on parole, and he would later seek and obtain direct assistance from LASO and LASD, and from prosecutor Ronald A. Bass in those efforts. See infra at 50.

61. The indirect assistance Thompson received from LASO and LASD in the form of being given the opportunity to participate and to actually participate in various outside business ventures made it possible for Thompson to develop marketable skills and to amass a sizeable nest egg. See Exh. 21 at 71-75. LASD and Thompson then relied on those accomplishments as evidence of his suitability for parole release.

62. For example, in his letter written on Michael Thompson's behalf, Larry D. Bodenstedt, a high-ranking official with the Special Investigations Bureau (SIB) of the Los Angeles County Sheriff's Department, expressly referred to Michael Thompson's business and financial accomplishments, and importantly, also to Thompson's cooperation and testimony in AB related murder cases, including a Humboldt County case (namely petitioner's case), and indicated that in the opinions of staff who had worked with Michael Thompson, he would have a successful parole. Exh. 23 at 2. The letter mentioned that Thompson had been transported to testify in a Humboldt County case (petitioner's) and was taken on public transportation and into public restaurants while being so transported. Id. This was another undisclosed benefit to Thompson.

63. Captain Bodenstadt's letter was addressed to Thompson's correctional counselor at Tehachapi, and was dated January 19, 1989, which was just a few months before Thompson's scheduled parole hearing at that facility on April 7, 1989. When Thompson appeared at his parole hearing on that date and again in 1991, he went to great lengths to describe his various outside business and financial accomplishments, and his educational achievements. See Exh 21 at 71-75; Exh. 22 at 39-48.

64. Notably, both Thompson and LASD waited to make their pitches for Thompson's parole release until after petitioner's trial was over, when

any chance petitioner may have had of obtaining the information through court-ordered discovery for use at his trial as evidence of Thompson's bias and motives to fabricate, had long since passed.

65. At Thompson's February 1986 parole hearing, which took place several weeks before he testified at petitioner's trial, one of the reasons the Parole Board articulated in finding Thompson unsuitable for parole was that he had not developed any marketable skills. Exh. 24 at 115. The Parole Board did not know, because Thompson and LASD did not inform them, that Thompson was already in the process of developing such skills through his participation in outside business opportunities. Thompson affirmatively represented to the Parole Board that he was being treated like a maximum-security inmate while on OTC status since January 1985 at the county jail. Id at 61. That representation was false and/or materially misleading, as Thompson's own statement to the parole board in 1989 shows. See Exh. 20 at 14-15. Thompson's decision at his 1986 parole hearing to misrepresent how he was being treated at HOJJ, and to omit any mention of his outside business dealings and LASD's help and assistance to him in that regard, is significant. Thompson had already made clear early on in petitioner's case that he (Thompson) would withhold relevant information when he believed it might be discoverable and/or helpful to the defense. See e.g. CT 2212. As a seasoned convict, with substantial experience in criminal trials, both as a defendant and as a witness, Thompson was undoubtedly aware that petitioner would probably get disclosure of Thompson's 1986 parole hearing transcripts through discovery, which petitioner in fact did, although belatedly. See RT 18975. Thus, by omitting any mention during that hearing of his business dealings or the help he was receiving from LASO, and affirmatively misrepresenting how he was being treated while on OTC

together, Permanent Eyes. Exh. 22 at 44-45. Permanent Eyes was located at 656 South Pacific Coast Highway in Laguna Beach, and was incorporated in California on February 15, 1986. See Exh. 25.[12]

69. According to Thompson's statements, the services he performed for these businesses included doing marketing, advertising, accounting and also "legal work." Exh. 20 at 15. Thompson indicated he had taken courses in, inter alia, business and accounting, and he claimed to the parole board that he had enough law credits to take the Bar exam. Exh. 22 at 30. On questioning by a parole board member, Thompson was forced to admit that he had only one actual degree, a high school diploma. Id. at 28.

70. In rendering the services for Permanent Eyes and the related businesses, Michael Thompson used the name, E. Michael O'Brien. Id. at 42. He testified he did so with the knowledge and consent of LASO/LASD, which had assisted him in obtaining that name change. Id.

71. Although Michael Thompson, as E. Michael O'Brien, was not listed in the initial incorporation papers filed by Permanent Eyes in February of 1986, he was listed under that name in a later corporate filing. See Exh. 25. In that filing, E. Michael O'Brien (a.k.a. Michael Thompson) was listed as the secretary and the chief financial officer of the corporation, and as its agent registered to receive process. Id. The address listed for E. Michael O'Brien for such service is 656 S. Pacific Coast Highway, Laguna Beach, California, the address of Permanent Eyes Inc. Id. Michael

[12] In 1989, Thompson and Patricia Pavlik formed another business, National Cosmetic Tattooing Association. Also, in 1989, a fictitious business name listing was filed in Orange County for West Coast Academy of Permanent Cosmetics. The address listed is 658 S. Pacific Coast Highway in Laguna Beach, and Permanent Eyes, Inc. is listed as the owner. California Franchise Tax Board records show that Permanent Eyes Inc. was

to "get in touch" with people who handled the financing, that the loan was taken out in both of their names, and that the name he used was his new name: Michael E. O'Brien, or alternatively E. Michael O'Brien. Id. at 40-42. That was the name under which the mortgage company ran a credit check. Id at. 42. The mortgage company apparently had no knowledge that the prospective borrower, Mr. O'Brien, was actually Michael L. Thompson, a convicted double murderer, who was in custody and serving a 25 year to life sentence when he negotiated the loan and signed the loan documents.

77. On questioning by the parole board as to whether Thompson's use of his new name in conducting that transaction amounted to fraud, he responded that it did not, because LASO had gotten the name for him, and knew he was buying the home under that name. Id. at 42. As Thompson told the parole board and as Exhibit 23 (to which Thompson referred during his testimony) confirms, LASO knew he was buying a home, knew about his businesses, and knew that he was planning to reside in the home he jointly owned with Ms. Pavlik in Orange County after his release on parole. Exh. 22 at 43; Exh. 23 at 2.

78. Thompson testified that the amount of the loan he and Ms. Pavlik took out together was $87,000; that they put down a $50,000 down payment; and that he personally contributed one third of the down payment, about $15,000 to $18,000. Exh. 22 at 40-42.

79. Thompson did not say where or how he got that much money, and importantly, he evaded questions by members of the parole hearing panel about that. Id. Thompson did not purport to have gotten the money from his wages at the various tattooing businesses. He testified instead that those wages, which he estimated to be $26,000 a year, were deferred. Exh. 21 at 72. Thompson also did not purport to have gotten the money from

Ms. Pavlik. In documents she filed in 1987 in connection with her divorce from Donald Pavlik, she declared that her total annual gross salary from her business was $19,000, and she had no other income. Exh. 26 (Pavlik Income & Expense Statement).

80. The $15,000-$18,000 that Thompson testified he contributed as his part of the down payment on the residence is roughly consistent with the amount of money for "lodging" set forth in a document prepared by the Humboldt County District Attorney's Office in March 1994, the month before Thompson first testified against petitioner, concerning Witness Protection Assistance money. CT 4930-4938. The document is a confidential request by the Humboldt County District Attorney for reimbursement of $25,800 in witness protection expenditures. Of that total, $13,000 was for lodging. CT 4930. The names of three witnesses for whom this request was being sought included Mike Thompson, Linda Thompson (his sister) and Janet Myers. CT 4931. Both Janet Myers and Michael Thompson are listed as witnesses whose testimony was deemed critical to tying the murder conspiracy together. CT 4933.

81. During a heated courtroom exchange between the defense and the prosecution in March 1985 when that document was first disclosed, prosecutor Dikeman stated that the document was only a proposal for the inclusion of Janet Myers and Michael Thompson in the witness protection program and had not yet been acted on. CT 813-814. Dikeman's statement implied that the proposal had been submitted for action. The defense, however, was never privy to the actual outcome.

82. Whether Thompson's down payment money came directly or indirectly through Humboldt County, through other law enforcement agencies, or a combination of all of these, if the money came from law

enforcement sources, as it probably did, it was given to Thompson as payment for assistance against Mr. Price and favorable testimony for the prosecution at Mr. Price's trial. Without access to discovery and full compliance by the prosecutors and agencies involved with Thompson in this case, petitioner cannot state at this time which if any law enforcement source was involved, because that information is in the possession and control of those agencies, and petitioner cannot obtain it without a court-ordered subpoena.

83. Part or all of the funds that Thompson used to pay for the numerous college courses he told the Parole Board he had taken through correspondence courses at the University of California (Berkeley) and another institution during and after the proceedings against petitioner may also have come either directly or indirectly from law enforcement as a reward or payment to Thompson for his cooperation against petitioner. Thompson also listed these courses in his motion pursuant to California Penal Code section 1170(D) See Exh. 60. That is a motion that is filed in the sentencing court for the purpose of obtaining an early release from prison. Petitioner does not know whether Thompson's 1170 (D) motion was actually filed. Thompson admitted during his testimony in McClure that he may have told LASO agent Barnett in 1983 that he intended to work for resentencing under section 1170(D). Exh. 44 at 161. Petitioner notes that the present cost of a three unit course through U.C. Berkeley's correspondence program is $300-$400 dollars, not including required textbooks. See Exh. 1 at 7. Even if the courses cost less than half that when Thompson took them, the overall cost of his educational program appears to have exceeded $5,000, and probably, well over $10,000. That amount, taken together with the approximately $15,000 down payment on

the real estate loan, and with the cost of the portable computer Thompson had in his module at HOJJ, which he said he purchased in 1986, allegedly with the proceeds of wildlife articles he sold (Exh. 20 at 15), is an unbelievably large sum of money for an incarcerated inmate to have accumulated independently.[15] The fact that Thompson had such funds available in the aftermath of petitioner's trial is further evidence indicating that Thompson's testimony that he had not been promised and did not receive any rewards from law enforcement was contrived and false.

84. The same is true of Thompson's claims that he had not and would not accept any help from the prosecution or from law enforcement with parole. RT 17015. As subsequent events revealed, Thompson was more than willing to accept as well as request such assistance. For example, Thompson filed a formal written request seeking to have both Ron Bass and former SPU investigator Paul Tulleners to appear as witnesses on his behalf at his 1989 parole hearing. Exh. 29. Neither appeared, but Bass sent a favorable letter to the parole board about Thompson's cooperation against Mr. Price. Exh. 30. In his letter, Bass stated that Thompson had not received any leniency for his testimony. Id. That representation shaded the truth and was materially misleading, since as Bass knew, although Thompson did not get a sentencing reduction or a release on parole, he received numerous other benefits and rewards for his cooperation in this case.

85. Thompson also asked LASO Barnett to assist him by providing investigative documents to the parole board to support Thompson's claims

[15] Petitioner cannot at this time state which law enforcement source or sources were involved, because that information is in the possession and control of those agencies, and can only be obtained through court-ordered

that he did not commit various in-prison assaults to which he had pled guilty. Exh. 21 at 23-24. Barnett and/or other LASD personnel agreed to provide those documents. Id. In addition, as petitioner has indicated supra, LASD official Larry D. Bodenstedt wrote a letter on Thompson's behalf to Thompson's counselor about his suitability for parole release. Exh. 23.

86. Thompson's requests for and acceptance of such assistance from Ron Bass and from law enforcement in his efforts to gain release on parole is further evidence that his testimony at petitioner's trial that he would not even "allow" any recommendations to the parole board from anyone in law enforcement , and that his only motivation in cooperating against petitioner was because Thompson believed in what he was doing, was false and contrived, and calculated to mislead the jury. RT 17015.

3. Miscellaneous Cash Benefits

87. In addition to the foregoing undisclosed benefits and privileges, Thompson also received at least one undisclosed cash payment directly from LASO about which the petitioner and his counsel were never apprised. Thompson received that payment about two months before he testified for the prosecution at petitioner's April 1994 preliminary hearing. The amount of that payment was $870, and the payment was requested for Michael Thompson by LASO Sgt. Barnett from Los Angeles County's Witness Protection Fund (hereinafter "the Fund"). Exh. 31; Exh. 32 (Highland memo from JILT files). The Fund was administered by the Los Angeles County District Attorney's Office, and was part of the county's Victim-Witness Assistance Program. Exh. 45. 133-135. The money in the Fund

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discovery or by subpoena.

was intended to be used for Los Angeles County prosecutions in which a witness or family member of a witness had been threatened or an actual threat existed, and criminal charges had been filed against the defendant in whose case the witness would be called. The intended purpose of the money was to provide lodging, meals, transportation for relocation, utilities, and other essential expenses related to the security of the witness and/or the witness' family. Id. There was no legitimate reason or need to have given such money to Thompson personally, since he was incarcerated and his housing and other essential living expenses were already all being paid for by the taxpayers.

88. According to the Los Angeles County District Attorney's Witness Payment records, which were not disclosed to petitioner or to his attorneys, Barnett's request was approved, and Mr. Thompson received $870 of the $870 authorized. Exh. 31. The date listed for the payment to him is February 13, 1984. Curtis Price is named as the defendant for whose case Mr. Thompson received this $870 payment. Id.

89. Petitioner had no pending case in Los Angeles County, because the Los Angeles District Attorney had declined to prosecute him for the Barnes murder, even though the venue of that crime was in Los Angeles County. Barnett therefore used the case number of another case that was pending in Los Angeles County in which Thompson had a connection. That case was People v. Bulpitt & Buenrostro, No. A 344712. Id. Thompson had appeared briefly for the prosecution in that case in December 1983. Exh. 32 (Memorandum of Lois Moy & Informant Information Sheet. Thompson testified that he did not receive anything for his testimony in Buenrostro, and neither he nor Barnett mentioned anything about seeking witness protection funds for Thompson or his family.

90. Petitioner's name on the $870 funds request, although listed in connection with a wholly different case and case number, was not a mistake or a clerical error. That is shown by the fact that, one day after that payment was made to Thompson, Janet Myers, another of the prosecution's witnesses in petitioner's case, also received a payment from the Los Angeles County Witness Protection Funds, and she, like Thompson, received those funds under the Buenrostro-Bulpitt case number. Exh. 31. Unlike Thompson, Ms. Myers had no connection whatsoever to that case or to Mr. Bulpitt, the defendant named in the Myers' witness protection fund application, or to defendant Buenrostro. She was never called as a witness or listed as a prospective witness in their case. Robert H. Morck is listed as the law enforcement agent who made the application for funds for Ms. Myers. Id. Morck was the LA County homicide investigator assigned to the Richard Barnes murder investigation for petitioner's case. The amount of money requested for and received by Ms. Myers was $400. Id.

91. These peculiar facts show that Los Angeles County law enforcement agents were funneling cash to prosecution witnesses in petitioner's case, using a bogus case name and number, the Buenrostro-Bulpitt case, as a cover. These facts also show that Thompson's testimony that he did not receive any money for his cooperation was false. Importantly, only a few months after Thompson received this payment, he testified at petitioner's preliminary hearing that he had not been given anything for his cooperation except immunity. CT 2139, 2286. He did not mention anything about any witness protection money. At trial, he testified that his sister had gotten assistance each of the four times he claimed she relocated, but he denied that he had received any money. RT 17019. In fact, he testified there was no money given to him or to his family members

other than the witness relocation funds for his sister. Id.

92. Other inmate informants, including Larry Turtle Jones and Frank Wirshup, who furnished information in this case but were never called as witnesses, received hundreds of dollars in financial assistance in paying the cost of their family's telephone calls to them. See e.g. Exh. 43 at 39. Ron Bass personally approved some of those expenditures of witness protection money for those purposes, as did Hugh Allen and others in SPU. Id.

93. Patricia Ann Porter, Michael Thompson's girlfriend at the time, states in her declaration that she also received $200 in cash to cover the cost of some of her phone calls to Michael Thompson while he was housed at HOJJ. Exh. 3 at 5-6. She received this cash from Linda Thompson, Michael Thompson's sister. Id. Linda Thompson is the same sister who was listed as receiving witness protection relocation assistance in this case. See CT 4931. Michael Thompson made the arrangements for Ms. Porter to obtain the $200 from his sister. Id. At a pre-arranged time, Ms. Porter went to a bar where Linda Thompson was working, and Ms. Thompson gave her the money at that time. Ms. Thompson told Ms. Porter that LASO agent Roger Harryman, who was one of Michael Thompson's "handlers", had been there several hours earlier to see Ms. Thompson. Id.

94. That scenario, coupled with the fact that other informants were getting financial assistance from law enforcement to pay for personal phone calls in return for their assistance against petitioner, strongly suggests that law enforcement was funneling similar assistance to Thompson through his sister Linda using witness protection fund sources. For petitioner to confirm this, he will need access to court-ordered discovery, and also compliance by law enforcement with any court-ordered subpoenas.

95. As for Ms. Myers, she was a long-time heroin addict who

admitted during her testimony that she was supposed to keep receipts for the money she received through witness protection, but did not do so. RT 14011; 14087. She also admitted when she testified at petitioner's preliminary hearing on April 18, 1984, that she used heroin two months earlier. CT 1911-1912. That would have been within a day or so of the time she received her $400 from the Los Angeles Witness Protection Fund. Myers' admission at petitioner's preliminary hearing that she used heroin while she was on probation after having obtained an early release from prison in return for her agreement to cooperate against Mr. Price did not stop Humboldt County officials from giving her more cash several months later, even though they knew or should have known that she was a heroin addict and still abusing drugs. See RT 13915-13916.

96. Turning back to Michael Thomspon, although he denied that he received anything for himself in return for his assistance against Mr. Price other than immunity, and persisted in that denial before the parole board after petitioner's trial, the nature and extent of the special benefits he in fact received while the proceedings against petitioner were pending, and continued to receive afterwards, make his denials unworthy of belief. As prison gang expert Anthony L. Casas states:

> Based on my review of relevant documents, I am aware that in the Price trial, Michael Thompson was asked but denied receiving any promises or any benefits from anyone in law enforcement or from the prosecution, other than immunity for himself and witness protection for his family. I am informed that Thompson made similar denials in his testimony in cases of other defendants against whom he was cooperating while he was housed at the Los Angeles County jail. Thompson also made the same representations in his testimony before the California Board of Prison Terms in 1989 and 1991.

I do not find Thompson's denials to be credible for several reasons. First, as I have detailed above, the special privileges Thompson was receiving at the Los Angeles County jail were extremely unusual. These privileges were not permitted under CDC regulations, or for that matter, under regulations at local jail facilities in California. I cannot think of another cooperating witness who received the array of special privileges given to Thompson. Clearly, the special privileges he received, such as having outside visitors in his cell, having conjugal visits in his cell, getting to wear street clothes, getting to make and receive unlimited and unmonitored phone calls and the like, greatly improved the quality of Thompson's life in custody. I know from my experience at CDC dealing with cooperating gang dropouts and other inmate informants, that such inmates will typically demand benefits as a quid pro quo for their cooperation that tend to make the inmate's daily existence while incarcerated more tolerable. I have found this to be particularly true for "lifers" (those serving life terms). Receiving immunity from prosecution on new crimes usually does not mean as much to them as getting the goodies that would make their daily existence better. For example, getting cigarettes, extra cash posted on their books, having their family's phone bills covered, and the like, are the kinds of benefits those and other inmate informants typically demand and often receive as rewards for their cooperation. The "lifestyle" benefits Michael Thompson received while housed at the Los Angeles are staggering by contrast. By any measure, those benefits were substantial and significant. These are the kind of benefits that could well motivate an inmate informant to lie. In my opinion, the suggestion that such benefits were not rewards to Thompson in return for his assistance against Mr. Price, and others, is simply not credible.

For the reasons set forth above, it is my professional opinion that Michael Thompson's testimony in the Price trial and in other cases, and also before the Board of

> Prison Terms denying that he had received any promises, benefits, inducements or rewards from anyone in law enforcement beyond immunity and witness protection for family members was false or at minimum, materially misleading.

Exh. 2 at 13-15.

97. The prosecution's knowing use of Mr. Thompson's false and materially misleading testimony as set forth above violated petitioner's federal constitutional rights under Napue v. Illinois, supra, and Giglio v. United States, supra.

D. The Prosecution's Knowing Use of False and/or Materially Misleading Testimony By Clifford Smith About Inducements, Benefits and Rewards for His Cooperation Against Petitioner

98. Clifford Smith was the second of the trio of informant witnesses called by the State at petitioner's trial. Smith had previously testified on petitioner's behalf at his 1984 preliminary hearing. CT 2829 et seq. At that time, Smith testified he knew nothing about the murder of Richard Barnes before it happened, and that Michael Thompson, whom Smith described as "a general without an army", never talked to him about an alleged contract killing of Richard Barnes. CT 2840, 2851. Smith acknowledged that he knew Janet Myers, and that she had visited him after petitioner's release from Palm Hall, but he testified that she never gave him any messages from petitioner. CT 2842-2843.

99. At petitioner's trial, Clifford Smith provided testimony that was completely contrary to what he had said at the preliminary hearing. For example, he generally corroborated Michael Thompson's allegations about

the AB murder conspiracy regarding Richard Barnes, and about petitioner's role in that conspiracy. He also claimed personal responsibility for changing the target of the AB conspiracy from Steve Barnes' wife, Sue, to Richard Barnes and anyone else in the residence, and for giving petitioner Richard Barnes' address. See RT 14671, 14685.

100. On February 2, 1986, at a hearing held outside the jury's presence, the defense renewed its requests for disclosure of all relevant impeachment evidence, specifically requesting disclosure of any promises made to Clifford Smith in exchange for his cooperation. RT 14586. Prosecutor Bass stated that the only promises or representations that were made to Smith were set forth in the reports that had already been given to the defense. RT 14595. Those reports included summaries of interviews with Clifford Smith, with Helen Smith, and with Clifford Smith's brother, Jimmy DeWayne Smith.[16] See Exh. 34. Bass knew or should have known at the time he made that representation, that it was false and/or materially misleading. None of those reports contained any mention of a possible plea bargain and sentence reduction for Clifford's brother Jimmy, in return for Clifford's assistance to the prosecution against petitioner.

101. Bass represented to the court and defense counsel that the promises to Clifford Smith included protection of family members, and also $119 worth of clothing for Smith. RT 14595. Bass maintained that Clifford was not receiving any housing or prison benefits that he (Bass) was aware of, and he stated, "as a matter of fact", that Clifford did not even have yard privileges, and was on continuous lock down. Id.

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16 In various official records, Jimmy Smith's middle name is spelled either DeWayne or Dwayne. Petitioner will hereinafter refer to him in this petition simply as Jimmy Smith.

102. That was in fact untrue. As Clifford Smith admitted during later testimony before the jury, he was getting one hour of yard exercise every other day; that was more yard that he got at San Quentin, and that he now had his own cell, a color television and also weekly contact visits. RT 14865, 16175.

103. Bass knew or should have known that his factual assertions about the conditions of Clifford Smith's post-cooperation confinement were untrue. In fact, on January 31, 1986, just days before Bass made that in-court misrepresentation, he had personally visited Smith at Tehachapi, where Smith was being housed in PHU Unit 9-West. Exh. 43 at 107. Bass' lack of candor and his downplaying of the actual benefits his informant witnesses were receiving were a repeated occurrence in this trial.

104. At the same hearing held outside the jury's presence, Clifford Smith testified that the only promises the prosecution had made to him were: 1) he would not be prosecuted for what he testified about in this trial; 2) his family would be protected and he would get a safe place to sleep and a housing settlement when he was eligible for parole; and 3) someone from the Attorney General's office would appear or provide a written report to the Parole Board to indicate that he had cooperated in this case. RT 14598-14600.

105. During his direct examination before the jury, Smith testified "I'm not getting nothing out of this." RT 14700-1. As he knew, but chose not to reveal, he was in the process of arranging for his younger brother, Jimmy, to "get something out of this" – namely, a plea to reduced charges, a modification of his sentence, and an early release on parole. See infra at 69-79. Clifford Smith then testified that he had no parole date, and was not eligible until August of 2007. RT 14645. He was serving a 25 year to life

sentence for the murder of Steven "Loser" Clark, and another 15 years for priors involving assaults on three inmates, and he did not expect to be paroled in 2007. RT 14843-14845. CDC records confirm that Clifford Smith was sentenced in 1983 to serve a 36 year to life sentence, following his conviction for the Clark murder and for prior prison assaults. CCT 2059.

106. Clifford Smith testified that in return for his testimony, the State had promised to protect members of his family. Defense counsel attempted to explore that issue during cross-examination, asking Smith which family members the promise covered, whether it meant they would be relocated to another part of the state, and whether the prosecution had paid to move any of Smith's family. Bass noted that he did not want any names or locations revealed, and he objected to each of these questions for lack of relevance. The trial court sustained each objection. RT 14859-14860.

107. The trial court's rulings precluded all inquiry into the nature and extent of the promised protection. In its opinion in petitioner's automatic appeal, this Court held that under the federal constitution, the trial court's ruling was error. People v. Price, supra, at 422; Davis v. Alaska, 415 U.S. 308 (1974), Delaware v. Van Arsdall, 475 U.S. 673 (1986). This Court held the error to be harmless.

108. Neither this Court, nor petitioner, his trial attorneys, his state appellate attorney, nor probably even the trial court, had knowledge of the relevant and material facts concerning the alleged "protection" received by Clifford's Smith's brother, Jimmy DeWayne Smith, or of the fact that witness protection was used in this instance, as it was with Michael Thompson, as a pretext to hide the prosecution's deals and other benefits

which its key witnesses, including Clifford Smith, were demanding and receiving as a quid pro quo for their assistance against Mr. Price. Clifford Smith, Ron Bass, certain officials in the California Attorney General's Office, and LASO Sgt. Hayward Barnett all knew the real truth. They knew that what Clifford Smith wanted most in return for his cooperation against petitioner and what Clifford Smith obtained in return for that cooperation, namely charging and sentencing leniency, and an early release from custody for his brother Jimmy in his (Jimmy's) pending Kern County case (People v. Jimmy DeWayne Smith, Kern County Superior Court No. 29445). See Exh. 35 at 14-27.

109. As set forth below, obtaining charging leniency and an early release date for his brother Jimmy was the key motivating factor that induced Clifford Smith to assist the prosecution against Mr. Price, for whom he had earlier been a very favorable witness. As also set forth below, through the machinations of the prosecution and its agents, including LASO, Clifford Smith obtained that benefit, which was of primary importance to him, but the defense and jury had no knowledge of it. This evidence was powerful impeachment evidence, and was far more probative on the issue of Clifford Smith's motives to fabricate in this case than evidence that he had been given use-immunity for himself, especially where Smith was already serving a life sentence, . See Carriger v. Lewis, supra (habeas relief granted for Brady error involving suppressed evidence of informant's prison file, and rejecting contention that evidence of informant's prior criminal history and immunity agreement was sufficient for impeachment purposes), see also Exh. 2 at 14. Indeed, immunity was not even one of Clifford's stated concerns at petitioner's trial. See RT 14761.

110. Bass's objection to the entire line of questioning about the kind of protection that was promised Clifford Smith for his family members, and the trial court's erroneous ruling sustaining that objection eliminated any chance that the defense might find out through its questioning of Clifford Smith about the nature of that alleged "protection" or the fact that the quid pro quo Clifford Smith received for his assistance in this case was leniency for his brother in another criminal case. The prosecution's decision not to call Jimmy Smith, who was on its list of witnesses, kept the defense and the jury from learning about those benefits directly from Jimmy. Helen Smith, Clifford's and Jimmy's mother, could also have been a source of that information, but the prosecution did not call her either, even though she had been subpoenaed as a prosecution witness.

111. The following background information about Jimmy Smith is essential to an understanding of the present claim and of the pretextual claim about witness protection. Jimmy Smith, like Clifford, had had numerous contacts with the criminal justice system. He had prior felony convictions, and had served time in prison. In May of 1984, Jimmy Smith appeared for sentencing in a forgery case in the Kern County Superior Court (# 27033). Exh. 35 at 1-13. During that hearing, the subject of good time-work time credits for defendants housed for their protection in protective custody was discussed. Id. at 3-4. As Jimmy Smith's attorney stated and as the court indicated, inmates who were housed in protective in the CDC were not eligible to get the 50 percent good time - work time credit reduction in their sentences, because CDC did not have work programs available for such inmates. Id. This was a major concern to Mr. Smith and his counsel. For that reason, the court granted the defense request that Jimmy Smith, who was a multiple offender and had violated his

probation, would be sentenced to the medium rather than maximum term. Jimmy Smith was sentenced on that date to a term of two years. Id. at 13. He served his sentence in protective custody without incident.

112. There were two reasons why it was necessary to house Jimmy Smith in protective custody. The first reason was alluded to at the May 10, 1984 sentencing hearing, namely, that Jimmy Smith had been assisting local law enforcement. Id. at 3. The second reason, mentioned in Jimmy Smith's interview with Paul Tulleners, and in testimony by LASO agent Hayward Barnett at a sentencing hearing on December 9, 1986, in another of Jimmy Smith's criminal cases, was that Jimmy Smith had been attacked in 1979 by a Mexican Mafia member, and had suffered a serious injury to his arm. Id. at 42.

113. On May 6, 1985, while Jimmy Smith was on felony probation and/or parole, he was arrested in Bakersfield for strong-arm robbery. Id. at 14. His trial date on that charge was originally set for September 16, 1985, in Kern County Superior Court, Case, No. 29445, but later postponed. Jimmy Smith failed to appear at the criminal readiness conference on October 25, 1985, and a bench warrant was issued for his arrest. A minute order, dated 10/29/85, reflected that Jimmy Smith was in custody in Butte County on a parole violation stemming from his involvement in yet another offense.[17]

114. Excluding his Butte County case, Jimmy Smith was facing 2 to 5 years on the strong-arm robbery charges in Kern County, (No 29445). Since Jimmy Smith had a prior felony commitment, and was on parole

[17] These and several other records have been misplaced, and petitioner will file them in a supplemental exhibit as soon as they can be found or obtained again from the court. See Exh. 1, at 7.

when he committed the strong-arm robbery, under normal circumstances, he would probably have been sentenced to the maximum term. In 1986, there were still few jobs available to protective custody inmates, such as Smith. See Exh. 35 at 36-37. Thus, instead of getting a 1/2 reduction of his time in custody, he would likely have gotten only 1/3 off. For a five year maximum term sentence, that would mean serving 40 months (less credit for time served prior to sentencing); for a three year medium term sentence, that would mean serving 24 months (less credit for time served prior to sentencing), and for a two year minimum term sentence, that would mean serving 16 months (less credit for time served prior to sentencing.)

115. On January 10, 1986, pursuant to a negotiated plea bargain, the robbery charge against Jimmy Smith was dropped, and Jimmy entered a plea of guilty to a reduced charge Penal Code § 487.2 (grand theft from a person). Under the terms of the negotiated plea agreement, Jimmy would serve no more than a year in county jail. Jimmy Smith entered his guilty plea before Kern County Judge, Marvin E. Ferguson.

116. The circumstances surrounding that favorable plea agreement are material to the present claim. During his testimony on December 9, 1986, which was presented in an in camera proceeding, LASO agent Hayward Barnett went into some of the circumstances surrounding that plea agreement. The transcript of this in camera hearing, which occurred while petitioner's case was pending on appeal, was sealed, and not transcribed and filed in the Kern County Superior Court until June 15, 1992. Id at 34. That was after petitioner's automatic appeal and state habeas petitions had already been denied.

117. Sgt. Barnett was asked the following questions, mostly leading, by the Deputy District Attorney, Craig Phillips, about Jimmy

Smith's prior robbery case and the plea bargain for a reduced charge of less than robbery:

> Q. Sergeant Barnett, you are familiar with the last time Jimmy Smith was in court on a robbery situation, are you not?'
> A. Yes.
> Q. And at that time you had asked the District Attorney for us to offer Jimmy something less than robbery so he could be housed here at Lerdo for his safety?
> A. Yes.
> Q. And that was done, right?
> A. Yes.
> Q. And that was not because of anything Jimmy had done, but that was because of the protection you had guaranteed Clifford for him and his family?
> A. Yes.

Id. at 43.

118. Earlier in the same hearing, Sgt. Barnett was asked a series of questions about protective housing units (PHUs), and about the availability of jobs that would entitle Jimmy to get 50 percent sentencing credit. Sgt. Barnett testified that the largest protective housing unit at the time was at Soledad, but that almost every prison in the state had protective housing cells, and some others had entire units. Id. at 37, 41. At Soledad, there were actually two protective housing units: PHU I (for individuals unaffiliated with gangs) and PHU 2, (for gang dropouts). Id. at 37. Sgt. Barnett thought that Jimmy Smith would likely be housed in PHU 2 because his brother (Clifford) was formerly associated with a major prison gang. Id. at 38. Sgt. Barnett went on to testify that there were few jobs for PHU 2 inmates, and even a waiting list for such jobs. Id. at 38-39.

119. At that hearing, Sgt. Barnett made several comments about

arrangements for Jimmy Smith's safety in CDC. He testified:

> . . . [T]here will be arrangements made at the reception center at Chino Prison to keep him safe while he's there, during classification. . .

Id at. 37.

120. Later in his testimony, Sgt. Barnett was asked the following series of questions by Jimmy Smith's attorney, Mr. Coker, about Jimmy Smith's safety once he was transferred to a prison facility from the Reception Center and placed in a protective housing unit:

> Q. Why would a prisoner be put into PHU 2 instead of PHU I?
> A. If he had any associate on [sic] to any one of the gangs and then he had ceased that association or membership, he would go into PHU 2.
> Q. In other words, PHU 2 is designed to protect people who have the animosity of the gang against them?
> A. Yes.
> Q. And I assume, then, that P.H. Unit I would not offer then the same degree of protection?
> A. It would offer them the same degree of protection, but the clientele in there would have no connection to any of the gangs.

Id. at 39-40.

121. This testimony by Sgt. Barnett makes several things clear. First, Sgt. Barnett knew that Jimmy Smith could have been safely housed for his own protection in CDC. That was equally true in January of 1986, when Jimmy was given his plea bargain to reduced charges, and was true even in 1984, when Jimmy Smith was sentenced to state prison and housed in a protective custody unit without incident. Therefore, it was entirely unnecessary to give Jimmy Smith a plea bargain to reduced charges and no more than a year in county jail (Lerdo facility) in order to protect his safety. Second, Sgt. Barnett knew that Jimmy Smith would likely have to serve

two-thirds of a state prison sentence due to the unavailability of good-time-work time credits for protective housing inmates. Even if he was given only the minimum term, he would still do 16 months in custody, not taking into account credit for time served. With a one year sentence in county jail, he would serve only a little over 8 months, not taking into account credit for time served.

122. What emerges from this is that witness protection was not the true purpose or reason for the favorable plea bargain for Jimmy Smith. It was a pretext designed to enable Jimmy Smith to serve less time behind bars. Sgt. Barnett knew that, the prosecution in petitioner's case knew that, and so did Clifford Smith. His role in the negotiations for Jimmy's deal came to light at a hearing on February 28, 1986 in the Kern County Superior Court in Jimmy's case. At that hearing Deputy D.A. Phillips made it clear that Jimmy Smith's negotiated plea bargain for Jimmy was made with Clifford Smith:

> This particular plea bargain was entered by the People on behalf of ourselves because of another criminal matter involving Mr. Smith's older brother. . . .
>
> The People are willing and agree to have the Court re-sentence him to local time at this particular hearing. The matters under which he was granted this deal, again I don't wish to make part of the record, and the Court is aware of those, but they do center around Clifford Smith, the defendant's older brother, and the negotiated plea was made with him. I will leave it at that.

Exh. 35 at 17-18.

123. The following chronology of events shows that Clifford Smith's decision to cooperate against petitioner and leave the Aryan Brotherhood was integrally related to Jimmy Smith's renewed legal problems and to the probability that Jimmy would end up back in prison for a substantial period of time unless Clifford arranged for leniency for Jimmy as a quid pro quo for his own cooperation and testimony. That is precisely what occurred. This chronology also shows the role Helen Smith, Clifford's and Jimmy's mother, played in the events leading to Jimmy's favorable deal.

124. As noted, Jimmy Smith was arrested in May of 1985 on the robbery charge. On September 12, 1985, four days before Jimmy's scheduled trial date on that charge, Paul Tulleners, the SPU investigator assigned to petitioner's case, traveled to Kern County to talk to Helen Smith. Exh. 34 at 1. Prosecutor Bass authorized Tulleners to make that contact with Mrs. Smith. Id.

125. During Tulleners' conversation with Mrs. Smith on September 12th, she asked him to arrange for her to have telephone contact with her son, Clifford, for the purpose of encouraging him to cooperate with law enforcement in this case. Id. at 1-2. Clifford was housed in the San Quentin Adjustment Center at the time, and he had limited, if any, telephone privileges.

126. Before his September 12th meeting with Mrs. Smith, Tulleners had received information that she corresponded with Michael Thompson and wanted her son Clifford to also drop out of the AB. Id. at 1. Thompson and Mrs. Smith were very close, and she treated him like a son. RT 14973. Thompson had of course dropped out of the AB himself, and was actively assisting Tulleners and other law enforcement officials on this

case at the time of the Tulleners-Helen Smith contact. According to Clifford Smith, Tulleners told Helen Smith that he could arrange a phone call for her to Michael Thompson. Clifford testified that when he (Clifford) heard about that, he believed that Thompson had sent Tulleners. RT 14973. Whether or not Thompson sent Tulleners directly to Helen Smith, it is probable that Thompson had a role in orchestrating the roll-out (defection) of his close friend Clifford Smith from the AB and in Clifford's agreement to cooperate with the State in this case.

127. On September 19, 1985, just a week after Tulleners first met with Helen Smith, prosecutor Bass authorized Tulleners to contact and interview Jimmy Smith. Exh. 34 at 2. Shortly before that, Jimmy Smith had made known to SSU Agent Donald Hill that he wanted to speak to Tulleners. Id. at 4. Petitioner's present counsel have information that Jimmy Smith and Michael Thompson were in contact during this same time period. Without access to discovery, we cannot confirm this, because the information is presently beyond petitioner's reach.

128. On September 20, 1985, Tulleners interviewed Jimmy Smith about this case. During the course of that interview, Jimmy provided damaging information against petitioner, which if true, was very helpful to the prosecution's case against petitioner. Although the prosecution subpoenaed Jimmy Smith, he was never called a witness.

129. Within days of the Tulleners-Jimmy Smith interview, Mrs. Smith and Clifford got to speak to each other by phone several times. Id at 5. Then, during the week of October 10, 1985, Mrs. Smith and Clifford had a contact visit at San Quentin that had been arranged by Tulleners. RT 14774-14777. LASO Sgts. Barnett and Harriman, Michael Thompson's "handlers", arranged Mrs. Smith's travel from Southern California to Marin

County and back for that visit. Exh. 34 at 5. Mrs. Smith had not seen Clifford before that in several years.

130. Clifford Smith officially dropped out of the AB the next week, on October 18, 1985. On that date, Clifford Smith left San Quentin prison, and was taken to Los Angeles County. The law enforcement agents who took Clifford Smith to Los Angeles County were LASO agents Barnett and Harryman. Exh. 43 at 22. They were acting as Michael Thompson's handlers at the time, and Thompson was already present in Los Angeles County at HOJJ. Petitioner's present counsel have information that Thompson and Smith had contact with each other around the time of Smith's defection from the AB, (presumably to get their stories straight regarding the Price case), but without access to discovery and subpoena power and without compliance by the agencies in possession of the relevant records, we cannot confirm this information.

131. Less than two months later, before his testimony began against petitioner, Clifford was given the deal for his brother Jimmy. Clifford Smith began his testimony against petitioner on February 4, 1984, resumed his testimony on February 11, 1984, and again on February 26; 1984, and was then recalled on April 11, 1984. See RT Index at xliv, x & xiii.

132. Clifford Smith testified that a primary motivation for his dropping out of the AB and assisting against petitioner was that his mother had urged him to leave the AB so that he could be released in her lifetime. RT 14775. That seems palpably absurd, since Mrs. Smith was seriously ill with emphysema even before Clifford began to cooperate with law enforcement. She died only a few years later. Jimmy, not Clifford, was the son who, with help from Clifford, had a chance of being released while his

mother was still alive. Clifford had no possibility at all of being released in his mother's lifetime, since he was serving a thirty-six year to life sentence for the prison murder he committed at Palm Hall in 1982, and for the prison assaults he committed the year before. RT 14843-14845. He and his mother obviously knew that.

133. As for Jimmy Smith, he not only received the deal for county jail time, he was even released from that county jail sentence early, and his mother was a factor in that release. Exh. 35 at 31-33. On April 11, 1986, before the conclusion of Clifford Smith's his testimony in petitioner's case, Jimmy Smith filed a motion to modify his sentence. Id. In support of his motion, he filed a declaration in which he stated that his release from custody was necessary because his mother had to relocate immediately to another community, and it would work an undue hardship on her to have to wait until to his present release date. Id. The motion to modify sentence was heard on a time-shortened basis, on April 14, 1986. On that date, the court granted the motion and Jimmy Smith was given an immediate and early release from custody. Id. at 33.

134. The fact that Clifford Smith negotiated leniency for a family member rather than for himself in return for his own cooperation is not a unique occurrence. It has been reported happened in other cases. See Exh. 45 at 10-15. It also happened here, but the jury never heard about it because Clifford Smith misled the jury about the true facts, and the prosecution allowed his materially misleading account of the deals and promises made to him in exchange for his cooperation to go uncorrected.

135. Clifford Smith appears to have been well coached in advance of testifying to ensure that nothing about the lenient deal for Jimmy would come out. For example, right after the court erroneously sustained the

prosecution's repeated objections on relevancy grounds to defense counsel DePaoli's questions about the protection Clifford had been promised for his family members, (RT 14859-14860), Mr. DePaoli asked Clifford the following questions, to which no objection was raised:

Q. Promised not to prosecute your brother?

A. No one's mentioned a word to me about it.

RT 14860.

That answer was false, since Clifford had been promised that his brother would not be prosecuted on the robbery charge pending against him, but would instead be allowed to plead guilty to a lesser charge. The prosecution knew that answer was false, yet allowed it to go uncorrected.

136. Mr. DePaoli also asked Clifford Smith if there had been any promises to him not to prosecute his mother. Id. Clifford responded: "No one mentioned nothing to me about it. There's nothing to prosecute her for." Id. In response to Mr. DePaoli's question about whether Clifford's mother had ever smuggled dope into prison for him, Clifford answered: "No, she has not." Id. That answer was also false. As Clifford Smith knew, his mother had smuggled dope into him in prison. Petitioner's present counsel have information learned only last week that an individual, who served time with Clifford Smith while his mother was still alive, has confirmed that Mrs. Helen Smith did smuggle dope into prison for Clifford, and that this individual actually got some of that dope. See Exh. 1 at 7. Petitioner's current counsel have not had an opportunity to interview this person, or to obtain a declaration from him in time for filing this petition. Id.

137. Clifford Smith's false testimony about the promise not to prosecute Jimmy Smith for robbery, his materially misleading testimony to

the effect that protection was all his family members received in return for his own cooperation, and the pretextual nature of the alleged "protection" for his brother Jimmy, are all indicative of the fact that obtaining leniency for Jimmy was the key motivating factor for Clifford's cooperation against petitioner, and the key inducement he was promised in return for that cooperation. This impeachment evidence was critical to an adequate assessment by the jury of his bias and interest as a witness. Had the jury known that Clifford was given leniency for his brother, that Clifford had lied to the jury during his testimony about this benefit, and that he and the prosecution had hidden the true nature of the "alleged" protection for Clifford's brother, the jury would have had ample reasons for disbelieving Clifford Smith's entire testimony.

138. The prosecution's knowing use of Clifford Smith's false and materially misleading testimony violated petitioner's federal constitutional rights under Napue v. Illinois, supra, and Giglio v. United States, supra.

E. Janet Myers' False Testimony About Promises, Inducements and Rewards for her Testimony

139. Prosecution witness Janet Myers was the third of the trio of informants who provided testimony helpful to the State's case concerning the existence of the alleged AB murder conspiracy and petitioner's alleged role in that conspiracy. Although Ms. Myers admitted to having received a 54-day early release from state prison in 1983 in return for her willingness to cooperate against petitioner (RT 13844), she and the State concealed the full extent of the leniency she received or would receive in return for her testimony against petitioner. Ms. Myers also out lied at petitioner's trial when she asserted that she had no charges pending against her at that time

that had not gone to a determination of guilt or innocence (RT 13767), thereby implying that she had little or nothing to gain from her trial testimony in this case as a witness for the prosecution. Ms. Myers knew that was untrue, and so did Ron Bass, who did nothing to correct Ms. Myers' false and misleading testimony. In fact, the record shows that it was Bass himself who actually led Ms. Myers into making that false assertion. Id.

140. Ms. Myers made that assertion in testimony she gave on January 24 1986, at a hearing held outside the jury's presence to determine Ms. Myers' current legal and custody status. On questioning by the court, Ms. Myers testified that she was in custody due to warrants she had from other counties, and that she was serving time in Los Angeles County on a charge of being under the influence of heroin and on another charge of prostitution.[18] RT 13766. The court then asked her whether she had any pending charges that had not yet been adjudicated. Ms. Myers responded in the affirmative. Ron Bass then stepped into the colloquy, and interjected that Myers had already been convicted in several of the cases, but that she just had not appeared in some of the courts. RT 13767. Ms. Myers immediately agreed with Bass, and changed her answer: "Yeah. There are warrants. Oh no. I have no open cases, new cases." Id.

141. The court then attempted to clarify further: "Okay. They're closed cases. Warrants for failure to appear for sentencing; is that it?" RT 13767. Ms. Myers responded in the affirmative. The court then asked

[18] The cases on which Ms. Myers was serving jail time were both from the Los Angeles County Municipal Court in Pomona. Ms. Myers entered guilty pleas in both cases and was sentenced on January 9, 1986 to 90 days in the county jail on the first case (under the influence of heroin) and to 45 days consecutive on the second case (prostitution.). See Exh. 37 at 1-2.

Bass: "Do we have local copies of the things that she faces charges or warrants for or do we know?" Id. Bass responded that he thought he had six of them. Those reports had been sent to Bass by Paul Tulleners on January 15, 1986 - almost 10 days before Bass called Myers as his witness at trial. The court asked Ms. Myers again: "Okay. So as far as you know at the present time you have no pending criminal cases that have not gone to a determination of guilt or innocence; is that right." Ms. Myers responded: "Yes, sir." RT 13768. Later in the hearing, the Court stated: ". . .I was under the impression that perhaps there were open cases on drug trafficking or something like that." RT 13770. Deputy District Attorney Dikeman then made a non-responsive comment to the court's remark stating that the other cases were all misdemeanors. Bass then injected that he thought Ms. Myers may not have pleaded guilty to the hit and run charge in Modesto, but, as Ms. Myers informed the court, she had.[19] Id. Neither she nor Bass nor Dikeman clarified the true status of her still pending cases, however.

142. Ms. Myers' testimony, initially supplied to the trial court by Ron Bass, that all of her cases had been adjudicated and that she just was awaiting sentencing, was false. Ms. Myers had an unadjudicated (open) prostitution case pending against her at the time she testified at petitioner's trial. She also had two under-the-influence cases which were also open and pending against her at that time. All of these cases were from the San Bernardino County Municipal Court. The open prostitution case was MWV 91787, charging Ms. Myers with engaging in an act of prostitution on

[19] Ms. Myers was convicted in the hit and run property case from Modesto (Modesto Municipal Court No. 110787) on October 18, 1984, and was sentenced on that date to 24 months probation. On July 3 1986, four months after she testified against petitioner, her probation was extended for two years, and she received a fine.

January 23, 1985. See Exh. 37 (case 91787). Ms. Myers failed to appear for the pretrial in that case in February of 1985, and a $5000 bench warrant was issued for her arrest. Id. Her other open pending cases were MWV 90925 - charging her with being under the influence of heroin on October 13, 1984, and MWV 91900, charging Ms. Myers with being under the influence of heroin on January 14, 1985. Petitioner's counsel were unable to obtain copies of those records. See Exh. 1 at 5. Ms. Myers was not convicted in case MWV 90925 until April 22, 1986, when she entered a guilty plea, and she was not convicted at all in the other two cases, which were dismissed that same day. See e.g., Exh. (91787) at 2.

143. Each of those open misdemeanor charges carried the possibility of a six month sentence. Ms. Myers was statutorily ineligible for diversion because she was convicted of a felony on May 3, 1982, or within five years prior to her commission of the two section 11550 (A) offenses. Cal. Pen. Code § 1000(a)(6)[20]. See Exh. 36 (Myers' rap sheet). Because her pending drug and prostitution charges were unrelated to one another and were committed on separate dates, imposition of consecutive six month terms was legally authorized. Thus, Ms. Myers was actually facing 18 months in jail at the time she testified at petitioner's trial.

144. When she testified in front of the jury, Ms. Myers continued to provide a false and or misleading account about her current legal situation. On cross-examination she was asked whether she had signed a promise to appear on the San Bernardino County cases. She answered: "On my warrants in San Bernardino County, I appeared on everything up to sentencing. Then I didn't go in. . . ." RT 13919. That testimony was in

[20] The copy of Ms. Myers' rap sheet that was provided to petitioner's defense counsel only went through October of 1984. See Exh. 36.

fact false, and the prosecution knew or should have known it was, but did nothing to correct it.

145. Instead, after asking Ms. Myers about her recent arrests on a "bunch" of warrants for under the influence and prostitution, Bass asked her if she had been given any jail time yet and she answered that she was serving a 135 day sentence in Los Angeles County and was due to be released on April 4, 1986. RT 13815-13816. The impression created by Bass' series of carefully tailored questions and Ms. Myers' answers was that she was already serving the sentences she had received as a result of her arrests on the outstanding warrants. That was not true, since one half of the "bunch" of warrants were from San Bernardino County on open charges.

146. Bass later brought out through Ms. Myers that she had been released 54 days early from prison. The early release to which Bass and Myers were referring was in San Bernardino County Superior Court No. OCR 7884 (Exh. 36), and occurred three years earlier, in December of 1983. Bass then asked Myers: "So you're doing this for fifty-four days?" Ms. Myers responded: "No, not really." RT 13844. As Bass knew when he asked that question, that 54 days was a thing of the past, since Ms. Myers' sentence in case number OCR 7884 had been discharged almost a year and a half earlier. Ms. Myers' response to Bass' question was therefore appropriate.

147. What Ms. Myers and the prosecution concealed from the jury, however, was that she had current charges hanging over her head that gave her a present incentive and motivation to testify against petitioner at his trial - namely the open San Bernardino County cases which exposed her to one and one half years of additional jail time after she completed the 135 day

Los Angeles County sentence she was then serving – and which gave her a powerful incentive to stay on the prosecution's good side by furnishing testimony helpful to its case at petitioner's trial. And she did precisely that – providing testimony that went beyond what she testified to at the preliminary hearing.

148. For example, in her trial testimony, she identified a photograph of Richard Barnes' residence as the location to which she claimed she had gone with petitioner. RT 13949-13951. She placed the date of their alleged visit to that location sometime during the week before Richard Barnes was killed inside his residence. RT 13801. She referred by name to Lower Azusa Road, the main street that bordered the Barnes house, as the street she and petitioner drove down. RT 13800-13801. She also testified at trial, but not at the preliminary hearing, to a visit she and her friend Tammy Shinn supposedly made the day after the Barnes murder to Palm Hall inmates Clifford Smith and Robert Griffin, during which she claimed to have relayed a message to them from petitioner that "Everything was all right." RT 13813. The State contended that petitioner's message was an admission to his co-conspirators, Smith and Griffin, that he had committed the Barnes murder.

149. As noted above, two months after Ms. Myers provided that very useful testimony to the State, she received a favorable deal in the San Bernardino County cases. On April 22, 1986, four days after the evidentiary portion of petitioner's trial had concluded, she was allowed to plead guilty to one charge of being under the influence of heroin (MWV #90925). See Exh. 37 at 2. The second charge of under the influence of heroin, and the prostitution charge, were both dismissed. She received a sentence of only 135 days in jail with 21 days credit for time served. See

Exh. 1 at 5.

150. Ms. Myers claimed during her testimony at petitioner's trial that she had not been promised anything for her trial testimony, and she specifically denied that anyone from the prosecution, from the State Attorney General's office or from any law enforcement agency, had promised they would go to court in the cases where she faced sentencing and get leniency for her or intervene on her behalf. RT 13785-13786. The fact that Ms. Myers lied about the real status of her San Bernardino cases and was so quick to agree with Bass that she had no open cases indicates that she knew from the prosecution in this case that a favorable deal for her in those cases was in the making or would be arranged as a reward for her trial testimony in this matter.

151. Indeed, given her history in San Bernardino County of arrests, probation violations and failures to appear, (see Exh. 36), it is highly improbable that the prosecutors there would have treated this repeat offender so leniently had it not been in return for the assistance she had given to the California Attorney General's Office and the Humboldt County District Attorney's office in petitioner's capital murder trial. Moreover, San Bernardino County law enforcement authorities had an interest in the outcome of this case, since the venue of the AB murder conspiracy alleged against petitioner was San Bernardino County, where Chino State Prison and its maximum security wing, Palm Hall, are located.

152. Ms. Myers' rap sheet reveals that her history of criminality in San Bernardino began in 1975 when she was arrested and convicted of receiving stolen property. Exh. 36. She was arrested there again in 1978 for receiving stolen property, and for other offenses in 1981 and 1982. On May 3, 1982, she was convicted by the San Bernardino County Superior

Court in case number OCR 7884 of two counts of grand theft property, and received a 2 year suspended state prison sentence, 365 days in jail and 36 months probation. In August of 1983, Ms. Myers' probation was revoked in that case, following her arrest for a prostitution charge, her failure to appear, and her subsequent plea of guilty to the prostitution charge. She was committed to state prison that same month to begin serving a two year prison sentence. On December 7, 1983, in return for her agreement to cooperate against petitioner, Ms. Myers' sentence was modified at the State's urging. She was sentenced to probation, and her 2 year state prison sentence which she was then serving was ordered suspended.

153. The defense was not informed until the preliminary hearing in April of 1984 that Ms. Myers' felony sentence had been modified on December 7, 1983, in return for her cooperation against petitioner, and that she received a 54 day early release from prison. CT 1898. The prosecution never told the defense what the actual terms of the modification order were, other than the 54 day early release from prison, and did not inform the defense that Ms. Myers was placed on probation. The modification order and the proceedings at the modification hearing were sealed.[21] Ms. Myers mentioned that she was on probation. CT 1911.

154. Four months after Ms. Myers testified against petitioner at his preliminary hearing, while she was still on felony probation in case OCR 7884, Ms. Myers was again arrested in San Bernardino County on a charge of being under the influence of heroin. On August 23, 1984, she pled guilty in that county to a violation of California Pen. Code § 148.9 (providing

[21] Petitioner's counsel was informed in 1997 that the entire file in OCR 7884 (a case that is now over 15 years old) has been and remains sealed. Janet Myers mentioned that she was on probation, however. CT 1911.

false identification to the police). She was sentenced to 90 days in jail, but her felony probation was not revoked. On October 13, 1984, she was arrested again in San Bernardino County on a drug charge, and then picked up a second drug charge and a prostitution charge in January of 1985 – the charges on which she received leniency on April 22, 1986, after testifying against petitioner at his trial.

155. The defense was never informed about the leniency in plea and sentencing that Ms. Myers received for her assistance to the prosecution in this case. The defense also was not informed that despite her arrests in the summer and fall of 1984, Ms. Myers' probationary sentence which the State had helped gain for her on December 7, 1983, when they sought a modification of her sentence, was never revoked.

156. Ms. Myers' false testimony about the charges that were still hanging over her head at the time she testified at petitioner's trial, and about the benefits concerning those charges that were promised to her for her testimony, deprived petitioner of critical impeachment evidence that would have shown that Ms. Myers had a present and compelling motive to provide favorable testimony for the prosecution. This denied petitioner his federal constitutional rights under Napue v. Illinois, supra, and Giglio v. United States, supra. As the facts set forth in the next subsection of this claim show, benefits were not the only matters she and the prosecution's other key informant witnesses lied about during petitioner's trial.

F. Other Perjured Evidence Was Knowingly Used By the Prosecution Against Petitioner To Obtain his Convictions and Sentence of Death

157. In addition to the perjured testimony by Thompson, Smith and

Myers concerning benefits and inducements given and/or promised them for their testimony against petitioner, those witnesses provided other false testimony against petitioner. The prosecution knew or should have known that testimony was false, but used it to obtain petitioner's convictions and his death sentence.

158. The false evidence included the testimony by Janet Myers and Clifford Smith about an alleged visit by Myers to Smith at Palm Hall on Sunday, February 13, 1983. RT 13813. Richard Barnes had been murdered earlier that same day. Myers testified that during her visit with Clifford Smith on February 13, 1983, she conveyed a message from petitioner to Smith. Id. RT 13830-1-13831; 13845.

159. Myers, who did not have her own car, testified that she went with Tammy Shinn to Palm Hall that Sunday, and that Shinn visited her boyfriend Robert Griffin that day while Janet was visiting Clifford Smith. Id. At petitioner's trial, Myers testified that before she and Shinn went to this visit, she asked petitioner if he had any message for the guys at Palm Hall, and he allegedly told her to tell them "Everything was okay." Id. Myers testified she conveyed that message, which she said was verbal and not in writing, to Clifford Smith during a phone visit with him on February 13, 1983. RT 13831. Prison staff at Palm Hall monitored phone visits between Smith, Griffin and other gang-affiliated inmates and their visitors. RT 13932.

160. Clifford Smith testified that Janet Myers delivered a written message from petitioner that Sunday, and that the message was in petitioner's handwriting. RT 14692. Smith claimed that Myers held the message up to the glass for him to read, and then passed it to Tammy Shinn, who in turn held it up for Griffin to read. Smith testified that Myers then

destroyed the message by burning or eating it. RT 14696.

161. Evidence existed showing that Janet Myers did not visit Clifford Smith on Sunday, February 13, 1983, the day of the Barnes murder, as both she and Smith claimed. That evidence, which of course would have been highly favorable to petitioner's defense, was suppressed by the prosecution and/or by CDC in petitioner's case. The defense made a specific request for discovery of Clifford Smith's C-file, and for his visiting records for that time period. RT 14541. None were provided by the prosecution or the CDC. That agency finally produced Clifford Smith's C-file for in camera inspection on March 3, 1986. However, the file did not contain any visiting records for Clifford Smith. RT 15060.

162. Eight years after petitioner's trial, Clifford Smith testified for the prosecution in the McClure case in Oregon. McClure's attorneys obtained a subpoena duces tecum directed to CDC for the production of Smith's C-file. In compliance with that subpoena, CDC turned over portions of Smith's C-file to the McClure defense. See Exh. 39. Among the documents in that file were Clifford Smith's visiting records, including visiting records for the first half of 1983. Exh. 40. Clifford Smith was housed at Palm Hall during that time period. The names on the records were already blacked out, apparently by CDC, when petitioner's current counsel obtained these records from McClure's attorneys. However, several letters in the last name listed can be made out even through the black-out. The first letter of the first name is a "J". The second two letters of the last name are "My." There are other indications that the visitor in question is Janet Myers. First, Ms. Myers testified at petitioner's preliminary hearing that she had burned Smith on a drug transaction, and last saw him in February, 1983. CT 620-621. This is consistent with Exh.

40, which shows there were no more visits made by this visitor to Smith after February 1983. Second, the visitor is listed as Clifford's friend. Based on the foregoing, these are clearly records of Janet Myers' visits to Clifford Smith during the time period at issue here.

163. Before CDC converted to a computerized system for processing visitors, prisons in California kept records of visits to prison inmates on large, manilla cards. See Exh. 1 at 6-7. Each inmate had a visiting record card. CDC required that all visitors be pre-approved. When a visitor arrived at the prison, that visitor had to be processed before being allowed inside the prison to visit. This was also true for those visiting inmates only by telephone. As part of processing the visitor, the officers would manually pull the visiting card of the inmate. Each prison had these cards for the inmates housed there. The processing officer would then check the visiting card to make sure the visitor was pre-approved. The processing officer would then make a written notation on the card, next to the name of the approved visitor, of the date of the visit. Id. That allowed the prison to keep track of every person who went inside the prison. This process was done before the visitor was allowed to proceed further into the institution. Id. The same process was done for attorneys and non-attorneys. Exh. 40 is an example of the visiting cards used before CDC switched to computerized visiting records. Id. It is the left hand portion of the whole visiting card.[22]

164. Exhibit 40 contains 12 notations of visits to Clifford Smith in the first half of 1983 by Janet Myers. None of those visits were on

[22] Petitioner's defense counsel introduced some visiting records for Clifford Smith that he was able to obtain independently. Those records are different from the standard records used during the actual processing of visitors into

February 13, 1983, the date Clifford and Janet alleged they had the visit during which Janet allegedly conveyed the message from petitioner that the prosecution argued was an admission by him of the Barnes murder. There are only four notations for the month of February: February, 4, 9, 17 and 20. Petitioner has also appended the visiting records for Robert Griffin showing visits to him by Tammy Shinn during the first four months of 1983. See Exh. 41. Janet Myers testified that she and Tammy went together to Palm Hall on Sunday, February 13, 1983; that she (Janet) visited Clifford Smith, and that Tammy visited Robert Griffin. There are numerous visits by Tammy Shinn to Robert Griffin during the month of February 1983, but none were on that Sunday. Id. The only dates of visits by both Tammy and Myers during February 1983 were February 4, February 9, and possibly February 17, 1983. Only one of these visits occurred after Richard Barnes was killed.

165. The suppressed visiting records are material and favorable evidence for petitioner. They establish that Janet Myers did not visit Clifford Smith the same day Richard Barnes was killed, and Tammy Shinn did not visit Robert Griffin that day either. These suppressed records thus show that Janet Myers's testimony about the alleged visit, and about conveying a message to Smith from petitioner during that visit, was false. Clifford Smith's testimony corroborating Janet Myers was also false, as was his testimony that Janet Myers' showed him a written message from petitioner during the visit, and his testimony that Tammy Shinn was visiting Robert Griffin at the time and that Shinn had shown Griffin the message before Janet destroyed it.

166. The prosecution knew or should have known that this

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the prison, and are less complete.

testimony by Myers and Smith was false. The falsity of their testimony was apparent from the CDC visiting records, but importantly to this claim, those records were not produced by either the prosecution or the CDC despite specific defense requests for those documents. Although the prosecution suggested that Smith's visiting records for 1983 were unavailable, and even insinuated that the defense may have been responsible for this (see RT 20434-20435), the fact remains that the allegedly unavailable records were highly favorable and material evidence for the defense -- evidence that petitioner would certainly have presented to the jury if he could have. That was not true for the prosecution, since the allegedly "unavailable" records that were turned over in the McClure case prove Myers and Smith to be liars. Given all the other instances of misconduct by the prosecution in this case, and the damaging nature of the records in question to the prosecution's case, the prosecution's claim in petitioner's case that Clifford Smith's visiting records were unavailable was untrue.

167. The significance of a visit by Janet Myers to Clifford Smith, one of petitioner's alleged co-conspirators, the very day of the Barnes murder, and of the alleged incriminating message from petitioner through Myers on that date, was plain. That alleged visit and that alleged message circumstantially connected petitioner to the Barnes murder. See RT 20431-20434. Prosecutor Dikeman therefore recognized that he should devote time during his closing to dealing with Defense Exhibit XXX, which consisted of some of Clifford Smith's visiting records for 1983 and several years prior to 1983, but showed no visits for Smith in 1983. See CCT 915-918. Mr. Dikeman argued to the jury that the records in Exhibit XXX were for contact visits, but that there were different records for telephone visits, and that the visit at issue on February 13, 1983 was a telephone visit. See

RT 20435. If the prosecution had disclosed the allegedly "unavailable" visiting record that magically turned up eight years later in the McClure discovery, the jury would have known not to be swayed by Mr. Dikeman's argument. Exhibit 40 shows visits by Myers on three weekdays in February – the 4th (a Friday), the 9th (a Wednesday), and the 17th (a Thursday) and one weekend day, the 20th (a Sunday.) Myers testified that days for contact visits at Palm Hall were three Saturdays a month. RT 13953. Thus, even if there are different records for telephone and contact visits, Exhibit 40 is a telephone record, and it shows no telephone visit by Ms. Myers with Mr. Smith on February 13, 1983, the day of the Barnes murder.

168. It is important to note here that Janet Myers did not make her false allegations about the alleged visit on the day until after her three hour or longer confrontation with Michael Thompson on November 1, 1983 at the Antelope Valley Substation. See RT 13835-13836. This visit was arranged by law enforcement at Thompson's request to get corroboration for his account. RT 17083. During the visit he was acting as a police agent, and even as a de facto member of the law enforcement team. As Thompson recognized, Myers was emotionally unstable, an addict, facing two years in prison, and susceptible to pressure. Id.

169. In addition to Myers' and Smith's lies about the 2/13/83 visit, other contrived evidence was introduced by the prosecution at petitioner's trial. One piece of false evidence introduced by the prosecution through Michael Thompson concerned the infamous "hit-or-miss" message that petitioner allegedly included along the right hand border of his letter to Thompson dated August 24, 1983 (hereinafter "hit or miss letter"). See Exh. 7, and attached Exh. B.

170. Petitioner was in custody on August 24, 1983. He was being

held in, Humboldt County following his arrest in March 1983 for the murder of Elizabeth Hickey, the burglary of the Moore residence, and for various robberies. Michael Thompson was in custody at San Quentin State Prison on August 24, 1983, and confined in San Quentin's maximum security segregated housing unit, the Adjustment Center, and his mail was all photocopied at that time by the prison authorities. RT 16916; CT 2303-2304.

171. Petitioner was definitely the author of the body of the letter, and he signed the letter. However, he did not write the "hit-or-miss" message along the border of the letter, and was not involved in any way in the preparation of the message or in sending the message. The message was placed on the border of the letter by someone else after it had left petitioner's possession and control.

172. Thompson testified that the letter was opened when he received it. RT 17062. He said he thought no other inmates had seen it before he did, and said he did not show it to another inmate before he defected. Thompson claimed he discovered the hit-or-miss urine message the same day he received the letter. RT 17064. He also claimed that he and petitioner had worked out a convention whereby letters starting with "howdy" or "hello" meant they contained a "hit or miss" message. RT 17063.

173. The hit-or-miss message on the border of the letter in question here is all in capital letters except for the letter "n". The text of the message reads: "nEED COnTACT WITnESS PROBLEM COULD WALK". See Exh. B attached to Exh. 7.

174. Thompson defected and began cooperating several weeks after he received this letter and allegedly "discovered" the message. During

Thompson's interview with CDC/SSU agent James Hahn on September 14, 1983, Thompson made some general comments about the use of urine to write messages. He never said that petitioner had ever used urine to write messages, and importantly, he never said he had received a letter from petitioner containing a urine or secret message from petitioner. Thompson did tell Hahn that he had some letters from petitioner, but he said they did not have a hint of anything to do with petitioner's pending homicide charges. RT 17068. At trial, Thompson attempted to cover this obvious lapse and inconsistency in his story by clear sophistry, claiming that the hit or miss message did not actually "relate" to the homicide itself. RT 17969.

175. Thompson also claimed that he did not give the letter to Hahn at the time because his property was in custody. Even if his property was in custody at the time, it was at San Quentin when Thompson was being interviewed. Moreover, he was being interviewed by SSU and CDC officials, who could have gotten authority, if they did not already have it, to retrieve something from Thompson's property of this importance.

176. Thompson did not furnish the letter to law enforcement until his interview at Tehachapi by Humboldt County District Attorney investigator, Barry Brown. See RT 17069. By that time, Thompson had been in Unit 9-West, the Tehachapi snitch unit for several weeks, having arrived there on October 3, 1983. Exh. 17. Larry Dean House, a good friend of Thompson's, was in that unit with Thompson. See Exh. 18.

177. The prosecution made no effort to evaluate the authenticity of the "hit-or-miss" inscription on the letter. The defense did, after finally getting disclosure of the letter. The defense had the letter examined by former California Department of Justice questioned documents expert, Terry Pascoe. Pascoe subsequently testified at trial for the defense.

Investigator Barry Brown was present when Pascoe conducted his testing of the letter, which involved putting the letter under a black light, and taking ultraviolet photographs of it. RT 20176-20177.

178. Pascoe testified that he compared the "hit-or-miss" message with handwriting exemplars that petitioner had provided. He stated his opinion that petitioner's exemplars showed no indication of deception or disguise. RT 18543. He also stated his conclusion that the "hit-or-miss" message on the letter was probably written by someone else, and not by petitioner. Id. On cross-examination, he testified that although petitioner could not be ruled out as the author of the message, he thought the likelihood that petitioner wrote the message was small. RT 18552.

179. As part of petitioner's investigation for his federal habeas petition, he had the hit or miss letter examined by Lloyd Cunningham, a Bay Area forensic documents examiner. Mr. Cunningham's declaration is appended to this petition as Exhibit 7. Mr. Cunningham is a retired San Francisco Police Department Inspector. He has been a questioned documents examiner for the past 18 years. He has received two plus years of training at the United States Postal Crime Laboratory Questioned Documents Section in San Bruno, California, and graduated from the F.B.I. Advanced Topics – Questioned Document School in Quantico, Virginia. Mr. Cunningham has been a lecturer about Forensic Document Examination to numerous groups and organizations, and has served as a touring guest speaker for the California District Attorney's Association. He is currently teaching a course in Questioned Document Investigative Techniques in connection with the San Jose State University Adminstration of Justice Bureau. He is certified by the California Commission on Peace Officer Standards and Training to teach Questioned Document Investigative

Techniques in the Institute of Criminal Investigation. He has testified and been accepted as an expert Forensic Document Examiner in excess of 350 times in courts and hearings. Id. at . 1- 2.

180. Mr. Cunningham's examination of the "hit or miss" letter revealed favorable new information strongly indicating that petitioner did not write the "hit or miss" message. To understand the significance of this information, a basic understanding of the factors involved in the scientific identification of handwriting or in this case handprinting is necessary. Mr. Cunningham discusses those factors as follows:

> The scientific identification of handwriting and hand-printing is based upon a sufficient and significant combination of "class" and "individual" characteristics, executed in a free and normal manner and a lack of any consistent, basic differences.
>
> Typically, handwriting/printing contains both "class characteristics" and "individual" characteristics. A "class characteristic" is one that is common to a group of individuals. An example of a "class characteristic" is a "copybook" letter form. When learning to print/write in English, school children are typically taught to form the letters of the alphabet using copybooks. After learning how to print/write copybook letter forms, most people continue to have some "class characteristics" in their letter formations but they also begin to incorporate "individual characteristics" into their handprinting and handwriting. An "individual characteristic" is one that is highly personal or distinctive. "Individual hand-writing/printing characteristics" can be subtle. In other words, the writer does not realize the distinctive characteristics that are present in the way the writer normally writes or prints a given letter of the alphabet.

Exh. 7 at 3.

181. Mr. Cunningham's examination reveals that the hand-printing of a number of the letters in the hit or miss message along the side of the letter appears to contain individual hand-printing characteristics of the person who wrote it. He indicates that the author of the "hit-or-miss" message maintained a similar construction in style and design between corresponding letter conformations. Although some of those letter conformations are "class" in nature, namely common to many people, the message also contains hand-printing features that may represent some of the normal (subtle) "individual" hand-printing habits of the author. Id.

182. Mr. Cunningham examined known and collected samples of petitioner's writing, including the body of the hit or miss letter, as part of his examination. He was able to determine that the handwriting and handprinting in those documents is petitioner's normal genuine handprinting, and he found no evidence that petitioner attempted to intentionally distort his handprinting or handwriting in those documents. Id. at 4.

183. Mr. Cunningham then conducted a side by side comparison of the known handprinting of Mr. Price versus the questioned handprinted material, i.e., the hit or miss message. He found numerous obvious and subtle differences present between handprinting in the hit or miss message and petitioner's handprinting. Id. Those differences include, but are not limited, to the following:

> a) The author of the "questioned handprinted material" uses lowercase "n's" in combination with all uppercase letters. Mr. Price uses uppercase "N's" when applicable and uses lowercase "n's" when applicable, except in the request-alphabet form when he uses an uppercase "N" where a lowercase "n" is designated. In addition, Mr. Price constructs the terminal stroke quite differently

than the questioned handprinted "n's" terminal strokes,

b) The questioned handprinted uppercase "C's" exhibit a hook at the top. Mr. Price makes plain top "C's".

c) The questioned handprinted uppercase "P" was constructed with two strokes. Mr. Price makes a one stroke uppercase handprinted "P".

d) The questioned handprinted uppercase "W's" were constructed with sharp-pointed bottoms. Mr. Price makes rounded bottoms on lower & uppercase handprinted "W's".

e) The questioned handprinted uppercase "'M" was constructed with sharp-peaked tops. Mr. Price makes a different style uppercase handprinted "M".

f) From the Exhibit C photograph, I cannot accurately determine the number of strokes used to form the questioned handprinted uppercase "A's." However, it appears that three strokes were used and the horizontal stroke extends far to the right of the "A." Mr. Price makes two stroke "A's" and barely extends the horizontal stroke to the right of the "A".

g) The questioned handprinted uppercase "R" appears to have been constructed with three strokes. Mr. Price makes uppercase "R's" with one stroke.

Id. at 4-5. On the basis of the above-described differences, especially the subtle differences, between the hit or miss message and the known handprinting exemplars of Curtis F. Price, Mr. Cunningham concludes that those differences strongly indicate that Mr. Price did not prepare the "hit or miss" " message. Id.

184. Mr. Cunningham goes on to state that the only reason Mr. Price cannot be entirely eliminated as the author of the "hit or miss" "questioned handprinted material" is because there are some similarities between that material" and Mr. Price's known handprinting exemplars.

However, he explains that those similarities are "class" in nature, and are in common with the handprinting of many individuals. Id. at 5-6. He explains that anyone who has the skill level and artistic ability to prepare copybook letter conformations cannot be positively eliminated as the author of the "hit or miss" message. That would include the vast majority of our population. Id.

185. Thus, petitioner did not write the "hit-or-miss" message nor did he have anything to do with it. He does not know who in fact wrote that message. However, it is plain that Michael Thompson was behind the forgery. Notably, Thompson was involved in another high profile case in which an alleged "coded" message appeared on a letter, and that "coded" message too proved to be a forgery. The case, State of Oregon v. Garrett, Washington County Cir. Ct. No. C91-0372CR, was the companion case to McClure. Thompson's friend and fellow Tehachapi-snitch unit inmate, Larry Dean House, was determined to have been the author of the forgery. Relevant portions of testimony from Garrett by Thompson, House and forensic documents examiner Pascoe are appended to this petition. See Exh. 47.

186. Thompson was also involved in another high profile case, the capital trial of Joseph O'Rourke, an alleged AB member, (People v. O'Rourke, Orange County Superior Court N. C-56904) in which Thompson's associate and fellow Tehachapi-snitch unit inmate, Roger Wiersma provided highly incriminating testimony that turned out to be false. See Exh. 1 at 6-7. Thompson's testimony in O'Rourke was consistent with the false incrimination given by Wiersma. Mr. O'Rourke's defense attorney managed to obtain and introduce evidence proving that Wiersma's account was perjury, and Mr. O'Rourke was acquitted. Id. As

noted previously, Mr. Price's attorneys tried to obtain information showing that Thompson, Smith and Myers were falsely incriminating Mr. Price in this case. However, unlike the O'Rourke case, the evidence was beyond their reach in the Price case and might have remained hidden had Thompson and Smith not surfaced as witnesses in Oregon.

187. Thompson also gave information to Ron Bass and Paul Tulleners about another murder, the murder of AB member Jack Mahon, otherwise known as "the general," that proved to be false. Exh. 43 at 29-30. Thompson told Bass and Tulleners that John Stinson and Shirelle Crane, the wife of AB member Robert Crane, "sent the general to the country." Thompson and Smith mentioned a similar "take the girl to the country" message in their testimony against petitioner. They said this phrase meant to murder the girl, and that petitioner utilized this phrase to let his co-conspirators know that he (Price) had murdered Elizabeth Hickey. Thompson said that word came in a letter to him from John Stinson that Shirelle Crane shot Jack Mahon while she was on the phone talking to Bobby Crane, her husband. Id. Thompson claimed to have gotten his information that petitioner had carried out the murder contract on Richard Barnes and the murder of Elizabeth Hickey from John Stinson has well. RT 16912.

188. Shirelle Crane was charged with the Mahon murder, but she was either acquitted or charges against her were dropped, after her attorney Leslie Abramson obtained evidence showing that someone else committed the Mahon murder and that Shirelle Crane and John Stinson were not involved. A detailed account of Ms. Abramson's investigation in the case is set forth in her recent book entitled "The Defense is Ready: Life in the Trenches of Criminal Law" (Simon & Shuster, 1997).

189. Thompson gave his false information about the Mahon murder during his interview with Ron Bass and Paul Tulleners in the Humboldt County jail right before he took the stand in petitioner's trial. The prosecution did not turn over the notes of that interview, until April 10, 1986, a month after Thompson's testimony had been completed. Exh. 43 at 32. This delay deprived the defense of an opportunity to investigate the facts of the Mahon murder, and to cross-examine Thompson about the matter to show his pattern of making false accusations against his former AB associates, including against petitioner.[23]

G. The Prosecution's Knowing Use of False Testimony Entitles Petitioner to Relief on Habeas Corpus

190. The pervasive lying by the prosecution's prisoner informant witnesses in this case, and the kinds of lies they told and material misrepresentations they made and were allowed by the prosecution to make, was not an isolated instance of such abuses by California snitch witnesses.

191. The Los Angeles Grand Jury (hereinafter "Grand Jury") investigated similar abuses in 1989-1990 in the wake of the well-publicized

[23] Petitioner's current counsel found documents in Thompson's JILT file indicating yet another instance when Thompson provided information that that was not credible. That information was furnished by Thompson at John Stinson's retrial for the murder of Alfred Armijo. LASO agent Roger Harryman, one of Thompson's "handlers" had alerted the Los Angeles County District Attorney that Thompson had helpful information about the Stinson case. Thompson was called as a prosecution witness to prove Stinson's intent to kill. Thompson testified that Stinson made admissions to him about the murder while they were both at Chino in 1981. Stinson denied making the admissions. The jury hung 9-3 on intent. The JILT memo reflects that the jurors thought Thompson was not a credible witness. Exh 32 (Report to Greg Thompson.

Los Angeles jailhouse informant scandal. Its investigation covered the ten year time period from 1979 to 1989. The proceedings in petitioner's case occurred within that time period. Prisoner informant Michael Thompson was housed for three years in the Los Angeles County jail during that period, and was receiving undisclosed but substantial benefits from LASD and LASO. Clifford Smith was housed for about six weeks in the custody of the LASD after he began cooperating against Mr. Price. RT 14603.

192. The Grand Jury heard testimony from 120 witnesses, including public officials, prosecutors from the Los Angeles County District Attorney's Office and the California Attorney General's Office, defense attorneys, law enforcement officials from the Los Angeles County Sheriff's Department, and from six jailhouse informants.

193. The Grand Jury's 153 page Report which petitioner incorporates here by this reference, is replete with illustrations of the kind of benefits, favors and inducements that were promised and given to the prosecution's key informant witnesses for their cooperation in this case. Petitioner has appended pages of the report that are particularly relevant to his case as Exhibit 45 to this petition.

194. The following determinations and findings by the Grand Jury that the prospect of getting benefits and favorable treatment provides a strong and compelling incentive for prisoner informants to cooperate and also to fabricate or shape testimony in favor of the prosecution are equally applicable to the informants in petitioner's case. As the Grand Jury found:

> The myriad benefits and favored treatment which are potentially available to informants are compelling incentives for them to offer testimony and also a strong motivation to fabricate, when necessary, in order to provide such testimony. This premise is a basic concept

to the understanding of the jail house informant phenomena. The courts have sometimes lacked adequate factual information to fully realize the potential for untrustworthiness which is inherent in such testimony because of the strong inducements to lie or shape testimony in favor of the prosecution. [footnotes omitted].
Jail house informants want some benefit in return for providing testimony. [footnote omitted]. The more sophisticated may attribute their willingness to testify for law enforcement to other motives, such as their repugnance toward the particular crime charged, a family member having been a victim of a similar occurrence, the lack of remorse shown by the defendant, or other explanation to account for their assistance to law enforcement. Nevertheless, in the vast majority of cases it a benefit, real or perceived, for the informant or some third party that motivates the cooperation.

The benefits can range all the way from added servings of food up to the ultimate reward, release from custody. According to an officer at the central jail, inmates who provide information about problems within the jail might be rewarded with an extra phone call, visits, food or access to a movie or television. A former high ranking official with the California Department of Corrections described: '[Informants] want something, especially if you are that kind of person and I don't know anybody that has ever come forward with information inside a prison or criminal justice system that didn't want something for himself or for some friend of his.'[24]

[24] Clifford Smith wanted something for his own brother in petitioner's case.

Id. at 10-12.

195. The Grand Jury report went on to list a variety of different benefits described by six jailhouse informant witnesses who appeared before the Grand Jury. Those informants alleged they received such benefits as placement in a cell with a TV, coffee pot, and other amenities generally unavailable to other inmates; obtaining a release for a family member as a benefit for the informant's activities as an informant; having their sentencing postponed until immediately after testifying; receiving pocket change [from $10-$50] from various officials with whom they worked, and greater access to telephones, coffee, candy, donuts, cookies and cigarettes. One informant testified to having received the equivalent of several thousands of dollars and housing and expenses once released from jail. Id at 13-15.

196. The Grand Jury Report also contains a section entitled "Informants' Non-Commitment to Truth." In that section, the Report discusses such abuses and practices as: (1) informants obtaining bits and pieces of information about a case and/or crime from law enforcement sources and/or by obtaining records about a given case or crime, and then putting that information together and claiming to have gained it either from personal knowledge about the crime or from the target defendant; and, (2) informants collaborating among each other to concoct false evidence and/or to obtain false corroboration for their testimony, and also committing perjury. Id at 16-36.

197. The prosecution and LASO and LASD had actual and/or constructive knowledge and notice that those kinds of abuses and practices were occurring in petitioner's case as well, and that the troublesome lack of veracity and integrity of prisoner informants, which the Grand Jury

commented on, was true of the cooperating prisoner informants in this case.

198. Michael Thompson is an excellent example. Michael Thompson is the prototype of a sophisticated informant, and like other informants, he used the ploy of claiming he was cooperating in this case because he found the murder of innocent victims to be repugnant. Thompson was a known and admitted perjurer, a persuasive and effective manipulator, a sophisticated liar and master of distorting the truth. As he stated in explaining how he allegedly avoided lying when he testified for the defense in AB trials: "You just don't tell the whole truth. In other words, if the question isn't asked, you don't answer it. You don't offer. So you answer within a limited range and only that." RT 16902. As Thompson put it during a meeting with Bass and Tulleners to go over his testimony, "I couldn't be selective as to the truth." Exh. 43 at 28. That statement of Thompson's was not disclosed to the defense. See Id. at 33. If the trial court agreed to its deletion, that was error.

199. Thompson was also highly opportunistic. Even in the act of defecting from the AB and becoming a cooperating witness, Thompson engaged in exploitative and indeed treacherous actions for his own aggrandizement. For example, he set up Robert Rowland, another AB member or associate, by asking Rowland to keep a zip gun for Thompson in his (Rowland's) cell. RT 18980-1. Several days later, Thompson rolled out of the AB and used that information to inform on Rowland to San Quentin authorities. RT 18745. He did so to establish his own credibility and prove his information was good.

200. There were early indications in this case that Thompson was contriving information against petitioner. For example, Thompson's statement to law enforcement officials that none of petitioner's letters to

him had a hint of anything to do with petitioner's pending charges (RT 17068), coupled with Thompson's omission of any mention of the alleged hit-or-miss urine message in the four or five interviews Thompson had with law enforcement within days of the time he allegedly "discovered" the message, should have put the prosecution and others involved in the investigation and prosecution of this case on notice that something was "fishy" about the hit-or-miss message.

201. In addition, there was evidence that Thompson was taking bits and pieces of information he was learning from law enforcement and incorporating them into his own account as if he knew the information independently. A good example is the caliber of weapon used in the Barnes murder. Thompson had to be told the caliber by law enforcement during an initial debriefing interview, and then after receiving that information, Thompson wove it into his own accounts as if it were something he had known all along.

202. There was also evidence that Thompson was obtaining information about events and testimony in petitioner's case after defecting either directly from law enforcement or independently. For example, he made comments during his interviews with law enforcement showing that he knew about Michelle Scarborough's testimony for the defense at petitioner's October 1983 preliminary hearing, and characterized it as not being that helpful. Thompson also made comments showing he knew that the defense had obtained a continuance of that preliminary hearing due to Scarborough's unavailability. Thompson obtained that information while he was still at San Quentin or was in Tehachapi. Sgt. Haywood Barnett told the defense attorneys in the McClure case that Thompson was calling out to other courts and getting documents brought in to the Los Angeles County

jail while he was being housed there. Exh. 52 at 88.

203. In addition, the prosecution, among others, had been expressly warned by other informants, including but not limited to Ronald Harper, who had personal knowledge that Michael Thompson was orchestrating contrived testimony for this case. See Exh. 42. One example of this involved the wallet and a statue belonging to victim Richard Barnes, which were missing from his residence after the crime. Thompson and Steve Barnes, the victim's son, had discussed those items during the time Barnes was housed with Thompson in Unit 9-West in Tehachapi. Thompson told other informants that he planned to work those items into his own account, which he did in a statement to Paul Tulleners. Thompson suggested to Steve Barnes that he (Barnes) call Tullener with the same information, which Steve Barnes did. Thompson also called Tulleners. See Exh. 43.

204. Petitioner's position is and always has been that Thompson's entire account of the alleged AB murder conspiracy and of petitioner's alleged participation in the conspiracy was contrived, and that Janet Myers and Clifford Smith provided Thompson with false corroboration. As Thompson knew, Myers was vulnerable and easily manipulated, and would basically say whatever he told her to say. Indeed, Myers did not start cooperating with law enforcement in this case until Thompson had spent more than three hours talking to her at the Antelope Valley substation.

205. Clifford Smith was Thompson's closest ally and in-prison crime partner. During his testimony in the McClure trial, Leslie Vernon White, the informant who first brought the L.A. jailhouse informant scandal to light, described Michael Thompson and Clifford Smith, both of whom White knew well and considered as his friends, as being as "tight as two fat

men in a telephone booth." Exh. 46 at 111.

206. During his preliminary hearing testimony, Clifford Smith said of his relationship with Thompson: "Me and him was in a circle and he was the leader, you know, because he was the one that come up with all the bright ideas, and I was his yes man, for lack of a better phrase..." CT 2840. Before Clifford defected and began providing statements and later testimony against petitioner, he already knew about the "bright ideas" Thompson had come up with against petitioner, namely the alleged AB murder conspiracy and petitioner's alleged participation and perpetration of the overt acts in furtherance of the conspiracy. He had read Thompson's preliminary hearing testimony in this case, as well as Janet Myers' preliminary hearing testimony, and he had also been writing and conferring with petitioner's defense attorneys and their representatives about the prosecution's evidence. He therefore knew in advance what he had to say to corroborate his close ally, Michael Thompson, and his former girlfriend, Janet Myers, and he did so.

207. However, Smith also provided some inconsistent details, such as claiming that the decision to kill Richard Barnes was not made until late 1982 (RT 14885-14886), which would have been after petitioner's release, and claiming that the message from petitioner that Myers conveyed to Smith on the February 13, 1983 visit was in writing. RT 14692. According to Leslie White, building in some inconsistencies and flaws was a tactic he and other informants used to make their contrived corroboration appear more realistic. Exh. 46 at 110-111.

208. Although each of these prisoner informants had lengthy felony records and were of dubious credibility, the prosecution gave them their official stamp of approval anyway. The numerous instances of false

testimony and of knowing use of false testimony, and of other prosecutorial misconduct, including suppression of evidence and playing games with discovery, as discussed in this Claim and in Claim VII which petitioner incorporates here by this reference, shows that the prosecution was so intent on winning this high-profile case that they were willing to violate petitioner's federal constitutional rights to obtain his murder convictions and sentence of death.

209. In another high profile gang prosecution, a federal RICO prosecution of the El Rukn gang in the Northern District of Illinois, the prosecution and some of the prosecution's key ex-gang member witnesses engaged in very similar misconduct. See United States v. Boyd, 833 F. Supp.1277, 1343-1365 (N.D. Ill. 1993), aff'd 55 F.3d 239 (7th Cir. 1995). Like the misconduct in petitioner's case, the misconduct in Boyd involved knowing use of perjured testimony and the suppression of evidence of undisclosed special benefits and favors to those ex-gang member government witnesses. That misconduct was held to require a new trial for the Boyd defendants. A new trial is required here for the same reasons.

210. A conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Napue v. Illinois, supra, at 269-271; Alcorta v. Texas, supra; Giglio v. United States, supra. The false evidence in this case went to the credibility of the three witnesses who provided the foundation and cornerstone of the prosecution's murder conspiracy case against petitioner. Theirs was the only evidence that the AB leadership entered into a conspiracy at Palm Hall to murder Richard Barnes, that petitioner was assigned and accepted that murder contract, that he had been to the Barnes

residence before the murder, and that he had sent messages to his alleged co-conspirators which the prosecution contended were admissions that he murdered Richard Barnes and Elizabeth Hickey. Evidence of the significant but concealed benefits to these witnesses constituted powerful impeachment evidence that, had the jury heard it, provided a compelling reason for the jury to disbelieve these witnesses and to disregard their testimony in its entirety. Petitioner's federal and state constitutional rights were violated by the prosecution's knowing use of false testimony. He is entitled to habeas corpus relief.

H. THE PROSECUTION'S SUPPRESSION OF THIS AND OTHER CONSTITUTIONALLY MATERIAL EVIDENCE

211. The prosecution has a duty to disclose evidence that is favorable to the accused. Brady v. Maryland, 373 U.S. 83 (1963). This duty applies to evidence that may be used to impeach the credibility of the prosecution's witnesses, and not just to direct evidence of innocence. United States v. Bagley, 473 U.S. 667, 682 (1985). Brady also imposes a critical concomitant duty on the prosecution to personally become aware of potentially exculpatory evidence in the possession of other government actors. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490(1995); Carriger v. Stewart, supra, In re John Brown, supra.

212. The prosecution's failure to disclose exculpatory evidence violates federal due process if the suppressed evidence is constitutionally material. Kyles v. Whitley, supra, 131 L.Ed. 2d at 506-507 (citing Bagley). The Bagley test of materiality has four aspects. First, under Bagley, materiality is a "reasonable probability" of a different result. "The question is not whether the defendant would more likely than not have received a

different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id. Second, the Bagley test of materiality is not a sufficiency of the evidence test. The accused need not demonstrate that had he been privy to the suppressed evidence and presented the evidence at trial, he would have been acquitted. Id. Third, once constitutional error is found under Bagley, there is no further need for harmless error review. Id. That is because a "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different means that the suppression had 'substantial and injurious effect or influence in determining the jury's verdict. Id. Finally, Bagley materiality is to be measured and analyzed "in terms of suppressed evidence considered collectively, not item by item." Kyles v. Whitley, supra, 131 L.Ed.2d at 508-509.

213. In this case, the prosecution violated Brady by suppressing constitutionally material evidence of significant benefits to all three of its guilt-innocence phase prisoner informant witnesses. In support of these Brady claims, petitioner alleges the facts below, among others to be developed after further discovery, investigation and an evidentiary hearing, should one be ordered.

214. As set forth above, Michael Thompson and Clifford Thompson provided testimony that was the foundation of the prosecution's entire murder conspiracy case. Janet Myers provided essential corroboration.

215. Impeaching these three witnesses was a major focus of the defense efforts both before and during trial, and was a crucial issue to the defense in defending against the murder conspiracy charges, the substantive murder charges and the other substantive crimes alleged as overt acts of the

conspiracy.

216. Petitioner's defense attorneys filed numerous pretrial discovery motions seeking disclosure of impeachment evidence. In those motions, defense counsel specifically requested, among other information, any offers, agreements or inducements made by law enforcement or the prosecution for testimony of all prosecution witnesses, including Michael Thompson and Janet Myers. See e.g. CT 3462, 4448. They specifically included as part of one such request disclosure of changes in Thompson's post-cooperation living conditions. CT 3462.

217. Petitioner's defense counsel also attempted to obtain relevant impeachment evidence by way of subpoenas duces tecum, directed to various California agencies, including the California Department of Corrections, and the Prison Gang Task Force (LASO) of Los Angeles County Sheriff's Department, which were involved with and/or assisting in the investigation of this case and in the "handling" of the prisoner informant witnesses. Among the items of impeachment evidence defense counsel specifically sought in one such subpoena were records of all requests by Thompson for out of state housing or incarceration, and information about Thompson's visiting status, including whether he was getting conjugal visits; about his confinement conditions, including whether he was having meals with other people, and getting to wear his own clothing; and about the size of his cell, what furniture it contained, what appliances he had, whether he was being housed in a single or double cell, and with whom he was having recreation. CT 3778-3779.

218. Defense counsel also made a specific request for other records, including CDC records showing when petitioner was allowed on the prison yard during the time he was at Palm Hall, and when the alleged

members of the AB conspiracy at Palm Hall had yard time during the months in 1982 when the alleged conspiracy was allegedly formed. Id. In addition, as noted earlier, defense counsel made a specific request for Clifford Smith's visiting records, including records showing visits for Clifford Smith in 1983.

219. The prosecution had a duty to disclose all the favorable evidence it knew and possessed about promises to Thompson, Myers and Smith in return for their assistance against Mr. Price. The prosecution also had a duty to find out about and to obtain all such evidence known to and in the possession of other California law enforcement, corrections and prosecution agencies and to timely provide that information to the defense. Brady v. Maryland, supra, Bagley v. United States, supra, Kyles v. Whitley, supra, In re Brown, supra. The prosecution ignored its obligations to disclose favorable evidence that was of use as impeachment and on the issue of guilt or innocence, and in doing so "tacked too close to the wind." Kyles v. Whitley, supra.

220. The prosecution should have, but did not, disclose favorable impeachment evidence of the substantial benefits promised to its key guilt phase prisoner informants, including the array of benefits and favors to Michael Thompson set forth above; the benefits and favors to Clifford Smith which are set forth above; and the benefits to Janet Myers which are set forth above. To the extent that the trial court knew about these benefits, but did not require the prosecution to produce such evidence, this was error and in violation of petitioner's federal constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

221. The prosecution should have but did not disclose other evidence that was favorable to the defense as impeachment and/or on the

issue of guilt or innocence, including but not limited to the following documents and record:

a. CDC visiting records for Clifford Smith from the date of petitioner's release through the date of his arrest in March 1983, with the names of all visitors and the times and dates of their visits to him at Palm Hall, and specifically during February of 1983. Those records would have been helpful to the defense in refuting testimony by Janet Myers and Clifford Smith that she visited Clifford Smith on February 13, 1983 at Palm Hall, and delivered a message from petitioner. See Exh. 40.

b. CDC records showing the dates and times that petitioner, his alleged Palm Hall co-conspirators, and other AB members or associates, including Rick Rose, had yard time during the summer of 1982 and during the time period of the alleged conspiracy. Those records would have been useful to the defense in refuting testimony by Thompson about the alleged meeting on the Palm Hall yard during which Thompson claimed he gave petitioner the Barnes murder contract.

c. A prior statement made by Clifford Smith to LASO Sgt. Haywood Barnett about the alleged February 13, 1983 message from petitioner that Smith claimed to have received through Janet Myers on that date. See

Exh. 51 at 15.[25] In that prior statement, Smith told Barnett that the alleged message said: "done deal. I got him last night. He's through." Id. Smith's testimony at trial was much less expressly incriminatory. He testified the message said: "That's took care of. Everything went well. I am going back north. I will be in touch with you later." RT 14694. The inconsistencies in Smith's account would have been helpful to the defense in several respects. First, the changes in Smith's account of the message arguably show that he was making the whole thing up. Second, the fact that Smith changed his prior version to one which on its face was less specific and incriminating but more consistent with Janet Myer's account about the content of the alleged message, shows that Smith was willing to adapt his testimony to corroborate his fellow informing witnesses even if he knew what they were testifying to was not true. In addition, Smith's prior account would have given the defense more ammunition for its contention that, assuming there was a AB murder conspiracy as alleged, Janet Myers had more knowledge than she claimed about the Barnes murder, and was a member of the conspiracy, and thus, an accomplice as a matter of law, whose testimony could not be used to corroborate

[25] In Barnett's affidavit, he indicates that this statement was made by Confidential Informant I (C I # 1). The other information in the affidavit, including the informant's criminal history is consistent with Clifford's

testimony by her accomplices. See AOB at pp. 547-559.

d. Michael Thompson's handwritten statement about petitioner's case. This is a statement of the witness that was never disclosed. Thompson revealed for the first time in McClure that he wrote a handwritten statement on the 17 cases on which he was assisting. Exh. 44 at 130. One of the 17 cases was Mr. Price's case. Thompson also testified that LASO agent Roger Harriman produced a typed version from Thompson's handwritten notes. Id. As this testimony shows, LASO had possession of Thompson's handwritten notes but the prosecution did not disclose them.

e. Information known to Sgt. Haywood Barnett that Michael Thompson had given information about Senon Grajeda, an alleged Mexican Mafia leader, which did not pan out. Exh. 32 (Highland Memo dated 10/3/90). The fact that he provided bad information in another case involving reputed and high-ranking gang members and his "handler" knew he did, would have been helpful to petitioner's defense in showing that Thompson was contriving his information against petitioner in this case.

f. Thompson's letter to Humboldt County District Attorney Terry Farmer in August of 1985 about housing

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Smith history, and petitioner believes Smith is C. I. # 1.

outside CDC, and Farmer's response, and evidence showing the efforts made by LASO and SSU on Thompson's behalf for out-of-state placement. Exh. 43 at 18. This information was relevant and would have been helpful to the defense to show that Thompson was lying when he testified that he had not requested anything from anyone associated with the prosecution in this case.

g. The substance of all statements made by Thompson about this case, including statements about evidence, about witnesses and about his own upcoming testimony, during his phone conversations with Ron Bass in October 1985 and afterwards during the evidentiary phase of petitioner's trial, and made during in-person meetings between Bass and Thompson. Bass said in October of 1985 that he was in phone contact with Thompson almost daily. Id. at 23. Since Bass was the prosecutor and Thompson a key prosecution witness in this case, it is probable that some, if not all, of those conversations involved this case. This information would have been relevant to show the key role Thompson played in the orchestration of this prosecution and his de facto status as a member of the prosecution team.

h. The substance of a phone conference between

Clifford Smith and SPU agent Suazo on February 11, 1986, and the reports prepared about that phone conference. Id. at 25. Given the date of the phone conference, which is close in time to certain events in Jimmy Smith's Kern County case, it is probable that this conference concerned some of the negotiations worked out by Clifford Smith for his brother.[26] The information was relevant and would have been helpful to the defense on the issue of Clifford Smith's bias and motive, and also to show the involvement of high-ranking State officials in those negotiations.

i. Information about Thompson's discussions with Sgt. Haywood Barnett before petitioner's trial about seeking a resentencing under California Penal Code section 1170(D) in his original commitment case (in which he had been sentenced to a twenty-five year to life sentence) and about any statements made during those discussions by either Thompson or Barnett that Thompson's cooperation could help with that. Barnett testified in the McClure case that Thompson had

[26] Court records in Jimmy Smith's case indicate that on February 7, 1986, Jimmy was sentenced to 16 months in state prison on his conviction pursuant to the favorable reduced charge that Clifford had negotiated for him. That prompted Clifford to take steps to see that Jimmy was housed in local custody as opposed to state prison. Clifford used the "witness protection" rationale for doing so. On February 28, 1986, the court withdrew its prior commitment order and sentenced Jimmy to serve his sentence in county jail. Exh. 35 at 15-27.

discussed a sentence modification with him in 1983. This information was relevant and would have been helpful to the defense to show that Thompson was lying when he claimed in petitioner's case that he was not seeking any leniency for himself or assistance from law enforcement in obtaining leniency.

j. Information that various law enforcement agencies, including the LASD, and its Special Investigations Bureau, promised to help Michael Thompson and Clifford Smith with Cal. Pen. Code section 1170 (D) motions and that serious attempts would be made to get them out of prison. Exh. 46 at 119.

222. Petitioner's currrent counsel obtained the information about the foregoing suppressed evidence from materials provided by defense counsel in McClure. They did not furnish petitioner's counsel with any documents they received from the California officials that were subject to a protective order. For that reason, petitioner still has no access to a host of reports prepared by Tulleners that relate to the petitioner's case, and which may provide further information about the above-described evidence. There are additional references in Tulleners logs that are relevant to petitioner's defense and to this claim. Petitioner has appended the pages containing many of those references to this petition, and has flagged those references on the specific pages. See Exh. 43.

I. CONSIDERED COLLECTIVELY, THE SUPPRESSED EVIDENCE WAS MATERIAL UNDER BAGLEY

223. The suppressed evidence set forth above went to the credibility and veracity of the prosecution's key guilt phase prisoner informant witnesses, Michael Thompson, Clifford Smith and Janet Myers.

224. As is set forth in detail in the statement of facts in the AOB, which petitioner incorporates here by this reference, their testimony provided the foundation upon which the prosecution built its entire murder conspiracy case against Mr. Price. Thompson and Smith provided direct evidence and also the only evidence that leaders of the Aryan Brotherhood had entered into a murder conspiracy at Palm Hall in 1982, the object of which was the murder of Steve Barnes' father, Richard Barnes. Likewise, Thompson and Smith provided direct evidence and also the only evidence that petitioner had been assigned and had accepted the Barnes murder contract, and the only evidence that directly linked petitioner to the commission of that murder.

225. Thompson's and Smith's testimony tied all of the crimes alleged in the Information to the AB conspiracy, and Thompson furnished the evidentiary link between the Hickey murder and the alleged AB conspiracy and between the Hickey and Barnes murders. Thompson's testimony also provided the only motive for why petitioner would have killed Ms. Hickey. Thompson suggested she was killed to conceal petitioner's involvement in the Barnes murder conspiracy. That testimony helped counter the defense theory that Hickey's live-in boyfriend, Berlie Joe Petry, had in fact killed her.

226. Janet Myers provided the only direct evidence and the only

evidence that petitioner was ever in Temple City, and the only evidence that he had visited the Barnes' crime scene shortly before the murder. Myers also provided the only evidence that petitioner was absent and unaccounted for the night Richard Barnes was killed, and the only evidence that he was in possession of a .22 caliber revolver in February of 1983 during the time he was in Southern California.

227. Smith and Myers provided the only evidence that the day after the Barnes murder, petitioner sent in a message through Janet Myers to his alleged co-conspirators at Palm Hall which the prosecution contended was an admission by petitioner that he had taken care of the Barnes murder contract.

228. Thompson and Smith provided the only evidence of another alleged message by petitioner, namely the message that petitioner had "sent a girl to the country." Thompson and Smith testified that the phrase "take or send someone to the country" meant to kill them. The State contended that this was an admission by petitioner that he had murdered Elizabeth Hickey.

229. The credibility of Thompson, Smith and Myers was of critical importance to the prosecution because they provided such key testimony against petitioner in this case. For the same reason, impeaching the credibility of Thompson, Smith and Myers was of equal importance to the defense.

230. At petitioner's trial, Thompson passed himself off as someone who had recognized the error of his ways, namely his admitted involvement in the AB conspiracy that resulted in the murders of two innocent people, Richard Barnes and Elizabeth Hickey, and claimed his motivation in testifying was because he believed it was the right thing for him to do.

Thompson affirmatively represented that he was not getting any personal benefit from his cooperation, and that he would not permit the State to give him anything for his cooperation beyond immunity and protection for himself and a family member.

231. The prosecution assisted and participated in cloaking Thompson with a false mantel of credibility by eliciting self-serving testimony from him about his alleged altruistic motives in cooperating with the prosecution against the AB and in testifying against Mr. Price. The prosecution further bolstered Thompson's credibility by reading Thompson's immunity agreement, including a statement that the court found the allegations in the immunity petition to be true and found Thompson's immunity to be in the public interest. RT 10132.

232. Evidence that Thompson was in fact receiving extensive personal benefits for himself in return for his cooperation and was assured of getting continued benefits once he gave favorable trial testimony against petitioner constituted powerful impeachment evidence for the defense. The concealed evidence, had it been presented to the jury, furnished a compelling reason for the jury to disbelieve Thompson and to reject his testimony in its entirety. See United States v. Wallach, 935 F.2d 445, 447 (2nd Cir. 1991) (ordering new trial for knowing use of perjured testimony and for suppression of evidence relevant to impeach the testimony of one of the two prosecution witnesses who provided the foundation for the government's entire conspiracy case and who claimed to have undergone a "moral" transformation); see also United States v. Boyd, supra, 55 F.3d at 245-246 (similar rationale utilized in reversing convictions of El-Rukin gang members.)

233. Clifford Smith did not profess to have the same lofty motives

as Thompson for defecting from the AB. Smith testified he left the AB because his mother asked him to do so, and because he realized he might not live too long if he stayed affiliated. Smith's motivation for testifying for the prosecution against petitioner was another matter.

234. The evidence of promises made to Clifford Smith about which the jury was informed was remote in time and not of much impeachment value. For example, the jury was told that Smith had been promised immunity from prosecution for his testimony, a favorable letter to the Parole Board, and if and when he was ever released on parole, some kind of unspecified housing settlement. However, as the jury knew, Clifford Smith was serving a 36 year to life sentence that had been imposed just three years earlier. He was therefore already facing the prospect of spending a substantial portion of the next three decades of his life in custody. As prison gang expert Anthony Casas indicates, for an inmate in that position, getting immunity from prosecution for additional crimes was not a significant benefit. See Exh. 2 at 13. Clifford Smith did not claim otherwise. Similarly, since his parole eligibility date was not until 2007, which was twenty years in the future, and he testified he did not even expect to be released on parole at that time, the promise of a favorable letter to the parole board about his cooperation and some unspecified housing settlement when he was released was too remote in time to be of any significant impeachment value.

235. By contrast, the concealed evidence involved a benefit that was both immediate and tangible, not to mention one that was important enough to Clifford Smith and his family that he (Clifford) negotiated the deal himself on his brother's behalf. The reduced charges and a sentencing reduction that Clifford obtained on Jimmy Smith's behalf meant that Jimmy

wound up spending only about twenty-one days in state prison on his new offense, and less than another two months in county jail. In fact, Jimmy was released from prison within days of the time Clifford completed his testimony in this case.

236. The evidence of that significant benefit given to Clifford Smith for his brother was key to a meaningful assessment by the jury of Clifford's interest and bias as a witness in this case, and a benefit Clifford chose to lie about and the prosecution chose to conceal. The concealed evidence was non-cumulative and had significant impeachment value, and the prosecution and Clifford Smith obviously realized that.

237. The concealment of this evidence was made worse by Clifford Smith's own credibility-bolstering comment that this was the first time in ten years that he had come into a courtroom and not had to remember a lie (RT 14780); by his non-responsive reference to the fact that he had taken polygraph tests (which the jury would assume Smith must have passed since he was being used as a prosecution witness, but which the jury was later instructed to disregard, RT 14894, 14996); and by Bass' improper vouching for Clifford Smith's credibility by telling the jury in closing argument in regard to Smith: "God, what a great witness. That's my opinion." RT 20846. See United States v. Wallach, supra, at 445 (where key government witness committed perjury and government suppressed evidence of that perjury, prosecutor's vouching for witness' credibility provided one more reason to set aside jury's verdict). Unlike Bass, the jury would probably have taken a jaundiced view of Clifford Smith's credibility and veracity had the jury known about the concealed evidence.

238. The suppressed evidence of Janet Myers' lenient plea bargain and sentence in her pending San Bernardino cases was also non-cumulative

impeachment. Like the deal for Jimmy Smith, this was an immediate, tangible, and positive benefit. Ms. Myers was a new mother, and a heroin addict, and having two charges dismissed entirely and only 135 days on the other charge amounted to a substantial and significant benefit to her. She testified that she did not want to spend another year in jail. RT 13988. She knew she would not in fact have to spend another year in jail, but the jury never learned that.

239. That the jury was aware of some of the benefits Thompson, Smith and Myers received or were to receive in return for their testimony does not render immaterial information concerning the remainder. As the Ninth Circuit stated in Carriger v. Lewis, 132 F.3d 463 (9th Cir. 1997)(en banc):

> "We have held that the goverment cannot satisfy its Brady obligation to disclose exculpatory evidence by making some evidence available and claiming the rest would be cumulative. Rather, the goverment is obligated to disclose 'all material information casting a shadow on a government witness's credibility.'" Id. at 482-482, quoting United States v. Bernal-Obeso, 989 F.2d 331, 335 (9th Cir. 1997)

240. In Carriger, the jury was aware that a witness-informant was a "burglar testifying with immunity. The telling evidence that remained undisclosed included the length of [his] record of burglaries and, more impportant, his long history of lying to the police and blaming other to covery up his own guilt." Id. at 481. This disparity led the court to conclude that "[t]he district court erred when it concluded that Carriger had not been prejudiced by the withholding of the information . . . ." Id. The undisclosed evidence of benefits granted to Michael Thompson, Clifford

Smith, and Janet Myers are every bit as material as the undisclosed information in Carriger.

241. There is a reasonable probability that, had the impeachment and other favorable evidence been disclosed to the defense, the result of petitioner's trial would have been different. United States v. Bagley, supra. For all of these reasons, petitioner is therefore entitled to federal habeas corpus relief.

CLAIM II.

CURTIS PRICE IS INNOCENT OF THE MURDER OF RICHARD BARNES AND HIS WRONGFUL CONVICTION OF THAT MURDER VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ANALOGOUS PROVISIONS OF THE CALIFORNIA CONSTITUTION AND TAINTS THE ENTIRE JUDGMENT AGAINST HIM AND HIS SENTENCE OF DEATH

1. Petitioner did not commit the murder of Richard Barnes and his wrongful conviction of that murder violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and analogous provisions of the California Constitution and taints the entire judgment against him and also his sentence of death. Petitioner alleges the following facts, among others to be presented after access to discovery, to adequate funding, and an evidentiary hearing, in support of this claim.

2. Petitioner was charged in Count XI of Information 9898 filed against him in the Humboldt County Superior Court with the first degree murder of Richard F. Barnes (hereafter the Barnes murder). Mr. Barnes was killed on or about February 13, 1983, in Temple City, California, which is located in Los Angeles County. In Count XII of the Information, petitioner was charged with conspiracy. The Barnes murder was alleged as one of the overt acts of that conspiracy. In Count I, petitioner was charged with the first degree murder of Elizabeth Hickey. The Barnes murder was alleged as a multiple murder special circumstance in that Count. Elizabeth Hickey was killed on or about February 19, 1983, in Eureka, CA, which is located in Humboldt County. CT 3072-3082.

3. Mr. Barnes was killed on early Sunday morning on February 13,

1983. He was still fully clothed and was wearing his cowboy boots when his body was found lying face down on his bed. RT 11647; CCT 1243. He had been shot three times in the back of the head with a small caliber weapon. RT 11663-11666. The prosecution's ballistics expert testified that the bullet fragments retrieved from Mr. Barnes' body were probably .22 rim fire magnum rounds, although he was not certain of that, and those bullet fragments were consistent with having been fired from any one of four possible brands of .22 caliber weapons, all of which he testified were fairly common. RT 12144. The Barnes murder weapon was never recovered.

4. Petitioner has consistently maintained that he is innocent of *inter alia* the Barnes murder and of participation in the alleged AB murder conspiracy. See e.g., CT 1308; RT 22280-1, 22464-22465. Another person, Danny DeAvila, who was a member of a different gang, confessed to a fellow gang member that he (DeAvila) had killed Mr. Barnes. See Exh. 4 (Declaration of Salvador Buenrostro).

5. Petitioner has appended two declarations to this petition in support of this claim. One declaration is from prison gang expert Anthony L. Casas. Exh. 2. The other is from Salvador Buenrostro, the person to whom DeAvila made his confession.

6. Mr. Casas is a retired California Department of Correction's (CDC) official, and works as a private consultant on California prison gangs. He has extensive knowledge about, among others, the Mexican Mafia, a prison gang that was formed in California and still operates here. Mr. Casas has tracked the Mexican Mafia and its operations for decades, and continues to do so. During his 23 year tenure with CDC, Mr. Casas organized the first Prison Gang Task force in California, worked as a special agent for the Special Security Unit (SSU), and also worked as a classification representative before he was promoted to the positions of Deputy Director and Assistant Director of

the CDC, and associate Warden at the California Men's Colony and at San Quentin State Prison. See Exh. 2, at 1-3. Through his work for the CDC, which was heavily devoted to prison gangs and gang-related issues, Mr. Casas

7. Obtained extensive knowledge about the identities of Mexican Mafia members, and about gang's operations, activities, modus operandi, gang argot and insignias. Id. Mr. Casas has published and presented papers on the Mexican Mafia, has been a consultant about the Mexican Mafia and other gangs for numerous law enforcement agencies, and for criminal defense attorneys. He also was a technical advisor on a Hollywood film about the Mexican Mafia, entitled "American Me." Id. Mr. Casas is a recognized expert on the Mexican Mafia, and has been qualified as a prison gang expert in California courts. Id.

8. Testimony by a qualified prison gang expert, such as Anthony L. Casas, is admissible on the issue of whether a given individual is a gang member, and on other gang-related matters, including gang operations and modus operandi. People v. Williams, 16 Cal.4th 153, 193-195 (1997); People v. Gardeley, 14 Cal.4th 605, 620 (1996.) In his declaration for petitioner's case, Mr. Casas has identified both Danny DeAvila and Salvador Buenrostro as being members of the Mexican Mafia. Exh. 2 at 6-8. Danny DeAvila is now deceased, having been murdered in 1986 at the Los Angeles County jail by fellow gang members. Exh. 2 at 8. Salvador Buenrostro is presently a CDC inmate. He too was attacked at the Los Angeles County Jail by fellow gang members, and almost killed. Exh. 61. He survived the attack, and was placed in protective custody for his personal safety.

9. In his declaration, which petitioner incorporates here fully by this reference, Ms. Casas provides that the following information about the background of the Mexican Mafia and about its operations, modus operandi etc:

By way of background information, the Mexican Mafia, also known as the "eMe", is a sophisticated, notorious and ruthless organized prison gang. The Mexican Mafia was loosely formed at Deuel Vocational Institution in Tracy, California in the late 1950s. In the early 60's, the gang became more formally organized. In the late 60's or early 70's, the Mexican Mafia extended their criminal operations outside the prisons and into the streets. Since that time, the Mexican Mafia has engaged in extensive criminality on the streets and also inside the prison system. The gang's membership was and still is drawn primarily from Southern California.

The Mexican Mafia, like its Italian Mafia counterpart, was and still is a tightly knit organization, which requires and receives the extreme loyalty of its members. Members of the gang, and particularly, its full members maintain regular communication and contact with each other outside of prison and also on the inside, keeping each other informed about known and suspected informants who are providing information to the authorities against the gang or one of its members.

The Mexican Mafia is known to murder informants and also innocent family members of informants. The Mexican Mafia is also known to commit such retaliatory murders, execution-style and inside the homes of the victims, often gaining entry through ruses, such as narcotic transactions. The reason the Mexican Mafia chooses to murder victims in their own homes, which are normally considered refuges and places of safety, is to create a reign of terror as a way of maintaining its control of the community and as a disciplinary tool. The murder of innocent family members of known or suspected informants and the commission of such a crime in the homes of the victims is not known to be a trademark of the Aryan Brotherhood, whose sphere of influence and power is primarily within the walls of the penal system.

The Mexican Mafia is and has been comprised of full ("made") members, who are at the echelons of power within the gang, and also lesser ranking members and (even lesser ranking) associates. Danny DeAvila, the individual named in Mr. Price's habeas petition as the admitted perpetrator of the Richard Barnes murder, was a full member of the Mexican Mafia." Exh. 2 at 2-8.

10. Mr. Casas also identified Arthur George Blajos as a "made" (full)

member of the Mexican Mafia. Id. at 9. In November of 1982, three months before Richard Barnes was murdered, Steve Barnes provided information to law enforcement about Blajos. Steve Barnes implicated Blajos in the murder of Gilbert Ruiz at the Los Angeles County jail, and told the authorities that he would testify in court against Blajos. RT 4044; 11814-11816. After his father's murder, Steve Barnes apparently rethought his decision to testify Blajos, and the latter was never prosecuted for the Ruiz murder, and is still currently free and apparently living outside the United States. Exh. 49 (L.A. Times article. Steve Barnes is deceased. He apparently died of complications from AIDS in the mid-1990's.

11. Arthur Blajos was released from Palm Hall on Friday, February 11, 1983, the day before Richard Barnes was killed. RT 18904-2- 18904-3. Blajos had been serving a prison sentence for his conviction in a Los Angeles County case of being an ex-felon in possession of a firearm. See Exh. 49 (Memo to Harry Sondheim) . Blajos had originally been charged, along with another eMe member, Michael Moreno, with a first degree execution-style murder. Blajos and Moreno managed to beat that murder charge. Blajos was also implicated in another execution-style murder in Tulare County. That murder was committed inside the victim's home, where Blajos dispatched the victim with a gunshot or gunshots to the back of the head. RT 18904-2.

12. According to information provided by Blajos' former parole officer, Stan Nix, Blajos was in the Temple City area with his then-wife, Maria Elena Blajos, the same weekend that Richard Barnes was killed in Temple City. Exh. 49 (Delong report.). Detective Robert Morck, one of the detectives assigned to the Richard Barnes murder investigation acknowledged during his testimony for the defense at Mr. Price's trial that he initially considered Blajos a possible suspect in the murder of Richard Barnes. RT 18941. Prosecution witness, Robert Ross, the other detective assigned to the Barnes homicide

investigation, testified that Blajos was not a suspect in the Barnes murder case. RT 11814. Little if anything was done by either of those detectives to investigate whether the Mexican Mafia was linked to the Richard Barnes murder. Petitioner has no information that those detectives or any other law enforcement agents ever questioned Blajos or anyone else in the Mexican Mafia concerning the Barnes murder. If they did, no report was ever disclosed to the Price defense.

13. In the early 1980s, Danny DeAvila, Richard Barnes' confessed killer, lived at 2640 Earle Avenue in Rosemead, CA, and his wife and children continued living in Rosemead after that. Exh. 2 at 7. Rosemead adjoins Temple City, where Richard Barnes lived and was killed. The Mexican Mafia had and still has a strong presence in the Rosemead-Temple City area. Id. The DeAvila's address was just a few miles from Richard Barnes' home at 4802 Alessandro in Temple City. During February 1983, the month Richard Barnes was killed at his residence, Danny DeAvila, who had spent many years behind bars during his lifetime, was free on bond and on the streets. Exh. 48 at 10.

14. Danny DeAvila had a long felony record, and according to statements in court by his attorney Richard Walton, he had some involvement in at least one prior gang-related murder. Id. at 2.[27] In August, 1982, DeAvila was convicted of a heroin-related offense, stemming from his arrest at his Rosemead home in 1981. Two other suspects were present at the time of his arrest. One suspect was Robert Salas. Id. Anthony Casas indicates that Robert Salas, otherwise known as "Robot" Salas was a full member of the

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27 Mr. Walton had been counsel for a defendant, Fernando Escarcega, in the late 1960's in a gang-related murder case. See People v. Escarcega (1969) 273 Cal.App.2d 853. There were several unnamed co-defendants in the case. Given the time frame, and the fact that Mr. Walton was counsel in the case, petitioner believes that Escarcega was the murder

Mexican Mafia, and one of its highest ranking and most influential leaders. Exh. 2 at 7.

15. Danny DeAvila managed to obtain bond on appeal following his conviction in August 1982, and he was free on bond until December 2, 1983, when he was remanded to custody after his appeal was denied. Exh. 48 at 10, 12, 15 . DeAvila would have been housed at the Los Angeles County jail in the high-power unit where known gang members were jailed, until his transfer to the Reception Center at the California state prison in Chino on January 3, 1984. Exh. 2 at 7. It was during that time period that DeAvila and Salvador Buenrostro who was also housed at the Los Angeles County Jail, had a number of conversations.

16. During one conversation, DeAvila brought up Steve Barnes. DeAvila said he knew who Steve Barnes' dad was, indicating that he had known or met him (Richard Barnes) before. Exh. 4 at 1. DeAvila said that he had run into Richard Barnes in a bar one night in Temple City, and that on that night at the bar, he had some drinks with Mr. Barnes and was "bull-shitting him real good." DeAvila said he then went out and "took care of him." Id. Salvador Buenrostro had no doubt what DeAvila meant by that. They were speaking in Spanish, and the words DeAvila used meant he had killed Steve Barnes' dad. Id. From what DeAvila was saying, Mr. Buenrostro picked up that the reason DeAvila had killed Steve Barnes' dad was because Steve had been snitching on, or was going to snitch on gang prisoners, including eMe members. Id.

17. Anthony Casas has reviewed Mr. Buenrostro's declaration, and has commented as follows on the information contained therein:

I have reviewed the declaration obtained by Mr. Price's federal habeas

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case in which Danny DeAvila was also involved.

> counsel from Salvador Buenrostro in which Buenrostro states that DeAvila admitted to him that he (DeAvila) had murdered Richard Barnes. . . . For DeAvila to have made such an admission to one of his eMe "brothers" is not surprising. Members of the Mexican Mafia would and did freely share information with each other, including information about their roles in murders and other crimes. Normally, eMe members would speak in Spanish when talking about such information, and they typically would use gang argot, rather than using standard language to talk about their criminal activities.
>
> Buenrostro indicates in his declaration that he understood from what DeAvila told him that DeAvila had "taken care" of Richard Barnes, in other words, murdered him, because Steve Barnes, Richard's son, had or was about to snitch on members of the Mexican Mafia, among others. That is consistent with how the Mexican Mafia operated and still does. The Mexican Mafia is and continues to be such a ruthless and punitive organization that if the gang merely suspected but had no actual proof that an individual had snitched or was about to snitch on an eMe member, that would have been enough to have the suspected snitch "hit" (murdered), if he could be found, and also to have his family "hit" as retaliation and as a way of making him keep his mouth shut. In Steve Barnes' case, he was reportedly snitching on Arthur George Blajos, a "made" (full) member of the Mexican Mafia. Any eMe member would therefore have been free to carry out a "hit" on Steve Barnes or on his family, and it would not have been necessary for the organization to have expressly sanctioned the "hit."

Exh. 2 at 8-9.

18. Mr. Casas goes on to make the following comments about Michael Thompson's assertions at petitioner's trial that the Mexican Mafia would not harm or kill anyone associated with the AB, such as Steve Barnes or his father. See RT 17147-17148):

> Curtis Price's counsel has informed me that AB dropout, Michael Thompson, testified during the Price case that the Mexican Mafia would not have killed or inflicted bodily injury on anyone associated with the AB, such as Steve Barnes or his father. Thompson's testimony is at complete odds with what I know to be true about the Mexican Mafia, its policies and how it operates, based on my decades of

> investigating and researching that particular organization. Contrary to Thompson's testimony, the Mexican Mafia will carry out "hits" on any individual and on his innocent relatives, who the Mexican Mafia knows or suspects is informing on the organization of one of its members, particularly a "made" member, regardless of that individual's former gang affiliations.

Exh. 4 at 8-9.

19. DeAvila's confession to Buenrostro about having killed Richard Barnes is consistent with details of the homicide investigation of the Barnes murder, and with the physical evidence. That investigation, conducted by detectives Ross and Morck confirms that Richard Barnes, who, like DeAvila, was of Hispanic descent, was drinking at the Tem-Rose bar the night he was killed. CCT 1248.[28] The Tem-Rose bar is located on Lower Azusa Road. The Barnes' residence bordered on Lower Azusa Road. RT 11649. The Tem-Rose is located in the same block as Feiro's Liquor Store. RT 10275. That was only about four blocks from Richard Barnes's residence. RT 12065. The Tem-Rose is also only a few blocks from Rosemead, hence the name, "Tem-Rose".

20. Before he went to the Tem-Rose that night, Mr. Barnes stopped off at Feiro's Liquor store. RT 12064. Mr. Barnes cashed a $56.34 check at Feiro's that night (RT 17863), and also purchased a pint of Vodka, and possibly some orange juice there. RT 12063; CCT 1248. Mr. Barnes came into Feiro's at approximately 7:30 p.m. that night. Id.

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[28] Mr. Barnes had a number of tattoos on his arms, including a cross device on his right upper arm (CCT 1264), which possibly indicates some prior gang involvement on his part. Petitioner notes that two of Richard Barnes' sons, Paul Barnes and Steve Barnes, were gang members. Paul Barnes was an active member of the Vagos when his father was killed. CCT 1250.

21. The detectives determined that Mr. Barnes also went to the Tem-Rose bar that night, and stayed for 30 minutes to an hour. RT 11870. As part of their investigation, detectives Ross and Morck interviewed Shirley Hawkins, who was the bartender at the Tem-Rose that night. CCT 1248-1249. She told the detectives that someone bought Mr. Barnes a "Screwdriver" that night, and Mr. Barnes ordered a second as a double. Id. A screwdriver is a mixed drink containing Vodka and orange juice. RT 12059. The Ross-Morck investigation report contains no further details about the description of the person who bought Mr. Barnes the first "Screwdriver." Shirley Hawkins was on the prosecution's witness list (CCT 1641), but did not testify at petitioner's trial, and the defense was not provided with any statement from her beyond the detective's terse notes. CCT 1248-1249.

22. Ms. Hawkins told the detectives she thought Mr. Barnes came into the bar that night at around 10:00 p.m. and stayed for about an hour. CCT 1248. The detectives determined from talking to other witnesses, however, that Mr. Barnes was over at the Seven-Eleven store, which is located directly across the street from the Tem-Rose and Fiero's at around 10:30 p.m. RT 11740, 11867. Mr. Barnes purchased eggs, a quart of Hagen-Daz ice cream, milk and some bread at the Seven-Eleven that night. RT 11740, 12075. It appears from this that Ms. Hawkins confused the time Mr. Barnes arrived at the Tem-Rose with the time he left there, since it is highly unlikely that he would have purchased the ice-cream and other items, and then gone over to the bar to drink for another hour.

23. The detectives found the ice-cream, which was in a paper bag from the Seven-Eleven on Mr. Barnes' kitchen counter, the next morning. The ice-cream was melted but still cold. RT 11740. The detectives were dispatched to the Barnes residence at 10:30 A.M. after Mr. Barnes' friends, George and Lillian Noriega, had alerted the police that they discovered Mr. Barnes' dead

body in a bedroom in his home. RT 12063.

24. The police also found an empty pint bottle of Smirnoff Vodka in the kitchen trash in Mr. Barnes' residence. RT 11735. They found another pint bottle of Smirnoff Vodka in his refrigerator. RT 11741. The contents of that pint had been mostly consumed, and there was only an inch of liquid left in the bottom of the bottle. Id. Other than those two pint bottles of Vodka, there is no indication in the Ross-Morck homicide report or in their testimony that any other bottles of Vodka were found at Mr. Barnes' residence.

25. The toxicology report performed on samples of Barnes' blood and urine showed that Mr. Barnes had a blood alcohol level of 0.11%. CT 1275. The level of ethanol detected in his urine was 0.17%. Petitioner is informed that blood alcohol levels generally remain constant after death with proper handling of the body, and in any event generally do not dissipate. He will need the access to funding to obtain the assistance of a forensic expert to establish this. The coroner's case report indicates that Mr. Barnes weighed 176 pounds and was 5'7" tall.[29] On average, for a person of Mr. Barnes' weight, it would take approximately five shots of alcohol consumed in a one hour period to reach the blood alcohol level Mr. Barnes had. Exh. 50 (alcohol chart). If in addition to the three shots Mr. Barnes had at the Tem Rose within two hour or less or his death, Mr. Barnes had also consumed the entire empty bottle of Vodka found in his trash by himself, his blood alcohol levels would have been much higher than they were, since a pint of Vodka contains 16 shots of alcohol. This in turn suggests that Mr. Barnes had help from someone he knew, polishing off the bottle of Vodka he had purchased earlier that night in Feiro's. That person was Danny DeAvila, the same person who had drinks with Richard Barnes at the Tem-Rose earlier in the evening. See Exh. 4 at 1.

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29. The page of the report that so indicates has been misplaced.

26. Other evidence also suggests that Richard Barnes returned to his home with someone he knew on the night he was killed, and that individual was the person who killed Barnes.[30] There was no sign of a forced entry or of a struggle. RT 11746. Mr. Barnes' front door was found locked, but not completely closed, suggesting that was the door from which his killer left the home, rather than through a back door. All of the lights in the house were found on. Had Mr. Barnes come home alone, it is unlikely that would have been the case.

27. Although petitioner was in the Los Angeles area the weekend of the Barnes' murder and bought gasoline in Anaheim that weekend (RT 19395), there was no evidence that actually placed him in Temple City on February 12, 1983, either during the day or the night. Janet Myers claimed petitioner left her residence in Pomona that night at around 11:00 p.m., and borrowed Tammy Shinn's car. RT 13811-13812. Tammy Shin's car was very noisy. RT 13924. A neighbor of Mr. Barnes, Edward Pohorff, told the police he heard what sounded like three pops and then possibly two more, at around midnight. He did not hear a vehicle drive away from the crime scene. CT 1245. Petitioner's fingerprints were not found anywhere at the Barnes crime scene.

28. Petitioner had no personal motive to kill Richard Barnes or to harm Steve Barnes. There is no evidence that petitioner knew Richard Barnes, and Steve Barnes had been even been a witness for petitioner only a few years

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[30] It would not have been unusual for Mr. Barnes to have brought someone home with him who he ran into at a bar, in this case, Danny DeAvila. Once Mr. Barnes brought a hitchhiker and allowed him to stay at his home for a week. See RT 11806. According to Alice Barnes, Richard's wife, he was fascinated by hobos, and would also bring them home. Alice Barnes also mentioned that several months before Richard was killed, he stayed at a motel in Rosemead. That was the same city where Danny DeAvila lived.

earlier in a trial in which petitioner was acquitted.

29. Danny DeAvila had both opportunity and motive for killing Richard Barnes – namely, to retaliation against Steve Barnes and get him to back off the Mexican Mafia, and in particular Arthur George Blajos. Indeed, it was common for the Mexican Mafia to kill a suspected informant's innocent family member for just such a reason. Exh. 2 at 9.

30. DeAvila's confession that he murdered Richard Barnes completely undermines the testimony by the prosecution's inmate witnesses, Michael Thompson and Clifford Smith, that Barnes was murdered by petitioner under directions from the AB. Clifford Smith's visiting records for the first six months of 1983, which were suppressed, completely undermine his testimony and that of Janet Myers that petitioner sent a message to Smith and his co-conspirators at Palm Hall on February 13, 1983 through Myers saying "That's took care of. Everything went well. I'm going back up north. I'll be in touch with you later. " RT 14694. The prosecution argued that message was an admission by petitioner that he had murdered Richard Barnes earlier that day. As the suppressed records show, no such visit by Myers to Smith took place on that date. Petitioner did not kill Richard Barnes, nor did he send in a message indicating that he did.

31. Other than the testimony by Thompson, Smith and Myers, the evidence offered by the prosecution to prove Mr. Price killed Richard Barnes and did so pursuant to an AB conspiracy was scant. Those three witnesses all lied during their testimony about the benefits they were given and/or promised for their testimony. See Claim I, which petitioner incorporates here fully by this reference. Their perjury about matters material to their motivations to fabricate is highly relevant and favorable evidence supporting petitioner's claims that their testimony against him was fabricated, and their corroboration of one another false. These facts provide further proof to petitioner's claims

that the government relied on perjured testimony to convict Curtis Price. See Napue v. Illinois, 360 U.S. 264, 269 (1959). In short, the newly discovered evidence shows that Curtis Price is innocent, just as he has consistently maintained from the beginning.

32. The newly discovered evidence set forth in this claim and in Claim I of this petition, which is incorporated here fully by this express reference entitles petitioner to a new trial. In re Branch (1969) 70 Cal.2d 200 ("newly discovered evidence" that undermines the prosecution's entire case states claim for habeas relief under state law); e. g. Harris v. Vasquez (1990) 913 F.2d 606 ("newly discovered evidence" warrants federal habeas corpus relief if it would "probably produce an acquittal.")

33. Petitioner's false convictions for the Barnes murder and the alleged AB murder conspiracy had a prejudicial effect on the other charges for which he was convicted, including the Hickey murder charge, and on his death sentence. The Hickey murder was alleged as an overt act of that conspiracy. Moreover, the conspiracy charge was used as the vehicle for trying petitioner for the Barnes murder in Humboldt County rather than in Los Angeles County where the crime was committed. Any defense attorney whose office was located at the opposite end of the state from the venue of that murder would have had difficulty adequately investigating and defending against that charge. For attorneys Bernard DePaoli, who suffered from a severe alcohol problem (Exh. 8 at 2-4), and for Anna Klay, who was little trial experience, (Id. at 1), the task proved overwhelming. By contrast, the prosecution had manpower throughout the state to investigate and assist it on the Barnes murder and AB conspiracy charges, given the direct involvement of the California Attorney General's Office, and its SPU unit, in the case.

34. In addition, trying petitioner for both the Barnes and Hickey murders in the same proceeding gave the prosecution another huge advantage,

since the combined impact of two murders undoubtedly helped the prosecution obtain convictions on what were otherwise quite weak and entirely circumstantial cases on each separate murder.

35. The prejudicial impact of petitioner's false convictions for the Barnes murder and AB murder conspiracy on the penalty verdict is also clear. The jury reported twice that it was deadlocked on penalty. RT 23050 - 23051. The Barnes murder was alleged as a multiple special circumstance under the Hickey murder count. Had the jury known about the newly discovered evidence set forth in this petition, it is highly improbable that they would have sentenced petitioner to death.

36. In Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853 (1993), the Supreme Court considered the issue of whether the conviction and death sentence of an innocent person would violate the Eighth Amendment. The Court determined that in that case the evidence of innocence was insufficiently strong to warrant such a ruling. However, in reaching that conclusion, the Court assumed for the sake of argument that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief..." Id. at 856. The Court in Herrera did not ultimately set forth an actual innocence standard, because it determined that the evidence was insufficiently persuasive under any reasonable standard.

37. In Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851 (1995), the Court returned to the issue of innocence in the context of determining whether the petitioner had satisfied procedural obstacles which required some showing of factual innocence. In that case, the Court held that "if a petitioner ... presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial..." then he is entitled to a full consideration of his claims regardless of the procedural posture in which they are raised. Id. at 861.

38. Whatever the appropriate standard, the facts above undermine confidence in the outcome of Curtis Price's trial. For this reason alone, his convictions and sentence of death must be vacated, as violative of his right to due process, a fair trial, effective representation, and to be free from cruel and unusual punishment, as guaranteed to him under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

CLAIM III

THE PROSECUTOR IN THIS CASE ENGAGED IN UNETHICAL AND INAPROPRIATE CONDUCT BY HAVING OUT-OF-COURT CONTACT WITH A MEMBER OF THE JURY DURING THE TRIAL IN THIS CASE IN VIOLATION OF PETITIONER'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY AN IMPARTIAL JURY

1. The prosecutor in this case engaged in unethical conduct during the trial by having inappropriate contact with a member of the jury outside the courtroom that involved giving her money and alcohol to curry favor with her, in violation of petitioner's right to a fair trial, due process of law, and trial by an impartial jury, as guaranteed by the Fifth, Sixth Eighth, and Fourteenth amendments to the U.S. Constitution.

2. One of the jurors, Ms. Zetta Southworth, worked as a cook at a local bar and restaurant in Eureka. She continued to work during the evenings while she served as a juror in this case. Exh. 11 (Declaration of Sandra L. Michaels) at 1. During the trial, Ron Bass, an assistant attorney general who was prosecuting this case along with the local assistant district attorney, Worth Dikeman, came into the bar one evening with Worth Dikeman's wife, Gerry Johnson. Id. at 2. Johnson and Bass had been playing racquetball together prior to coming to the bar. Id. On this particular occasion, Mr. Bass and Ms. Johnson drank large amounts of alcohol. Id.

3. Mr. Bass was aware that Ms. Southworth was working as a cook at the restaurant. Id. As noted in elsewhere in this petition, he was also well aware that Ms. Southworth had a serious alcohol problem and had pending criminal cases in Humboldt County. *See* Claim IV. Nevertheless, he sent drinks back to her in the kitchen on this occasion. Exh. 11 at 2-3. At some

point in the evening, Mr. Bass took out some cash, handed it to the bartender, and told the bartender to take it back to Ms. Southworth and tell her to bring back a guilty vote. The bartender complied, took the cash and gave it to Ms. Southworth along with the message from Mr. Bass. Ms. Southworth accepted the cash. Id.

4. The bartender at the Waterfront who was an eyewitness to this event, and who took the money from Bass and handed it to Southworth, is a man named Robert McConkey. Id. at 1. Mr. McConkey told petitioner's counsel Robert McGlasson about these events in a conversation they had in Eureka, California. Id. McConkey later recounted the same events once again to Mr. McGlasson and to Sandra Michaels, a Georgia attorney who assisted petitioner's counsel in some of the investigation of this case in federal habeas corpus proceedings. Id. Current counsel attempted, through Eureka private investigator Robert Cloud, to obtain a signed declaration from Mr. McConkey. When Cloud approached him, however, McConkey became upset. Exh. 10 at 1-2. McConkey told Cloud that he did not want to become involved in the case, and indicated that he was hostile to the defense efforts in this matter. Id.

5. In Remmer v. United States, 347 U.S. 227 (1954), the Supreme Court held that "in a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties." Id. at 229 (citations omitted). In Remmer a juror reported to the trial court that he had been contacted by an unnamed person and was told that he could profit from bringing a favorable verdict for the defendant. The trial court informed the prosecutor, and the FBI investigated the incident, determining that the statement was made in jest, at which point

the court dropped the matter. Defense counsel was never notified. The Court held that it was error to conduct an ex parte investigation on a matter of jury tampering without the knowledge of the defense.

6. Remmer has been applied in numerous contexts in this Circuit. See U.S. v. Harber, 53 F.3d 236 (9th Cir. 1995)(Remmer requires presumption of prejudice where government agent's notes reviewed by jury); U.S. v. Angulo, 4 F.3d 843, 847-48 (9th Cir. 1993) (upon showing of illicit improper contact with a juror, Remmer presumption requires government to show contact was harmless beyond reasonable doubt).

7. The facts of this case are far more egregious than those in Remmer or the other circuit cases cited above. Here, one of the lead prosecutors in the case had an inappropriate interaction with a member of the jury that was obviously designed to curry favor with her and against the defendant by giving her alcohol and money, knowing full well she was an alcoholic with criminal convictions for alcohol-related offenses. There can be no clearer example of improper and unlawful contact by a prosecutor with a juror in a criminal case. The prosecutor's conduct was particularly invidious here, because the juror involved was already under the direct supervision of local authorities in her own criminal case, and had probation revocation proceedings hanging over her head during guilt-innocence phase deliberations and during the penalty phase of trial. Bass' actions can only be viewed as a direct attempt to take advantage of Ms. Southworth's vulnerability vis-a-vis the local prosecuting office.

CLAIM IV

A MEMBER OF THE JURY WAS BIASED AGAINST THE DEFENDANT, DISHONEST ON VOIR DIRE, AND ENGAGED IN MISCONDUCT DURING THE TRIAL, IN VIOLATION OF PETITIONER'S RIGHTS TO A FAIR TRIAL BY AN IMPARTIAL AND UNBIASED JURY, AND TO DUE PROCESS OF LAW

1. Zetta Southworth, a member of the jury in this case, was biased against the defendant, was dishonest during voir dire, and engaged in misconduct during the trial, depriving petitioner of a full and complete voir dire, a fair trial by an impartial and unbiased jury, and due process of law, in violation of his rights as guaranteed by the Fifth, Sixth and Eighth and Fourteenth Amendments to the U.S. Constitution.

2. Zetta Southworth was a member of the venire in this case. Despite defense counsel's challenge for cause, she ultimately served on the jury.

3. Ms. Southworth showed potential for bias against Mr. Price from the outset of jury selection in this case. In her questionnaire, she stated her view that the State should execute everyone who, for any reason, intentionally kills another person. See Exh. 62 (Long Questionnaire of Zetta Southworth) at 11.

4. In her initial voir dire examination, in response to defense counsel's brief hypothetical based on the prosecution allegations in the present case, Ms. Southworth testified that in such a case she would not consider mitigating evidence in favor of a life sentence; rather, if such facts were proved, she believed the penalty should automatically be death. RT 7192-7194. She described this as a strong feeling she would not be able to put aside. RT 7194.

5. The prosecutor then rehabilitated her to say that she could listen to the evidence from both sides and not make her mind up "entirely" until hearing all the evidence. RT 7194-7196. Once again, however, in response to defense questioning, Ms. Southworth said the defendant would have to convince her to change her mind from death to life without parole. RT 7197-7198.

6. Finally, upon the urging of the trial court, Ms. Southworth assured the court she would listen to the evidence with an open mind. RT 7199. Even if the facts were as defense counsel described them, she could "listen to other evidence and make a choice based on that evidence." RT 7199. If a sentence of life without parole was shown to be correct, she could vote for it. RT 7199.

7. On the basis of this voir dire testimony the defense challenged Ms. Southworth for cause. RT 7194, 7198. Defense counsel argued that in her testimony she had shown a substantial impairment of her ability to be fair and impartial by her statement that she could not vote for life without parole unless the defendant had a guilty conscience. RT 7200-7201. The trial court deferred ruling. RT 7201. The entry in the clerk's minutes states that the defense challenge was denied, but that the court would review the answers again. CT :7779-7780. If further review was conducted, it apparently did not change the court's conclusion, because the minute entries contain nothing further from the court on the defense challenge for cause. Ultimately Ms. Southworth was seated as a juror. CT :8499.

8. Later in the jury selection process, however, during the exercise of peremptory challenges, defense counsel Anna Klay reported that it had come to her attention that Ms. Southworth had a severe drinking problem. RT 9245-9246. The judge responded that the time had past for exercising any challenge for cause. The court did indicate, however, that he would

excuse Southworth if both sides stipulated. RT 9245-9246. Although defense counsel continued to urge her excusal for cause, the prosecution repeatedly refused to acquiesce, and so Ms. Southworth remained on the jury, despite several revelations and incidents during the trial, any one of which should have resulted in her being dismissed from the jury.

9. With regard to the drinking problem, Ms. Klay went on to explain that Southworth's neighbor, Jennifer Tyrrell, had informed defense counsel that Southworth appeared to be intoxicated every time she saw her.[31] RT 9246. Deputy District Attorney Dikeman stated that Ms. Southworth always appeared sober in court, and "what she does in her own time is her business." RT 9246.

10. A short while later, Ms. Tyrrell was sworn outside the presence of the prospective jurors and questioned. She had lived next door to Southworth for fourteen months. CCT 1679. She saw Southworth once or twice a week, and she was rarely sober. Id. Usually, Southworth had difficulty walking or talking, and once when she visited Tyrrell, she had to be helped up the stairs. Id. Her speech was generally heavily slurred. Id. at 1680. The occasions when she had observed Southworth intoxicated were generally during mid-day, between 11:00 and 3:00. CCT-6:1680

11. Defense counsel again argued that Southworth should be excused for cause. CCT 1681. In light of the court reporter's testimony, defense counsel believed there was too great a risk that Southworth's drinking problems would cause complications sometime during the trial. CCT 1681-1683. The prosecutor argued against the motion, repeating that what Ms. Southworth did at home was her own business. The court

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31 Jennifer Tyrrell was one of the court reporters for the Curtis Price trial. CCT:9266-9267.

acknowledged that even if Southworth were sober during court, there might be a problem if she regularly went home and got intoxicated, causing her to forget the evidence she had heard that day. CCT 1684.

12. The court questioned Southworth about the matter in chambers. Ms. Southworth claimed that she had no alcohol problem whatsoever, and implied that she not smoke or drink. CCT 1689-1690.

13. The court then took the matter under submission. CCT 1690-1691. The issue was discussed again the following day. Defense counsel continued to urge the court to excuse Southworth, and the prosecutor continued to resist the motion. The court expressly relied on Ms. Southworth's testimony that she did not drink or have a problem with alcohol, stating that "I have no indication from [Southworth's testimony] that the lady may or may not be intoxicated at certain times outside the court...", and denied the challenge for cause. See Reporter's Transcript of Sealed Proceedings of October 29, 1985, at RT 9471-2 to 9471-3.

14. The trial court committed error from the outset by not excusing Ms. Southworth for cause. It is, of course, common knowledge that persons who do suffer from alcoholism frequently refuse to admit they have a problem. Thus, Southworth's denial in the present case did not help in determining whether she did not have an alcohol problem, or it was just a problem she refused to admit. On the other hand, Jennifer Tyrrell, an employee of the court without any good reason or motivation for her to embarrass herself and her neighbor by making accusations that were untrue, was a highly credible witness. Ms. Tyrrell's testimony was thus solid evidence that juror Southworth had a serious alcohol problem that would have affected her ability to be a fair, impartial and competent juror in this case.

15. The judge's reliance on the veracity of Ms. Southworth's testimony as against that of Tyrrell was misplaced. In fact, Southworth lied about her lack of any alcohol problem. Contrary to her sworn testimony, Ms. Southworth had a serious problem with alcohol and was definitely an alcoholic. Exh. 11 at 2-3. As demonstrated below, her problems with alcohol were ongoing throughout the Price trial and continued until her death in 1989.

16. On December 20, 1985, less than 60 days after Ms. Southworth testified under oath that she did not drink or have a drinking problem, Ms. Southworth was arrested for driving under the influence in violation of Section 23152(a) of the California Vehicle Code. Exh. 62 at 2-3 (Complaint # G55716.) She was convicted of this offense on January 3, 1986. Id. at 4. Her sentence was suspended, and she was placed on three years conditional revocable release for this offense. Id. She was also fined in the amount of $850.00, and was ordered to pay $20.00 per month beginning February 10, 1986. Id

17. Worse yet, on December 26, 1985, Ms. Southworth was again arrested for driving under the influence. Id. 5-6 (Complaint # G55788). She was arraigned and convicted on for this second offense on either January 10, 1986 or January 17, 1986. Id. at 7-8. Her probation for her first offense was not revoked, but the conditions were apparently modified to require inter alia her completion of a local alcohol treatment program called the "Lucky Deuce". Id. at 9-10.

18. The prosecutor was well aware of Ms. Southworth's alcohol-related legal troubles during this trial. On January 6, 1986, Deputy District Attorney Dikeman reported that Ms. Southworth had been convicted and sentenced for driving under the influence of alcohol. RT 12295. He knew

all about the case, and detailed on the record the terms of her sentence. RT 12297.

19. The following day, the trial judge noted that Southworth had been arrested for the second offense of driving while intoxicated only six days after the first one. RT 12454. Without seeking input from counsel initially, the judge reiterated his position that he saw no problem with these developments, in that he still believed she always appeared sober in court. Id. Defense counsel repeated his doubts about her ability to serve, pointing out the extent of the blood alcohol level noted on the paperwork from Ms. Southworth's December 20th arrest. The court thanked counsel for the input, and then left Ms. Southworth on the jury.[32] Id.

20. On Thursday, May 1, 1986, the Lucky Deuce issued a notice of Ms. Southworth's non-compliance with the program. Id. at 10. As noted above, Ms. Southworth's successful completion of the treatment program was a condition of her probation. On Tuesday, May 6, 1986, the court issued a notice to Ms. Southworth ordering her to return to court on her case. Id. at 11.

21. While Ms. Southworth's own criminal cases were proceeding during her jury service, it is important here to note the ongoing progress of petitioner's trial in which she sat as a juror. When Ms. Southworth received the notice for her to return to court on her criminal case, the jury in petitioner's trial was in its deliberations on the guilt-innocence phase of the

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32 The record is not clear as to whether defense counsel's response here was interpreted by the trial court as a renewed challenge for cause. The California Supreme Court, however, apparently so interpreted it, as that Court failed to hold the claim procedurally defaulted or waived as suggested by counsel for Respondent during the appeal. For purposes of this federal habeas corpus proceeding, therefore, this issue is before this Court on the merits. See Harris v. Reed, 489 U.S. 255 (1989).

case. CT 10194-10227. Deliberations began on Friday, April 25, 1986. Id. at 10194. They continued through the following week of April 28, 1986, when the Lucky Deuce sent its notification of non-compliance on May 1st. They then continued through Friday of the following week of May 5, 1986, when Ms. Southworth received notice that she was being ordered to return to court on her own case. Thus, unbeknownst to defense counsel, as she deliberated on petitioners' guilt or innocence, Ms. Southworth was herself aware that her fate on her own criminal cases was in jeopardy, and that the Humboldt County district attorney's office would have a role in what ultimately happened to her.

22. On May 19, 1986, Ms. Southworth was ordered to appear in court on June 6, 1986. Exh. 62 at 11. At the June 6, 1986 hearing, the court ordered that a probation hearing be set for June 26, 1986. Id. Ultimately her probation was reinstated and she was re-referred to the treatment program. Id. Yet another notice of non-compliance was issued by the Lucky Deuce program on July 30, 1986.

23. Importantly here, on June 25, 1986, the day before the probation hearing, Mr. Dikeman reported that probation revocation proceedings were pending against Southworth. He noted for the record that Ms. Southworth's attorney, a Mr. Vodopals, was present in the courtroom. He then stated that he had received a notice "indicating that one of our jurors has a probation revocation matter scheduled for tomorrow at ten." Dikeman then stated that he had told Mr. Vodopals that he [Dikeman] "would have no objection to continuing the matter," noting that it involved Ms. Southworth. Thus Dikeman's comments make clear that he was either in charge of, or at least a required party to, discussions about the disposition of Ms. Southworth's criminal proceedings, in particular, her probation revocation proceedings. RT 22649-22650.

24. Vodopals then sought and received permission from the court to tell Ms. Southworth that Dikeman had authorized a continuance in her case, so she wouldn't have to appear in court on her case as scheduled. Id. at 22650.

25. After this colloquy, defense counsel Anna Klay reiterated the prior objection to Ms. Southworth's continued service. Id. Ms. Klay noted the previous challenge for cause, and then stated that the defense, unlike the prosecution, were in the dark about the ongoing developments of Ms. Southworth's criminal cases. Defense counsel's statement makes clear they were not previously aware of any probation revocation proceedings pending against Ms. Southworth. Defense counsel attempted to argue that a probation revocation proceeding was worse than the initial offense, and that it implied that a new offense had been committed. Id.

26. The trial court's response was curt, insulting to Ms. Klay, and most importantly here, oblivious to any further issue created by this development: "Yeah. And you were informed of both [original] offenses. It would seem to me if you knew about the process, you would understand that there would be a probation revocation." Id. at 22650-22650-1.

27. It should be noted here that Ms. Southworth's drinking problems, as well as her dishonesty about them, continued well after the trial in this case. On May 2, 1988, Ms. Southworth was arrested yet another time for DUI. Exh. # at 17. On May 23, 1988, despite the clear record to the contrary, Ms. Southworth denied in court that she had any prior DUI's. Id. She was convicted of this third DUI offense on June 28, 1988. She was sentenced to thirty days in jail for violation of her earlier probation from the convictions she received during Mr. Price's trial. Id. Several times after the 1986 and 1988 DUI convictions, bench warrants were issued due to Ms. Southworth's failure to keep up payments on her fines. Id. at 18-23.

28. In 1989, Zetta Southworth died. On November 28, 1989, the outstanding bench warrants against her for failure to pay fines were removed from the computer files due to her death. Id. at 17.

29. In addition to all of the above facts indicating a serious potential for bias, as noted in Claim III in this petition, Southworth was involved in an incident in which the prosecutors had an impermissible interaction, which ensured her bias against the defendant, but which went unreported to the court or to defense counsel in this trial.

30. Ms. Southworth worked as a cook at the Waterfront, a local bar and restaurant in Eureka. Exh. 11 at 2-3. She continued to work during the evenings while she served as a juror in this case. Id. During the trial, Ron Bass, the assistant attorney general who was co-prosecuting this case with the local assistant district attorney, Worth Dikeman, came into the bar one evening with Worth Dikeman's wife, Gerry Johnson. Id. Johnson and Bass had been playing racquetball together prior to coming to the bar. Id. On this particular occasion, Mr. Bass and Ms. Johnson drank large amounts of alcohol. Id.

31. Mr. Bass was aware that Ms. Southworth was working as a cook at the restaurant. Id. As noted above, he was also well aware that Ms. Southworth had a serious alcohol problem and had pending criminal cases in Humboldt County. Nevertheless, he sent drinks back to her in the kitchen on this occasion. Id. At some point in the evening, Mr. Bass took out some cash, handed it to the bartender, and told the bartender to take it back to Ms. Southworth and tell her to bring back a guilty vote. Id. The bartender complied, took the cash and gave it to Ms. Southworth along with the message from Mr. Bass. Id. Ms. Southworth accepted the cash. Id.

32. The bartender at the Waterfront who was an eyewitness to this event, and who took the money from Bass and handed it to Southworth, is a

man named Robert McConkey. Id. at 1. Mr. McConkey told petitioner's counsel Robert McGlasson about these events in a conversation they had in Eureka, California. Id. McConkey later recounted the same events once again to Mr. McGlasson and to Sandra Michaels, a Georgia attorney who assisted petitioner's counsel in some of the investigation of this case in federal habeas corpus proceedings. Id. Current counsel attempted, through Eureka private investigator Robert Cloud, to obtain a signed declaration from Mr. McConkey. When Cloud approached him, however, McConkey became upset. Exh. 10 at 1-2. McConkey told Cloud that he did not want to become involved in the case, and indicated that he was hostile to the defense efforts in this matter. Id.

33. In addition to all of the above, there was yet another incident involving Southworth during this trial indicative of her bias in favor of the prosecution. On April 2, 1986, while the guilt-innocence phase of the trial was proceeding, Ms. Southworth was seen outside the courtroom embracing and conversing with prosecutor Worth Dikeman's wife, Gerry Johnson. Southworth claimed that Ms. Johnson was a friend with whom she never discussed any legal matters. Southworth insisted her friendship with the wife of the prosecutor would not interfere with her ability to be fair and impartial. RT 18921-18923. However, the mere fact that Southworth had no qualms about making a public demonstration of her affection for the prosecutor's wife and doing so in the hallway outside the courtroom where petitioner was on trial for his life shows Ms. Southworth's insensitivity to the defense and suggests she was lined up on the side of the prosecution in this case. It bears repeating here that Gerry Johnson was with Assistant Attorney General Ron Bass at the bar on the evening when Bass passed drinks and money to Ms. Southworth.

34. All of these facts, read separately or together, demonstrate that petitioner did not receive a fair trial by an impartial jury in accordance with due process of law.

35. The sixth amendment right to a jury trial "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). "Even if 'only one juror is unduly biased or prejudiced,' the defendant is denied his constitutional right to an impartial jury." United States v. Eubanks, 591 F.2d 513, 517 (9th Cir. 1979), quoting United States v. Hendrix, 549 F.2d 1225, 1227 (9th Cir. 1977).

36. The U.S. Supreme Court has long held that a thorough voir dire examination serves to protect the right to an impartial trier of fact "by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in responses to questions on voir dire may result in a juror being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious." McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554 (1984). In McDonough the Court held that a new trial should be granted where a petitioner demonstrates that "a juror failed to answer honestly a material question on voir dire" and "that a correct response would have provided a valid basis for a challenge for cause."

37. The concurring opinions in McDonough received a total of five votes, hence it is to them that we look for guidance on the precise scope of the ruling. Both concurring opinions hold that the actual, intentional honesty or dishonesty of a particular juror was not essential to a finding of juror bias sufficient to warrant a new trial. "[R]egardless of whether a

juror's answer is honest or dishonest, it remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias or, in exceptional circumstances, that the facts are such that bias is to be inferred." Id. at 556-57 (Blackmun, J., with whom Stevens, J., and O'Connor, J. join, concurring) citing Smith v. Phillips, 455 U.S. 209, 215-16 (1982). The concurring opinion of Justice Brennan, joined by Justice Marshall, likewise held that juror bias can be "actual or implied", and that "[w]hether the juror answered a particular question on voir dire honestly or dishonestly, or whether an inaccurate answer was inadvertent or intentional, are simply factors to be considered in [the] determination of actual bias." 464 U.S. 548, 558 (Brennan, J., with whom Marshall, J., joins, concurring in the judgment). Thus a majority of the Court in McDonough agree that the dishonesty of the juror is not critical to the outcome in a case of juror bias, and that bias may be implied from the totality of the circumstances in some cases.

38. The principles set forth in McDonough have been interpreted to apply to both civil and criminal cases. See United States v. Aguon, 851 F.2d 1158, 1170 (9th Cir. 1988) (en banc). Moreover, the Ninth Circuit has acknowledged since McDonough that implied or inferred bias, apart from actual bias, may require a reversal where juror partiality can be presumed from the "'potential for substantial emotional involvement, adversely affecting impartiality,' inherent in certain relationships." Tinsley v. Borg, 895 F.2d 520 (9th Cir. 1990)(citations omitted).

39. In this case, the facts above demonstrate actual bias on the part of juror Southworth. She was dishonest on voir dire about her alcohol problem. Had she been honest, the court would have granted the defense challenge for cause.

40. She was also a participant in an act of misconduct on the part of the prosecution in this case. She received drinks and money from one of the prosecutors, and did not report the contact to the court or to defense counsel. Thus it is beyond dispute that this juror was actually biased against defendant Curtis Price.

41. Moreover, her act of receiving drinks and money from Mr. Bass and then failing to report the incident to the court is an act of juror misconduct which itself requires this Court to grant petitioner a new trial. In Remmer v. United States, 347 U.S. 227 (1954), the Supreme Court held that "in a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties." Id. at 229 (citations omitted). In Remmer a juror reported to the trial court that he had been contacted by an unnamed person and was told that he could profit from bringing a favorable verdict for the defendant. The trial court informed the prosecutor, and the FBI investigated the incident, determining that the statement was made in jest, at which point the court dropped the matter. Defense counsel was never notified. The Court held that it was error to conduct an ex parte investigation on a matter of jury tampering without the knowledge of the defense.

42. Remmer has been applied in numerous contexts in the Ninth Circuit. See U.S. v. Harber, 53 F.3d 236 (9th Cir. 1995)(Remmer requires presumption of prejudice where government agent's notes reviewed by jury); U.S. v. Angulo, 4 F.3d 843, 847-48 (9th Cir. 1993) (upon showing of illicit improper contact with a juror, Remmer presumption requires government to show contact was harmless beyond reasonable doubt).

43. Even if the Court determines that these facts do not show actual bias, it must be implied from the overwhelming amount of evidence demonstrating that Ms. Southworth could not be fair and impartial in this case. From the outset this juror demonstrated bias against a defendant in a capital case. Prior to her being rehabilitated, she honestly answered that she believed anyone convicted of murder should be put to death. Similarly, she initially candidly stated that she would not consider mitigating evidence in such a case, and even after coaching from the prosecution, testified that the defendant would have to affirmatively change her mind from the death penalty to a life sentence.

44. Second, this juror's drinking problem, at the very least, greatly complicated her service as a juror in this case. Not only was she being prosecuted by the same office that was trying the case in which she sat as a juror, but as it turned out, because she did not comply with the terms of her sentence, Southworth was also facing revocation proceedings while she was deliberating on the guilt or innocence of petitioner. And if it was not already clear to Ms. Southworth, her attorney eventually made it explicit that the man in control of her fate (or at least with a significant amount of input as to her fate) as to her probation revocation proceedings was the same man asking her to sentence Curtis Price to death. This Court can only assume that, as a result of her DUI offenses and the resulting probation complications, during this trial juror Southworth was in the vulnerable position of having a reason to fear casting a vote that would displease the prosecutor. Such a position rendered her incapable of being impartial, and thus from this set of facts alone bias should be inferred.

45. Third, when the facts regarding her own misconduct are coupled with those of the prosecutor, Southworth's bias cannot be denied. Her failure to report that misconduct reinforces the view that she was solidly in

the camp of the prosecution in a case where, by law, she was required to be impartial.

46. Added to all of these facts, which on their face demonstrate Southworth's bias, is the hugging incident with Worth Dikeman's wife which evidenced a relationship that was closer than Southworth was willing to acknowledge. In light of the above incident, at which Ms. Johnson was present, Southworth's claim of an innocent association with Ms. Johnson is doubtful. Although the record is silent, this Court can and should infer that Southworth's gestures toward Ms. Johnson are related to the incident in the bar and the misconduct to which Ms. Johnson was, at the very least, a witness. Indeed, Southworth admits that she met Ms. Johnson while she was working at night at the bar where the misconduct took place. Id. at 18921. Her testimony, which failed to disclose the full truth about how and in what circumstances she had been involved with Ms. Johnson, is yet another incidence of juror dishonesty demonstrating either actual or inferred bias requiring reversal here.

47. These facts are disturbing in their implications for the denial of a fair trial in this case. When viewed in their totality, regardless of whether it is concluded that Ms. Southworth was intentionally dishonest, or whether her bias must be inferred from the overwhelming evidence, this Court must conclude that petitioner did not receive a fair trial by an impartial jury in this case.

CLAIM V

A MEMBER OF THE JURY WAS BIASED AGAINST THE DEFENDANT AND DISHONEST ON VOIR DIRE, IN VIOLATION OF PETITIONER'S RIGHTS TO A FAIR TRIAL BY AN IMPARTIAL AND UNBIASED JURY, AND TO DUE PROCESS OF LAW

1. Debra Kramer, a member of the jury in this case, was biased against the defendant, and failed to reveal on voir dire pertinent information about her prior relationship with defense counsel, depriving petitioner of a full and complete voir dire, and a fair trial by an impartial and unbiased jury, in violation of his rights as guaranteed by the Fifth, Sixth and Eighth Amendments to the U.S. Constitution.

2. Debra Kramer was one of the members of the venire in this case. Despite defense counsel's challenge for cause, she ultimately served on the jury, during the guilt/innocence phase as an alternate, and during the sentencing phase, as the foreperson of the jury.

3. Years before the voir dire and trial in this case began, and shortly after Mr. Price was arrested, Ms. Kramer's husband, Dr. Richard Kramer, a local Eureka psychologist, was called in by the prosecutor's office to assist them in the investigation of the case. Dr. Kramer was often relied upon in the Humboldt county criminal justice system to do forensic work for the courts and law enforcement. In this case, he was asked to explain away the fact that suspect Berlie Petry, the abusive boyfriend of the deceased, Elizabeth Hickey, had flunked two police-administered polygraph examinations. RT 8003. Apparently he completed his work satisfactory to the prosecution, as Mr. Petry was never charged in connection with the murder of his girlfriend.

4. Some time later, but again years before the voir dire or trial process

in this case began, Dr. Kramer had formed very clear and distinctly negative opinions of the defendant in this case, Curtis Price. Defense trial counsel Anna Klay filed a declaration in support of a motion for bail on August 16, 1985, in which she related facts of Dr. Kramer's feelings about Mr. Price. CT 7347-7351. In that declaration she described how Mr. DePaoli had asked her to be co-counsel in the case, and about the reaction she received from friends in the community. In particular, she stated that Dr. Richard Kramer had "expressed grave concern to myself and my husband that I should never be alone with Mr. Price as he would surely harm me." Id. When she questioned him about his concern, he said that he based his views on what he had heard from local law enforcement. CT 7349.

5. Ms. Kramer was undoubtedly privy not only to her husband's involvement with the prosecution in this case, but also to her husband's views towards Mr. Price. In the first place, from the beginning this case was a well publicized, high profile event in the small community of Eureka, California and the surrounding communities. See AOB at 136-152. At the time Dr. Kramer performed his work for the prosecution, and shared his concerns about petitioner's propensity for violence with Ms. Klay, there is no question Debra Kramer would have been already aware of the case, given its local notoriety. More importantly here, given the nature of the case and of Dr. Kramer's connection to it, and given the fact that Debra Kramer was not only his wife, but also his office secretary and assistant, see RT 7392, it is clear that the couple would have spoken to one another about the case and about Dr. Kramer's personal involvement in it and his views about petitioner. And critically here, at that time, years before the beginning of jury selection, Ms. Kramer would not have known that she was to be called for jury service and would actually serve on the jury in this case.

6. Voir dire in the case began in June, 1985. On September 12, 1985,

Ms. Kramer was initially questioned. Ms. Kramer testified that she was married to Dr. Richard Kramer. RT 7392. As noted previously, she was also Dr. Kramer's secretary. Id. Ms. Kramer testified that she was aware that Dr. Kramer had already served as an expert consultant for the Humboldt County District Attorney's office in the investigation of the murder of Elizabeth Hickey. Id. She did not testify that Dr. Kramer had already formed very negative views of Mr. Price.

7. During this initial voir dire examination, Ms. Kramer revealed that she had known Bernard DePaoli, petitioner's trial counsel, because she had been a victim in a criminal matter in which Mr. DePaoli was the prosecutor. RT 7394. She said nothing more about her relationship to Mr. DePaoli. Ms. Kramer did testify that she was Jewish, and that it was her understanding that the Aryan Brotherhood was an anti-Semitic organization. RT 7393. For all of these reasons, Ms. Kramer expressed reservations about serving on the jury in petitioner's case. RT 7394.

8. The defense immediately moved to challenge Ms. Kramer for cause. Id. The prosecution opposed the challenge, and the trial court denied the challenge and ordered that Ms. Kramer fill out the longer juror questionnaire so that she could be subject to further voir dire. RT 7395.

9. Approximately one month later, on October 16, 1985, after her husband had been appointed to conduct a mental competency evaluation of Mr. Price and had completed his report on the issue, and after the defense had subpoenaed any records Dr. Kramer had concerning his consultation with the prosecution in the case, Ms. Kramer was again subjected to further examination on voir dire. RT 7992. The court introduced Ms. Kramer noting that she was both Dr. Kramer's wife and his secretary and receptionist. RT 7991.

10. The defense first asked Ms. Kramer a series of general questions

about whether there was anything she had thought of during the period between her first voir dire examination and the present that she wanted to reveal to the court:

> Q — All right. Having had the time between then and now, did any of the questions occur to you that you answered at that time that may cause your answers to be different today than they were at that time?
>
> Is there anything that you could think of that you wish you could have answered differently?
>
> A — On the questionnaire?
>
> Q — Yes.
>
> A — No.
>
> Q — Is there something else?
>
> A — Yes.
>
> Q — Could you tell us about it?

RT 7992-7993.

11. Ms. Kramer then testified that the defense subpoena for records regarding her husband's consultation with the prosecution had come to her as the keeper of records in her office. RT 7993-7995, 8012-8013. She stated that she read through the subpoena when she received it and then had her husband deal with it. Id. She also recalled making an entry into the books as a "no charge" consultation matter. RT 7994, 8013. Finally, having read it, she was aware that the subpoena had to do with her husband's consultation with the prosecution regarding "the boyfriend in this case," Berlie Petry. RT 7994, 8012. She also knew that her husband had written a letter in response to the subpoena. RT 8013. No one asked her if she had typed her husband's

response to the subpoena.

12. Ms. Kramer also testified that she was aware that her husband had been asked to counsel with Mr. Price at the request of the court for some reason of which she was allegedly unaware. RT 8011, 8014. In fact, because of her role as secretary and receptionist (and apparently bookkeeper), she knew that her husband had just received a check in the mail for his services the day before her testimony. RT 7993, 8011.

13. In the middle of questioning about the subpoena for records regarding the prosecution's use of Ms. Kramer's husband as an expert consultant in the case, the prosecutor objected to any further questioning along these lines, and the trial judge ordered the defense to move to another subject area of questioning. RT 7995. During his later explanation for this objection, the prosecution for the first time acknowledged that Dr. Kramer had in fact been consulted by Barry Brown, an investigator with the district attorney's office, about Berlie Petry's reactions to the two police-administered lie detector tests which he had previously failed. RT 8003.

14. In making a transition to general questions about the death penalty, Mr. DePaoli again asked Ms. Kramer if there was anything else elicited by the juror questionnaire which would cause Ms. Kramer to add anything to her previous testimony. She answered in the negative. RT 7995-7996.

15. Finally, once again, at the end of the defense questioning, Mr. DePaoli asked Ms. Kramer:

> Q -- Can you think of any other reason now as you sit there having read the questionnaire, having discussed the matter with me, having listened to the Court, where you think you could not be a fair and impartial juror on any phase of this potential trial other than what you've said?

A -- No.

RT 8002.

16. Upon questioning by the trial judge, Ms. Kramer stated in several different ways that she did not feel she would be an appropriate juror in this case. She testified that the fact that her husband had been a "counselor at the request of the Court" would interfere with her ability to be a fair and impartial juror. RT 8014. She explained that with her working in her husband's office, and his having involvement in the case, "the chances are increasing that some sort of information would come across my desk..." *Id.* She also stated that if her husband testified she would be more likely to believe him because of their relationship. The court then informed her why her husband was called into the case by the court, namely, to consult on Mr. Price's "his present status and your husband's opinion of his status at that time." RT 8015. The court also informed her that her husband had issued a report, and that it was not clear whether he would testify about its contents, but that, in any event, such testimony would be limited to Mr. Price's "particular condition on a particular day..." RT 8015-8016.

17. Even when defense counsel attempted to characterize her testimony, suggesting that she would have no problem as a juror so long as her husband did not testify as a witness, Ms. Kramer still expressed reservations about being a juror in this case. RT 8016. Indeed, when limited to the simple issue of whether, in her own mind, she could be fair and impartial, regardless of all of the other factors, Ms. Kramer stated uncertainty about the matter. RT 8017. She reiterated that she might overhear a phone conversation in her husband's office, and that then "it could be a big waste of time and money for the courts" if she was serving on the jury. *Id.* She also worried that she might hear testimony that would jog her memory about something else as yet unrevealed

that would contaminate her as a juror in the case. *Id.*[33] Even when the prosecution attempted to rehabilitate her, Ms. Kramer continued to express clear reservations about her ability to be fair and impartial in this case. RT 8018-8020.

18. At the end of this second phase of her voir dire, the defense again moved that she be excused for cause. RT 8018, 8043-8047. The defense argued that Dr. Kramer might be called as a defense witness with regard to his use by the prosecution on Berlie Petry's failed polygraph tests, and as an expert in mitigation at the sentencing phase of the trial. Id.

19. Throughout the voir dire of Ms. Kramer, the prosecution continually opposed the defense challenges for cause. *See e.g.*, RT 7394; 8047. In addition to the reasons that appear on the face of the record, the prosecutors had another reason why they felt she would make a good jury for the prosecution. Once again, although neither the prosecution nor Ms. Kramer revealed the fact, Ms. Kramer was at the time being assisted by the district attorney's office in collecting child support from her ex-husband, Robert Lee Balsley, Jr., the father of her child. Exh. 55, & Exh. 8 at l

20. On October 15, 1985, in a minute order the court denied the defense

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[33] Her prediction was prophetic. During a subsequent voir dire, Ms. Kramer revealed that her husband, Dr. Kramer, worked with the local parole office, and that they were social friends with Dick Wild, a parole agent in that office. Ms. Kramer testified that she liked Mr. Wild. RT 9568-9569. Wild was well aware of the Price case, and in fact had assisted in his initial arrest. RT 80-89. Wild testified at the preliminary hearing, and he testified during the trial in this case about Mr. Price's arrest. RT 18515. In addition, several witnesses testified during the trial about Mr. Wild's assistance in the arrest of Mr. Price, and about his attitude that Curtis Price was one of the most dangerous persons ever to be released from the California Department of Corrections. RT 80-89, RT 94. Ms. Kramer also revealed that she had recently met Officer Randy Mendosa of the Arcata police department, who investigated the Village Liquors robbery with which Mr. Price was charged. RT 15687.

Later during the trial, the court revealed that Ms. Kramer was a social friend of Dr. Kenneth Barney, who was a psychotherapist who had treated the victim, Elizabeth Hickey, before her death. RT 18181, 18216.

challenge for cause. CT 8109.

21. When the ultimate jury was selected, the defense did not use a peremptory challenge against Mrs Kramer. RT 9728-9729. The record is silent as to why, having twice sought to challenge Ms Kramer for cause, the defense did not exercise a peremptory challenge against her.[34]

22. The record thus reveals that Ms. Kramer was at the very least uncertain, if not uncomfortable, about being a juror in this case. What the record does not reveal, because Ms. Kramer chose to keep the facts concealed, was that she had even stronger reasons why she knew she should not be involved as a juror in this case.

23. Although Ms. Kramer alluded to having known Mr. DePaoli when he prosecuted a case in which she was the victim, what she did not reveal, and what Mr. DePaoli also kept to himself, was the fact that he and Ms. Kramer had a romantic relationship at that time, and that Mr. DePaoli had provided financial assistance to her as well. The scope of their personal relationship included going out on dates, dancing together, and some physical intimacy. With respect to her finances, some time not long after her rape trial Mr. DePaoli assisted her in purchasing a car by co-signing a note on the loan. Exh. 9 at 10-11.

24. Ms. Kramer's failure to reveal this information was a knowing and intentional omission of material, relevant information that, had it been revealed, would have resulted in the trial court's having granted the defense's challenge for cause. In the first place, Ms. Kramer did reveal that she had known Mr. DePaoli because of a criminal matter in which she was the victim and DePaoli was the prosecutor, so it is clear she had not simply forgotten

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[34] The explanation does not lie in the fact that the defense strategically used up their peremptories on other jurors; in fact, the defense failed to exhaust their peremptory challenges in this case.

about her association with Mr. DePaoli.

25. Secondly, it is not the case that she had no opportunity to reveal the extent of the prior relationship between her and Mr. DePaoli. On three separate occasions during her voir dire the defense asked her in an open-ended way if there were any other facts she felt she should disclose about any of the matters that had been discussed in court or in the jury questionnaire. Each time she failed to mention the prior relationship with Mr. DePaoli.

26. Third, it cannot fairly be said that Ms. Kramer was unaware that her relationship with Mr. DePaoli was precisely the type of information which she was being asked to reveal (and which she should have revealed) on more than one occasion, both by the court, and by the parties, throughout the voir dire process. For this reason her failure to do so must be construed as a constructive act of intentional concealment.

27. All of these facts, read separately or together, demonstrate that petitioner did not receive a fair trial by an impartial jury in accordance with due process of law.

28. The sixth amendment right to a jury trial "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). "Even if 'only one juror is unduly biased or prejudiced,' the defendant is denied his constitutional right to an impartial jury." United States v. Eubanks, 591 F.2d 513, 517 (9th Cir. 1979), quoting United States v. Hendrix, 549 F.2d 1225, 1227 (9th Cir. 1977).

29. The U.S. Supreme Court has long held that a thorough voir dire examination serves to protect the right to an impartial trier of fact "by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in responses to questions on voir dire may result in a juror being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The

necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious." McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554 (1984). In McDonough the Court held that a new trial should be granted where a petitioner demonstrates that "a juror failed to answer honestly a material question on voir dire" and "that a correct response would have provided a valid basis for a challenge for cause."

30. The concurring opinions in McDonough received a total of five votes, hence it is to them that we look for guidance on the precise scope of the ruling. Both concurring opinions hold that the actual, intentional honesty or dishonesty of a particular juror was not essential to a finding of juror bias sufficient to warrant a new trial. "[R]egardless of whether a juror's answer is honest or dishonest, it remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias or, in exceptional circumstances, that the facts are such that bias is to be inferred." Id. at 556-57 (Blackmun, J., with whom Stevens, J., and O'Connor, J. join, concurring) citing Smith v. Phillips, 455 U.S. 209, 215-16 (1982). The concurring opinion of Justice Brennan, joined by Justice Marshall, likewise held that juror bias can be "actual or implied", and that "[w]hether the juror answered a particular question on voir dire honestly or dishonestly, or whether an inaccurate answer was inadvertent or intentional, are simply factors to be considered in [the] determination of actual bias." 464 U.S. 548, 558 (Brennan, J., with whom Marshall, J., joins, concurring in the judgment). Thus a majority of the Court in McDonough agree that the dishonesty of the juror is not critical to the outcome in a case of juror bias, and that bias may be implied from the totality of the circumstances in some cases.

31. The principles set forth in McDonough have been interpreted to apply to both civil and criminal cases. See United States v. Aguon, 851 F.2d

1158, 1170 (9th Cir. 1988) (en banc). Moreover, the Ninth Circuit has acknowledged since McDonough that implied or inferred bias, apart from actual bias, may require a reversal where juror partiality can be presumed from the "'potential for substantial emotional involvement, adversely affecting impartiality,' inherent in certain relationships." Tinsley v. Borg, 895 F.2d 520 (9th Cir. 1990)(citations omitted).

32. In this case Ms. Kramer's responses on voir dire satisfy any possible applicable standard that may be gleaned from McDonough. In the first place, her failure to divulge information about her the nature and extent of her prior relationship to Mr. DePaoli can only be viewed as an act of dishonesty in light of the questions she was asked both in the lengthy juror questionnaires and on voir dire, as noted above. Had she revealed this information, she would have been excused for cause, especially given the remainder of her testimony on voir dire. For this reason alone, a new trial should be granted.

33. Moreover, the fact that Ms. Kramer did not reveal the nature and extent of her relationship with Mr. DePaoli and her financial involvement with the district attorney's child support office, when viewed in light of all of the facts which she did reveal on voir dire connecting her to the case and to the parties involved, are of a nature that require this Court to presume unfair bias in this case.

34. Ms. Kramer must be presumed to have been biased here, where she served on the jury in a case in which she had had some physical intimacy and a sexually flirtatious relationship with one of the attorneys in the case. The fact that she chose not to reveal that information is significant. As noted above, it is not the case that she was not given more than enough of an opportunity to disclose this information. Instead, on more than one occasion she intentionally kept quiet. This fact alone suggests that she was uncomfortable with what had occurred between her and DePaoli, which in and

of itself is indication of bias against defense counsel, and therefore, against petitioner.

35. Ms. Kramer must also be presumed to have been biased here, where she was also married to, and worked for, a psychologist who had significant personal and professional ties to the case and to all parties involved in the litigation. Dr. Richard Kramer had consulted with the prosecution, had been an expert for the trial court on the issue of mental competency, and ultimately served the defense by conducting psychological tests on Mr. Price in preparation for the sentencing phase of trial. RT 21103-21113. As the office secretary, receptionist, and bookkeeper, Ms. Kramer admitted that she had seen several documents come through her husband's office relating to the case, including a subpoena with case-related information, a check from the court, and a reference to her husband's work for the prosecution. She herself felt these entanglements were sufficiently prejudicial and pervasive that she could not be certain of her objectivity in the case. And, as noted above, her husband's involvement and mind-set about the defendant in the case was formed long before Ms. Kramer would have known that it would have been improper for her husband to have shared his knowledge and views about the case with her.

36. In addition, Ms. Kramer must be presumed to have been biased where her husband did work for the local office of the state parole department in Eureka. One of its agents, Dick Wild, was heavily involved in the surveillance, initial apprehension, and arrest, of Mr. Price. Wild felt Price was one of the most dangerous people in California, a feeling he readily expressed to other people. Wild was also a personal friend of the Kramer's. Exh. 9 at 11. It is no surprise then, that Dr. Kramer had similarly strong negative views of Mr. Price, which he likewise felt free to discuss with others in the community and surely, with his own wife.

37. Ms. Kramer must also be presumed to have been biased here, as she had been the victim of a brutal gang rape. One of the victims in this case, Elizabeth Hickey, was brutally beaten about the head, neck, and shoulders. Although Mr. Price was not charged with a sexual assault, Ms. Hickey's body was found nude and laying spread out across her bed.

38. And finally, the presumption of bias should also arise from the fact that Ms. Klay was Jewish, and she believed that the Aryan Brotherhood was a gang with strong anti-Semitic principles and beliefs.

39. Although Ms. Kramer served only as an alternate during the first phase of trial, curiously, when she was placed on the jury for the sentencing trial, she was elected foreperson. This fact shows that she obviously commanded the respect of the jury even as an alternate, which likely would have come from her having had prior discussions with the other members of the jury about the guilt-phase issues in the case.

40. All of these facts point to one conclusion: Debra Kramer had so many reasons to be biased in this case, and her impartiality was so improbable, that this Court should find that she was biased, either actually or implicitly, and grant a new trial.

CLAIM VI.

PETITIONER WAS DENIED HIS RIGHT TO A FAIR TRIAL BECAUSE HIS TRIAL ATTORNEY, BERNARD C. DEPAOLI, LABORED UNDER AN ACTUAL CONFLICT OF INTEREST WHICH ADVERSELY AFFECTED HIS PERFORMANCE AT TRIAL

1. Petitioner's trial attorney, Mr. Bernard DePaoli, labored under an actual conflict of interest which adversely affected his performance at trial in this case, in violation of petitioner's rights to a fair trial, due process, and to adequate representation, as guaranteed by the Fifth Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

2. Debra Kramer was one of the members of the venire in this case. Despite defense counsel's challenge for cause, she ultimately served on the jury, during the guilt/innocence phase as an alternate, and during the sentencing phase, as the foreperson of the jury.

3. On September 12, 1985, Ms. Kramer was initially questioned on voir dire. Ms. Kramer testified that she was married to Dr. Richard Kramer. RT 7392. She was also Dr. Kramer's secretary. Id. Ms. Kramer testified that she was aware that Dr. Kramer had already served as an expert consultant for the Humboldt County District Attorney's office in the investigation of the murder of Elizabeth Hickey. Id.

4. During this initial voir dire examination, Ms. Kramer revealed that she had known Mr. Bernard DePaoli, petitioner's trial counsel, because she had been a victim in a criminal matter in which Mr. DePaoli was the prosecutor. RT 7394. She also noted that she was Jewish, and that it was her understanding that the Aryan Brotherhood was an anti-Semitic organization. RT 7393. For all of these reasons, Ms. Kramer expressed reservations about

serving on the jury in petitioner's case. RT 7394.

5. The defense immediately moved to challenge Ms. Kramer for cause. Id. The prosecution objected to the defense challenge, the trial court denied the challenge, RT 7395, and ordered that Ms. Kramer fill out the longer juror questionnaire so that she could be subject to further voir dire.

6. Approximately one month later, on October 16, 1985, after her husband had been appointed to conduct a mental competency evaluation of Mr. Price and had completed his report on the issue, and after the defense had subpoenaed any records Dr. Kramer had concerning his consultation with the prosecution in the case, Ms. Kramer was again examined on voir dire. RT 7992. The court introduced Ms. Kramer noting that she was both Dr. Kramer's wife and his secretary and receptionist. RT 7991.

7. The defense first asked Ms. Kramer a series of general questions about whether there was anything she had thought of during the period between her first voir dire examination and the present one that she felt she should reveal:

> Q — All right. Having had the time between then and now, did any of the questions occur to you that you answered at that time that may cause your answers to be different today than they were at that time?
>
> Is there anything that you could think of that you wish you could have answered differently?
>
> A — On the questionnaire?
>
> Q — Yes.
>
> A — No.
>
> Q — Is there something else?
>
> A — Yes.

Q — Could you tell us about it?

RT 7992-7993.

8. Ms. Kramer then testified that the defense subpoena for records regarding her husband's consultation with the prosecution had come to her as the keeper of records in her office. RT 7993-7995, 8012-8013. She stated that she had her husband deal with it, although she did read through the subpoena when she received it. Id. She also recalled making an entry into the books as a "no charge" consultation matter. RT 7994, 8013. Finally, having read it, she was aware that the subpoena had to do with her husband's consultation with the prosecution regarding "the boyfriend in this case," Berlie Petry. RT 7994, 8012. She also knew that her husband had written a letter in response to the subpoena. RT 8013. No one asked her if she had typed her husband's response to the subpoena.

9. Ms. Kramer also testified that she was aware that her husband had been asked to counsel with Mr. Price at the request of the court for some reason of which she was allegedly unaware. RT 8011, 8014. In fact, because of her role as secretary and receptionist (and apparently bookkeeper), she knew that he had just received a check in the mail for his services the day before her testimony. RT 7993, 8011.

10. In the middle of questioning about the subpoena for records regarding the prosecution's use of Ms. Kramer's husband as an expert consultant in the case, the prosecutor objected to any further questioning along these lines, and the trial judge ordered the defense to move to another subject area of questioning. RT 7995. During his later explanation for this objection, the prosecution acknowledged that Dr. Kramer had in fact been consulted by Barry Brown, an investigator with the district attorney's office, about Berlie Petry's reactions to the two police-administered lie detector tests which he had

previously failed. RT 8003.

11. In making a transition to general questions about the death penalty, Mr. DePaoli again asked Ms. Kramer if there was anything else elicited by the juror questionnaire which would cause Ms. Kramer to add anything to her previous testimony. She answered in the negative. RT 7995-7996.

12. Finally, once again, at the end of the defense questioning, Mr. DePaoli asked Ms. Kramer:

> Q -- Can you think of any other reason now as you sit there having read the questionnaire, having discussed the matter with me, having listened to the Court, where you think you could not be a fair and impartial juror on any phase of this potential trial other than what you've said?
> A -- No. RT 8002.

13. Upon questioning by the trial judge, Ms. Kramer stated in several different ways that she did not feel she would be an appropriate juror in this case. She testified that the fact that her husband had been a "counselor at the request of the Court" would interfere with her ability to be a fair and impartial juror. RT 8014. She explained that with her working in her husband's office, and his having involvement in the case, "the chances are increasing that some sort of information would come across my desk..." Id. She also stated that if her husband testified she would be more likely to believe him because of their relationship. The court then informed her why her husband was called into the case by the court, namely, to consult on Mr. Price's "present status and your husband's opinion of his status at that time." RT 8015. The court also informed her that her husband had issued a report, and that it was not clear whether he would testify about its contents, but that, in any event, such

testimony would be limited to Mr. Price's "particular condition on a particular day..." RT 8015-8016.

14. At the end of this second phase of her voir dire, the defense again moved that she be excused for cause. RT 8018, 8043-8047. The defense argued that Dr. Kramer might be called as a defense witness with regard to his use by the prosecution on Berlie Petry's failed polygraph tests, and as an expert in mitigation at the sentencing phase of the trial. Id. On October 15, 1985, in a minute order the court denied the challenge for cause. CT 8109.

15. During a subsequent voir dire, Ms. Kramer revealed that her husband, Dr. Kramer, worked with the local parole office, and that they were social friends with Dick Wild, a parole agent in that office. Ms. Kramer testified that she liked Mr. Wild. RT 9568-9569. Wild was well aware of the Price case, and in fact had assisted in his initial arrest. RT 80-89. Wild testified at the preliminary hearing, and he testified during the trial in this case about Mr. Price's arrest. RT 18515. In addition, several witnesses testified during the trial about Mr. Wild's assistance in the arrest of Mr. Price, and about his attitude that Curtis Price was one of the most dangerous persons ever to be released from the California Department of Corrections. RT 80-89, RT 94. Ms. Kramer also revealed that she had recently met Officer Randy Mendosa of the Arcata police department, who investigated the Village Liquors robbery with which Mr. Price was charged. RT 15687.

16. Later during the trial, the court revealed that Ms. Kramer was a social friend of Dr. Kenneth Barney, who was a psychotherapist who had treated the victim, Elizabeth Hickey, before her death. RT 18181, 18216.

17. When the ultimate jury was selected, the defense did not use a peremptory challenge against Mr. Kramer. RT 9728-9729. The record is silent as to why, having twice sought to challenge Ms Kramer for cause, the

defense did not exercise a peremptory challenge against her.[35]

18. The explanation may only lie in a fact that, though well known to Mr. DePaoli, and also to Ms. Kramer, was kept hidden from the trial court, the prosecution, and most importantly here, the defendant, Curtis Price, and the other members of the defense team. Although Ms. Kramer alluded to having known Mr. DePaoli when he prosecuted a case in which she was the victim, what she did not reveal, and what Mr. DePaoli also kept to himself, was the fact that he and Ms. Kramer had a romantic relationship at that time, and that Mr. DePaoli had provided financial assistance to her as well. The scope of the romantic relationship included going out on dates, dancing together, and some physical intimacy. With respect to her finances, some time not long after her rape trial Mr. DePaoli assisted her in purchasing a car by co-signing a note on the loan. Exh. 9 at 10-11.

19. Mr. DePaoli did not reveal the information about his romantic involvement with Ms. Kramer to Ms. Klay until after the end of Mr. Price's trial. Exh. 8 at 2-3; Exh. 9 at 10-11. He never told Ms. Klay at any time about his financial involvement with Ms. Kramer. Exh. 8 at 3. Thus, at the time when the for-cause challenges against Ms. Kramer were denied and the parties were exercising peremptory strikes against potential jurors, Mr. DePaoli was the only person on the defense team who was aware of his prior personal involvement with Ms. Kramer.

20. Ms. Kramer's failure to reveal these critical facts during her voir dire is dealt with in claim IV of this petition; Mr. DePaoli's failure to disclose it to the court or to his own client and co-counsel, is the subject of this claim.

21. Mr. DePaoli's decision to conceal information about the extent of

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[35] The explanation does not lie in the fact that the defense strategically used up their peremptories on other jurors; in fact, the defense failed to exhaust their peremptory challenges in this case.

his relationship to Ms. Kramer must be viewed in light of the effects of his alcoholism on his judgment, and in light of the consequences such a disclosure would have had for him both personally and professionally. As noted in Claim VII in this petition, Mr. DePaoli suffered from severe alcoholism throughout the time he represented Mr. Price. Exh. 9 at 8-9; Exh. 8 at 1-2. By his own admission and that of his co-counsel, he drank large amounts of gin every night and on weekends during the Price case. Id. While Ms. Klay was well aware of the extent of Mr. DePaoli's alcohol problem, Exh. 8 at 2, as was the trial judge, id. at 4-5, see Claim VII, Mr. DePaoli was in complete denial about his problem and the effect it was having on his exercise of good judgment in the Price case. Exh. 9 at 9. Co-counsel Klay was quite concerned about the extent to which Mr. DePaoli's alcohol problem was affecting his performance and judgment in the Price case. Exh. 8 at 2-5. Thus any judgment call Mr. DePaoli was forced to make, including the particularly sensitive one of whether to reveal potentially damaging and embarrassing information about his prior relationship to juror Kramer, was necessarily impacted adversely by his alcoholism.

22. Alcoholic or not, DePaoli was caught between a rock and a hard place in dealing with the Kramer problem. He had engaged in a potentially unethical relationship with the chief witness/victim in a rape case in which he was the lead prosecutor. Indeed, ethical questions had been previously raised about his having allegedly had sex with a rape victim, so he was clearly sensitive to the problem and to its potentially damaging impact on his legal career. Exh 9 at 11. Such problems were only compounded by the fact that he had provided financial assistance to a witness in a criminal case he prosecuted, a fact which possibly could have compromised the verdict in that case. Id. The legal ramifications of revealing such assistance, see U.S. v. Bagley 473 U.S. 667 (1985) Giglio v. U.S. 405 U.S. 150 (1972); Napue v.

Illinois, 360 U.S. 264 (1959), were surely not lost on a successful prosecutor turned defense attorney such as Mr. DePaoli. Thus, DePaoli was faced with a difficult choice: he could either disclose his prior personal and financial relationship with Ms. Kramer to the trial court and to the defense, and risk his personal and professional reputation (not to mention the verdict in the rape case), or he could sit on the information and deprive his client of facts that would have been undisputably critical to an adequate assessment of Ms. Kramer's propriety as a sitting juror in this case. Having chosen the latter, the objective (and non-alcoholic) part of the defense team was left completely in the dark in making a decision that was fundamentally important to the overall fairness of the trial in this case. See Ham v. South Carolina, 409 U.S. 524 (1973).

23. Most importantly here, regardless of Mr. DePaoli's intentions or motivations, there can be no doubt that Mr. DePaoli was divided in his loyalties. By law he owed a duty of loyalty to his client Curtis Price. Mr. Price and the defense team had a right, and a clear need, to know about his attorney's relationship with a potential juror, and the ramifications of that relationship to the suitability of that person as a juror in his capital trial. And yet, having failed to reveal the critical information to anyone during the trial, Mr. DePaoli instead protected himself, his reputation in the community, and/or, as the former prosecutor in a successful rape trial, the verdict in that case. The conflict between these loyalties is clear.

24. Finally, it is also clear that this conflict hampered Mr. DePaoli in his defense of Mr. Price. Mr. DePaoli's personal and professional concerns prevented him from revealing to his client information about which Mr. Price should have been made aware before the defense exercised peremptory challenges during final jury selection. However, because of his divided loyalties, to his client, Mr. Price, on the one hand, and to his own reputation

and his professional career, on the other, Mr. DePaoli failed to reveal information to Mr. Price and the members of the defense team.

25. The law is clear that Mr. DePaoli labored under a conflict of interest in this case which rendered Mr. Price's trial unfair, and unconstitutional. It is axiomatic that the most basic duty of counsel, whether appointed or retained, is the duty of loyalty. See, e.g., Strickland v. Washington, 446 U.S. 668, 692 (1984); Nealy v. Cabana, 782 F.2d 1362 (5th Cir. 1986); see also ABA Model Rules of Professional Conduct, comment to Rule 1.7 (1983) ("loyalty is an essential element in the lawyer's relationship to a client"). If the Sixth Amendment right to the effective assistance of counsel guarantees anything, it guarantees that the accused in a criminal case be afforded counsel whose ability to act on his client's behalf is untrammeled and unimpaired by a conflict of interest. See Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978); Cuyler v. Sullivan, 446 U.S. 335 (1980); Wood v. Georgia, 450 U.S. 261, 271 (1981); Strickland, 446 U.S. at 692.

26. Here, Mr. DePaoli did not reveal information to his client which he should have revealed in order for the defense to make knowing and intelligent usage of their peremptory strikes. He was conflicted from revealing this information because of his desire to avoid embarrassment and the potential for reversal in one of his prior successful prosecutions. This is therefore a classic example of a conflict of interest in which the attorney has divided loyalties between his client, on the one hand, and another outside interest, (in this case, his own), on the other hand.

27. Moreover, in this case petitioner can make the requisite showing as to prejudice. In conflict jurisprudence, the accused must demonstrate that counsel's performance was adversely affected by an actual conflict of interest. Cuyler, 446 U.S. at 348-49. Once an actual conflict of interest adversely affecting counsel's performance is established, prejudice is presumed. Id. at

349-50 ("[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."); Strickland, 446 U.S. at 692; see also Nealy, 782 F.2d at 1365 ("Adverse effect is not the equivalent of prejudice,"; "[w]hether the outcome of the trial was affected ... is not the test", rather, "sufficient prejudice is presumed from any adverse effect"). See also United States v. Olivares, 786 F.2d 659, 664 (5th Cir. 1986)("proof of adverse effect does not require proving that the outcome of the trial was affected").

28. Actual ineffectiveness claims, which rely upon the two-prong inquiry in Strickland v. Washington, potentially implicate the entire gambit of attorney performance. Conflict of interest cases, however, implicate only a single dimension of counsel's performance -- albeit the most fundamental one. At stake in a conflict claim is the duty of loyalty, "the most basic of counsel's duties." Strickland, 466 U.S. at 692. Given the importance of this obligation, as well as the inability of a reviewing court to measure the precise effect of its denial, the United States Supreme Court has insisted that reviewing courts must presume prejudice if there was an actual conflict that adversely affected counsel's performance. This rule applies regardless of counsel's performance in the remainder of the case. Id.; Cuyler, 446 U.S. at 349-50. Indeed, in recognition of the singular importance of this duty, conflict cases are the only instance of attorney error for which the Court employs a presumption of prejudice. Strickland, 466 U.S. at 693 ("Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.")(emphasis added); Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988).

29. In this case, regardless of his performance during the remainder of the trial, Mr. DePaoli's conflict adversely affected his performance in this

instance. He failed to reveal relevant, material information to the defense team about her. Indeed, now that he is in recovery and is sober, Mr. DePaoli admits that his failure to disclose this information was a bad judgment call made to protect his personal reputation in the community. App. 9 at 11-12. This is the type of information that any defendant or member of a defense team would want to know in making reasonable, informed decisions during jury selection.

30. This information would have likely impacted the jury selection process. In the first place, had it been revealed, it is probable Ms. Kramer would have been excused for cause. The record was already filled with facts about Ms. Kramer which suggested she was not an appropriate juror in this case. On that basis the defense had twice moved to challenge her for cause. If Mr. DePaoli had revealed the extent of his prior relationship with her, she would not have been suitable and would have been struck for cause.

31. At the very least, this information would have impacted the defense's use of peremptory strikes. Having attempted more than once to remove her for cause, there can be little doubt that the other members of the defense team would have wanted to exercise a peremptory against Ms. Kramer had they known of her prior association with Mr. DePaoli. Exh. 8 at 3. Indeed, Mr. DePaoli himself now acknowledges that had he been sober, he would not only have revealed the potentially embarrassing information, but also, if necessary, he would have exercised a peremptory challenge against Ms. Kramer. Exh. 9 at 11-12.

32. For all of these reasons, Mr. Price was denied his right to due process and a fair trial represented by competent, conflict-free counsel, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

CLAIM VII

IN THIS CASE A NUMBER OF INTER-RELATED ISSUES LED TO A COMPLETE BREAKDOWN IN THE ADVERSARIAL PROCESS, AND IN COMBINATION DEPRIVED PETITIONER OF HIS RIGHT TO A FAIR TRIAL AND TO DUE PROCESS OF LAW

1. The trial judge in this case, the Hon. John E. Buffington, acted in ways that, when combined with the conduct of the defense attorneys, the prosecuting attorneys, and members of the jury, resulted in a complete breakdown in the adversarial process, depriving petitioner of a fair trial before a fair and impartial judge and of his right to due process of law, and the effective assistance of conflict-free counsel, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

2. Though difficult to quantify on the issue of prejudice, as set forth more fully below, the actions of judge, defense counsel, prosecutors and jurors, nevertheless led to the denial of a fair trial. This undermining of the fairness of the process has been recognized by the Supreme Court and other federal courts in several contexts. See U.S. v. Cronic, 466 U.S. 648, 658-61 (1984) (right to fair trial denied where lack of adequate representation led to breakdown in adversarial process); Walberg v. Israel, 766 F.2d 1071, 1076-77 (7th Cir. 1985) (judicial animosity toward defense counsel resulted in unfairness difficult to quantify, but nonetheless a denial of fair trial by fair judge with adequate counsel); Sheppard v. Maxwell, 348 U.S. 333 (1966) (circus-like atmosphere of publicity surrounding trial denied defendant fair trial); Berger v. U.S., 295 U.S. 78 (1935) (prosecutorial methods "calculated to produce a wrongful conviction" are unfair and unconstitutional); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)(prosecutorial misconduct requires

reversal where it "infected trial with unfairness"). Whether or not the prejudice resulting from these instances of inappropriate, unethical or improper behavior is fully demonstrated on the face of the record, when viewed in combination they lead to the inescapable conclusion that petitioner's trial was wholly unfair. As such, where the system itself failed to comport with fundamental principles of fair play and due process of law, prejudice should be presumed. Id. The behaviors and events demonstrating petitioner received an unfair trial are set forth below.

3. The collapse of the process in this case largely rests on the shoulders of the trial court, although some of the instances cited below are solely the responsibility of the attorneys and/or members of the jury. Ultimately, however, as trial judge it was Judge Buffington's duty to ensure that, at least with respect to any information, allegations, or arguments presented to him, he would give petitioner a fair trial, and that he would remain above the adversarial battles of the parties. The record reflects, however, that in many respects, Judge Buffington's overt hostility toward the defense caused him to fail in his duty to ensure that the process was fair to the defendant.

4. It appears the animosity toward lead counsel Bernie DePaoli pre-dated petitioner's trial. The record reflects Judge Buffington had previously been involved in bitter controversies with DePaoli. See CT 27: 4398-4412, at 4400 (defense affidavit notes "serious political disagreements that had existed between Judge Buffington and Mr. DePaoli as a result of Mr. DePaoli's re-election bid for office of the District Attorney in 1982...."). Exh. 9 at 2-3.

5. During the proceedings in this case, relations between the defense and Judge Buffington began to deteriorate during the period of January through September of 1985. By the eve of trial, the court had lost most of its ability to treat the defense attorneys in a fair and balanced manner.

6. On January 9, 1985, the defense moved to disqualify Judge Buffington on the ground that he had engaged in improper ex parte contacts with members of the jail staff. Having just heard and ruled upon a habeas corpus action involving Price's treatment and the conditions at the Humboldt County jail in early December, 1984, Judge Buffington was contacted by jail officials later in the month, and they asked him to modify his order regarding the amount of recreation time to be allowed petitioner. Without notifying the defense, the court sua sponte modified its order detrimental to petitioner. CT 16:4173-4195. In response to the disqualification motion, Judge Buffington admitted the ex parte contacts, but justified them on the basis of it being over the course of the Christmas holiday season when attorneys were out of town. Id. at 4278. Although this disqualification motion did not itself produce substantial visible signs of animosity between Judge Buffington and the defense, it marked the beginning of what would become a serious problem.

7. Much of Judge Buffington's obvious antagonism toward the defense centered around the issue of discovery. In fact, discovery issues, and the prosecution's failures to comply with court orders regarding such, were perhaps the most contentious ongoing issue in this case at trial. Exh. 9 at 5; Exh. 8 at 8. The details of these skirmishes are set forth below in this claim and also in Claim I, and are incorporated herein by express reference. In short, as a result of the prosecution's continual foot-dragging, hiding of evidence, and refusal to comply with court orders, the defense filed numerous motions designed to force the prosecution to provide discovery in compliance with Judge Buffington's rulings, including motions for sanctions, motions to dismiss, and motions to exclude the testimony of witnesses. Judge Buffington's response to these motions traces the course of his increasing antagonism toward the defense.

8. On March 12, 1985, at a hearing on a variety of motions, the court

denied a defense motion to dismiss relating to the prosecution's failure to provide discovery. See RT 1371-1409. The court's tone at this point in the proceedings was relatively balanced and impartial. The court acknowledged that the prosecution had perhaps being negligent in failing to provide the defense with discovery in a timely manner. RT at 1403, 1407-08. The record reflects no bitterness or hostility toward the defense, although the judge does note that the defense had some responsibility in failing to bring the issue to the court's attention at an earlier time. Id. In the end, although the judge denied the motion, he left open the possibility of some other type of sanction against the prosecution for their discovery violations. The only threatened sanctions that were forthcoming, however, despite continued discovery abuse by the prosecution, were directed toward defense counsel.

9. It should be noted here that, according to the record, Judge Buffington was privately willing to acknowledge that the prosecution was indeed playing games with discovery in this case. On January 9, 1985, Anna Klay, second chair defense counsel in the case, met with Judge Buffington in private in his chambers. See CT 29:8053-54. She discussed with him the fact that the defense intended to file the aforementioned motion to disqualify. In addition, she and the judge discussed the discovery problems the defense was having with the prosecution. In the course of that discussion, although the judge did indicate that some of the defense requests were incomplete, he also made clear that he knew the prosecution and other government agencies were playing games with discovery and refusing to turn over information that they were required to disclose. Id. This fact is crucial, because it highlights the judge's true feelings about the discovery issue at the time, feelings which were to change dramatically over the course of the next few months.

10. Thus by September 5, 1985, when faced with ruling on another defense motion to dismiss relating to further discovery problems, the judge's

sentiments toward the defense had taken a severe turn for the worse. See CT 28:7760-7770. In his ruling, Judge Buffington made clear his disdain for defense counsel: he accused them of being unethical, dishonest, and playing games with the court and the entire process. Id. Rather than acknowledging what petitioner shows elsewhere in this petition (see Claim I) were blatant prosecutorial discovery violations, the court sided against the defense and blamed them for not doing their job properly. In the end, he denied a hearing on the motion, and then acerbically declared that "the only hearings merited by this motion" are contempt hearings against both defense attorneys for filing what the court believes are frivolous motions. Judge Buffington went on to declare that "these hearings will be held post-trial and the Court will consider compliance with this ruling as a factor at that hearing." Id. at 7769-7770. This act of holding contempt proceedings over the heads of defense counsel during the trial was addressed as a specific and separate issue in the AOB at pages 152-171, and the allegations and arguments contained there are incorporated herein by express reference.

11. What transpired in the intervening period between March and September, 1985, is crucial to an understanding of how, and why, the judge's attitude toward the defense became so personally bitter that his ability to be fair and impartial in this case was wholly undermined.

12. The explanation of the court's change in viewpoint can be found in at least two occurrences during the intervening period. In the first place, it came to the court's attention on more than one occasion that lead defense attorney Bernie DePaoli had a serious problem with alcohol, so much so that it was hampering his ability to exercise good judgment throughout the trial in this case. Secondly, the court began to believe that DePaoli was engaging in unethical and criminal misconduct in this case. As set forth below, in response, the court failed to address these problems directly in a manner that

would protect petitioner's right to a fair trial.

13. On the issue of DePaoli's alcohol problem, as noted, DePaoli was petitioner's lead trial counsel in this case, and ultimately, he controlled all of the significant decisions in the case, from the pre-trial motions, throughout the voir dire process, and throughout both evidentiary phases of the trial. Exh. 9 at 1-2; Exh. 8 at 1. Although Anna Klay was appointed as second counsel to Mr. Price, her involvement was largely as an assistant to DePaoli. Id. She had virtually no prior criminal experience. No substantive decisions were made, or pleadings prepared, without DePaoli's authorship and/or approval. Id. Indeed, at one point in the trial Judge Buffington, frustrated by what he believed were frivolous motions signed by Ms. Klay, ordered that DePaoli review and expressly certify every pleading in the case as to form and content, regardless of whether he prepared it. CT 28:7769.[36]

14. Despite his role as the lead defense attorney in a complex criminal conspiracy case involving hundreds of witnesses and thousands of pages of documents, throughout all phases of this trial DePaoli had a severe alcohol problem. He drank regularly at night throughout the pre-trial and trial proceedings in this case. Exh. 9 at 8-9; Exh. 8 at 1-2. Each night he would open a large bottle of alcohol, and he would not quit drinking until the bottle was completely empty. Id. Judge Buffington was aware of the extent of the problem.

15. Ms. Klay was a licensed social worker prior to becoming an attorney. Exh. 8 at 2. Thus she was knowledgeable about the signs and symptoms of alcoholism. Id. It was clear to her that Mr. DePaoli had a serious alcohol problem, and that it was damaging his ability to perform as Mr. Price's

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36 The court later rescinded this order, noting that it was "not a workable situation." RT 7659.

attorney. Id. According to Ms. Klay often Mr. DePaoli would promise to do a particular task in the case, and then fail to follow through. Id. This left him unprepared to handle what happened in court. Id. In addition, she witnessed that his alcoholism affected his judgment in many ways during the Price trial. For example, she felt the defense was woefully unprepared to enter the penalty phase of trial, and that this was largely because DePaoli used poor judgment in assessing the viability of the guilt-phase defense. Id. Characteristic of alcoholics, he kept secrets and failed to reveal information which he should have, including the information set forth in Claims V and VI regarding his prior relationship with juror Debra Kramer. Id. at 2-3.

16. On several occasions Mr. DePaoli's drinking problem surfaced on the record in this case. For example, several times during the trial he failed to appear in court in the morning because of an alcohol binge the previous night. Also, several times during the trial, DePaoli was arrested for alcohol-related offenses, including public drunkenness and disorderly conduct. See e.g., CT 29:8147, 8380 (4/30/85 arrest in which DePaoli was reported being verbally abusive to arresting officer); CT 29:8147, 8383 (9/17/85 arrest for public drunkenness); RT 20158 (DePaoli stopped by local police on DUI charges).

17. Judge Buffington knew the problem was sufficiently serious that he felt a need to do something to protect the record on this issue. On May 3, 1985, Judge Buffington spoke with Mr. DePaoli and Mr. Price about the first public drunkenness incident. See e.g., RT 1515-0-a through RT 1515-0-i; RT 7658-1 (sealed). On this date he held an in-chambers hearing during which he discussed with the defense an article in the local newspaper regarding DePaoli's arrest for public drunkenness. Id. Although the record is not clear, it can be gleaned that this incident generated local public attention in the media, as Mr. DePaoli claimed that he was being harassed by the local police because of his defense of Mr. Price. Id.

18. In addition to what is on the record about this incident, Judge Buffington was made even more fully aware of the extent of Mr. DePaoli's alcohol problem off the record. When Mr. DePaoli was arrested for public drunkenness in April, 1985, co-counsel Klay spoke with Judge Buffington in private and off the record. Exh. 8 at 4. She told him that Mr. DePaoli had a serious alcohol problem, and that it was severely interfering with his ability to do his work and exercise good judgment in the Price case. Id. She also told Judge Buffington that, under the circumstances, she felt the proper course of action was to relieve Mr. DePaoli and herself as counsel in the case, and find other counsel to represent Mr. Price. Id. According to Ms. Klay although Judge Buffington acknowledged the extent of Mr. DePaoli's alcohol problem, he was unwilling to even consider finding new counsel for Mr. Price. Id. at 4-5. Thus, rather than take any steps to protect petitioner's rights, Judge Buffington ignored the problem and merely had Mr. Price agree to continue to being represented by DePaoli without communicating to Price his own knowledge of the extent of the problem.

19. Judge Buffington repeated his reaction when Mr DePaoli received another alcohol-related charge during the guilt-innocence phase of the case. RT 20158. In this instance, again, the judge brought it up, this time in court, and asked if the defense wanted to have it raised before the jury. DePaoli, of course, said he did not; Judge Buffington then sent a note to Mr. Price, who was still in his jail cell absent from his trial, and Price agreed with DePaoli. Once again, however, Judge Buffington did absolutely nothing to determined whether, once again, DePaoli continuing alcohol problem was affecting his ability to fairly represent his client.

20. The alcohol issue surfaced before Judge Buffington repeatedly throughout the trial in this case. Again and again, defense attorney Anna Klay approached Judge Buffington privately, off the record, and informed him about

DePaoli's drinking problem. Exh. 8 at 4-6. She complained over and over again that he was drinking excessively, and that it was interfering with his judgment and his ability to represent his client adequately. Id. On every such occasion, Judge Buffington acknowledged the problem, but stated that there was nothing he could do about it, and that he would never let DePaoli or her off the case.[37]

21. At one point during the voir dire process, DePaoli asked to be relieved as counsel, citing health problems which were confirmed by his doctor. Although the record does not make clear the source of the problems, they are of the type, namely hypertension, encountered by individuals with severe alcohol addiction. RT 7660-7689.[38]

22. Should there be any doubt that DePaoli's alcoholism was a serious problem that grossly hampered his ability to exercise good judgment, his personal and professional life continued in a downward spiral after the Price trial was finished. In fact, he ended up losing his license to practice law in the State of California. Exh. 9 at 1 He has been convicted and imprisoned for crimes in the States of Nevada and California ranging from repeated drunk driving charges, to embezzling client funds, to bribing a witness in a criminal case. He has already served a prison sentence in the State of Nevada, and at

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[37] At one point later in the trial, in a characteristic display of overt and insulting hostility toward the defense, Judge Buffington commented on his observation of Mr. DePaoli's deteriorating mental condition: "Record should reflect Mr. DePaoli is slowly but surely flipping out." RT 21012.

[38] It should be noted here that Judge Buffington felt tremendous pressure from the Board of Supervisors and from his fellow judges to keep the county's costs down in the trial of this case. The local press reported that it was the most costly criminal trial in Humboldt County history. Moreover, the county was already hard strapped for cash due to the deteriorating economy from the fall off in logging and fishing. Exh. # (AK) at 5.

the time of writing of this petition is confined in state prison here in California. Id.

23. These facts are presented here not to shame, embarrass, or moralize. Alcoholism is clearly a horrible and debilitating medical disease, one which has effectively ruined Mr. DePaoli's professional life as a member of the bar. However, it cannot be ignored that this disease, with all of its attendant effects on the exercise of good, rational judgment, was raging full blown in DePaoli throughout the trial in this case, and Judge Buffington was well aware of this fact. There is no way to know the degree to which this disease impaired the millions of individual judgments and decisions DePaoli had to make throughout the pre-trial and trial proceedings in this case. What is clear, however, is that this disease negatively impacted DePaoli's judgment throughout the Price trial. Exh. 9 at 9-12; Exh. 8 at 1-4. That is precisely why, when confronted with the problem repeatedly, Judge Buffington should have taken the appropriate steps to find counsel for Price who was not similarly impeded in his or her exercise of sound judgment.[39] Instead, the judge did nothing, except attempt to cover the record by getting Mr. Price to accept DePaoli's representation despite his obvious debility. And, Judge Buffington lost all respect for, and grew more hostile toward, the defense.

24. The second occurrence between March and September of 1985 that would explain Judge Buffington's marked shift in attitude toward defense counsel was the fact that the judge became secretly convinced that DePaoli

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[39] That is also, why, in such a circumstance, where there is no question petitioner's lead trial counsel had a serious medical condition that interfered with his ability to make good decisions for his client, and where the trial judge was fully informed of the problem and failed to do anything to address it, the adversarial process entirely broke down, and so petitioner should not have to prove how he was prejudiced, but rather prejudice should be presumed. Cronic, supra.

was engaged in dishonest and criminal misconduct in the case. Although Judge Buffington's views were not disclosed to either defense counsel or the defendant, (Exh. 9 at 3-4; Exh. 8 at 4, he did discuss them directly with the prosecution. Exh. 54; RT 1714-g.

25. Thus on June 4, 1985, Judge Buffington had an in-chambers hearing, with only himself present, during which he dictated for the court reporter his concerns about DePaoli's misconduct. See RT 1714-a through 1714-i. During this bizarre "hearing", Judge Buffington stated that he believed DePaoli had falsified names, dates and other information on defense subpoena's in the case. Id. Throughout this "hearing" the trial judge acted as witness, expert witness, prosecutor, victim, and judge of his own judicial conduct. For example, acting as his own expert, Judge Buffington claimed that the changes were made with the same typewriter as that which was used originally. Id. at 1714-f. Acting as prosecutor, the judge argued that DePaoli's conduct constituted a crime, as well as a breach of the code of professional responsibility. Id. At 1714-g. In fact, acting as victim, the judge indicated he had already informed the same prosecutors trying petitioner's case about DePaoli's alleged criminal conduct, and noted that they had decided to hold off prosecution of the matter until after the trial. Id. It is important to note here that the judge made the prosecution well aware his harshly critical attitude toward Mr. DePaoli and his actions in this case. Finally, the trial court acted as a judge over himself when he determined, again, without anyone but the court reporter present, that despite his "discovery" of DePaoli's alleged crimes and misconduct, he could nevertheless be fair and impartial to Mr. Price and his attorneys, and therefore should not recuse himself. Id. at 1714-i.

26. During this private "hearing", the trial judge claimed, erroneously, that it would be wrong to remove Mr. DePaoli from the case because Mr. Price was entitled to counsel of his own choosing, despite the fact that DePaoli was

appointed counsel whose service was controlled by the court and not by a private retainer from Mr. Price. Id. at 1714-g.

27. As noted, although Judge Buffington made his concerns known to the prosecution, he hid them from not only defense counsel, but also from the defendant. This is not because he did not have a clear opportunity to do so. When Price filed a motion to have his counsel relieved from service in September, 1985, he noted that it appeared to him that Judge Buffington had lost confidence in his attorneys' competence to defend him. Citing repeated instances where the judge had been critical of his attorneys' conduct, and with unwitting accuracy, Price stated that "I can tell by the Court's rulings and admonishments that it feels my attorneys are both individually and personally incompetent." CT 8155. Rather than telling Price the truth, which is that he was absolutely right and that he should be appointed different counsel, Judge Buffington failed to disclose the aforementioned private "hearing", and ultimately required defense counsel to continue in their representation of petitioner.

28. Further evidence of Judge Buffington's increasing feelings of hostility toward the defense can be seen in his handling of the issue of Mr. Price's mental competency during this same period of time. In the face of what all agreed were signs of petitioner's possible incompetence to stand trial, Judge Buffington appointed what he should have known was a tainted expert to examine Price. And, when the report came back with an inconclusive result which explicitly pointed to the need for further evaluation, Judge Buffington completely mis-characterized the report on the record without first even showing it to defense counsel. See RT at 7601, 8006.

29. Defense counsel again attempted to raise the issue of Judge Buffington's bias against them. On October 15, 1985, toward the conclusion of voir dire, the defense filed a second motion to disqualify Judge Buffington

on the grounds of bias. CT 8027. In it they cited a number of examples of the judge's hostile conduct toward the defense. Id. at 8034-8035. Notably, what is missing from this motion, because Judge Buffington had not disclosed the fact to the defense, was any mention of the judge's private "hearing" regarding his views about DePaoli's criminal misconduct.

30. It is also important here to note that this second defense motion was filed in response to Judge Buffington having recently inquired on his own about the possibility of voluntarily disqualifying himself due to bias. See RT 7615-7616; 7624-7631. The defense noted in response that the fact that the judge had raised the issue on his own was itself further reason to question his ability to be fair and impartial to the defense. CT 7929. When the court ultimately ruled on the defense motion, he admitted to being perhaps somewhat "caustic" on occasion, but never mentioned the depth of his disdain for DePaoli and his own attempts to suggest that he be prosecuted for his perceived misconduct. See CT 8142, 8144. Additionally, in his ruling Judge Buffington did address the issue of DePaoli's alcohol problem, and noted that he had allowed Mr. Price to make the decision about whether he should remain as lead defense counsel in the case. Id. at 8147.

31. In fact, the judge was not completely candid about his personal feelings toward the defendant in his response to this motion to disqualify him. While on the record he only admitted to being somewhat "caustic" toward the defense, off the record he expressly acknowledged that he was biased against Mr. Price. Defense attorney Klay had a private, off-the-record conversation with Judge Buffington just prior to his asking the parties to brief the disqualification issue. Exh. 8 at 6. In that conversation, Ms. Klay and Judge Buffington discussed a recent letter or communication from Mr. Price to the judge in which Mr. Price stated that he felt Judge Buffington hated him. Id. In their conversation, Judge Buffington told Ms. Klay that indeed he did hate

Mr. Price, and that the defense should file a section 170 motion (to disqualify the judge) and he would not oppose it. Id. Nevertheless, once the parties had briefed the matter, Judge Buffington inexplicably changed his mind, and did not even acknowledge his personal bias as he had in private.

32. The trial court's attitude toward DePaoli continued throughout the remainder of the trial. Much later in the case, Judge Buffington held another in-chambers hearing, this time with Mr. DePaoli present, in which he directly accused him of lying about the availability of an expert defense witness. RT 19771-19776, 19800-1 through 19800-3. He stated that he had asked the district attorney's office to investigate the matter. The district attorney's investigator, Barry Brown, who was one of the lead prosecution investigators in the Price case itself, did in fact investigate DePaoli's conduct for the judge, and determined that DePaoli had engaged in misconduct. Id. at 19772. The judge also stated that DePaoli's conduct violated ethical rules, and was an act of contempt of court. Id. Later, after this initial sealed "hearing", the judge had another private "hearing" with himself in which he accused Mr. DePaoli of yet another, separate contempt of court, namely, lying to the court in the earlier in-chambers hearing regarding the initial issue of dishonesty. RT 19800-1 through 19800-3.

33. Several facts are important here to an understanding of Judge Buffington's improper actions in this regard, as well as his general hostility toward Mr. DePaoli during the Price trial. Judge Buffington had been the district attorney for HumboldtCounty prior to becoming a judge. Mr. DePaoli had worked for him as a deputy prosecutor in the office. Exh. 9 at 2. During that time, then D.A. Buffington and Mr. DePaoli were social friends and had drinks together. Id. Once Buffington was elevated to the bench, DePaoli became the district attorney for Humboldt County. Their relationship quickly deteriorated. According to Mr. DePaoli, Judge Buffington would not let go of

his role as a prosecutor, and would not give up his control over the district attorney's office. Id. at 3. Indeed, while Mr. DePaoli was district attorney, Judge Buffington would write memos to DePaoli about office management, office policy, and even about individual cases and the appropriate outcomes in them. Id. Understandably, this created friction between Judge Buffington and DePaoli. DePaoli resented Judge Buffington's actions in this regard, and communicated that directly to the judge. The friction even became public, as Mr. DePaoli complained locally about Judge Buffington's apparent use of the crony system to hand out particularly lucrative appointment cases. Id. The rift between Judge Buffington and Mr. DePaoll grew, so much so that Judge Buffington would not endorse Mr. DePaoli in his unsuccessful re-election bid for district attorney. Id.

34. It is no wonder then, that tensions were bound to arise between these two during the Price trial. It is also no wonder that Judge Buffington chose some of the methods he did, including his private collusion with the prosecution to attack DePaoli while the Price trial was ongoing. These facts thus amply explain Judge Buffington's willingness in the Price case to act as a prosecutor, consult with the prosecutor's office and refer a case to them, and even retain the prosecutor's investigator to look into his concerns about the defense attorney. However, such an explanation in no way excuses or minimizes the significance of what the judge did in this case for his ability, in fact or in appearance, to remain fair and impartial toward the defense. Nor do they in any way justify his failure to inform Mr. Price and the defense of his actions and attitudes toward Mr. DePaoli and the defense. Had the defense known of Judge Buffington's actions, they would have raised it as additional support in their motions to disqualify him. Exh. 9 at 5.

35. The fact that Judge Buffington consulted with the prosecution about these matters, and made known to them his contempt for the defense, perhaps

explains why, throughout the discovery process, they continually chose to disregard their duty. As noted, the prosecutors knew full well that Judge Buffington did not trust DePaoli. They also knew that Judge Buffington was increasingly willing to blame the defense for the discovery issues in the case, rather than them. They engaged in a number of different tactics that were designed to frustrate and hamper the ability of defense counsel to adequately meet and counter the prosecution's evidence. This necessitated protracted discovery hearings, the filing of numerous discovery motions by the defense, and numerous motions for sanctions and mistrial motions. See e.g. CT 4431-4452. The record contains scores of instances where such unfair tactics were used. There are simply too many for them all to be listed in this petition. Petitioner will therefore provide some illustrative examples below. However, these are not meant to be an exhaustive list.

36. The prosecution's unfair tactics included, among others, delaying the production of court-ordered discovery without good cause. There are abundant examples of this in the record. For example, the prosecution did not provide the defense with audible tapes of various interviews by law enforcement with key prosecution witness Michael Thompson conducted in 1983 and early 1984 until months after he had testified at petitioner's preliminary hearing in April 1984. See CT 3455. The prosecution did not provide Thompson's taped interview with SSU agent Hahn on September 14, 1983, until April 1986, a month after Thompson had concluded his testimony. See RT 17816-17817. The prosecution delayed in turning over 1485 pages in previously ordered discovery until March 1, 1985, which was just before the trial was scheduled to begin. RT 801-821. That discovery included documents which had been generated by or were in the possession of the Humboldt County prosecutor long before that. For example, the documents belatedly disclosed in March 1985 included witness protection assistance

expenditure records from March of 1984. CT 4930-4938. Those records were requests by Humboldt County for reimbursement for $25,800 in funds for Michael Thompson, Linda Thompson (his sister) and Janet Myers. Id. Michael Thompson and Janet Myers testified against petitioner at his preliminary hearing in April of 1984. Although the witness protection records were in existence at that time, they were not timely disclosed to the defense. The unexplained and unjustified delay deprived the defense of a meaningful opportunity to cross-examine Thompson and Myers during the preliminary hearing about the cash assistance they may have been receiving in return for their cooperation.

37. The prosecution also unjustifiably delayed turning over a report of a June 1983 interview of Franklin Sherman Thompson, who had been with Elizabeth Hickey within days for the time she was killed and to whom she had shown various guns that she wanted to sell, until April of 1985. See Exh. 56. The defense had earlier requested all reports of interviews with Franklin Thompson. They made that request in September of 1984. CT 3468. The prosecution claimed at that time that the defense had everything available. RT 801-821. That representation was clearly wrong. It also appears from the date stamped on the "hit-or-miss" letter that it was also among the records which were not disclosed until March of 1985, even though Humboldt County law enforcement officials had obtained that letter from Michael Thompson at the end of 1983. See. Exh. 7 at attached Exh. C (hit/miss). The handwritten notation indicating disco 12/23/83 is an internal district attorney office reference, not the date the letter was turned over to the defense. This is confirmed by the fact that the defense did not question Thompson when he testified in April of 1984 at petitioner's preliminary hearing about the "hit or miss" letter. Given the obvious potential relevancy of that letter, clearly the defense would have asked Thompson about it had they known of its existence.

38. Similar unjustified delays occurred in producing other relevant documents or evidence, including tapes of LASO Sgt. Barnett's interviews with Clifford Smith in October 1985, which were not produced by Barnett until February 11, 1986 and as to which he claimed privilege (RT 14891-14895); the transcript of Michael Thompson's February 26, 1986 parole hearing which was not provided to the defense until April 3, 1986 (RT 18975), one month after Thompson had testified for the prosecution; the daily case-related logs of SPU investigator Paul Tulleners, which were often not provided until weeks after they had been prepared and sent to DAG Bass. See e.g. RT 4091-4092. One daily log for the date 3/7/86 contained relevant statements made by prosecution witness Michael Thompson to DAG Bass and Tulleners at the Humboldt County Jail shortly before Thompson took the stand. That log was not disclosed to the defense, however, until April 10, 1986, which was again about a month after Thompson's testimony had concluded, and he was back in Los Angeles County. See Exh. 43 at 33.

39. Not only was the defense hampered by getting discovery too late or not at all, it was also hampered by the prosecution's unfair tactic of failing to timely inform defense counsel about which witnesses would be called the next day, as the court had ordered. See RT 12174. This kept the defense off-balance and at a disadvantage by not knowing which of the hundreds of witnesses on the prosecution's witness list they had to prepare to cross examine the following day. See e.g. RT 11823, 12174, 12260, 12523-12524.

40. The prosecution also kept the defense from having timely access to relevant documents by making the legally erroneous claim that its only obligation was to turn over documents in its possession, and that it had no obligation to obtain documents in the possession of other agencies, even various branches within the California Department of Justice, such as SSU and CDC, and agencies such as LASO. See e.g. RT 263-29; 263-41. The trial

court described such tactics as an improper attempt to "shuffle justice." RT 14544-14545. However, rather than sanctioning the prosecution, as the defense repeatedly requested, the trial court instead allowed the prosecution to prevail in its discovery tactics. This in turn erroneously placed the burden on the defense to obtain the information from the various agencies through subpoenas duces tecum. See e.g. CT 3757, 3777, 4536-4546; 4555, 4673, 4922, 5064, 5413, 5485, 5515, 5519, 5791, 5889, 5900-5910; etc. As the defense correctly asserted, it was the prosecution's burden and duty to find out about and disclose impeachment and other Brady evidence from any and all law enforcement agencies involved in any manner in petitioner's case. Kyles v. Whitley, 514 U.S. 419 (1995); Carriger v. Lewis, 132 F.3d 463 en banc (9th Cir. 1998,); In re John Brown, 17 Cal.4th 873 (1998). One such agency was LASO, which not only facilitated and participated in interviews of key prosecution witnesses concerning the crimes with which petitioner was charged, but also acted as Michael Thompson's liaison with the prosecution in this case. See Claim I supra at 15.

41. The prosecution compounded this error by teaming up with the subpoenaed agencies to claim that the defense subpoenas were technically deficient and should be quashed. An example of this occurred with respect to the production of prosecution witness Clifford Smith's prison file. The defense did not obtain disclosure of that file, to the limited extent disclosure was even ordered, until February 6, 1986, which was months after Smith began cooperating against petitioner and was subpoenaed as a prosecution witness. That is because the prosecution shifted the burden to the defense of obtaining the file from the California Department of Corrections (CDC) by subpoena. Then, the prosecution and the CDC claimed that there were technical deficiencies in the service of the subpoena, and the CDC was therefore refusing to honor it. See RT 14542-14550-1.

42. During the interview petitioner's attorney, Robert L. McGlasson, had with former SPU investigator Paul J. Tulleners, who had been the lead case agent for the California A.G.'s office in this case, Mr. Tulleners mentioned that the CDC and SSU kept asserting through their legal representatives in the A.G's office that the defense subpoenas were defective or that the manner of service of the subpoenas was improper. Mr. Tulleners said this was their way of "messing with" the defense; that it was all game playing to avoid giving up information they did not want to give up. See Exh. 6 (Declaration of Robert L. McGlasson) & see Exhibit 1 (Declaration of Paul Tulleners) attached thereto at 4-7. Petitioner will cite to the relevant pages of that attached exhibit below.

43. During the same interview, Mr. Tulleners also said that his superiors in the SPU office, including Hugh Allen and John Gordnier, along with Ron Bass and others involved in the Price prosecution, wanted to keep as much information as they could from the defense, including discoverable evidence. Id. at 2-5. Mr. Tulleners said that they made their intentions clear by their statements and actions, which included limiting the scope of Tullener's duties on the case. Id. at 2

44. For example, Bass and the others took steps to keep the defense from finding out about potentially favorable, discoverable information through witness reports. They accomplished that goal by ordering Tulleners, whose standard practice they knew was to include in his witness interview reports all relevant information provided by the witness, including information that might prove helpful to the defense, to cease having any further contact with witnesses in the Price investigation. They also told Tulleners that he was no longer authorized to participate in any witness interviews. Id. at 3. Although that ban was eventually lifted and Tulleners was authorized to resume his contacts with witnesses and to attend witness

interviews, he was specifically directed by Bass and the others that he was not to take notes of any interviews he witnessed, and not to prepare any written reports of such witness interviews, and that another agent would write the witness interview report. Id. In addition, Tulleners was directed by Bass at some point in the case to keep two separate daily logs of his activities. One log would be for internal review. The other would be provided to the Price defense after Bass determined which entries were irrelevant and those entries were then excised. Id.

45. Tulleners told Mr. McGlasson that he complied with those directives. He also told Mr. McGlasson that at some point during the Price case he began to keep notes about what was really happening on the back sides of pages in his official daily logs. Those back pages were not disclosed to the judge in the Price case or to the defense. Petitioner believes that Bass and others in the SPU office did not know about these references on the backs of the log pages either. Mr. Tulleners has kept a copy of his daily logs with the references on the backs of pages, and showed Mr. McGlasson many of those references. Mr. Tulleners had previously voluntarily provided a copy of his daily logs with those references to defense counsel in the McClure case in Oregon, in which Tulleners testified as a defense witness. The copy Tulleners provided to McClure defense counsel was not subject to any protective order, and they therefore provided a copy to petitioner's federal habeas counsel at our request. Exhibit 43 to this petition contains relevant entries in the log reflecting the prosecution's discovery tactics in petitioner's case.

46. Another of the prosecution's unfair discovery tactics was to claim that certain discoverable documents did not exist, only to have those documents surface months and sometimes years later. For example, DAG Bass stated that he had checked with Los Angeles homicide detective Robert

Morck and Morck had no notes from his 1983 investigation of the Richard Barnes homicide. RT 2364. In July of 1985, the notes turned up. RT 3532-3533. However, by that time, Detective Morck could no longer recall what many of his entries meant or to whom they referred. See e.g. RT 3656, 4005, 4034-4035.

47. Much the same thing happened with SSU agent James Hahn's interview with alleged ex-AB member, Larry "Turtle" Jones in March 1984. Jones had told Tulleners about the interview and about how it had been tape-recorded. Tulleners included that in his notes. During his testimony at discovery hearing held on March 7, 1985, about the matter, Hahn denied that any tape recording had been made. RT 1173, 1176, 1184. The prosecution took Hahn's position. Hahn's testimony was untrue. See RT 1101-1109, 2991.

48. Mr. Tulleners told Mr. McGlasson that the entire incident involving the Hahn-Jones interview tapes was an example of what Tulleners knew from his own personal knowledge were unfair discovery practices in the Price case. Exh. # at . Mr. Tulleners then described an interchange he had with Ron Bass concerning the Hahn-Jones interview tapes.

49. Tulleners said that sometime after that hearing, he observed Bass in the courthouse reading a lengthy document. The document, which Bass initially refused to show Tulleners, was a long transcript of the taped interview that SSU agent Hahn had with Turtle Jones the year before, which, to that point in the trial, the prosecution and Hahn had insisted did not exist. Id. at 4-5. When Bass finally allowed Tulleners to see the transcript, Bass told Tulleners not to tell Gordnier, as Bass had been specifically instructed by Gordnier not to show the document to Tulleners, and Bass was trying to stay in Gordnier's good graces. Id.

50. Tulleners asked Bass how he was going to handle the matter, now

that they knew Hahn had a taped interview with Jones. Bass said they were going to say Hahn and the SSU had not interviewed Jones. Tulleners responded that was not true, and Bass said, yes it is, that they had "debriefed" Jones, but they hadn't "interviewed" him. Id. That was a clear distortion of the truth, since a debriefing is an interview. See Exh. 2 at 3. Bass asked Tulleners to go along with story, but Tulleners refused to do so. Exh. 6, attached Exh. at 5. Tulleners viewed Bass' coaching of witnesses to lie or shade the truth as an example of abominable prosecutorial misconduct. Id.

51. Tulleners also told Mr. McGlasson about another flagrant act of misconduct by Ron Bass that he (Tulleners) personally witnessed. Mr. Tulleners said that after the Price trial was over, they were all sitting around, and Bass opened his desk drawer, pulled out a piece of evidence and said, sarcastically, "Well lookie what we have here", and then winked to let everyone know he had been hiding it all along. To the best of Tullener's recollection, the hidden evidence was a transcript or tape of a witness interview that the defense had been asking for it and the prosecution kept saying they did not have it. Id. at 5.

52. The record reveals that the prosecution claimed that other relevant documents had also been lost or did not exist. For example, Barry Brown testified he discovered that the notes of his visit with Janet Myers to the Barnes crime scene in 1984 were missing. RT 14021-14023. The prosecution did not even claim that the notes and/or reports by Los Angeles County law enforcement agents Ross, Morck and or Barnett about their visit with Ms. Myers to the Barnes crimes scene in 1984 were missing. They just never provided them.

53. The prosecution also claimed surprise about damaging information their witnesses disclosed for the first time at petitioner's trial. For example, prosecution witness Tina Ransbottom testified that she had seen a brown-

colored car parked near the Hickey residence the night she was killed. Mr. Price had a brown-colored car, but so did other men Ms. Hickey knew. Prosecutor Dikeman said Ms. Ranbottom's description of the car and driver was news to him. See RT 12625-12626. Another example occurred during Clifford Smith's testimony when he referred to a San Quentin counselor and said she had monitored a phone conversation between him and his mother. DAG Bass represented he did not know that until it was brought up in court. RT 14799-14800. There were simply too many lost documents, too much concealed evidence, and too much game-playing by the prosecution concerning discovery to make those claims of surprise credible.

54. Indeed, the prosecution's purposeful tactics to frustrate the defense's ability to defend this case, and their deceitful, self-righteous portrayal of themselves as the party not at fault on the ongoing discovery disputes with the defense, are reflected in the following back – page reference in the Tullener daily logs. This reference concerns the trial court's suggestion that defense counsel DePaoli and Mr. Tulleners meet informally and try to resolve some of the discovery problems. Although Bass appeared to go along with that suggestion in open court, he took the opposite tact with Tulleners after court, advising Tulleners to tell DePaoli to "get the fuck" lost. Exh. 43 at 11.

55. The prosecution ultimately turned the trial into a sporting event by utilizing those tactics and also suppressing critical evidence and knowingly relying upon false testimony, as referred to in Claim I of this petition and incorporated herein by express reference. Although these instances of prosecutorial misconduct require a new trial in their own right, it cannot be overlooked that Judge Buffington's actions in confiding in the prosecution likely contributed to the problem.

56. Judge Buffington also showed clear contempt for defense attorney

Anna Klay. The record is replete with examples where Judge Buffington is curt, ill-tempered, and rude toward Ms. Klay. On numerous occasions throughout the pre-trial and trial proceedings, Judge Buffington rudely cuts her off and even makes chastising remarks directly to her. See e.g., RT 12261 (Judge ridicules Klay's comment as "absurd" regarding defense failure to receive witness list interfering with defense preparation); RT 15679-15681, 15711 (cuts off Klay after prosecutor has used profanity toward DePaoli at the bench but in front of jury, not allowing her to make record that she witnessed jurors hearing the prosecutor's profane remark; later notes he was in error); RT 16760-1 through 16760-2 (cutting off Klay with the remark, "why don't you just stay out of it" after Klay is accused of telling a witness not to talk to the police, and she attempts to respond); RT 17700-5 (judge makes derogatory comments that prosecution would have gotten what they wanted from a defense witness if Klay had to "stayed out of it").

57. Significantly here, the Judge's inappropriate conduct of the type here described is directed for the most part against Ms. Klay, and not to the other male parties to this litigation. Thus the record in this case shows that Judge Buffington had clear problems with gender bias, which he took out on Ms. Klay.

58. Both defense counsel were cognizant of Judge Buffington's gender bias against Ms. Klay during the Price trial. Ms. Klay recalls numerous times on and off the record when Judge Buffington was rude, patronizing, and degrading toward her. Exh. 8 at 7. She believed his conduct toward her was much worse than it was toward the male attorneys involved in the Price case, and for this reason, believed his attitude was sexist toward her. Id. This view was confirmed by one particularly inappropriate private, off-the-record comment that Judge Buffington made to Ms. Klay in which he said: "You used to be a pretty, fun loving girl, and now you're a goddamn basket case." Id.

59. Mr. DePaoli also witnessed judge Buffington's sexist treatment of Ms. Klay. Exh. 9 at 12. He saw Judge Buffington chastise her and treat her in a derogatory manner, sometimes on the record, and sometimes off. Id. Based on his prior associations with Judge Buffington, DePaoli believed that the judge's sexist attitude toward Ms. Klay as exhibited during the Price trial was part and parcel of his "good old boy" mentality, a mentality in which he viewed women as ornaments for men and female attorneys as intellectually inferior to male attorneys. Id. at 13.

60. Judge Buffington's inappropriate treatment of Ms. Klay had a negative impact on her ability to represent Mr. Price competently. Exh. 8 at 7-8; Exh. 9 at 12. She lost confidence in herself as a result of his comments and actions toward her, and she became less vocal during the trial . Id. It also impacted her communications with her client, as he was well aware of Judge Buffington's attitude toward her. Id.

61. Judge Buffington's sexist treatment of Ms. Klay had a spillover effect in how the other male attorneys in the case treated her. Exh. 8 at 7. On one occasion, prosecutor Worth Dikeman called her a "lying sack of shit" in the hallway at the courthouse during the trial . Id. Ms. Klay believes some of the jurors heard his comment. Id. In her judgment, such comments would never have been made had Judge Buffington not effectively condoned such conduct by his own bad example. Id. at 8.

62. Judge Buffington has had similar problems in other cases. Recently, in Catchpole v. Brannon, 36 Cal.Exh.4th 237 (1995), the appellate court reversed a case over which Judge Buffington presided due to his gender bias. The court held that, just as in the present case, Judge Buffington's comments in that case showed gender bias and showed that he had pre-conceptions against women. These same pre-conceptions existed ten years earlier when he mis-treated Anna Klay in petitioner's trial, and thus

petitioner's case must be reversed for similar reasons.

63. When the entire record is thus revealed, the picture that emerges is that Judge Buffington lost confidence in the ability, honesty and integrity of Curtis Price's lead counsel, but refused to allow the course of the trial to be interrupted with a search for competent counsel to represent Mr. Price. He also refused to inform the defendant of his concerns about defense counsel, despite the fact the Mr. Price had accurate instincts about Judge Buffington's loss of respect for and confidence in their ability and integrity.

64. The remainder of the trial court's decisions that are contrary to the wishes or requests of the defense can only be viewed in light of Judge Buffington's clear derision toward the defense. When viewed in this light, only one conclusion emerges: Mr. Price did not receive a fair trial. See Walberg, supra.

65. In Walberg the Court reversed a habeas corpus petitioner's state conviction for burglary where the trial judge showed inappropriate hostility toward the defense attorney. The court in that case struggled with both the theory under which the issues should be analyzed, as well as the need for determining whether any prejudice resulted from the judge's actions and demeanor. Although the Court ultimately held that the trial judge's threats to refuse to continue to appoint the defense attorney if he did not change his ways in the case violated the petitioner's right to conflict-free, effective counsel, the Court was clear that the case required reversal regardless of what legal pigeonhole was relied upon to reach the result, and regardless of whether the record reflected a showing of prejudice in the actual outcome of the trial. Id. at 1077.

66. The Court noted several factors that are important to an understanding of petitioner's facts and his issue here. First, the Court noted that while it was true the hostility was directed mostly toward the attorney and

not the defendant, the issue was whether the defendant had a fair trial by an impartial tribunal. Id. Here, Judge Buffington directed his anger at both attorney and defendant. The fact that much of it was expressed toward DePaoli, however, does not undermine the basis of the claim.

67. Second, the Court also noted that the issue could be framed as one of judicial bias. The Court noted that judicial bias may fatally infect a criminal trial even if the judge is not the trier of fact. Id. at 1075; see U.S. v. Holland, 655 F.2d 44 (5th Cir. 1981). In this case, even though Judge Buffington was not the trier fact, his bias against the defense, including the defendant, was clear and requires reversal.

68. Third, analyzing the issue as one of a denial of effective representation, the Court held that the trial judge's actions toward defense counsel "so far impeded [the defendant] in his ability to defend himself effectively that he is entitled to a new trial. . . ." Id. at 1074. The Court also noted the conflict of interest created by the trial court's threats to the attorney in that case, noting that once they were made, the attorney "knew that he would have to be on his best behavior at trial . . .", which meant, "not just avoiding unethical conduct but also not pressing too hard. . . ." Id. The Court analyzed the issue under Cuyler v. Sullivan, 446 U.S. 335 (1980), and held that the judge's threats deprived petitioner of his Sixth Amendment right to counsel.

69. So too here, where Judge Buffington threatened both DePaoli and Klay with contempt, and then informed them he would be judging their conduct during the trial as a part of his determination whether to actually hold them in contempt after the trial, there existed an unfair and unconstitutional conflict of interest depriving petitioner of his Sixth Amendment rights. Cuyler.

70. The Court in Walberg ultimately assessed the issue as follows:

> In judging the fairness of a trial it is sometimes helpful to adopt the vantage point of the defendant and ask whether a rational albeit criminal individual could be persuaded that he had had a fair trial, by which we mean here simply a trial in which an innocent defendant would be reasonably assured of acquittal.

Id. at 1077. As the Court held in Walberg, "We do not think it would be possible to convince [Price] of this even if he were capable of appraising the situation objectively." Id. For this reason, his convictions and sentences should be reversed.

71. As noted at the outset of this claim, other occurrences during the trial, in addition to Judge Buffington's loss of judicial impartiality, contributed to the breakdown in the system in this case.

72. For example, Judge Buffington's refusal to move this case to a different venue culminated in a series of events which denied petitioner a fair trial. As a result, the boundaries between counsel and jurors were inevitably to be violated repeatedly. As noted elsewhere in this petition, and incorporated herein by express reference, the prosecution engaged in unethical conduct aimed at currying favor with a juror. This fact alone warrants reversal. See Remmer v. United States, 347 U.S. 227 (1954). This same juror had previously lied about her own alcohol problem on voir dire, see CCT-9277-9278, and then when she received two DUI's during the trial, faced criminal proceedings by the same prosecution office litigating the case on which she sat as a juror. RT 12295-12297; 12454. Her potential for bias against the defendant was clear, and yet the court did nothing to correct the problem. See McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554 (1984).

73. In addition, because this case arose in a small community, many jurors were quite familiar with the witnesses in this case. For example, also

noted in Claim V in this petition, and incorporated herein by express reference, juror Kramer was married to, and worked for, local psychologist Richard Kramer, who ultimately acted as an expert for the prosecution, the court, and the defense. She also had previously been involved with DePaoli, and yet neither she nor DePaoli disclosed this fact to the court or the parties. Thus juror Kramer's potential for bias was also clear. Id.

74. In sum, as a result of Judge Buffington's bias against the defense, in combination with a host of other facts which undermined the fairness of the adversarial process in this case, petitioner did not receive a fair trial, and his convictions and sentences must be reversed.

CLAIM VIII.

CURTIS PRICE IS INNOCENT OF THE MURDER OF ELIZABETH HICKEY, AND HIS CONTINUED INCARCERATION, AND SENTENCE OF DEATH FOR THAT MURDER VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

1. Curtis Price is innocent of the murder of Elizabeth Hickey, and therefore his conviction and sentence of death must be vacated as violative of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, and analogous provisions of the California Constitution.

2. While the prosecution evidence established that Price had some relationship with Hickey in the months before her death, and that he ended up in possession of some guns that had belonged to her and Petry, as well as some that belonged to her parents, this evidence falls far short of establishing that he was in fact responsible for Hickey's death. More critically in this case, the record is woefully lacking in any substantiated explanation for why Curtis Price would have killed Elizabeth Hickey.

3. In the paragraphs that follow, petitioner recounts a large amount of information that can be gleaned from the fact of the trial record in this case regarding the paucity of hard evidence linking petitioner to the murder of Elizabeth Hickey. That information has previously been set forth to this Court in Appellant's Opening Brief. Rather than repeat those numerous citations to the record in this section of the petition, for the sake of simplicity, petitioner here incorporates those sections of the AOB, including the citations to the record, that are relevant to this claim. They can be found at AOB 53-75, 365-

440, and 700-708, incorporated herein by express reference.

4. True, the evidence showed that Price might have been seen with Hickey in the months preceding her death, and that he might have visited her apartment on several occasions. He possessed a notebook with her phone number, and a notation "Elizabeth, weapons, corner of Simpson and Pine," and she possessed a note with the phone number of a friend of Price's, saying "Call Curt at (916) 885-3319 about money for guns." RT 15436-15437, 15471-15472. From these two notes and Price's possession of the Hickey/Petry and Moore weapons, a wide range of speculative inferences might be drawn.

5. In an attempt to fill the void in the evidence regarding Price's possible motive for taking Hickey's life, the prosecution suggested at various points that Price might have obtained weapons from Hickey and then killed her because she knew too much or because she might have been blackmailing him.[40]

6. On the other hand, consistent with Price's testimony at the sentencing phase of trial, it is more plausible that the notes and Price's possession of the weapons meant nothing more than the fact that Hickey gave him the weapons to sell for her, in order to raise money so that she could leave Petry. This is precisely what she had confided in other people she intended to do, before her death.

7. It is also true that there is evidence that, when the body was discovered, the closet in which the Petry/Hickey guns were kept showed signs of forcible entry. The prosecution used this fact to argue that whoever killed Hickey also stole the guns. However, since Hickey and Price apparently had

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[40] This theory was totally speculative. No evidence was introduced that Hickey actually was blackmailing Price or knew something about him that could cause him any problem.

reached some type of business arrangement in regard to the guns, there would have been no reason for him to steal them from her.

8. On the other hand, if Petry learned or suspected that Hickey had given his guns to another person in order to raise money to leave him, it is easy to envision him prying open the closet door (perhaps in a rage, or because he was unable to locate the key) immediately before or after killing Hickey. Alternatively, Hickey may have pried open the closet door in an effort to make Petry believe the guns had been stolen by a burglar, only to then admit to him that she had sold the guns.[41]

9. Another reasonable alternative is that Petry killed Hickey in an explosion of anger for any of a number of reasons, and then he rushed back to work to cover himself. In the couple of hours before he returned home to "discover" the body, he could have calmed down enough to realize that he needed an explanation for the killing. He could have then quickly pried open the closet door when he returned home, in order to make it look like Hickey was killed in a burglary.

10. Petry was in the habit of calling Hickey hourly, throughout the entire night. Hickey regularly taunted and provoked Petry. It is quite reasonable to believe that there could have been a middle-of-the-night call in which Hickey either told Petry in anger that she had sold his guns and was leaving him, or in which she said or did something else that angered Petry enough to cause him to leave his job and rush home, where he could have discovered the guns were missing. If that happened, it would be no surprise if Petry's frustrations, which had been percolating for years, finally boiled over

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[41] Indeed, Hickey had engaged in this type of trickery before, where she intentionally made it appear that she had been the victim of a theft crime when that was untrue.

in furious anger, causing him to beat Hickey to death. Nothing makes this latter scenario any less reasonable than the prosecution scenarios.

11. The only evidence that even approaches connecting Price directly to the Hickey homicide was Thompson's testimony regarding what he allegedly heard about the killing. Thompson testified that he was aware of Hickey's murder and why it occurred. RT 16915. During a hearing outside the presence of the jury, it became clear that all of Thompson's claimed knowledge about the Hickey homicide constituted inadmissible hearsay. Thompson claimed to have gained his knowledge of the Hickey killing in May, 1983, from John Stinson, an alleged member of the AB. RT 16943. According to Thompson, Stinson had been selected as the primary contact for petitioner to use when communicating with people inside prison. Thompson testified that Stinson would have received the information from a "runner." RT 16950. Thompson noted that Myers could visit Stinson to relay messages. RT 16890-16821. Stinson testifying as a defense witness, denied acting as a contact person for Price after his release, and denied ever receiving a visit from Myers. RT 18621-18622, 18668. In any event, because the alleged communication from Stinson to Thompson occurred well after the arrest of Price and the termination of any alleged conspiracy, the co-conspirator hearsay exception was unavailable and the court ruled that such hearsay could not be admitted. RT 16951.[42]

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[42] Before it became clear that all of Thompson's claimed information about the Hickey killing consisted of inadmissible hearsay, the prosecution had asked several questions about the matter in front of the jury. First, the prosecutor asked Thompson why Hickey was killed. RT 16898. Defense counsel objected on the ground of lack of personal knowledge, and the prosecutor then asked whether Thompson had talked to other AB members who had talked to Price before Price's arrest. Thompson answered affirmatively, and defense counsel objected on the ground of double hearsay. RT 16898-16899.

12. Aside from being inadmissible multiple-level hearsay, Thompson's evidence about the Hickey murder suffers from significant credibility problems, and, as established in Claim I of this petition, comes from a witness who lied repeatedly, and with prosecutorial impunity, throughout petitioner's trial. Moreover, Thompson's account of the Hickey murder was inaccurate in its details. For example, Thompson testified that he understood Hickey died from being stabbed in the back. RT 17156. He also said that he told Detectives Ross and Morck that the guns used to kill Barnes came from Hickey's residence. RT 17086. He acknowledged that he could have told the officers that Hickey was killed before Barnes; Thompson claimed that his confusion stemmed from grouping the Moore burglary and the Hickey homicide together. RT 17086-17088.

13. In sum, an analysis of the value of Thompson's evidence about the Hickey murder, especially in light of the evidence about Thompson's mendacity, and his potential for bias, which the prosecution hid from the defense and from the jury, demonstrates the evidence is entitled to little or no weight and cannot change the fact that the overall evidence of guilt was weak.

14. Aside from all these weaknesses in the prosecution evidence against Price, the evidence presented by both sides established that there was a much likelier suspect than Price, namely, Berlie Petry. There are many reasons to believe that it was Petry, not Price, who killed Hickey, and there are no good reasons to come to a conclusion that Petry did not commit the crime.

15. As noted elsewhere in this petition, the relationship between Petry and Hickey was most unusual. It is clear that he was obsessed with Hickey to a destructive degree. In the year before her death, Hickey successfully sought short-term relationships with dozens, and perhaps a hundred or more different men. She regularly brought these men home with her at night, while Petry was at work. He came home once and found her in his bed with another man, and

he contracted venereal diseases from her on at least two occasions, and her persistent infidelity was no secret from Petry.

16. From the strange diagram of Hickey's life prepared by Petry, and from the limited portions of his writings that were allowed in evidence, it is clear he was thoroughly preoccupied with the problems in their relationship. Also, he went to the extreme measure of calling her every hour on the hour of every working night, from midnight on, to check up on her.

17. Petry persistently claimed that he was never angry with Hickey, despite the fact that several witnesses testified that he fought with her and was physically violent towards her. Indeed, this can only be explained by concluding either that Petry was blatantly lying about his feelings, or else Dr. Martin Blinder was one hundred percent accurate in his undisputed expert assessment of Petry as the classic example of a person in a relationship likely to lead to an explosion of fatal violence.

18. Petry had many unusual things to say to the police just after Hickey was killed, and, on cross-examination before the jury at trial, he displayed an extraordinary inability to recall the simplest details. After Hickey, his guns were probably the most important part of his life.[43] Just before Hickey was killed she was involved in some kind of financial negotiations with Price regarding the guns. As noted, Petry had beaten Hickey on prior occasions. Hickey had expressed her mortal fear of him, but the jury never got to hear that evidence.

19. There was evidence that Ms. Hickey had purchased a small, concealable, J-frame, .38 caliber chrome Smith and Wesson pistol, apparently

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[43] Although Petry displayed an extraordinary inability to recall the simplest details, the one thing he did describe in detail was the host of firearms he and/or Ms. Hickey owned, testifying that he personally maintained and cleaned all the firearms he and Hickey owned.

for her protection, sometime in the year or so before she was killed. RT 15273. Ms. Hickey's close friends knew about the gun. See e.g. RT 18701-18702. After Ms. Hickey's death, the police found the gun (People's Exh. 6b) inside a glass mirrored box, which was located on the headboard of the bed, just above Ms. Hickey's dead body. RT 12793. The gun was the only intact firearm found during the police search of the Hickey-Petry residence after the crime. RT 15487-15488. Petry testified that he knew nothing about the gun. RT 13399-13401. His lack of knowledge, coupled with the fact that Ms. Hickey kept the gun in a box on the headboard of the bed suggest that she kept the gun a secret from Petry, because she wanted to have a gun in a handy location to protect herself from him. The fact that Exhibit 6(b) was the only intact gun the police found at the crime scene suggests that the existence of the gun was not known to whoever perpetrated the Hickey murder.[44] That person was Berlie Petry.

20. When Petry arrived at work just hours before Hickey was killed, the security guard he relieved, who had seen him regularly over a three-year period, thought that Petry was strangely nervous, edgy, perturbed, and irritated. See RT 17953-17961. Petry's punch clock tape for that night showed that he was not performing his regular duties for a 40 minute period that was very close to the time of Hickey's death. While Petry claimed he was attending to a boiler problem, defense evidence indicated no such problem had occurred. That evidence was disputed, but even if it is rejected, there is still no

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[44] The prosecution contended that petitioner did know about the gun, and had used it to commit one of the robberies charged against him. The prosecution, on behalf of Ms. Hickey's mother has moved the trial court to return the gun to the mother. Petitioner has resisted that motion. In his prayer for relief, petitioner requests that this court order all evidence in this case preserved until final determination.

affirmative evidence, except Petry's word, to indicate that there really was a boiler problem. We know that Petry's place of employment was only six to eight minutes away from his home, so that 40 minutes was ample time for him to drive home in anger, kill Hickey, and drive back to work.45

21. None of Price's fingerprints was found inside the Petry residence. No murder weapon was ever tied to Price. While there was gross speculation that a fish billy found in the trunk of Mrs. Lloyd's car could have been the weapon, Petry's own crowbar was a much likelier murder weapon.46

22. Thus, Petry clearly had the motive, means, and opportunity to commit the murder of Hickey. His performance on the witness stand provided many reasons to doubt his credibility as a witness. His alibi had a hole in it large enough to allow him to commit the crime. Indeed, he was the initial police suspect in the case and ceased to be a suspect only when Price became one. This is so despite the fact that he flunked the two polygraphs which the police administered to him to ascertain if he was lying. Days later, Petry moved to a different state.

23. Whether or not Petry would have been found guilty beyond a reasonable doubt in a trial focusing on him, a reasonable juror could easily conclude that Petry had never been satisfactorily eliminated as a suspect.

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45 As has been noted, since Petry regularly called Hickey from work throughout the night, it is quite possible that something was said during a phone conversation that night that caused Petry to rush home. He could have raced home in anger at something Hickey said on the phone, or he could have gone home out of concern and exploded in anger over something he discovered when he arrived, such as his missing weapons.

46 Petry testified that his crowbar was kept with his tools in the closet under the stairs. RT 13451. However, Officer Olson, who searched the Petry residence looking for anything that could have been used to pry open the closet door, did not see the crowbar inside the apartment. RT 12934.

Adding to that is the overall weakness of the evidence against Price.

24. When the above evidence is supplemented by critical pieces of evidence which were withheld, some from the jury, and some from both the jury and the defense, the picture that emerges is that Berlie Petry was in fact Hickey's murderer, as she feared he would be. As noted elsewhere in this petition, the jury did not hear that in fact Hickey was indeed afraid for her life around Petry. She had confided to several individuals before her death that she needed money to get away from him, and that if she did not do so he would kill her one day. Also, Petry flunked two polygraph examinations, a fact that the jury never heard.

25. Additionally, the police found evidence that could potentially have entirely eliminated Price as Ms. Hickey's killer. There were, remarkably, fingerprints made with Ms. Hickey's wet blood on her naked body below her breast. These prints may well be those of Ms. Hickey's killer. RT 12998. The potential significance of the prints was obvious. Yet rather than calling in someone from the local office of the Department of Justice crime lab who was qualified to lift such prints from the body, the police only preserved the prints by taking photographs of them. RT 12858-12861; 17509-17514. Even the photographs, however, show that one or more of the prints contains some ridges. The presence of such ridges, if they constitute fingerprint characteristics, can be used for elimination purposes, even if there are an insufficient number of characteristics necessary to make a positive identification. To make that determination, it is necessary to have the negatives and utilize photo-enhancement techniques. See Exh. 1 at 7-8.

26. The prosecution sent the negatives of the photographs of the bloody prints to the FBI crime lab for inspection and testing after having sent them to the California Department of Justice lab without conclusive results on the issue of identification. See Exh. 57. The defense specifically requested disclosure

of the report prepared by the FBI crime lab concerning its examination of the bloody fingerprint evidence and the results. The prosecution never provided that to the defense or to the trial judge. Instead, the prosecution indicated that the bloody prints were not useable. See RT 1879, 2176.[47]

27. Notably, useable prints that were not petitioner's were found on objects at the crime scene that may have been touched by the perpetrator. For instance, there was a useable latent print found on the downstairs trimline phone which was found off the hook shortly after Ms. Hickey's death. RT 17505. According to Petry's testimony, he was able to reach Ms. Hickey by phone up to around 3:00 a.m., but afterwards the line was busy. As noted, Hickey's nude body was found on her bed. An empty can of Pepsi was found on the back of the bed near her body. That Pepsi can also contained useable latent prints which did not belong to Mr. Price, Ms. Hickey, Mr. Petry, or to Ms. Hickey's two small children. Exh. 57 and RT 17477-17478, 14505-14506.)-

28. As noted in Claim I of this petition, the prosecution repeatedly hid exculpatory evidence in this case. The prosecution also knowingly allowed, and relied upon, witnesses to testify falsely in pursuit of their case against Price. These other instances of misconduct are highly suggestive that, in this instance, once again the prosecution failed to provide the information because it was exculpatory to Curtis Price.

29. In Herrera v. Collins, 506 U.S. 390 (1993), the Supreme Court considered the issue of whether the conviction and death sentence of an innocent person would violate the Eighth Amendment. The Court determined

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47 During the course of preparing this petition, an investigator assisting petitioner's current counsel made a number of requests to the Humboldt County authorities to allow petitioner an opportunity to have the negatives copied and enhanced. Those authorities did not respond to these requests.

that in that case the evidence of innocence was insufficiently strong to warrant such a ruling. However, in reaching that conclusion, the Court assumed for the sake of argument that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief..." Id. at 856. The Court in Herrera did not ultimately set forth an actual innocence standard, because it determined that the evidence was insufficiently persuasive under any reasonable standard.

30. In Schlup v. Delo, 513 U.S. 298 (1995), the Court returned to the issue of innocence in the context of determining whether the petitioner had satisfied procedural obstacles which required some showing of factual innocence. In that case, the Court held that "if a petitioner ... presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial...", then he is entitled to a full consideration of his claims regardless of the procedural posture in which they are raised. Id. at 861.

31. Whatever the appropriate standard, the facts above undermine confidence in the outcome of Curtis Price's trial. For this reason alone, his conviction and sentence of death must be vacated, as violative of his right to due process, a fair trial, effective representation, and to be free from cruel and unusual punishment, as guaranteed to him under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

CLAIM IX

THE CALIFORNIA STATUTORY SCHEME UNDER WHICH PETITIONER WAS SENTENCED TO DEATH IS UNCONSTITUTIONAL

1. The California statutory scheme under which petitioner was convicted and sentenced to death, as set forth in California Penal Code § 190 et. seq., violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article 1 sections 1, 7, 15, 16 and 17 of the California Constitution. These constitutional defects, whether considered separately or in total, require reversal of Mr. Price's sentence of death. In support of this claim, petitioner alleges as follows:

A. Failure to Perform Constitutionally Mandated Narrowing Function

2. The California death penalty statute under which Mr. Price was convicted and sentenced to death fails to adequately narrow the class of individuals eligible for the death penalty and creates a substantial likelihood that the death penalty will be imposed in capricious and arbitrary fashion. Furman v. Georgia, 408 U.S. 238, 313, 92 S. Ct. 2726. 33 L. Ed. 2d 346 (1972) (death penalty statute must provide a meaningful basis for distinguishing the cases in which the death penalty is imposed from the many cases in which it is not) (conc. opn. White, J.).[48] A capital murder statute must take into

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[48] In Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 316 (1972), the Supreme Court, for the first time, invalidated a state's entire death penalty scheme because it violated the Eighth Amendment. Because each of the justices in the majority wrote his own opinion, the scope of, and rationale for, the decision was not determined by the case itself. Justices Stewart and White concurred on the narrowest ground, arguing that the death penalty was unconstitutional because a handful of murderers were

account the Eighth Amendment principles that death is different (California v. Ramos, 463 U.S. 992, 998-99,(1983)), and that the death penalty must be reserved for those killings which society views as the most grievous . . . affronts to humanity." Zant v. Stephens, 462 U.S. 862, 877 n.15, (1983). See also Adamson v. Rickens, 856 F.2d 1011, 1025 (9th Cir. 1988) (blanket eligibility for death sentence may violate the Fifth and Fourteenth Amendment due process guarantees as well as Eighth Amendment).

3. California's death penalty statute, which was enacted by a popular initiative, violates the Eighth Amendment by multiplying the "few" cases in which the death penalty is possible into the many. As of the date of the offenses charged against petitioner, twenty-seven "special" circumstances existed under California Penal Code § 190.2, embracing every type of murder likely to occur.[49] The over-inclusive nature of the death penalty law in California means that death eligibility is the rule, not the exception, as required by the Eighth Amendment.

4. At the time of the decision in Furman, the evidence before the court established, and the justices understood, that approximately 15-20% of those convicted of capital murder were actually sentenced to death. Chief Justice Burger so stated for the four dissenters (402 U.S. at p. 386 n. 11), and Justice

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arbitrarily singled out for death from the much larger class of murderers who were death-eligible. (Id. at pp. 309-310 (Stewart, J. concurring) and at 311-13 (White, J. concurring). In Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 7909, 49 L. Ed. 2d 859 (1976), the plurality understood the Stewart and White view to be the ''holding'' of Furman (id. at pp. 188-189), and in Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 18563, 100 L. ?? 2d 372 (1988), a unanimous Court cited to the opinions of Stewart and White as embodying the Furman holding. (Id. at p. 362).

[49] The number of special circumstances has continued to grow, and is now thirty.

Stewart relied on Justice Burger's statistic when he said: "[I] it is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder . . . (402 U.S. at p. 309, n. 10)[50] This, while Justice Stewart and White did not address precisely what percentage of statutorily death-eligible defendants would have to receive death sentences in order to eliminate the constitutionally unacceptable risk of arbitrary capital sentencing. Furman, at a minimum, must be understood to have held that any death penalty scheme under which less than 15-20% of statutorily death-eligible defendants are sentenced to death permits too great a risk of arbitrariness to satisfy the Eighth Amendment. In order to meet the concerns of Furman, the states were required to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty.

> Our cases indicated, then, that statutory aggravating circumstances play a constitutionally necessary function at the state of legislative definition; they circumscribe the class of persons eligible for the death penalty.

Zant v. Stephens, 462 U.S. 862, 878, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983). It was the Court's understanding that, as the class of death-eligible murdered was narrowed, the percentage of those in the class receiving the death penalty would go up and the risk of arbitrary imposition of the death penalty would correspondingly decline.

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50 In Gregg, the plurality reiterated this understanding: "It has been estimated that before Furman less than 20% of those convicted of murder were sentenced to death in those states that authorized capital punishment." (428 U.S. at 182 n. 26, citing Woodson v. North Carolina, 428 U.S. 280, 295-96 n. 31).

> The pre-Furman experience in California was consistent with the Court's understanding. Evidence before the Court for the years 1964, 1967 and 1968 indicated that approximately 16% of California's first degree murderers were being sentenced in death, Aikens v. California, 406 U.S. 813 (1972)(Brief for Petitioner, Appendix F, pp. 4f-5f.)

> As the type of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate . . . it becomes reasonable to expect that juries — even given discretion not to impose the death penalty — will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device.

Gregg v. Georgia, 428 U.S. at p. 222 (White, J. concurring).

5. In California in 1987, approximately 10% of convicted first degree murderers were sentenced to death. See Declaration of Steven P. Shatz. Professor Shatz's declaration was filed in this Court as Exhibit 143 to the petition for writ of habeas corpus in the case of In re Teddy Brian Sanchez, No. S049502, ¶ 7).[51] Petitioner hereby requests that this Court take judicial notice of Professor Schatz's Declaration and the attached Exhibits thereto pursuant to California Evidence Code Section 452(d). Under the California scheme, the class of first degree murderers is narrowed to a statutorily death-eligible class by the special circumstances set forth in California Penal Code section 190.2(a). People v. Bacigalupo, 6 Cal. 4th 457, 467-468 (1993).[52]

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[51] Professor Shatz' data and analysis in In re Teddy Brian Sanchez, No. S049502, are based on the statutory listing of special circumstances in 1987, the time of the crime charged against Mr. Sanchez. (Id., ¶ 6) The only relevant difference between the 1987 statute and the law applicable to this case is that in 19080 and 1981, California Penal Code § 189 did not have language making any murder by means of armor piercing ammunition murder in the first degree. Professor Shatz' data show that this difference is without significance. (Exhibit AAA, ¶ 11.b)

[52] In fact, there is some slight additional narrowing as a result of the exclusion of accomplices who neither killed nor intended to kill (California

For the California scheme to achieve a level of rationality and non-arbitrariness greater than that found unconstitutional in Furman — i.e., a level where more than 20% of those statutorily death-eligible were sentenced to death — the special circumstances would have to narrow the death-eligible class to less than 50% of first degree murders generally.[53] Under the death penalty scheme in effect in 1987, at least 84% of first degree murders were special circumstances murders. See Schatz declaration (Exhibit AAA ¶ 26). As a result, only approximately 12% of the statutorily death-eligible class of first degree murderers were in fact being sentenced to death. (Exhibit AAA § 35). Thus, the risk of arbitrariness in California's death penalty scheme is even greater than the risk found unconstitutional in Furman, and the scheme is likewise unconstitutional.

6. The across-the-board eligibility for the death penalty provided by the California statutory scheme fails to account for the different degrees of culpability attendant to different types of murders, enhancing the possibility that a death sentence will be imposed arbitrarily, without regard for the blameworthiness of the particular defendant or the acts at issue.

Penal Code § 19). 2(d) and minors (California Penal Code § 190.5).

[53] The Ninth Circuit reached this same conclusion, albeit apparently without considering any statistical evidence, when it stated that the special circumstances would have to reduce the class to less than a majority (of first degree murderers). See Wade v. Calderon, 29 F. 3d 1312, 1319 (9th Circ. 1994) cerr den _____ U.S. _____, 115 S. Ct. 923, 130 L. Ed. 2d 802 (1995).

CLAIM X.

THE ACTIONS OR INACTIONS OF TRIAL AND APPELLATE COUNSEL DEPRIVED PETITIONER OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

1. Trial and appellate counsel failed to provide effective representation to petitioner in a number of respects throughout the pre-trial, trial, direct appeal and state post-conviction proceedings in this case, which prejudiced the outcome of those proceedings, in violation of petitioner's rights to due process, a fair trial, the effective assistance of counsel, and his right to be free from cruel and unusual punishment, as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

2. There were numerous constitutional flaws in petitioner's trial, and in his unitary direct appeal/state habeas corpus proceeding, some of which emanated from constitutionally inadequate representation at each phase of those proceedings. Petitioner asks this Court to rule on the merits of all of the claims set forth in this petition. As noted at the beginning of this petition, current counsel believe the claims in this petition have been litigated in compliance with all discernible applicable state procedural rules, including those rules existing at the time of filing the original direct appeal and state habeas corpus petition in this case, and those rules that have developed since that time. See section IX supra, incorporated here by express reference.

3. It is possible, however, that this Court will hold that some of the claims contained herein are subject to a procedural default because of a perceived untimeliness in the manner in which they are being litigated in

this Court in this petition. See In re Clark, 5 Cal. 4th 750 (1993).[54] If that is the determination of this Court, then petitioner hereby asserts that his prior trial, appellate and state habeas counsel were ineffective in failing to properly preserve and litigate whatever claims in this petition the Court may determine are subject to such a timeliness procedural bar. Petitioner also hereby asserts that prior counsel have no reasonable strategic or tactical reason for failing to develop and present any such claims in prior proceedings before this Court. Finally, petitioner asserts that he was prejudiced by such failure on the part of prior counsel, all in violation of his constitutional rights. See Strickland v. Washington, 466 U.S. 668 (1984); Evitts v. Lucey, 469 U.S. 387 (1985).

4. Specifically, with respect to attorney Mark Cutler, to the extent this Court determines that his failure to raise any of the claims in this petition present a timeliness procedural bar to such claims, Mr. Cutler was ineffective for failing to raise such claims. As his attached declaration makes clear, he had no reasonable strategic justification for failing to raise any of the claims set forth in this petition.

5. On Claims I, III, and the misconduct section of claim IV, as noted previously, current counsel believe responsibility for any prior failure to litigate these claim falls squarely on the shoulders of the prosecution due to their affirmative concealment of discoverable evidence and evidence of prosecutorial misconduct that forms the basis of these claims. Moreover, with respect to claim I, this Court failed to provide Mr. Cutler access to

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[54] As noted previously, by arguing that the claims in this petition are being litigated in accordance with the state's timeliness requirements, Clark, supra, petitioner does not concede that these rules are wholly discernible or clear, nor does he concede that these rules satisfy the federal adequate and independent state ground doctrine. See Fields v. Calderon, ___ F.3d ___, (1997).

relevant sealed trial documents which could have led to the discovery of at least some of the factual information set forth in this claim. Exh. 5 at 1. Finally, Mr. Cutler did not have subpoena power, or court ordered discovery in either the direct appeal or the state habeas corpus process; hence, he was precluded from obtaining the relevant information necessary to develop and litigate any of these claims. Id. However, to the extent this Court determines that he could or should have been able to obtain any part of the factual information that provides the basis for these claims, he was ineffective for failing to have done so, and he lacked any strategic reason for failing to discover the information.

6. Moreover, with respect to the misconduct portions of claims III and IV, throughout the time he represented Mr. Price, Mr. Cutler did not discover that Ron Bass had inappropriate contacts with juror Southworth during the Price trial. Id. at 1-2. If this Court determines that failure to learn of these facts is the fault of counsel, then Cutler was ineffective in his handling of the state habeas corpus petition. His failure to discover the factual basis of these claims can only then be attributed to his woefully lacking investigation in the state habeas corpus process. He did not hire an investigator to assist him during the time he represented Mr. Price. Id. at 1-2. He did not conduct an independent investigation as to juror Southworth's DUI problems while she sat on the jury in the Price trial. Id. at 1. Apparently, he never spoke with Southworth, as she died before he contacted some of the other jurors by telephone. Id. Again, lacking any reasonable strategic justification for such failure, he was ineffective in his state habeas representation in this regard.

7. With respect to claim II, again, if the Court determines that Mr. Cutler should have discovered the factual basis for this claim earlier, then he was ineffective for failing to do so. As with the other claims, on this one

he did not conduct an independent investigation into the murder of Richard Barnes. He did not attempt to interview the primary witness on this claim, Salvador Buenrostro, nor any member of the Mexican Mafia or the Aryan Brotherhood about the Barnes murder. Id. at 2. Nor did he hire an investigator to assist him on this or any other aspect of the case. Id.

8. With respect to claims V and VI, current counsel believe trial counsel DePaoli's prior failure to tell the truth to Mr. Cutler regarding his relationship with juror Debra Kramer, see id. at 2, combined with Ms. Kramer's misrepresentations on voir dire, prevented Cutler from developing and litigating these claims in prior state court proceedings. However, should this Court determine otherwise, then Cutler was ineffective for failing to discover and present the factual and legal bases for these claims in those proceedings. As with the other claims in this petition, such failure can only be attributable to Mr. Cutler, if at all, because of his failure to fully investigate the facts that form the basis for these claims. Having no strategic reason for such failure, he was ineffective in this regard.

9. With respect to claim VII, Mr. Cutler did not receive any of the transcripts of the private hearings Judge Buffington held during the trial, with only himself and a court reporter present, until approximately one year after he filed his opening brief. Id. at 1. Under those circumstances, as with the other claims in this petition, current counsel believe that the litigation of this claim is timely in the current petition. If this Court determines otherwise, then Cutler was ineffective for failing to perceive and litigate this claim in prior state court proceedings. His failure here is largely attributable to his negligence in failing to discern the importance of the facts which, though he was late in receiving, were at some point disclosed to him when the sealed transcripts were unsealed. His failure was compounded by the fact that he had learned of at least some of the information contained in

this claim from the trial record itself. As noted in the body of claim VII, incorporated herein by express reference, throughout the trial there are on-the-record references to DePaoli's alcohol problem. Moreover, the trial judge's inappropriate treatment of Ms. Klay can readily be discerned from the face of the record as well. Mr. Cutler also lacked any strategic justification for failing to perceive and litigate all aspects of this claim.

10. With respect to claim VIII, Mr. Cutler litigated most of the contents of this claim in his opening brief. See Appellant's Opening Brief at 365-440, 694-708, incorporated herein by express reference. He did not conduct an independent investigation into the bloody fingerprints found on the body of the deceased, id. at 2, nor did he hire an investigator to assist him on this or any other claim in this petition. Id. at 1-2. Thus any failure of Cutler's which this Court finds as the basis for procedurally barring any of this claim can only be attributable to his ineffective representation. Having no tactical reason for such failure, he was ineffective in his representation in this regard.

11. With respect to claim IX, Mr. Cutler failed either to perceive or litigate this claim, and was ineffective in that failure. Having no reasonable strategic basis for such failure, he was ineffective in his representation in this regard.

12. Obviously, if this Court determines that any of these claims has merit, then prejudice is thereby established, and petitioner is entitled to a new direct appeal and/or state habeas corpus proceeding. See Evitts, supra.

13. In addition to all of the above aspects of Mr. Cutler's direct appeal/state habeas representation, he was also ineffective in several additional respects. First, as noted, as a general matter his investigation was woefully lacking and rendered him ineffective at that stage of the proceedings. He conducted only minimal investigations, on his own and

without the aid of an investigator, even though he was hundreds of miles from the scene of the trial and the crimes. An example of the cursory nature of his "investigation" is the fact that he merely called jurors by phone, rather than seeking to interview them (or other critical witnesses) in person. Exh. 5 at 1. This inadequate investigation compromised the effectiveness of Cutler's representation in general and, as noted, prevented him from learning of several important facts which form the basis of many of the claims in this petition.

14. Moreover, Mr. Cutler failed to present available, or readily discoverable evidence regarding Price's emotional and mental problems in support of the claims that he did raise on habeas and direct appeal, including petitioner's lack of mental competency, his alleged "voluntary" absence from most of the guilt-innocence phase of the trial, the shackling issue, and the ineffective assistance of trial counsel in their handling of these and other issues in the case. See Exh. 12 & 13. The information contained in these declarations, which was either available to Mr. Cutler or readily discoverable through even minimal investigation, provides substantial support to each of the claims contained in the initial state proceedings that revolve around Mr. Price's mental and emotional disabilities. Importantly too, this is information that would have made a difference. Thus Cutler's failures in this regard prejudiced the outcome of Mr. Price's direct appeal/state habeas proceeding: had he conducted a reasonable investigation into these and other facts, and had he presented that evidence in support of these claims and those he raised in the direct appeal/state habeas proceeding, this Court would have been duty-bound to grant relief under applicable state and federal law.

15. Finally, with respect to each of the perceived failings of Mr. Cutler set forth above, he had no valid or reasonable tactical or strategic

justification for such failures. As his declaration makes clear, he just did not do the investigative work necessary to develop and present these claims in Mr. Price's initial state proceedings.

16. Turning to the ineffective assistance of trial counsel, petitioner would note that Mr. Cutler raised several instances of ineffective assistance of trial counsel in his direct appeal and state habeas corpus pleadings. In addition to those allegations, which have been ruled upon by this Court, petitioner would submit that trial counsel was also ineffective in numerous other respects, including, but not limited to, the following:

(a) Bernie DePaoli's conflict of interest with regard to juror Debra Kramer deprived petitioner of his right to conflict-free and/or effective representation, see Strickland, supra; Cuyler v. Sullivan, 446 U.S. 335 (1980); see also claims V and VI, incorporated herein by express reference;

(b) DePaoli and Anna Klay's conflict of interest due to the trial court's bias against them, see claim VII supra, incorporated herein by express reference, and due to the threat of contempt which Judge Buffington used against them during the trial, id., deprived petitioner of the effective assistance of counsel;

(c) DePaoli's serious alcohol problem undermined his judgment throughout the trial of this case, see Exh. 8 at 1-4, and 9 at 9-12, and resulted in a complete breakdown in the adversarial process, see U.S. v. Cronic, 466 U.S. 648 (1984),

as well as deprived petitioner of the effective assistance of counsel, Strickland, supra;

(d) trial counsel's failure to adequately prepare, investigate, and present, through the testimony of family members and others who knew petitioner as a child and who were aware of the circumstances of his earlier years, see Exhs. 12 and 13, substantial relevant evidence pointing toward his lack of mental competency at the trial, see Pate v. Robinson, 383 U.S. 375 (1966); Dusky v. U.S., 362 U.S. 402 (1960), and a wealth of mitigating evidence for use at sentencing, regarding petitioner's impoverished childhood, the abuse he suffered at the hands of his father and adult caretakers, and the mental and emotional problems that he suffered from, partly as a result of his upbringing, and partly as a result of organic brain impairment and/or other psychiatric illnesses, see Eddings v. Oklahoma, 455 U.S. 104)1982); Lockett v. Ohio, 438 U.S. 586 (1978), deprived Mr. Price of the effective assistance of counsel at all stages of the trial proceedings, Strickland, supra.

17. With respect to sub-parts a-c above, trial counsel did attempt to raise their concerns regarding these issues to the trial judge. See claim VII supra, incorporated herein by express reference; Exh. 8 at 4-6. To the extent the court was responsible for failing to correct the errors, such failure standing alone denied petitioner a fair trial. See claim VII, incorporated herein by express reference. Should this Court determine, however, that trial counsel was responsible for failing to do more to correct the problems

noted in sub-parts a-c above, no reasonable strategic justification exists for such failing. Also, with respect to subpart d above, trial counsel's failure to investigate, develop and present this evidence had no valid strategic justification.

18. Finally, each of these failings on the part of trial counsel, whether taken individually or viewed as a whole, prejudiced the outcome of the trial. Had counsel not failed in the manners specified above, there is a reasonable probability the outcome would have been different. Strickland, supra.

XI.

Petitioner has no other plain, speedy or adequate remedy at law, since this petition raises issues based in part upon facts outside the record in the direct appeal.

XII

Petitioner seeks relief in this Court in the first instance because the Court is familiar with the facts in this capital case, having previously decided petitioner's automatic appeal and prior habeas petitions.

XIII.

The declarations, documents and records in the accompanying volume of appendices to the petition, are made part of this petition by reference as if set forth herein. Petitioner's claims under this petition will be based on the petition, the declarations, documents and records in the accompanying volume of appendices to the petition, and all records, documents, and pleadings on filed with this Court in People v. Curtis F. Price, S004719, and In re Price on Habeas Corpus, S018328.

XIV

Petitioner hereby requests that this Court take judicial notice of the record on appeal and the briefs filed in People v. Price, S004719 (Evid. Code §§ 452, 459), because reproducing the record for use in connection with this petition would be a waste of time and money since this Court and counsel for respondent already have a copy of the record.

PRAYER FOR RELIEF

WHEREFORE, petitioner respectfully requests that this Court:

1. Issue an order staying the setting of an execution date;

2. Take judicial notice of the record on appeal in People v. Price No. S004719, the briefing filed in this Court in that matter; the record and

files in petitioner's habeas corpus action (In re Price on Habeas Corpus), and the petitions and briefing filed in this Court on that matter.

3. Order respondent to show cause why petitioner is not entitled to the relief sought;

4. Grant petitioner sufficient funds to secure investigation and expert assistance as necessary to prove the facts alleged in this petition;

5. Grant petitioner the authority to obtain subpoenas for witnesses and documents;

6. Grant petitioner the right to conduct discovery;

7. Order an evidentiary hearing at which petitioner will offer further proof in support of the allegations herein;

8. Order the disqualification of Senior Assistant Ronald A. Bass, all attorneys under his supervision in the San Francisco Office of the California Attorney General; any other attorneys in the California Attorney General's Office or in the Humboldt County District Attorneys Office with knowledge and or involvement in the prosecutorial misconduct set forth in Claims I and VII herein, including but not limited to California Deputry Attorneys General Hugh W. Allen and John Gordnier , and all attorneys under their supervision, and Worth Dikeman (Deputy District Attorney of Humboldt County).

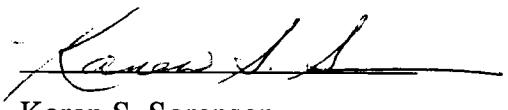
9. After full consideration of the issues raised in this petition, vacate the judgment and sentence imposed upon petitioner in Humboldt County Superior Court Case No.9898; and

10. Grant petitioner such further relief as is appropriate and in the interest of justice.

DATED: April 20, 1998

Respectfully submitted,

Karen S. Sorensen, Esq.
Robert L. McGlasson, Esq.
Attorneys for Petitioner Curtis F. Price

By: 
Karen S. Sorensen

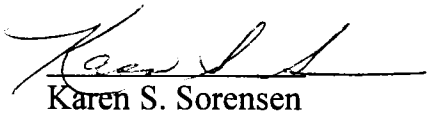
VERIFICATION

I, KAREN S. SORENSEN, declare as follows:

I am an attorney admitted to practice law in the State of California. I represent petitioner herein, who is confined and restrained of his liberty at San Quentin Prison, San Quentin CA.

I am authorized to file this petition for writ of habeas corpus on petitioner's behalf. I make this verification for the following reasons. Petitioner has undergone cataract surgery in the last two years. That surgery left his eyesight in one eye blurry, and due to his still impaired vision, petitioner cannot read this lengthy petition and the accompanying volume of appendices in sufficient time before the petition must be filed to be able to verify it. In addition, I am far more familiar with the facts, claims and law set forth in the petition than is petitioner. I have read the petition and know the contents of the petition to be true.

Executed this 20th day of April 1998, at Kentfield, California



Karen S. Sorensen

Declaration of Service by Mail

RE: IN RE CURTIS F. PRICE ON HABEAS CORPUS, NO S018328

I, Karen S. Sorensen, declare that I am over 18 years of age and not a party to the within cause; my business address is 929 Sir Francis Drake Blvd, Suite C, Kentfield, CA 94904. I served a true copy of the within:

PETITION FOR WRIT OF HABEAS CORPUS AND THREE (3) VOLUMES OF EXHIBITS

on each of the following by placing same in a mailing container addressed (respectively) as follows:

David H. Rose
Deputy California Attorney General
50 Fremont Street, 3rd Floor
San Francisco, CA 94105

Clerk of the Superior Court
For Delivery to Judge John Buffington
County Courthouse
825 5th Street
Eureka, CA 95501

Worth Dikeman
Deputy District Attorney
County Courthouse
825 5th Street
Eureka, CA 95501

Enclosed said mailing container was then, on April 21, 1997, sealed and deposited in the United States Mail at Kentfield, California, the county in which I am employed with postage thereon fully prepaid

I declare under penalty of perjury that the foregoing is true and correct. Executed on this on April 21, 1998, at Kentfield, California.

KAREN S. SORENSEN