

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

EDWARD PATRICK MORGAN,

On Habeas Corpus.

No. **S162413**

(Automatic Appeal  
No. S055130)

Orange County  
Superior Court  
No. 94ZF0036

SUPREME COURT  
**FILED**

APR -4 2008

Frederick K. Ohlrich Clerk

Deputy

**PETITION FOR WRIT OF HABEAS CORPUS**

MICHAEL G. MILLMAN  
SB45639  
EXECUTIVE DIRECTOR  
CALIFORNIA APPELLATE PROJECT  
101 Second Street, 6<sup>th</sup> Floor  
San Francisco, CA 94105

Attorney for Petitioner Edward Patrick Morgan

**DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

_____	)	No. _____
In re	)	
	)	(Automatic Appeal
EDWARD PATRICK MORGAN,	)	No. S055130)
	)	
On Habeas Corpus.	)	Orange County
	)	Superior Court
	)	No. 94ZF0036
_____	)	

**PETITION FOR WRIT OF HABEAS CORPUS**

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

Petitioner, Edward Patrick Morgan, by his attorney, the California Appellate Project,  
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 writ:

**Procedural History and Background**

A. Petitioner is unlawfully confined and restrained of his liberty at San Quentin State  
Prison, San Quentin, California, by Warden Robert L. Ayers, Jr. and by James E. Tilton, Secretary  
of the California Department of Corrections and Rehabilitation. Petitioner is confined pursuant to  
the judgment of the Orange County Superior Court in Case No. 94ZF0036, entered on July 31,  
1996.

B. This Petition is filed now in anticipation of this Court's order appointing petitioner  
new habeas corpus counsel, to permit the investigation and presentation of potentially meritorious  
claims before this Court within the time frame permitted by state law, and to afford petitioner the

benefit of counsel's assistance. If petitioner is not permitted to file this Petition and amend it within three years of the appointment of habeas counsel, petitioner will be irreparably prejudiced by the mutually incompatible timeliness provisions of California state law and federal law pertaining to habeas corpus petitions, as applied in this case.

1. A petition for writ of habeas corpus is presumptively timely if filed within 36 months after appointment of habeas corpus counsel. (Supreme Court Policies Regarding Cases Arising Out Of Judgments of Death, Policy 1-1.1.) This Court has not yet appointed habeas corpus counsel.

2. If petitioner is unsuccessful in seeking relief in this Court from his convictions and sentences, petitioner will be subject either to the statute of limitations of the federal Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. section 2244(d)(1), which requires petitioner to file his federal habeas petition within one year following the date on which this Court's affirmance on direct appeal becomes final, or 28 U.S.C. section 2263(a), which would require petitioner to file within 180 days of such affirmance, should the Attorney General of the United States certify California as qualifying for the procedural benefits of Chapter 154 of Title 28 of the United States Code. This Court affirmed petitioner's judgment and sentence in its opinion issued on November 15, 2007. On January 23, 2008, this Court denied the Petition for Rehearing and issued its remittitur. On March 24, 2008, the United States Supreme Court denied petitioner's petition for writ of certiorari. Although the federal limitations periods are tolled by the filing of a state habeas corpus petition, the limitations period does not provide for the time necessary for petitioner's yet-to-be-appointed habeas corpus counsel to investigate and draft the state petition.

3. If not permitted to immediately file a state habeas petition that may be amended within three years of the appointment of habeas corpus counsel, petitioner will be

deprived of the presumptive timeliness period for the preparation of his state habeas corpus petition or forced to enter federal court prematurely.

4. In light of these extraordinary circumstances, in order to (1) provide petitioner's yet-to-be-appointed habeas corpus counsel with time to file a fully developed and investigated state habeas corpus petition that will be presumed timely under this Court's policies and rules, and (2) afford petitioner's new habeas corpus counsel, if necessary, an opportunity to file a timely federal habeas corpus petition pursuant to the statutes and rules applicable in the federal courts, see 28 U.S.C. §§ 2244(d)(2), 2263(b)(2), petitioner now files this petition, with the intention of amending it within 36 months of the appointment of new habeas corpus counsel to include additional claims as determined by habeas corpus counsel.

5. Petitioner further requests that this Court defer informal briefing on this petition, should this Court desire such briefing, until petitioner has filed the amended petition and provided the Court with all reasonably available documentary evidence in support of the allegations in the amended petition. (See *In re Carmen Ward*, California Supreme Court Case No. S142694 (order filed June 26, 2007, deferring informal briefing on Amended Petition for Writ of Habeas Corpus); *In re Gregory Scott Smith*, California Supreme Court Case No. S138147 (order filed December 13, 2006, granting petitioner's Motion to Defer Informal Briefing on First Amended Petition for Writ of Habeas Corpus until petitioner files a Second Amended Petition, or the period of presumptive timeliness expires).)

C. On May 25, 1994, a complaint was filed charging petitioner with the anal or genital penetration of Leanora Wong by a foreign object in violation of Penal Code section 289 (count 1) and the murder of Ms. Wong in violation of Penal Code section 187(a) (count 2). (Case No. 94 CF 1416.) The "offense" was alleged to be a serious felony within the meaning of Penal Code section

1192.7(c)(1). The murder was alleged to have been committed within the meaning of Penal Code section 190.2(a)(17)(xi). (Clerk's Transcript on Appeal ["CT"] A 1, 5.)<sup>1</sup> On June 10, 1994, petitioner entered a plea of not guilty to the complaint and denied the special allegations. (CT A 2; Reporter's Transcript on Appeal ["RT"] U 4.)

D. On June 13, 1994, a grand jury was convened in Case No. 94ZF0036 to consider charges against petitioner. (CT 12.) At the conclusion of its hearing that day, the grand jury returned an indictment charging petitioner with kidnapping Leanora Wong, in violation of Penal Code 207(a) (count 1), the unlawful penetration of Ms. Wong with a foreign object, in violation of Penal Code section 289 (count 2), and the murder of Ms. Wong, in violation of Penal Code section 187(a). The indictment also alleged that the offenses were serious felonies within the meaning of Penal Code section 1192.7(c)(1), and that the murder was committed while petitioner was engaged in the attempted commission and commission of the crime of kidnapping, in violation of Penal Code 190.2(a)(17)(ii), and in the commission and attempted commission of the crime of unlawful penetration by a foreign object, in violation of Penal Code 190.2(a)(17)(xi). (CT 177, 183-185, 187.) On June 21, 1994, petitioner pleaded not guilty to each count and denied all of the special allegations. (CT 196; RT 1.) On July 8, 1994, Case No. 94CF1416 was dismissed due to the filing of the grand jury indictment in Case No. 94ZF0036. (CT A 3; RT I 1-2.)

E. On September 16, 1994, the Orange County Public Defender declared a conflict, and Julian Bailey was appointed to represent petitioner. (CT 382; RT 557-558, 561.)

F. On May 12, 1995, petitioner's trial counsel declared a doubt as to petitioner's competency. Criminal proceedings were suspended. Dr. Seawright Anderson and Dr. David Sheffner were appointed to examine petitioner, and the case was continued to June 16, 1995, for

---

<sup>1</sup> Hereafter "CT" refers to the original Clerk's Transcript on appeal; "ACT" refers to the unnumbered Clerk's Transcript on appeal; and "RT" refers to the Reporter's Transcript on appeal.

proceedings pursuant to Penal Code section 1368. (CT 406-408; RT 1-7.) On August 11, 1995, the issue of petitioner's competency was submitted on the doctors' reports and the trial court found petitioner was presently mentally competent within the meaning of Penal Code section 1368. (CT 421; RT 29-31.)

G. On April 15, 1996, trial commenced with jury selection. (CT 494.) On April 18, 1996, 12 jurors and 4 alternates were sworn. (CT 499.)

H. On April 24, 1996, both sides rested, the defense having presented no evidence. (CT 525; RT 1272-1275.)

I. On April 25, 1996, the jury returned verdicts finding petitioner guilty of kidnapping, in violation of Penal Code section 207(a) as charged in count 1 of the indictment, anal or genital penetration by a foreign object, in violation of Penal Code section 289 as charged in count 2, and murder, in violation of Penal Code section 187(a) as charged in count 3. The special circumstances of murder during the commission or attempted commission of kidnapping, and murder during the commission or attempted commission of unlawful penetration by a foreign object, were found to be true. (CT 655-656; RT 1465-1469.)

J. On April 29, 1996, a hearing was held pursuant to Evidence Code section 402 on petitioner's motion to exclude evidence of his alleged prior violent criminal activity from the penalty phase of trial. The motion was argued and denied. (CT 664; RT 1474-1486.)

K. On April 30, 1996, the penalty phase of the trial commenced. (CT 669; RT 1510.) On May 6, 1996, evidence having been presented by both the prosecution and the defense, both sides rested. (CT 735; RT 1916.)

L. On May 8, 1996, the jurors returned a verdict of death. (CT 824, 827-828; RT 2078-2080.)

M. On July 7, 1996, a hearing was held on petitioner's automatic motion to modify the death penalty. (CT 874; RT 2087-2102.) The trial court denied the motion and denied probation. (CT 884-885; RT 2099.) The trial court sentenced petitioner to the mid-term of five years for the kidnapping charged in count 1, and to the mid-term of six years for the unlawful penetration charged in count 2, both sentences to merge with the sentence imposed on count 3. (CT 885, 888, 893; RT 2099-2100.) For the murder charged in count 3, the court sentenced petitioner to death. (CT 868-873, 886-887, 893; RT 2100-2102.)

N. On November 15, 2007, this Court issued its opinion on petitioner's direct appeal. (*People v. Morgan* (2007) 42 Cal.4th 593.) The Court reversed petitioner's kidnapping conviction, set aside the Penal Code section 190.2(a)(17)(ii) (kidnapping felony-murder) special circumstance finding, and invalidated any kidnapping felony-murder basis for petitioner's first-degree felony-murder conviction. (*People v. Morgan, supra*, 42 Cal.4th at p. 613.)

O. However, finding that the jury's verdict was based on a legally valid theory of felony murder predicated on the violation of Penal Code section 289 (Penal Code section 189), the Court otherwise affirmed the judgment and sentence of death. (*People v. Morgan, supra*, 42 Cal.4th at pp. 613, 629.)

P. On January 23, 2007, this Court denied petitioner's Petition for Rehearing and its judgment became final.

Q. On January 24, 2008, petitioner filed a Petition for Writ of Certiorari in the United States Supreme Court, No. 07-9024.

R. On March 24, 2008, the United States Supreme Court denied the Petition for Writ of Certiorari.

S. No other applications, petitions, or motions, other than petitioner's direct appeal of his conviction, have been made with respect to petitioner's detention and restraint.

T. This petition is necessary because petitioner has no other plain, speedy, or adequate remedy at law for the substantial violations of his constitutional rights as protected by the state and federal constitutions, mandatory state statutes, decisions or regulations, and international law in that the factual bases for these claims lie wholly or significantly outside the record developed on appeal; the claims involve allegations detailing the inadequacy of trial counsel's representation; and petitioner's direct appeal is final.

U. Petitioner hereby requests that this Court take judicial notice of the record on appeal and the briefs filed in *People v. Morgan, supra*, 42 Cal.4th 593 (California Supreme Court Case No. S055130), decided by this Court on November 15, 2007, and made final on January 23, 2008. Reproducing the record for use in connection with this petition would be an inefficient use of time and resources because this Court and counsel for respondent already have a copy. (Cal. Evid. Code, §§ 452, 459.)

V. Because this Court has yet to appoint habeas corpus counsel, petitioner has not been provided a reasonable opportunity to conduct a full factual investigation and development through access to this Court's subpoena power and other means of discovery, and to interview material witnesses without interference from State actors, and as a result identification of all potentially meritorious claims is not presently feasible.

W. Petitioner's conviction and death sentence were obtained in violation of his rights under the United States Constitution, as well as his rights under the California Constitution, state law, and international law. In an amended habeas corpus petition, to be filed within 36 months after appointment of habeas corpus counsel, petitioner will set forth with specificity additional



claims of state and federal constitutional violations that entitle him to relief, along with facts and exhibits supporting those claims.

### **FIRST CLAIM FOR RELIEF**

#### **Petitioner was Deprived of His Right to the Effective Assistance of Counsel and to a Fair and Reliable Determination of Guilt, the Special Circumstance Finding, and Penalty by Trial Counsel's Prejudicially Deficient Performance.**

I. Petitioner's confinement, judgment of conviction, and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to a trial by a fair and impartial jury; a reliable, fair, non-arbitrary, and non-capricious determination of guilt and penalty; the effective assistance of counsel; present a defense; confrontation and compulsory process; the privilege against self-incrimination; the enforcement of mandatory state laws; a trial free of materially false and misleading evidence; a fair trial; an impartial and disinterested tribunal; equal protection; due process of law; and a fair and objective judicial determination pursuant to California Penal Code section 190.4, subdivision (e), as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; article I, sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution; state statutory and decisional law; and international law as set forth in treaties, customary law, human rights law, and under the doctrine of jus cogens, because petitioner's trial counsel rendered constitutionally deficient representation in failing to adequately investigate, prepare, and present meritorious guilt and special circumstance defenses and potential penalty phase evidence, in failing to effectively request, object to, and litigate jury instructions, and in failing to competently object to and litigate motions relating to the exclusion and admission of improper and prejudicial evidence and argument. Defense counsel's representation fell below prevailing standards of professional care and this deficient performance prejudiced petitioner at all critical stages of the criminal proceedings.

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

A. Petitioner's trial counsel's request for an inapplicable and detrimental instruction, CALJIC No. 4.20, and/or his failure to request an explanatory instruction that CALJIC No. 4.21 is an exception to the general rule stated in CALJIC No. 4.20, fell below an objective standard of reasonably competent trial assistance within the meaning of the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution.

1. Petitioner was charged and convicted of one count of violating Penal Code section 289, and one count of first-degree murder, and the jury found true a special circumstance allegation pursuant to Penal Code section 190.2, subdivision (a)(17)(xi) (murder while engaged in violation of Penal Code section 289).

2. On petitioner's automatic appeal, this Court found that the jury convicted petitioner of first degree murder based on a felony-murder theory premised on the Penal Code section 289 violation. (*People v. Morgan, supra*, 42 Cal.4th at pp. 613, 617-620; Penal Code section 189.)

3. At trial, prosecution witnesses testified that petitioner consumed several alcoholic beverages and appeared to be intoxicated on the night of the crimes. (RT 970-976, 980, 982, 988, 1001-1002.)

4. Intoxication is a partial defense to specific intent crimes in that it may negate the specific intent element. (Pen. Code § 22.)

5. Felony-murder based on a violation of Penal Code section 289 under Penal Code section 189, and the special circumstance codified in Penal Code section 190.2,

subdivision (a)(17)(xi), all include specific intent elements, as this Court recognized on petitioner's automatic appeal. (*People v. Morgan, supra*, 42 Cal.4th at p. 619; see also *People v. Senior* (1992) 3 Cal.App.4th 765, 776.)

6. Based on the evidence of alcohol intoxication presented at petitioner's trial, the trial court granted the request of petitioner's trial counsel to instruct the jury on the partial defense of intoxication pursuant to CALJIC Nos. 4.20, 4.21, and 4.22. (RT 1312, 1421-1422; CT 563-565.)

7. The first paragraph of CALJIC No. 4.20, read to petitioner's jury, instructed as follows: "The law provides that no act committed by a person while in the state of voluntary intoxication is less criminal by reason of his having been in such condition." (RT 1421; CT 563.)

8. At the time of petitioner's 1996 trial, the Use Note to CALJIC No. 4.20, as well as case law, specified that the instruction should not be given when specific intent crimes are charged. (See also, *People v. Spencer* (1963) 60 Cal.2d 64, 87; *People v. Cameron* (1994) 30 Cal.App.4th 591, 599-600; *People v. Rivera* (1984) 162 Cal.App.3d 141, 145.) This is so because it incorrectly implies jurors should disregard evidence of voluntary intoxication for purposes of determining whether the defendant harbored the specific intent required for the charged crime. (*People v. Cameron, supra*, 30 Cal.App.4th at p. 600.)

9. The instruction cited in paragraph 6, above, was given at the request of petitioner's trial counsel. (RT 1312.)

10. Petitioner's jury also was instructed pursuant to CALJIC No. 4.21, in relevant part, as follows: "If the evidence shows that the defendant was intoxicated at the time of

the alleged crime, you should consider that fact in determining whether the defendant has such *specific intent* and/or mental state.” (RT 1422; CT 564.)

11. At the time of petitioner’s 1996 trial, case law stated that the provision of CALJIC No. 4.21 did not correct the erroneous provision of CALJIC No. 4.20 in a case involving specific intent crimes absent an additional explanatory instruction, such as CALJIC No. 4.21.1, and that CALJIC No. 4.21 states an exception to the general rule expressed in CALJIC No. 4.20. (See, e.g., *People v. Rivera, supra*, 162 Cal.App.3d at p. 145; CALJIC No. 4.21.1 (1992 ed.) [“Voluntary Intoxication - Trial with General and Specific Intent Crimes”].)

12. Petitioner’s trial counsel requested neither CALJIC No. 4.21.1 nor a similar explanatory instruction, nor was such an instruction otherwise provided petitioner’s jury.

B. Petitioner’s trial counsel’s failure to adequately investigate and present additional evidence at the guilt phase in support of the partial defense of intoxication fell below an objective standard of reasonably competent trial assistance within the meaning of the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution.

1. In addition to the evidence of alcohol intoxication presented at trial, petitioner’s trial counsel was aware of additional evidence that petitioner had consumed large amounts of cocaine and steroids before the charged crimes.

2. Petitioner’s trial counsel failed to adequately investigate this evidence.

3. Petitioner’s trial counsel failed to present this evidence in support of the partial defense of intoxication.

C. The failure of petitioner's trial counsel to present expert testimony at the guilt phase regarding the intoxicating effects of alcohol, cocaine and steroids, and their potential effect on an intoxicated person's ability to form the requisite specific intent for violating Penal Code section 289 fell below an objective standard of reasonably competent trial assistance within the meaning of the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution.

1. At the time of petitioner's 1996 trial, expert testimony was admissible, and often necessary, to explain the intoxicating effects of controlled substances to lay jurors. (See, e.g., *People v. Kaurish* (1990) 52 Cal.3d 648, 696, and authorities cited therein; *In re Sixto* (1989) 48 Cal.3d 1247, 1259-1260.)

2. Petitioner's trial counsel failed to present the testimony of such an expert.

D. Petitioner's trial counsel's failure to adequately investigate and present the evidence outlined in paragraphs B and C, above, at the penalty phase of trial fell below an objective standard of reasonably competent assistance within the meaning of the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution.

1. At the time of petitioner's 1996 trial, evidence the defendant was intoxicated at the time of the crimes, as well as evidence of the defendant's drug addiction or dependency, was relevant and admissible mitigation. (Penal Code section 190.3, subs. (h),(k); see, e.g., *People v. Roldan* (2005) 35 Cal.4th 646, 739 [error to exclude such evidence from 1992 trial under state law and the federal constitution].)

2. Petitioner's trial counsel was aware of evidence that petitioner consumed not only alcohol but also large quantities of cocaine and steroids before the crimes.

3. At penalty phase petitioner's trial counsel did not present the evidence cited in paragraph 2, or evidence of the intoxicating effects of those controlled substances, or any evidence that petitioner was dependent on, or addicted to, controlled substances.

E. It is reasonably probable the jury's verdicts finding petitioner guilty of violating section 289 and guilty of first degree murder under a section 289 felony-murder theory, and finding true the section 190.2, subdivision (a)(17)(xi) special circumstance allegation, would have been more favorable to petitioner were it not for the unreasonable performance of petitioner's trial counsel as outlined in Paragraphs A-C, above.

F. It also is reasonably probable the jury's penalty verdict would have been more favorable to petitioner were it not for the unreasonable performance of petitioner's trial counsel as outlined in Paragraphs A-C, above.

#### **PRAYER FOR RELIEF**

WHEREFORE, petitioner respectfully requests that this Court:

1. Deem this petition to be properly and timely filed under the laws of California and the rules and policies of this Court;
2. Permit petitioner to amend this petition within 36 months after the appointment of habeas corpus counsel to include additional claims as determined by habeas corpus counsel;
3. Defer informal briefing on this petition, should this Court desire such briefing, until petitioner has filed the amended petition and provided the Court with all reasonably available documentary evidence in support of the allegations in the amended petition;
4. Following the filing of the amended petition, order respondent to show cause why petitioner is not entitled to the relief sought;

5. Grant petitioner sufficient funds to secure investigative and expert assistance as necessary to prove the facts supporting petitioner's claims for habeas corpus relief;

6. Grant petitioner leave to conduct discovery, including the right to take depositions, request admissions, propound interrogatories, issue subpoenas for documents and other evidence, and afford petitioner the means to preserve the testimony of witnesses;

7. Order an evidentiary hearing at which petitioner will be permitted to offer further proof in support of his claims for habeas relief;

8. Take judicial notice of the record on appeal and the briefing in *People v. Morgan*, California Supreme Court Case No. S055130.

9. After full consideration of the issues raised in this petition and petitioner's amended petition, issue a writ of habeas corpus relieving petitioner from the judgment and sentence of death imposed upon petitioner in Orange County Superior Court Case No. 94ZF0036 on July 31, 1996.

10. Grant petitioner such further relief as is appropriate and in the interests of justice.

Dated: April 4, 2008

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT

By: Michael G. Millman  
Michael G. Millman  
Attorney For Petitioner Edward Patrick Morgan

VERIFICATION

I, Michael G. Millman, declare as follows:

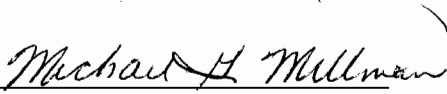
I am an attorney admitted to practice in the State of California.

I am authorized to file this petition for writ of habeas corpus on behalf of petitioner, Edward Patrick Morgan, who is confined and restrained of his liberty at San Quentin Prison, San Quentin, California.

I make this verification because petitioner is incarcerated in a county different from that of my law office.

I have read the petition and I am informed and believe the matters therein to be true, and on that ground allege that the matters stated therein are true.

Executed under penalty of perjury on April 4, 2008, in San Francisco, California.

  
Michael G. Millman



**DECLARATION OF SERVICE BY MAIL**

*In re Edward Patrick Morgan*, Automatic Appeal No. S055130

I, Karen Thomson, declare that I am over the age of 18 years and not a party to the within cause; my business address is 101 Second Street, Sixth Floor, San Francisco, California 94105. I served a true copy of the attached:

**PETITION FOR WRIT OF HABEAS CORPUS**

on each of the following by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Randall D. Einhorn  
Office of the Attorney General  
110 West A Street, Suite 1100  
San Diego, CA 92101

C. Delaine Renard  
Deputy State Public Defender  
221 Main Street, 10<sup>th</sup> Floor  
San Francisco, CA 94105


Mr. Edward Patrick Morgan  
Post Office Box K-17000  
San Quentin, CA 94974

Michael G. Millman  
Executive Director  
California Appellate Project  
101 Second Street, 6<sup>th</sup> Floor  
San Francisco, CA 94105

Each said envelope was then on April 7, 2008, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty that the foregoing is true and correct.

Executed on April 7, 2008, at San Francisco, California.

  
\_\_\_\_\_  
Karen Thomson  
Declarant