IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

DAVID KEITH ROGERS,

On Habeas Corpus.

CAPITAL CASE
S084292

(Related Appeal No. S005502)
Kern County Superior Court No. 33477
The Honorable Gerald K. Davis, Judge

SUPREME COURT
FILED
JUL - 2 2001
Frederick K. Ohlrich Clerk
DEPUTY

INFORMAL OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
INTRODUCTION TO ARGUMENT	3
ARGUMENT	7
I. PETITIONER'S CLAIMS OF JUROR MISCONDUCT ARE INSUFFICIENT TO SHOW A PRIMA FACIE CASE FOR RELIEF	7
A. Juror Sauer's Exposure To News Media Accounts And His Wife's Comments	9
B. Juror Tegebo's Exposure To Co-worker Comments	14
C. The Alleged Site Visits And Resulting Alleged Discussions	17
D. Alleged Bias And Concealment Of Bias On Voir Dire	19
II. PETITIONER'S COMPLAINTS OF HIS SHACKLING AT ARRAIGNMENT AND THE PRELIMINARY EXAMINATION FAIL TO SHOW ERROR OR PREJUDICE	35
III. RESPONDENT AGREES THAT AN ORDER TO SHOW CAUSE SHOULD ISSUE AS TO THE CLAIMS REGARDING THE ATTACK ON TAMBRI BUTLER	43
IV. THE PETITION FAILS TO SHOW INCOMPETENCE OF COUNSEL OR PREJUDICE	44
A. Failure To Move For Severance Of The Murder Counts48	
B. Petitioner's Absence From Certain Procedural Appearances	63

TABLE OF CONTENTS (continued)

Page

C. Some Conferences Were Not Transcribed 64

D. Failure To Call Petitioner's Brother, Dale, At The Guilt Phase To Corroborate Defense Psychiatric Witnesses 65

E. Alleged Inadequacies Regarding Guilt Phase Instructions 74

1. Instruction On Intentional Second Degree Murder 75

2. Instruction On The Effect Of Provocation On Premeditation 76

3. Instruction On The Effect Of Mental Disease Or Defect On Premeditation 77

4. Failure To Request Instruction On Imperfect Self-defense 78

5. Failure To Request Instruction On Involuntary Manslaughter 79

6. Failure To Request An Instruction On Unconsciousness 80

7. Instruction On Concurrence Of Act And Implied Malice 81

8. Failure To Request Instruction On Circumstantial Evidence Generally 82

9. Failure To Object To Other Instructions Which Allegedly Diluted The Concept Of Reasonable Doubt 83

10. Failure To Suggest Different Responses To Jury Questions 83

TABLE OF CONTENTS (continued)

Page

11. Failure To Request A Limiting Instruction On The Joined Counts 84

12. Failure To Request A Limiting Instruction On The Ellen Martinez Evidence 85

F. Alleged Incoherence In Defense Theories At The Guilt Phase 85

G. Alleged Inadequate Investigation Of Petitioner's Background For The Penalty Phase 92

H. Alleged Failure To Challenge The Ellen Martinez Evidence 93

I. Alleged Failure To Investigate And Present Evidence Regarding The Attack On Tambri Butler 94

J. Failure To Object To The Admission Of The Excam Semiautomatic Pistol To Corroborate Tambri Butler's Identification Of Petitioner As Her Attacker 95

K. Alleged Failure To Present A Coherent Penalty Phase Defense 95

L. Alleged Inadequacy In Argument 97

M. Failure To Request Additional Or Different Penalty Phase Instructions 98

N. Alleged Failings At Post-verdict Proceedings 99

V. ALLEGED CUMULATIVE ERROR 103

CONCLUSION 104

TABLE OF AUTHORITIES

	Page
Cases	
Blystone v. Pennsylvania (1990) 494 U.S. 299	29
Bonin v. Calderon (9th Cir. 1996) 59 F.3d 815	45
Boyde v. California (1990) 494 U.S. 370	29
Burger v. Kemp (1987) 483 U.S. 776	45
Ex parte Walpole (1890) 84 Cal. 584	4, 29
Frank v. Superior Court (1989) 48 Cal.3d 632	60
Hendricks v. Calderon (9th Cir. 1995) 70 F.3d 1032	45, 71
In re Carpenter (1995) 9 Cal.4th 634	9-13, *passim*
In re Hamilton (1999) 20 Cal.4th 273	9, 14, 15, *passim*
In re Hitchings (1993) 6 Cal.4th 97	25, 34
In re Malone (1996) 12 Cal.4th 935	13, 19
In re Waltreus (1965) 62 Cal.2d 218	64, 65, 81, 83
Irvin v. Dowd (1961) 366 U.S. 717	33
Jones v. United States (1999) 527 U.S. 373	29
Kimmelman v. Morrison (1986) 477 U.S. 365	44
Kollert v. Cundiff (1958) 50 Cal.2d 768	22
Lockhart v. Fretwell (1993) 506 U.S. 364	46
Nix v. Whiteside (1986) 475 U.S. 157	46
Noll v. Lee (1963) 221 Cal.App.2d 81	23

TABLE OF AUTHORITIES (continued)

	Page
Penal Code section 954	49
People v. Anderson (1968) 70 Cal.2d 15	87
People v. Anderson (1990) 52 Cal.3d 453	54
People v. Arias (1996) 13 Cal.4th 92	52, 56, 58
People v. Barnett (1998) 17 Cal.4th 1044	80
People v. Barrick (1982) 33 Cal.3d 115	4
People v. Beardslee (1991) 53 Cal.3d 68	84
People v. Berryman (1993) 6 Cal.4th 1048	45
People v. Bolin (1998) 18 Cal.4th 297	39, 40
People v. Bradford (1997) 14 Cal.4th 1005	103
People v. Bradford (1997) 15 Cal.4th 1229	50, 52, 57, 64
People v. Breaux (1991) 1 Cal.4th 281	12, 100
People v. Breverman (1998) 19 Cal.4th 142	90
People v. Carpenter (1997) 15 Cal.4th 312	51
People v. Castaldia (1959) 51 Cal.2d 569	23
People v. Chessman (1959) 52 Cal.2d 467	50
People v. Cooper (1991) 53 Cal.3d 771	103
People v. Cox (1991) 53 Cal.3d 618	15, 16, *passim*
People v. Crittenden (1994) 9 Cal.4th 83	30
People v. Davenport (1995) 11 Cal.4th 1171	100

TABLE OF AUTHORITIES (continued)

	Page
People v. Davis (1995) 10 Cal.4th 463	59, 60
People v. Duncan (1991) 53 Cal.3d 955	45
People v. Duran (1976) 16 Cal.3d 282	38
People v. Duvall (1995) 9 Cal.4th 464	5
People v. Fierro (1991) 1 Cal.4th 173	35, 39
People v. Galloway (1927) 202 Cal. 81	23
People v. Gates (1987) 43 Cal.3d 1168	29
People v. Gidney (1937) 10 Cal.2d 138	21
People v. Gonzalez (1990) 51 Cal.3d 1179	3, 11
People v. Gordon (1990) 50 Cal.3d 1223	103
People v. Griffin (1988) 46 Cal.3d 1011	54
People v. Harris (1981) 28 Cal.3d 935	33
People v. Hawkins (1995) 10 Cal.4th 920	38, 59, 63
People v. Heishman (1998) 45 Cal.4th 147	94
People v. Hendricks (1987) 43 Cal.3d 584	62
People v. Holt (1997) 15 Cal.4th 619	31, 41
People v. Howard (1996) 47 Cal.App.4th 1526	64
People v. Hutchinson (1969) 71 Cal.2d 342	21
People v. Jackson (1989) 49 Cal.3d 1170	80
People v. Jennings (1991) 53 Cal.3d 334	45, 47

TABLE OF AUTHORITIES (continued)

	Page
People v. Johnson (1988) 47 Cal.3d 576	50, 52, 55
People v. Jones (1997) 15 Cal.4th 119	28
People v. Karis (1988) 46 Cal.3d 612	4
People v. Kemp (1961) 55 Cal.2d 458	50
People v. Kipp (1998) 18 Cal.4th 349	56
People v. Ledesma (1987) 43 Cal.3d 171	47
People v. Madaris (1981) 122 Cal.App.3d 234	4, 5
People v. Marshall (1997) 15 Cal.4th 1	50, 52, 56, 63
People v. Mason (1991) 52 Cal.3d 909	60, 62
People v. Mayfield (1997) 14 Cal.4th 668	103
People v. McCarthy (1986) 175 Cal.App.3d 593	4
People v. McPeters (1992) 2 Cal.4th 1148	48
People v. Medina (1995) 11 Cal.4th 694	39, 40
People v. Memro (1995) 11 Cal.4th 786	53, 57
People v. Millwee (1998) 18 Cal.4th 96	53, 80
People v. Mincey (1992) 2 Cal.4th 408	30, 80
People v. Musselwhite (1998) 17 Cal.4th 1216	57
People v. Nesler (1997) 16 Cal.4th 561	9, 15, *passim*
People v. Ochoa (1998) 19 Cal.4th 353	39, 40
People v. Osband (1996) 13 Cal.4th 622	39, 40, 47

TABLE OF AUTHORITIES (continued)

	Page
People v. Pensinger (1991) 53 Cal.3d 334	45, 48
People v. Pope (1979) 23 Cal.3d 412	47, 48
People v. Price (1991) 1 Cal.4th 324	52, 56, 57
People v. Pride (1992) 3 Cal.4th 195	37
People v. Rodrigues (1994) 8 Cal.4th 1060	40
People v. Rodriguez (1986) 42 Cal.3d 730	28
People v. Sandoval (1996) 4 Cal.4th 155	60
People v. Staten (2000) 24 Cal.4th 434	30
People v. Sully (1991) 53 Cal.3d 1195	50
People v. Swain (1996) 12 Cal.4th 593	87
People v. Tuilaepa (1992) 4 Cal.4th 569	36, 39, 40
Roe v. Ortega (2000) 528 U.S. 470	47
Rogers v. Zant (11th Cir. 1994) 13 F.3d 384	45
Romano v. Oklahoma (1994) 512 U.S. 1	11
Schnell v. Florida (1972) 405 U.S. 427	103
Sopp v. Smith (1963) 59 Cal.2d 12	23
Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal.App.3d 201	4
Strickland v. Washington (1984) 466 U.S. 668	44-46, 48, 65
United States v. Cronic (1984) 466 U.S. 648	46
United States v. Tucker (9th Cir. 1983) 716 F.2d 576	45

TABLE OF AUTHORITIES (continued)

	Page
Weeks v. Angelone (2000) 528 U.S. 225	29
Williams v. Bridges (1934) 140 Cal.App. 537	22
Williams v. Superior Court (1984) 36 Cal.3d 441	61
Witherspoon v. Illinois (1968) 391 U.S. 510	28

Statutes

Evidence Code section 353	37
Evidence Code section 664	102
Evidence Code section 802	71
Evidence Code section 1101, subdivision (b)	55
Evidence Code section 1150, subdivision (a)	19, 26
Evidence Code section 1200	5
Penal Code section 187	1
Penal Code section 190.2, subdivision (a)(3)	1
Penal Code section 190.4, subdivision (e)	102
Penal Code section 190.4, subdivision (e)	2
Penal Code section 192	87
Penal Code section190.2, subdivision (a)(3)	62
Penal Code section 1093, subdivision (f)	75
Penal Code section 12022.5	1

TABLE OF AUTHORITIES (continued)

	Page
Penal Code section 1474, subdivision 3	3
Court Rules	
California Rules of Court, rule 421, subdivision (b)(1)	101
Other Authorities	
1 Witkin, Cal. Criminal Law (3d ed., 2000) § 103	87
1 Witkin, Cal. Criminal Law (3d ed., 2000) § 77	87
4 Witkin, *Cal. Criminal Law* (2d ed., 1988) Proceedings Before Trial, § 2087	49
9 Witkin, Cal. Procedure (4th ed., 1996) Appeal, § 597	38
CALJIC No. 2.10	71
CALJIC No. 2.90	83
CALJIC No. 3.36	77
CALJIC No. 8.20	76, 87
CALJIC No. 8.40	87
CALJIC No. 8.73	76

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **DAVID KEITH ROGERS,** On Habeas Corpus.	**CAPITAL CASE** S084292

PRELIMINARY STATEMENT

On February 17, 1987, petitioner was arraigned in the West Kern Municipal Court on a complaint filed the same day charging him with the murders of an unidentified female human being on or about February 8, 1987, and Janine Benintende on or about January 1, 1986 to February 21, 1986, both with the use of a gun (Pen. Code, §§ 187, 12022.5). The complaint also charged a multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)). (CTS 943-944.) The matter was continued one day for appointment of counsel. At that time, Eugene Lorenz was appointed to represent petitioner. (CTS 950.)

On April 1, 1987, petitioner was charged by information with the murders of Tracie Clark on or about February 8, 1987 (Count 1), and Janine Marie Benintende (count 2) on or about January 1, 1986 to February 21, 1986, both with the use of a gun (Pen. Code, §§ 187, 12022.5). The information also charged a multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)). (CT 354-355.)

On November 16, 1987, trial commenced with the hearing of motions and jury selection. On February 17, 1988, opening statements were given and the presentation of evidence to the jury commenced. (CT 480-497.) On March

7, 1988, after the People rested their case-in-chief in the guilt phase, the court granted a defense motion for acquittal of premeditated first degree murder as to Count 2, leaving the charge as one of second degree murder. (RT 5174-5184, 5201-5203.)

On March 7, 1988, presentation of evidence in the defense case commenced. (CT 586-591.) On March 14, 1988, the People presented their case in rebuttal, counsel presented their arguments, the court instructed the jury and the jury retired to deliberate. (CT 593-594.) The jury was instructed on first degree murder by premeditation (which only applied to Count 1), second degree murder by express and implied malice and voluntary manslaughter by a sudden quarrel or heat of passion. (CT 629-648.) On March 16, 1988, the jury returned verdicts finding petitioner guilty of murder in the first degree in Count 1 and guilty of murder in the second degree in Count 2. The jury found that both murders were committed with the use of a gun and found the multiple murder special circumstance true. (CT 596.)[1/]

The penalty phase commenced on March 23, 1988, with various preliminary matters, opening statements for the People and the defense and the presentation of the People's case. (CT 681-683.) The defense case was presented on March 24, 1988. (CT 689-691.) On the next court day, March 28, 1988, the People and the defense made their arguments to the jury, the court gave the penalty phase instructions and the jury retired to deliberate. (CT 692-693.) On March 29, 1988, the jury returned a verdict of death. (CT 694-695.)[2/]

On May 2, 1988, the court heard and denied a motion for a new trial and the automatic motion to modify the penalty verdict under Penal Code section 190.4, subdivision (e). On Count 1, the court sentenced petitioner to

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1. The jury deliberated for 8 hours, 41 minutes, assuming that it took one-hour lunches (as described in RB 3, fn. 2).

2. The jury deliberated for 7 hours, 45 minutes, in the penalty phase, assuming that it took one-hour lunches (as described in RB 4, fn. 3).

death. On Count 2, it sentenced appellant to prison for 15 years to life plus two years for the gun use enhancement. (CT 729.)

The appeal of the judgment was automatic. On August 10, 1988, the Attorney General's office filed a request by respondent for correction of and addition to the record, serving petitioner's trial counsel. On January 13, 1989, current counsel was appointed to represent petitioner. On or about July 13, 1989, pursuant to extensions of time granted by the Supreme Court, appellant filed a motion which included a request for correction of and addition to the record and related motions. The Attorney General's office filed a response on behalf of respondent on July 25, 1989. The District Attorney's office filed a supplemental response on behalf of respondent on or about July 27, 1989. A hearing was held on the record on December 15, 1989. Petitioner filed a proposed settled statement on or about August 14, 1992, which was approved September 16, 1992. The record was corrected and certified complete on May 24, 1994.

Petitioner filed his opening brief on appeal on November 4, 1997. Respondent filed its brief on September 30, 1998. Petitioner filed a supplemental opening brief on November 12, 1998 and his reply brief on September 13, 1999. The instant petition was filed on December 14, 1999. The Court directed respondent to file a response on August 21, 2000.

INTRODUCTION TO ARGUMENT

A petition for writ of habeas corpus must be verified by the oath or affirmation of the party making the application. (Pen. Code, § 1474, subd. 3.)

As this Court has stated:

> A habeas corpus petition must be verified, and must state a "prima facie case" for relief. That is, it must set forth specific facts which, if true, would require issuance of the writ. Any petition that does not meet these standards must be summarily denied. . . .

(*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1258.)

In *People v. Karis* (1988) 46 Cal.3d 612, 656, the Court stated:

> When a habeas corpus petition is prepared by the defendant in propria persona, we require that he "allege with particularity the facts upon which he would have a final judgment overturned." (*In re Swain* (1949) 34 Cal.2d 300, 304, 209 P.2d 793.) *This rule applies with even greater force when a petition is prepared by counsel.* Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing.
>
> . . .

(*Id.* at p. 656 [emphasis added].)

As stated in *Ex parte Walpole* (1890) 84 Cal. 584, the factual allegations must be "in such form that perjury may be assigned upon the allegations if they are false."

In *People v. McCarthy* (1986) 175 Cal.App.3d 593, 596-597 for example, the Court of Appeal found deficient a petition which was verified by the statement: "I know the contents of the petition, which contents *I believe to be true.* I declare under penalty of perjury that the foregoing is true and correct." [Italics in the original.]

Similarly, a petition based upon the trial attorney's unsworn statements and the appellate attorney's declaration containing hearsay was denied in *People v. Madaris* (1981) 122 Cal.App.3d 234, 241-242 (overruled on other grounds concerning prior convictions for impeachment in *People v. Barrick* (1982) 33 Cal.3d 115, 127.) As emphasized in *Madaris*, "Verification, under the statute, manifestly requires that all factual matters *relied upon* be stated by their declarant, whomsoever he may be, under oath." (*Id.* at p. 241.)

The reasons for the requirement of verification are readily apparent. Allegations within the petitioner's personal knowledge should be usable against him as admissions or prior inconsistent statements if he should later make contrary allegations. Requiring that petitioner personally make allegations of fact which are within his own knowledge ensures that the allegations are made in good faith (see *Star Motor Imports, Inc. v. Superior Court* (1979) 88

Cal.App.3d 201, 204), and that petitioner will not make conflicting allegations at a later point in the same proceeding or a subsequent proceeding.

In the instant proceeding, the facts stated in the petition itself are not verified by petitioner. Counsel verified the petition, not based on personal knowledge but relying, instead, on the record and on the exhibits to the petition. (See Verification, which follows Pet. 235.) The allegations which are neither proven by the record, which are sworn to under penalty of perjury or are sufficiently authenticated, nor verified are insufficient under the authorities cited above, although they may be effective to define and argue the claims.

In addition, respondent objects to hearsay within the various declarations as insufficient to constitute verified allegations (*People v. Madaris*, *supra*, 122 Cal.App.3d 234, 241-242; *Star Motor Imports, Inc. v. Superior Court*, *supra*, 88 Cal.App.3d 201, 204) or to prove the truth of the matters stated (Evid. Code, § 1200).

Respondent notes that even if the petition is later verified, it contains virtually no specific allegations of particular facts beyond those contained in the record on appeal or in the attached declarations. Instead, the petition appears to rely exclusively on the facts in the appeal record and the declarations. As this court has emphasized, the petition should "state fully and with particularity the facts on which relief is sought (*People v. Karis,* (1988) 46 Cal.3d 612, 656, 250 Cal.Rptr. 659, 758 P.2d 1189 []; *In re Swain* (1949) 34 Cal.2d 300, 304, 209 P.2d 793)." (*People v. Duvall* (1995) 9 Cal.4th 464, 474.)

As the Court in *Duvall* explained:

> Our state Constitution guarantees that a person improperly deprived of his or her liberty has the right to petition for a writ of habeas corpus. (Cal. Const., art. I, s 11; see *In re Clark* (1993) 5 Cal.4th 750, 764 & fn. 2, 21 Cal.Rptr.2d 509, 855 P.2d 729 (hereafter *Clark*).) Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to plead sufficient grounds for relief, and then later to prove them. "For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the

> conviction and sentence; defendant thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260, 275 Cal.Rptr. 729, 800 P.2d 1159, italics in original (hereafter *Gonzalez*).)
>
> . . .
>
> An appellate court receiving such a petition evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief. (*Clark, supra,* 5 Cal.4th at p. 769, fn. 9, 21 Cal.Rptr.2d 509, 855 P.2d 729; *In re Lawler* (1979) 23 Cal.3d 190, 194, 151 Cal.Rptr. 833, 588 P.2d 1257 [hereafter *Lawler*].) If no prima facie case for relief is stated, the court will summarily deny the petition. If, however, the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an OSC. (*Clark, supra,* at p. 781, fn. 16, 21 Cal.Rptr.2d 509, 855 P.2d 729; *In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4, 87 Cal.Rptr. 681, 471 P.2d 1.)

(*People v. Duvall, supra,* 9 Cal.4th 464, 474.)

For the reasons just discussed, respondent will address the petition as if the only allegations of specific facts are the facts in the record or the declarations which are relied on in the petition.

ARGUMENT

I.

PETITIONER'S CLAIMS OF JUROR MISCONDUCT ARE INSUFFICIENT TO SHOW A PRIMA FACIE CASE FOR RELIEF

Petitioner raises a claim of juror misconduct, based principally on allegations that (A) juror Sauer watched television coverage of the trial and heard his wife comment on the case; (B) juror Tegebo heard co-workers comment on the case; (C) juror Sauer falsely stated in voir dire that he would consider a verdict of life without parole and (D) a juror, Sauer, visited a motel in the area where the victims were, or might have been, picked up by their murderer and the canal where the Tracie Clark murder occurred, and discussed the visits with another juror. (Pet. 8-25.) Respondent contends that only the allegation of watching television coverage of the case is sufficient to establish misconduct and that none of the allegations raise a substantial likelihood of prejudice.

This Court has recently summarized the rules governing claims of jury misconduct:

> An accused has a constitutional right to a trial by an impartial jury. (U.S. Const., amends. VI and XIV; Cal. Const., art. I, 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722 [81 S.Ct. 1639, 1642, 6 L.Ed.2d 751] (*Irvin*); *In re Hitchings* (1993) 6 Cal.4th 97, 110 [24 Cal.Rptr.2d 74, 860 P.2d 466] (*Hitchings*); see *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132] (*Weathers*).) An impartial jury is one in which no member has been improperly influenced (*People v. Nesler* (1997) 16 Cal.4th 561, 578 [66 Cal.Rptr.2d 454, 941 P.2d 87] (*Nesler*); *People v. Holloway* (1990) 50 Cal.3d 1098, 1112 [269 Cal.Rptr. 530, 790 P.2d 1327] (*Holloway*)) and every member is " 'capable and willing to decide the case solely on the evidence before it' " (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 554 [104 S.Ct. 845, 849, 78 L.Ed.2d 663] (*McDonough*), quoting *Smith v. Phillips* (1982) 455 U.S. 209, 217 [102 S.Ct. 940, 946, 71 L.Ed.2d 78] (*Smith*)).
>
> However, with narrow exceptions, evidence that the internal

thought processes of one or more jurors were biased is not admissible to impeach a verdict. The jury's impartiality may be challenged by evidence of "*statements* made, or conduct, conditions, or *events* occurring, either within or without the jury room, of such a character as is *likely* to have influenced the verdict improperly," but "[n]o evidence is admissible to show the [*actual*] *effect* of such statement, conduct, condition, or event upon a juror . . . or concerning the *mental processes* by which [the verdict] was determined." (Evid. Code, 1150, subd. (a), italics added; see *People v. Hutchinson* (1969) 71 Cal.2d 342, 349-350 [78 Cal.Rptr. 196, 455 P.2d 132] (*Hutchinson*).) Thus, where a verdict is attacked for juror taint, the focus is on whether there is any overt event or circumstance, "open to [corroboration by] sight, hearing, and the other senses" (*Hutchinson, supra*, 71 Cal.2d at p. 350), which suggests a likelihood that one or more members of the jury were influenced by improper bias. [Fn. 17]

[Fn. 17.:] This rule "serves a number of important policy goals: It excludes unreliable proof of jurors' thought processes and thereby preserves the stability of verdicts. It deters the harassment of jurors by losing counsel eager to discover defects in the jurors' attentive and deliberative mental processes. It reduces the risk of postverdict jury tampering. Finally, it assures the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of jurors' thought processes." (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 414 [185 Cal.Rptr. 654, 650 P.2d 1171], fn. omitted (*Hasson*).)

When the overt event is a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors, the event is called juror misconduct. (See, e.g., *Nesler, supra*, 16 Cal.4th 561, 578-579; *In re Carpenter* (1995) 9 Cal.4th 634, 647 [38 Cal.Rptr.2d 665, 889 P.2d 985] (*Carpenter*); *Hitchings, supra*, 6 Cal. 4th 97, 118.) A sitting juror's involuntary exposure to events outside the trial evidence, even if not "misconduct" in the pejorative sense, may require similar examination for probable prejudice. Such situations may include attempts by nonjurors to tamper with the jury, as by bribery or intimidation. (See, e.g., *Remmer v. United States* (1954) 347 U.S. 227, 229 [74 S.Ct. 450, 451, 98 L.Ed. 654]; *People v. Cobb* (1955) 45 Cal.2d 158, 161 [287 P.2d 752] (Cobb); *People v. Federico* (1981) 127 Cal.App.3d 20, 38-39 [179 Cal.Rptr. 315] (*Federico).*)

(*In re Hamilton* (1999) 20 Cal.4th 273, 293-295.)[3/]

A. Juror Sauer's Exposure To News Media Accounts And His Wife's Comments

Petitioner argues that Juror Sauer committed misconduct in permitting himself to be exposed to news accounts of the trial and in discussing the case with his wife. (Pet. 15-20; see Pet. 9-10 [allegations], 11-12 [discussion of declaration].)

The governing standard was described in *People v. Nesler* (1997) 16 Cal.4th 561, 578-579:

> We assess the effect of out-of-court information upon the jury in the following manner. When juror misconduct involves the receipt of information about a party or the case from extraneous sources, the verdict will be set aside only if there appears a substantial likelihood of juror bias. (*In re Carpenter* (1995) 9 Cal.4th 634, 653.) Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not "inherently" prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was "actually biased" against the defendant. If we find a substantial likelihood that a juror was actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard.

(*Id.* at pp. 653-654 [lead opinion].)

In *In re Carpenter* (1995) 9 Cal.4th 634, 653, 654, the Court stated:

> In an extraneous-information case, the "entire record" logically bearing on a circumstantial finding of likely bias includes the nature of the juror's conduct, the circumstances under which the information

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3. Petitioner relies heavily on *Hamilton* (Pet. 9-10), but fails to mention its holdings, which are uniformly adverse to his arguments, as respondent will explain below.

> was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant. For example, the stronger the evidence, the less likely it is that the extraneous information itself influenced the verdict

Petitioner relies on juror Sauer's declaration, dated September 23, 1996, which states:

> I served as a juror in the trial of David Rogers for the crime of murder in 1988. The trial was televised, with cameras in the court room, and I saw some of the coverage on my television set at home. My wife and children were interested in the trial because I was on the jury. Also, my wife knew the lawyers and sometimes came home to watch the trial during her breaks (she worked next door to the courthouse). We would watch the television coverage together. Sometimes I turned it on to see if they showed me. We got three local channels and I flipped back and forth to see the trial coverage. I never saw the jury, but I saw David Rogers and I heard the announcers talk about the case, although I don't remember what they said.

(Exh. 8.)

It appears to respondent that, if the statements in the declaration are true, the conduct described would constitute misconduct by the active receipt of extraneous information. (*In re Carpenter, supra,* 9 Cal.4th at p. 647; see *id.* at p. 642.) In addition, the conduct would constitute a violation of the court's admonition not to watch television news accounts of the case. (RT 809-810; see RT 4522-4523 [to jury: "remember what I told you about watching television broadcasts about this case"].) However the declaration fails to show a substantial likelihood of prejudice.

Sauer's declaration states that he "saw some of" the television coverage of the trial at home and that "[s]ometimes" he turned it on to see if they showed him and flipped from channel to channel. He said, "I never saw the jury, but I saw David Rogers and I heard the announcers talk about the case, although I don't remember what they said." Thus, the only reason stated in Juror Sauer's declaration that *he* watched television coverage of the trial was *to see himself.* The declaration does not mention anything of substance in the news

stories, except that Sauer saw petitioner. Instead, the news coverage made so little impression on Sauer that he remembered nothing of what the announcers said[4/]

Contrary to petitioner's premise (Pet. 15-18), nothing in Sauer's declaration shows that he saw any particular news stories. The substance of the statements are that Sauer and his wife "would watch the television coverage together," at unstated times and on an unstated number of occasions, and that he sometimes "flipped back and forth to see the trial coverage" in order to see himself. (Exh. 8.) Petitioner presents no valid allegations which might tend to

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4. The declaration does not state, as petitioner argues, that Sauer "spent his evenings actively seeking out all of the televised reports that he could find, changing channels . . . to make sure that he heard it all." (Pet. 15.)

As respondent has noted, petitioner bears the burden of setting forth "specific facts which, if true, would require issuance of the writ." (*People v. Gonzalez, supra,* 51 Cal.3d 1179, 1258.) As noted above, the petition itself contains no verified allegations, although the attached declarations do.

A report of the Sheriff's comment after the guilt verdict and before the penalty phase that he would have "no problems at all if he goes to the electric chair. It's been tough on everyone" (RT 5734; Exh. A on motion) could not have affected the guilt phase. It would also have no persuasive force as to the penalty verdict because the jury was told to weigh the factors for itself to determine the appropriate penalty. Moreover, since the Sheriff had a duty to uphold the law, it would be expected that he would personally hold other peace officers to a higher standard. As in *In re Carpenter, supra,* 9 Cal.4th at p. 650 and *Romano v. Oklahoma* (1994) 512 U.S. 1, 13-14, it is impossible to predict the effect of the extraneous information, at least without inadmissible declarations about the effect of the information on deliberations. Moreover, petitioner has waived any claim of prejudice by declining the court's offer to question the jurors regarding whether they were exposed to the Sheriff's comment. (RT 5745, 5747.)

Other news stories discussed by petitioner preceded the trial and, under Sauer's declaration, were not seen by Sauer. (Pet. 18; see Pet. 18, fn. 11 [admitting that Sauer was not exposed to any pre-trial media accounts of the case].)

show that Sauer saw any particular news stories.[5/] Since no extraneous material can be identified, petitioner fails to show that the extraneous material was inherently prejudicial. Petitioner also fails to show actual bias due to exposure to the extraneous material.

In *In re Carpenter, supra,* 9 Cal.4th 634, during the guilt phase of trial, a juror had obtained information, "from newspaper accounts, either directly or through her husband" that the defendant had already been convicted of other murders and sentenced to death in another county. The husband had told the juror that the trial was a waste of time and money. In addition, the juror and her husband had been "experiencing drinking problems and marital troubles" and had made false statements regarding their newspaper subscription in their declarations during habeas corpus proceedings. (*Id.* at pp. 642-643, 647.) However, this Court disagreed with the finding of the superior court that the misconduct was prejudicial. (*Id.* at p. 647.) Specifically, the Court disagreed with the superior court's finding that the extraneous was "inherently prejudicial." (*Id.* at p. 655.) The Court found the evidence of guilt

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5. Due to this failing, petitioner's reliance on videotaped television news stories in Exhibits 49 and 50 is misplaced. (See Pet. 16-17.) Even if the television news stories in Exhibits 49 and 50 are considered, they fail to show a reasonable probability of prejudice. The story with Janine Benintende's mother (see Pet. 16-17) merely shows that her mother was upset about her daughter's murder, together with facts which were proven by the evidence. As this Court held in a different context in *People v. Breaux* (1991) 1 Cal.4th 281, 295, "the fact that the victim had friends, some of whom felt that her murderer should receive the death penalty, does not make this case different from most murder cases . . . ." Other news stories mentioned by petitioner (Pet. 17) also show nothing more than facts which were proven by the evidence. A news reporter's implication that the prosecution had "demolished" a defense witness on cross-examination and had argued effectively (Pet. 17-18) are wholly innocuous because the jury heard the cross-examination and argument itself. It is not the law that jurors are presumed to be swayed by a television news personality's opinions which have an uncertain basis and are subject to a well-known motive to sensationalize a story to gain viewers.

overwhelming and noted that the jury had heard evidence of the murders in the other county and only the information about the verdict was new. (*Ibid.*) The Court also found that there was no "substantial likelihood the juror was biased or that the extraneous information impermissibly influenced her to the defendant's detriment." (*Id.* at p. 656.) The Court stated that it was "hardly shocking," although unfortunate, that the juror learned of the death verdict in the other case, noting that the trial was "long and highly publicized trial" and that "it is virtually inevitable that in a trial such as this some secrets cannot be kept." (*Ibid.*) The Court also refused to presume that the one juror told the others what she had learned, stating, "We will not presume greater misconduct than the evidence shows." (*Id.* at p. 657.)

The instant case shows several similarities to *Carpenter*. First, in *Carpenter*, most of the extraneous information was disclosed by the trial evidence. In the instant case, petitioner fails to show that Sauer received *any* information from the news stories which was not presented at trial. (*In re Carpenter, supra,* 9 Cal.4th 634, 655; cf. *In re Malone* (1996) 12 Cal.4th 935, 965.) Indeed, based on Sauer's declaration, it would appear that the news stories *exclusively* consisted of reporting on the trial.[6/] Second, the spouses of the jurors in *Carpenter* and the instant case said that the trial was a waste of money. The court found that the circumstances failed to show a substantial likelihood the juror actually was impermissibly influenced by the entirety of the outside information. (*Carpenter, supra,* at p. 656.) Third, as in *Carpenter*, there is no evidence that juror Sauer discussed any of the extraneous information about the case with the other jurors. The court in *Carpenter* refused to accept the defendant's assumption that the juror told the other jurors, stating, "We will

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6. Although petitioner relies on editorializing by reporters (Pet. 17-18), the function of the jury is to draw its own conclusions from the evidence. There is no reason to believe that the jurors in this case were so mentally vacant that they automatically adopted the conclusions of television reporters.

not presume greater misconduct than the evidence shows." (*Id.* at p. 657.) The court went on to state:

> The fact the juror here did not reveal her knowledge to the rest of the jury is not alone dispositive, but it is also not irrelevant. Rather, it is probative in two important respects. First, it tends to negate the inference the juror was biased; a biased juror would likely have told other jurors what she had learned. Second, it tends to show the juror intended the forbidden information not to influence the verdict.

(*Id.* at p. 657.) The same considerations apply with equal or greater force to the instant case. Finally, as in *Carpenter*, the evidence in the instant case was overwhelming and the case generated substantial publicity.

Some aspects of *In re Hamilton, supra,* 20 Cal.4th 273, also apply to the instant case. In *Hamilton*, a juror had failed to disclose a pretrial conversation regarding an exculpatory story told by the defendant, which the juror later said was "ridiculous" and which convinced the juror that the defendant was guilty. (*Id.* at pp. 282, 286.) The court found that the circumstances did not show that the juror was biased. (*Id.* at pp. 297-299.) Respondent suggests that the instant case contains even less indicia of bias because the conclusion that the trial was a "waste of time" was formed on the basis of hindsight some time within eight years after the trial. In addition, the conclusion was formed by the juror's wife and was only impliedly agreed with by the juror at the time of signing the declaration.

B. Juror Tegebo's Exposure To Co-worker Comments

Petitioner also argues that Juror Tegebo committed misconduct, although apparently unintentional, in hearing co-worker comments about the case. (Pet. 19-20; see Pet. 10-11 [allegations], 13-14 [discussion of declaration].)

Contrary to petitioner's premise (Pet. 15-16), the "involuntary

exposure to events outside the trial" is *not* misconduct, although it "may require similar examination for probable prejudice." (*In re Hamilton, supra,* 20 Cal.4th 273, 293-295.) As this Court has found, there is a difference between active and passive receipt of extraneous information. (*In re Hamilton, supra,* 20 Cal.4th 273, 305; *In re Carpenter, supra,* 9 Cal.4th 634, 665.)

Also contrary to petitioner's argument, the co-worker comments to which juror Tegebo was exposed did not show a substantial likelihood of bias. (Pet. 20.) The comments were, in substance, that petitioner was guilty and should get the death penalty, that the sheriff had "called for" the death penalty for petitioner and that he "must be really bad" if the sheriff said that because "they expected that police would stick together." (Exh. 7.) As this Court has impliedly found in *In re Carpenter, supra,* 9 Cal.4th 634, 656, the opinions of non-jurors about a case show neither inherent bias nor a substantial likelihood of bias.

Despite petitioner's hyperbolic ventilations (Pet. 20), the comments of juror Tegebo's coworkers regarding the Sheriff's statement were neither inherently nor substantially likely to cause bias. Contrary to petitioner's premise, the opinions of third persons are not "information" which might cause a juror not to base his or her verdict solely on the evidence. (See *People v. Nesler, supra,* 16 Cal.4th at pp. 578-580 [discussing extraneous "information"], 583-585 [where the court employed information, but not opinions, heard by the juror as the basis for its decision]; see also *People v. Cox* (1991) 53 Cal.3d 618, 696 [a statement by a juror during deliberations that it "did not matter" whether the jury returned a verdict of death implicated "the jurors' reasoning process"].) As stated in *In re Hamilton, supra,* 20 Cal.4th 273, 296:

> The standard is a pragmatic one, mindful of the "day-to-day realities of courtroom life" (*Rushen v. Spain* (1983) 464 U.S. 114, 119 [104 S.Ct. 453, 456, 78 L.Ed.2d 267]) and of society's strong competing interest in the stability of criminal verdicts (id. at pp. 118-119 [104 S.Ct. at pp. 455- 456]; *Carpenter, supra,* 9 Cal.4th 634, 655). It is "virtually impossible to shield jurors from every contact or

Court stated in *People v. Cox, supra,* 53 Cal.3d 618, "'[i]t is settled . . . that "a jury verdict may not be impeached by hearsay affidavits." [Citations.]' (*People v. Williams* [(1988)] 45 Cal.3d [1268,] 1318-1319, 248 Cal.Rptr. 834, 756 P.2d 221.)"

However, even if the hearsay statements are considered, they are inadequate to show prejudicial misconduct. It is obvious from the trial evidence (see RB 12-14) that nothing significant would be gained by a visit to the crime scene over a year after the murder. Petitioner fails to allege anything significant that might have been learned in the alleged visit or even argue that the juror learned anything significant. (See Pet. 20-23.) The trial evidence shows that important facts in this case had nothing to do with the *details of the scene* of the Tracie Clark murder, but only the *events* which occurred there. Although the events were obviously affected by movable things, such as petitioner's truck, the evidence permits no inference that the events were affected by permanent objects at the scene, such as the road, the ground, the embankment or the canal. (See RB 12-14 [testimony regarding the scene], 20-22 [petitioner's confession], 29-34 [petitioner's testimony], 40-45, 48-53, 58-60 [defense psychiatric witnesses].) The defense investigator's declaration states that in 1996 Sauer told her that "way after" the trial he saw blood on the bridge, "just like in the photos," obviously referring to the trial exhibits. (Exhibits 16-54 were photographs of the scene.) (Exh. 2, ¶¶ 25-26.) However, based on the trial evidence, Tracie's blood could only have been deposited on the bridge after the murder while petitioner was putting Tracie's body in the canal. The fact that he did so was undisputed, and the viewing of blood on the bridge could not possibly affect the principal issues with regard to the Tracie Clark murder, which were whether the murder was committed in the heat of passion or was premeditated. The other scenes mentioned by petitioner, including a motel

room, had even less importance.[9] Finally, petitioner fails to show that the unnamed juror received any information at the scene which was different from that presented at trial. (*In re Carpenter, supra,* 9 Cal.4th 634, 655; cf. *In re Malone, supra,* 12 Cal.4th 935, 965.)

D. Alleged Bias And Concealment Of Bias On Voir Dire

Petitioner again attacks Juror Sauer, arguing that he concealed bias during voir dire in 1987 by saying he was "neutral" "on the issue of punishment in this case" (RT 3310-3311) but in 1996 signed a declaration which states, in pertinent part: "I believe in the death penalty, and that if you kill someone, you should die. So after David Rogers confessed on the witness stand to killing that woman, I thought there was no point in us (the jury) being there" (Exh. 8).[10] (Pet. 23-25.) Petitioner argues that Sauer's views caused him to "automatically" vote for a verdict of death. (Pet. 24.) Respondent contends that the statements in Sauer's declaration on which petitioner relies may not be considered because the statements exclusively concern Sauer's mental processes rather than objective statements, conduct, conditions, or events during the trial. In any event, the statements relied on by petitioner fail to show that Sauer was biased during the trial.

Evidence Code section 1150, subdivision (a) provides:

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9. The trial evidence concerning the El Don Motel were that Connie Zambrano was standing in front of the motel when she saw petitioner pick up Tracie Clark at the corner, drive down the street and stop before proceeding. (RT 4639, 4644-4649.) There was also evidence of the distance between the El Don Motel and the bridge over the canal where Tracie Clark's body was found. (RT 4715-4716.)

10. Petitioner testified during the guilt phase of the trial, which occurred in February and March, 1988. During petitioner's testimony he admitted fatally shooting Tracie, the victim in Count I, who was killed in late January or early February of 1987. (RT 5363, 5367.)

(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

In *People v. Cox, supra,* 53 Cal.3d 618, this Court described the effect of Evidence Code section 1150 as follows:

> The statute thus makes a "distinction between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved . . . ." (*People v. Hutchinson* (1969) 71 Cal.2d 342, 349 [78 Cal.Rptr. 196, 455 P.2d 132].) "This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent." (*Id.*, at p. 350; *People v. Ozene* (1972) 27 Cal.App.3d 905, 914 [104 Cal.Rptr. 170]; cf.*Tanner v. United States* (1987) 483 U.S. 107, 126-127 [the federal counterpart to Evidence Code section 1150 did not violate the Sixth Amendment].).

In *In re Hamilton, supra,* 20 Cal.4th at p. 294, the court stated, "with narrow exceptions, *evidence that the internal thought processes of one or more jurors were biased is not admissible to impeach a verdict.*" [Emphasis added.] It then described the exceptions:

> The jury's impartiality may be challenged by evidence of "*statements* made, or conduct, conditions, or *events* occurring, either within or without the jury room, of such a character as is *likely* to have influenced the verdict improperly," but "[n]o evidence is admissible to show the [*actual*] *effect* of such statement, conduct, condition, or event upon a juror . . . or concerning the *mental processes* by which [the verdict] was determined." (Evid. Code, 1150, subd. (a), italics added; see *People v. Hutchinson* (1969) 71 Cal.2d 342, 349-350 [78 Cal.Rptr. 196, 455 P.2d 132] (*Hutchinson*).) Thus, where a verdict is attacked for juror taint, the focus is on whether there is any overt event or circumstance, "open to [corroboration by] sight, hearing, and the other senses" (*Hutchinson, supra*, 71 Cal.2d at p. 350), which suggests a likelihood that one or more members of the jury were influenced by

improper bias. [Fn. 17] [Italics in *Hamilton*.]

[Fn. 17:] This rule "serves a number of important policy goals: It excludes unreliable proof of jurors' thought processes and thereby preserves the stability of verdicts. It deters the harassment of jurors by losing counsel eager to discover defects in the jurors' attentive and deliberative mental processes. It reduces the risk of postverdict jury tampering. Finally, it assures the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of jurors' thought processes." *(Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 414 [185 Cal.Rptr. 654, 650 P.2d 1171], fn. omitted (*Hasson*).)

In re Hamilton, supra, 20 Cal.4th 273, 298, fn. 19, also stated:

[T]he rule against proof of juror mental processes is subject to the well-established exception for claims that a juror's preexisting bias was concealed on voir dire. (See, e.g., *Hutchinson, supra,* 71 Cal.2d 342, 348; *People v. Castaldia* (1959) 51 Cal.2d 569, 571-572 [335 P.2d 104]; *People v. Hord* (1993) 15 Cal.App.4th 711, 724 [19 Cal.Rptr.2d 55].)

However, an examination of the authorities underlying this characterization shows that it is based on an overly broad description in *Hutchinson* of statements in other opinions. In the relevant portion of *People v. Hutchinson* (1969) 71 Cal.2d 342, 347-348, this Court found that the rule barring a jury's impeachment of its verdict was judicial in origin, and not legislative, as had been stated in *People v. Gidney* (1937) 10 Cal.2d 138, 146. The Court stated:

Although purporting to recognize legislative preemption of the field, the court in *Gidney* also acknowledged the existence of the judicial exception to the rule that allows jurors' affidavits to be used to prove that one or more of the jurors concealed bias or prejudice on voir dire. (*People v. Gidney, supra,* 10 Cal.2d 138, 146; see *Williams v. Bridges* (1934) 140 Cal.App. 537 [35 P.2d 407].) This exception is now well settled (see e.g., *Kollert v. Cundiff* (1958) 50 Cal.2d 768, 773-774 [329 P.2d 897]; *People v. Castaldia* (1959) 51 Cal.2d 569, 572 [335 P.2d 104]) and has been extended to . . . show that a juror did not intend to follow the court's instructions on the law and had concealed that intention on voir dire. (*Noll v. Lee* (1963) 221 Cal.App.2d 81 [34 Cal.Rptr. 223].)

(*People v. Hutchinson, supra,* 71 Cal.2d 342, 348.)

However, the cases cited show that the rule was a limited one.

In *Gidney*, the defendant presented juror affidavits which showed misconduct by the bailiff in discussing the sentence with the jury, among other things. This Court held that the juror affidavits were inadmissible under the general rule barring impeachment of the verdict by jurors, adding, "Only where the misconduct of a juror occurred before empanelment of the jury, or constituted false swearing on his voir dire examination, has the statutory prohibition been deemed inapplicable. (See *Williams v. Bridges*, 140 Cal. App. 537 [35 Pac. (2d) 407]; 23 Cal. L. Rev. 359.)" (*People v. Gidney, supra,* 10 Cal.2d 138, 146.)

In *Williams v. Bridges* (1934) 140 Cal.App. 537, cited in *Hutchinson* and *Gidney*, a juror had denied on voir dire that she had knowledge of the accident which was the subject of the case. However, during deliberations, she *told the other jurors* of her independent knowledge of the accident. The opinion of the Court of Appeal stated the applicable rule as follows:

> It is ground for new trial that a juror had personal knowledge of material facts in the case, had formed and expressed an opinion on the case * * * if such ground of objection was denied or concealed by the juror on proper inquiry on his voir dire examination. * * *" 46 C. J. 92; *Lane v. Vaselius*, 137 Misc. 756, 244 N. Y. S. 585, 586; *Kelley v. Adams County*, 113 Neb. 377, 203 N. W. 544; *Rhoades v. El Paso & S. W. Ry. Co.* (Tex. Com. App.) 248 S. W. 1064, 1066; *Harding v. Fidelity & Casualty Co.* (Mo. App.) 27 S.W.(2d) 778.

(*Williams v. Bridges*, 140 Cal. App. 537, 540.) Thus, as described in *Williams*, the exception to the rule of exclusion only applies to knowledge of facts, which later opinions show is a matter of objective fact rather than subjective mental processes. (*In re Hamilton, supra,* 20 Cal.4th 273, 294; see *People v. Nesler, supra,* 16 Cal.4th 561, 578.)

Another case cited in *Hutchinson*, *Kollert v. Cundiff* (1958) 50 Cal.2d 768, 773-774 merely cites *Williams v. Bridges* for the bias exception to the general rule. (*Kollert* at p. 773.) However, the court found that no exception to

the general rule was shown by the affidavits in that case.

In *Noll v. Lee* (1963) 221 Cal.App.2d 81, 82-83, the last case cited on this point in *Hutchinson*, the affidavits showed that one of the jurors had relied on his own copy of the Vehicle Code during deliberations. The Court of Appeal found the affidavits admissible for that purpose, citing *Kollert v. Cundiff, supra,* 50 Cal.2d 768, 772-773 and *Sopp v. Smith*, 59 Cal.2d 12, 14. (*Noll v. Lee* at p. 86.)

In *Sopp v. Smith* (1963) 59 Cal.2d 12, 14, cited in *Noll*, an affidavit showed that a juror made various observations and experiments in connection with the site of the accident at issue. The Court cited *Kollert* for the bias exception, but found that it did not apply and excluded the affidavit.

In *People v. Castaldia* (1959) 51 Cal.2d 569, 570-571, cited in *Hamilton*, post-trial affidavits showed that a juror had *told a bus driver* during the defendant's trial for bookmaking that she disliked bookmakers, that the defendant did not have a chance and that the jury was going to throw the book at him. The court found the affidavits admissible, stating:

> Affidavits of jurors may be used to set aside a verdict where the bias or disqualification of a juror was concealed by false answers on voir dire examination. (*Kollert v. Cundiff, supra,* at 773 [4a]; *Williams v. Bridges,* 140 Cal.App. 537, 540 [3] [35 P.2d 407]; cf. *People v. Galloway,* 202 Cal. 81, 92 [3] et seq. [259 P. 332].)

As in *Williams*, the affidavits clearly concerned objective events.

In *People v. Galloway* (1927) 202 Cal. 81, cited in *Castaldia,* a juror made statements before and during trial that she would "hang" anyone who got drunk. (*Id.* at pp. 86-89.) The trial evidence showed that the defendant had been drunk when he fatally beat an acquaintance with the motor crank from an automobile. The court stated:

> We think the proper rule is this: That under [Penal Code] section 1181, subd. 3 [jury misconduct], it is within the power of the trial court to grant to an accused a new trial because of misconduct of a juror whether such misconduct consists of failure to disclose a

prejudicial mind at the time he is sworn or whether such misconduct arises after he is sworn as a member of the trial jury.

(*Id.* at p. 92.) The Court held that the affidavits concerning the juror's statements before she was sworn and while serving as a juror were properly considered. (*Id.* at p. 96.) However, the Court did not disturb the trial court's ruling excluding affidavits concerning statements by the juror after the verdict. (See *id.* at pp. 89, 96.) Thus, the opinion fails to support petitioner's position for three reasons: (1) it was based on Penal Code section 1181 and not on the rule now embodied in Evidence Code section 1150; (2) the case involved objective statements and (3) the opinion did not hold that post-verdict statements were admissible.

However, even if *Hamilton* correctly characterized the rule as it existed before the enactment of Evidence Code section 1150 as part of the original Evidence Code in 1966, respondent contends that the rule has been superceded by Evidence Code section 1150.

Respondent's view of the current state of the law is confirmed by this Court's more recent statements of the current rule, citing *Hutchinson*. In *In re Hamilton, supra,* 20 Cal.4th 273, 294, the Court stated:

> However, with narrow exceptions, evidence that the internal thought processes of one or more jurors were biased is not admissible to impeach a verdict. The jury's impartiality may be challenged by evidence of "statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly," but "[n]o evidence is admissible to show the [actual] effect of such statement, conduct, condition, or event upon a juror . . . or concerning the mental processes by which [the verdict] was determined." (Evid. Code, 1150, subd. (a), italics added; see *People v. Hutchinson* (1969) 71 Cal.2d 342, 349-350 [78 Cal.Rptr. 196, 455 P.2d 132] (*Hutchinson*).) Thus, where a verdict is attacked for juror taint, the focus is on whether there is any overt event or circumstance, "open to [corroboration by] sight, hearing, and the other senses" (*Hutchinson, supra,* 71 Cal.2d at p. 350), which suggests a likelihood that one or more members of the jury were influenced by improper bias.

This statement obviously equated the overt statements, conduct, conditions, or events as described in Evidence Code section 1150 with the "narrow exceptions" to the general rule against the use of "internal thought processes" described in court opinions.

In *People v. Cox, supra,* 53 Cal.3d 618, 694, the court quoted Evidence Code section 1150, subdivision (a), and used the following language from *Hutchinson* to describe the "limitation" on evidence as based on the "'distinction between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved . . . .' (*People v. Hutchinson* (1969) 71 Cal.2d 342, 349."

Thus, the authorities relied on in the footnote 19 in *Hamilton, supra,* 20 Cal.4th at p. 298, show that bias on voir dire is not an exception to Evidence Code section 1150's requirement that the evidence concern objective events; it is an exception to the former non-statutory rule which generally barred a jury's impeachment of its own verdict. Instead, the former rule and its exception are embodied in the distinction between overt acts and subjective reasoning processes in Evidence Code section 1150.

In the instant case, the statements in Juror Sauer's declaration upon which petitioner relies were, in substance, that Sauer believed generally that "if you kill someone, you should die" and "[s]o" after petitioner admitted the shooting death of Tracie Clark in his guilt phase testimony, "I thought there was no point in us (the jury) being there." At most, the statements concern only the subjective mental processes by which Sauer determined his vote. All of the reported California opinions found by respondent in which bias has been found have involved objectively ascertainable overt acts, as described in *Hamilton, supra,* 20 Cal.4th 273, 294. The opinions relied on by petitioner (Pet. 23-25) are examples. In *In re Hitchings* (1993) 6 Cal.4th 97, 116-118 a juror falsely minimized her knowledge of the case during voir dire, discussed the case with

a coworker during trial, saying that what he did to the victim should be done to him, and later lied about the discussion. The external information which the juror had about the case was clearly a matter of objective fact (*In re Carpenter, supra,* 9 Cal.4th at p. 647), as was the juror's discussion with another person during the trial. In *People v. Nesler, supra,*16 Cal.4th at p.. 578-580, a juror heard prejudicial information about the defendant from an external source and used the information during deliberations to support conclusions which undermined the defense theory. Since Juror Sauer's post hoc statements exclusively describe mental processes, rather than objective "statements made, or conduct, conditions, or events" (Evid. Code, § 1150, subd. (a)) at a time when they might have affected the verdict, the general rule applies that the alleged facts are "not admissible to impeach [the] verdict." (*In re Hamilton, supra,* 20 Cal.4th 273, 294.)

In addition to the fact that the declaration does not describe overt, objective events, the subject matter of the statements in the declaration exclusively consist of mental processes. In that respect, the instant case is similar to *Cox*. In that case, the trial court refused to conduct a hearing on a motion for a new trial based on counsel's statement that a juror "told the entire panel that the death penalty had not been exercised in California since the 1960s; and with Rose Bird on the court, that Mr. Cox would not die anyway so it didn't matter whether they gave him death or not." (*People v. Cox , supra,* 53 Cal.3d 618, 693.) The Court held that the juror's conclusion that "it didn't matter whether they gave him death or not" could not be considered under Evidence Code section 1150, subdivision (a) because it "implicates the jurors' reasoning process." (*Id.* at p. 696.) It held that the facts concerning the execution of the death penalty were well known facts within the general knowledge of the jurors. (*Ibid.*)

However, even if the statements in Juror Sauer's declaration, made nine years after the trial, are properly considered, they fail to make the required

showing of bias.

In *In re Carpenter, supra,* 9 Cal.4th 634, 654-655, the Court stated:

> We emphasize that before a unanimous verdict is set aside, the likelihood of bias under either test must be substantial. As indicated in the high court decisions discussed above[11], the criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. The jury system is fundamentally human, which is both a strength and a weakness. (*People v. Marshall, supra,* 50 Cal.3d at p. 950.) Jurors are not automatons. They are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias. To demand theoretical perfection from every juror during the course of a trial is unrealistic.

In *People v. Nesler, supra,* 16 Cal.4th 561, 580-581, the Court stated:

> What constitutes "actual bias" of a juror varies according to the

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11. At pp. 647-650, the opinion had discussed:

Smith v. Phillips (1982) 455 U.S. 209, where, during the trial, one of the jurors applied for employment as an investigator in the District Attorney's Office; *Rushen v. Spain* (1983) 464 U.S. 114, involving improper ex parte communications between the trial court and jurors; *McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, involving a juror who failed to disclose certain information during voir dire; and *Romano v. Oklahoma* (1994) 512 U.S. [1, 10] [129 L.Ed.2d 1, 114 S.Ct. 2004], where the court found that evidence of a prior conviction and death sentence had not "affirmatively misled the jury regarding its role in the sentencing process so as to diminish its sense of responsibility."

The *Carpenter* court quoted the following:

"Even assuming that the jury disregarded the trial court's instructions and allowed the evidence of petitioner's prior death sentence to influence its decision, it is impossible to know how this evidence might have affected the jury. It seems equally plausible that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so. Either conclusion necessarily rests upon one's intuition. To hold on the basis of this record that the admission of evidence relating to petitioner's sentence in the [first] case rendered petitioner's sentencing proceeding for the [second] murder fundamentally unfair would thus be an exercise in speculation, rather than reasoned judgment." (*Romano v. Oklahoma, supra*, 512 U.S. at p. [14] [129 L.Ed.2d at p. 14].)

> circumstances of the case. (*In re Carpenter, supra*, 9 Cal.4th at pp. 653-654.) In assessing whether a juror is "impartial" for federal constitutional purposes, the United States Supreme Court has stated: "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." (*United States v. Wood* (1936) 299 U.S. 123, 145-146 [57 S.Ct. 177, 185, 81 L.Ed. 78)

Petitioner's argument is in essence that Sauer was biased because he had a pre-existing opinion about when the death penalty was appropriate. (Pet. at p. 24.) However, respondent contends that such an attitude with respect to the death penalty does not constitute bias. On the contrary, it serves an important societal function and is in no sense comparable to prejudging the facts of the case, as occurred in the cases on which petitioner relies.

As the Court has explained:

> "[T]he sentencing function [at the penalty phase] is inherently moral and normative, not factual; the sentencer's power and discretion under . . . [the 1978 law] is to decide the appropriate penalty for the particular offense and offender under all the relevant circumstances. [Citation.] . . . [¶] . . . Instructions like those discussed in [*People v.*] *Brown* [(1985) 40 Cal.3d 512, 230 Cal.Rptr. 834, 726 P.2d 516] are better suited to the normative task of sentencing than are admonitions . . . which speak in terms associated with traditional factfinding."

(*People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) Similarly, an analysis of bias which is suitable to factfinding is not appropriate for capital sentencing discretion.

A capital jury expresses the "conscience of the community." (*People v. Jones* (1997) 15 Cal.4th 119, 185, citing *Witherspoon v. Illinois* (1968) 391 U.S. 510, 519-520.) Clearly, this requires that each juror bring his or her own conscience to the trial and uses that conscience in deciding the penalty. Even assuming that Juror Sauer's declaration is properly considered, it fails to show that Sauer did anything more or less than that.

Contrary to petitioner's assertion, Sauer's declaration does not show

that he would "automatically" vote for death upon being convinced that appellant was guilty of "homicide." (Pet. 24.)[12/] More importantly, nothing in Sauer's declaration shows that he actually voted for death "automatically," that is, without considering the penalty factors and the relevant evidence. Under United States Supreme Court opinions, "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307.) In *Blystone*, the court upheld a sentencing procedure in which death was required if an aggravating circumstance was found but no mitigating circumstances were found. The language quoted above was used in *Boyde v. California* (1990) 494 U.S. 370, 377, to uphold the statutory procedure which provided that the jury "shall" impose death if aggravation outweighs mitigation. Thus, in evaluating whether a death procedure is unconstitutionally biased in favor of death, the United States Supreme Court's analysis begins and ends with the question of whether the jury was permitted to "consider all relevant mitigating evidence." (Quoting *Blystone, supra,* at p. 307; cf. *Jones v. United States* (1999) 527 U.S. 373, 381; see *Weeks v. Angelone* (2000) 528 U.S. 225.) Similarly, under state law, it is sufficient if the jury considers the evidence and the sentencing factors. (See *People v. Gates* (1987) 43 Cal.3d 1168, 1188-1190 [multiple use of the same facts], 1203 [use of unadjudicated criminal activity].)

It follows that petitioner had no right to demand a juror who had no pre-existing thoughts about when the death penalty might be appropriate. As

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12. Petitioner asserts that Sauer "would 'automatically vote for a verdict of death. . . .'" (Pet. 24.) Although petitioner does not cite a source for the quotation, he implies that Sauer is the source. The implication is false. Nothing in Sauer's declaration nor any other statement by Sauer which is shown by the appeal record or adequately alleged on habeas corpus connects the quoted language to Sauer. In respondent's view this shows the necessity that allegations in the petition must be "in such form that perjury may be assigned upon the allegations if they are false." (*Ex parte Walpole, supra,* 84 Cal. 584.)

this Court has held,

> The proper standard for exclusion of a juror based on bias with regard to the death penalty–the so-called *Witherspoon-Witt* standard–is whether the juror's views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 . . . .)

This Court has applied that standard to approve the failure to excuse prospective jurors for cause in virtually identical circumstances to those presented in the instant case. In *People v. Staten* (2000) 24 Cal.4th 434, a prospective juror stated in his questionnaire, "[t]he ones committing hideous crimes *must* be executed!," but orally stated on voir dire that he would follow the judge's instructions with regard to penalty. (*Id.* at p. 453.) The Court held that neither this prospective juror nor two others "expressed views that would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath." (*Id.* at p. 454 [internal quotation marks omitted].) In *People v. Crittenden* (1994) 9 Cal.4th 83, one prospective juror said "he believed that if a defendant had committed deliberate, first degree murder, he or she should receive the death penalty. . . and that a defendant's background or life experiences would not affect his decision to impose the death penalty," but later said he could vote for life without parole based on the evidence. (*Id.* at p. 122.) Another said he would automatically vote in favor of death, but also said he would follow the guidelines provided by the court. (*Id.* at p. 123.) The Court held that "[n]either juror expressed views indicative of an unalterable preference in favor of the death penalty, such that their protestations that they would follow the law would not 'rehabilitate' them" and noted that they gave conflicting responses. (*Id.* at p. 123; cf. *People v. Mincey* (1992) 2 Cal.4th 408, 456-457.)

The instant case presents circumstances similar to those in *Staten, Crittenden* and *Mincey*, where jurors expressed opinions favoring the death

sentence for a certain class of crimes, but also agreed to follow the court's instructions. In the instant case, the jury was instructed that it "shall consider all of the evidence which has been received during any part of the trial in this case" and "shall consider, take into account and be guided by" the penalty factors (CT 698; cf. CT 704) to determine the penalty which is "justified and appropriate" (CT 704). As a member of the jury, Sauer is presumed to have understood and followed the instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662.) As respondent has noted, the jurors presumably swore that they would "well and truly try" the cause and "a true verdict render according to the evidence." (*In re Carpenter, supra,* 9 Cal.4th 634, 641; RT 4469.)

Sauer's declaration fails to overcome the presumption that he followed the instructions and his oath as a juror, or to show that he gave false answers on voir dire, as petitioner also argues. The relevant voir dire occurred after a group of jurors, which included Sauer, was informed of the charges and the capital case procedure. (RT 3265-3268; see Pet. 23-24.) At that time, the group was informed that the purpose of the session was to inquire into the prospective jurors' personal views regarding capital cases. (RT 3267.) The court told the group that it would ascertain if any of them entertained "such a conscientious opinion about the death penalty" as to prevent them from finding the defendant guilty or from finding a special circumstance or "from voting for the death penalty under any circumstances." (RT 3268.) The court next stated:

> Also, it's necessary that we find out if there is any prospective juror who has such a conscientious opinion regarding the two possible verdicts that he or she would automatically vote for a verdict of death and under no circumstances vote for a verdict of life imprisonment without the possibility of parole.

(RT 3268.)

The court also informed the group:

> In [the penalty] phase of the trial, should we get there, evidence may be presented to you by both sides as to any matter relevant to aggravation, mitigation and sentence.

(RT 3269-3270.)

The court concluded that the purpose of the questions was to "ascertain any attitude or feeling or belief that you have which may interfere with your ability to be a fair and impartial trial juror if you are selected." (RT 3270.)[13/]

Thus, the court made it clear that the purpose of the questions to the prospective jurors was to determine if the jurors could be fair. In the context of the court's previous explanation, this clearly meant that a juror would consider the evidence in mitigation and aggravation without favoring either of the parties.

In answering the questions put to him on voir dire, Sauer said that he would not automatically vote not guilty, against the special circumstances, or for or against the death penalty. (RT 3309-3310.) He then affirmed that he was not "inclined to vote one direction or the other right now." (RT 3310-3311 [quoting the court's question].) In answer to a later question by defense counsel, Sauer said he had not thought much about capital punishment. (RT 3311, 3312.) When asked whether he was "neutral and not really an advocate of [capital punishment]," Sauer answered, "Neutral, more or less neutral." He said he had not thought about the types of cases in which capital punishment might be appropriate. (RT 3312.)

Thus Juror Sauer's answers on voir dire showed that he had thought very little about the death penalty and had no preconceived ideas about it. However, when he heard the guilt phase evidence, he formed the inferably tentative conclusion that the death penalty would be appropriate for the murder

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13. The first definition of "partial" is "Inclined to favor one party in a cause . . . ." (Webster's New International Dictionary, Unabridged, 2d Ed.) This meaning of the term is more limited than "biased," a term which can be synonymous with "partial." The difference is particularly applicable to the penalty decision in a capital case. As respondent has noted, since capital jurors express the "conscience of the community," they will often have a "bias," which simply means that they lean one way or the other. However, what they should not be is "partial," which means that they favor one party over the other.

of Tracie Clark, which was the only count on which the death penalty could be imposed. He then heard the penalty phase evidence, instructions and argument and deliberated with the other jurors, during which his tentative conclusion became a firm one. Properly understood, Sauer's declaration contains nothing to the contrary.

The declaration consists in part of Sauer's current thoughts in 1996 when it was executed and in part of his attempt to reconstruct his thoughts at or near the time of trial, which occurred nine years earlier. The pertinent paragraph of the declaration starts with Sauer's *current* view: "I believe in the death penalty, and that if you kill someone you should die." He then described his thoughts during the trial: "So after David Rogers confessed on the witness stand to killing that woman, I thought there was no point in us (the jury) being there." This sentence does not specifically state whether Sauer formed his conclusion during the guilt phase, the penalty phase, or at some time later. Even assuming that the declaration refers to a conclusion formed during the guilt phase, the conclusion would merely be an impression or tentative opinion, which would not be inconsistent with the presumption that Sauer later considered all of the evidence and the penalty factors to determine the penalty which was "justified and appropriate" as the court instructed. (CT 704.) (*In re Hamilton, supra,* 20 Cal.4th 273, 295-296 [preliminary impressions from pretrial publicity]; *People v. Harris* (1981) 28 Cal.3d 935, 949-950, quoting *Irvin v. Dowd* (1961) 366 U.S. 717, 722-723 ["To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard."].) The third and final sentence of the relevant paragraph was: "As my wife put it, it was a waste of the taxpayer's money." Obviously, this sentence refers to a time *after* the trial, when it would be feasible to make such a characterization. Thus, Sauer's declaration did not show that he failed to base his penalty decision solely on the evidence. (See *In re Carpenter, supra,*

9 Cal.4th 634, 656-657 [explaining, "We will not presume greater misconduct than the evidence shows"].)

It is petitioner's burden to show that Sauer's "wrong or incomplete answer hid the juror's actual bias." (*Hamilton, supra,* at p. 300.) As respondent has discussed, petitioner's factual allegations, based primarily on Sauer's declaration, fail to show actual bias.

Possibly as an alternative, petitioner argues that Sauer's answers on voir dire concealed a basis for a peremptory challenge by the defense. (Pet. 23.) However, petitioner fails to cite any authority supporting his apparent premise that false answers on voir dire which conceal the basis for a peremptory challenge, but not inherent or actual bias, is a ground for reversal, much less a ground for relief on habeas corpus. Although language in *In re Hitchings, supra,* 6 Cal.4th 97, 110-112, implies that concealment of grounds for a peremptory challenge on voir dire can be reversible error, in that case, the juror falsely minimized her knowledge of the case during voir dire, discussed the case with a coworker during trial, saying that what he did to the victim should be done to him, and later lied about the discussion. Thus, the juror concealed objective information which was material to the decision as to guilt or innocence and showed that she had actually prejudged the case. (*Id.* at p. 122.) Moreover, neither *Hitchings* nor any of the cases discussed hold that the concealment of a state of mind which does not constitute actual bias can constitute grounds for reversal. As noted petitioner fails to show actual bias. However, even if actual bias were unnecessary, the petition fails to show concealment or misrepresentation, as discussed above. As a result, petitioner fails to show grounds for relief.

II.

PETITIONER'S COMPLAINTS OF HIS SHACKLING AT ARRAIGNMENT AND THE PRELIMINARY EXAMINATION FAIL TO SHOW ERROR OR PREJUDICE

Petitioner argues that he was deprived of a fair trial by his shackling at arraignment and at the preliminary examination. (Pet. 26-31.) Respondent contends that the shackling was not error and that petitioner fails to show any effect on his trial.

In *People v. Fierro* (1991) 1 Cal.4th 173, 218-219, the Court held that the requirement of "manifest need" for restraints applied to the use of restraints at the preliminary examination. The Court noted that the requirement

> serves not merely to insulate the jury from prejudice, but to maintain the composure and dignity of the individual accused, and to preserve respect for the judicial system as a whole; these are paramount values to be preserved irrespective of whether a jury is present during the proceeding. Moreover, the unjustified use of restraints could, in a real sense, impair the ability of the defendant to communicate effectively with counsel (*People v. Harrington* [(1871)] 42 Cal. [165,] 168) or influence witnesses at the preliminary hearing.

(*People v. Fierro, supra,* at pp. 219-220.)

Petitioner implies that a showing of "manifest need" was required before he could be in shackles at arraignment. (Pet. 31.) Based on his references to being brought to court in shackles (Pet. 26, 28, fn. 14), it further appears to be his position that "manifest need" is required before he could be taken in shackles to and from the courtroom for arraignment. Respondent contends that the considerations noted in *Fierro* do not apply to shackling at arraignment. There are no jurors, no witnesses, and, in general, no occasion for extensive communication with counsel. Although considerations of composure and dignity of the accused and respect for the judicial system do exist, the effect of restraint on these factors at arraignment is highly attenuated. In short, there is no significant likelihood of prejudice to either the accused or the judicial

system from shackling at arraignment. Moreover, security considerations at in-custody arraignments strongly militate in favor of the routine use of physical restraints at these appearances. Frequently, many defendants, accused of a variety of crimes, have appearances on the same calendar. As a result, these in-custody defendants are in close proximity to other defendants, custodial officers and sometimes to court personnel or private persons while in such places as holding areas, elevators, corridors and the courtroom itself. Even if custodial officers had no firearms, the courtroom bailiffs generally do. The danger from a number of unrestrained in-custody defendants in proximity to firearms and freedom is obvious. In addition, a requirement of "manifest need" for restraints at arraignment, would necessitate the unshackling of defendants for their appearance and reshackling them for transportation. However, even disregarding the danger and consumption of time which would be involved in unshackling a number of defendants for calendar court appearances, respondent urges that the attenuated effect of restraints at arraignments, balanced with the danger which would still exist, compels the conclusion that the requirement of "manifest need" not be applied to arraignments or other calendar court appearances.

In any event, as this Court has held,

> It is settled that the use of physical restraints in the trial court cannot be challenged for the first time on appeal. Defendant's failure to object and make a record below waives the claim here. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 95 [270 Cal.Rptr. 817, 793 P.2d 23]; *People v. Walker* (1988) 47 Cal.3d 605, 629 [253 Cal.Rptr. 863, 765 P.2d 70]; *People v. Duran, supra,* 16 Cal.3d 282, 289.)

(*People v. Tuilaepa* (1992) 4 Cal.4th 569, 583.)

As a result, petitioner has waived any complaint regarding shackling at arraignment.

Petitioner did, however, object to his shackling at the preliminary examination. (CT 11.) Senior Deputy Kurt Poeschel, who was in charge of Municipal Court security (CT 13), testified that petitioner was on a 24-hour

suicide watch and had made threats to kill himself. (CT 16, 19.)[14/] Poeschel also testified that petitioner is transported separately from other prisoners. (CT 19.) The magistrate ordered that cameras be turned off until it ruled. (CT 21.) Petitioner agreed. (CT 21.) After hearing a witness for petitioner and argument, the magistrate ruled that he was convinced by the testimony of Senior Deputy Poeschel that petitioner posed a risk to himself and "potentially" to others. (CT 80-81.) He ordered petitioner to remain shackled. (CT 81.) Respondent notes that petitioner fails to demonstrate or allege that any television pictures were broadcast showing that he was in shackles at the preliminary examination. All of the news stories on which he relies predated the preliminary examination, which began on March 16, 1987. As petitioner notes, the magistrate ordered that no pictures of petitioner in shackles at the preliminary examination be disseminated. (CT 82; Pet. 28.) The magistrate further ordered that only one video camera was permitted in the courtroom at the preliminary examination. (CT 12.)

A reviewing court will uphold the decision of the trial court to shackle a defendant absent an abuse of discretion. (*People v. Pride* (1992) 3 Cal.4th 195, 231-232, 10 Cal.Rptr.2d 636, 833 P.2d 643.) Petitioner argues that no "manifest need" was shown for his shackling at the preliminary examination. (Pet. 29-30.) He argues that essential to a showing of "manifest need" is a credible threat of violence or other "nonconforming conduct." (Pet. 29.) Petitioner then argues that he "had not threatened to harm others or shown any inclination to escape or engage in any other unruly behavior." (Pet. 29-30.) However, he does not argue that the facts before the magistrate were insufficient to show that he had threatened suicide or that the facts were insufficient to show

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14. Although this information was apparently gained through hearsay, there was no objection. (See Evid. Code, § 353.)

that he was a danger to himself.[15] Moreover, as this Court has held, it has "never placed . . . preconditions on the trial court's exercise of discretion" such as an attempt to disrupt courtroom proceedings or to escape from jail. (*People v. Hawkins* (1995) 10 Cal.4th 920, 943-944.)

The petition contains an admission[16] that "eight armed deputies" were present at the preliminary examination. (Pet. 30; see CT 15 [4 deputies in the courtroom and 4 behind the gate], 20 [the number would vary, to a minimum of 3].) In respondent's view, this fact reinforces the danger presented by petitioner's status as a suicide risk. Since petitioner was well trained and obviously experienced in the swift use of firearms, the presence of so many guns would present a grave danger if petitioner was not restrained. Even if petitioner only attempted to shoot himself, any attempt to grab one of the deputies' guns could provoke shooting by other deputies. As Deputy Poeschel testified, the deputies could protect the audience but might not be able to control petitioner where they were. (CT 16-17.) Under the circumstances, there was a clear danger to persons in the courtroom, whether from petitioner in attempting to secure unchallenged possession of a gun or from one of the deputies' actions in response. Thus, the magistrate was well within his discretion in ordering petitioner shackled during the preliminary examination.

Petitioner also argues that there must be "a prior demonstration that no less onerous alternative could adequately address the demonstrated security problem," (Pet. 29, citing *People v. Duran* (1976) 16 Cal.3d 282, 290.) However, petitioner has failed to allege the precise restraints which were used on him at the preliminary examination or that any lesser restraints were

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15. Petitioner presented evidence at trial that, around that time, he was "a high suicide risk" (RT 5395, 5397, 5452; cf. RT 5329) and had been found with razors and strips of cloth (RT 5452-5453, 5252).

16. A statement in a brief may be treated as an admission by a party. (9 Witkin, Cal. Procedure (4th ed., 1996) Appeal, § 597, p. 631)

available.[17] Accordingly, petitioner fails to carry his burden on habeas corpus.

In any event, petitioner has failed to show prejudice. The decisions of this Court show that a conviction will not be reversed due to shackling in the absence of a showing of prejudice. (*People v. Osband* (1996) 13 Cal.4th 622, 674 [a brief glimpse by jurors of the handcuffs "could not have caused prejudice"]; *People v. Medina* (1995) 11 Cal.4th 694, 732 [no showing that jurors saw restraints]; *People v. Tuilaepa, supra,* 4 Cal.4th 569, 584 [same]; *People v. Cox, supra,* 53 Cal.3d 618, 652; see *People v. Bolin* (1998) 18 Cal.4th 297, 317-318 [since jurors did not see the defendant in shackles, there was no duty to give a cautionary instruction]; *People v. Ochoa* (1998) 19 Cal.4th 353, 416-417 [failure to replace a juror who saw restraints]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1179 [same].) In *People v. Fierro, supra,* 1 Cal.4th 173, 220, the court held that shackling at the preliminary examination was not prejudicial, noting that there was no showing that an identifying witness saw the shackles. The court relied on the general rule that

> "[I]rregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination." (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529 [165 Cal.Rptr. 851, 612 P.2d 941].)

(*Fierro, supra,* at p. 220.)

Petitioner argues that "the ubiquitous nature of the pretrial publicity," which, he implies, included showing petitioner in shackles, "was functionally the same as [ ] in cases in which the jurors are actually in court when a defendant is so displayed." (Pet. 30.) However, he fails to cite any authority for his conclusion, which conflicts with the prior decisions of this Court which

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17. The District Attorney observed that the restraints were "rather minimal," noting that petitioner was in handcuffs and "perhaps" leg cuffs, which he could not see. (CT 79.)

refused to find prejudice unless jurors actually observed the defendant in shackles. (*People v. Medina, supra,* 11 Cal.4th at p. 732 [the record failed to show that the jurors saw the defendant's shackles]; *People v. Tuilaepa, supra,* 4 Cal.4th at p. 584 [same].) In fact, the decisions of this Court support the conclusion that jurors must observe the defendant in shackles *in the courtroom during trial* before prejudice will be deemed to have resulted. (*People v. Osband, supra,* 13 Cal.4th at p. 674 [a brief glimpse of handcuffs by prospective jurors "could not have caused prejudice"]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1177-1180 [a juror's observation of the defendant in handcuffs in a custody area "could not have had any prejudicial effect"].)

Petitioner implies that Juror Tegebo was prejudiced by seeing a television news story showing petitioner in an orange jumpsuit "being led into court for some pre-trial court appearance." (Pet. 26-27, citing Exh. 7.) He also relies on videotapes of television news stories which show petitioner in shackles at arraignment. (Pet. 26, citing Exh. 50.) Since petitioner's argument appears to be that Tegebo was biased by the news coverage, the standard of review is that for the receipt of extraneous information. This Court's decisions show that juror observations of shackled defendants outside the trial are not inherently prejudicial. (*People v. Bolin, supra,* 18 Cal.4th 297, 318 [defendant was manacled in court before trial sessions began]; *People v. Ochoa, supra,* 19 Cal.4th 353, 416-417 [defendant was seen in shackles outside the courthouse]; *People v. Osband, supra,* 13 Cal.4th at pp. 673-674 [prospective jurors may have seen the defendant in handcuffs before trial]; *People v. Rodrigues, supra,* 8 Cal.4th at pp. 1178-1179 [defendant was seen in handcuffs on the jail floor of the courthouse].) As a result, petitioner must show a substantial likelihood, based on all the circumstances of the case, that the juror was actually biased. (*In re Carpenter, supra,* 9 Cal.4th at p. 653.)

As this Court stated in *In re Hamilton, supra,* 20 Cal.4th at p. 295:

> The jurors' pretrial exposure to publicity about the case is not

> itself grounds to impeach the verdict, even when the exposure led them to develop tentative opinions about the defendant's guilt or innocence. "In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. [Citations.]" (*Irvin, supra*, 366 U.S. 717, 722-723 [81 S.Ct. 1639, 1642-1643].)

In the instant case, there is no basis for an inference that Juror Tegebo was biased by seeing petitioner in custody on television before the trial. On voir dire, she said that she had seen news coverage of the case (RT 834) and that she knew that a deputy or an ex-deputy was arrested for the murder of two prostitutes (RT 836). However, she agreed that she could be "as fair and neutral and impartial as is possible for a human being to be at this point." (RT 836.) As a member of the jury, she "evidently swore, in conformity with the oath prescribed by statute, that she would 'well and truly try' the cause and 'a true verdict render according to the evidence.' (Code Civ. Proc., former § 604, enacted 1872, repealed Stats. 1988, ch. 1245, § 7, p. 4155; accord, id., § 232, subd. (b).)" (*In re Carpenter, supra*, 9 Cal.4th 634, 641.) (See RT 4469 [jury sworn].) In addition, the jury was instructed at the guilt phase that it must base its verdict on the evidence received at trial and not from any other source (CT 610; RT 5628 [CALJIC No. 1.03]) and at the penalty phase that "shall consider all of the evidence which has been received during any part of the trial in this case" and "shall consider, take into account and be guided by" the penalty factors (CT 698; cf. CT 704) to determine the penalty which is "justified and appropriate" (CT 704). "Jurors are presumed to understand and follow the court's instructions." (*People v. Holt, supra,* 15 Cal.4th 619, 662.)

Petitioner stresses Tegebo's declaration that in the news story, evidently soon after his arrest, petitioner looked "strange–deranged, almost" and possibly "guilty." (Pet. 28, citing Exh. 7.) Respondent notes that if petitioner indeed looked strange, that would only support the defense evidence at the guilt and penalty phases that soon after his arrest petitioner was emotionally unstable and suicidal. Tegebo's observation that petitioner looked like he might be guilty is not an unusual one to make regarding an in-custody defendant. It goes without saying that since petitioner was on trial, he *might* be guilty, but his guilt was the issue the jury had a duty to resolve based on the evidence, as the jurors promised and as they were repeatedly told. Tegebo's declaration provides no reason to believe that she did not perform her duty to render a just verdict based solely on the evidence.

III.

RESPONDENT AGREES THAT AN ORDER TO SHOW CAUSE SHOULD ISSUE AS TO THE CLAIMS REGARDING THE ATTACK ON TAMBRI BUTLER

Since respondent agrees that a resolution of disputed evidence is required to resolve the issues raised in Claims III, IV and V(K), respondent agrees that an Order to Show Cause should issue.

IV.

THE PETITION FAILS TO SHOW INCOMPETENCE OF COUNSEL OR PREJUDICE

Petitioner makes numerous claims of incompetent representation by trial counsel. None of the claims is meritorious.

The constitutional standard for inadequate assistance of counsel was defined in *Strickland v. Washington* (1984) 466 U.S. 668, 689-690:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-4, 102 S.Ct. 1558, 1574-5, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." . . .
>
> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

(*Strickland v. Washington*, *supra*, 466 U.S. 668, 689-90; see also *Kimmelman*

v. Morrison (1986) 477 U.S. 365, 382 ["highly demanding" standard of "gross incompetence"].)

Strategic choices made after "thorough investigation" of the relevant law and facts are, of course, "virtually unchallengeable;" however strategic choices made "after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations in investigation." (*Strickland v. Washington*, *supra*, 466 U.S. 668, 690-1; see *Burger v. Kemp* (1987) 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed. 2d 638; *Bonin v. Calderon* (9th Cir. 1996) 59 F.3d 815, 833, 835, cert. denied, 116 S.Ct. 718, 133 L.Ed. 2d 671.) The duty to investigate "'is not limitless: it does not necessarily require that every conceivable witness be interviewed. . . .'" (*Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1040, quoting from *United States v. Tucker* (9th Cir. 1983) 716 F.2d 576, 584.)

"The correct approach to investigation reflects the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources." (*Rogers v. Zant* (11th Cir. 1994) 13 F.3d 384, 387, cert. denied 115 S.Ct. 255, 130 L.Ed. 2d 175.)

As the Court has stated, appellate courts will not second guess a trial attorney's tactical decisions unless they are outside the permissible range of competence. Review is "highly deferential." (*People v. Duncan* (1991) 53 Cal.3d 955, 966; see also *People v. Berryman* (1993) 6 Cal.4th 1048, 1082; *People v. Pensinger* (1991) 53 Cal.3d 334, 379-380; *People v. Jennings* (1991) 53 Cal.3d 334, 379-380.)

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that a counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is

reliable.
(*Strickland v. Washington*, *supra*, 466 U.S. 668, 687.)

To demonstrate prejudice:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.

(*Strickland* v. *Washington*, *supra*, 466 U.S. 668, 694-5.)

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission would meet that test [citation omitted] and not every error that conceivably could have influenced the outcome undermines the reliability of the proceeding.

(*Strickland* v. *Washington*, *supra*, 466 U.S. 668, 693.)

The *Strickland* court also noted, "[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal. . . ." (*Strickland v. Washington*, *supra*, 466 U.S. 668, 685.) Moreover, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Id.* at 686.)

In *Lockhart v. Fretwell* (1993) 506 U.S. 364, the Supreme Court found that the reliability and fairness of the trial is the key to prejudice. *Fretwell* generally relied on the *Strickland* description of prejudice, but noted, "'Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.'" (*Fretwell*, *supra*, at p. 369, quoting *United States v. Cronic* (1984) 466 U.S. 648, 658.)

In *Fretwell* the court emphasized that merely demonstrating that the outcome would have been different was *insufficient* for prejudice. (*Lockhart v. Fretwell*, 506 U.S. 364, 369, fn. 2, relying on *Nix v. Whiteside* (1986) 475 U.S.

157, 175-176 [*Nix* held that defense counsel was not required to offered perjured testimony].)

In *Roe v. Ortega* (2000) 528 U.S. 470, 484, the United States Supreme Court held that, to show prejudice in that case, the defendant was required to "demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." The court explained,

> In adopting this standard, we follow the pattern established in *Strickland* and [*United States v.*] *Cronic*, [466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)] and reaffirmed in [*Smith v.*] *Robbins*, [528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000)], requiring a showing of actual prejudice (i.e., that, but for counsel's errors, the defendant might have prevailed) when the proceeding in question was presumptively reliable, but presuming prejudice with no further showing from the defendant of the merits of his underlying claims when the violation of the right to counsel rendered the proceeding presumptively unreliable or entirely nonexistent. See *Strickland*, 466 U.S., at 493-496; *Cronic*, 466 U.S., at 658-659, 104 S.Ct. 2039; *Robbins*, 528 U.S., at [285-286], 120 S.Ct., at 764-765.

The *Strickland* standard has been adopted in California. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217; see also *People v. Osband, supra,* 13 Cal.4th at p. 644.)

Respondent notes that petitioner has provided no substantial new evidence on habeas corpus bearing on trial counsel's reasons, or lack of reasons, for the actions or omissions which petitioner challenges on habeas corpus.

In an appeal from a conviction, the defendant must show both incompetence and prejudice from the record on appeal. In the absence of such a showing, the conviction must be affirmed. (*People v. Jennings, supra,* 53 Cal.3d 334, 376; *People v. Pope* (1979) 23 Cal.3d 412, 425.) If the record does not illuminate the basis for the challenged acts or omissions, the conviction will be affirmed on appeal, unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v.*

Pope, supra, 23 Cal.3d 412, 425-426; see *People v. McPeters* (1992) 2 Cal.4th 1148, 1186-1187 [a plausible tactical explanation for counsel's action was possible]; *People v. Pensinger, supra,* 52 Cal.3d 1210, 1252 [the record failed to show whether the possible reasons for counsel's action amounted to incompetence].).)

Since petitioner has failed to show the reasons for most of the challenged decisions by counsel, the presumption remains that the decisions were made for a tactical reason if any valid tactical reason is possible.

A. Failure To Move For Severance Of The Murder Counts

Petitioner argues that his trial counsel acted incompetently in failing to move for severance of the two murder counts and by failing to request a limiting instruction. (Pet. 69-74.) Respondent contends that the failure to move for severance was not prejudicial because severance would have been an abuse of discretion and because evidence of each murder would have been admitted at the trial of the other even if they had been severed.[18/] For the same reason, competent counsel could have decided that such a motion would be futile. Accordingly, petitioner fails to show prejudice or inadequacy.[19/]

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18. Petitioner argued on appeal that the trial court erred in failing to sever the counts sua sponte. Respondent made largely the same points on appeal as are pertinent to the habeas petition. (See RB 120-122 [statutory standards], 127-141 [discussion of the factors favoring joinder].) In order to respond to the petition, respondent will fully set forth its arguments, although much of it will repeat its arguments on appeal.

19. In *Strickland v. Washington, supra,* 466 U.S. 668, 679, the court stated:

> [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that

Petitioner admits that the statutory requirements for joinder were met and that he made no severance motion. (Pet. 71; see AOB 125.) However, he argues that counsel should have moved for severance. He argues that counsel's failure to do so was prejudicial, obviously based on the premise that in the absence of joinder evidence of the two crimes would not have been cross-admissible. (Pet. 70-71, 72-73.) The premise is false.

The joinder of offenses is governed by Penal Code section 954, which states:

> *An accusatory pleading may charge two or more different offenses connected together in their commission*, or different statements of the same offense *or two or more different offenses of the same class of crimes or offenses*, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; *provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately* or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count. [Emphasis added.]

As described in 4 Witkin, *Cal. Criminal Law* (2d ed., 1988) Proceedings Before Trial, § 2087, p. 2456:

> [C]rimes are "connected together in their commission" . . . where the same weapon is used, the same method is employed, or they all take place in the course of a related series of acts or transactions.
>
> Formerly, joinder was authorized only where the offenses related to the same transaction. The present language ("connected together") is broader: "As it now reads the statute permits the joinder of different offenses, even though they do not relate to the same transaction or

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course should be followed.

> event, if there is *a common element of substantial importance in their commission,* for the joinder prevents repetition of evidence and saves time and expense to the state as well as to the defendant." (*People v. Scott* (1944) 24 C.2d 774, 778, 151 P.2d 517; see also *People v. Kelly* (1928) 203 C. 128, 135, 263 P. 226; *In re Pearson* (1947) 30 C.2d 871, 873, 874, 186 P.2d 401; *People v. Bundte* (1948) 87 C.A.2d 735, 745, 197 P.2d 832; *People v. Walker* (1952) 112 C.A.2d 462, 471, 246 P.2d 1009; *People v. Chapman* (1959) 52 C.2d 95, 97, 338 P.2d 428; *People v. Chessman* (1959) 52 C.2d 467, 492, 341 P.2d 679 ["even though they do not relate to the same transaction and were committed at different times and places and against different victims"]; *People v. Kemp* (1961) 55 C.2d 458, 475, 11 C.R. 361, 359 P.2d 913; *People v. Pike* (1962) 58 C.2d 70, 84, 22 C.R. 664, 372 P.2d 656; *People v. Matson* (1974) 13 C.3d 35, 39, 117 C.R. 664, 528 P.2d 752.)

Crimes of assault against the person are crimes of the same class. (*People v. Kemp* (1961) 55 Cal.2d 458, 476 [rape, murder and kidnaping]; see *People v. Johnson* (1988) 47 Cal.3d 576, 587 [rape and murder]; *People v. Chessman* (1959) 52 Cal.2d 467, [robbery and kidnaping, some of which involved rape].)

Under the standard of abuse for discretion, where cross-admissibility is shown, none of the other factors need be analyzed. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1317.) As this Court has held, cross-admissibility is sufficiently shown where the facts of the criminal attacks are "probative of a common method or approach." (*People v. Marshall* (1997) 15 Cal.4th 1, 28 [evidence of a non-fatal sexual assault would have been admissible in separate trial of the murder case to show identity, intent and motive], citing *People v. Sully* (1991) 53 Cal.3d 1195, 1222-1223 [similar pattern in six murders; joinder upheld].)

Petitioner does not dispute that ballistic evidence tied him to both murders. (See Pet. 70.) Specifically, the evidence conclusively showed that the same gun was used to kill both victims and inferably showed that the gun was in petitioner's exclusive possession since he stole it well before the first murder until it was found in his truck a few days after the second murder. (See RB 18-

21, 25-26, 28-30.) In addition, petitioner made a number of false statements about the gun, both to investigators and in his testimony, which showed consciousness of guilt as to both murders. (See further discussion below; RT 131-132.) In *People v. Carpenter* (1997) 15 Cal.4th 312, 361-362, this Court held that ballistics evidence made two criminal incidents cross-admissible, even though there was markedly different evidence of identity as to each. The Court explained:

> Evidence of both incidents would have been admissible at separate trials of each. The ballistics evidence showed that the same gun was used each time, strongly indicating that the same person committed each crime. Thus, evidence that defendant was the gunman in one incident was evidence that he was the gunman in the other. The evidence of identity was strong for both incidents. Regarding the Hansen/Haertle crimes, there were multiple eyewitness identifications, evidence regarding the distinctive jacket both the gunman and defendant wore, shoe print evidence, and evidence that defendant owned a car similar to the gunman's. Regarding the Scaggs crimes, the morning of the day she disappeared, defendant was scheduled to drive her to the very area where her body was later found. As the trial court stated, the question of severance was not close. (*People* v. *Medina* (1995) 11 Cal.4th 694, 748-749 [47 Cal.Rptr.2d 165, 906 P.2d 2] ["[T]he ballistic evidence alone probably would have been sufficient to justify admission of the 'other crimes' evidence."].)

(*Carpenter*, *supra*, at pp. 362-363.)

Respondent contends that *Carpenter* squarely refutes petitioner's argument that there was a possibility that a severance motion might have been granted. Nevertheless, respondent will answer petitioner's specific points.

Petitioner argues that he was prejudiced in the "weak" Benintende case by spillover from the Clark case and that petitioner was prejudiced in the Clark case by evidence from the Benintende case. (Pet. 70-71.) It appears to respondent that these arguments virtually concede that each case affected the other. However, contrary to petitioner's premise, the cross-effect was due to the cross-admissibility of relevant evidence, not to improper cross-spillover. This Court's opinions show that the proper use of one crime to prove another is not

"spillover." (See, e.g., *People v. Bradford, supra*, 15 Cal.4th 1229, 1316-1317; *People v. Marshall, supra*, 15 Cal.4th 1, 28; *People v. Arias* (1996) 13 Cal.4th 92, 127-128; *People v. Price* (1991) 1 Cal.4th 324, 388-390 [motive and underlying plan to further gang activities]; *People v. Johnson, supra,* 47 Cal.3d at pp. 589-590 [noting that the key factor in that case was not the cross-admissibility of the evidence, but the "the circumstantial cross-linking of the evidence"].)

The evidence in this case showed significant similarities and telling differences between the murders of Janine Benintende and Tracie Clark, which showed a common pattern to both murders. The pattern was valuable in drawing inferences as to each murder.

Janine Benintende and Tracie Clark left Union Street under similar circumstances close to a year apart. They inferably disappeared on their first nights working as prostitutes in Bakersfield. In light of petitioner's job as a patrol officer and his familiarity with Union Street prostitutes, the necessary conclusion is that he knew that Janine and Tracie were new to the area and consequently there was less likelihood that anyone would miss them if they disappeared. In addition, the two victims were shot under apparently similar circumstances using a similar pattern of shots (some shots to different sides of the body and at least two shots fired at the same or nearly the same places on the body). Their bodies were thrown into the same canal and were found only a few miles apart. The similarities between the two killings strongly tended to undermine petitioner's defense that his shooting of Tracie Clark was a spontaneous reaction to provocation by Clark.

Moreover, the only apparently significant proven difference between the two murders was that petitioner only shot Janine Benintende three times while he shot Tracie Clark six times, emptying the gun. A comparison of the two cases raises the inference petitioner did not reflexively shoot Tracie Clark until the gun was empty but continued shooting because she kept moving (as

suggested by his confession) and he could not be sure that she would die. In addition, petitioner's guilt of the murder of Janine Benintende contradicted Dr. Glaser's theory that petitioner's confession was false because it was motivated by a desire to commit "legal suicide." (See RT 5250-5252, 5298-5300, 5326-5327; see also RT 5594-5595 [District Attorney's argument].) (See *People v. Millwee* (1998) 18 Cal.4th 96, 129-131) [evidence of another shooting in which the defendant offered the same "pat" excuse was properly admitted in rebuttal]; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1245 [evidence of the defendant's conduct in a separate robbery contradicted defense evidence that he was mentally impaired]; *People v. Memro* (1995) 11 Cal.4th 786, 850-851 [evidence of one crime was admissible to rebut a psychiatric defense to another; joinder properly denied].) Finally, in the amytol interview, introduced in evidence at the penalty phase, petitioner made statements suggesting that he had never killed anyone before (RT 5879), which the Janine Benintende murder showed was a self-serving fabrication, which was inferably true of the amytol interview generally.[20/]

Petitioner specifically argues that evidence of the Tracie Clark murder was not admissible with respect to the Janine Benintende murder. (Pet. 72-73; see AOB 128-129.) The argument is spurious. As noted, there were marked similarities in the pattern of the wounds, and other circumstances, in the murders of Tracie Clark and Janine Benintende. Moreover, several types of evidence which were present in the Clark murder were lacking in the Benintende murder and therefore tended to shed light on the Benintende murder. In the murder of Janine Benintende, the most significant evidence of the circumstances of the murder was the gunshot wounds themselves. In the Clark murder, there was

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20. Respondent notes that the murder of Janine Benintende was an element of the multiple murder special circumstance, which the People were entitled to prove at some point in the proceeding, although not necessarily at the same trial or phase of trial. (See further discussion below.)

additional physical evidence in the blood at the scene, the shoe tracks, tire tracks, other "disturbances" in the dirt and in gunpowder tattooing on Tracie Clark's body which corresponded to an entry wound on the right side, inferably showing that she was shot inside the truck. These additional facts strongly corroborated the inference that Janine Benintende was killed intentionally, when combined with the pattern of gunshot wounds on Janine Benintende's body and the other known circumstances of her death. The District Attorney's only theory of malice as an element of the Janine Benintende murder was express malice. (RT 5591-5593.)

Moreover, petitioner's use of the same gun in the murder of Tracie Clark was highly significant in the Benintende murder. It tended to show that petitioner had deliberately acted to make this particular gun immediately available for his use when he picked up newly-arrived prostitutes. The fact that petitioner had stolen the gun in 1982, used it to murder two prostitutes in 1986 and 1987 and that he had it in the back of his pickup truck that only he drove (RT 4928) shortly after the 1987 murder was relevant to show that he, and only he, used the gun. Respondent also notes that the gun was not significantly worn or pitted (Exh. 107 [the gun]) and was free of gunshot residue (RT 4875). These facts raised the inference that petitioner cleaned the gun after *both* murders, which tended to show intent to kill Janine Benintende and the premeditated intent to kill Tracie Clark. (See *People v. Anderson* (1990) 52 Cal.3d 453, 471 [cooking a plate of noodles in the victim's house after she was dead was evidence of a prior intent to kill].) These facts also contradicted petitioner's trial testimony that he "[t]hrew" the gun in the back of his truck, "left it there and never touched it" and that he wandered around the house confused. (RT 5368, 5383; cf. RT 4699, 4706 ["not used to guns" but qualified with a gun].) The jury could consider this, with other false testimony by petitioner, as showing consciousness of guilt of both offenses. (See *People v. Griffin* (1988) 46 Cal.3d 1011, 1027 [false pretrial statements].)

Finally, respondent notes that petitioner's failure to take Tracie Clark back to town shows consciousness of guilt of the Janine Benintende murder; he probably knew that the bullets would be matched but wanted Tracie Clark dead to avoid being associated with the bullets.

Petitioner complains that evidence of the murder of Tracie Clark would not have been admissible to prove his identity as Janine Benintende's murderer because they were not sufficiently similar. (Pet. 72-73; see AOB 130-134.) Respondent disagrees. As respondent has noted, the evidence of the Clark murder was clearly relevant to shed light on the circumstances of the Benintende murder and the intent involved (Evid. Code, § 1101, subd. (b)). In *People v. Johnson, supra,* 47 Cal.3d at pp. 589-590, a woman was beaten to death during a burglary, after which a gun was missing. The defendant's fingerprint was found on a window screen. A few days later, the defendant used a similar gun to commit a rape. This Court found that there were insufficient similarities between a rape and murder to show identity based on modus operandi. Despite this, the Court found that there were sufficient common features to support joinder. It explained:

> The question here, however, is not cross-admissibility of the charged offenses but rather the admissibility of relevant evidence which tended to prove that defendant was the murderer. The evidence found at the rape scene was admissible at the murder trial as circumstantial evidence to show that defendant was the murderer. What was crucial was that the cartridges and gun clip found at the scene of the rape were identified as arguably taken from the scene of the murder. These items were circumstantial evidence that defendant was involved in both crimes. The thumbprint found on the clip, although its legibility for identification was disputed, further tied defendant to the murder. The victim's identification added to the identification of defendant as the perpetrator of the assault and rape and inferentially as the possessor of physical items taken from the murder scene. [Fn. 5 omitted.]
>
> It was the circumstantial cross-linking of the evidence that prompted the trial court to deny the severance motion, and it was correct in its determination. The court recognized that even if severance were granted, since the gun and fingerprint were additional

> evidence in support of the prosecution's case that defendant murdered Cavallo, the evidence of that gun and how it was found would have come in in any case. Likewise, if defendant were being tried just for the rape, the evidence of the robbery/murder of Cavallo would have come in as it would help tie defendant to the gun used in the rape and attempted murder of Mary and thus help establish that he was her assailant. In weighing its discretionary power to order separate trials, the trial court could consider this interplay of evidence between the two occurrences. Whether tried separately or together, the interplay would occur. In both situations, the jury's ability to weigh the question of guilt objectively would depend upon effective instructions.
>
> We conclude that the evidentiary connections described above, as the trial court stated, rendered severance an "idle act" and dispelled any possibility of prejudice from the consolidation of the charges. (*Williams* [*v. Superior Court* (1984)] 36 Cal.3d [441,] 448.) [Fn. 6]
>
> [Fn. 6:] Defendant suggests that it may have been possible to "sanitize" the rape victim's identification testimony and that the trial court erred in failing sua sponte to recognize this when it ruled on the severance motion. Defendant cites no authority for imposition of such a duty on the trial court, and we reject the suggestion that the court erred in this regard. . . .

(*Johnson*, *supra*, at pp. 589-590, cf. *People v. Kipp* (1998) 18 Cal.4th 349, 369-372 [uncharged rape-murder was properly admitted to prove identity, common plan and intent]; *People v. Marshall, supra,* 15 Cal.4th at p. 28 [motive, intent, identity due to similarities in method of attack, common scheme]; *People v. Arias, supra,* 13 Cal.4th at pp. 127-128 ["'some evidence" of cross-admissibility on issues of motive, identity, and consciousness of guilt"]; *People v. Price, supra,* 1 Cal.4th at pp. 388-390 [motive and underlying plan to further gang activities].)

In the instant case, identity was an element of the Benintende murder charge and the similarities in both murders certainly tended to show identity, regardless of whether the "signature test" for modus operandi was met. Respondent also contends that the signature test was met. In addition to the arguably generic similarities in the two murders of Union Street prostitutes noted by petitioner (see AOB 131-132), there were a number of highly

distinctive similarities, including the facts that both victims were apparently murdered their first nights in Bakersfield, were murdered within about two weeks of the same day of the year a year apart (after which petitioner was arrested), were shot with the same ammunition in the same gun, with similar patterns of shots, were thrown into the same canal, were found 3-1/2 miles apart. Even under the signature test there were sufficient similarities. (See *People v. Bradford, supra,* 15 Cal.4th at pp. 1316-1317.)

Petitioner argues that evidence of both murders was "inflammatory," apparently suggesting that the Clark murder was inflammatory and "spill[ed] over" into the Benintende murder. (Pet. 73; see AOB 135-136.) However, as held in *People v. Bradford, supra*, 15 Cal.4th 1229, 1314, the defendant "has not shown that one of the offenses was significantly more likely to inflame the jury against defendant, since the murders were similar in nature and equally gruesome." (Cf. *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1244-1245.) As in *People v. Price, supra,* 1 Cal.4th 324, 390, "Although different in their particulars, the two killings were equally abhorrent." As in *People v. Memro, supra*, 11 Cal.4th 786, 851, "The crimes were of a similar class: murder. If one was inflammatory, all were."

Respondent also notes that the strongest defense offered by petitioner was the mental defense offered with respect to the Clark killing, which could also have applied to the Benintende killing. As a result, the "spillover effect" could have gone in favor of petitioner if the jury had credited his defense.[21/] Since the jury rejected his defense, the joint trial made no difference. As in *People v. Bradford, supra*, 15 Cal.4th 1229, 1318, petitioner "has not shown that evidence of guilt was significantly stronger in one case, creating the danger that that case would be used to bolster the weaker case, because the prosecutor's

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21. Petitioner has agreed that the psychiatric testimony with respect to the shooting of Tracie Clark could also be applied to the shooting of Janine Benintende. (AOB 80.)

evidence was nearly equal in strength as to both offenses." As in *People v. Arias*, *supra*, 13 Cal.4th 92, 129-130, petitioner's claim that one of the cases was weak is belied by the evidence.

Moreover, contrary to petitioner's premise (Pet. 70-71), the Benintende case was not "weak." The prosecution evidence was that Janine Benintende was on Union Street one night in the latter part of January 1986, working as a prostitute for the first time in Bakersfield. She disappeared that night. Her decomposed body was found in the Arvin-Edison Canal on February 21, 1986. She had been shot once near the sternum and twice in the back through the same entry wound. The gun used to shoot her was a six-shot .38 caliber Colt Detective Special revolver with a two-inch barrel. Petitioner had stolen the gun while on duty in 1982 and had written a false report about it. He used the same gun to shoot Tracie Clark six times on the night of February 7-8, 1987. There was a grazing wound to Tracie's abdomen, one wound in her back and four wounds in or near her right breast, including one wound associated with powder tattooing on her right arm and another which was inflicted while Tracie's back was against a solid surface, such as the ground. The gun was in a bag, with two other guns, in the back of petitioner's beige Ford pickup truck at the time of his arrest. In his confession of the murder of Tracie Clark, petitioner said he often used the services of prostitutes. He described how he picked up Tracie, made an agreement for prostitution, took her to a remote area where they had a dispute, he shot her once and then shot her to death to prevent her from reporting him and later pushed her body into the canal. He initially denied shooting Janine Benintende and minimized his knowledge of guns.

When the evidence of the Janine Benintende murder is considered in its entirety, including the pertinent evidence in the Tracie Clark murder, it is obvious that the evidence of identity and malice is very strong. The instant case is not one of a strong charge and a weak charge, but a case involving interdependent evidence on both charges. As a result, the evidence in one case

did not tip the balance in the other case and caused no "gross unfairness" under this Court's opinions.[22/]

This Court has found arguments similar to petitioner's unpersuasive. In *People v. Hawkins, supra,* 10 Cal.4th 920, eyewitness identifications (which the defendant disputed) showed that the defendant had committed a convenience store robbery-murder and ballistics evidence (which the defendant also disputed) showed that petitioner had committed an execution-style murder of a fellow bar patron a week earlier. (See *id.* at pp. 934-937.) As does petitioner here, the defendant argued that the inflammatory nature of the murder in which there was independent identification evidence prejudiced him in the murder in which identity was proven in part by ballistics evidence. As noted, this Court found that the defendant had waived his severance argument under state law as well as arguments under the federal Fifth, Sixth, Eighth or Fourteenth Amendments. However, in assessing the defendant's claim of incompetence of counsel in failing to make a severance motion, the Court found that there was no reasonable probability that a severance motion would have been granted. The Court explained that "much of the incriminating evidence in the Sonny's Market counts would have been used in a separate Hedlund murder trial to prove the identity of the murderer." (*Id.* at p. 941.)

In *People v. Davis* (1995) 10 Cal.4th 463, 507, the defendant directed one victim to a remote area and attempted to have sex with her, but she was able to escape. The body of a victim of who was raped, sodomized, beaten and strangled was found on a golf course. Upon being arrested for the attempted rape, the defendant made various statements to other persons in jail admitting the murder. (See *id.* at pp. 488-493.) This Court held: "As the trial court

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22. As petitioner has noted, the "gross unfairness" standard appears to be one of state due process, since there are no opinions of the United States Supreme Court holding that joinder of cases which are connected or of the same class can violate due process.

properly concluded, the close proximity in time and place of the two incidents, and the similarities between them, strongly supported joinder. On that ground alone, there was no abuse of discretion." (*Id.* at p. 508, citing *Frank v. Superior Court* (1989) 48 Cal.3d 632, 639.) The Court also held that there was no due process violation, noting that there was substantial evidence of both charges. (*Davis*, *supra*, at pp. 508-509.)

In *People v. Sandoval* (1996) 4 Cal.4th 155, the defendant argued that the two sets of murders with which he was accused were unrelated. The trial court denied severance on the basis of one witness who testified as to statements by the defendant which both provided the evidence of identity of the second set of murders and tended to show that the motive for the second set of murders was based on the first set. (See *id.* at pp. 168-171, 172.) This Court held that even if there had been no cross-admissibility, the defendant failed to carry his burden of showing a substantial danger of undue prejudice. (*Id.* at p. 173.)

In *People v. Mason* (1991) 52 Cal.3d 909, the defendant argued that the trial court abused its discretion in joining four burglary-murders with the murder in jail of a rapist who was giving police information on his accomplices. After assuming that the evidence was not cross-admissible, this Court held that the defendant showed neither an abuse of discretion nor gross unfairness. (*Id.* at pp. 933-935.) Despite the defendant's arguments that the evidence of identity as to the jail murder was weak, this Court relied on circumstantial evidence to find that the evidence on all counts was strong. (*Id.* at pp. 935-936.) The Court also held that one of the burglary-murders was not rendered sufficiently stronger than the others to require severance because the defendant repudiated his confessions of the others. (*Id.* at p. 936.)

In *Frank v. Superior Court, supra,* 48 Cal.3d 632, the defendant, a physician, was charged with two similar (but arguably not distinctive) rapes with drugs. The defendant denied using drugs and claimed that he had consensual sex with both victims. He argued that since the sole issue was the

credibility of the victims, he would be prejudiced by the evidence of two rapes in one trial. This Court reversed a writ of mandate to compel severance which had been ordered by the Court of Appeal. The Court found that the defendant failed to show potential prejudice. (*Id.* at p. 641.)

Thus, contrary to petitioner's premise (Pet. 72), the trial court would not have abused its discretion if it had denied severance. Instead, it is clear that the granting of severance would have been a clear abuse of discretion. Under the circumstances, competent counsel would have chosen not to make such a futile motion.

Moreover, since the evidence as to each murder was clearly cross-admissible as to the other, petitioner would not have been aided by severance. As the Court held in *Williams v. Superior Court* (1984) 36 Cal.3d 441, 448, "the evidentiary connections . . . rendered severance an 'idle act' and dispelled any possibility of prejudice from the consolidation of the charges." (See RB 133-135.) Also contrary to petitioner's argument, it is not reasonably probable that petitioner would have been acquitted in the Benintende murder or convicted of a reduced charge which would preclude the death penalty. (Pet. 71-72.) As respondent has described, the evidence of petitioner's identity as Janine Benintende's murderer was very strong, and none of the evidence was contradicted by the defense. The evidence, particularly the pattern of multiple shots, two entering through the same entry wound and the third from a markedly different direction, permitted no inference other than that the murder was intentional. (As discussed above; see RB 9-10, 134-135; see also RT 5592-5593, 5622 [District Attorney's argument that Janine Benintende was shot once and intentionally killed with the next two shots].) Since there was no evidence of heat of passion upon sufficient provocation, or any other factor which might make the murder manslaughter instead, there was no possibility that petitioner would have been convicted of a lesser offense.

Petitioner complains that the joinder of charges made the case capital.

(Pet. 71-72; see AOB 124, 145-147.) The argument is based on the false premise that separate trials would have barred the death penalty. Under the multiple murder special circumstance, petitioner would have been convicted of the two murders in the same "proceeding," even if in separate trials. (See Pen. Code, § 190.2, subd. (a)(3).) Since the same accusatory pleading was involved, the People were entitled under Penal Code section 954 to verdicts on each count and, by extension, on the special circumstance. If the trials had been severed, either count could have been tried first, and the special circumstance could have been tried with the second count to be tried or in a separate phase.[23/] Neither Penal Code section 190.2 nor any other provision of law requires that the convictions of multiple murder and the special circumstance finding be returned by the same jury in the same trial. In *People v. Hendricks* (1987) 43 Cal.3d 584, 596, this Court negated the basis for petitioner's argument, holding that "[t]he order of the commission of the homicides is immaterial" and that a person already convicted of murder in a prior proceeding "must be considered eligible for the death penalty if convicted of first degree murder in a subsequent trial."

Moreover, in respondent's view, the People cannot be deprived of their right to seek the penalty prescribed by law by manipulating the charges and the sequence of separate trials. This Court rejected a similar argument in *People v. Mason*, *supra*, 52 Cal.3d 909, 934:

> Defendant's third argument, that consolidation would make the Johnson murder a capital crime, was simply incorrect. It is true that the only special circumstance charged in connection with Johnson's murder was that defendant had "in this proceeding been convicted of more than one offense of murder in the first or second degree." ([Pen. Code,] § 190.2, subd. (a)(3).) Defendant's argument, however, erroneously assumes that the People would have tried the Johnson murder, which occurred last in time, before trying the murders of

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23. As discussed, respondent disagrees with petitioner's assertion that the evidence of his guilt of the Benintende murder was weak. (See AOB 146.) Respondent contends that the ballistic and other evidence was overwhelming.

> Picard, Jennings, Brown, and Lang. There was no requirement that the People try the Johnson murder first. Moreover, a single murder conviction in a prior proceeding based on the killing of Picard, Jennings, Brown, or Lang would have permitted the People to amend the information regarding the Johnson murder to charge that defendant had been "previously convicted of murder in the first or second degree." ([Pen. Code,] § 190.2, subd. (a)(2).)

As stated in *People v. Marshall*, *supra*, 15 Cal.4th 1, 28, "the joinder of a death penalty case with noncapital charges does not by itself establish prejudice. (*People v. Lucky* (1988) 45 Cal.3d 259, 277-278.)"

Finally, petitioner complains that the trial court failed to give, sua sponte, a limiting instruction regarding the limited use of the evidence of one murder in considering the other. (Pet. 71, 120; see AOB 142-145.) Petitioner suggests that such an instruction would say that "evidence relating to one offense cannot be used to establish guilt of the other." (Pet. 120 [Claim V(E)(5)(a)].) The suggestion is vacuous in light of the fact that the evidence of each offense was cross-admissible as to the other. Competent counsel might conclude that limiting instruction would serve no purpose in light of the obvious cross-admissibility of the two offenses. He might also conclude that it would be counter-productive to call attention to the strength of the evidence of the Tracie Clark murder (See *People v. Hawkins*, *supra*, 10 Cal.4th 920, 942) while arguing insufficient evidence of guilt of the murder of Janine Benintende (see RT 5611-5613 [argument that there was no evidence of mental state], 5611-5612 [suggesting that the ballistics evidence was not persuasive]).

B. Petitioner's Absence From Certain Procedural Appearances

Petitioner argues that counsel was incompetent in failing to ensure that petitioner was present during the review of questionnaires of prospective jurors. (Pet. 74-79.) Petitioner argued the same issue on appeal. (AOB 153-168; RB 147-159; ARB 114-117.) As respondent has argued on appeal, the record fails

to show that petitioner's absence affected his ability to defend against the charges. (*People v. Bradford, supra,* 15 Cal.4th at p. 1357; see also RB 147-150.) Moreover, as respondent has also argued (RB 151-153), petitioner's expressed indifference to his counsel's proposal that appellant would be absent from the proceedings (RT 16) constituted a waiver of any claim of error based on his absence. (See *People v. Howard* (1996) 47 Cal.App.4th 1526, 1539-1540 [an oral waiver constitutes voluntary absence under section 1043 and makes compliance with the writing requirement of section 977 unnecessary].) Finally, respondent notes that petitioner has failed to offer or rely on any new evidence on habeas corpus.[24/] As a result, the claim is barred under *In re Waltreus* (1965) 62 Cal.2d 218, 225.

C. Some Conferences Were Not Transcribed

Petitioner argues that counsel was incompetent in failing to ensure that certain bench conferences and in-chambers discussions were transcribed. (Pet. 79-85.) Petitioner argued the same issue on appeal. (AOB 160-164; ARB 87-103.) As respondent argued, the issue is whether petitioner has been deprived of his right to pursue an appeal, based on an examination of specific appeal arguments proffered by petitioner. (RB 160-179.) Respondent has argued that petitioner's ability to pursue his appeal has not been affected. (RT 164-169.) Respondent based its argument on a discussion of the specific issues on appeal which petitioner claimed were affected by the alleged inadequacy of the record. On habeas corpus, petitioner has not offered or relied upon any new evidence.[25/] Under the circumstances, respondent contends that petitioner's claim is purely

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24. Petitioner cites settled statements(Pet. 74) which, of course, are part of the record on appeal.

25. Petitioner cites settled statements (Pet. 79, fn. 55) which, of course, are part of the record on appeal.

an appeal issue and fails to raise a claim which may be considered on habeas corpus. As a further result, the claim is barred under *In re Waltreus, supra,* 62 Cal.2d 218, 225.

D. Failure To Call Petitioner's Brother, Dale, At The Guilt Phase To Corroborate Defense Psychiatric Witnesses

Petitioner argues that his trial counsel was incompetent in failing to call petitioner's brother, Dale, as a witness at the guilt phase to corroborate the testimony of the defense psychiatric witnesses, clinical psychologist David Bird, psychotherapist Joan Franz and psychiatrist David Glaser. (Pet. 85-87.) Petitioner relies for this claim on the declaration of his brother, Dale. (Exh. 5.) Respondent contends that competent counsel could have concluded that the testimony of the three defense experts for their opinions that petitioner did not premeditate the killing of Tracie Clark would leave the jury with a persuasive and consistent scenario and that Dale's testimony was unnecessary. In addition, Dale's testimony carried the danger that it could have undermined the factual basis of the expert opinions and could have provided information which would have supported the prosecution's theory that petitioner could control his emotions and therefore made a considered choice to kill Tracie Clark to prevent her from reporting what he had done. Most importantly, petitioner has failed to show the probability of a different result if counsel had called Dale as a witness at the guilt phase. (See *Strickland v. Washington, supra,* 466 U.S. 668, 693.)

The primary witness as to petitioner's childhood was clinical psychologist David Bird. Dr. Bird prepared charts of appellant's family history, including one on trauma and blackouts. (RT 5462-5468, 5471-5474, 5484; Exh. A.) The purpose of the evidence was to show that petitioner did not premeditate the shooting of Tracie Clark, a conclusion which was testified to by Dr. Bird, as well as psychotherapist Joan Franz and clinical psychologist David Glaser.

Dr. Bird testified that petitioner said he had been sodomized when he

was four (RT 5477), that he had been sodomized repeatedly by a stepfather named William who appeared around the time petitioner was in first grade (RT 5480; cf. RT 5406 [Franz][26]) and was also sodomized when he lived in Ukiah from ages 7 to 11 (RT 5483-5484; cf. RT 5406 [Franz]). Dr. Bird testified that on one occasion, the children were placed in an aunt's home where petitioner was seduced by a cousin during a "ritualistic sexual performance" involving dancing in a circle. (RT 5486.) Dr. Bird testified that petitioner's mother used to dress him in female panties and female clothing since he was toilet trained. (RT 5469, 5471.) Dr. Bird testified that one stepfather, W.C. "Dub" Ellis would make petitioner and Dale play a "turn and burn" "game" in which Ellis "would force the boys to grasp each other in the nude, either back to back or face to face and then hit them with a silver pointed belt . . . when one or the other could turn the other boy to him." (RT 5478-5479.) Dr. Bird characterized the "game" as "sexually sadistic." (RT 5478.) As a result of "fire setting behavior," Ellis took petitioner to the river, picked him up as if to throw him in and threatened to kill petitioner if he "got out of hand any more." (RT 5479.) Both petitioner and his brother, Dale, remembered their mother's "necklace," a belt which she used to administer punishment. (RT 5482.) The District Attorney asked no questions on cross-examination or recross examination about petitioner's history or childhood. (RT 5522-5528 [the entire cross-examination], 5529 [the entire re-cross examination].) Dr. Bird concluded that petitioner had blocked memories, which was consistent with sexual abuse, and also sexual dysfunction. (RT 5470-5471; cf. RT 5488.)

Dr. Bird theorized that the sexual dysfunction led to a dispute with Tracie Clark. He thought there was a likely connection in appellant's mind between Tracie Clark and the stepmother Barbara who had seduced him in the

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26. Joan Franz testified that she received information from petitioner, his brother, Dale, "family members" and from "Susan Peninger reports." (RT 5434; cf. RT 5421 [information from Dale].)

bathtub because they were both black. (RT 5488; see RT 5488, 5491-5492 [Dr. Bird's testimony regarding Barbara].) Dr. Bird believed that the killing of Tracie Clark was "a sudden rush of happenings, a woman that looked like his stepmother Barbara, a comparison of words used, bastard, you like little boys, fingernails and the claws, triggering something in him and his reacting to it." (RT 5500-5501, 5512-5513, 5520-5521, 5529.) Dr. Bird stated, "the rational policeman in him, was wiped out [by a] fear type of reaction." (RT 5501; cf. RT 5472.) In his opinion, petitioner could not premeditate the killing of Tracie Clark (RT 5461-5462, 5500-5501, 5521-5522) and did not weigh the consequences of killing or not killing because he was reacting rather than thinking. (RT 5522.)

Ms. Franz testified that if Tracie Clark had called appellant names suggesting homosexuality, it might trigger an auditory imprint from his childhood, which could cause him to "protect his essence, his soul, that last thread that was trying to be moral and solid and sane." (RT 5417-5420; see RT 5440-5441.)

Psychiatrist David Glaser formed the "impression" that petitioner "suffered from multiple dissociative states and multiple amnesia episodes," (RT 5249), apparently based on petitioner's statements that he had trouble remembering the Tracie Clark shooting, in comparison with his description of the shooting in the amytol interview.

He concurred in Dr. Bird's opinion regarding the shooting, testifying:

> [I]t is my opinion that at the time of the killing of Miss Clark that Mr. Rogers was overwhelmed with numerous affective states specifically stemming from his sexual dysfunction and specifically the volley of expletives that followed such dysfunction from Miss Clark.

(RT 5249; cf. RT 5224-5226, 5329 .)

It was his opinion that "the actual shooting and killing was an impulsive heat of passion event." (RT 5249-5250.) He thought that appellant did not have "the capacity at that time to coldly weigh the consequences to, for and against"

killing her. (RT 5261.)

Dr. Glaser testified that petitioner's statements to police admitting premeditation were fabrications in order to commit "legal suicide." (See RT 5326-5327.)

Petitioner himself testified at the guilt phase that he had hired Tracie Clark for prostitution. (RT 5353-5358.) When he could not ejaculate quickly enough, Tracie became angry, suggesting that he preferred boys and started getting abusive. (RT 5358-5359.) Appellant testified that he did not remember much after that. (RT 5361, 5364, 5367.) He did remember that he shot Tracie once, and then a second or two later, after she had backed up, he shot her five more times. (RT 5363, 5267.) He said he felt only fear, was only thinking of protecting himself, and that there was no argument about money. (RT 5363.) He remembered that after she was shot, Tracie walked into the middle of the road, lay down and died. (RT 5367.) In the amytol interview, petitioner said that Tracie said he "liked little boys more than [he] liked women" and called him names. (RT 5240-5243, 5245.) He then shot her once, waited a few seconds, and shot her five more times in quick succession. (RT 5246.)

In his statements to police, petitioner had said that as Tracie was "giving [him] head" she said she wanted more money for being "so far out of town." "[S]he got real weird," became agitated and started swinging at him. He blocked her blows with his right hand, but was concerned that she would scratch him with her long fingernails. With his left hand he reached under the seat, retrieved a snub-nose .38 revolver, cocked the hammer and pointed it at her. He said he bought the gun at a bar about six years before. She did not stop swinging at him and also started to kick at him. The gun went off. Tracie fell back against the door and started screaming. Petitioner opened the passenger door and kicked her out of the truck with his feet. "She started running out in front of the headlights and screaming and hollering. . . ." He could see blood in her rib cage area. She started "going crazy again and said she [was] going to

report it" and he "was going to jail." He then shot her again. This time the gun was in his right hand. (RT 4678-4685, 4693-4695, 4701, 4705, 4707-4708.) Tracie ran up the road and leaned against a dirt embankment. He shot her until the gun was empty. She ran to the other side of the road, staggered and fell down. (RT 4686-4687.) He drove down the road but came back and pushed her body into an irrigation canal. He then went home, dropping the cartridge cases on the way. (RT 4687-4690, 4892.)

In closing argument, the District Attorney said that the People had not denied that petitioner was a victim of child abuse. (RT 5614.) "The extent of the child abuse, I don't know." (RT 5614.) She noted that there were no reports from social workers or family members. (RT 5614.)

The District Attorney then asked, "But are we to say because this man was abused as a child, he cannot be a murderer?" (RT 5614-5615.)

> If you believe all the hearsay evidence that was given by the doctors, then, yes, he is probably a pathetic person and, yes, he was probably extensively abused as a child, even though some of that evidence is directly contradicted by Mr. Rogers' statements himself.
>
> And we have nothing to prove that it was true. We only have the words of the doctors, and we don't even know where they got their statements.
>
> But there is no question he was probably sexually abused. But does it follow that he should not be held responsible for the crimes that he committed.

(RT 5615.)

In closing, the District Attorney argued:

> He had a very hateful, mean, cruel stepfather for about a year and half, that he probably had alcoholics in his background and that he murdered Janine Benintende, and that he murdered Tracie Clark. [(RT 5622.)]
>
> And the fact that he was molested as a child had absolutely nothing to do with the murders. It was just very sad that there has to be a person in the world who has that [page 5623] kind of background, but that is not an excuse for murder. [¶] Thank you.

(RT 5622-5623 [end of argument].)

As the evidence shows, the crucial aspect of the testimony of the defense experts concerned the events surrounding the shooting of Tracie Clark and petitioner's reaction to the events. Petitioner's childhood provided a background and a possible explanation for his reaction. However, common experience shows that petitioner's childhood did not automatically cause the reaction proposed by the defense. Even the defense experts did not suggest that a childhood such as petitioner's must automatically lead to homicide or leave a person incapable of premeditation in all situations. Obviously there were many decisions petitioner could make after weighing the consequences. However, the defense theory was that petitioner did not premeditate because his background led to an irrational reaction to Tracie's specific alleged provocation. As a result, the issue for the jury to decide was not whether petitioner had been sexually, physically and emotionally abused as a child–the District Attorney agreed that he had been abused.[27/] The issue for the jury was whether petitioner was actually reacting in the way described by the defense experts when he shot and killed Tracie Clark. That decision would depend almost exclusively on whether the jury believed the defense theory of the facts of the shooting. Additional confirmation of the specifics of the abuse would not have added significantly to

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27. Thus, the District Attorney did not argue that petitioner had not been abused. However, the District Attorney impliedly questioned the extent of the abuse. As one example of a defense expert's overstatement of the extent of the abuse was Dr. Glaser's insistence that the "turn and burn" method of punishing petitioner and his brother was sexual in nature. (RT 5331; see RT 5335.) The only support in Glaser's testimony for any inference that this method of abuse was sexual was Glaser's description that the boys would be "hit with the belt would be hit in the genitals." (RT 5253.) However, on cross-examination, Dr. Glaser could not cite any point in the videotaped and transcribed interviews when petitioner said he had been hit in the genitals. (RT 5262-5265, 5333-5334 [recross-examination].) Respondent notes that Dale's declaration does not say that either he or petitioner were ever struck in the genitals during this game. He describes being hit on the back, legs and buttocks. (Exh. 5, at p. 4.)

the defense case.

Dale's declaration contains some family history, which he had apparently told to defense investigator Susan Peninger before trial (Exh. 5, at p. 1) (cf. RT 5421, 5434), but provides no new disclosures of abuse of either Dale or petitioner. Petitioner argues that Dale's testimony was necessary to show that "the underlying abuse had even occurred." (Pet. 85.) However, the District Attorney's argument shows that the District Attorney essentially conceded that the bulk of the underlying abuse had occurred.

Moreover, contrary to petitioner's premise, the jury was not authorized to simply reject all of the testimony of the defense experts simply because it was based (in part) on hearsay. The hearsay information used by the experts was admitted as the basis for the experts' opinions under Evidence Code section 802 [a witness may generally state the matter on which an opinion is based]. (RT 5226, 5230 [continuing objection].) The jury was instructed they could consider the statements as the basis for expert opinion. (CT 614 [CALJIC No. 2.10]; cf. RT 5582 [District Attorney argument].) As respondent has noted, the important aspect of the defense evidence was the expert opinion that petitioner did not premeditate the killing of Tracie Clark because he was in a "dissociative state." If petitioner was not in such a state at the time of the killing, the fact that he was abused as a child would have no logical tendency to affect the pertinent issue, which was whether petitioner premeditated the murder of Tracie Clark.[28/]

Under the circumstances, the instant case bears no similarity to *Hendricks v. Calderon, supra,* 70 F.3d at p. 1044, the only case cited by petitioner as to this claim. (Pet. 86.) In contrast to the instant claim, *Hendricks*

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28. Defense counsel also argued for a manslaughter verdict based on sudden quarrel or heat of passion. (RT 5600-5601.) This argument was obviously based on petitioner's statements that he and Tracie had a dispute, that she swung at him and came at him with her fingernails. (RT 4679-4680, 4701) The defense experts' conclusion that petitioner shot Tracie in a highly emotional state would also support this argument.

involved penalty phase evidence intended to invoke sympathy. In such a situation, the underlying evidence could have importance independent of expert opinion. Perhaps more importantly, the *Hendricks* decision was based on *lack of investigation*, rather than the failure to call witnesses. Petitioner offers nothing to show that counsel's investigation in his case was inadequate. On the contrary, the trial record shows that counsel obtained extensive information on petitioner's personal history, including Peninger's investigation and report, and discussions by defense experts with petitioner and his brother, Dale. Finally, in *Hendricks*, in contrast to the instant case, it is apparent that the prosecutor did dispute the defense claim that the defendant had been abused as a child.

In any event, respondent contends that the psychiatric defense at the guilt phase failed, not because it lacked corroboration as to petitioner's childhood, but because it was squarely refuted by petitioner's confession to police and the physical evidence.

In his confession, petitioner described how he reached under the seat, retrieved a snub-nose .38 revolver, cocked the hammer and pointed it at Tracie, who was inside the truck. When she continued to swing at him and started to kick at him, he shot her. She fell back against the door and started screaming. He opened the passenger door and kicked her out of the truck with his feet. "She started running out in front of the headlights and screaming and hollering . . . ." He told her he would take her to town and get her a cab to take her to the hospital. He could see blood in her rib cage area. She started "going crazy again and said she [was] going to report it" and he "was going to jail." (RT 4678-4685, 4693-4695, 4701, 4705, 4707-4708.) Petitioner said that when he shot Tracie the first time, he knew he was "in big trouble." He shot her again because he knew he would be "in big trouble if she reported it." He knew "she couldn't testify against" him if she were dead and "that was the bottom line." (RT 4704-4706.) Tracie ran up the road and leaned against a dirt embankment. He shot her until the gun was empty. She ran to the other side of the road,

staggered and fell down. (RT 4686-4687.) He drove down the road but came back and pushed her body into an irrigation canal. He then went home, dropping the cartridge cases on the way. (RT 4687-4690, 4892.)

The confession was consistent with the evidence that Tracie was shot from various angles. (See RB 13-14.) The pathologist's conclusion that Tracie was shot once while her back was against a solid surface (RT 4613) raises the inference that petitioner shot Tracie after she was on the ground, inferably after moving to a position where he could do so.[29/] In addition, petitioner's confession was entirely believable as an attempt to show provocation by Tracie to excuse the shooting while admitting facts petitioner would believe the police would know. However, in so doing, he told police his true motive for shooting Tracie. Since the motive arose a considerable time before petitioner fired the fatal shots, it provided conclusive proof of premeditation.

The "legal suicide" theory was crucial to persuade the jury to discount the confession, which there was no other reason to disbelieve. However, as the District Attorney argued, the "legal suicide" theory was "just hogwash." (RT

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29. The District Attorney argued that the story appellant told under sodium amytol was "the impossible story, the one that couldn't have happened." (RT 5616.) In light of her previous argument that it would have made no sense for Tracie to start calling petitioner names while she was "out in the middle of nowhere and couldn't get back to town without this man," (RT 5586), it is apparent that the District Attorney was arguing that Tracie did not go berserk at a customer who was pointing a .38 caliber revolver at her. (Cf. RT 5586-5587 [noting that petitioner's story under amytol was in conflict with the powder burns on Tracie's arm].) Indeed, a crucial difference between petitioner's confession and the defense theory at trial was that in the former Tracie was shot the first time inside the truck during a disagreement while in the latter Tracie was outside the truck coming at petitioner while he pointed the gun at her. As the District Attorney argued, the former scenario was entirely believable while the latter was implausible at best.

The District Attorney also noted that petitioner had told police he thought Tracie was Puerto Rican or Mexican, while Dr. Bird's opinion was based on the premise that petitioner thought Tracie was Black, as one abusive stepmother had been. (RT 5588-5590; see RT 5488.)

5591-5592.) For example, if petitioner had actually intended to commit suicide, he would have told police he had stolen the murder weapon, instead of falsely saying he had bought it from a bartender, (compare RT 4924 with RT 4904-4906) and would have admitted that he had also murdered Janine Benintende, instead of saying he did not remember if he had killed her (RT 4929-4930). (RT 5594-5595 [District Attorney's argument].)

Respondent contends that petitioner's story under amytol was demonstrated to be a lie, which showed that petitioner's claims of memory gaps were also false. This removed a major factual basis for the conclusion of the defense experts that petitioner was in a "dissociative state" in which he could not premeditate. Since the defense could not offer believable evidence to disprove the confession, the defense collapsed like a house of cards.[30/] Further substantiation of petitioner's abusive childhood would have made no difference.

E. Alleged Inadequacies Regarding Guilt Phase Instructions

Petitioner argues that trial counsel was incompetent in failing to prepare and request certain guilt phase jury instructions. (Pet. 87-122.) On appeal, he argued that the trial court's failure to give the same instructions on the same subjects was error. (AOB 35-40; SAB 1-10; ARB 17-27.)

Respondent has argued on appeal that the jury was adequately instructed on all of the subjects as to which petitioner claims error and that there

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30. In denying the automatic motion for modification of the penalty, the trial court stated:

> And so I do agree with the jury that the homicide of Tracie Johann Clark was murder in the first degree.
>
> I do not believe the testimony [sic; obviously referring to petitioner's story] as it was outlined in the sodium amytol interview. I did not believe the testimony of Dr. Glaser.
>
> I do not think the jury believed it either. I found Dr. Glaser's testimony to be incredible.

(RT 5993.)

was no prejudice. (RB 194-282.) Respondent will summarize its positions below. In addition, with few exceptions which respondent will discuss below, respondent has not argued that any of the claims of instructional error were waived. As to claims of error which will be decided on appeal, whether counsel performed inadequately appears to be a moot point, and there appears to be no reason to address the claims on habeas corpus.[31/]

1. Instruction On Intentional Second Degree Murder

Petitioner argues, as he did on appeal, that the court failed to instruct on intentional second degree murder. (Pet. 92-95, 135; see AOB 21, 26-35.) As respondent has argued on appeal, the jury was adequately instructed on murder including intentional murder by express malice. (RB 195-205.) The prosecution's only theory of malice as to the murder of Janine Benintende was express malice. (RT 5592-5593; see RT 5622.) Moreover, since the jury found

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31. Petitioner argues that his counsel gave "little thought . . . to how the jury should be charged." (Pet. 89; cf. Pet 89-90.) However, petitioner presents no facts to support that argument. Counsel's declaration shows that he knew the defenses he was pursuing and did not waive any instructions, but otherwise "can no longer remember specifics of what occurred during the in-chambers discussion regarding the guilt phase jury instructions." (Exh. 14 at pp. 1-2.) The declaration was signed April 6, 1999. Counsel's lack of recall eleven years after the trial is not surprising.

Contrary to petitioner's characterization, counsel's declaration does not say *he* believed that the judge was "alone responsible for the jury instructions." (Pet. 90.) Counsel states that the trial judge believed it was the judge's job to come up with instructions. (Exh. 14 at 2.) The declaration fails to show that counsel misunderstood his responsibility to propose specific instructions pertinent to the theories of the defense. Indeed, the record shows that he understood his responsibility to propose jury instructions to supplement the general principles on which the judge was required to instruct. (RT 5625 [proposed defense instruction refused; counsel waived instructions on 2 issues]; see Pen. Code, § 1093, subd. (f).) Respondent also notes that the District Attorney submitted a list of jury instructions (CT 603-604), which was also the District Attorney's responsibility because it was her case.

that the murder of Tracie Clark was wilful, deliberate and premeditated, it clearly found express malice in the murder. As a result, petitioner's premise that the jury was not instructed on second degree murder by express malice fails. He offers nothing additional which would support a claim of incompetence of counsel.

2. Instruction On The Effect Of Provocation On Premeditation

Petitioner argues that trial counsel was incompetent in failing to request an instruction on the effect of provocation on premeditation. (Pet. 95-98; see AOB 35-40.) As respondent has argued on appeal (RB 228-241, 243), there was no error or prejudice because the jury was properly instructed on deliberation and premeditation, including the concept that "a sudden heat of passion or other condition" may preclude deliberation. (RT 5638-5640; CT 634-635 [CALJIC No. 8.20, "DELIBERATE AND PREMEDITATED MURDER"].)

Respondent also argued that an instruction on the effect of provocation on premeditation would be a pinpoint instruction which was only required at the request of the defense. (RB 232-241.) Petitioner argues that counsel was incompetent in failing to request such an instruction. (See Pet. 96.) Respondent contends initially that competent counsel could conclude that such an instruction would have added nothing to the instructions already given or to the defense evidence and argument on the subject.[32/] (See discussion at RB 239-241.)

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32. CALJIC No. 8.73, as current at the time of trial, read:

CALJIC 8.73 (1979 Revision)
EVIDENCE OF PROVOCATION MAY BE
CONSIDERED IN DETERMINING
DEGREE OF MURDER

When the evidence shows the existence of provocation that played a part in inducing the unlawful killing of a human

Respondent next contends that the failure to give a specific instruction was harmless in light of the evidence, including the testimony of the defense experts that petitioner did not premeditate the killing due to his emotional reaction to the situation, the premeditation instruction and the arguments of counsel on the relation of provocation to petitioner's mental state and premeditation (RT 5600-5601, 5607-5609, 5610-5611, 5613-5614, discussed at RB 239-241).

3. Instruction On The Effect Of Mental Disease Or Defect On Premeditation

Petitioner argues that trial counsel was incompetent in failing to request an instruction on the effect of mental disease or defect on premeditation. (Pet. 98-102; see AOB 40-47.) As respondent has argued on appeal (RB 228-229, 241-243), there was no error or prejudice because the jury was properly instructed on deliberation and premeditation. The jury was also specifically instructed:

> Evidence has been received regarding a mental disease or mental defect or mental disorder of the defendant at the time of the offenses charged in counts one and two and in the lesser included offense of voluntary manslaughter. You may consider such evidence solely for the purpose of determining whether or not the defendant actually formed the mental state which is an element of the crimes charged in the information and the crime of voluntary manslaughter.

(RT 5640; CT 644 [CALJIC No. 3.36, "EVIDENCE OF MENTAL DISEASE –RECEIVED FOR LIMITED PURPOSE"].)[33/]

> being, but also shows that such provocation was not such as to reduce the homicide to manslaughter, and you find that the killing was murder, you may consider the evidence of provocation for such bearing as it may have on the question of whether the murder was of the first or second degree.

33. CALJIC No. 3.36, as current at the time of trial, read:

CALJIC 3.36 (1981 New)
EVIDENCE OF MENTAL DISEASE --

Thus, the jury was instructed that it could consider evidence of a mental disease, defect or disorder as to any mental state involved in murder or voluntary manslaughter, which, as the jury was instructed in CALJIC 8.20, included premeditation. As competent counsel would recognize, there was no need for an additional instruction on mental disease or defect and provocation. Moreover, as discussed as to the previous subclaim, the defense theory of lack of premeditation based on provocation and an underlying mental problem was fully set forth in the evidence and was supported by the instructions and argument. Under the circumstances, there was no error and no prejudice. (See RB 241-243.)

4. Failure To Request Instruction On Imperfect Self-defense

Petitioner argues that trial counsel was incompetent in failing to request an instruction on unreasonable self-defense. (Pet. 103-105, 136-137.) As respondent has argued on appeal, there was insufficient evidence to support a defense of unreasonable self-defense because there was no evidence that appellant had any fear, rational or irrational, of death or great bodily injury, which was required for even imperfect self-defense. (RB 249-255.) As respondent argued (RB 249, 253-255), the defense of a sudden quarrel or heat

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RECEIVED FOR LIMITED PURPOSE

Evidence has been received regarding a [mental disease] [mental defect] or [mental disorder] of the defendant [_____] (insert name of defendant if more than one) at the time of the commission of the crime charged [in Count _____]. You may consider such evidence solely for the purpose of determining whether the defendant [_____(insert name of defendant if more than one)] actually formed the required mental state which is an element of the crime charged [in Count _____], to-wit _____.

of passion fit the defense evidence better than the theory of imperfect self-defense. It also had the advantage of requiring less credulity by the jury than the theory counsel pursued. A sudden quarrel only required that the jury disbelieve petitioner's confession that he killed Tracy to avoid being reported. Imperfect self-defense would, in addition, require that the jury believe that he was in fear of death or great bodily injury. In respondent's view, such an argument would, at best, be ineffective and, at worst, would alienate the jury by insulting its intelligence and common sense. Thus, counsel's choice of a manslaughter theory was clearly the best available.

In any event, the absence of an instruction on imperfect self-defense was obviously harmless. As noted, there was no evidence that appellant had any fear of death or great bodily injury. Moreover, under the facts it is impossible to reconcile the jury's rejection of the defense of sudden quarrel or heat of passion, and its finding of deliberate and premeditated murder, with the conclusion that appellant fatally shot Tracie Clark to prevent her from scratching him. The primary evidence which supported the premeditation finding was the pattern of shots fired into Tracie's body and appellant's admission that he fired the final fatal shots at a time when Tracie was not a physical threat to him in order to prevent her from reporting him. Since the jury concluded that the facts proved deliberation and premeditation under these facts, there is no possibility that the jury would have found that appellant believed the killing was necessary to protect himself from death or great bodily injury.

5. Failure To Request Instruction On Involuntary Manslaughter

Petitioner argues that trial counsel was incompetent in failing to request (and in fact declining; see RB 256-257) an instruction on involuntary manslaughter. (Pet. 105-107, 137.) The premise of this claim is that petitioner had no intent to kill. (Pet. 105.) The circumstances of the shooting, including

the pattern of shots, as well as petitioner's confession, showed that petitioner shot Tracie Clark as she moved from place to place, inferably dodging petitioner's gunfire, until his gun was empty and she lay down in the road and died. The reasonableness of counsel's decision is confirmed by penalty evidence of petitioner's statements in his videotaped amytol interview, of which counsel was unquestionably aware. In the interview, petitioner said that there was a delay in time, as well as a brief conversation with Tracie, between the first shot and the later five. (RT 5868-5875.) He was specifically asked, why, after firing the first shot, he "didn't just get in the car and drive away and leave her?" (RT 5872.) Petitioner answered, "Because I knew she was a prostitute and she would make a report." (RT 5872.) Petitioner said he thought she would make a report that a "john, armed with a gun, had pulled a gun out on her." (RT 5873.) Petitioner then said he thought she was going to claw his face, adding "The gun stopped her." (RT 5873.) Since counsel could not have hoped to show lack of intent to kill, an involuntary manslaughter instruction would not have aided the defense. Moreover, there was no evidence that the killing, even if unintentional, was less than murder by implied malice. (See RB 258-260.)

In any event, the failure to instruct on involuntary manslaughter was harmless because the jury necessarily resolved the issue of intent to kill adversely to petitioner in returning a verdict of first degree premeditated murder. (*People v. Millwee, supra,* 18 Cal.4th at pp. 155-158; *People v. Barnett* (1998) 17 Cal.4th 1044, 115-1156; *People v. Mincey, supra,* 2 Cal.4th at pp. 438-439; see *People v. Jackson* (1989) 49 Cal.3d 1170, 1197 [alleged error in manslaughter instructions].) Since the jury found intent to kill, an instruction on an unintentional killing would have made no difference.

6. Failure To Request An Instruction On Unconsciousness

Petitioner argues that his trial counsel was incompetent in failing to

request an instruction on the defense of unconsciousness. (Pet. 107-109.)[34/] As respondent has argued on appeal (RB 262-264), there was no evidence that appellant was unconscious when he shot either victim. In fact, the evidence of the number and pattern of shots in both murders shows that he altered his aim to compensate for changes in position by himself, the victim, or both. His ability to adjust to changing external events positively disproves any possibility that he was unconscious. Even the defense experts failed to express the opinion that petitioner had been unconscious in either shooting. (See RB 262-264.) Since there was no substantial evidence of unconsciousness, the failure to request such an instruction was neither incompetence nor prejudicial.

7. Instruction On Concurrence Of Act And Implied Malice

Petitioner argues that the concurrence instruction given by the court was erroneous in that it failed to require concurrence between act and implied malice. (Pet. 110-112, 114-116.) The claim appears to be conditional on this Court's finding on appeal that counsel waived the failure to give a correct instruction. (Pet. 111, 115.) Respondent has not argued that counsel waived a correct instruction. Instead, respondent argued that, despite an incomplete concurrence instruction, the jury was adequately instructed on the concurrence requirement. (RB 209-228.) Thus, it does not appear that petitioner has raised a claim which is cognizable on habeas corpus. (*In re Waltreus, supra,* 62 Cal.2d at p. 225.) In any event, as respondent argued on appeal, the instructions given were adequate. In addition, there was no prejudice because there was no issue of whether petitioner's mental state concurred with the acts which caused the actus reus of either crime; instead, the major issue was what petitioner's mental

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34. The claim appears to be conditional on this Court's finding that counsel waived the failure to give an unconsciousness instruction. (Pet. 108.) Since counsel did not expressly decline such an instruction, it does not appear that the claim on habeas corpus adds anything to the argument on appeal.

state was. (See RB 217-218.) Petitioner offers no valid suggestion that, under the evidence, the jury might have convicted him based on a finding that he had malice at a time or place different from the time or place of the shooting. (See Pet. 111.) Moreover, with respect to the Tracie Clark count, no prejudice as to implied malice is possible because the jury found that the killing was intentional, i.e, was committed with express malice.

8. Failure To Request Instruction On Circumstantial Evidence Generally

Petitioner argues that trial counsel was incompetent in failing to request CALJIC No. 2.01 (circumstantial evidence generally), in addition to CALJIC No. 2.02 (circumstantial evidence of mental state), with respect to the Janine Benintende count. (Pet. 112-113.) The claim appears to be conditional on this Court's finding on appeal that counsel waived the failure to give a correct instruction. (Pet. 113; see AOB 82-87.) Respondent has not argued that counsel waived a correct instruction. Instead, respondent argued that CALJIC No. 2.01 was not required, and the failure to give it was not prejudicial because there were no significant conflicting inferences from the evidence as to *physical* facts. As shown by counsel's opening statement (RT 4490-4492), the defense evidence, counsel's argument (RT 5597-5614) and counsel's declaration (Exh. 14 at p. 1), the defense theories were lack of premeditation and heat of passion, which, of course are mental states. Thus, the only significant question for the jury was the mental state which should be inferred from the evidence. As noted, the jury was instructed on circumstantial evidence of mental state. (RB 265-277.) Counsel specifically argued the instruction on circumstantial evidence of mental state. (RT 5598, 5603.) Under the circumstances, competent counsel was not required to request the general circumstantial evidence instruction in addition to the circumstantial evidence instruction which was given. In addition, as respondent argued on appeal, the absence of the instruction was not

prejudicial. (RB 267-273.)

9. Failure To Object To Other Instructions Which Allegedly Diluted The Concept Of Reasonable Doubt

Petitioner argues that trial counsel was incompetent in failing to object to instructions instructing on circumstantial evidence of mental state (CALJIC No. 2.02), as well by instructing on wilfully false testimony (CALJIC No. 2.21), number of witnesses (CALJIC No. 2.22), the sufficiency of one witness (CALJIC No. 2.27) and motive (CALJIC No. 2.51). Petitioner argues that these instructions diluted the instruction on reasonable doubt (CALJIC No. 2.90). (Pet. 116-117; see AOB 103-107.) The claim appears to be conditional on this Court's finding on appeal that counsel waived the failure to give a correct instruction. (Pet. 117.) Respondent has not argued that counsel waived a correct instruction. Instead, respondent argued that the other instructions did not dilute the concept of reasonable doubt. (RB 278-282.) Thus, it does not appear that petitioner has raised a claim which is cognizable on habeas corpus. (*In re Waltreus, supra,* 62 Cal.2d at p. 225.) In any event, petitioner has failed to show that competent counsel should have objected to instructions which are generally regarded as correct or that the failure to object was prejudicial.

10. Failure To Suggest Different Responses To Jury Questions

Petitioner argues that trial counsel was incompetent in agreeing that the court respond to jury requests for a definition of the degrees of murder, and apparently the elements of the offenses, by sending the jury a copy of the written instructions. (Pet. 117-119.) The premise of petitioner's claim is that the instructions were erroneous, as he has previously argued. Respondent argues that the instructions were adequate to answer the question, as the trial court impliedly found. (See RB 244-249.) In particular, the instructions fully

and accurately informed the jury of the definitions and elements of first degree murder and of murder generally, and unmistakably told the jury that, if the murder was not of the first degree, it was necessarily of the second degree. Thus, any defects in the instructions did not affect the subject of the jury's request. Moreover, the fact that the jury reached a verdict within a reasonable time after hearing the requested testimony and receiving the requested exhibits and instructions shows that the jury's legal questions were resolved by the written instructions. Thus, there was no prejudice. (See *People v. Beardslee* (1991) 53 Cal.3d 68, 96-98.)

11. Failure To Request A Limiting Instruction On The Joined Counts

Petitioner argues that trial counsel was incompetent in failing to request an instruction which barred the jury from using one offense in establishing guilt of the other. (Pet. 120.) Of course, such an instruction would have been erroneous because evidence of each offense was admissible as to the other. (See above, Argument V, subdivision (A); see also RB 120-141.) Moreover, petitioner fails to show that requests for limiting instructions on joined offenses are commonly made by the defense bar. This failure suggests that competent counsel are not required to request such instructions. In any event, petitioner fails to show that the absence of such an instruction was prejudicial. Specifically, petitioner fails to show a reasonable probability that the jury used the evidence of one offense for an improper purpose with respect to another, or that trial counsel should have concluded that there was a danger of improper use. Contrary to petitioner's evidence premise, a conscientious jury would use the evidence only for proper purposes under the instructions. Under the circumstances, there was no inadequacy or prejudice.

12. Failure To Request A Limiting Instruction On The Ellen Martinez Evidence

Petitioner argues that trial counsel was incompetent in failing to request a limiting instruction on the Ellen Martinez evidence. (Pet. 121-122.) The guilt phase evidence showed that, several years before either charged murder, petitioner was fired from the Sheriff's Department for engaging in improper conduct with Ellen Martinez, who was working as a prostitute, after Martinez reported the incident. (See RB 65-66.) None of the details of the incident itself were introduced at the guilt phase. As respondent has argued, the evidence was admitted to corroborate and support petitioner's confession that he fatally shot Tracie Clark to prevent her from reporting that he had shot her. (RB 180-193.) In guilt phase argument, the District Attorney argued that the evidence proved motive. (RT 5580; cf. RT 5581.) As with the other limiting instruction claim, there is no reason to believe that the jury would, or did, use the evidence for an improper purpose. As a result, petitioner fails to show that competent counsel was required to request a limiting instruction or to show that counsel's failure to do so in this case was prejudicial. As respondent argued on appeal (RB 192), any error related to the evidence utterly was harmless because the evidence of petitioner's guilt of the two charged murders was overwhelming, and the psychiatric evidence presented by the defense was largely incredible, wholly unpersuasive and was strongly contradicted by the objective facts of the crimes. Contrary to petitioner's apparent premise (see AOB 204), it was not the Martinez incident which undermined his defense that the murder of Tracie Clark was not premeditated, it was the physical evidence, petitioner's confession, the weakness in the psychiatric testimony and the fact that he had murdered another prostitute under apparently similar circumstances almost exactly a year before.

F. Alleged Incoherence In Defense Theories At The Guilt Phase

Petitioner argues that trial counsel failed to present a coherent theory

of defense. (Pet. 123-138.) Petitioner's argument is belied by the trial record and trial counsel's declaration stating his primary theories. (See Exh. 14.)

Counsel's opening statement disclosed that the defense did not dispute petitioner's identification as the killer of the two women but would attempt to show that petitioner did not premeditate the killings (RT 4490-4491) and that the killings were "crimes of passion" (RT 4490) due to petitioner's "extreme mental problems" (RT 4491-4492) caused by repeated abuse when he was a child (RT 4492-4495). Counsel also engaged in an extended discussion of the defense theory that petitioner had formed a "plan" to commit "suicide." (RT 4496-4499.) In so doing, counsel recognized the crucial importance of undermining petitioner's confession of premeditation.

As the petition notes, counsel introduced the testimony of defense experts to show that petitioner did not premeditate and deliberate the Clark killing (Pet. 123), although he fails to acknowledge the testimony which tended to support the theory of a sudden quarrel and heat of passion, which would make the offense voluntary manslaughter. In addition, counsel used his witnesses to set forth the basis of the "legal suicide" theory from the available facts and the opinions of the experts.

In argument, counsel explained the same theories, stressing lack of premeditation (RT 5598-5599, 5607, 5610-5611; cf. RT 5602-5604 [using the incident with Connie Zambrano to argue lack of a plan to kill prostitutes]), argued that the confession of premeditation was an "obvious fabrication" (RT 5607-5609 and urged a verdict of voluntary manslaughter based on a sudden quarrel or heat of passion (RT 5600-5601).

Petitioner's argument consists of little more than picking at phantom nits and merely shows petitioner's lack of understanding of California criminal law. Petitioner first suggests that counsel failed to argue second degree murder to the jury. (Pet. 124-125.) The suggestion is ludicrous. As the jury was amply instructed, if the murder of Tracie Clark was not premeditated, it was necessarily

second degree murder. (See RB 195-205.) As noted above, the bulk of counsel's argument was directed to convincing the jury that the murder was not premeditated.

Petitioner also complains that counsel used the terms premeditation and deliberation and intent "virtually interchangeably." (Pet. 125.) In so doing, he ignores the definition of first degree murder by premeditation, which is that the murder was "willfull, deliberate and premeditated" (CALJIC No. 8.20). The three factors are interrelated. Deliberation and premeditation both refer to the intent to kill. It would be nonsensical to refer to a deliberate and premeditated *lack* of intent to kill. Petitioner criticizes counsel for, in essence, combining the concepts of deliberation and premeditation. (Pet. 125, fn. 86, citing RT 5521 [examination of Dr. Bird].) In doing so, counsel merely did what is routinely done in discussing this type of first degree murder, which is to refer to deliberation and premeditation as if they were the same concept. (Cf. *People v. Swain* (1996) 12 Cal.4th 593, 601; 1 Witkin, Cal. Criminal Law (3d ed., 2000) § 77, p. 290; RB 228-237.) In fact, respondent suggests that the two concepts are impossible to separate since both refer to consideration of the consequences of killing. (Compare CALJIC No. 8.20 [describing the weighing requirement under the factor of deliberation] with *People v. Anderson* (1968) 70 Cal.2d 15, 26, and 1 Witkin, Cal. Criminal Law (3d ed., 2000) § 103, p. 719 [describing the weighing requirement as premeditation].) Clearly, counsel understood the import of first degree murder terminology.

Petitioner also complains of counsel's references to absence of malice. In so doing, petitioner obviously assumes that the reference is to *absence of intent to kill.* (Pet. 125, citing RT 5601.) This assumption betrays petitioner's failure to understand that, in California legal doctrine, the presence of a sudden quarrel or the heat of passion is deemed to negate malice in an intentional killing. (See CALJIC No. 8.40 ["There is no malice aforethought if the killing occurred [upon a sudden quarrel or heat of passion]"]; Pen. Code, § 192

["Manslaughter is the unlawful killing of a human being without malice."].) Counsel made the connection in argument (RT 5600, 5601) and was certainly aware that the jury would be instructed in the same terms with CALJIC No. 8.40. After making the argument, counsel rhetorically asked "what his mental state at the time of the killing" was and then concluded that petitioner had not premeditated the killing *but instead* the killing was the product of "extreme passion and extreme emotion" (RT 5601), which, under the defense theory arose suddenly in the dispute with Tracie and showed that the murder was not premeditated (cf. RT 5609-5611, 5613-5614). Despite petitioner's sniping (Pet. 125), counsel was using a valid technique of asking and answering a rhetorical question. Counsel also used the theme of mental state to make a rational segue from his voluntary manslaughter argument early in his argument to proceed to his argument against premeditation (RT 5601), which occupied virtually the remainder of the argument.

Petitioner next complains of counsel's use of the term "specific intent." (Pet.126-127, citing RT 5609.) However, in using the term, "specific intent," counsel was evidently using the term in its general English sense rather than as a legal term of art. In the same way, several of the jury instructions treated "specific intent" and "mental state" as interchangeable. (RT 5636-5637.) Indeed, petitioner has complained on appeal that the instructions used the term, "specific intent," inappropriately. (AOB 49-54, 77-82.) However, no specific intent crimes were charged in the instant case. Intentional murder and voluntary manslaughter were general intent crimes, in that they required the intent to do the actus reus, and involved additional special mental states. (See RB 215, fn. 117.) Since the technical definition of a specific intent crime was not involved in the case, counsel could safely use the term, "specific," to focus the jury on petitioner's mental state, which, as counsel argued, must "correlate with the exact physical act" of killing (CT 5600). The term also suggested the high burden of proof on the prosecution to show that the killing was done with

premeditation. (Cf. RT 5597 [emphasizing the prosecution's burden].)[35/]

Petitioner also complains that counsel did not elicit the opinion of Dr. Glaser that petitioner lacked the intent to kill Tracie Clark, but rather that the opinion was elicited by the prosecutor. (Pet. 124.) It is obvious that lack of intent to kill did not fit the theory of defense. As counsel knew, petitioner had explained in the amytol interview that he fired the final volley of shots at Tracie Clark "[b]ecause [he] knew she was a prostitute and she would make a report." (RT 5872.) As the prosecutor's decision to raise the issue shows, Dr. Glaser's opinion that petitioner lacked intent to kill actually *undermined* Glaser's entire testimony because the opinion was so clearly unreasonable in light of the facts. Competent counsel would have hoped to avoid the issue. In addition, competent counsel might well have concluded that the jury would be unwilling to return a verdict of *in*voluntary manslaughter in the Tracie Clark killing because the crime clearly involved a greater level of culpability. As shown by the evidence and the eventual verdicts, it would have been vain to hope for a verdict of involuntary manslaughter, and the effort would likely have undermined the defense counsel reasonably chose to pursue.

In a separate subdivision, petitioner seizes on a statement in counsel's declaration in an attempt to show that counsel bungled an attempt to raise an involuntary manslaughter defense. (Pet. 128-131.) Counsel's declaration states that he attempted to show that Tracie Clark "said or did something" that "set" petitioner "off" "and as a result he was not acting rationally or intentionally when he shot her." (Exh. 14, at p. 2.) However, the trial record (and the

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35. Petitioner asserts, with no specific citation to the record, that counsel made the argument that petitioner lacked intent to kill. (Pet. 126; cf. Pet. 127.) Respondent has not found such an argument. Instead, it is apparent that counsel implicitly conceded intent to kill, but argued against premeditation and for heat of passion or a sudden quarrel.

Elsewhere, petitioner contradictorily asserts that counsel *did not* argue unintentional murder. (Pet. 135-136.) This latter assertion is correct.

preceding paragraphs of the declaration) clearly show that involuntary manslaughter was not part of the defense theory. As respondent has explained, there were compelling reasons for counsel to make such a decision. Moreover, the statement relied on by petitioner suggests that the *shooting* itself was not intentional. Thus, it is possible that the statement was referring only to the *first* shot, which might have been a reflexive act under the defense evidence. However, even under the defense evidence, there is no possibility that the final five shots were unintentional (or that petitioner lacked intent to kill, as explained above). Thus, the statement must either refer to the first shot only or it must be dismissed as in conflict with the trial record and a product of misrecollection eleven years after the fact.

Petitioner next complains that counsel did not argue that his "heat of passion" was rational. (Pet. 129-131.) As respondent has explained (RB 249-255), it was not necessary that *petitioner's* heat of passion be produced by rational means; it is sufficient if he actually had heat of passion and if the provocation was sufficient to arouse heat of passion in a reasonable person. (See *People v. Breverman* (1998) 19 Cal.4th 142, 163-164.) Counsel might not have wanted to stress the latter, objective, element; as petitioner suggests, this was perhaps the more difficult element to show. Counsel could instead hope that the jury would focus on petitioner's subjective "heat of passion" and thus find voluntary manslaughter. However, contrary to petitioner's premise (Pet. 130), counsel never pursued a theory of involuntary manslaughter. As respondent has explained, this decision was the best tactical choice. He also relies on the premise that the jury was never instructed on second degree murder (Pet. 130-131), a premise respondent has shown to be false (RB 195-205). In short, there was no inconsistency between the defenses offered, which were that the killing was not premeditated and that it was committed in the heat of passion or upon a sudden quarrel.

Petitioner complains of counsel's "presentation" and argument as to

the Janine Benintende count. (Pet. 132-134.) However, he fails to demonstrate that there was any evidence counsel could have presented or any additional argument counsel could have made. As a result, he fails to show incompetence or prejudice.

Even if counsel's argument was not organized to suit petitioner, the argument focused on the defense theories, which were the best, and probably the only, theories available. The argument made the points counsel should have made and explained how the pertinent legal concepts from the instructions fit the evidence. Petitioner's complaints about counsel's performance at the guilt phase are vacuous.[36/]

Petitioner concludes that, as a result of counsel's incompetence at the guilt phase, it was "impossible" for the jury to find him guilty of a lesser-included offense. (Pet. 89, 90; cf. Pet. 122-123.) As respondent has explained, the jury was clearly and explicitly instructed on the lesser offenses of intentional second degree murder (which, if found as to Tracie Clark, would have precluded the death penalty) and voluntary manslaughter on a sudden quarrel or in the heat of passion (which, if found as to either count, would have precluded the death penalty). As trial counsel's declaration shows, his objective was to avoid the death penalty by obtaining an acquittal or manslaughter verdict as to Janine Benintende or a second degree murder or voluntary manslaughter verdict as to Tracie Clark. (Exh. 14 at p. 1.) These statements impliedly show that counsel believed it was futile to expect any more favorable result. Under the evidence, petitioner's best chance to avoid the death penalty was to avoid a premeditation finding as to Tracie Clark. The strongest defense effort in the guilt phase was mounted to that end. However, this effort was defeated not by any inadequacy in the attempt, but by the physical evidence of the Tracie Clark murder,

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36. The arguments at Pet. 134-138 are apparently intended to be a summary of arguments which petitioner had made earlier in the petition. As a result, respondent will not address them separately.

combined with the similarities and differences between the two killings, and by petitioner's confession, which the defense could not undermine.[37] Since the jury was adequately instructed on premeditation, murder by express malice, and voluntary manslaughter, any error with respect to instructions on lesser offenses was necessarily harmless.

G. Alleged Inadequate Investigation Of Petitioner's Background For The Penalty Phase

Petitioner argues that counsel was incompetent in failing to perform an adequate investigation. (Pet. 140-145.) He first complains of inadequate investigation of his background. (Pet. 140-143.)[38] Respondent initially notes that petitioner has failed to account for all of the investigation which was shown in the trial record. Joan Franz testified that she received information from petitioner, his brother Dale, "family members" and from the "Susan Peninger reports." (RT 5434; cf. RT 5421 [information from Dale].) Dale's declaration shows that he imparted family history information to defense investigator Susan Peninger before trial. (Exh. 5, at p. 1.) Dr. Bird testified that both petitioner and Dale provided him with family history information. (E.g. RT 5482.) Petitioner fails to show that the investigation was inadequate.

Petitioner also complains about the investigation of his friends and family members. (Pet. 141-142.) However, as is apparent from the penalty

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37. Petitioner notes that "the jury spent two days deliberating in the guilt phase." (Pet. 91.) There is no reason to believe they were talking about something other than the trial, as petitioner's argument would require.

38. The introductory paragraphs of Part 2 of Claim V at Pet. 138-140 appear to be a summary of the claims to be made in the following subdivisions, rather than as separate claims. The closing paragraphs at Pet. 185-190 and 222-224 also appear to summarize previous claims. Respondent will deal with the specific claims made and will not separately address the introductory and closing paragraphs.

phase testimony (see RB 84-89), mitigating witnesses were called from among petitioner's family and friends. Petitioner fails to present evidence of what counsel did to investigate petitioner's friends and family members, or the prosecution evidence (Pet. 142-145).

More importantly, with the exception of the evidence as to Tambri Butler, petitioner fails to set forth any new evidence which, he claims, an adequate investigation would have disclosed. Respondent has already agreed that an Order to Show Cause should issue as to the claim concerning the Tambri Butler evidence. (See above, Argument IV.) As to the remaining items, petitioner has failed to make any showing of inadequacy or prejudice.

H. Alleged Failure To Challenge The Ellen Martinez Evidence

Petitioner argues that counsel was incompetent in failing to "challenge the admissibility of" the evidence concerning the incident with Ellen Martinez. (Pet. 145-164.) However, as respondent has described (RB 181-183), counsel did oppose the admission of the evidence at the guilt phase that petitioner was fired as a result of the incident. (RT 5549-5550.) Counsel may well have viewed a further objection to more detailed evidence at the penalty phase as futile. (See RB 289-300.) Moreover, as respondent has described (RB 180-192), the evidence was admissible to explain petitioner's motive to kill Tracie Clark and corroborated a statement regarding the incident he made in his confession to police regarding his motive to kill Tracie Clark (see RT 5564). As respondent has also argued, the incident also showed a crime involving an implied threat of violence. (RB 297-299.)

Petitioner faults counsel for not using the materials from the personnel file on the incident to impeach Martinez. (Pet. 154-157.) Respondent contends that the minor inconsistencies relied on by petitioner were insufficient to undermine Martinez's credibility. Instead, competent counsel could conclude that his best course was to make selected logical points on cross-examination,

as he did (RT 5771-5777) and then present contradictory testimony which, if believed, would destroy the credibility of Martinez's entire story, as he did (RT 5945-5946 [Roberta Cowan]).

Petitioner also complains of the failure to request that guilt phase instructions on credibility and proof beyond a reasonable doubt be repeated at the penalty phase. (Pet. 160-164.) As respondent has argued, such re-instruction was not necessary. (RB 315-330; cf. RB 299-300; see e.g. *People v. Heishman* (1998) 45 Cal.4th 147, 182.) Thus, counsel was not required to request it.

Petitioner further argues that counsel should have requested an instruction on the limited use of the evidence. (Pet. 161-162.) As with petitioner's other similar contentions, respondent contends that there is no reason to believe the jury used the evidence for an improper purpose. Moreover, since the incident was excluded from the jury's consideration as evidence of another crime (RT 5968; see RB 293) and the proper purpose was obvious, such an instruction was unnecessary.

Finally, as respondent has argued (RB 300), there was no prejudice in light of the other evidence.

I. Alleged Failure To Investigate And Present Evidence Regarding The Attack On Tambri Butler

Petitioner argues that counsel was incompetent in failing to Investigate and present evidence regarding the attack on Tambri Butler. (Pet. 164-184.) Respondent has already agreed that an Order to Show Cause should issue as to the claims concerning the Tambri Butler evidence. (See above, Argument IV.) In so doing, respondent does not concede that the petition is sufficient to show incompetence of counsel in this regard but believes that the underling facts regarding Tambri's identification of petitioner should be resolved. If the facts are adverse to petitioner's position, respondent believes that any inadequacy of

counsel will be rendered harmless.

J. Failure To Object To The Admission Of The Excam Semiautomatic Pistol To Corroborate Tambri Butler's Identification Of Petitioner As Her Attacker

Petitioner argues that counsel was incompetent in failing to object to the admission of the excam semiautomatic pistol to corroborate Tambri Butler's identification of petitioner as her attacker. (Pet. 185-185.) As respondent has argued on appeal (RB 307-309), the evidence was admissible. As a result, counsel was not required to object, and his failure to do so was not prejudicial.

K. Alleged Failure To Present A Coherent Penalty Phase Defense

Petitioner argues that counsel was incompetent in failing to present a coherent penalty phase defense. (Pet. 190-193.) The substance of petitioner's argument is that counsel pursued inconsistent theories, which were that petitioner had "'human worth'" (Pet. 191, citing RT 5762) but was a "dangerous" "sexual deviant" (Pet. 191, not citing the record). Respondent disagrees that the defense evidence of petitioner's abused childhood created this conflict. Instead, counsel had to accept that the jury believed his client was dangerous and obsessed with sex in light of the offenses of which the jury had convicted petitioner. Under the circumstances of the case, counsel's attempt to both humanize petitioner and to generate sympathy for his abused childhood was the best tactical choice. Counsel would then hope that the jury would conclude that petitioner had human worth and was capable of emotional improvement and that a sentence of life in prison would be adequate to prevent petitioner from becoming involved in further dangerous conflicts with prostitutes.

Petitioner also faults counsel for presenting the testimony of family members and co-workers, which permitted the District Attorney to argue that

petitioner does not "snap[]" in stressful situations. (Pet. 192-193.) This claim is inconsistent with his general claim of lack of investigation of petitioner's friends and family. However, since the other evidence showed that petitioner had been a sheriff's deputy for many years and had a wife and children, competent counsel would know that the jury would wonder whether petitioner acted normally in these relationships or acted like a monster, as the evidence of the crimes tended to show. The former inference would be no worse than the evidence counsel presented. The latter inference would be something counsel would want to avoid if possible. Counsel made the best choices under the circumstances.

Petitioner next argues that counsel was incompetent in failing to present his brother Dale's testimony to substantiate the psychiatric evidence. (Pet. 193-202.) In asserting that the District Attorney relied on the evidentiary gap, he cites only the District Attorney's guilt phase argument. (Pet. 193-194, citing 5226, 5286, 5323-5324[39/].) However, as respondent has explained (Argument V, subd. (D)), the District Attorney conceded the factual basis for the argument. Moreover, there was no limitation on the use at the penalty phase of petitioner's statements for the truth of the matters stated. (RT 5757-5758, 5966-5970; cf. AOB 219, fn. 162; see RB 74, fn. 49.) Competent counsel could decide that further discussion of the details through Dale was unnecessary. Instead, counsel elicited Dale's confirmation that there had been physical abuse in the home (RT 5934-5935) and showed the effect on Dale by eliciting the story that Dale had been tempted to plan a murder and had been in therapy (RT 5934, 5936-5937).

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39. Petitioner cites a point in Dr. Glaser's guilt phase testimony in which he was asked a hypothetical question about sodomy. (RT 5323.) There was subsequent testimony that petitioner had been sodomized. (RT 5406, 5416, 5477, 5480, 5483, 5484.) Thus, petitioner's complaint about the comments of the court and the District Attorney that there was no evidence of sodomy are spurious.

As Dale's declaration shows, eliciting Dale's full story would have created a danger of presenting information to the jury which would have reflected badly on petitioner. Examples are Dale's statements that petitioner stole women's underwear, was obsessed with pornography and engaged in sex play as a young teenager with cousin Donna. (Exh. 5 at p. 6.) Counsel reasonably declined to present this additional evidence but, instead, attempted to present a more sanitized and sympathetic version through Dr. Bird, who was the sole expert witness for the defense at the penalty phase.

Finally, there was no prejudice. As at the guilt phase, the question for the jury was the validity of the expert opinion regarding petitioner's mental state at the time of the Tracie Clark shooting (and, inferably, at the time of the Janine Benintende shooting). However, as at the guilt phase, the opinions offered by the defense experts (at both the guilt and penalty phase) were strongly undermined by petitioner's confession of his calculating thought processes at the time of the Tracie Clark shooting, the second of the two murders.

L. Alleged Inadequacy In Argument

Petitioner argues that counsel was incompetent in his penalty phase argument. As with his claim regarding counsel's guilt phase argument, he fails to establish incompetence or prejudice. (Pet. 202-212.) Specifically: competent counsel (1) could tactically decide not to discuss the aggravating evidence in argument but could leave it to the jury's good sense to evaluate the testimony, including counsel's cross-examination (see Pet. 203 [concerning Butler]) and contradicting evidence (see RT 5945-5946 [concerning Martinez]; (2) was not required to specifically mention that petitioner's mental problems could fall within specific mitigating factors in addition to the all-inclusive mitigating

factor (k)[40]; (3) was not required to specifically argue remorse where the evidence showed evidence of remorse (see Pet. 209); (4) was not required to argue lingering doubt where there was no reason to believe the jury had any; and (5) was not required to argue lack of intent regarding the murder of Janine Benintende where, under the evidence and the prosecutor's argument, the jury clearly found that the murder was intentional.

M. Failure To Request Additional Or Different Penalty Phase Instructions

Petitioner argues that counsel was incompetent in failing to request modifications to penalty phase instructions or additional penalty phase instructions. (Pet. 212-222.) Petitioner fails to show incompetence or prejudice. Specifically: (1) the standard instructions were proper, as argued on appeal (see RB 331-340); (2) the modification of factors (f) [deleting moral justification], (g) [deleting substantial domination of another], and (h) [deleting intoxication] was proper under the evidence and was not prejudicial (see RB 311-313); (3) counsel was not required to request repetition of certain guilt phase instructions (see RB 313-330); (4) counsel was not required to request an instruction that petitioner's deviant sexual history could not be considered in aggravation because counsel would understand that the jury could consider petitioner's history as relevant to the murders and that the jury would not use the specific events for aggravation because they were excluded from the prior offense factor (b) (see RT 5968; RB 293); (5) counsel was not required to request further instruction on the absence of prior felony convictions where the jury was instructed on the factor (RT 5967); (6) counsel was not required to request a

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40. Contrary to petitioner's implication (Pet. 207-209), the jury was instructed to consider "Whether or not the offense was committed while the defendant was under the influence of extreme or emotional disturbance" (RT 5967).

specific instruction that lack of intent to kill Janine Benintende was a mitigating factor because such a factor would fall under factor (a) and because the jury clearly found intent to kill Janine Benintende under the evidence and the prosecutor's arguments.

N. Alleged Failings At Post-verdict Proceedings

Petitioner argues that counsel was incompetent in post-verdict proceedings. (Pet. 225-229.) Petitioner's first ostensibly specific argument is that counsel should have presented argument and authority to support the automatic motion to modify the penalty verdict under Penal Code section 190.4, subdivision (e). (Pet. 227.) However, petitioner fails to set forth any specific arguments counsel should have made in the motion, except by reference to Argument XIV of his Opening Brief on appeal, which comprises his claims of error in connection with the automatic motion to modify the penalty. (AOB 329-348.) He makes the same points in support of his more specific argument of incompetence of counsel at the penalty phase. (Pet. 227-229.) Thus, the instant argument adds nothing to his more general claims.

Petitioner does specifically argue that counsel was incompetent in failing to object to the probation report as containing hearsay and the probation officer's opinion. (Pet. 227-228.) Competent counsel would understand that a probation report properly contains hearsay and the probation officer's conclusions with regard to sentence. Petitioner points to nothing improper in the report. As respondent has argued on appeal, the probation report was proper for its proper purposes, i.e., the imposition of the non-capital sentences. (RB 344-346.) Counsel could be confident that the court would only use the report for its proper purposes, as the record shows he did. (RT 5996-5997; see RB 345-346.)

Respondent next complains of counsel's failure to object to the "victim impact" testimony of Janine Benintende's father, Frederick val Fredrek. (Pet.

228.) He appears to argue that the court should not have considered the statement for purposes of the modification motion because the statement was not before the jury. However, this Court has held that victim impact information is proper at the modification motion. (*People v. Breaux, supra,* 1 Cal.4th at p. 321.) Moreover, Mr. Fredrek's statement was essentially argument, rather than new facts. (RT 5989-5991; see RB 348.) Even if the statement contained some improper facts which were not reflected in the trial record, competent counsel could rely on the court not to consider them regarding modification and could decide not to object. Finally, since the court had initially indicated it was disinclined to hear the statement (RT 5988), petitioner fails to show that the court actually did consider the statement for an improper purpose. Thus, petitioner fails to show either incompetence or prejudice.

Petitioner asserts that the trial court improperly made multiple use of the facts of the offenses. (Pet. 228.) Petitioner fails to demonstrate any multiple-counting or improper weighing. (See RB 349-350.)

Petitioner complains that the court improperly considered his dangerousness. (Pet. 228.) However, dangerousness is a proper penalty consideration based on the evidence underlying the penalty factors. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1223; see RB 350.)

Respondent next argues that counsel should have objected to the court's consideration of matters which were not presented by the evidence. (Pet. 228-229, citing AOB 342-344.) In so doing, he is evidently referring to the court's reference to the Martinez incident when it discussed the attack on Tambri Butler and implied that it was part of a pattern, which also included the murders of Janine Benintende and Tracie Clark. (RT 5995.) Even if the court erred in considering the "Martinez incident" under factor (b), the incident was relatively minor and certainly paled in comparison with the two murders of which appellant was convicted and his violent sexual assault on Tambri Butler. Petitioner has complained of the court's reference to a "pattern of violence," on

the theory that a pattern of violence is not a penalty factor. (AOB 343-344, citing RT 5995; see Pet. 228 [reference to "nonstatutory criterion"].) At the page cited, the court did not refer to a pattern of *violence*. At the page cited, the court implies that the two murders, petitioner's conduct with Ellen Martinez and his violent sexual assault on Tambri Butler were part of a pattern.[41/] The court's reference to a "pattern of violence" occurred *after* it had denied modification and was discussing the sentence to be imposed. (RT 5996.) In that context, a "pattern of violence" was a proper factor (Cal. Rules of Court, rule 421, subd. (b)(1) ["The defendant has engaged in violent conduct which indicates a serious danger to society."]). It may be that the court had no statutory sentencing choice to make with respect to the second count, the second degree murder of Janine Benintende with the use of a gun. But even if the court had relied on an improper factor in support of a nonexistent choice, that would not have harmed petitioner. In any event, to the extent that the court could have considered the proportionality of any part of the sentence, it could properly have relied on a commonsense characterization of petitioner's conduct as showing a pattern of violence. Respondent also contends that the trial court could consider petitioner's pattern of criminal conduct in deciding the automatic motion to modify the death verdict under factors (a), the circumstances of the charged

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41. The court said that "it" happened with each of the four named persons, but the court never specified what the court meant by "it." Even if it is assumed that the court was referring to factor (b) ["The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."], petitioner fails to show error. Although the *jury* was told not to consider the "Martinez incident" under factor (b), that limitation was not necessary. As respondent has noted, petitioner's actions toward Ellen Martinez did fall within factor (b), the District Attorney gave notice that she intended to use the incident for aggravation, and the evidence was never objected to or subject to an evidentiary limitation at the penalty phase. Even if the court should not have considered the "Martinez incident" at the penalty phase, it paled in comparison with the murders and the sexual assault on Tambri Butler.

offenses, and (b), other criminal conduct involving actual or threatened force or violence.[42/] Under the circumstances, counsel could conclude that petitioner was not harmed by the reference and that the result would have been no different if he had objected.

Petitioner finally argues that the trial court failed to consider mitigating evidence. (Pet. 229.) However, the record only shows that the court did not specifically mention mitigating evidence. (RT 5995-5996; see RB 352-353.) Competent trial counsel would understand that the court had weighed the mitigating evidence, as the court was required to do. (Pen. Code, § 190.4, subd. (e); see Evid. Code, § 664 [presumption that official duty is regularly performed].) As a result, petitioner fails to show incompetence or prejudice.

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42. As respondent has argued, the "incident" with Angel Martinez involved the threatened use of force or violence.

V.

ALLEGED CUMULATIVE ERROR

Petitioner summarily argues that the alleged errors were cumulatively prejudicial. (Pet. 229-230.) Respondent contends that there was little or no error and no prejudice to accumulate. (*People v. Cooper* (1991) 53 Cal.3d 771, 839; see *People v. Bradford* (1997) 14 Cal.4th 1005, 1057; *People v. Mayfield* (1997) 14 Cal.4th 668, 809.) A defendant is entitled to a fair trial but not a perfect one. (*Cooper, supra,* at p. 839; cf. *Schnell v. Florida* (1972) 405 U.S. 427, 432; *People v. Gordon* (1990) 50 Cal.3d 1223, 1278.) He had a fair trial on guilt and penalty.

CONCLUSION

Accordingly, for the foregoing reasons, respondent agrees that an Order to Show Cause should issue as to Claims III, IV and V(K), but respectfully requests that the petition be denied as to all other claims.

Dated: June 28, 2001

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re David Keith Rogers** No.: **S084292**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 28, 2001, I served the attached **INFORMAL OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, addressed as follows:

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Denise Anton **P.M.B. No. 197** **38 Miller Avenue** **Mill Valley, CA 94941**	Honorable Terry McNally Kern County Clerk 1415 Truxtun Avenue, Rm. 212 Bakersfield, CA 93301

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 28, 2001, at Sacramento, California.

_____

Signature