

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

Samuel Zamudio Jimenez,

On Habeas Corpus

Case No.

(*People v. Zamudio*, Supreme Court
No. S074414)

(Los Angeles County Super. Ct. No.
VA036217)

PETITION FOR WRIT OF HABEAS CORPUS

CRISTINA BORDÉ (Bar No. 195464)
SARA COHBRA (Bar No. 193270)
MÓNICA OTHÓN (Bar No. 241543)
HABEAS CORPUS RESOURCE CENTER
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: 415-348-3800
Facsimile: 415-348-3873

Attorneys for Petitioner Samuel Zamudio
Jimenez

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re)	Case No.
Samuel Zamudio Jimenez ¹ ,)	Related to Automatic Appeal Case No. S074414
On Habeas Corpus)	Los Angeles Superior Court Case No. VA036217

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 THE STATE OF CALIFORNIA:

Petitioner, Samuel Zamudio Jimenez, through his counsel, the Habeas Corpus Resource Center (hereinafter "HCRC"), by this verified Petition for Writ of Habeas Corpus (hereinafter "petition"), petitions this Court for a writ of habeas corpus and sets forth the following facts and causes for the issuance of the writ:

I. PROCEDURAL HISTORY

A. BACKGROUND

1. Mr. Zamudio is unlawfully confined and restrained of his liberty at San Quentin State Prison, San Quentin, California by Warden Robert L. Ayers, Jr. and by Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation pursuant to the judgment in Los Angeles County Superior Court Case Number VA036217 rendered on

¹ Mr. Zamudio's surnames are transposed and misspelled in the caption of the trial court record. This caption contains petitioner's correct name.

2. This petition is filed now to effectuate this Court's order appointing Mr. Zamudio's habeas corpus counsel on June 27, 2007, permit the investigation and presentation of potentially meritorious claims before this Court within the time frame permitted by state law, and afford Mr. Zamudio the benefit of counsel's assistance. If Mr. Zamudio is not permitted to file this petition and to amend it within three years of the appointment of habeas counsel, he 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.

3. On June 27, 2007, this Court appointed HCRC as habeas corpus and executive clemency counsel of record for Mr. Zamudio.

4. This Court's appointment order provides that any state habeas petition filed on behalf of Mr. Zamudio will be presumed timely if it is filed within thirty-six months of the date of the order, which is on or before June 28, 2010. This Court also specified that any successive petition filed within those thirty-six months is "presumed . . . justified or excused (see *In re Clark* (1993) 5 Cal.4th 750, 774-782), in light of this court's delay in appointing habeas corpus/executive clemency counsel on behalf of appellant Samuel Jiminez Zamudio." This petition, and any amendment thereto filed on or prior to June 28, 2010, are therefore timely.

5. If Mr. Zamudio is unsuccessful in seeking relief in this Court from his convictions and sentences, he 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 him to file his federal habeas petition within one year following the date on which this Court's affirmance of the convictions and sentence on direct appeal becomes final – or 28 U.S.C. section 2263(a) -- which would require him 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 Mr. Zamudio's judgment and sentence as modified in its opinion issued April 21, 2008, and denied the petition for rehearing on June 11, 2008.

6. If not permitted to immediately file a state habeas petition that may be amended within three years of the appointment of habeas counsel, Mr. Zamudio will be either deprived of the presumptive timeliness period for the preparation of his state habeas petition or forced to enter federal court prematurely.

7. Thus, given these extraordinary circumstances, in order to (1) provide Mr. Zamudio's counsel with the amount of time for the filing of a fully developed state petition for habeas corpus that will be presumed timely under this Court's policies and rules, and (2) afford his 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. sections 2244(d)(2), 2263(b)(2), Mr. Zamudio now files this petition, with the intention of amending this petition within three years of June 27, 2007.

8. Additionally, Mr. Zamudio requests that informal briefing on this petition be deferred pending the filing of an Amended Petition. *See In re Gregory Scott Smith*, No. S13847 (Cal. Dec. 13, 2006) (order 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); *In re Carmen Lee Ward*, No. S142694 (Cal. June 27, 2007, and July 3, 2007) (order, amended July 3, 2007, granting petitioner's Motion to Defer Informal Briefing on Amended Petition for Writ of Habeas Corpus until either petitioner files all reasonably available documentary evidence in support of the allegations in the

Amended Petition, and any additional allegations or claims for relief; or the period of presumptive timeliness expires).

9. In support of his request for relief, Mr. Zamudio offers the following verified facts and allegations:

B. LOWER COURT PROCEEDINGS

1. On February 11, 1996, Elmer Howard Benson and Gladys Lorene Benson were found dead in their home. On the same day Mr. Zamudio, the Bensons' friend and neighbor, was arrested by the South Gate Police Department for their murders. (1 RT 92-93, 1930, 2632; 1 CT 28.)²

2. On February 14, 1996, the Los Angeles District Attorney filed a Felony Complaint charging Mr. Zamudio with four felony counts, as follows:

a. Count one and two charged Mr. Zamudio with the murders of Mr. and Mrs. Benson, in violation of California Penal Code section 187(a), and using a knife in these offenses, causing the offenses to be serious felonies within the meaning of Penal Code section 1192.7(c)(23).

b. Count one and two further alleged that the offenses in those counts were special circumstances within the meaning of Penal Code section 190.2(a)(3) and were committed while engaged in the commission of the crime of robbery, within the meaning of Penal Code section 190.2(a)(17). (1 Suppl. CT 1-5.)

c. Counts three and four charged Mr. Zamudio with second-degree robberies of Mr. and Mrs. Benson in violation of Penal Code section 211, and using a knife in the commission of the offenses, causing

² Throughout this petition, the Reporter's Transcript is cited as RT, the Clerk's Transcript as CT and supplemental volumes of the CT as Suppl. CT. The volume number of the Clerk's and Reporter's Transcript precedes the CT or RT designation and the page reference follows.

the offenses to be serious felonies within the meaning of Penal Code section 1192.7(c)(23). (1 Suppl. CT 1-5.)

3. Mr. Zamudio requested counsel on February 14, 1996, and the Los Angeles County Public Defender was appointed to represent him. (1 CT 85.)

4. On February 29, 1996, Mr. Zamudio was arraigned and entered a plea of not guilty to all charges. Mr. Zamudio was represented by Deputy Public Defender John Francis Montoya, Jr. during arraignment and throughout his trial. (1 CT 86.)

5. On April 4, 1996, the district attorney filed an Amended Complaint, changing counts three and four of the complaint from second degree robbery to first degree residential robbery in violation of California Penal Code section 211. (1 CT 80-84.)

6. The preliminary hearing was held in Los Angeles County Municipal Court on July 10, 1996. At the end of the hearing Mr. Zamudio moved to dismiss the Amended Complaint for insufficiency of evidence, in particular, Counts 3 and 4, alleging robbery of the victims. The court denied the motion to dismiss and held Mr. Zamudio to answer on all counts and to appear for arraignment on July 24, 1996, in Superior Court. (1 CT 1-79.)

7. On July 24, 1996, the prosecution filed an Information in Superior Court alleging two counts of felony murder in violation of California Penal Code section 187(a) and two counts of first degree residential robbery in violation of Penal Code section 211. The Information further alleged that the two counts of murder met the multiple murder special circumstances under Penal Code section 190.2(a)(3) and were committed while engaged in robbery under the felony-murder special circumstances within the meaning of Penal Code section 190.2(a)(17). (1

CT 101-105.)

8. On July 24, 1996, Mr. Zamudio appeared in Los Angeles County Superior Court before Judge Dewey Lawes Falcone for arraignment. Mr. Zamudio pled not guilty to all charges. (1 CT 113.)

9. Jury selection began on October 15, 1997, and concluded on October 23, 1997. (2 CT 414, 424.)

10. The guilt phase of the trial began on October 24, 1997, and ended on November 12, 1997. Jury deliberations began on that same day at 3:19 p.m. (2 CT 426, 450.) On November 17, 1997, after a three-day weekend, the jurors found Mr. Zamudio guilty on all counts and found the charged special circumstances were true. (2 CT 486-88.)

11. The penalty phase began on November 19, 1997, and concluded on November 20, 1997. (2 CT 517-19.) On November 21, 1997, the jury returned a verdict of death. (2 CT 528.)

12. On July 22, 1998, the trial court denied Mr. Zamudio's motion for a new trial, except as to an issue of juror misconduct, which was reserved for further hearing. (3 CT 840-41.)

13. On August 7, 1998, and September 14, 1998, the court held hearings on a defense motion concerning juror misconduct and denied the motions on those dates. (3 CT 878-79, 894.)

14. On October 5, 1998, the trial court denied Mr. Zamudio's motion for modification of the death verdict and sentenced him to death. (3 CT 895.)

C. PROCEEDINGS IN THIS COURT

1. Mr. Zamudio's convictions and judgment of death are final as to this Court in that his proceedings on direct appeal have concluded; however, his Petition for Writ of Certiorari remains pending before the United States Supreme Court.

a. On August 1, 2002, this Court appointed the State Public Defender to represent Mr. Zamudio in his automatic appeal.

b. The certified record on appeal was filed in this Court on September 23, 2003. Appellate counsel filed Mr. Zamudio's Opening Brief on July 2, 2004. The State filed its Respondent's Brief on March 9, 2005. On November 15, 2005, appellate counsel filed Mr. Zamudio's Reply Brief. On January 8, 2008, appellate counsel filed Mr. Zamudio's Supplemental Opening Brief. The State filed its Supplemental Respondent's Brief on January 16, 2008. The direct appeal was argued and submitted on February 6, 2008.

c. On April 21, 2008, this Court issued its opinion vacating one multiple-murder special-circumstance, but otherwise affirming the guilt and penalty judgments.

d. The California Public Defenders Association and the Los Angeles County Public Defender submitted requests for modification of this Court's opinion on May 5, 2008. On May 6, 2008, appellate counsel filed a petition for rehearing. On June 11, 2008, this court modified its opinion with no change to the judgment and denied the petition for rehearing. *People v. Zamudio*, 43 Cal. 4th 327 (2008).

e. Appellate counsel filed a Petition for Writ of Certiorari in the United States Supreme Court on June 12, 2008. The State filed a brief in opposition on August 14, 2008.

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

3. This petition is necessary because Mr. Zamudio has no other plain, speedy, or adequate remedy at law for the substantial violations of his constitutional rights as protected by the First, Fourth, Fifth, Sixth, Eighth,

and Fourteenth Amendments to the United States Constitution; the California constitutional analogues; state statutory law, including but not limited to California Penal Code sections 190 *et seq.*, 1367 *et seq.*, 1054 *et seq.*, and 1473; and international law in that the full factual bases for the claims raised in this petition lie outside the certified record on appeal; the claims involve allegations detailing the inadequacy of trial counsel's representation; and Mr. Zamudio's direct appeal has concluded in this Court.

4. Mr. Zamudio requests that this Court take judicial notice of all of the records, documents, exhibits, orders, and pleadings filed in this case in the courts below in Los Angeles County Superior Court Case No. VA036217.

5. Mr. Zamudio requests that this Court take judicial notice of the certified record on appeal and all of the briefs, motions, orders and other documents filed in *People v. Samuel Jiminez Zamudio*, California Supreme Court Case No. S074414.

a. Mr. Zamudio makes this request to avoid duplication of those voluminous automatic appeal documents, a copy of which this Court and counsel for respondent already possess.

b. By this request, Mr. Zamudio re-alleges the claims made on his behalf in the automatic appeal so that they may be considered cumulatively with the claims raised herein in assessing the existence of constitutional errors and the prejudice flowing from them.

6. Mr. Zamudio requests the allegations herein be considered cumulatively with each other, as well as with the arguments and claims for relief set forth in the automatic appeal, in assessing the existence of

constitutional errors and any prejudice from these multiple errors.³

7. Mr. Zamudio has provided this Court with the allegations and claims as are known to date. He has not provided further documentation because the full documentation in support of the verified allegations is not currently available due to the time constraints under which he is operating.

a. Mr. Zamudio thus far has been unable to obtain documents from several governmental, judicial, and public agencies, both in California and outside the state, that are known to him to exist and that are necessary to demonstrate the bona fides of his allegations.

b. The HCRC staff assigned to this case have begun to

³ Such a cumulative review is mandated under the Eighth and Fourteenth Amendments in light of the heightened scrutiny and need for reliability in capital cases. Moreover, Mr. Zamudio's request is consistent with this Court's jurisprudence, *see, e.g., People v. Holt*, 37 Cal. 3d 436, 458-59 (1984) (cumulating effect of errors); *People v. Cardenas*, 31 Cal. 3d 897, 907 (1982) (recognizing cumulative error analysis), and its special duty in capital cases to examine the complete record to ascertain whether a capital-charged defendant received a fair trial. *People v. Easley*, 34 Cal. 3d 858, 863 (1983); *see also United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (a balkanized, issue-by-issue harmless error review is far less effective than analyzing the overall effect of all errors); *United States v. Tory*, 52 F.3d 207, 211 (9th Cir. 1995); *United States v. Wallace*, 848 F.2d 1464, 1475-76 (9th Cir. 1988).

Multiple deficiencies merit a collective or cumulative assessment of prejudice, because errors that do not require that a judgment be set aside when viewed alone, or do not rise to the level of a constitutional violation when viewed singly, may violate the federal constitution and require relief in the aggregate. *Alcala v. Woodford*, 334 F.3d 862, 883-94 (9th Cir. 2003) (cumulating the issues of both error and prejudice); *Killian v. Poole*, 282 F. 3d 1204, 1211 (9th Cir. 2002), *cert. denied*, 537 U.S. 1179 (2003); *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993) (cumulating trial court errors and deficiencies of trial counsel); *United States v. Tucker*, 716 F.2d 576, 595 (9th Cir. 1983); *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979); *see also Henry v. Scully*, 78 F.3d 51, 53 (2nd Cir. 1996).

identify missing discovery materials and will file a post-conviction discovery motion pursuant to California Penal Code section 1054.9 as soon as practicable.

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

II. CLAIMS FOR RELIEF

A. CLAIM ONE: MR. ZAMUDIO WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S CONSTITUTIONALLY DEFICIENT PERFORMANCE AT THE GUILT PHASE OF HIS TRIAL.

Mr. Zamudio's confinement, judgment of conviction, and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to the effective assistance of counsel; a trial by a fair and impartial jury; a reliable, fair, non-arbitrary, and non-capricious determination of guilt and penalty; the presentation of 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; equal protection; due process of law; an impartial and disinterested tribunal; 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 Mr. Zamudio's trial counsel rendered constitutionally deficient representation in failing adequately to investigate, prepare, and present meritorious guilt and special circumstance defenses; to competently litigate motions relating to the exclusion and admission of evidence; and to object to unlawful and prejudicial acts undertaken by the prosecution during the trial proceedings. Trial counsel's representation fell below prevailing standards of professional care and this deficient performance prejudiced Mr. Zamudio at all critical stages of the criminal proceedings.

Trial counsel unreasonably and prejudicially failed to conduct a timely or adequate investigation of the potential guilt issues, did not make informed and rational decisions regarding potentially meritorious defenses and tactics, and did not develop or present an adequate or coherent trial defense. Trial counsel's errors and omissions were such that a reasonably competent attorney acting as a diligent and conscientious advocate would not have performed in such a fashion.

Reasonably competent counsel handling a capital case at the time of Mr. Zamudio's trial would have known that a thorough investigation of the prosecution's theories of guilt, an independent analysis of the evidence supporting those theories, a review and examination of law enforcement's investigation, a thorough examination of witnesses, and a review of potential defenses were essential to the development and presentation of a defense at trial.

Reasonably competent counsel also would have recognized that a thorough investigation of Mr. Zamudio's background and family history,

including, but not limited to, evidence of his physical, psychological, psychiatric, cognitive, emotional, and social vulnerabilities and the developmental operative impact of such deficits on his functioning and behavior was essential to adequate preparation for the guilt phase of the trial. Trial counsel's performance fell significantly below then-existing standards for trial counsel representing capital clients, which required counsel to formulate a defense theory based upon in-depth investigation. *See, e.g.*, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, §§ 11.4.1, 11.7.1 (1989).

With respect to each error set forth below, (1) a reasonably competent attorney acting as a diligent and conscientious advocate at the time of Mr. Zamudio's trial would not have performed in such a fashion, and (2) but for the errors, singly or cumulatively, the jury would not have found Mr. Zamudio guilty of first degree murder and found the charged special circumstances true. Moreover, trial counsel's misguided and unreasonable defense theory in the guilt phase so infected the penalty phase that there is a reasonable probability the jury would not have sentenced Mr. Zamudio to death if trial counsel had pursued a different avenue at the guilt phase.

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

1. Trial counsel unreasonably failed to object to multiple instances of prosecutorial misconduct during the guilt phase opening statement, and closing and rebuttal argument. No reasonable strategy accounts for trial counsel's failure to object to the prosecutor's misconduct, which had the injurious effect of misleading and deceiving the jury regarding Mr. Zamudio's guilt of the charged crimes. The prosecutor's

misconduct included, but was not limited to the following:

a. The prosecutor repeatedly and unlawfully referred to and argued facts and evidence in his opening statement subsequently not introduced in trial in violation of Mr. Zamudio's constitutional right to confront and cross examine witnesses and to due process of law. Improper and prejudicial information argued and presented as facts during the prosecution's opening statement, which was not subsequently introduced at trial, included but was not limited to the following:

(1) The prosecutor unlawfully stated as a fact during his opening statement that, after killing Mrs. Benson, Mr. Zamudio walked towards Mr. Benson, placing his palm on the doorway along the way. (9 RT 1639.) No evidence to support such a statement was presented at trial. In fact, at least three of the prosecution's witnesses stated that they could not tell when the palm prints were left on the doorway. (10 RT 1776; 11 RT 1922; 12 RT 1992-93.) Given that Mr. Zamudio had been in the Benson's home many times, the prosecutor's assertion that the palm print was left after killing Mrs. Benson was not a reasonable inference from the evidence. (16 RT 2573, 2629; 17 RT 2676, 2678; 18 RT 2810.) The prosecutor's inflammatory statement improperly bolstered the prosecution's evidence and suggested that the prosecution had a stronger case and more incriminating facts than it actually had.

(2) Similarly during his opening statement, the prosecutor unlawfully stated that the bloody shoeprints left in the Bensons' kitchen were "made by [Mr. Zamudio's] shoes and no other shoes," even though the evidence presented at trial did not support this statement. (9 RT 1639.) The prosecution inappropriately overstated its evidence by suggesting to the jury that all of the shoeprints in the Bensons' house were made by Mr. Zamudio, though four out of the six shoeprints found in the

kitchen had not been adequately examined and compared to Mr. Zamudio's shoes, and were not matched to Mr. Zamudio's shoes to the exclusion of all others. (13 RT 2176, 2188, 2215-18.) The evidence presented at trial was inconsistent with and did not support the statements the prosecution made during its opening statement. The prosecutor's misstatement improperly inflated the strength of the prosecution's evidence and violated Mr. Zamudio's constitutional rights.

(3) The prosecutor falsely characterized Mr. Zamudio's actions on the day of his arrest in order to implant in the jurors' minds the inference that Mr. Zamudio's behavior implied he was guilty. The prosecutor stated that Mr. Zamudio "dragged [Officer] Scott over into his house," to show him the calendar where Mr. Zamudio had marked the date on which Mr. Zamudio was to pay the Bensons back. (9 RT 1643.)

(a) Contrary to the prosecutor's implication that Mr. Zamudio "dragged" Officer Scott from outside all the way into his house, Officer Scott testified that he was already inside Mr. Zamudio's home, concluding a telephone call on Mr. Zamudio's home telephone, when Mr. Zamudio directed Officer Scott to the kitchen to view the calendar. (11 RT 1956-58.)

(b) The prosecutor's erroneous statement implanted false impressions in the jurors' minds regarding Mr. Zamudio's behavior in violation of Mr. Zamudio's constitutional rights.

b. The prosecutor repeatedly and unlawfully referred to and argued facts not in evidence during his closing and rebuttal argument in violation of Mr. Zamudio's right not to testify, to confront and cross-examine witnesses, and to due process of law. Inflammatory and prejudicial information argued to the jury as facts, but about which there had been no evidence presented during the guilt phase of the trial, included

but was not limited to the following:

(1) The prosecutor argued, without basis in the evidence, that the fact that Mrs. Benson did not immediately provide Mr. Zamudio with the loan he requested proved that she did not trust him. (20 RT 2998.)

(a) In fact, during pretrial motions, the prosecution stipulated that the prosecution's own witness, Martin Van Lierop of the South Gate Police Department, would testify to different reasons for Mrs. Benson waiting to provide Mr. Zamudio with the money – she wanted him to provide her with collateral, which he had to go obtain, and she wanted to discuss the loan with her husband outside of Mr. Zamudio's presence. (1 RT 118-19.) Trial counsel was ineffective for failing to elicit this testimony during trial in order to fully dispel any inference that Mrs. Benson had Mr. Zamudio return later in the day because of a lack of trust.

(b) The prosecution's pretrial stipulation regarding the reason Mrs. Benson did not give Mr. Zamudio the money immediately was consistent with testimony presented at trial regarding the Benson's money-lending practices. The victims' children, Linda Bouffard and Micki Downey, testified that their parents, who were "depression-era people," often loaned money to friends and family members, but required that all borrowers, family members and non-family members alike, set up a monthly repayment schedule and sign a promissory note, and often required that they provide collateral as well. (11 RT 1864; 12 RT 2008.)

(c) The prosecutor's manufacturing of evidence that the Bensons distrusted Mr. Zamudio was prejudicial misconduct. The prosecutor's fabrication suggested to the jury that it had extra-record information that Mr. Zamudio had behaved dishonestly

towards the Bensons such that they came to distrust him. This inflammatory statement caused the jury to discredit unimpeached and un rebutted testimony indicating that Mr. Zamudio had a good relationship with the Bensons and to believe that the Bensons disliked and even feared Mr. Zamudio.

(2) The prosecutor unfairly and unlawfully, and without any basis in the evidence presented, stated to the jury that the killer had to be Mr. Zamudio because he knew that the victims had money in the house even though the victims kept their money hidden from him.

(a) The prosecutor argued that “since [Mr. Zamudio lived] right next door, he knows [Mrs. Benson] never left anywhere to go get that money. She had it in the house somewhere and didn’t want him to see where she got it from. So you know that the person who committed the crimes knew that he [sic] had money in there, and you know he knew they had money in there.” (20 RT 2998-99.)

(b) No evidence whatsoever was presented about Mr. Zamudio’s or Mrs. Benson’s activities between the time Mr. Zamudio asked Mrs. Benson for a loan and the time Mrs. Benson provided him with the money he requested, or any reason for the delay of only several hours between Mr. Zamudio’s request for the loan and the time Mrs. Benson gave him the money.

(c) The prosecutor’s statements misled the jurors by suggesting that the prosecution had information that had not been presented to them that Mr. Zamudio spent the time between his asking for the loan and his receiving the money watching the Bensons’ house and monitoring Mrs. Benson’s movements. This suggestion inflamed the passions of the jury against Mr. Zamudio by portraying him as a stalker who was waiting for an opportunity to harm the Bensons.

(3) The prosecutor argued, without any basis in the evidence presented, that the reason there was no blood found on Mr. Zamudio's clothing was that Mr. Zamudio changed his clothes. (20 RT 2999, 3004.) This argument was contradicted wholesale by all of the undisputed evidence presented about Mr. Zamudio's clothing on the day prior to and the day of the Bensons' death. Every single witness who testified about Mr. Zamudio's clothing stated that Mr. Zamudio was wearing the same clothes in the morning of February 11, 1996 when he arrived home after the police investigation had begun that he had worn the previous day. (*See, e.g.*, 16 RT 2580, 2583, 2590, 2610-11, 2631; 18 RT 2809, 2814-15; 19 RT 2844, 2850.)

(4) To manufacture support for this faulty argument, the prosecutor stated that Mr. Zamudio had "a lot of changes of clothes," though there was no evidence presented at trial to support such an assertion. (20 RT 3004.) Testimony presented regarding the amount of clothes Mr. Zamudio possessed indicated that he had *few* clothes. Mr. Zamudio's brother-in-law Jesus Barron, who lived with Mr. Zamudio, testified that Mr. Zamudio did not have "that many" changes of clothes. (18 RT 2816.)

(5) The prosecutor informed the jury, contrary to all evidence presented, that Mr. Zamudio "cleaned up." (20 RT 3005.) The evidence presented by all witnesses who testified about Mr. Zamudio's whereabouts was that he did not shower or change his clothing between the evening of February 10, 1996, when the Bensons were alive, and the morning of February 11, 1996, when the Bensons' bodies were found. (16 RT 2580, 2583, 2590, 2610-11, 2631; 18 RT 2809, 2814-15; 19 RT 2844, 2850.)

(6) The prosecutor told the jury, without basis in the

evidence, that Mr. Zamudio had “blood all over him.” (20 RT 3003.) This was not only contrary to the prosecutor’s earlier observation that Mr. Zamudio did *not* have blood all over him (20 RT 2999), but also was contrary to the evidence presented that no blood was found on Mr. Zamudio’s person and most of his clothing, including his pants, shirt, and undergarments. (10 RT 1816-17; 12 RT 2089, 2127-28, 2130, 2138; 13 RT 2292-95; 15 RT 2380-82; 16 RT 2593; 18 RT 2809; 19 RT 2844-45, 2850.)

(7) The prosecutor unfairly and unlawfully, and without any valid basis in the evidence presented, told the jury that they did not need to consider the criminologist Stephan Schliebe’s testimony in determining that the shoeprints in the Bensons’ kitchen were made by Mr. Zamudio’s shoes because they could look at the overlays presented in trial and make that determination themselves.

(a) Referring to the shoeprints, the prosecutor stated that “it doesn’t require expert testimony You can look at it for yourself” (20 RT 3000.) No evidence supported the prosecution’s argument that the expert’s determination was so obvious that a lay person could conclude that the shoeprints in the Bensons’ kitchen were made by Mr. Zamudio.

(b) The prosecutor made this statement in closing argument after the court sustained an objection to the prosecution’s question of Schliebe regarding whether a lay person could look at the shoeprint overlays and come to the same conclusion arrived at by Schliebe. Before Schliebe could respond, the court sustained the defense objection, deemed the prosecution’s question of his expert inappropriate, and struck it from the record. (13 RT 2191-92, 2195.) Trial counsel was ineffective for failing to request that the court admonish the jury not to consider any suggestion from this question as evidence that the shoeprints could be

evaluated accurately by lay people.

(c) In violation of the court's order striking the inappropriate question, the prosecutor endorsed the suggestion that the shoeprints could be evaluated without an expert. The prosecution's wholly unsupported assertion improperly inflated the strength of the shoeprint evidence and relied on an improper question explicitly excluded by the court.

(8) The prosecution reiterated the false assertion made in the opening statement that all the shoeprints in the kitchen matched Mr. Zamudio's shoes. The prosecutor told the jury, "you can see from the little arrows and the rest of it that his shoes and no other shoes left those bloody footprints in that house. And this record shows no evidence in it to suggest anything other than that, period." (20 RT 3000.) The prosecutor's assertion did not match the evidence presented at trial. Schliebe testified that four out of the six shoeprints found in the kitchen had not been extensively examined and compared to Mr. Zamudio's shoes, and could not be matched to Mr. Zamudio's shoes to the exclusion of all others. (13 RT 2176, 2188, 2215-18.) The prosecutor's misstatement was designed to inflate the strength of the prosecution's evidence and violated Mr. Zamudio's constitutional rights.

(9) The prosecutor unlawfully, incorrectly, and prejudicially informed the jury that he was not able to present to the jury Mr. Zamudio's sock, on which the prosecution's experts had allegedly detected blood, because the sock was "still at the defense lab." (20 RT 3004.)

(a) The prosecutor's argument was incorrect because the reason the sock was not presented to the jury was because the court banned introduction of exhibits with blood. (10 RT 1831; 12 RT

2135-36.) The prosecutor's inaccurate statements were prejudicial as they misled the jury into believing that the defense lab had tested the sock, and that the defense could not disprove the prosecution's assertions regarding its incriminating effect.

(b) The prosecutor's false statement capitalized on previous misconduct during the trial when he elicited testimony from criminalist Gisele LaVigne that several pieces of clothing were released to the defense lab and had not been returned to her. (13 RT 2282; 15 RT 2419.) The trial court overruled counsel's objection to this line of questioning and motion for a mistrial, and this Court found no preserved error in the trial court's ruling. *See People v. Zamudio*, 43 Cal. 4th 327, 351-56 (2008).

(c) The prosecutor's questions of LaVigne at trial and reiteration that the defense lab had certain pieces of clothing during closing argument violated a host of constitutional rights including Mr. Zamudio's right to remain silent, against self-incrimination, to counsel, the presumption of innocence, a fair trial and due process. The questioning of LaVigne and reference to the defense lab in closing argument also improperly shifted the burden of proof to the defense by implying that Mr. Zamudio was guilty because trial counsel had not presented evidence from the defense lab's analysis of the clothing.

(d) Trial counsel had no reasonable basis for failing to object to the false and prejudicial argument made by the prosecutor regarding why he could not show the jury the sock. Counsel was also unreasonable in failing to object on the multiple constitutional grounds listed above to prevent the prosecutor from implying that the defense's failure to present evidence from the defense lab was evidence of Mr. Zamudio's guilt.

(10) The prosecutor unfairly and unlawfully, and without any valid basis in the evidence presented, told the jury that the blood found on Mr. Zamudio's sock was Mrs. Benson's. (20 RT 3004.)

(a) No evidence was presented at trial to suggest that the blood on Mr. Zamudio's sock belonged to Mrs. Benson. LaVigne, the prosecution's serologist, testified that she only examined the sock with a presumptive blood test, which does not even distinguish between human and animal blood. (15 RT 2382.) Accordingly, the evidence did not support the prosecutor's assertion that the blood on the sock belonged to Mrs. Benson.

(b) In spite of the *de minimus* probative value of the blood on the sock, the prosecutor unfairly and unlawfully bolstered the value of his argument-turned-evidence by suggesting that it was "common sense" not to test "every piece of blood found in this case." (20 RT 3004.) The prosecutor unlawfully implied to the jury that it was common sense not to test the sock because it was common sense to believe that Mrs. Benson's blood was on the sock. No evidence was presented that the crime lab did not test the sock because it assumed that the sock had Mrs. Benson's blood.

(c) The prosecutor also unlawfully and without basis in the evidence stated that it would take "years" to test all the evidence in the case. (20 RT 3004.) No witness testified as to how long it would have taken to test the relatively few items with blood that were collected in this case.

(11) The prosecutor argued, without any basis in the evidence presented at trial, that Mr. Zamudio's prior employment as a police officer in Mexico indicated that he can deal with violent people and is violent and aggressive himself. The prosecutor argued that "no one has

been a cop in Mexico or anywhere else that doesn't have a passing familiarity with violence, and doesn't have a thought of themselves being the type of person that can deal real well with *other* violent people. 'I can control *other* violent people. I know all about that stuff.'" (20 RT 3051 (emphasis added).) No evidence was presented at the guilt phase regarding the nature of Mr. Zamudio's responsibilities during his tenure in the police department in Mexico. The prosecutor's arguments that Mr. Zamudio "can deal real well with *other* violent people" was not supported by the evidence and was designed to implant in the jury's mind the false notion that Mr. Zamudio was violent and aggressive. The prosecutor concocted this argument in order to rebut the consistent and undisputed testimony given by all of Mr. Zamudio's family, friends, and acquaintances that he was a calm and peaceful person for whom violence was out of character.

(12) Relying on false and irrelevant extra-record evidence, the prosecutor unlawfully and prejudicially referred to good character evidence allegedly introduced in several notorious murder cases to discount the weight of uniform and undisputed evidence of Mr. Zamudio's non-violent nature. The prosecutor improperly argued that the undisputed evidence indicating Mr. Zamudio was not violent was characteristic of all trials of mass murderers.

(a) The prosecutor stated that as in Mr. Zamudio's case, in the case of notorious murderers such as Timothy McVeigh, Ted Bundy, and Charles Manson, there were also "people coming in and saying what a great guy he is." (20 RT 3052.) The prosecutor argued that the "fact of the matter is there's been no murderer in history ever that didn't have friends or family that could come in and say, oh, he's great. He wouldn't have done that." (*Id.*)

(b) The prosecutor further unlawfully

referred to facts not in evidence when he compared Mr. Zamudio's case to that of an "older lady up in Sacramento" who "killed a bunch of old men for their social security checks." (20 RT 3053.) The prosecutor explained that in the case of the old lady, her neighbors said that she was quiet, kept to herself, and would never murder someone, though at least 12 bodies were found buried under her house. The prosecutor argued that "I don't care who you are. You can bring family and friends in." (*Id.*)

(c) The prosecutor's reference to these notorious murder cases, which were not in evidence, was egregious misconduct that inflamed the jurors' passion and led them to discount the reliable and critical testimony regarding Mr. Zamudio's non-violent character.

(d) Trial counsel unreasonably failed to object to the prosecutor's unsupported comparison of Mr. Zamudio's case to details of other cases, which were not in evidence. Had counsel objected, the court would have excluded the evidence as the court did when counsel attempted to compare the case to that of OJ Simpson. (15 RT 2431.) The prosecutor's unsupported and false comparisons to other murder cases completely undermined the heart of the defense argument that Mr. Zamudio's non-violent character was inconsistent with the murders. No rational strategic reason can account for defense counsel's failure to object to this unrelated, inflammatory, and prejudicial reference to well-known murder cases.

(13) The prosecutor unlawfully fabricated evidence when he argued that Mr. Zamudio "knew" he was caught for committing the murders when police officers took his shoes. (20 RT 3054.) No evidence supports the prosecutor's egregiously prejudicial fabrication that Mr. Zamudio admitted to the charged crimes or expressed any

consciousness of guilt. On the contrary, all the testifying witnesses indicated that Mr. Zamudio maintained his innocence. (12 RT 2047-50, 2054-57, 2082, 2107-08, 2115-19.) The prosecutor's argument telegraphed to the jury that Mr. Zamudio had confessed to the crimes, though there was no such evidence. The prosecutor's argument coupled with counsel's unreasonable arguments that Mr. Zamudio killed the victims, though without the requisite mental state for first degree murder, had a devastating prejudicial effect. As a result, both defense counsel and the prosecutor falsely communicated to the jury that Mr. Zamudio had admitted to the crimes.

(14) The prosecutor committed unlawful misconduct when he fabricated evidence that Mr. Zamudio's income tax return was not filed until after Mr. Zamudio was in custody. (20 RT 3057.)

(a) The prosecutor implied during his cross examination of Mr. Zamudio's wife, Maria Irma Barron, that Mr. Zamudio's income tax return had not been filed until two weeks after Mr. Zamudio was arrested. (16 RT 2612-13.) During her trial testimony, Ms. Barron answered the prosecutor's inquiry on this topic in the negative and stated, "He did that before [he was arrested]. That is when he put in the claim, was before." (16 RT 2613.) Aside from Ms. Barron's testimony, no other evidence regarding when Mr. Zamudio's income tax return had been filed was elicited at trial.

(b) In spite of Ms. Barron's un rebutted testimony, the prosecutor stated as a fact during his rebuttal argument that the income tax return "was applied for after [Mr. Zamudio] was in custody." (20 RT 3057.) This statement discredited Ms. Barron's testimony by suggesting to the jury that the prosecutor had extra-record information to support his leading question. The statement also falsely

informed the jury that Mr. Zamudio was not expecting an income tax refund in the amount of \$2,403 at the time of the murders. The implications arising from the prosecutor's statement bolstered his theory that Mr. Zamudio robbed and killed the Bensons because he had no money and had no way to pay them back.

(c) Trial counsel was ineffective for failing to introduce evidence to rebut the false implications made by the prosecutor during Ms. Barron's testimony and for failing to object to the prosecutor's false assertion during his rebuttal argument.

c. The prosecution intentionally and unlawfully misstated the law in several critical respects, leading the jury to believe that the prosecution had lesser burdens of production and persuasion than is legally required.

(1) The prosecution unlawfully misstated the law related to first degree felony murder and the special circumstances of murder during the commission of a robbery. The prosecutor's repeated misstatements misled the jury to believe that they could find Mr. Zamudio guilty of first degree felony murder and the special circumstance true, even if the robbery was only incidental to the murder and without finding that Mr. Zamudio killed the victims in the course of or in order to further the robbery.

(a) During closing argument, the prosecutor stated that the Bensons "were robbed. They were murdered, period. That establishes the crimes. It also establishes the special circumstances." (20 RT 2995.) Contrary to the prosecutor's arguments, even if the victims were both robbed and killed, these facts alone were not sufficient to establish first degree murder or the truth of the robbery-murder special circumstance.

(b) The prosecutor then explained the

felony-murder rule by stating that it involved even accidental deaths or deaths under “any circumstance” which occur during a robbery. (20 RT 2995-96.) Following that erroneous explanation, the prosecutor told the jurors they did not need to consider whether Mr. Zamudio was guilty of first degree murder under the “classical, traditional murder theory . . . because if you find a robbery – and it’s obviously a robbery – those are first-degree murders, and those special circumstances are true, period.” (20 RT 2996.)

(c) The prosecutor’s description of the legal elements of first degree felony murder and the felony-murder special circumstance as including deaths that occur under “any circumstance” was incorrect and very prejudicial. First degree felony murder requires that the murder occur during the commission or attempted commission of the robbery or as a direct causal result of the robbery; while the felony-murder special circumstance requires that the murder was committed in order to carry out or advance the robbery or to facilitate escape therefrom or avoid detection. CALJIC 8.21 and 8.81.17. Under the prosecutor’s characterization of the law of first degree felony murder and the felony-murder special circumstance, the jurors were permitted to conclude that any death that occurred in any manner, by any cause, during a robbery, supported a conviction of first degree murder and a finding that the robbery-murder special circumstance was true. The prosecutor’s definition also erroneously conflated the legal elements for first degree felony murder and the felony-murder special circumstance.⁴

⁴ “The portion of CALJIC No. 8.81.17 requiring a finding that the killing was to advance, facilitate the escape from or avoid detection of the underlying felony distinguishes a felony-murder special circumstance from first degree felony murder, which requires only that the killing occur during the commission or attempted commission of the underlying felony.” *People v. Williams*, 30 Cal. App. 4th 1758, 1762 (1994).

(d) The prosecutor's description of the law of first degree felony murder and the felony-murder special circumstances misinformed the jurors that the prosecution had a lesser burden of production of evidence and proof than is actually required to convict of first degree felony murder and find true the robbery-murder special circumstance. As a result, the jurors were free to conclude that Mr. Zamudio was guilty of first degree murder, and that the robbery-murder special circumstance was true, simply because the victims were dead, without having to consider any evidence of how they died or whether the robbery was incidental to the murder, as the defense had argued.

(e) After the prosecutor misled the jury, defense counsel unreasonably failed to correct the prosecutor's misstatement of the law in his closing argument. The jury, therefore, did not have a reason to distrust and reject the prosecutor's explanation of the complicated legal terms in the jury instructions. Since one of the defense theories was that robbery was incidental to the murders, the prosecutor's misstatement of the law had a significant prejudicial effect.

(2) The prosecution intentionally, unlawfully, and prejudicially argued that the evidence presented supported a jury finding of premeditated and deliberate murder.

(a) During a jury instruction conference out of the presence of the jury, the prosecutor informed counsel and the trial court that the evidence did not support an instruction on premeditated and deliberate first-degree murder: "[W]e have either felony murder or we have the defendant's version that he is not guilty at all, so on that basis, after reevaluating the evidence in the case, I am not requesting traditional murder, the first or seconds on those theories." (19 RT 2932.)

(b) Notwithstanding the beliefs of both the

prosecutor and defense counsel that no evidence supported a theory of premeditated and deliberate murder, the court gave the first degree murder instruction on premeditated and deliberate murder. The court's reasoning was that in order to give the second degree murder instruction requested by counsel, the court had to also instruct on first degree premeditated and deliberate murder. (19 RT 2932-35.)

(c) Despite the prosecutor's statements that no evidence supported the traditional murder theory, the prosecutor argued to the jury: "On the circumstances of this case, you don't really need the felony murder rule. You're also being instructed on classical premeditated, deliberate murder. It's that as well." (20 RT 2996.)

(d) The prosecution presented no evidence to support an instruction or argument for premeditated, deliberate murder. Even under the prosecution's theory, Mr. Zamudio committed the murders out of an unconsidered and rash impulse. There is no evidence that Mr. Zamudio weighed and considered the question of killing the Bensons and the reasons for and against such a choice, and that having in mind those consequences he decided to kill. Accordingly, there is no evidence of premeditation and deliberation to support the first-degree murder instruction.

(e) There is also no evidence to support the prosecution's speculative alternative theory that, even if Mr. Zamudio killed Mrs. Benson without premeditation and deliberation, Mr. Zamudio nonetheless must have killed Mr. Benson with premeditation and deliberation. (20 RT 3051-52.) There is no evidence to show that Mrs. Benson was killed first or how much time passed between the murders. The pathologist called by the prosecution testified that the time of death estimates provided at trial for Mr. and Mrs. Benson were extremely rough,

had a window of error of about eight hours, and were of little value. (15 RT 2472, 2478-79.) Nothing in the evidence supports a reasonable inference that the killer weighed and considered killing the second victim.

(f) Given the lack of evidence to support an instruction on deliberate and premeditated murder, trial counsel erred in not objecting to such an instruction and the court erred in so instructing. Further, the prosecutor committed misconduct by arguing that the evidence supported such a theory of first degree murder and trial counsel unreasonably failed to object to his arguments.

(3) The prosecutor unlawfully and prejudicially informed the jury that the shoeprints alone constituted sufficient evidence to support Mr. Zamudio's conviction for first degree murder and the special circumstances. (20 RT 3000.) The prosecutor's statement misstated the prosecution's burden of persuasion. The prosecution expert's testimony that two bloody shoeprints in the kitchen appeared to match Mr. Zamudio's shoes is in no way sufficient to prove the element of intent necessary for a first degree murder conviction and a finding that the felony-murder special circumstances were true. The shoeprints alone do not show that Mr. Zamudio premeditated and deliberated before killing the Bensons or killed them in the course of a robbery or to facilitate the robbery.

(4) The prosecutor unlawfully and prejudicially informed the jury that the blood allegedly detected on Mr. Zamudio's watch alone constituted sufficient evidence to support Mr. Zamudio's conviction for first-degree murder and the special circumstances. (20 RT 3005.) The blood allegedly found on the watch is insufficient to show that Mr. Zamudio premeditated and deliberated the murders or killed them in the course of a robbery. The blood on the watch also fails to prove the necessary element of intent for the felony-murder special circumstance, that

the murder was committed in order to facilitate the robbery.

d. The prosecutor unlawfully, erroneously, and prejudicially argued that counsel was presenting a sham and underhanded defense designed to deceive the jury. The prosecutor's arguments violated Mr. Zamudio's rights to confront and cross-examine witnesses, to the assistance of counsel, and to due process of law.

(1) In rebuttal argument the prosecutor erroneously characterized counsel's closing argument as legally incorrect. The prosecutor stated that the "problem" with counsel's theory is that it required that jurors "speculate what the evidence might be, guess what the evidence might be, guess what evidence there is out there that they didn't hear, think of what imaginary sequence of events might have happened. [¶] That is really not the role of the jurors or the lawyers, frankly." (20 RT 3048.) The prosecutor's argument improperly informed the jurors that they could not draw reasonable inferences from the evidence, as trial counsel had asked them to do and as they were charged by the court with doing regarding the circumstantial evidence. The prosecutor's argument was an improper statement of the law that misled the jurors to dismiss the defense theory as legally incorrect.

(2) The prosecutor's argument that the jury could not draw reasonable inferences from the evidence in a manner that gave the benefit of the doubt to the defense was inconsistent with his exhortations to the jury to draw inferences from the evidence that favored the prosecution's view of the evidence. This inconsistency was intentional and egregious. It encouraged the jury to disregard the law and instruction that if circumstantial evidence points to two reasonable conclusions, one leading to guilt and the other to innocence, the jury must adopt the interpretation that points to innocence and reject that which points to guilt. (20 RT 2965.)

(3) The prosecutor further biased the jury against defense counsel by arguing that counsel had unfairly argued that Mr. Zamudio killed the Bensons in the “heat of passion,” as is used in CALJIC 8.20 to distinguish a premeditated and deliberate killing (2 CT 569), though the jury had not been instructed on what “heat of passion” meant. (20 RT 3049-50.) The prosecutor defined “heat of passion” as the state of mind necessary for manslaughter and aroused in a reasonable and ordinary person. (20 RT 3050.) After counsel objected, the prosecutor withdrew the statement, yet he reiterated that the jury was “not going to get” an instruction explaining “heat of passion.” (*Id.*) The prosecutor’s argument followed a pattern of characterizing defense counsel’s argument as not only wrong, but also as unfair and a conning of the jurors.

(4) The prosecutor unlawfully and prejudicially denigrated defense counsel’s argument as a sham because he did not present an affirmative defense to the crimes. The prosecutor repeatedly argued that counsel had a “hidden defense,” which he was not telling the jurors, though the prosecutor was never clear what that alleged “hidden” or “real” defense was. (20 RT 3053-54.)

(5) Later in rebuttal, the prosecutor incorrectly and prejudicially argued that counsel’s presentation of character witnesses was not a “legal defense to the charges.” (20 RT 3059.) The prosecutor argued that trial counsel was attempting to deceive jurors by “attack[ing]” them “in their guts” and “hit[ting] them emotionally so their emotions will not let them hear what their brain cells are trying to tell them.” (*Id.*) He argued that defense counsel was attempting to “hook one or two of you at an emotional level” so the jurors would not look at the evidence. (*Id.*) The prosecutor told the jurors that counsel had resorted to these illegal techniques because he had no defense to the crimes. (*Id.*) The prosecutor

committed outrageous misconduct by demeaning counsel's argument as deceitful and illegal in order to advance his case.

(6) No reasonable trial strategy can account for defense counsel's failure to object to the prosecutor's unlawful statements. By informing the jurors that the law prevented them from crediting the reasonable inferences that counsel argued could be drawn from the forensic evidence and the non-violent character evidence, the prosecutor withdrew from the jurors' consideration all of the critical evidence presented in Mr. Zamudio's defense. There is a reasonable probability that the jury credited the prosecutor's interpretation of the law and dismissed the defense theory as legally unfounded.

(7) Counsel had no reasonable basis for failing to object to this egregious misconduct. The prejudice is blatant. The prosecutor unlawfully and incorrectly led the jurors to believe that the defense theory was not only wrong, but legally incorrect and presented only to deceive the jury.

e. During closing argument, the prosecutor unlawfully and prejudicially vouched for the work and testimony of the experts consulted by the prosecution to analyze the physical evidence.

(1) The prosecutor repeatedly praised the work of the laboratory which prepared photographs of the blood allegedly found on Mr. Zamudio's shoes, watch, and ring. He told the jurors that it was only when the "lab does such good work like it did in this case" (20 RT 3003) that the blood on these items becomes visible in photographs.

(2) The prosecutor also improperly vouched for the reliability of the prosecution evidence when he stated that "there's no chance of a mistake" regarding the DNA analysis, serology work, and shoeprint examination that the prosecution's laboratories conducted. (20

RT 3049.)

(3) The prosecutor further improperly argued that the jurors would have heard if there were any problems or difficulty in the work performed at the criminalist laboratories. (20 RT 3049.) The prosecutor thus inappropriately bolstered the prosecution's evidence by arguing that he himself was credible and forthcoming.

(4) The prosecutor's vouching for the work of the prosecution-affiliated laboratories was improper and prejudicial both because it implied that the prosecutor had independent knowledge that had not been presented to the jury about the strength and accuracy of the work done by the lab and suggested to the jurors that without such "good work," the defendant would have gotten away with murder. (20 RT 3054.)

f. The prosecutor unlawfully opined that the crime was a "bad one" and "[t]hey don't get any worse than this." (20 RT 3059.) The prosecutor's statement that the crime was the worst there is was not based on any facts in the evidence and constituted an illegal offer of his purported expertise in weighing the gravity of the crime against other crimes. The jury likely credited the prosecutor's statement, surmising that he would know how egregious this murder was in relation to others based on his experience prosecuting cases. The prosecutor's opinion was inadmissible and prejudicial and affected not only the guilt phase, but also the jury's decision to sentence Mr. Zamudio to death. The prosecutor's untested opinion about the gravity of this offense violated Mr. Zamudio's right to confront and cross-examine witnesses and his right to due process.

g. In closing argument, the prosecution unfairly and unlawfully prejudiced the jury against Mr. Zamudio by using inaccurate and inflammatory terms to describe the killing of the Bensons, including but not limited to the following:

(1) Evoking a gory picture, the prosecutor argued that Mr. Zamudio “carved on both of [the Bensons] necks for a while.” (20 RT 3058.) The provocative image depicted by the prosecutor was not only inflammatory but inaccurate, as no evidence indicated that the neck wounds were inflicted in a deliberate and sustained fashion.

(2) Using repetition for inflammatory effect, the prosecutor stated four times in a row that the wounds inflicted were “killing wounds.” The prosecutor argued: “Those are killing wounds. [¶] And those aren’t killing wounds by some man that doesn’t know what he’s doing the wound in the back was a killing wound, the wound in the stomach was a killing wound, and the wounds in the heart were killing wounds” (20 RT 3058.)

(3) In a blatant attempt to arouse the jurors’ sympathy for the victims and outrage toward Mr. Zamudio, the prosecutor described Mr. Benson at the time of his death as follows: “Poor Mr. Benson. He is in a physical condition he can’t protect himself. He’s got to watch this guy do that to his wife and then watch him come over to him, and he can’t do anything about it one way or another.” (20 RT 3058; *see also* 20 RT 3059 (“[Mr. Benson] was sitting right there in that wheelchair and watched this guy do what he did to his wife.”).) The prosecutor’s argument unfairly aroused the jurors’ passions and clouded their fair judgment of the evidence.

h. Trial counsel had no reasonable basis for failing to object to the many unlawful statements made by the prosecutor in opening, closing, and rebuttal arguments. The prosecutor’s repeated references to facts not in evidence, egregious misstatements of the law, vouching for law enforcement agencies and the crime lab, characterization of the defense as an underhanded, illegal sham, and use of inflammatory terms completely

undermined the evidence presented by the defense.

i. Each of these unlawful actions by the prosecutor, individually and cumulatively, had an injurious effect on the outcome of the case. Counsel had no reasonable basis for failing to object to this misconduct, which the court had discretion to exclude. But for counsel's unreasonable failure to object to the prosecutor's misconduct, Mr. Zamudio would not have been found guilty of first degree murder, nor sentenced to death.

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. Allow petitioner to amend this petition within three years of June 27, 2007, the date of the appointment of the HCRC as petitioner's habeas counsel;
3. Defer informal briefing and stay further proceedings on this petition until June 28, 2010, or the filing of an Amended Petition for Writ of Habeas Corpus, whichever is earlier, so that petitioner may file reasonably available documentation in support of the petition as well as any additional claims that may become known to him during that time;
4. Grant petitioner sufficient funds to secure investigative and expert assistance as necessary to prove the facts supporting petitioner's claims for habeas relief;
5. Order the Los Angeles County District Attorney to disclose all files that Mr. Zamudio is unable to obtain from trial counsel and that he would have been entitled to at trial, and grant petitioner leave to conduct discovery, including the right to take depositions, request admissions, propound interrogatories, issue subpoenas for documents and other evidence, and afford petitioner the means to preserve the testimony of witnesses;
6. Take judicial notice of the certified record on appeal and all pleadings filed in *People v. Zamudio*, California Supreme Court Case No. S074414;
7. Order an evidentiary hearing at which Mr. Zamudio will offer this and further proof in support of the allegations herein;

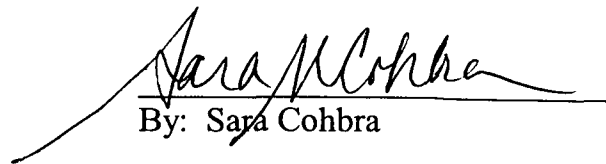
8. After full consideration of the issues raised in this petition and petitioner's amended petition, considered cumulatively and in light of the errors alleged on direct appeal, issue a writ of habeas corpus relieving petitioner from the judgment and sentence of death imposed upon him in Los Angeles County Superior Court Case No. VA036217;

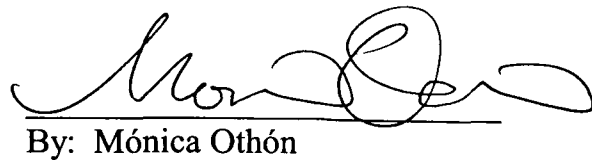
9. Grant Mr. Zamudio such further relief which is appropriate and just in the interests of justice.

Dated: September 29, 2008

Respectfully Submitted,
Habeas Corpus Resource Center

Cristina Bordé with express permission
By: Cristina Bordé *of Sara Cohbra*


By: Sara Cohbra


By: Mónica Othón

Counsel for Samuel Zamudio
Jimenez

VERIFICATION

Cristina Bordé declares as follows:

I am an attorney admitted to practice in the State of California. I represent petitioner Samuel Zamudio Jimenez herein, who is confined and restrained of his liberty at San Quentin State Prison, San Quentin, California.

I am authorized to file this petition for writ of habeas corpus on petitioner's behalf. I make this verification because petitioner is incarcerated in a county different from that of my law office. In addition, many of the facts alleged are within my knowledge as much or more than petitioner's.

I have read the petition and know the contents of the petition to be true.

Executed under penalty of perjury on this September 29, 2008, at San Francisco, California.

Cristina Bordé with express permission
CRISTINA BORDÉ
of Sara Colares

PROOF OF SERVICE

I, Carl Gibbs, declare that I am a citizen of the United States, employed in the City and County of San Francisco, I am over the age of 18 years and not a party to this action or cause. My current business address is 303 Second Street, Suite 400 South Tower, San Francisco, California 94107.

On September 29, 2008, I served true copies of the following document:

Petition for Writ of Habeas Corpus

by enclosing such document in an envelope and depositing the sealed envelope with the United States Postal Service with postage fully prepaid, and addressed as follows:

Edmund G. Brown, Jr.
Attorney General
Herbert S. Tetef
Deputy Attorney General
Office of the Attorney General
300 South Spring Street, 5th Floor
Los Angeles, CA 90013

Peter R. Silten
Deputy State Public Defender
Office of the State Public Defender
221 Main Street, 10th Floor
San Francisco, CA 94105

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Service for Samuel Jimenez Zamudio (P-14700) will be completed by utilizing the 30-day post-filing period within which we will hand deliver a copy to him at San Quentin State Prison.

I declare under penalty of perjury that the foregoing is true and correct.
Executed in San Francisco, California on September 29, 2008.

Carl Gibbs

