IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

DAVID ESCO WELCH,

On Habeas Corpus.

CAPITAL CASE
S107782

Alameda County Superior Court No. 90396
The Honorable Stanley Golde, Judge

INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

BRUCE ORTEGA
Deputy Attorney General

CATHERINE A. RIVLIN
Supervising Deputy Attorney General
State Bar No. 115210

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5977
Fax: (415) 703-1234

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **DAVID ESCO WELCH,** On Habeas Corpus.	**CAPITAL CASE** S107782

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

INTRODUCTION

Still the worst mass murder in Oakland history, David Esco "Moochie" Welch's planned execution of the Mabrey family is not a contested fact. The evidence is compelling and ultimately met only by petitioner's testimony that despite the presence of his bullets in the victims, his shoe prints on the door, one victim's blood on his gun, and eyewitness identification by several surviving victims who knew him well, the crime must have been committed by "some other Moochie." However, he was the Moochie who threatened to kill the entire Mabrey family only hours before all but a few members of the family, and their houseguests, including the children, were murdered. He was the Moochie who lurked around the neighborhood of the Mabrey house, watching the police watching for him, and cleverly, swiftly, moved in for the kill at their change of shift. He was the Moochie against whom members of the Mabrey family, and the adult houseguest, were scheduled to testify the following Monday. He was

the Moochie who used a writ of habeas corpus to convince a superior court judge to let him out of custody for the weekend he needed to kill his witnesses, promising as a condition that he would not contact or go near the Mabreys, a promise he had broken within hours of his release from custody. He was the Moochie whose name was screamed, "No, Moochie, don't," as the gun was pointed at mothers, sons, and daughters. He was the Moochie who pulled the trigger over twenty times, hunting his prey, room to room, killing six with shots to the head and leaving two others for dead. He was the Moochie, who said, "this is for you, bitch," as he executed his ex-girlfriend, Dellane, and the baby in her arms, and shot her three-year-old, Dexter, whom he believed to be his own son. He was the Moochie who climbed on the bed and shot Dellane once more, placing the barrel of his gun between her eyes, for good measure. He was the Moochie who coldly committed multiple, premeditated, deliberate murders in the early morning hours of December 8, 1986.

He was also the Moochie who manipulated the legal system from the start, doing everything he could think of to delay trial, disrupt proceedings, and denigrate the court and its officers. While there has been some shifting with the winds, strategy-wise, to accommodate the *au courant* issues in habeas corpus, the manipulation continues. There being no disagreement over who committed this crime, the only people to attack are the victims and those committed to insuring petitioner a fair trial, whether he wanted one or not.

As he did in the Mabrey home, Moochie again takes aim at whatever might be moving. He argues he was obviously sane, competent, and intelligent, so it was error not to let him represent himself. In the alternative, of course, he argues he was obviously insane, incompetent, and a moron, so he should never have stood trial and cannot now be executed. The trial court, and this Court on direct review, found him disruptive and manipulative, comprehending but deeply antisocial, a completely unrepentant and cold-blooded killer. While petitioner continues to rail against the experienced judge and court officers for

giving him the fair trial he did his best to obstruct, the record establishes that all of petitioner's issues have been waived, defaulted procedurally, or simply fail to state a claim upon which relief can be based.

STATEMENT OF THE CASE[1/]

On December 16, 1987, the District Attorney of Alameda County filed information number 90396, charging petitioner, David Esco Welch, with nine felonies, including the first degree, special circumstance murder of six persons, the attempted murder of two persons and possession of a concealable firearm by a felon. (Pen. Code, §§ 187, 190.2, subd. (a)(3), 664, 12021.) Specifically, the information charged:

Count I: Murder of Sean Orlando Mabrey, in violation of Penal Code, section 187. (CT 1787.)

Count II: Murder of Dwayne Miller, in violation of Penal Code, section 187. (CT 1788.)

Count III: Murder of Kathy Walker, in violation of Penal Code, section 187. (CT 1789.)

Count IV: Murder of Darnell Mabrey, in violation of Penal Code, section 187. (CT 1790.)

Count V: Murder of Dellane Mabrey, in violation of Penal Code, section 187. (CT 1791.)

Count VI: Murder of Valencia Morgan, in violation of Penal Code, section 187. (CT 1792.)

Count VII: Attempted murder of Dexter Mabrey, in violation of Penal Code, sections 187 and 664. (CT 1793.)

---

1. References to CT and RT are to the transcripts in petitioner's direct appeal, *People v. Welch*, S011323, of which both parties request the Court take judicial notice.

Count VIII: Attempted murder of Leslie Morgan, in violation of Penal Code, sections 187 and 664. (CT 1794.)

Count IX: Possession of a concealable handgun by an ex-felon, in violation of Penal Code, section 12021. (CT 1795.)

The information further charged petitioner was armed with a firearm (his accomplice's weapon) and personally used a firearm (his Uzi) when he committed the murders and attempted murders. (Pen. Code, §§ 12022, subd. (a), 12022.5, 1203.06, subd. (a).) In addition, the information charged petitioner with the special circumstance of multiple murder, pursuant to Penal Code, section 190.2(a)(3). (CT 1787-1795.)

The information also charged petitioner with three prior felony convictions.

I. On or about March 1, 1983, petitioner was convicted of battery with serious bodily injury on a prison guard, in violation of Penal Code, 243, subdivision (c), and served a separate prison sentence therefor. (CT 1796.)

II. On or about August 5, 1981, petitioner was convicted of receiving stolen property, in violation of Penal Code, section 496, and served a separate prison sentence therefor. (CT 1796.)

III. On or about May 8, 1981, petitioner was convicted of assault with a deadly weapon, in violation of Penal Code, section 245, subdivision (a), and served a separate prison sentence therefor. (CT 1796.)

Petitioner was arraigned on April 7, 1988. (CT 1832.) He entered a plea of not guilty to the nine counts of the information, and denied the special circumstance and all of the further allegations. (CT 1832.) Petitioner stood mute on the three prior conviction allegations. (CT 1832.)

In the period leading up to the trial, petitioner filed numerous motions to disqualify the judge and prosecuting attorneys, and to replace or dismiss his appointed counsel. On May 12, 1987, petitioner filed a motion requesting the Superior Court to relieve his current counsel, James Giller, and appoint a new

one. (CT 470.) This motion was apparently granted.

On October 19, 1987, petitioner filed a motion to disqualify the Honorable Vernon A. Moore from presiding over further proceedings in his case. (CT 699.) That same day, petitioner filed another motion to disqualify the prosecuting attorneys. (CT 705.) On October 30, 1987, petitioner filed a second motion to disqualify Judge Moore along with the entire Alameda County Superior Court bench from hearing his case. (CT 720-724.) These motions were all denied. (CT 787, 803.)

On July 27, 1988, petitioner made an unsuccessful *Marsden*[2/] motion to remove his appointed counsel, Spencer Strellis. (CT 1936, 1943-1947.) On that same day, petitioner filed a renewed motion to disqualify the entire Alameda County Superior Court bench. (CT 1931.)

On October 24, 1988, petitioner filed a renewed motion to disqualify the Alameda County Superior Court bench from hearing his case, and to recuse the Alameda County District Attorney's office. (CT 2043.) Petitioner filed a separate motion to disqualify the Alameda County Superior Court from ruling on his primary disqualification motion. (CT 2037.) Accordingly, the California Judicial Counsel assigned the disqualification hearing to the Honorable James Moelk of Solano County for disposition. (CT 2066.) Judge Moelk's order denying Welch's motion was filed on November 3, 1988. (CT 2107.)

On November 7, 1988, petitioner filed another motion to disqualify the Alameda County Superior Court bench from hearing his case. (CT 2111.) This motion was denied at a hearing the next day. (CT 2117.) At this hearing, petitioner's renewed *Marsden* motion and motion to recuse the Alameda County District Attorney's office were also denied. (CT 2117.)

---

2. *People v. Marsden* (1970) 2 Cal.3d 118.

On November 8, 1988, petitioner filed a *Faretta*[3] motion seeking self-representation. (CT 2120.) Jury trial commenced the next day in the Alameda County Superior Court before the Honorable Stanley P. Golde. (CT 2124.) On November 14, 1988, the trial court denied petitioner's renewed motion to disqualify Judge Golde. (CT 2127.) Petitioner filed another motion to disqualify Judge Golde that was denied the next day. (CT 2128-2134.) On November 17, 1988, the trial court denied petitioner's renewed motion to disqualify the judge. (CT 2143.) On November 21, 1988, the trial court denied petitioner's *Faretta* motion from November 8, finding Welch competent to stand trial, but unable to control his behavior in court and specially impaired in his ability to appreciate his need for competent counsel. (CT 2144.)

The trial court denied petitioner's oral *Marsden* motion on December 2, 1988. (CT 2157.) On January 6, 1989, petitioner filed another motion to disqualify the Alameda County District Attorney's office. (CT 2199.) On January 11, 1989, the trial court heard and denied petitioner's oral *Marsden* motion. (CT 2232.) On January 12, 1989, the trial court denied petitioner's January 6 motion to disqualify the District Attorney's office. (CT 2247.)

Jury selection began on January 19, 1989. (CT 2266.) On January 31, 1989, petitioner made another *Marsden* motion and moved for the trial court to recuse itself from hearing the *Marsden* motion. (CT 2292.) Both motions were denied. (CT 2292.) The next day, the trial court heard and denied petitioner's request that his former counsel, Thomas Broome, be brought in to handle his *Marsden* motion. (CT 2293.) On February 6, 1989, the trial court denied petitioner's motion for a hearing to determine Thomas Broome's availability as a substitute for his present counsel. (CT 2296.) On February 21, 1989, the trial court denied another *Marsden* motion by petitioner. (CT 2311.) On February 22, 1989, petitioner made a *Faretta* motion. (CT 2320.) The trial court ruled

---

3. *Faretta v. California* (1975) 422 U.S. 806.

that the motion was improper and had already been ruled on. (CT 2320.) On March 15, 1989, the trial court denied petitioner's motion to disqualify the judge. (CT 2347.) On March 20, 1989, the trial court heard and denied petitioner's *Marsden* motion. On April 18, 1989, the trial court denied another *Marsden* motion. (CT 2374.) On April 27, 1989, the trial court heard and denied petitioner's *Marsden* motion. (CT 2380.) On May 10, 1989, the trial court heard and denied another *Marsden* motion. (CT 2400.)

The jury was sworn in on May 16, 1989. On that day, the trial court heard and denied petitioner's *Marsden* motion. (CT 2424.) On June 1, 1989, the trial court heard and denied petitioner's *Marsden* and *Faretta* motions. (CT 2453.) The next day, the trial court denied another *Faretta* motion by petitioner. (CT 2454.) On June 12, 1989, the trial court heard and denied petitioner's *Faretta* motion. (CT 2459.)

Jury deliberations commenced on June 13, 1989. (CT 2460.) On June 19, 1989, the jury returned verdicts finding petitioner guilty of six counts of first degree murder, two counts of attempted first degree murder, and one count of carrying a concealed firearm as an ex-felon. (CT 2482-2491.) The jury found true the special circumstance of multiple murder. (CT 2488.) The jury also found true all the arming, use, and great bodily injury clauses attached to Counts I through VIII. (CT 2482-2490.)

The penalty phase began on June 26, 1989. On that day, the trial court heard and denied petitioner's *Faretta* motion. (CT 2493.) On July 12,1989, the jury returned a verdict of death. (CT 2514, 2523.) On the trial court's motion, the four prior conviction allegationss, and the arming, use, and great bodily injury clauses of Counts VII and VIII were dismissed. (CT 2524.) The judgment of death was entered on July 25, 1989. A notice of appeal was filed on July 27, 1989. (CT 2531.)

On automatic appeal to this Court, the judgment was affirmed on June 1, 1999. Petitioner's petition for rehearing was denied on August 18, 1999. His

petition for writ of certiorari, in case No. 99-862, was opposed by respondent and denied on February 22, 2000.

Rather than pursue state habeas corpus relief, petitioner requested the appointment of federal habeas corpus counsel on February 28, 2000. Two attorneys were appointed on April 16, 2001, and a substitution of counsel was approved as to one of them on March 21, 2002. The one-year federal statute of limitations pursuant to the Antiterrorism and Effective Death Penalty Act, hereafter AEDPA, 28 U.S.C. section 2254, was twice tolled on petitioner's motion, ultimately to June 24, 2002. However, no federal petition was ever filed and that case was dismissed on the motion of the United States District Court on July 29, 2002, without prejudice to filing a petition for writ of habeas corpus immediately upon exhaustion of state court remedies.

Instead, as the federal court was aware, the present petition was filed on the afternoon of June 24, 2002. This Court has requested informal opposition from respondent, which we now provide.

STATEMENT OF FACTS

Kicking in doors in the middle of the night and searching room to room for anyone he had missed, petitioner killed four adults and two toddlers, execution style. He attempted the murder of another adult and a nine-month old baby who lay screaming in his dead mother's arms. Petitioner had been terrorizing the family for months and was out on bail, scheduled for a preliminary hearing the next day in the felony charges arising out of his past actions at the same house, when he began executing the witnesses and their children.

Petitioner's Earlier Assaults On The Mabrey Family

In 1986, Barbara Mabrey lived at 10510 Pearmain Street in Oakland with her four sons, Darnell, Sean, Stacey and Charles, her daughter Dellane, and her daughter's two-year-old child, Valencia. Sixteen-year-old Dellane had an ongoing relationship with Valencia's father, Leslie Morgan. (RT 4195-4197.) In January, Dellane introduced Barbara to petitioner, David Esco "Moochie" Welch, describing him as her new boyfriend. (RT 4197, 4110-4113.) Soon Dellane told Barbara she was pregnant with Dexter, whom petitioner treated like a son from the time he was born on September 23, 1986.[4/] (RT 4197-4198, 4200-4201.) Dellane continued to date both petitioner and Leslie Morgan. (RT 4483-4484.)

Barbara Mabrey did not approve of Dellane's relationship with petitioner. Barbara knew petitioner had a wife and children. She saw petitioner slapping Dellane around. (RT 4284-4288.) Starting in September, Barbara Mabrey tried, but failed, to discourage Dellane from seeing petitioner. She also told petitioner not to come around the house anymore, but petitioner ignored her request. (RT 4198-4199, 4294.)

In early October, when Dexter was two weeks old, petitioner broke into Barbara's bedroom and grabbed the baby away from her at gun point. Petitioner threatened to kill Barbara if she did not stop interfering in his relationship with Dellane and baby Dexter. To avoid an incident, Dellane, Valencia, and Dexter left with petitioner. (RT 4200-4201.) They remained with him in a motel room for several days, until found by some of the older male relatives and returned home on October 12. (RT 4202, 4304, 4537.)

Late on the night of October 12, 1986, petitioner drove up to where

---

4. Blood tests conducted later in preparation for a civil determination of Dexter's custody established that Leslie Morgan, not petitioner, was Dexter's father. (RT 4831-4833, 4864-4865.)

Barbara Mabrey was finishing her shopping, got out of his car and spit at her, saying "Bitch, you are dead." (RT 4203-4204.) He followed as a friend, Eddie Money, drove her home. (RT 4204.) Petitioner drove up fast as Mr. Money dropped Barbara Mabrey off in front of her home. The fender of petitioner's car clipped Ms. Mabrey's knee. As she stumbled and ran for the opposite sidewalk, Barbara saw petitioner laughing with a passenger and putting his car in reverse. Petitioner brought the car around again and drove toward Barbara Mabrey again, missing her by three feet. (RT 4205-4207, 4309-4311.) Ms. Mabrey was frightened of what petitioner would do if she contacted the police. The next morning, however, she made a police report. (RT 4208; PEX 69, crime report dated October 13, 1986.)

A week later, Barbara Mabrey was walking from a store on 105th and Edes Streets when petitioner walked up to her and threw a liquid in her face. (RT 4209, 4314-4315.) She heard petitioner say, "Bitch, I told you not to come up here." Petitioner struck her on the side of her head with his fist. Barbara Mabrey fell to the ground. Petitioner kicked her in the back and the side as she lay in a totally defensive posture. (RT 4210-4211, 4316.)

A police car drove up, attracted by the gathering crowd. Petitioner jumped on his motorcycle and fled. When Barbara explained that "Moochie" had jumped her, the officers took her with them as they took off after the speeding motorcycle. Petitioner got away. (RT 4212, 4317-4318.) Barbara Mabrey filed her second police report in as many weeks. (RT 4213; PEX 70, crime report dated October 20, 1986.)

Barbara Mabrey was awakened at three in the morning on October 29, 1986, by Dellane's scream, "David, stop." (RT 4215, 4326-4327.) Barbara went into the hall to find petitioner standing in the hall with a gun. Petitioner pointed the gun at Barbara's chest and told her not to come any closer. Then he slapped Dellane with his open hand. (RT 4216, 4327-4328.) He again leveled the gun at Barbara and threatened that if she went to court and testified against him, he

would kill her slowly, shooting off her limbs one at a time. (RT 4217, 4329-4330.) Petitioner then turned the gun on Leslie Morgan, who was standing with Dellane in her bedroom doorway, and told him to stay out of his [petitioner's] bed, mind his own business, and "Get your motherfucking ass out of here." Morgan fled out of the house in his underwear. (RT 4218, 4329, 4443-4444, 4487.) Petitioner pointed the gun at Sean and Darnell, then left. (RT 4219.)

Barbara Mabrey filed her third police report of the month. (PEX 71, crime report dated October 29, 1986.)

Petitioner was arrested. He wrote Barbara a letter from jail, saying he was being mistreated, expressing sorrow at what he had done, and asking her to drop the charges. She did not respond. Within a few days he was back on the streets. (RT 4221, 4337-4338.) He came to visit Dexter and Dellane, bringing with him a case of formula and a box of diapers. (RT 4222.) It was, he knew, a condition of his bail that he not go near the Mabreys. (RT 5103.)

The preliminary examination on the charges arising out of Barbara Mabrey's three police reports concerning petitioner's assaults on the Mabrey family was scheduled for December 9, 1986. (RT 4228-4229.)

Petitioner Threatens To Kill All The Mabreys, Then Does So

On December 6, 1986, petitioner came to the house at 11:30 p.m. He had two pit bull puppies with him, which he showed around, then deposited in the fenced front yard while he went inside to visit with Dexter. (RT 4222-4223 4339-4340.) When petitioner came out only one of the puppies was in sight. Petitioner began making accusations that the puppy had been stolen. He shot out the windows of Steve Early's car, shouting, "You stole my dogs, you motherfucker." When Early drove off, petitioner turned on the Mabrey family and their neighbors, saying "You Niggers better find my dog or you are all going to die." (RT 4226, 4451-4453.)

Petitioner came over to the Mabrey home twice on Sunday, December

7, 1986. First he brought over a woman named Rita Lewis and introduced her to Barbara. Petitioner asked where his dog was and wanted help finding it. He asked Barbara whether she planned to go to court on Tuesday, December 9, and testify against him. When she said she was going to court, petitioner asked her to take a ride with him and Rita Lewis. Barbara refused, assuming petitioner was up to something. (RT 4227-4229, 4401.) Petitioner again warned Barbara Mabrey not to show up in court, then left with Rita Lewis. (RT 4228, 4230.)

At 8:00 p.m., petitioner returned in a car driven by Delores Walker.[5/] Walker's daughter, Vanessa Towers was driving a station wagon belonging to Will Henderson. (RT 4231, 4538, 4540-4541, 5182-5183, 5322.) Petitioner was sitting in the back seat of his own car with Will Henderson and William Thomas, known as "Billy the Kid." The station wagon hit Stacey Mabrey's Monte Carlo, sending it onto a neighbor's yard. The Mabrey's heard the noise and came outside. Stacey told petitioner that somebody was going to have to pay to fix his car. (RT 4227, 4230-4231, 4454, 4693, 5183-5184, 5188, 5323.) Stacey's cousin Perry also made a comment about paying for the car. (RT 4493-4495, 5458.)

When he heard the remarks about paying for the car, petitioner turned and pistol-whipped Perry on the head with his .45 caliber weapon, saying "Do you know, do you know who you messing with? Do you know who I am?" Perry fell to the ground bleeding. Petitioner then turned on Will Henderson, hitting him until he also fell to the ground. (RT 4232, 4355-4356, 4405, 4455-4456.) Barbara asked a neighbor to call police. (RT 4356.) Before he left, petitioner said "You Stone City Niggers [referring to the Stonehurst section of Oakland where the Mabreys resided] better get my dog" or "you are all going to die." (RT 4233.) "Everybody in this fucking house is going to die." (RT 4538, 4563.) Petitioner also said the family would never be able to press

---

5. Delores Walker and Catherine Walker were not related. (RT 5192.)

charges against him again because they "are all dead." (RT 5163.) Petitioner sped away in his car with Billy the Kid before the police arrived. (RT 4359.)

Petitioner was very angry. (RT 5328.) Petitioner left, but he only drove a little ways away. From a vantage point, unknown to the Mabreys, he watched the house for some time with his headlights off. (RT 4560-4561.) He told others that after the police left, he would be back to kill everybody in the house. (RT 5460.) About 10:00 p.m., petitioner asked a neighbor of the Mabreys whether the police had left the area yet. (RT 5285-5286, 5291-5292.) When told the police were still around, petitioner said he would be back. (RT 5286.)

Ultimately, the Mabrey family retired for the night. (RT 4234.) Barbara Mabrey was sleeping in the middle bedroom. Leslie Morgan and Dellane Mabrey, after watching television in the den for a while, joined the children, Valencia and Dexter, in the first bedroom, closest to the den. (RT 4234.) Sean, Stacey, and Darnell Mabrey and houseguests Cathy and Dwayne Walker also watched television in the den. Then Sean went to sleep in the living room, Darnell, Cathy Walker and four-year-old Dwayne Walker went to sleep in the den, and Stacey went to sleep in the third bedroom, farthest from the den and the front door on Pearmain Street. (RT 4123-4124, 4270-4271.)

After midnight, petitioner went to a house down the street and told Dolores Walker that he was going to kill everybody at the Mabrey house. Dolores told her friends, in petitioner's presence, "it is going to be some bullshit tonight." (RT 4539.) Petitioner left.

At approximately 3:30 a.m. on the morning of December 8, 1986, Barbara Mabrey was awakened by two gunshots coming from the front of the house. She heard Dellane scream, "No, Moochie, Don't." Barbara could not see petitioner, but she saw Rita Lewis in the hall, pointing a gun and telling "Moochie" to get out of the way. (RT 4235.) She heard more gunfire coming from Dellane's room, but no more screams. Barbara Mabrey ran through the

kitchen and out the back door to a neighbor's house and called police to say petitioner was shooting her family. (RT 4235-4243.) Barbara's children, Sean, Darnell, and Dellane, were killed. Barbara's grandchild, Valencia, was killed. Barbara's friend and houseguest, Cathy Walker and her son, Dwayne, were killed that morning, one day before Barbara was scheduled to testify at petitioner's preliminary hearing. (RT 4244.)

Stacey Mabrey was also awakened by gunshots in the house. (RT 4125.) Petitioner and Rita Lewis were entering the hallway from the first bedroom, looking toward the front of the house. (RT 4126.) Petitioner had a semi-automatic machine gun in his hand and was moving from Dellane's bedroom to the den. (RT 4127.) Rita Lewis held a short-barrelled .38 revolver. She said, "Come on, Mooch, let's go." (RT 4128.)

Stacey stepped back into his bedroom and into the closet to put on his shoes to leave out the back door. Suddenly petitioner came into the bedroom, turned on the light and said, "Where's Chuck [another Mabrey son, who often slept in that room]?" Petitioner apparently did not see Stacey, frozen in the closet. Petitioner turned out the light and walked back toward the den. (RT 4131.) Stacey heard five more shots as he went out the back door and around the side of the house. From the side, he saw petitioner and Rita Lewis come out the front door and head down the stairs. (RT 4132-4133.) Petitioner was limping and fell once near the gate. Rita Lewis and a third person, who got out of the driver's seat of petitioner's car, helped petitioner into the car. Then they all drove away. (RT 4133-4134; see also 4387, 4390, 4394 [Barbara's testimony to the same facts].)

Stacey looked back inside the house. His siblings, Sean, Darnell, and Dellane, his niece Valencia, Cathy Walker and Dwayne Walker all appeared to be dead. Baby Dexter seemed injured, but alive. Leslie Morgan was lying motionless on the floor. (RT 4134-4135.) The first officers on the scene found Sean dead on the couch in the living room; Catherine and Dwayne Walker dead

on the floor of the den; Darnell dead on the couch in the den; Dellane and Valencia dead in the bed in the middle bedroom, with baby Dexter, shot in the face, but crying, quite alive, and clinging to his mother's body. (RT 4038-4034.) Seriously injured Leslie Morgan, Barbara Mabrey, and Stacey Mabrey had made it out of the house. (RT 4037.)

Leslie Morgan was awakened at 3:30 a.m. by shots coming from the living room. (RT 4459-4460.) Petitioner kicked in the heavily bolted door to the bedroom in which Morgan, Dellane, and the two babies slept. He stood at the foot of the bed with his finger on the trigger of a paratrooper-style Uzi and said, "This is for you, bitch." He shot Dellane, who fell silently back on the bed, next to Valencia, with Dexter still cradled in her left arm. Then petitioner pointed the Uzi at baby Valencia's head and pulled the trigger, killing her instantly. Morgan rolled under the covers toward petitioner at the foot of the bed and grabbed his arms, causing the Uzi to fall into the bedsheets. (RT 4465-4466.) Rita Lewis then stepped into the room, holding a .38 caliber revolver, and said, "Watch it. Watch out, Moochie." (RT 4467-4469.) She fired her gun at Morgan, hitting him in the shoulder. (RT 4469.) Petitioner retrieved the Uzi and fired twice more at Morgan, hitting him in the arm. Morgan lay still, hoping petitioner would think he was already dead and not shoot him in the head as he had the others. (RT 4472.) Petitioner straddled Dellane's already lifeless body, fired once more at close range, then moved on down the hall. (RT 4474-4475.) Infant Dexter lay wounded in the head and crying, still cradled in his dead mother's arm. (RT 4482, 4632.)

Morgan heard petitioner roaming through the house, looking for Barbara Mabrey, and muttering "Where is the bitch at?" (RT 4475.) Petitioner also said he would take them all outside and blow their heads off. (RT 4476.) Eventually, Morgan heard Rita Lewis and petitioner leave. Morgan looked out the window in time to see a third person help the shooters into a 1986 Mercedes and drive away. Petitioner, who could not walk without help, still held the Uzi

as he got in the car. (RT 4476-4477.)

Petitioner locked himself into the residence of his second cousin, Beverly Jermany, at 2116 103rd Avenue in Oakland at 5 a.m. (RT 4731-4732, 4765, 4782-4784.) He surrendered when the house was surrounded by police. Petitioner was arrested at 1:40 p.m. on December 8, 1986. (RT 4619-4620, 4624, 4641, 4656, 4668, 4734, 4745-4746.) He was wearing only his underwear. Inside, the fireplace was still warm. Ash in the shape of a pair of pants was visible on top of the fire. (RT 4746-4747.) Police recovered a pair of shoes, fitting petitioner, with a sole pattern generally matching a footprint on the kicked-in door to the murder scene, and with blood on them matching that of Leslie Morgan. (RT 4749-4752, 4756, 4828, 4833-4836, 4852-4857, 4038-4039, 4049; PEX 50, 110-B.) Rita Lewis was also arrested at the Jermany residence. (RT 4623, 4663.) Petitioner later explained to medical personnel that his leg was injured when Rita Lewis shot him with a .38 caliber revolver. (RT 4737.) Rita explained to Beverly Jermany that she had accidentally shot petitioner. (RT 4771.)

The Uzi used to kill all of the victims (RT 4054-4077, 4081-4087 [bullets recovered]; 4890-4910, 4924 [bullets matched]) was recovered in the yard of Ms. Jermany's house, wrapped in a pillowcase. (RT 4579-4581, 4583; PEX 3.) Petitioner and Lewis had brought an object or objects to Jermany's house in a pillow case at 5 a.m. (RT 4771-4773, 4777-4778, 4801, 4803.) Capable of firing 25 rounds without reloading, the Uzi had one live round in the chamber and four live rounds in the magazine. (RT 4581.) The rounds were nine millimeter hollow point ammunition. (RT 4585; PEX 103.)

Blood on the butt of the Uzi was consistent across several specific markers with that of Leslie Morgan, and could not have been the blood of petitioner or Rita Lewis. (RT 4827-4828.) Along with the Uzi, police recovered a Smith and Wesson .357 magnum with three live rounds and three expended rounds in the cylinder, as well as a .38 caliber Taurus revolver loaded

with two live rounds and four expended casings. (RT 4587-4589; PEX 104, 105.) One slug recovered at the murder scene was fired from a Smith and Wesson. (RT 4927; PEX 32.) Other bullet fragments could have been fired by either a Smith and Wesson or a Taurus. (RT 4926-4927.)

The forensic evidence confirmed that petitioner had executed his victims by shooting them in the head at close range, generally as they slept. (RT 3911-3921 [Sean Mabrey died of multiple gunshot wounds, including a chest wound penetrating the heart, a gunshot wound to the jaw, and a gunshot wound to the head affecting the skull and brain]; RT 3922-3935 [Darnell Mabrey died of multiple gunshot wounds, including two gunshot wounds to the neck and one to the head through the nose, piercing the brain]; RT 3965-3976 [Catherine Walker died of two gunshot wounds to the head]; RT 3977-3992 [Dellane Mabrey died of bullet wounds to the head and neck, including a contact wound between the eyes, and one down through the chin into the torso]; RT 4006-4014 [Dwayne Walker, age four, died of a single contact wound to the right side of the brain]; RT 4014-4021 [Valencia Mabrey, age three, died of a single contact wound to the forehead].) Baby Dexter survived two, possibly three, bullet wounds to the head, one (possibly two) near his right eye and the other near the nose. If the trajectory of either of the bullets had varied by a degree the bullets would have entered the brain and caused massive damage. (RT 4026-4030.)

The "Other Moochie" Defense

Petitioner's personal theory of defense was mistaken identity. He testified that there are a lot of people in Oakland called "Moochie" and one of the other "Moochies" must have slaughtered the Mabreys and their houseguests. (RT 5111-5112.) He admitted he had some "problems" with the Mabrey family, but noted he had problems with just about everyone, and the problems he had

with the Mabreys were not worth the trouble to kill them.[6/] (RT 5106-5107.)

Petitioner testified that it was he who: shot at Steve Early's car, shattering the back window, because he thought Early might have his dog (RT 5012-5014, 5107); took Rita Lewis by the Mabrey house on the morning of December 7, asked about the dog, and tried to get Barbara to go for a ride with him (RT 5026-5030); was present on the evening of December 7 when the car driven by Vanessa Towers knocked Stacey Mabrey's car onto a neighboring lawn (RT 5044-5047); pistol-whipped Stacey's friend or cousin Perry following the car incident (RT 5047, 5116-5117); fought with Will Henderson moments later (RT 5048, 5088); and got shot on December 8, 1986. (RT 5052-5053.) However, he testified he and his girlfriend, Rita Lewis, spent the early morning hours of December 8, 1986, together at petitioner's wife's house, at Scotty's Liquors, and at his cousin Beverly Jermany's house. (RT 5051, 5053-5055.) Petitioner refused to explain how he got shot in the leg because he was under a "code of silence" and it was irrelevant to the case. (RT 5055-5056, 5099-5101.) He knew it was a condition of his bail that he was not supposed to have any contact with Barbara Mabrey in December, 1986. (RT 5103.)

Petitioner admitted 1981 prior convictions for assault with force likely to produce great bodily injury and possession of stolen property, and a 1983 prior conviction for battery on a prison guard. (RT 5057-5059.) Chillingly, he mentioned each judge by name who had ever "sent [him] to prison." (RT 5058-5059.)

Petitioner denied taking Dellane, Valencia, and Dexter to the Sixpence

---

6. By contrast, he admitted firing on Steve Early, blowing out the rear window of his car, because he thought Early might be driving off with petitioner's lost dog. "That was worth a shot," petitioner acknowledged. (RT 5107.)

Motel or pulling a gun on Barbara Mabrey. (RT 5061.) Then he agreed he took Dellane, Valencia, and Dexter to the Sixpence Motel because there was no heat at the Mabrey house, but continued to deny he used any of his guns to get Dellane to come with him. (RT 5110.) He denied trying to run Barbara Mabrey down with his car. (RT 5062.) He admitted throwing a soda pop in Barbara Mabrey's face when she was at a liquor store and possibly telling her, "bitch, stay out of my affair." He warned her not to come into his neighborhood to tell lies to the police about him. (RT 5063.) After the warning and throwing the soda pop on Barbara Mabrey, petitioner fled to avoid contact with the police, he said, because he had guns and drugs on his person. (RT 5064-5065.)

Petitioner admitted he sold drugs, but reasoned that because he never made a profit, he was not really a drug dealer. (RT 5065.) Petitioner sold guns, but only to "cool" people. (RT 5079.) He admitted going to the Mabrey house with a friend and a gun on October 29, 1986, to get his motorcycle jacket back from Dellane. He had to hit her hard with his fist to wake her up. (RT 5067.)

Petitioner kept an arsenal of guns and ammunition spread around all the places where he might spend some time. (RT 5064-5065, 5075.) This included a chrome .357 magnum, a silver-plated .45 caliber automatic, various other pistols and revolvers, a "few" Uzis, but not the gun that police say killed the Mabreys. (RT 5047-5048, 5064, 5069, 5075 [he kept a .357 nearby], 5077-5078 [denying he testified he used .357 to shoot out Early's window], 5081-5083, 5086, 5111.) Petitioner admitted keeping guns nearby at all times, even though he knew it was a felony for him to possess a firearm. (RT 5079.) He boasted of being a good shot in a dangerous town. (RT 5079, 5081.) Even if guns were banned, he would find a way to have access. (RT 5079.)

Petitioner specifically denied shooting Sean, Darnell, Dellane, Dexter,

and Valencia Mabrey, Leslie Morgan, and Catherine and Dwayne Walker. (RT 5104-5111.) He had no idea what happened to his clothes. The police "speculated" he burned the clothes in Beverly Jermany's fireplace, but, he noted, they never put the ashes in evidence. (RT 5123-5124.) He denied stabbing Rita Lewis and again chastised the police for not bringing in the scissors he used if they existed, but he admitted he might have caused some of the injuries Ms. Lewis suffered, particularly the one to her chin. (RT 5121-5122, 5124.)

A urine screen and qualitative blood analysis were performed on blood drawn from petitioner on December 8, 1986. Petitioner had alcohol in his blood and cocaine and morphine, a metabolite of heroin, in his urine. (RT 5158-5159, 5342.) Since the requested quantitative analysis was never performed, exact amounts of alcohol, heroin, and cocaine consumed could not be estimated. (RT 5346, 5368-5369.) Dr. Herrmann was called by the defense to explain the effects generally these substances can have on the central nervous system. Alcohol and heroin, both depressants, and cocaine, a stimulant, whether consumed separately or in combination, can have a deleterious effect on motor skills and mental functioning, even at very low levels. (RT 5347-5355.) Testimony to the same effect was provided by Dr. Rosenthal, who also listed sleep deprivation as an additional factor affecting coherent thought processing. (RT 5389-5404.)

The Penalty Phase Evidence

The People proved three prior convictions.[7] (RT 5675-5676; PEX 123 [5/29/81 assault with deadly weapon], 124 [8/5/81 receiving stolen property],

---

7. A fourth conviction for a Vehicle Code section 10851 violation was excluded. (RT 5750.)

125 [4/7/83 assault on a peace officer].) In addition, the People presented evidence of petitioner's further violent criminal conduct at the penalty phase:

1. In 1973, while a juvenile detainee, petitioner committed a battery on Juvenile Hall counselor Mark Johnson (RT 5740-5743);

2. In 1975, petitioner fired one or more bullets at what he called a "nosey" neighbor, Faye McPherson, and her son, which entered a nearby bedroom and missed by inches her twin baby grandsons, sleeping in their cribs (RT 5731-5733);

3. In March of 1979, petitioner tried to run down a police officer with his motorcycle and committed separate batteries against two other officers while resisting arrest after a high speed chase (RT 5753-5759, 5761-5766, 5893-5896);

4. In December of 1979, petitioner severely beat and kicked Rosemary Dixon, an Oakland Police Officer working the warrant detail, causing her injuries to her arms, neck and back that forced her disability retirement (RT 5685-5688);

5. At 3:30 on the morning of May 21, 1980, petitioner entered the home of his former girlfriend, Juanell Turner who was home alone with her three-year-old daughter, then choked, repeatedly raped and sodomized Juanell Turner, then called her later, demanding to know why the police were in front of her house (RT 5705-5719);

6. While at San Quentin serving time on the Rosemary Dixon assault, petitioner smashed his wife's face into the wall of the visiting room (RT 5838-5843);

7. Also, while in the maximum security adjustment center at San Quentin, in 1982, petitioner committed a battery on Correctional Sergeant

Anthony Lee (RT 5807-5814);

8. While in the maximum security O-wing (Security Housing Unit or SHU) at the Correctional Training Facility at Soledad, on June 24, 1982, petitioner concluded a rules violation hearing (on the Lee battery), which he attended in waist chains, by spitting in the face of Correctional Lieutenant Steve Lawrence, charging and attacking him, requiring restraint by several other officers, and promising to be "nothing but trouble" from that day out (RT 5856-5861);

9. Later on the same day of the Laurence assault, on June 24, 1982, in the SHU, petitioner first threw feces in the face of Correctional Officer Gowin, struck the officer in the face with his handcuffs, then bit him (RT 5873-5880);

10. Paroled from state prison, but soon jailed in the maximum security area at Santa Rita in September 1982, petitioner assaulted Deputy Sheriff Lord, injuring his face, requiring stitches, and cracking several ribs (RT 5901-5908);

11. Petitioner assaulted other jail inmates in the maximum security area of Santa Rita Jail in January, 1985 (RT 5772-5776), and on a jail transportation van in July of that year (RT 5780-5785); and

12. In custody awaiting trial on the present offenses, petitioner assaulted Deputy Sheriff Charles Utvick in the administrative segregation unit in December 1987, then threatened to kill all the deputies in the unit. (RT 5789-5795.)

Petitioner requested that no mitigating evidence be put on by his attorneys because he said he could not see how the behavioral scientists could help. (RT 5916-5917.) The defense presented two witnesses in mitigation.

Dr. William Pierce, PhD., a psychologist, testified that he reviewed prison and juvenile court records, including probation reports, selected

transcripts of judicial proceedings focused on petitioner's courtroom behavior, and hospital records, interviewed petitioner in 1987, and consulted with counsel and other mental health professionals on the case. (RT 5930-5936, 5941-5943 [juvenile probation report read to jury], 5966-5967 [adult probation report read to jury, including the prediction "he will kill someone some day"], 5989.) He concluded petitioner had a differential diagnosis of delusional paranoid disorder combined with psychoactive substance disorder and possibly paranoid schizophrenia on axis one and an axis two diagnosis of impulsive personality disorder and/or organic personality disorder. (RT 5937.) In essence, petitioner believes he is being persecuted, does not later take responsibility for his own explosive actions, and has abused cocaine to the point where he is paranoid, impulsive, aggressive, bizarre, provocative, and violently acting out. (RT 5938, 5944, 5949-5951.) It was Dr. Pierce's opinion that petitioner was acting on December 8, 1986, under the influence of an extreme mental or emotional disturbance. (RT 5970.) Further, the psychologist opined petitioner's ability to conform his conduct to law was impaired as a result of a mental disease or defect, possibly exacerbated by cocaine, heroin, and/or alcohol intoxication.[8/] (RT 5971-5973.) On cross-examination, Dr. Pierce acknowledged that when petitioner armed himself with an Uzi, kicked in Dellane's door, said "this is for you, bitch," and pulled the trigger, there was nothing identifiably delusional about his thinking. He knew where he was and what he was doing. He knew right from wrong. (RT 5996-5999.) What was delusional, by implication, was his denial, later, that he killed her.

Dr. Samuel Benson, Jr., M.D., a psychiatrist, interviewed petitioner on

---

8. The psychologist specified later that petitioner's capacity to appreciate the criminality of his conduct was not impaired. (RT 6002.)

five occasions at the request of previous and current defense counsel. (RT 6009.) He reviewed the same records provided to Dr. Pierce and reached a similar, but not identical conclusion, that petitioner's differential diagnosis is either intermittent explosive personality disorder, organic personality disorder, persecutory delusional disorder, or cocaine-induced delirium and that whichever disorder controls affected petitioner's ability to conform his conduct to law. (RT 6010-6015, 6043.) He would get angry and spin out of control, the doctor opined, in an escalation of paranoid emotion. (RT 6083.) As did Dr. Pierce, Dr. Benson agreed on cross-examination that petitioner was fully aware that he was killing the Mabreys, intended to do so, and knew all along that killing the Mabreys was against the law. (RT 6092, 6094-6099.) He was, in Dr. Benson's opinion, simply lacking in a control mechanism to stop himself from doing what he intended, planned, and announced he would do. (RT 6099.)

PETITIONER'S CONTENTIONS

1. "*Brady* error – prosecution misconduct – withholding of impeachment evidence regarding payment and other favorable treatment given to Barbara and Stacey Mabrey." (Pet. 38.)

2. "Judicial error – failing to order a determination of petitioner's competence; trial while mentally incompetent in fact." (Pet. 59.)

3. "Judicial error – petitioner's rights were violated by the court's imposition on the defense of an unworkable form of hybrid representation." (Pet. 86.)

4. "Judicial error – denial of self-representation." (Pet. 112.)

5. "Prejudicial and egregious mistreatment of petitioner while incarcerated." (Pet. 122.)

6. "Juror misconduct: private communications by bailiff to jurors of material, extrinsic evidence." (Pet. 132.)

7. "Prejudicial courtroom atmosphere." (Pet. 141.)

8. "State misconduct – tampering with exculpatory forensic evidence." (Pet. 146.)

9. "Prosecutorial misconduct – prosecutor's prejudicial invocation of God's authority and consequences for failure to impose death penalty." (Pet. 156.)

10. "Prosecutorial misconduct – unconstitutional and shocking interaction in court with petitioner and prejudicial comments on petitioner during trial." (Pet. 165.)

11. "Prosecutorial misconduct – prejudicial introduction of egregious, extrinsic evidence in closing argument." (Pet. 173.)

12. "Prosecutorial misconduct – prosecutor's prejudicial misdirecting

jury to 'advise' the court; serve as the 'conscience of this community;'and impose a sentence of death to prevent hypothetical, future acts." (Pet. 179.)

13. "Prosecutorial misconduct – overt and prejudicial violation of court order." (Pet. 185.)

14. "Prosecutorial misconduct – improperly urging jury's comparison of petitioner to Ramon Salcido." (Pet. 192.)

15. "Prosecutorial misconduct and judicial error (*Batson*)." (Pet. 196.)

16. "*Brady* error – penalty phase impact of prosecution suppression of material evidence." (Pet. 203.)

17. "Cumulative error – prosecutorial misconduct." (Pet. 207.)

18. "Ineffective assistance – failure to competently investigate and present social history." (Pet. 210)

19. "Ineffective assistance of counsel – failure to move for competence determination." (Pet. 229.)

20. "Ineffective assistance of counsel– acquiescing in and failing to object to a hybrid form of legal representation devised by the court." (Pet. 241.)

21. "Ineffective assistance of counsel – failure to competently investigate and present impeachment evidence regarding prosecution witnesses." (Pet. 268.)

22. "Ineffective assistance of counsel – failing to adequately investigate and challenge the conditions of petitioner's confinement in the county jail." (Pet. 274.)

23. "Ineffective assistance of counsel – failure to competently investigate and present mental health evidence." (Pet. 279.)

24. "Ineffective assistance of counsel – failure to move for a private psychiatric examination of petitioner." (Pet. 301.)

25. "Ineffective assistance of counsel – failure to challenge loss or destruction of forensic evidence." (Pet. 305.)

26. "Ineffective assistance of counsel – jury selection proceedings." (Pet. 309.)

27. "Ineffective assistance of counsel – failure to competently confront and respond to prosecution case in aggravation. (Pet. 322.)

28. "Ineffective assistance of counsel – pretrial proceedings." (Pet. 335.)

29. "Ineffective assistance of counsel – guilt phase errors." (Pet. 345.)

30. "Ineffective assistance of counsel – deficient performance throughout the penalty phase." (Pet. 355.)

31. "Ineffective assistance of counsel during the post-trial phase." (Pet. 365.)

32. "Ineffective assistance of counsel – failure to object to prosecutorial misconduct." (Pet. 372.)

33. "Ineffective assistance of counsel – cumulative error." (Pet. 377.)

34. "Judicial bias – misconduct – failure to control proceedings." (Pet. 379.)

35. "Judicial Bias: Unconstitutional instruction precluding requisite consideration of testimony." (Pet. 385.)

36. "Judicial error – bias: denial of allocution rights – fundamental constitutional violation and judicial bias/error." (Pet. 389.)

37. "Judicial bias – court's unconstitutional denial of petitioner's opportunity to review probation report." (Pet. 397.)

38. "Judicial bias – failure to control jurors' access to media and failure to admonish jurors regarding the extensive pre-trial, trial and penalty

phase publicity." (Pet. 401.)

39. "Judicial bias – misconduct: prejudicial orders regarding petitioner's testimony and orders favoring prosecution witnesses." (Pet. 408.)

40. "Judicial bias – prejudicial curtailment and inadequate voir dire." (Pet. 412.)

41. "Judicial error – misconduct: unconstitutional, prejudicial comments on and bias towards petitioner." (Pet. 420.)

42. "Judicial misconduct – abdication of duty – misguiding and leaving jury during deliberations." (Pet. 426.)

43. "Judicial misconduct – instructional error – unconstitutionally precluding jurors' consideration of entire testimony (Angela Payton)." (Pet. 431.)

44. "Judicial error – misconduct – court's violation of Penal Code section 190.4 and constitutional guarantees in modification of sentence." (Pet. 440.)

45. "Judicial misconduct – review error: constitutionally erroneous application of Penal Code section 190.3 to ruling on automatic modification motion." (Pet. 446.)

46. "Judicial error – prejudicial shackling." (Pet. 450.)

47. "Judicial error – denial of petitioner's right to expert psychiatric, psychological and requisite medical assistance in the guilt phase." (Pet. 454.)

48. "Judicial error – denial of petitioner's right to expert psychiatric, psychological and requisite medical assistance in the penalty phase." (Pet. 469.)

49. "Judicial error – trial judge's introduction of prejudicial, extrinsic information regarding petitioner's conduct." (Pet. 476.)

50. "Judicial error – petitioner's fundamental right to be present was

violated by his absence during key portions of the trial." (Pet. 486.)

51. "Judicial error – pattern of ex parte contact by the court with the prosecutor and counsel." (Pet. 497.)

52. "Judicial error – unconstitutional venire and panel – excusing jurors who were not clearly pro-life without parole." (Pet. 501.)

53. "Judicial error: failure to change venue." (Pet. 508.)

54. "Judicial error: constitutionally inadequate record – failure to keep and provide petitioner transcripts of significant proceedings and essential elements of record." (Pet. 519.)

55. "Insufficiency of evidence – insufficient evidence of premeditation and deliberation to sustain conviction." (Pet. 533.)

56. "Instructional error – improvised, egregious murder instructions." (Pet. 539.)

57. "Instructional error – judicial bias: instruction on petitioner's conduct." (Pet. 546.)

58. "Instructional error – constitutional error in instructing jury that they must accept prior felonies as conclusively proved." (Pet. 553.)

59. "Instructional error – erroneously directing jurors to agree unanimously on a sentence less than death." (Pet. 557.)

60. "Instructional error – constitutionally inaccurate and confusing special circumstance instruction." (Pet. 561.)

61. "Instructional error – erroneous directive on the meaning of 'aggravating' and 'mitigating' evidence." (Pet. 565.)

62. "Instructional/CALJIC error – CALJIC 8.85 misled the jury to double count the circumstances of the crime in violation of the prohibition against doubt jeopardy." (Pet. 570.)

63. "Instructional error – failure to instruct jury of prosecution's burden to prove other criminal activity beyond a reasonable doubt." (Pet. 574.)

64. "Instructional error – instruction permitting consideration of criminal acts not involving violence as aggravating circumstances." (Pet. 580.)

65. "Failure to instruct on the presumption of life." (Pet. 586.)

66. "Cumulative errors – ruling on automatic modification motion." (Pet. 589.)

67. "Cumulative judicial error." (Pet. 591.)

68. "Ineffective assistance of appellate counsel." (Pet. 594.)

69. "Ineffective assistance/conflict of counsel – California system of dual representation results in conflict of appellate counsel." (Pet. 596.)

70. "Disproportionate Sentence." (Pet. 602.)

71. "California death penalty statutes are unconstitutional because they fail to perform the constitutionally mandated narrowing function." (Pet. 609.)

72. "International law – numerous due process violations violate treaties and principles of international law." (Pet. 616.)

73. "Systematic error – unbridled prosecutorial discrimination in charging." (Pet. 633.)

74. "California's death penalty scheme is unconstitutional because it fails to require written findings with respect to aggravating factors." (Pet. 636.)

75. "Appellate delay has denied petitioner his right to counsel, his right to due process, and his right to be free of cruel and unusual punishment." (Pet. 640.)

76. "Cruel and unusual punishment – lethal injection." (Pet. 642.)

77. "Cruel and unusual punishment – execution of mentally retarded

or impaired." (Pet. 656.)

78. "Cumulative error." (Pet. 658.)

RESPONDENT'S ARGUMENT

1. General rules governing evaluation of a petition for writ of habeas corpus in the California state courts.

2. Petitioner's requests for discovery and an evidentiary hearing should be denied.

3. Procedural bars are critical to the determination of this petition.

   A. Claims that were raised on appeal.

   B. Claims that could have been raised on appeal.

   C. The petition, its issues, and subissues, are presumptively untimely, substantially delayed without justification, and not subject to any of the relevant exceptions.

4. Petitioner's claim of *Brady* error and prosecutorial misconduct is procedurally barred and fails to state a claim upon which relief could be based.

   A. The claim of *Brady* error or prosecutorial misconduct is procedurally barred by substantial delay and the final subclaim could have been, but was not, raised on appeal.

   B. The Mabrey testimony was powerful, but the central witness to the murders was Leslie Morgan.

   C. Petitioner can establish neither materiality, nor an act of substantial misconduct, nor prejudice.

5. The claims of judicial error were actually decided on appeal and fail to state a claim upon which relief can be based.

6. The claim of mistreatment at the county jail is procedurally barred

and fails to state a claim upon which relief may be based.

7. The claims of juror misconduct are procedurally barred and fail to state a claim upon which relief could be based.

8. The claim that the courtroom atmosphere deprived petitioner of a fair trial is procedurally barred and fails to state a claim upon which relief may be based.

9. The claims of government misconduct are procedurally barred and fail to state a claim upon which relief may be based.

A. Responsibility for the failure to obtain a quantitative blood analysis was thoroughly assessed at trial and raised and resolved on appeal..

B. The general prosecutorial misconduct claims were raised and rejected on appeal, or could have been, and otherwise fail to state a claim for relief.

10. The prosecutor's invocation of God's authority and consequences for failure to impose death penalty.

11. The prosecutor did not introduce extrinsic material into the closing argument.

12. The ineffective assistance of counsel claims are procedurally barred and fail to state a claim for relief.

A. Any failure to further investigate social history, witness impeachment evidence, conditions of confinement, and mental health evidence was nonprejudicial.

B. Counsel's alleged failures to bring motions or voice objections did not prejudice petitioner.

C. Counsel's strategic decisions were reasonable.

13. Petitioner's judicial bias, misconduct and error claims are waived, procedurally barred and otherwise without merit.

A. The judicial bias, misconduct, and error claims are waived.

B. The judicial bias, misconduct, or error claims are procedurally barred and fail to support a claim for relief.

14. Neither the claim of insufficiency of the evidence nor the claims of instructional error are cognizable on petition for writ of habeas corpus.

A. Petitioner's sentence is not disproportionate to his offenses.

B. California's death penalty statutes perform the narrowing function.

C. International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements.

D. Prosecutorial discretion in charging, within the special circumstance framework, does not render the death penalty law unconstitutional.

E. Neither due process nor the right to meaningful review necessitate written findings regarding the factors in aggravation.

F. Petitioner has no right to a speedy appeal that fails to take into account "the unique demands of appellate representation in capital cases," nor has he been deprived of meaningful appellate review, due process, counsel, or the right to be free of cruel and unusual punishment by virtue of the appellate timetable.

G. The method of execution is neither cruel nor unusual.

H. Petitioner's claim that he falls within the category of condemned inmates whose execution would violate the recently recognized eighth amendment proscription against executing the mentally retarded is unsupported.

I. Whether considered individually or cumulatively, petitioner's claims do not require reversal.

ARGUMENT

I.

GENERAL RULES GOVERNING EVALUATION OF A PETITION FOR WRIT OF HABEAS CORPUS IN THE CALIFORNIA STATE COURTS

In a capital case, the trial is the main arena for determining guilt or innocence and whether death is the appropriate punishment. (*In re Robbins* (1998) 18 Cal.4th 770, 777.) The appeal "provides the basic and primary means for raising challenges to the fairness of the trial." (*Ibid.*; see *In re Clark* (1993) 5 Cal.4th 750, 764 [habeas corpus is an "extraordinary" remedy which seeks relief from a presumptively valid and final judgment of conviction].) "A habeas corpus petitioner bears the burden of establishing that the judgment under which he or she is restrained is invalid. [Citation.] To do so, he or she must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus." (*In re Visciotti* (1996) 14 Cal.4th 325, 351; *In re Avena* (1996) 12 Cal.4th 694, 730.) "[P]etitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them." (*People v. Duvall* (1995) 9 Cal.4th 464, 474.)

The purpose of an informal response is to assist the Court in its determination whether the petition states a prima facie basis for relief and whether any of the claims are procedurally barred. (*People v. Romero* (1994) 8 Cal.4th 728, 737; Cal. Rules of Court, Rule 60.) Habeas claims that fail to state a prima facie case are meritless and should be summarily rejected without formal pleading (i.e., return and traverse) or an evidentiary hearing. (*People v. Romero, supra,* at p. 742.) Before habeas relief may be granted, the court must issue an order to show cause and permit respondent the opportunity to file a

formal return. (*People v. Romero, supra*, 8 Cal.4th at pp. 740-742; *People v. Duvall, supra,* 9 Cal.4th at p. 478.)

II.

PETITIONER'S REQUESTS FOR DISCOVERY AND AN EVIDENTIARY HEARING SHOULD BE DENIED

Contrary to petitioner's request (see Pet. 26), the filing of a habeas corpus petition does not trigger a right to discovery. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1257.) A habeas petition must first be verified and state a prima facie case for relief, i.e., avoid summary dismissal, before discovery might be appropriate. (*Id.*, at p. 1258; see *In re Avena, supra*, 12 Cal.4th at p. 730 [discovery may be available if order to show cause issues].) Since no order to show cause has issued here, petitioner's request for discovery is premature and should be denied. (See *People v. Gonzalez, supra,* 51 Cal.3d at p. 1257 [nothing pending in trial court to which discovery motion may attach].)

By the same token, the mere fact that respondent asserts a difference of opinion regarding the facts does not alone signal the need for an evidentiary hearing. Addressing the claims on the merits in the informal opposition, respondent assumes, without in any way conceding, that the facts are true as alleged, if supported, and assesses whether they state a colorable claim. If the claims are procedurally barred, or if they fail to support a claim upon which relief could be based, their possible inaccuracy is irrelevant and need never be resolved. It is only if an order to show cause issues, and a dispute about the facts is joined in the return and traverse, that an evidentiary hearing **may** be required to determine if the alleged facts are true. (*People v. Romero, supra*, 8 Cal.4th at pp. 739-740 [after the return and traverse, an evidentiary hearing is necessary when "the return and traverse reveal that petitioner's entitlement to relief hinges on the resolution of factual disputes"].) If consideration of the written return and matters of record persuade the Court the contentions of the

petition lack merit, the Court may still deny the petition without an evidentiary hearing. (*People v. Romero, supra*, 8 Cal.4th at p. 729.)

III.

PROCEDURAL BARS ARE CRITICAL TO THE DETERMINATION OF THIS PETITION

Although each claim is discussed below, most of them are procedurally barred. Before any discussion of the merits is appropriate, issues of timeliness, and the proscription against the use of habeas corpus as a second appeal, must be addressed. Of the 78 separately numbered claims raised here, all but a handful are barred in their entirety because they either were or could have been raised on the direct appeal. Many rely on nothing outside the record on appeal and were or should have been brought, if at all, in the direct appeal.[9/] Petitioner has not justified his failure to have brought these claims in his direct appeal. Thus, at least 72 of petitioner's claims are not cognizable here.

As a general rule, a convicted criminal defendant may not use habeas corpus as a second appeal. Neither issues which were actually raised on appeal (*In re Terry* (1971) 4 Cal.3d 911, 927; *In re Waltreus* (1965) 62 Cal.2d 218, 225), nor issues which could have been but were not raised (*In re Dixon* (1953) 41 Cal.2d 756, 759; *In re Walker* (1974) 10 Cal.3d 764, 773), will be considered on habeas corpus absent strong justification or applicability of at least one of four narrow exceptions. (*In re Harris* (1993) 5 Cal.4th 813, 828.) [10/] In short,

---

9. To the extent that petitioner relies upon declarations or other evidence provided by alleged attorney expert witnesses (i.e., *Strickland* experts) to support his petition here, respondent objects to each and every such document as irrelevant hearsay. (*In re Avena, supra,* 12 Cal.4th at p. 720 [court is not bound by attorney expert testimony; failure to object waives issue].)

10. The four exceptions are (1) a claimed constitutional error that is both clear and fundamental and strikes at the heart of the trial process; (2) a lack of fundamental jurisdiction; (3) that the trial court committed acts in excess of jurisdiction that do not require a redetermination of the facts; or (4) a change in the law affecting a defendant after the appeal. The final three exceptions clearly

unless petitioner alleges sufficient justification, the law bars habeas claims which were or could have been raised on appeal. (*Id.*, at p. 829; *In re Waltreus, supra,* at p. 225.)

Where petitioner raises a claim on habeas corpus involving the same factual contentions raised on appeal but relying on a different legal theory, the claim is also barred. (*In re Dixon, supra,* 41 Cal.2d at p.759.) Habeas corpus is not a device for investigating possible claims but a means of vindicating actual claims. (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1260.) The court reviewing a habeas corpus petition must determine whether the petition states a prima facie case for relief "and also whether the stated claims are for any reason procedurally barred." (*In re Romero, supra,* 8 Cal.4th at p. 737.)

As will be detailed below, all but a few of petitioner's claims are procedurally defaulted because they have already been raised or could have been raised on appeal. Petitioner generally fails to acknowledge that many of the claims were even considered on appeal. As to claims that could have been but were not brought on appeal, petitioner fails to demonstrate any basis for failing to do so at that time.

A. Claims That Were Raised On Appeal

Petitioner's claims 2, 3, 4, 8, 9, 10, 11, 12, 14, 15, 17, 19, 20, 23, 24, 25, 32, 33, 44, 45, 50, 52, 53, 54, 55, 56, 58, 59, 62, 63, 64, 66, 67, 70, 71, 74, 75, and 76 were already raised in the direct appeal.

Petitioner here fails to acknowledge that these claims were even raised in his direct appeal. He is barred from reraising claims on habeas corpus

---

do not apply here, and petitioner has made no attempt to qualify under the first exception. (*In re Harris, supra,* 5 Cal.4th at p. 828.)

involving the same factual contentions raised on appeal, whether raised under the same or different legal theories. (*In re Dixon, supra,* 41 Cal.2d at p. 759.

B. Claims That Could Have Been Raised On Appeal

Petitioner's claims 1 [in part], 5, 7, 13, 16 [in part], 18, 21, 22, 26, 27, 28, 29, 30, 31, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 46, 47, 48, 49, 51, 57, 60, 61, 65, 69, 72, 73, and 78, could have been, but were not raised on appeal.

These claims are based on the record of trial available to petitioner at the time his automatic appeal was filed. Petitioner provides no justification for his failure to raise these claims on appeal, other than a cursory assertion of ineffective assistance of appellate counsel. The declaration from appellate counsel addresses issues that were not investigated for habeas purposes, but does not address issues that could have been, but were not raised on appeal. In sum, all these claims should be barred on procedural grounds.[11/]

In addition, many subparts within these claims are independently barred because they rely solely on the record at trial. Claims which rely exclusively on the appellate record were known or reasonably should have been known earlier and should have been presented on direct appeal. (See *In re Robbins, supra,* 18 Cal.4th at p. 814.) The parts of issues 1 and 16 that deal with deductions of perfidious prosecutorial behavior present counsel draw solely from their observation that several witnesses described petitioner as "evil," at trial, when they had described him as "crazy" on some earlier recorded occasion, such as a witness statement to police or at the preliminary hearing,

---

11. Respondent requests this Court rule on the application of procedural bars and explicitly invoke the bar as an independent basis for decision. (*Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 10.)

derive solely from the record and could have been, but were not, presented on appeal. Since these claims rely solely on the record below and either were or could have been raised on direct appeal, they are barred from consideration on collateral review. (*People v. Jackson* (1973) 10 Cal.3d 265, 268.) Petitioner has proffered no justification for his failure to raise the allegations on appeal, and the claims should therefore be denied as untimely.

This Court should also decline to consider subclaim 10 to claim 6, juror misconduct based on "other unique circumstances" (Pet. 140), because, if it is a claim at all, it presents merely conclusory allegations. (See *People v. Duvall, supra,* 9 Cal.4th at p. 474 ["Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing."].) Petitioner has supported these allegations by simply incorporating by reference exhibits relied upon in other claims. Petitioner, however, fails to state how those exhibits specifically relate to these new, separate claims and he cites no unique collateral evidence to support the allegations.

C. The Petition, Its Issues, And Subissues, Are Presumptively Untimely, Substantially Delayed Without Justification, And Not Subject To Any Of The Relevant Exceptions

Unjustifiable delay in presenting habeas corpus claims bars consideration of the merits of the petition. (*In re Clark, supra,* 5 Cal.4th at p. 759; *In re Stankewitz* (1985) 40 Cal.3d 391, 396, fn. 1; *In re Swain* (1949) 34 Cal.2d 300, 302.) The companion petition for writ of habeas corpus in a capital direct appeal is presumptively timely only if it is filed within 90 days of the filing of the reply brief, or within two years of the appointment of counsel, whichever is later. (Supreme Court Standards, Policy 3, Standards 1-1.1.) After

that, a petitioner must show: (1) lack of substantial delay; (2) good cause for the delay; or (3) that the particular claim at issue falls within one of the narrow exceptions to the untimeliness bar. (*In re Robbins, supra*, 18 Cal.4th at p. 780.) Petitioner bears the burden of establishing in his petition that he is entitled to have his claims heard. This Court has repeatedly explained that it evaluates such preliminary facts as timeliness on the basis of the petition and informal opposition, from which the determination of timeliness can be made. A failure of proof, in the petition, on the question of timeliness is fatal.[12/]

Petitioner concedes the presumptive untimeliness of this petition (Pet. 11), so we address the requirements in some detail.

1. The Burden Is On Petitioner To Show Lack Of Substantial Delay

To establish lack of substantial delay, petitioner must allege "with specificity, facts showing when information offered in support of the claim was obtained, and that the information was neither known, nor reasonably should have been known, at any earlier time . . . ." (*In re Gallego* (1998) 18 Cal.4th 825, 833.) The claim must be filed within a reasonable time after petitioner or counsel became aware, or should have become aware, of the factual basis and the legal basis for the claim. (*In re Clark, supra*, 5 Cal.4th at pp. 784-785.)

---

12. Petitioner's request that if there is any dispute about timeliness that an evidentiary hearing be ordered is simply wishful thinking. If petitioner has failed to establish his presentation of a claim is timely, justifiedly delayed, or subject to an exception, within the 665 pages of the petition itself, the claim should be dismissed as untimely. (See *In re Robbins, supra*, 18 Cal.4th at pp. 780-781 ["A petitioner bears the burden of *establishing*, through his or her specific allegations, which may be supported by any relevant exhibits, the absence of substantial delay;" or he may "demonstrate" good cause or a valid exception].)

This burden is not met by allegations in general terms that the information was recently discovered. Nor can it be supported by generally incorporating by reference all of the facts set forth in the exhibits accompanying the petition. Petitioners must clearly present, with appropriate references to, and descriptions of, any supporting exhibits, precise facts in context concerning when the information offered in support of each claim and subclaim was obtained, was known, and reasonably should have been known. (*In re Gallego, supra*, 18 Cal.4th at pp. 832-833; *In re Robbins, supra*, 18 Cal.4th at p. 795, fn. 16.) It is black letter law that claims relying exclusively on the appellate record were known, or should have been known, in time to file the petition in a timely manner. (*In re Gallego, supra*, 18 Cal.4th at p. 838; *In re Robbins, supra*, 18 Cal.4th at p. 814.)

2. Good Cause For A Substantial Delay Must Cover Every Period Of Delay

The burden of explaining good cause for substantial delay falls upon petitioner, regardless of whether he is represented or pro se. (*In re Clark, supra*, 5 Cal.4th at p. 765.) The extent of the delay which must be fully explained is measured from the time a petitioner or any counsel knew or should have known of the information offered in support of the claim. (*In re Robbins, supra*, 18 Cal.4th at pp. 780, 787.) Moreover, delay is not justified just because counsel asserts the claim is being filed as soon as the successor attorney became aware of the basis for the new claim. Any other rule would invite abuse of the writ of habeas corpus. (*In re Clark, supra*, 5 Cal.4th at p. 765 & fn. 6.)

Appellate counsel representing capital defendants have an obligation to investigate potentially meritorious grounds for habeas corpus which come to

the attention of counsel while preparing the appeal. (*In re Clark, supra*, 5 Cal.4th at pp. 783-784.) When petitioner or counsel knows or should know of facts warranting further investigation, that investigation should be undertaken to confirm or discount the claim. Failure to conduct a reasonable investigation in the face of triggering facts, and file a petition if the facts so warrant, may explain or justify the need to file a petition for writ of habeas corpus after a substantial delay. (*In re Sanders* (1999) 21 Cal.4th 697, 720.) Absent such triggering facts, however, there is no duty to investigate. (*In re Gallego, supra*, 18 Cal.4th at p. 833.) The duty of reasonable diligence "does not impose on counsel an obligation to conduct, nor does it authorize the expenditure of public funds for, an unfocused investigation having as its object uncovering all possible factual bases for a collateral attack on the judgment. Instead, counsel has a duty to investigate potential habeas corpus claims only if counsel has become aware of information that might reasonably lead to actual facts supporting a potentially meritorious claim." (*In re Robbins, supra*, 18 Cal.4th at p. 792, fn. 13, quoting Supreme Court Standards, Policy 3, Standard 1-1, and p. 794.)

While claims may be held pending the completion of a "bona fide ongoing investigation," so that all claims are presented together, that investigation must have been ongoing during all relevant time frames. That present counsel have been investigating during their tenure will not excuse a previous unjustified period of delay, since time begins running if the facts were known, or should have been known to petitioner or prior counsel. (*In re Robbins, supra*, 18 Cal.4th at pp. 805-806 & fns. 28, 29.) If, at any time during the period after the triggering facts become known, or should have become known, there is no "bona fide investigation into other potentially meritorious

claims," then a petition advancing the known claims must be presented promptly. (*In re Gallego, supra*, 18 Cal.4th at p. 834; *In re Robbins, supra*, 18 Cal.4th at pp. 805-806.)

Even if a substantial delay can be explained, a petitioner may be barred by the doctrine of laches if respondent shows both harm and prejudice to the People as a result of petitioner's delay in presenting the claims. (See *In re Spears* (1984) 157 Cal.App.3d 1203, 1208.)

3. Exceptions Are Narrowly Defined And Must Be Shown On A Claim By Claim Basis

Exceptions to the timeliness bar are strictly construed to prevent abuse of the writ. Even an unjustifiably delayed petition may be considered on the merits if the conviction or sentence being challenged constitutes a fundamental miscarriage of justice. This standard is only met if: (1) an error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error complained of no reasonable trier of fact would have convicted petitioner; (2) the petitioner is actually innocent of the crimes of which he has been convicted, as shown by evidence that undermines the entire prosecution case and points unerringly to innocence or reduced culpability; (3) the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable trier of fact would have imposed the sentence of death; or (4) the petitioner was convicted or sentenced under an invalid statute. *(In re Robbins, supra,* 18 Cal.4th at pp. 780-781, 812.) The first three exceptions are determined on the basis of California law, while federal law is applied to the fourth exception whenever a federal constitutional claim is at issue. *(In re*

Robbins, supra, 18 Cal.4th at p. 812, fn. 32.)

A concise timeline of the events in this greying case (the murders were committed in 1986) suffices to establish that the delay in filing this petition for writ of habeas corpus has been substantial, unreasonable, and unjustified, since petitioner has been well-represented by counsel at all times relevant, is himself quite a prolific litigant, and petitioner and counsel have, during this time period, obviously made the decision to pursue other potentially more productive paths to relief. Petitioner does not tie his discussion of justification and excuse to any particular claims, with one exception[13/], so it is very difficult to evaluate his allegations. Where we have made assumptions, to assist the Court and in the interests of justice, we have identified them.

Petitioner filed notice of appeal from his judgment of death on July 27, 1989. Counsel Boisseau was appointed to represent him in his state direct appeal and related habeas corpus proceedings, if any, on May 1, 1992. Counsel Boisseau perfected the appeal, briefed and argued it, and continued to represent petitioner well into the year 2000, when his petition for writ of certiorari was denied. Indeed, he was replaced by current counsel only in June of last year (2002). It is uncontested that counsel Boisseau did not file a state petition for writ of habeas corpus at any time during his representation of petitioner. It is uncontested that the petition for writ of habeas corpus would only have been presumptively timely had it been filed within 90 days of the filing of the reply brief, which occurred on May 18, 1998. The present petition is not entitled to a presumption of timeliness. (*In re Robbins, supra*, 18 Cal.4th at p. 784.)

---

13. Petitioner does assert that claims 1 and 8 were not substantially delayed because they relate to an assertion of state suppression of material evidence which was not discoverable by reasonable diligence. However, petitioner does not identify a declaration supporting this assertion. (Pet. 26.)

Petitioner first asserts that there is no substantial delay, despite the passage of more than four years from the presumptive due date of the petition, because the clock only starts running when counsel knew or should have known of the facts and legal basis for a claim. Putting all his eggs in one basket, petitioner announces that he only learned of petitioner's alleged organic brain damage as a result of the tests performed by Dr. Froming the week before this habeas corpus petition was filed in June of 2002. (Pet. Exh. 10.) We assume, generously, that he is attempting to allege the timeliness of claims 2, 19, 23, 24, 47, 48 , 68 and 77, all of which rely, to some extent, on mental health issues. However, the neurological testing did not arrive like some thunderbolt out of the sky in June of 2002, nor does it establish what petitioner alleges it establishes.

The question of petitioner's competence at trial was addressed via a Penal Code section 1368 motion, raised twice and denied before trial. (CT 778, 783, 813.) His sanity at the time of the crimes was established by the mental health professionals hired by the defense, whose testimony appears in the penalty phase evidence. (RT 5996-5999, 6002, 6092, 6094-6099 [He knew he was killing and knew that killing was not only wrong, but against the law, he lacked the self-control to stop himself; there was nothing delusional about it].) Petitioner, who continues to take an active, informed, and articulate role in his case, has some self-control issues.

The only new information is that he did not do very well on some aspects of Dr. Froming's test, the Halstead-Reitan Battery. This lack of success is attributable to testing methods, described by Dr. Froming in her declaration. Offered several options, including a hands-free test with sufficient security staff in the room, the Welch attorney team opted to have petitioner either alone with Dr. Froming, or with a single security officer, which under prison regulations

applied across the board to Grade B, adjustment center residents, like petitioner, necessitated having only one hand free at a time. (See Pet. Exh. 10, p. 12, ¶ 37.) Dr. Froming candidly reveals, to her credit, that the tests on which petitioner scored particularly low, involved passing things from one hand to another or doing tasks with first one hand and then the other. Since the score depends on elapsed time, and the time to unshackle one hand and switch the restraint to the other hand was counted in petitioner's trial time, he scored very low on some measures and could not complete one part of the test at all. Even Dr. Froming recognizes this was an unsatisfactory way to do the testing and resulted in an artificially low score. (Pet. Exh. 10, pp. 12-13, ¶¶ 39-40.) From that artificially low score, however, the conclusion of "performance consistent with moderate brain damage" follows. (Pet. Exh. 10, pp. 13-14, ¶ 43.) She concludes with an apparently unsolicited neuropsychological version of the observation that people with poor impulse control should not use drugs and/or drink and drive around with loaded Uzis. (Pet. Exh. 10, pp. 15-16, ¶ 49.) Trouble is, the poor impulse control was a matter of record and nothing in the neuropsychological testing report, as summarized in the declaration, at least, casts so much as a shadow on the basic question of competence. He is an effective verbal advocate. He asserts he has a verbal IQ of 83, and Full Scale IQ of 78. (Pet. Exh. 10, p. 9, ¶ 28.) He is also "impulsive, inappropriate, and socially unrestrained." (Pet. Exh. 10, p. 9, ¶ 29.) Indeed, Dr. Froming has unwittingly confirmed exactly what Judge Golde concluded, when he found petitioner mentally competent to stand trial and assist counsel, but behaviorally incompetent to represent himself. Dr. Froming's eleventh-hour test results do not tell us anything we did not already know about petitioner from reading the trial transcripts. None of these issues suddenly sprang to life, four years late,

just because testing confirms petitioner is articulate, but antisocial. Strike one.

Petitioner's fall back position is good cause. Part one of good cause is that since Dr. Froming had not done her test yet, the investigation into petitioner's competence was ongoing, and every other issue had to wait, so that there would be a unitary presentation of issues. However, as noted, unless there really was an ongoing investigation into mental health issues, there was a time when the rest of the issues should have been presented in a timely manner. The petitioner undermines this view, however, by explaining that during the period that attorney Boisseau was representing petitioner, neither attorney nor client was interested in establishing petitioner's incompetence. Boisseau believed (Pet. 21; Pet. Exh. 1), and it is hard to disagree in light of *Godinez v. Moran* (1993) 509 U.S. 389 and petitioner's detail-oriented and legally acute presentations in court, that at the time the appellate briefs were being filed, if any issue was likely to succeed in achieving a new trial for petitioner it was the *Faretta* claim. Nothing would be more damaging to the *Faretta* claim than a lot of neuropsychiatric jargon about diminished competence. On this record, petitioner has not ruled out a substantial and strategic gap in the ongoing investigation into his competence, during which he should have filed any other claims of which he was aware, such as the many claims wholly dependent on the record.

Part two of the good cause analysis involves the abandonment of petitioner by his appellate attorney, who was also obligated to investigate upon discovery of triggering facts, and file a petition if any of the investigated facts would support a cognizable claim. However, petitioner has not established that he was abandoned. Indeed, he has been well represented and every card has been played at the last possible moment so as to maximize the length of the

delay between the imposition of the judgment and the carrying out of that judgment.

Petitioner asserts, through present counsel, that any delay in producing this petition was occasioned by Mr. Boisseau's abandonment of the matter. However, the mere failure to file a petition for writ of habeas corpus does not establish abandonment. There has only been abandonment if appellate counsel was aware or should have been aware of triggering facts warranting further investigation and failed to investigate, or if he investigated and failed to file a petition for writ of habeas corpus on potentially meritorious facts. Mr. Boisseau's declaration confirms that he did not file a petition and did not pursue various specific lines of inquiry, but it does not acknowledge the awareness of triggering facts. Petitioner asserts certain duties arose because the need to perform them was apparent from the record, specifically, the need for a more complete social history, the need to interview prior counsel, the need to interview a mental health expert, and the need to draft declarations. The triggering facts petitioner discerns, with hindsight, were the preliminary hearing discussion of a failure to prosecute Stacey Mabrey for a misdemeanor assault, the trial testimony regarding the fact that there was never a quantitative analysis done of petitioner's blood, petitioner's complaint, after the guilt phase, but before the penalty phase, that the prosecutor had violated a gag order, and the combination of the pretrial denial of the Penal Code section 1368 motion and Judge Golde's denial of the *Faretta* motion on the basis of competency, which should have triggered a mental health investigation. However, viewing the record from the point of view of appellate counsel and recalling that he had no fishing license, none of these facts would necessarily trigger an investigation. There were social history materials and psychiatric reports already in the file,

provided by trial counsel, which were not particularly helpful to petitioner. Stacey Mabrey was a percipient witness and nearly a victim, not a jailhouse informant or coconspirator, so there was no obvious call to investigate witness inducements on the basis of what at most was evidence of a single benefit of the doubt given to a grieving brother over a tussle with a family member of the codefendant. Upon petitioner's request, the Court had agreed to make sure the prosecutor was not talking to the press, and there was no further complaint about it by petitioner. Finally, the trial record is clear that the prosecution requested the quantitative blood test, it just was not performed by the hospital. To the extent any of these issues appeared to be meritorious to appellate counsel, he developed them on appeal. The opening brief Mr. Boisseau drafted remains the source for much of the material supporting the continuing claims on competence or lack thereof, lack of proof of premeditation, destruction of evidence, and the impact of news media on the trial, at least from the perspective of the change of venue motion. (AOB arguments I, II, VII, XIV, XV.) Certainly, current counsel have borrowed liberally from his work to fill out their list of claims. (Compare, for example, AOB IV, pp. 76-84, with Pet. 539-545 [identical arguments on murder instructions].)

Moreover, petitioner was been making this abandonment argument in federal court for a year in pursuit of a longer period of time within which to seek habeas corpus relief in that forum, without taking the direct step of filing a state petition. Even supposing Mr. Boisseau dropped the ball, we see no justification for current counsel to sit on the claims in federal court for a year before bringing them in state court. After draining the federal well of investigative funds, promising a federal judge that a federal petition was in the works, and making progress reports to the federal court on such a petition, petitioner let the clock

tick down to nine minutes left to run on a one-year AEDPA statute of limitations in federal court. Indeed the federal year had already become two years, since the statue of limitations had been tolled for appointment of federal counsel (ultimately, the same team appearing here). Petitioner sought to extend his federal deadline further on the basis of this same assertion of abandonment by state appellate counsel, but was rebuffed by a federal court that recognized this petition could have been filed years earlier. Petitioner finally filed this petition instead of the federal petition, causing the federal cause to be dismissed on the court's own motion. The pendency of this petition, undoubtedly, will be proffered as a reason to again toll the federal statute of limitations, so that the nine minutes will remain within which petitioner may attempt to reopen the federal case and file a petition there, if he is unsuccessful in his bid for relief in this forum.

By doing nothing, petitioner has parlayed his state 90 days and his federal year into five years already.[14/] This is the "mischievous conundrum" of which Justice Baxter warned in *Sanders*, wielded effectively, to the detriment of the societal interest in the finality of criminal judgments. (*In re Sanders, supra,* 21 Cal.4th at p. 731, Baxter, J., dissenting ["If our policies allow counsel to create timeliness by ignoring it, the requirement of timeliness itself loses all meaning"].)

This petition was presumptively late on the 91st day after the filing of the reply brief on direct appeal. Petitioner has not alleged that appellate counsel was aware, or became aware, of facts triggering the duty to investigate more extensively than he did, or potentially meritorious facts prompting the duty to

---

14. Respondent is counting from the date the reply brief was filed to the present.

raise on habeas corpus issues that he had not already raised on direct appeal. This failure of allegation and proof defeats the abandonment justification. Absent an exception to the rule of untimeliness, therefore, the claims must be dismissed. Strike two.

We turn, then, to petitioner's purely conclusory allegations that his claims satisfy all of the exceptions. Here is his entire argument on this point:

> "68. In addition, the petition alleges facts which 'establish that a fundamental miscarriage of justice occurred as a result of the proceedings leading to the conviction and/or sentence.' (In re Clark, supra, 5 Cal.4th at [p.] 797.) Furthermore, the petition alleges facts which establish that petitioner is actually innocent of the crime or crimes of which he or she was convicted, and that the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death. (*Ibid.*) Accordingly, the petition falls within one or more exceptions to the timeliness requirements."

(Pet. 26.) Without reference to a single fact, however, this is just citation from this Court's *Clark* case. Petitioner has failed to specify how a single exception relates to a single claim in his petition. Conclusory pleadings fail to support an exception to the timeliness requirement, just as they fail to state a claim upon which relief can be based. Strike Three.

In summary, all but a handful of the present issues either were raised on appeal or could have been raised on appeal, since they arise from the record. The few issues which are based on matters outside of the record, in which we include at least portions of claims 1, 6, 16, 51, 68, and 77, are not clearly matters appellate counsel had a duty to investigate or pursue and there is no indication that an ongoing investigation into competence was continuous or justified a four-year wait for the other stale issues. Thus these claims are not rescued by an assertion of abandonment by appellate counsel or the need to

forgo a timely presentation of other issues in the hope of a lightning bolt of information from the neuropsychologist. Finally petitioner simply fails to support his assertion of one or more applicable exceptions. For all of these reasons, the Court should find these claims are barred from collateral review.

IV.

PETITIONER'S CLAIM OF *BRADY* ERROR AND PROSECUTORIAL MISCONDUCT IS PROCEDURALLY BARRED AND FAILS TO STATE A CLAIM UPON WHICH RELIEF COULD BE BASED

The prosecution has a due process obligation to disclose to the defense material evidence favorable to a criminal defendant, whether directly exculpatory or useful as impeachment of an inculpatory witness. (*Brady v. Maryland* (1963) 373 U.S. 83, 87; *United States v. Bagley* (1985) 473 U.S. 667.) Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." A reasonable probability of a different result is shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." (*United States v. Bagley, supra*, 473 U.S. at p. 678; *Kyles v. Whitley* (1995) 514 U.S. 419, 131 L.Ed.2d 490, 506.) "Under well-established principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents, even if the false evidence was not intentionally submitted. (*Giles v. Maryland* (1967) 386 U.S. 66; *Napue v. Illinois* (1959) 360 U.S. 264; *People v. Sakarias* (2000) 22 Cal.4th 596, 633.)" (*People v. Seaton* (2001) 26 Cal.4th 598, 647.) "Conduct by a prosecutor that does not render a trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" (*People v. Padilla* (1995) 11 Cal.4th 891, 940, quoting *People v. Espinoza* (1992) 3 Cal.4th 802, 820, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 866.) The prosecution must disclose to the defense and the trier of fact any

material inducements made to a prosecution witness and must also correct any false or misleading testimony by the witness relating to any material inducements. Such an error is reversible if it cannot be said that the error is harmless beyond a reasonable doubt. (*In re Jackson* (1992) 3 Cal.4th 578, 594; *Napue v. Illinois, supra*, 360 U.S. 264.)

Petitioner's first contention on state habeas corpus is that the prosecution violated due process when it suppressed evidence which could have been used to impeach Barbara Mabrey and Stacey Mabrey. Specifically, petitioner contends both witnesses "received cash payments;" that some charges were dropped against Stacey Mabrey; that the arrest of Stacey Mabrey for investigation of a bank robbery, with which he was never charged, was delayed for a couple of hours until after he testified at trial; and that, instead of being an eyewitness to the murders, Stacey Mabrey once claimed he was not present at the scene. In a separate argument under the same heading, petitioner asserts that several witnesses were coached by the prosecution to "alter earlier statements or testimony regarding petitioner's mental state." Respondent denies the allegations, many of which are refuted by the trial record. Procedurally, the issue is barred. And in any event, the assertions made do not rise to the level of a cognizable claim of *Brady* error or of prejudicial prosecutorial misconduct under either the state or federal standard.

A. The Claim Of *Brady* Error Or Prosecutorial Misconduct Is Procedurally Barred By Substantial Delay And The Final Subclaim Could Have Been, But Was Not, Raised On Appeal

Taking the subclaims, one by one, it is clear that none of them is cognizable in this petition.

1. The Claim Of Subornation Of Perjury Has Been Substantially, Unjustifiably And Unreasonably Delayed

At trial, petitioner personally made both a motion for mistrial and a motion for acquittal, primarily on the basis that the prosecution had knowingly put on perjured testimony by Barbara and Stacey Mabrey, whom he asserted were not present when the murders were committed, and without whose testimony the evidence was insufficient to convict him of the murders. (RT 4525, 4937.) The motions establish petitioner's personal awareness of a potential prosecutorial misconduct claim, concerning the testimony he attacks here, more than 13 years before the present petition was filed, yet petitioner has not accounted for his failure to follow up on his motions, other than to allege that present counsel only recently learned of the grounds and appellate counsel failed to file a habeas petition within 90 days of the reply brief.

By way of non-record evidence, petitioner offers a recent declaration from a cousin of Stacey Mabrey's, Troy Barnes, who indicates he was contacted by petitioner, at some unspecified time, but only recently was contacted by an investigator for present counsel and encouraged to put his evidence in writing. He alleges, among other things, that Stacey Mabrey told him he was nearby, but not in the house when his family was murdered and that Barnes believed Barbara and Stacey Mabrey received "cash payments" before being driven to court to give testimony. This vague hearsay declaration does not rule out the possibility that petitioner has had the information provided by Barnes, in one form or another, since trial, even though it suggests no attorney has been involved until recently.

2. No Exception Exists To Excuse The Substantial, Unreasonable, And Unjustified Delay In Bringing This Claim

Petitioner neither alleges, nor could he substantiate, claims of fundamental unfairness, actual innocence, a misleading profile, or statutory invalidity from the claims of prosecutorial misconduct asserted here. At most he asserts two witnesses might have been subject to slight impeachment, leaving a third and completely untarnished witness to provide the tragic details as he did at trial.

3. The Claim That Witnesses Must Have Been Coached On Their Use Of Mental Health Language Could Have Been, But Was Not, Raised On Appeal

Petitioner relies on the trial record[15/] to suggest that witnesses Barbara Mabrey, Stacey Mabrey, Leslie Morgan, and Angela Payton had all been coached to minimize their characterizations of petitioner as "crazy," despite using the word "crazy" in either police statements or preliminary hearing testimony, and Beverly Jermany had falsely testified that petitioner did not appear to be high on drugs. (Pet. 55-56.) There is nothing about this claim, as presented, to prevent its inclusion in the direct appeal, other than its complete lack of merit. The claim is not cognizable on habeas corpus and none of the

---

15. Petitioner does include a cite, not discussed in his text, to the declaration he provides from Rita Marie Lewis, as establishing that petitioner was using drugs and alcohol before and after the murders, but drug use was in the record already by way of petitioner's testimony and the qualitative analysis of petitioner's blood, and neither Lewis's declaration nor the trial record establishes that petitioner was so high on drugs that Jermany would necessarily have been lying when she testified he did not appear that way to her. (RT 4782-4783.)

four exceptions (neither fundamental fairness, lack of jurisdiction, acts in excess of jurisdiction, nor post-appellate change in the law) apply. (*In re Dixon, supra,* 41 Cal.2d at p. 759; *In re Walker, supra,* 10 Cal.3d at p. 773.)

B. The Mabrey Testimony Was Powerful, But The Central Witness To The Murders Was Leslie Morgan

Stacey Mabrey, 19 years old at the time of the murders, was an eyewitness who escaped by hiding in a bedroom closet of his mother's house. Specifically, Stacey Mabrey testified that when he was awakened by gunfire, he looked out in the hall to see the backs of petitioner, carrying an Uzi, and Rita Lewis, carrying a revolver, as they left Dellane's bedroom and headed for the den. (RT 4127-4128, 4173-4174.) Stacey went back into the bedroom he was using to get his shoes, then stepped into a closet when he heard approaching footsteps. Rita Lewis was saying, "Come on, Moochie, let's go." (RT 4128, 4179.) Petitioner turned on the light in the bedroom where Stacey Mabrey was hiding, and said, "where's Chuck?" (RT 4129-4130, 4180.) He was referring to Stacey's younger brother, whose bedroom it was, but who was in Juvenile Hall at the time. (RT 4130-4131, 4180-4182.) After a moment, petitioner turned off the light and left with Rita Lewis, never discovering Stacey in the closet. (RT 4131, 4180.) Stacey waited until he believed petitioner had gone, then ran out the back door, heading toward his car. (RT 4132, 4176.) Stacey saw petitioner limp out of the house, still carrying his Uzi, and get into a car with Rita Lewis that was being driven by a third person Stacey could not identify. (RT 4132-4134.) As the car drove away, Stacey headed briefly toward the neighbor's house where Barbara Mabrey had gone to call police, then returned to the scene. (RT 4134, 4183.) Police arrived within minutes and met

Stacey Mabrey at the front of his mother's house. (RT 4634.) Stacey Mabrey testified that he received no consideration for his testimony. (RT 4184.)

Barbara Mabrey was both an eyewitness to the murders and the victim of several assaults by petitioner leading up to the murders. She was scheduled to testify against petitioner at a preliminary hearing on assault charges on December 9, 1986, the day after the murders.

Mrs. Mabrey disapproved of petitioner's relationship with her teen-aged daughter, Dellane, and had told petitioner he was not welcome in her home. (RT 4198-4199, 4294.) Petitioner, who believed he was the father of Dellane's infant, Dexter, kidnapped Dellane and two-week-old Dexter in early October of 1986. Family members were able to return the teen-ager and her baby home on October 12, 1986. (RT 4304.) Later that day, petitioner threatened to kill Barbara Mabrey, then hit her in the leg with his car and drove off laughing. (RT 4203-4207.) A week later, on October 19, 1986, petitioner threw a liquid in Mrs. Mabrey's face, punched her in the head, then kicked her several times as she lay on the ground. (RT 4209-4211, 4314-4316.) On October 29, 1986, petitioner came into the Mabrey home with a gun, at 3:00 a.m., aimed it at Mrs. Mabrey's chest, and threatened to kill her by shooting off her limbs one-by-one if she testified against him. He also pointed the gun at Leslie Morgan, Sean Mabrey, and Darnell Mabrey, and slapped Dellane in the face with his open hand, before turning to leave. (RT 4215-4219, 4327-4329.) Petitioner was arrested on assault charges and was being held without bail in the Alameda County jail, until he obtained a writ of habeas corpus and was conditionally released, just days before the murders. One condition, of which petitioner was well aware, was that he not contact the Mabreys. (RT 5103.)

On Friday, December 6, despite the condition of his release, petitioner

came to the Mabrey house late at night, accused them of stealing one of his dogs, shot out the back window of a car, and threatened, "You Niggers better find my dog or you are all going to die." (RT 4222-4226, 4339-4340, 4451-4453.) The next day, Saturday, December 7, petitioner came to the Mabrey house with Rita Lewis, again asked for the dog, and demanded to know whether Mrs. Mabrey was planning on going to court to testify against him on December 9. Petitioner tried to get Mrs. Mabrey to go for a ride with him and Rita Lewis in their car. When she refused, he warned her not to testify, then left with Lewis. (RT 4227-4230, 4401.) He returned that night and got involved when a friend of his drove her car into Stacey Mabrey's car. Petitioner beat two friends of Stacey's by hitting them in the head with his .45 caliber handgun. (RT 4227-4232, 4355-4356, 4405, 4454-4456.) He threatened the entire family several times, saying: "You Stone City Niggers better get my dog" or "you are all going to die." (RT 4233.) He also said: "Everybody in the fucking house is going to die." (RT 4538, 4563.) He promised that the family would never be able to press charges against him because he was going to kill them all. (RT 5163.) The police were called again and patrolled the area around the house for several hours.

The murders were committed in the early morning hours of Sunday, December 8, 1986. Barbara Mabrey and her friend and houseguest, Catherine Walker, who were both scheduled to testify against petitioner at his preliminary hearing on Monday, December 9, 1986, finally settled their families down for the night. Barbara Mabrey was awakened by gun shots inside her home. She heard Dellane scream, "No, Moochie, don't." (RT 4235.) She saw Rita Lewis in the hallway with a gun and heard Lewis tell "Moochie" to get out of the way. (RT 4235.) She heard more gunshots, but did not hear any more screaming.

Barbara Mabrey ran through the kitchen and out a back door to a neighbor's house. She called police to tell them that petitioner was killing her family. (RT 4235-4343.) Barbara confirmed that Stacey was staying at the house that night, but escaped as she did. She saw him outside the house, just after the shootings. (RT 4234, 4243, 4362.)

In addition to Barbara and Stacey Mabrey, Leslie Morgan survived the attack, by playing dead after he was shot once in the shoulder by Rita Lewis and twice in the arm by petitioner. He testified in detail against petitioner. Indeed, in many ways, Barbara and Stacey Mabrey's testimony was corroboration of the testimony of Leslie Morgan, to which no challenge is made in the petition. Leslie Morgan was lying in bed with Dellane, asleep but starting to waken at the sound of gunfire, when petitioner burst through the locked door and said, "this is for you, bitch." Petitioner shot Dellane in the head. She died still cradling a wounded baby Dexter in her arms. Morgan saw his two-year-old daughter, Valencia, executed by petitioner. Petitioner put an Uzi to the toddler's head and pulled the trigger, killing her instantly. Morgan tried to stop petitioner by diving at him through the bedsheets. (RT 4459-4460, 4465-4466, 4632.) Petitioner dropped the Uzi onto the bed. Rita Lewis warned petitioner to "Watch it, watch out, Moochie," then shot at Morgan with her revolver, hitting him in the shoulder. (RT 4467-4469.) Petitioner picked up his Uzi and fired twice more at Morgan, hitting him in the arm. Morgan lay still, and petitioner moved on, but not before firing one more round into Dellane's lifeless body. (RT 4472-4475.) Morgan heard petitioner and Lewis roaming through the house, looking for Barbara Mabrey, before they left through the front door. (RT 4475.) He saw the two shooters get into a car with a third person and drive away. He met up with a very shaken Barbara Mabrey at the house next door, and soon was taken

to the hospital by police. (RT 4476-4479.)

The first officer on the scene, who arrived no more than a minute or two after petitioner and his cohorts drove away, immediately made contact with Stacey Mabrey. (RT 4634.)

C. Petitioner Can Establish Neither Materiality, Nor An Act of Substantial Misconduct, Nor Prejudice

Turning to the merits, the same analysis that establishes lack of materiality of petitioner's assertions also shows petitioner has not alleged a prejudicial act of substantial misconduct. Context is critical in evaluating these claims. It will be recalled that Stacey Mabrey is neither a jailhouse informant nor a coconspirator in the massacre of his family. Stacey Mabrey is a percipient victim witness. Mr. Mabrey did not volunteer for this duty. That he is no angel is of no importance, so long as the prosecution neither withheld material impeachment evidence from the defense nor failed to correct a false impression that he was offered no inducements to testify. The record clearly establishes there were neither promises nor expectations of favorable treatment; that the prosecution was entirely forthcoming; and that the statement about there being no inducements was accurate. The information provided by petitioner is not to the contrary.

Incongruously attached to the declaration of cousin Tony Barnes, is hearsay in the form of a police report that indicates Stacey Mabrey was investigated in connection with a bank robbery of which Barnes was convicted. The present trial record reflects that Mabrey was arrested on his way out of court after testifying in petitioner's murder trial on May 18, 1989. The police report provided by Barnes indicates Stacey Mabrey was released, however, and

never formally charged, because, unlike Barnes, there was no substantial evidence connecting Stacey Mabrey to the bank robbery. Additional hearsay documents purport to chronicle a successful misdemeanor concealed weapon prosecution of Stacey Mabrey taking place years after the trial in this case and additional misdemeanor charges which were resolved in a plea. It is unclear how these 1990's misdemeanor prosecutions establish that there was a deal in place in 1989 that Stacey Mabrey would receive a substantial benefit if he testified. Petitioner fails to explain how anyone could have known in 1989 that Stacey Mabrey would be arrested on misdemeanor charges in 1995, or again in 1999. Petitioner fails to explain how the substantial custody time and lengthy probation period Stacey Mabrey underwent on the misdemeanor charges, according to petitioner's exhibits, could be considered a benefit sufficient to induce false testimony a decade earlier.

As to the arrest during the Welch trial, the officers were under no obligation to arrest Stacey Mabrey the moment they decided to investigate whether he participated in the Barnes bank robbery. The efficient running of the Welch trial may have benefitted from having Mabrey arrested after his testimony, rather than rescheduling him to testify after his arrest, but it cannot be concluded that the timing of the arrest was a particular benefit to Stacey Mabrey. The testimony and the arrest were both bound to happen. Which came first was no doubt irrelevant to him. This is all an exercise in the tar and feathering of those few Mabreys petitioner failed to murder. Petitioner fails to support a claim that any promise of leniency was made to Stacey Mabrey in exchange for his testimony. Thus his statement that there were no inducements was accurate.

The context is equally important with respect to the allegation that the

Mabreys received "cash payments" and rides to court in exchange for their testimony. The declaration from Mabrey cousin and convicted bank robber Barnes does not allege that he personally witnessed the delivery of cash to the Mabreys, only that he "knew" it happened, nor does it specify a ballpark amount. Thus we could be arguing about bus fare. The declaration is pure hearsay and utterly unimpressive. Petitioner has cited no case law indicating that the provision of what may be no more than legitimate reimbursement for expenses (Barbara Mabrey was an out of town witness who was entitled to be reimbursed for her travel expenses, for example) and a lift to court is a substantial inducement to testify. To the contrary, recent case law establishes that reimbursement of expenses, up to and including even lost prison wages for jailhouse informants is not a substantial inducement. (*In re Roberts* (2003) 29 Cal.4th 726, 742 [no knowing presentation of false testimony where prisoner witnesses testified there were no inducements, despite "small amounts of money that were deposited into their prison accounts [which] recompensed them for the amounts they lost while they were in protective custody [as a result of agreeing to testify] and were unable to work"].) Moreover, there could be no prejudice, since a benefit that is only necessitated by the agreement to testify, whether a mere expense reimbursement or a big-ticket need to protect and relocate family members, has little value as impeachment. (*People v. Price* (1991) 1 Cal.4th 324, 423 [non-prejudicial error to preclude all cross-examination on deal to protect witness's family].) It is no inducement to testify that the costs of testifying will be defrayed. The witness is no better off testifying than not testifying. Thus any statement that there were no inducements was not substantially misleading and no prejudice could possibly have attached to leaving the jury with that impression.

The allegation that witnesses must have been "coached" because they avoided using the word "crazy" to describe petitioner at trial, despite having used the word before, does not and could not establish prosecutorial misconduct. To make out a federal constitutional violation based on the conduct of the prosecution, the defendant must establish conduct so egregious that it infects the trial with such unfairness that the resulting conviction cannot be said to be the result of due process. (*People v. Padilla, supra*, 11 Cal.4th at p. 939; *Darden v. Wainright* (1985) 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642.) First, there is a qualitative difference between encouraging a witness, prior to trial, to be precise in the use of inflammatory terminology, which is generally acceptable witness preparation, and what the courts refer to as witness tampering or witness coaching, which involves supplying them with information from the testimony of others during the period when the witnesses have been excluded from the courtroom and admonished not to discuss their testimony with anyone. Moreover, if the error involves cumulative evidence or mere impeachment of a witness, it rarely establishes constitutional unfairness so as to compel a new trial. (Compare *People v. Hudson* (1934) 137 Cal.App.729, 730 [proof of "tampering" with admonished witnesses requires new trial] with *People v. Adams* (1993) 19 Cal.App.4th 412, 427-432 [new trial motion properly denied, despite prosecutor's use of false testimony, since review of entire record showed guilt was otherwise firmly established].) There is no direct evidence of the malevolent form of coaching in the petition or its exhibits, only a conclusion drawn from the precision of the witnesses. Moreover, any error was harmless beyond a reasonable doubt, since the witnesses were thoroughly cross-examined on the discrepancies between their previous use of the word "crazy" and their trial testimony and since

petitioner's own mental health experts established he lacked control, but was completely aware of what he was doing, and that what he was doing was against the law, when he armed himself and went hunting room to room for the members of the Mabrey household.

Indeed, there could not possibly be any prejudice, even if some or all of these assertions about the surviving Mabreys could be substantiated. The witness who observed petitioner commit the execution-style, Uzi-to-the-head, murder of a two-year-old child, Valencia Morgan, was Leslie Morgan. The witness who was lying in bed next to 17-year-old Dellane when petitioner busted down the door and shot her and baby Dexter in the head was Leslie Morgan. The only adult witness to be fired directly upon by petitioner and survive was Leslie Morgan. Morgan's blood was found on the murder weapon petitioner still had with him when arrested. Morgan's blood was on petitioner's shoes. The Mabreys confirmed petitioner's presence in the house during the killings and just outside the house after the murders, but to a large extent they merely confirmed the compelling and unchallenged eyewitness testimony of thrice-wounded Leslie Morgan, which itself was fully corroborated by the forensic evidence.

V.

THE CLAIMS OF JUDICIAL ERROR WERE ACTUALLY DECIDED ON APPEAL AND FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE BASED

Petitioner's claims 2, 3, and 4, were raised and resolved on the direct appeal. In addition, claims two and four were also raised in petitioner's unsuccessful petition for writ of certiorari to the United State Supreme Court. Specifically, this Court held: (1) the trial court did not err in finding petitioner competent and failing to declare a doubt about petitioner's competence because there was no substantial evidence that defendant was incompetent to stand trial; (2) the hybrid representation arrangement caused no prejudicial harm to petitioner, since he was ably represented by counsel, yet able to make his own salient points to the trial court, outside the presence of the jury, frequently to his own benefit; and (3) that the trial court did not abuse its discretion in denying the *Faretta* motion. (*People v. Welch* (1999) 20 Cal.4th 701, 729-741.) Petitioner has added nothing that would necessitate a reanalysis of these claims, thus we refer the Court to its detailed analysis of these issues by way of a response on the merits.

The only augmentation on the competence determination provided by this petition was never presented to the trial court. Since a reviewing court evaluates a trial court's decision whether to order a competence determination on the basis of information available to the trial court (*Welch, supra*, 20 Cal.4th at p. 739), petitioner's documents from the current mental health experts, previous counsel, and the mental health professionals who testified at the penalty phase add nothing to the analysis of the trial court's discretion at the time, any more than did the testimony at the penalty phase of the trial level

mental health experts. What Judge Golde saw was an articulate, obstreperous defendant, raising valid points on his motion days which often led to favorable rulings and inquiries, but often refusing to control his behavior in court, whose pretrial motion pursuant to Penal Code section 1368 had been denied. Judge Golde was not presented with substantial evidence of incompetence to stand trial, so he properly did not declare a doubt as to petitioner's competence to stand trial. Further the judge did not declare a doubt as to petitioner's sanity as a matter of law, by ruling on the *Faretta* motion, nor did he abuse discretion in declining to declare such a doubt. Nor was counsel prejudicially ineffective for failing to declare a doubt about competence. The requirement to show both "representation below an objective standard of reasonableness," and prejudice, cannot be met (*Strickland v. Washington* (1984) 466 U.S. 668, 687-694), as this Court found, because since there had been a properly denied pretrial motion pursuant to section 1368, the court was not obliged to order a competency hearing solely on the basis of counsel's perception, and counsel had already alluded to the contemplation of an additional competency motion in connection with the *Faretta* hearing, leading the trial court to specifically find petitioner competent to stand trial at the time the *Faretta* motion was denied. (*Welch, supra*, 20 Cal.4th at pp. 741-743.)

The present attack on the hybrid representation arrangement derives entirely from the record and provides no basis for reopening an issue thoroughly briefed, argued, and decided on appeal.

Another issue briefed, argued, and decided on appeal concerns the denial of the *Faretta* motion. As noted, this issue has also been briefed by both sides upon petitioner's petition for writ of certiorari to the United States Supreme Court and let stand as a frequently cited analysis of the many

considerations attending the determination of a motion for self-representation. (See, for example, *In re Angel W.* (2001) 93 Cal.App.4th 1074, 1085; *People v. Silfa* (2001) 88 Cal.App.4th 1311, 1323; *People v. Carlisle* (2001) 86 Cal.App.4th 1382, 1385; *People v. Howse* (2001) 85 Cal.App.4th 1380, 1393.) Again, petitioner relies entirely on the trial record.

These claims are procedurally barred and fail to state a claim upon which relief could be based.

VI.

THE CLAIM OF MISTREATMENT AT THE COUNTY JAIL IS PROCEDURALLY BARRED AND FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE BASED

In his claim 5, petitioner asserts he was subject to physical and psychological abuse, which affected his mental and physical health at trial in violation of his rights to due process, a fair and reliable capital trial, including an unbiased tribunal, and incarceration that is neither cruel nor unusual. To make this claim, petitioner relies on the trial record of the hearings on petitioner's many complaints about jail staff. He adds only confirming observations by prior counsel. Respondent disputes the presently alleged facts and characterizations, which are largely addressed on the record. However resolution of any factual dispute is not required at this time, since the claim is procedurally barred. These issues were heard and resolved at trial. If they presented claims, those claims were available on appeal and should have been brought there. *(In re Dixon, supra*, 41 Cal.2d at p. 759; *In re Walker, supra,* 10 Cal.3d at p. 773.) We note here, however, that it was not ineffective to fail to raise these claims on appeal, since the record clearly shows petitioner engaged in a pattern of resistance and aggression against his jailors as part of his effort to delay or prevent trial, that he was provided adequate medical care for these effectively self-inflicted injuries, since his actions provoked the need to subdue him, and that the trial court and the jail officers performed commendably to protect his rights in the face of an onslaught of abuse.

This Court recognizes that conditions of pretrial and trial confinement may so impair the defendant's ability to participate in his defense that a due process violation or infringement of the right to effective assistance of counsel

may result. In so noting, however, this Court also recognized that "conditions of confinement that have not actually affected the defendant adversely are not grounds for reversal of a conviction; as we have determined, a defendant who was representing himself has no right to a continuance on the ground he had not received eight hours of sleep the night before the proceeding, when notwithstanding this adverse condition of confinement, the record indicated the defendant was awake and capable of participating in the proceedings. *(People v. Smith* (1985) 38 Cal.3d 945, 953; see also *People v. Davis* (1987) 189 Cal.App.3d 1177, 1197 [no indication defendant's performance as pro se counsel was affected adversely by sleep deprivation], disapproved on another point in *People v. Snow* (1987) 44 Cal.3d 216, 225.)" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1002.) In particular, "a trial court properly defers to a great extent to the judgment of jail authorities regarding the conditions of a pretrial detainee's confinement," on matters of security, order, safety and discipline. (*People v. Jenkins, supra*, 22 Cal.4th at p. 1006, fn. 22, citing *Bell v. Wolfish* (1979) 441 U.S. 520, 540, fn. 23, 547-548.)

Petitioner was not at all shy about voicing his concerns and objections about the effects of cell searches on his organizational system, altercations with jail personnel, and the effects of jailhouse food, living conditions, restraints, and rules on his ability to prepare for trial. Thus there is a substantial record on the physical and verbal altercations with jail personnel and the existence or non-existence of disciplinary diets, to which petitioner refers, in part, in his argument. Respondent denies the allegations of the petition on this issue, noting that the results of the many hearings on these complaints showed petitioner, who was a convicted prison-guard-assailant long before he was a convicted mass murderer, had initiated the violence. His record of attacks upon prison and jail

personnel, some of them career-ending, and his attacks on other inmates, is lengthy and detailed in the penalty phase evidence. (See *People v. Welch, supra,* 20 Cal.4th at pp. 726-727, for a summary.)

Of particular note, is the incident of December 16, 1987, which occurred while petitioner was in custody in this case, refusing to come to court, and in which he struck one deputy in the head and threatened to kill every correctional officer in the jail. This has become, in the petition, an "altercation" in which petitioner was "beaten up." (Pet. 124.) There was considerable discussion of the matter on the record, including a record of petitioner's medical treatment. (RT Misc. Vol 1, *passim.*) A review of this record, and indeed the record made in each of the cases in which petitioner engaged in disputes with jail personnel, shows the court was attentive to petitioner's constitutional rights as well as the need to maintain order in the jail and the courtroom. (See also, RT Misc. Vol. 2; RT 3, 279, 716, 765-767, 780-781, 1666-1667, 3313-3314, 3704-3707, 3780-3784, 5865-5869.) In light of the record, petitioner has not shown he was deprived to his prejudice of any constitutional rights as a result of the conditions of his confinement at the county jail.

Petitioner complains with particular anguish about a lack of visitors at the jail, but never asserts anyone tried to visit him who was turned away. (Pet. 130.) As the court repeatedly noted, petitioner had the same rights as any prisoner to receive visitors (RT 161), but respondent adds that no constitutional provision can be invoked to force family members to pay a visit to a defendant who also has a history of assaulting prison visitors. (See *People v. Welch, supra*, 20 Cal.4th at pp. 726-727 [petitioner grabbed his wife by the throat and threw her against a wall in the visiting room].)

Petitioner's claim is factually based upon the record. That is why it is

procedurally barred. In addition, that record completely refutes his constitutional arguments.

VII.

THE CLAIMS OF JUROR MISCONDUCT ARE PROCEDURALLY BARRED AND FAIL TO STATE A CLAIM UPON WHICH RELIEF COULD BE BASED

Petitioner's claim 6 asserts juror misconduct in learning from the bailiff that petitioner had urinated in the well that connected the holding cell and the jury room with the courtroom and that petitioner had threatened witnesses. While we deny the facts are as alleged, we acknowledge that it is improper for a juror to receive significant evidence outside of court about the pending case. (*In re Carpenter* (1995) 9 Cal.4th 634, 647.) Juror misconduct raises a presumption of prejudice that may be rebutted by proof that no prejudice occurred "or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party [resulting from the misconduct]." (*In re Hitchings* (1993) 6 Cal.4th 97, 119; but see *Smith v. Phillips* (1982) 455 U.S. 209, 217 [the defendant bears the burden of establishing not only juror misconduct but prejudice when pursuing a collateral attack on his judgment].) The relevant question is whether the exposure to the extrinsic evidence so infected the proceedings with unfairness that the conviction was a denial of due process. (*Romano v. Oklahoma* (1994) 512 U.S. 1, 129 L.Ed.2d 1, 13.) If the jurors followed the trial court's instructions to consider only the evidence developed at trial, which we presume they did (*Richardson v. Marsh* (1987) 481 U.S. 200, 206-207), then such evidence should have had little – if any – effect on their deliberations. (Paraphrasing *Romano v. Oklahoma, supra,* 129 L.Ed.2d at pp. 13-14.)

First, respondent denies that any such improper communications took

place. Petitioner's assertion is based on the declaration of an alternate juror and a juror that echoes a portion of the alternate's declaration. Specifically, the alternate juror alleges the bailiff provided information to one or more jurors that petitioner had threatened witnesses and that he urinated in the jury well one day, before the jury was called down. The juror confirms that the bailiff and jurors got along as friends and that the bailiff acknowledged there had been threats to witnesses. Petitioner asserts this information was not otherwise provided through testimony. However, this was a murder trial about how petitioner threatened the Mabrey family to discourage their providing testimony in his assault proceedings, and killed most of them on the night before his preliminary hearing, when they refused to drop charges and expressed an intention to show up at the preliminary hearing. All of the prosecution witnesses who were percipient witnesses to the murders had been repeatedly threatened. That was the point. They were threatened and when they did not do what petitioner ordered them to do, he killed them or tried to do so. Any recognition of that fact by the bailiff cannot have been prejudicial to petitioner in light of the fact that it was unmistakably and irrefutably true, as days of testimony confirmed.

Petitioner's urination in the jury well was also a fact and probably obvious to the jurors, who sat nearby, by virtue of their sense of smell. There was direct testimony at the penalty phase, by the defense mental health witnesses, offered as mitigating evidence, that petitioner inappropriately urinated in the jury well and also at a J.C. Penney's when apprehended for shoplifting. In context it is not a significant extrinsic fact, since petitioner made no secret of his contempt for the court, the court officers, and the courtroom, even in front of the jury. Thus we dispute whether any of the alleged communications would have been material, in context, if made, note that the

facts were established in testimony, and further assert that even if made and significant enough to be considered jury misconduct, there could be no prejudice on this record.

Taking a practical approach, this Court has acknowledged the ease with which bailiffs can be charged with misconduct, and the need to give them the benefit of the doubt. "Bailiffs have innumerable contacts with deliberating juries any of which offers the opportunity for an untoward comment. The mere potential for impropriety, however, cannot sustain an inference of misconduct. As officers of the court, bailiffs must be presumed to act in accordance with their sworn duty to keep the jury insulated from all extraneous influences, including their own. (Evid. Code, § 664; see *People v. Napolitano* (1959) 175 Cal.App.2d 477, 480; cf. *Rushen v. Spain, [(1983)]* 464 U.S. [114] at pp. 118-119.)" (*People v. Hawthorne* (1992) 4 Cal.4th 43, 67.) By failing to establish impropriety, since the subject matters of the alleged misconduct were abundantly clear to anyone paying attention in court, and all parties are subject to a presumption of performance of duty, petitioner has not alleged facts sufficient to charge the jurors (or the bailiff) with misconduct.

VIII.

THE CLAIM THAT THE COURTROOM ATMOSPHERE DEPRIVED PETITIONER OF A FAIR TRIAL IS PROCEDURALLY BARRED AND FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE BASED

Petitioner asserts he was deprived of a fair trial because of the dispiriting taunts of courtroom spectators. This claim is procedurally barred, because it relies on assertions about courtroom events to which petitioner, and all those present in the courtroom were allegedly witnesses. To the extent there were admonitions to the audience on the record, the trial record provides the evidence of both the event and its management. Had there been an issue here, it could have been raised either in the appeal or in a contemporaneous habeas corpus. We note, here, however, that it was not ineffective assistance of counsel not to raise this issue, since the incidents alleged clearly did not rise to the level of a constitutional violation and the record demonstrates the court was attentive to the need to maintain a decorum and a safe environment.

"Every person charged with a criminal offense has a constitutional right to a public trial, that is, a trial which is open to the general public at all times. (See U.S. Const., amends. VI, XIV; Cal. Const., art. I, § 15; see also Pen. Code, § 686, subd. 1.)" (*People v. Woodward* (1992) 4 Cal.4th 376, 382.) "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . . [Citations.] [Fn.] [¶] In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and

discourages perjury. [Citations.]" (*Waller v. Georgia* (1984) 467 U.S. 39, 46 [quoting prior authorities; internal quotation marks omitted].) (*People v. Woodward, supra*, 4 Cal.4th at p. 385.)

The general public, however, particularly the interested spectators, sometimes brings its boisterous preferences into the courtroom. Petitioner asserts, on the basis of a juror declaration, that there were audience members, antagonistic to petitioner, who were not shy about making their feelings known at times. Petitioner likens the spectators to a hostile mob and concludes there was an unacceptable risk of impermissible factors coming into play. (Pet. 145, citing *Holbrook v. Flynn* (1986) 475 U.S. 560, 572.) Generally, however, the prejudicial effects of spectator outbursts are completely neutralized by a request for order by the court and an admonition to the jury to disregard. (See *People v. Hill* (1992) 3 Cal.4th 959, 1001 ["In light of the nature and circumstances of the comment and the court's forceful admonition to disregard it, there is not even a plausible basis on which we could find prejudice to defendant."].) The record provides little or no evidence of outbursts from the crowd triggering the need for an admonition, so it is not clear any noise continued after the court assembled. Moreover, the jury was well aware of its duty to base its decisions solely on the evidence. (RT 3866, 5572.) Petitioner has failed to state a prima facie basis for relief. While the declaration in question asserts awareness of spectator comments, it does not support the claim that the fairness of the trial was affected. In addition to being time-barred, therefore, the petition fails to state a claim upon which relief could be based.

IX.

THE CLAIMS OF GOVERNMENT MISCONDUCT ARE PROCEDURALLY BARRED AND FAIL TO STATE A CLAIM UPON WHICH RELIEF MAY BE BASED

Petitioner's claims 8 through 17, assert various forms of prosecutorial and government misconduct, beginning with an assertion about destruction of, or failure to preserve, evidence which was specifically raised and rejected on appeal. From the opening brief on appeal, primarily, petitioner also raises the issues of invocation of biblical references and other misconduct in the argument of counsel for the People, statements made outside the presence of the jury, argument to "advise" the court regarding the death penalty and act as the "conscience of the community," the reference to Ramon Salcido, violation of a gag order, *Batson* error, *Brady* error, and cumulative error. We address these issues in turn showing they are procedurally barred, mostly because they have already been raised and resolved on appeal. To the extent additional subissues have been added, they could have been incorporated into the appeal or addressed in a timely petition.

We note here, however, that it was not ineffective to fail to raise any additional issues of prosecutorial misconduct on appeal, since, as will be shown, the issues are without merit and it is never ineffective to forgo the assertion of a meritless issue. "The circumstance that present counsel has raised an issue not advanced by prior counsel does not itself establish inadequate performance by prior counsel. As the high court has observed, appellate counsel (and, by analogy, habeas corpus counsel as well) performs properly and competently when he or she exercises discretion and presents only the strongest claims instead of every conceivable claim. (*Jones v. Barnes* (1983) 463 U.S. 745, 752;

Smith v. Murray (1986) 477 U.S. 527, 536.)" (*In re Robbins, supra*, 18 Cal.4th at p. 810.)

A. Responsibility For The Failure To Obtain A Quantitative Blood Analysis Was Thoroughly Assessed At Trial And Raised And Resolved On Appeal.

Petitioner claims that "the prosecution and other state actors involved in this case engaged in bad faith suppression, destruction, tempering, and failure to preserve critical and material exculpatory forensic evidence." (Pet. 152.) Petitioner complains specifically about the handling of a blood sample drawn from petitioner at the time of his admission to Highland Hospital on the day of the killings, alleging that bad faith by the investigating police is evidenced by their failures to order a quantitative analysis of the blood, to immediately obtain and preserve the bodily fluids taken by the hospital on admission, and to conform with departmental procedures regarding booking of evidence once the blood samples had been collected. Petitioner claims that each of these errors violates his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I sections 7, 15, 16 and 17 of the California Constitution, and individually or collectively establish a reasonable probability that the outcome of the trial would have been different if the suppressed information had been disclosed to the defense.

Petitioner's claim is not cognizable on collateral review because it could have been but was not brought on the direct appeal already ruled on by this Court. All of the documents provided in support of this claim were available at the time the appeal was filed, and this claim is based on the trial record and facts which were known at the time of trial. The claim was entirely discernable from the record on appeal and was cognizable on appeal. "[I]ssues

that could be raised on appeal must be so presented, and not on habeas corpus in the first instance." (*In re Harris, supra,* 5 Cal.4th at p. 829.) An unjustified failure to present an issue on appeal "will generally preclude its consideration in a postconviction petition." (*Ibid.*) In sum, habeas corpus is not available for relief on this claim.

Even if the merits are considered, the claim fails to state a prima facie basis for relief. There are two related standards of review, the disclosure standard and the preservation standard. (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 7-8.) Under the disclosure analysis originating in *Brady v. Maryland, supra,* 373 U.S. at pp. 86-87, due process is violated if the prosecution withholds evidence, material to the issues of guilt or punishment, which is either directly exculpatory or valuable as impeachment of prosecution witnesses. (*United States v. Agurs* (1976) 427 U.S. 97, 107-108.) Favorable evidence is only material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*United States v. Bagley, supra,* 473, U.S. at p. 682.) The *Brady* disclosure standard applies to evidence in existence and known to the prosecution or the investigating officers. (*Kyles v. Whitley, supra,* 514 U.S. at pp. 437-438.) Where evidence could have been, but was not created or preserved, a different standard applies. The prosecution's failure to retain evidence only violates due process when that evidence "might be expected to play a significant role in the suspect's defense" and has "exculpatory value [that is] apparent before [it is] destroyed." (*California v. Trombetta* (1984) 467 U.S. 479, 488-489.) The mere "possibility" that the information may ultimately prove exculpatory does not meet the standard of materiality applied in retention cases, and there is no due process violation under *Trombetta* unless the accused

can show bad faith by the government. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 56-58.)

Factually, the record is clear. A qualitative analysis showing that petitioner's blood contained ethanol was admitted at trial. A urinalysis showed that petitioner had cocaine and morphine in his urine. The police had ordered both a qualitative and a quantitative drug analysis of petitioner's blood, and confirmed the blood had been drawn, preserved, and tested, and that the results were on their way. However, by the time the results came back and included only a qualitative analysis of the blood and urine, it was no longer possible to have a quantitative analysis of the blood done. (RT 5153-5160.) Thus evidence was not withheld. The test was requested by the police, but never performed by the hospital, and sufficient blood was either not drawn or not preserved to do a quantitative analysis that would reveal the amounts of foreign substances in the blood at the time petitioner was admitted to the hospital on December 8. Since the prosecution is under no obligation to perform every conceivable test, or investigate the crime in any particular way, even if there had been a decision to perform the qualitative, rather than quantitative testing of the blood, that decision would have been defensible. But here the test was ordered by the investigating officer, confirmed with a telephone call to the hospital, and simply not done by the hospital. Petitioner cannot support a claim of bad faith. Nor can petitioner support a claim that the unperformed test was material under *Trombetta* standards.

We cannot assume that a quantitative analysis of the blood would have supported petitioner's theory that he was so under the influence of narcotics and/or alcohol that he was unable to deliberate and premeditate the killing of six people he had been threatening to kill for days. Obviously there is

overwhelming direct evidence is to the contrary, since numerous witnesses testified that petitioner planned the killing over several hours, while he waited for the police to leave the scene. He rounded up two accomplices, Rita Lewis, who accompanied him inside and shot Leslie Morgan in the leg, and the driver of the getaway car. He asked several people in the neighborhood during the night whether the police were still around, and stated his intention to return and kill everybody after the police had departed. Then he did it. With this kind of direct evidence of premeditation and deliberation, a drug analysis taken twelve hours after the killings, that would not indicate whether the drugs were ingested before or after the killings, is of little value. Even assuming, *arguendo,* that a quantitative analysis would have indicated very high levels of alcohol, cocaine, and morphine in petitioner's system, this evidence would still not be exculpatory.

From that evidence defense counsel argued that there existed a reasonable doubt petitioner had the ability to deliberate and premeditate. Knowing the precise numbers the day after the murders might have lessened the power of this argument, if the numbers were small. Even if the numbers were substantial, all that a quantitative analysis of petitioner's blood would have shown was how much alcohol and narcotics were in his system at the time he was admitted to the hospital on the afternoon of December 8, not how much, if any, alcohol and narcotics were in his blood stream twelve hours earlier, when he perpetrated the killings. The drugs and alcohol could have been an effort to self-medicate after he was shot by Rita Lewis. (See RT 4792-4793 [Beverly Jermany testifies that Rita Lewis brought alcohol with her when she and petitioner, who had been shot, showed up at Jermany's house after the murders].) The quantitative test could not tell us when the drugs were ingested.

Rather than obviously exculpatory, this evidence could be completely irrelevant to the question of whether petitioner was intoxicated or not, and whether or not he was able to formulate the requisite mental state for first degree murder *at the time of the killings*. Since the evidence to be obtained from the blood samples was not exculpatory, petitioner's rights were not violated by the failure, if any, to properly test or preserve them.

As argued above, the evidence at issue is not exculpatory in nature, and the failure to preserve it is not grounds for relief. If the Court finds that the evidence has any exculpatory value at all, however, at most it could be considered *potentially* exculpatory of petitioner. Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. (*Arizona v. Youngblood, supra,* 488 US at p. 58.) In the case on review here, the handling of the blood samples demonstrates no bad faith, and can at worst be described as negligent. At trial, Sergeant Peterson testified that both a quantitative and qualitative analysis were ordered on December 8, but that he only received a qualitative analysis. (RT 5153-5160.) The failure of the hospital to perform an ordered test surely cannot be attributed to bad faith by the police or prosecution. In addition, since a quantitative test had, according to Sergeant Peterson, been ordered, his delay in obtaining a warrant to pick up the samples can hardly be characterized as negligence, let alone bad faith. Once the blood had been obtained from the hospitals, the samples were evaluated, but were inadequate for testing. As in *Youngblood*, however, "[n]one of this information was concealed from [petitioner] at trial, and the evidence -- such as it was -- was made available to [petitioner's] expert." (488 U.S. at p. 58.) In *Youngblood*, the Court found this not to constitute bad faith, and the determination should be the

same in this case.

Furthermore, in order for the State to have a duty to preserve evidence, the evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*California v. Trombetta, supra,* 467 US at pp. 488-489.) While evidence of the exact quantity of alcohol and drugs in petitioner's system at the time he was admitted to the hospital may not have been available to petitioner by other means, comparable evidence which would in fact be more relevant to the issue of his intoxication at or around the time of the killings was otherwise available. Petitioner could have obtained evidence about his apparent mental state and intoxication or lack thereof from witness testimony. The People submitted such evidence in the form of the testimony of petitioner's cousin, who indicated that he did not appear to be high when he arrived at her house between 5 and 6 a.m. on December 8 (eight to nine hours closer in time to the killings than the blood test.) (RT 5557-5558.) Since comparable evidence was reasonably available to petitioner, under *Trombetta*, the blood samples do not fall within the state's duty to preserve evidence, and their failure to do so is not a violation of petitioner's rights.

Finally, the United States Supreme Court has explicitly held that due process is not violated when the police fail to use a particular investigatory tool. Thus, petitioner's contention that his rights were violated by the failure to quantitatively test the blood samples is without merit. The Court ruled that "the defendant is free to argue to the finder of fact that a [ ] test might have been exculpatory, but the police do not have a constitutional duty to perform any particular test." (*Arizona v. Youngblood, supra,* 488 U.S. at p. 58.) Here,

petitioner argued that a quantitative analysis could have been done, that it was irregular for one not to be done, and that such an analysis might have exculpated petitioner by showing that his formation of the mental state required for first degree murder might have been affected by the drugs. These arguments were apparently rejected by the jury, but petitioner was free to make the argument as required by *Youngblood*, and thus his due process rights were not violated simply because a quantitative blood test was not performed. Since it appears petitioner got more mileage out of the missing blood test than he could ever have hoped to get out of an actual quantitative test, any police failure in following up on the ordered test did not work to his detriment.

B. The General Prosecutorial Misconduct Claims Were Raised And Rejected On Appeal, Or Could Have Been, And Otherwise Fail To State A Claim For Relief

Petitioner claims that the prosecutor committed misconduct during both the guilt and penalty phases of his trial, and that this prosecutorial misconduct violated his rights under the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I sections 7, 15, 16 and 17 of the California Constitution. Petitioner raises the following allegations of prosecutorial misconduct: (1) prosecutor's invocation of God's authority and consequences for failure to impose death penalty (Pet. 156-165); (2) unconstitutional interaction in court with petitioner and prejudicial comments on petitioner during trial (Pet. 165-173); (3) introduction of extrinsic material in closing argument (Pet. 173-179); (4) misdirecting jury to advise the court, serve as the conscience of the community and impose death to prevent hypothetical future acts (Pet. 179-185); (5) overt violation of gag order (Pet. 185-192); (6) improperly urging jury's comparison of petitioner to Ramon

Salcido (Pet. 192-196); (7) use of peremptory challenges to strike three African-American jurors and one African-American alternate juror (Pet. 196-203); suppression of material evidence (Pet. 203-207); and (8) cumulative misconduct (Pet 207-210). Petitioner claims that these instances of prosecutorial misconduct, individually or collectively, establish a reasonable probability that the outcome of the trial would have been different absent such misconduct on the part of the prosecutor.

Petitioner's claims of prosecutorial misconduct are not cognizable on collateral review because they are procedurally barred. Even considered on the merits, however, these claims fail to state a prima facie basis for relief.

1. The Prosecutor's Invocation of God's authority and consequences for failure to impose death penalty

Petitioner's claim that the invocation of God's authority in the prosecutor's closing argument constituted prosecutorial misconduct is procedurally barred because essentially the same claim was brought on the direct appeal already decided by this Court. The entire claim, and any purportedly new facts were available to petitioner at the time his appeals were filed and heard, thus the claim is not cognizable here. The *Waltreus/Dixon* bar applies to claims of prosecutorial misconduct, such as the one raised here, because the claims are discernable from the record on appeal, are cognizable on appeal, and are already raised on the direct appeal previously heard by this Court. (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34; see also *In re Waltreus, supra,* 62 Cal.2d 218, *In re Dixon, supra,* 41 Cal.2d 756.) Petitioner has failed here to explain why this claim, already ruled upon on direct appeal, should also be considered on collateral review. (*In re Clark, supra,* 5 Cal.4th

750, 825.)

Even if this Court were to reach the merits of petitioner's claim, the claim still must fail, as it does not state a prima facie case for relief. Admittedly, this Court did find on direct appeal that the prosecutor's use of biblical references, along with his "otherwordly account of retribution," "has no place at the penalty phase of a capital trial," and constituted prosecutorial misconduct. (*People v. Welch, supra,* 20 Cal.4th at p. 762.) The Court ruled, however, that the "misconduct in this instance was not prejudicial" and that "[g]iven the magnitude of the penalty phase evidence against [petitioner], the relatively minor place of the religious argument in the closing argument as a whole, and the balancing effect of the defense in closing argument, there is no reasonable possibility that the jury would have chosen the lesser verdict if it had not heard the prosecution's religious references." (*Ibid.*, citing *People v. Brown* (1988) 46 Cal.3d 432, 446-448.) This Court also found that the misconduct harmless beyond a reasonable doubt. (*Ibid.*, citing *Chapman v. California* (1968) 386 U.S. 18.) If it considers the merits of this claim, this Court should follow these earlier findings.

2. The Prosecutor's Interactions With Petitioner And Descriptions Of Him During Argument Are All Presented On The Record And Were Available For Presentation On Appeal

Petitioner's next assertion is that he was prejudiced by comments made by the prosecutor during pretrial hearings. Petitioner asserts the prosecutor responded to defendant's personal request for juror information with the statement: "It will be a cold day in hell before I give him anything." (RT 1966.) Petitioner was not entitled to personal juror identifying information out

of concern for juror safety. However, his counsel properly had the relevant information on prospective jurors. The prosecutor's response was more colorful than necessary, but clear and on the record, and not made in front of the jury. The comment could have been cited as error on appeal. The failure to do so renders it unavailable for habeas corpus analysis. Moreover petitioner cannot support a meritorious claim of prejudice, since the comment could not have influenced the jurors, who had yet to be selected.

Petitioner also complains that he was called a "fool" and a "punk" by the prosecutor when he interrupted his own attorney to address the court in a situation in which only counsel had been invited to speak. Again, this was long before the jury was selected, so there is no possibility of prejudice. The court ordered both petitioner and the prosecutor to stop talking and they did. (RT 2906-2907.) While it served as a good reminder for all that the court decides who speaks and when, it cannot have been prejudicial to petitioner in any way, especially in comparison to some of the names he called the prosecutor and the judge at other times during the proceedings, both before and after this incident. (See, for example, RT 1948 [petitioner calls court "a bigot"], 1968 [court accused of "collusion" with prosecution], 3709 ["Is the imperial Ku Klux Klan wizard ready to speak to me?"], 3712 [petitioner says "fuck you" to court], 4844 [petitioner tells court to "shut up"], 4954 [petitioner tells court "Fuck you"], 4958 [petitioner calls court a "punk ass Klan"], 4959 [petitioner calls court a "racist," says "fuck you"], 4985 [petitioner urinates on and bangs wall of courtroom well].) Petitioner's claim to be "shocked" by the prosecutor's use of the words "fool" and "punk" seems somewhat disingenuous in light of petitioner's own exercises of his colorful command of the language.

3. The Prosecutor Did Not Introduce Extrinsic Material Into The Closing Argument

Petitioner's next claim is that in closing argument of the penalty phase, the prosecutor referred to matters not in evidence as aggravating factors. Entirely based on the trial record, this claim could have been addressed on appeal, but was not. It is not cognizable here.

On the merits, the petition fails to state a claim supporting relief. Petitioner's assertion is completely untrue on two levels, as the record demonstrates. First, the information, that petitioner had urinated in the courtroom well and had previously urinated in a J.C. Penney's changing room when accosted for shoplifting, was not extrinsic, it was evidence to which defense witnesses testified on cross-examination. Second, the jury was carefully instructed on what constituted aggravating factors, so if these physical demonstrations of lack of respect for authority were not appropriate for consideration, the jury could determine that from the instructions.

More to the point, and as the prosecutor indicated on the same pages of argument, in light of the execution-style killings of six persons, including two toddlers, to prevent the adults from testifying at a preliminary hearing, the challenged information is trivial. (RT 6117-6118.) It is not reasonably probable that petitioner would be serving a life sentence instead of facing execution had the prosecutor failed to mention petitioner's disrespect.

4. The Prosecutor's Comments To The Jury To Advise The Court, Serve As The Conscience Of The Community, And Protect The Community Were Addressed On Appeal

Petitioner's claim that, in the closing argument of the penalty phase, the prosecutor misdirected the jury to advise the court and act as the conscience of the community and impose the death penalty to prevent hypothetical future acts fails for the same reasons as his complaint about the prosecutor's religious references. This claim really comprises two separate claims: (1) that the prosecutor misdirected the jury that its function was to "advise" the court and (2) that the prosecutor argued that petitioner should be given the death penalty to prevent hypothetical future acts of violence. Both sub-parts of this claim are procedurally barred as already having been argued on direct appeal before this Court. Since this claim was discernable from the record on appeal, cognizable on appeal, and raised and rejected on direct appeal, it is not cognizable on habeas corpus. (*In re Robbins*, *supra* 18 Cal.4th at 814, fn. 34; see also *In re Waltreus, supra,* 62 Cal.2d 218; *In re Dixon, supra,* 41 Cal.2d 756.) No explanation is offered why this already-heard claim should be considered again. (*In re Clark, supra,* 5 Cal.4th at 825.)

Even if considered on the merits, this claim fails to state a prima facie case for relief. As this Court determined, given the prosecutor's clarifications that the jury's sentencing was an exercise of personal responsibility, the defendant's argument, and the trial court's instructions, "no reasonable juror. . . would have been mistaken as to the jury's role as the arbiter of [petitioner's] fate." (*People v. Welch*, *supra,* 20 Cal.4th at p. 763.) Since this claim on collateral review is essentially the same, this Court's ruling should be the same.

On direct appeal, and now again on collateral review, petitioner

alleged misconduct on the basis of the prosecutor's argument in the penalty phase closing that petitioner would be dangerous to fellow inmates and others with whom he came into contact if he were given life imprisonment rather than the death penalty. "It is settled that argument concerning a defendant's future dangerousness as a life prisoner is proper where it is based on evidence of past crimes admitted under one or more statutory factors in aggravation." (*People v. Millwee* (1998) 18 Cal.4th 96, 153.) This Court found that in this case, there was "ample evidence of [petitioner's] violent past, including numerous assaults on prison and jail officials and the commission of sodomy," and that the "prosecutor's argument regarding [petitioner's] future dangerousness, based on this history of violence, was not misconduct." (*People v. Welch*, *supra,* 20 Cal.4th at p. 761.) That conclusion still applies.

5. The Prosecutor's Acknowledgment To A Reporter Of The Guilty Verdict And Denial Of A Claim Of Jury Tampering, Never Repeated After It Was Brought To The Court's Attention By Petitioner, Could Have Been Addressed On Appeal Or In A Timely Petition, And Did Not, In Any Event, Prejudice Petitioner

Petitioner notes the existence of a gag order, and states it was violated when a reporter quoted the prosecutor as knowing of "no basis" for a claim petitioner had made of jury tampering and characterizing the allegation as a "wild claim" made by a man with nothing to lose because he had just been convicted of six counts of first degree murder and a special circumstance. The prosecutor was also quoted that day in another paper as being "elated" with the verdict. Later, he was quoted as estimating he had spent most of his time for a year on the case, believing it was worth the effort. When petitioner brought these quotes to the attention of the court, the court responded it would "handle

the prosecutor." Petitioner cites no further quotes in the press from the prosecutor. So apparently, the situation was handled. All of this took place between the guilt phase verdict and the commencement of the penalty phase.

Since petitioner's detailed objection was made on the record (RT 5725-5726) this issue could have been preserved for appeal by offering the newspapers as exhibits, and addressed on appeal, or it could have been addressed in a timely petition. That it was not, however, does not establish ineffective assistance of counsel at any level, because the information that a prosecutor is pleased with a guilty verdict and disagrees with a defense claim of jury tampering is hardly shocking news, or anything that would prejudice a jury. Given the jury had been instructed from the outset of trial, to avoid news accounts of the trial, and was still under that obligation between the guilt and penalty phases, there was no likelihood of any of this innocuous information reaching the jury. Moreover, a jury knows it has convicted a defendant of six counts of murder and a special circumstance, and knows the prosecutor has been spending most of every day working on the case, without reading about it in the newspaper. This is simply a meritless claim and has been since trial.

6. The Reference To Ramon Salcido Was Addressed On Appeal And Fails To State A Claim For Relief

Petitioner claims that the mention of another murder case (involving Ramon Salcido) during the prosecutor's guilt phase closing argument constituted prosecutorial misconduct, and that he was prejudiced thereby. This claim, however, was already heard by this Court on direct appeal. A claim that was discernable from the trial record and cognizable on direct appeal, and already raised on direct appeal, is procedurally barred on collateral review. (*In re*

Robbins, *supra*, 18 Cal.4th at 814, fn. 34; see also *In re Waltreus, supra,* 62 Cal.2d 218; *In re Dixon, supra,* 41 Cal.2d 756.) Petitioner fails to offer any explanation why this claim which has already been decided against him, should again be heard on habeas corpus. (*In re Clark, supra,* 5 Cal.4th at 825.)

Even if considered on the merits, petitioner's claim fails to provide a basis for relief. Trial counsel did not object to the prosecutor's reference to Salcido at trial. Misconduct claims, such as this one, are not preserved for review unless the purported misconduct is such that the harm could not have been cured by a timely admonition, had one been requested. (*In re Viscotti*, *supra*, 14 Cal.4th at p. 325.) When this same claim was made before this Court on direct appeal, the Court held that an admonition would have cured any harm, and therefore, the matter was not preserved for appeal. The Court went on to find that, in any event, in light of the evidence against defendant, the remark was not prejudicial. (*People v. Welch*, *supra,* 20 Cal.4th at p. 753.) On the merits, both because the issue was not preserved for appeal, and because it was not prejudicial, petitioner has failed to show a prima facie case for relief as to this claim.

7. Petitioner's *Batson* Claim Was Already Considered And Rejected On Appeal

As with most of petitioner's misconduct claims, petitioner's claim that the prosecutor's use of peremptory challenges in striking three African-Americans from the jury and from the alternate pool constituted misconduct was already raised on direct appeal. Therefore, since petitioner has already had this claim ruled upon, it is procedurally barred and not susceptible to habeas corpus review. (*In re Robbins, supra* 18 Cal.4th at 814, fn. 34; see also *In re Waltreus,*

supra, 62 Cal.2d 218, *In re Dixon, supra,* 41 Cal.2d 756.) Petitioner does not offer any explanation why this claim, rejected the first time, is worthy of being considered once more on collateral review. (*In re Clark, supra,* 5 Cal.4th at 825.)

Even if the Court considers this claim on the merits, petitioner has established no prima facie basis for relief. The trial court, ruling on petitioner's initial claim of the prosecutor's discriminatory misuse of peremptory challenges, found that no prima facie case under *Wheeler* or *Batson* had been made. (*Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.) Though not required to, the prosecutor volunteered explanations for excluding the prospective African-American jurors. On direct appeal, based on the record fact that three African-American jurors and two African-American alternates were seated at the time of the ruling and that the prosecution had used only three of its eleven peremptory challenges on African-American prospective jurors, this Court affirmed the trial court's ruling that petitioner had failed to make a prima facie showing of *Wheeler/Batson* error. This court further held that even if a prima facie showing of discrimination had been made, "the race-neutral explanations proffered by the prosecutor appear plausible and supported by the record." *People v. Welch, supra* 20 Cal.4th at 746.) Given that petitioner asserts nothing new in support of this claim, the claim provides no basis for relief.

8. The Claim Of Suppression Of Material Evidence At The Guilt Phase Does Not Support A Claim Of Relief From The Penalty Either

Petitioner realleges his claim of witness inducements and witness coaching to assert prejudice at the penalty phase because the same jurors who

heard the guilt phase evidence determined penalty. Respondent disputes the facts, but what matters at this stage is that this inflammatory allegation fails to state a claim supporting relief from the penalty. This claim is nonmeritorious because it fails to state a claim upon which relief can be based. The evidence of which petitioner complains he was deprived, if it existed, would be either immaterial under *Brady* or non-prejudicial under a prosecutorial misconduct standard because every fact to which the Mabreys testified was confirmed or corroborated either by petitioner himself (he acknowledged he threw a liquid in Barbara Mabrey's face, forcibly took Dellane and her children away from the Mabrey house for a few days, promised the judge who released him on bail that he would not contact the Mabreys, but did so immediately) or by Leslie Morgan, the wounded victim and unchallenged percipient witness to two of the murders and two of the attempted murders. Thus the circumstances of the crime, to be considered by the penalty phase jury, would not have been affected by the revelations petitioner alleges the prosecutor should have made.

9. The Misconduct Allegations Are Barred And Fail To State A Colorable Claim For Relief Whether Considered Singly Or Collectively

Petitioner claims that the purported instances of prosecutorial misconduct in the guilt and penalty phases, as discussed above, even if not considered prejudicial individually, had a cumulative impact which materially affected the verdict.

As discussed above, petitioner has failed to identify any colorable basis for relief. There is, accordingly, no prospect of "cumulative" prejudice. (*People v. Price, supra,* 1 Cal.4th at p. 491.) Petitioner is entitled to a fair trial, not a perfect one, even where, as here, his life is at stake. (*People v. Marshall*

(1990) 50 Cal.3d 907, 945.)

X.

THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ARE PROCEDURALLY BARRED AND FAIL TO STATE A CLAIM FOR RELIEF

Petitioner's claims 19 through 33 allege ineffective assistance of counsel. Petitioner's burden is to prove both performance below an objective standard of reasonable representation and that he was actually prejudiced thereby. The errors must be so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. (*Strickland v. Washington, supra,* 466 U.S. at pp. 687-694.) While ineffective assistance of trial counsel claims are not subject to a procedural bar because they could have been, or were, brought on appeal, the timeliness bar will still apply, particularly where a claim relies primarily or exclusively on the appellate record. (*In re Robbins, supra*, 18 Cal.4th at p. 814, fn. 34.) Many, if not all, of petitioner's ineffective assistance of trial counsel claims are time-barred without justification or excuse.

As presented, petitioner's ineffective assistance of trial counsel claims generally fall into three categories: (1) failures to investigate (claims 18, 21, 22, 23); (2) failures to object or take some action at trial (claims 19, 20, 24, 25, 26); and (3) general strategic failures or cumulative errors at particular phases of the trial (claims 27, 28, 29, 30, 31, 32, 33).

A. Any Failure To Further Investigate Social History, Witness Impeachment Evidence, Conditions Of Confinement, And Mental Health Evidence Was Nonprejudicial

Strickland establishes the standard of review of claims of failure to investigate. Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

(*Strickland v. Washington, supra,* 466 U.S. at pp. 690-691.) The question is not whether counsel could have conducted a more thorough investigation that might have turned up useful information. The question is whether the actions taken by counsel were reasonable under the circumstances. Valid strategic choices may be made without extensive investigation. (See *In re Andrews* (2002) 28 Cal.4th 1234, 1254, citing *Burger v. Kemp* (1987) 483 U.S. 776, 794.)

Trial counsel did investigate and put on evidence of social history. He cross-examined Stacey Mabrey on his run-in with Rita Marie Lewis's relative and on inconsistencies between his testimony at the preliminary hearing, his statement to police, and his trial testimony concerning where he went in the house and what he heard and saw. Counsel additionally investigated and presented mental health evidence, largely over petitioner's strenuous objection, and there was even a hearing on petitioner's conditions of confinement. The question is whether there is a reasonable probability that digging deeper would have made a difference in the outcome of the trial. Even if everything petitioner alleges turns out to be true, the answer to that question is still "no."

This Court's recent opinion rejecting a similar claim, in *In re Scott* (2003) 29 Cal.4th 783, 828, is instructive. There a referee determined that additional research into the defendant's social history would have established, and a trier of fact might have believed, that defendant had a "difficult childhood and troubled family history." This determination was found not to require reversal of the judgment, however, because in light of the particularly egregious circumstances of the crime and defendant's history of brutal sexual violence there existed no reasonable probability the outcome of trial would have been different. The same can be said here, even assuming the accuracy of the social history materials under discussion.

Similarly, although counsel has "no blanket obligation to investigate possible 'mental' defenses, even in a capital case" (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1244), counsel investigated and ultimately put on two mental health experts at the penalty phase. In light of their matching independent conclusions that petitioner's mental health problems did not change the fact that he knew exactly what he was doing when he armed himself, went to the Mabrey home, and massacred the family, it is no wonder that further investigation into defendant's mental health defenses were not pursued. Having mental health professionals hammer home the point, as the current ones do -- that the accused lacks self-control, not the ability to distinguish right from wrong -- is not particularly helpful in a capital defense. Indeed, the opportunities abound for the prosecution on cross-examination to do real damage to the defense-oriented bias that most jurors bring to criminal trials that anyone would have to be, in layman's terms, "crazy," to commit this kind of crime. As was done here, the prosecution was able to show that in clinical terms, what petitioner did was not "crazy," it was antisocial, because he knew it was wrong and he did it anyway.

On the related question of whether further investigation should have been undertaken so as to uncover evidence of petitioner's lack of competence to stand trial, again petitioner has not asserted such an investigation was warranted by the situation apparent to counsel at the time. Petitioner wanted to represent himself, so he was arguing that he was competent, and he resisted the court's order that he be evaluated on the question of competence to represent himself because he thought his lucid, focused, and articulate presentation of motions to the court established his competence to represent himself. Whatever memory problems and diminished math problem solving skills petitioner asserts now, the record clearly shows that at the time of trial he was stunningly effective

in the courtroom at making motions and preserving issues that we lawyers and judges have been debating on appeal, and now on habeas corpus, for years. In that context, a reasonable decision could have been made not to devote further resources to investigating petitioner's competence.

As noted in earlier treatment of this issue, it was also reasonable not to pursue further the issue of Stacey Mabrey's criminal record or inducements to testify. He was a victim, not a coconspirator or a jailhouse informant. Efforts to "dirty him up" would have failed, given that there was no evidence of promises or material inducements. The only solid evidence petitioner offers is that police had insufficient evidence to even consider Stacey Mabrey a suspect in one of the four bank robberies his cousin committed. Feeble attempts to sully a witness with no reason to lie could only have angered the jury. As discussed at length previously, with Leslie Morgan's blood on petitioner's gun, Stacey Mabrey was not the witness whose testimony made the case for first degree murder.

On the question of conditions of confinement, petitioner's own reliance on the trial record establishes that the matter was fully investigated and petitioner's fair trial rights were respected. There were hearings, motions, and rulings on this issue. Petitioner has not asserted any information, uncoverable through further investigation and not before the trial court, that creates a reasonable probability of a different outcome.

B. Counsel's Alleged Failures To Bring Motions Or Voice Objections Did Not Prejudice Petitioner

The second group of assaults on trial counsel's performance concern these alleged failures: to move for a competence determination or psychiatric

examination; to challenge the loss of blood evidence and the hybrid representation; to object to alleged prosecutorial misconduct; and to participate more fully in the voir dire of jurors and object when certain jurors were excused for cause or questioned by the court.

Evaluating the situation at the time, counsel was not prejudicially ineffective in failing to move for a competence determination or a private psychiatric examination as this Court found on appeal. (*People v. Welch, supra*, 20 Cal.4th at p. 743.) As noted, petitioner was resistant to further psychiatric investigations and his performance in court would indicate that lack of competence was not a fruitful path of inquiry. His present ability to consult with his lawyer with a reasonable degree of rational and factual understanding of the proceedings against him was demonstrated every day.

Next, there was considerable testimony on the failure to achieve a quantitative analysis of petitioner's blood and nothing to be gained by pursuing the matter further. Indeed, counsel had the best possible situation, combining some taint on the prosecution for not immediately following up on the performance of the analysis and the freedom to speculate about the quantities of drugs and alcohol that might have been in petitioner's system.

This Court also ruled on the "hybrid" arrangement for counsel, under which "defendant, although represented by counsel, was allowed to make motions pro se each Friday morning," finding it was not an abuse of discretion to permit this arrangement, and that petitioner could not have been prejudiced by it. (*People v. Welch, supra*, 20 Cal.4th at p. 736.) By the same reasoning, defense counsel was not ineffective in failing to object to the court's plan. Defense counsel remained in control of the defense, while a very motivated and articulate defendant was given the opportunity to pursue motions that have

preserved several issues for review. Petitioner's outbursts in court can in no way be attributed to the arrangement. Quite the opposite, since the motion day gave petitioner an outlet for his particular strengths as an advocate and a time to voice his concerns. The court's control over an unusually obstreperous defendant was enhanced by the ability to defer to Friday what petitioner wanted to discuss today.

This court has already found counsel was not prejudicially ineffective for failing to object to various instances of asserted prosecutorial misconduct. As the decision to object or not object is made on the spur of the moment and in context, it is generally motivated by tactical considerations and beyond challenge. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1140.)

Nor was counsel ineffective in his handling of the jury selection issues. This Court has detailed the history of the *Wheeler/Batson* issue and the challenges for cause, finding that no prima facie case was made showing the prosecutor used peremptory challenges on the basis of group bias alone, and finding that the three jurors excused for cause due to their views on the death penalty were properly excused. (*People v. Welch, supra*, 20 Cal.4th at pp. 745-747.) To the extent the petitioner reopens these issues, on the basis of Census numbers and statistical reports that post date the trial by a decade (See Pet. 321), he is spinning his wheels, since counsel's performance is evaluated on the basis of the information he or she actually possessed.

Presently, petitioner asserts that counsel was ineffective for not engaging in additional voir dire on the question of pretrial publicity; on the question of the report, during voir dire, that a prospective juror who did remember vague details of the crime had reminded others of what little she knew; and on individual jurors' views on race. Petitioner relies primarily on the

trial record to address these issues. That record shows that there was extensive voir dire on pretrial publicity and that all prospective jurors were given the opportunity to divulge what they knew about the case and any concerns they had about their ability to be fair.

Since "there is no single way to voir dire a juror" (*Mu'Min v. Virginia* (1991) 500 U.S. ___, 114 L.Ed.2d 495, 522, Kennedy J., dissenting) defense counsel was not constitutionally required to question the prospective jurors about whether they had read information on this case or heard about it from another prospective juror. All that was required was that the court be able to evaluate whether the jurors could be impartial, despite whatever they knew or thought they knew about the case or the defendant. (See *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1314-1316, analyzing *Mu'Min v. Virginia, supra*, 500 U.S. ___, 114 L.Ed.2d at p. 506 [no requirement that court pursue "content" questions to evaluate pretrial publicity].) Counsel did this as voir dire developed sufficient information for the necessary determination. Thus counsel cannot be faulted for failing to insist on more.

C. Counsel's Strategic Decisions Were Reasonable

The final grouping of ineffective assistance claims concerns counsel's performance generally at the main phases of trial. This analysis was done on appeal and need not be revisited here. (*People v. Welch, supra*, 20 Cal.4th at pp. 743, 751-752, 753-755, 763-765.)

XI.

PETITIONER'S JUDICIAL BIAS, MISCONDUCT AND ERROR CLAIMS ARE WAIVED, PROCEDURALLY BARRED AND OTHERWISE WITHOUT MERIT

Petitioner's claims 34-50, alleging judicial bias, misconduct, and error, are waived for failure to raise a contemporaneous objection and barred in their entirety because they either were or could have been raised on direct appeal. Many of the claims involve rulings that were appealed. They simply add the allegation that such a ruling evidenced judicial bias or hostility, even though, with a few exceptions, no judicial bias or hostility objection was raised at the time of the ruling. The claims are untimely, as well, because they are based on the appellate record and should have been raised, if not in the appeal, then in a timely petition for habeas corpus. Finally, however, the claims should be rejected on the merits, and for the same reason any ineffective assistance of counsel excuse for the procedural bars should be rejected, because as alleged they fail to establish a basis for relief from the judgment.

A claim of judicial bias requires a determination of whether the judge officiously and unnecessarily usurped the duties of the prosecutor and created the impression he was allying himself with the prosecution. (*People v. Clark* (1992) 3 Cal.4th 41, 143.) A court hearing a judicial bias challenge will presume the honesty and integrity of the court. (*Withrow v. Larkin* (1975) 421 U.S. 35, 47.) The United States Supreme Court has addressed the judicial bias issue with clarity, noting that:

> judicial rulings alone almost never constitute valid basis for a bias or partiality motion. See *United States v. Grinnell* Corp. [(1966)] 384 U.S. 563, 583 []. In and of themselves (i.e. apart from surrounding comments or accompanying opinion) they cannot possibly show

> reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinion formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. An example of the latter (and perhaps of the former as well) is the statement that was challenged to have been made by the district Judge in *Berger v. United States* [(1921)] 255 U.S. 22, 41 [], a World War I espionage case against German-American defendants: "One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans because their 'hearts are reeking with disloyalty.'" *Id.* at [p.] 28. Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration – even a stern and short-tempered judge's ordinary efforts at courtroom administration – remain immune.

(*Liteky v. United States* (1994) 510 U.S. 540, 555-556; See also *People v. Boyette* (2002) 29 Cal.4th 381, 460-461 [no judicial misconduct where jury understood court's comment to point out actual gap in testimony; if no misconduct, then no violation of right to fair trial or reliable penalty determination].)

A. The Judicial Bias, Misconduct, And Error Claims Are Waived

A claim of judicial hostility requires a specific objection in the trial court to provide the judge with an opportunity to dispel any misunderstanding with an appropriate admonition to the jury. (*People v. Wright* (1990) 52 Cal.3d 367, 411; *People v. Fudge* (1994) 7 Cal.4th 1075, 1107-1109.) Otherwise the claim is not preserved for review. There were in this case, pre-trial motions to disqualify the judge, which were denied, and objections by petitioner personally, in the form of outbursts, accusing the judge of being "in [the prosecutor's] pocket and stuff"(RT 5727) or "injecting these hostilities towards me." (RT 2404-2408.) While counsel did not adopt petitioner's emotional position that the court was biased or hostile, these outbursts and others did provide the court an opportunity to explain to the jury what their job was, how they should not be affected by petitioner's behavior, and that it was petitioner's actions in court that necessitated his removal, much to the regret of the court. The present claims have been waived for failure to preserve them by a contemporaneous objection at trial, by counsel. Alternatively, to the extent the claims have been preserved, they were cured by the admonition to the jurors that their province is to determine the facts and apply the law and that nothing the court has said or done should be interpreted as indicating a particular view of the facts. (RT 5574, 5581.)

B. The Judicial Bias, Misconduct, Or Error Claims Are Procedurally Barred And Fail To Support A Claim For Relief

Petitioner's claims 34 through 54 all allege that a particular action or failure to act on the part of the trial court evidenced judicial bias or hostility. They are based on the trial record. Specifically, claim 34 alleges that the trial

court failed to punish the prosecutor or admonish the jurors concerning a violation of the gag order after the guilt phase but before the commencement of the penalty phase, refused to send petitioner to a non-jail medical facility when petitioner initiated a fight with Sheriff's deputies and had to be subdued on his way to court, and did not conduct a hearing about a rumored jailhouse informant who was alleged to have attempted to contact the victims' family. Each of these matters was addressed on the record. The jury was admonished from the first day to completely avoid news accounts of the trial, radio, television, and print. (RT 3883.) Petitioner identifies six times when there was no specific reminder at the end of the day of the admonition in the course of a lengthy trial, but this is not evidence that the admonition had been relaxed. Petitioner's request for non-jail medical attention was specifically addressed on the record when the court denied the request to go to a specific hospital for security reasons, but immediately arranged for petitioner to see the doctor at the jail. (RT 3707.) The question of the alleged informant was being investigated by the Sheriff at the time petitioner requested a hearing on it. What the trial court did was deny a hearing without prejudice, pending the outcome of the investigation. No further mention of the hearing was made by either side, suggesting the matter was resolved to everyone's satisfaction by the Sheriff.

Claim 35 alleges that the court's jury instruction on inconsistent statements by a witness evidenced bias. The court explained that testimony that a witness no longer remembers an incident is inconsistent with prior testimony regarding the details and noted that Willie Henderson would be a witness to whom the instruction might apply. There was no objection. That Henderson was used as an example (an apt one, by the way), did not restrict the lack of memory instruction to that witness alone. Moreover, that the lack of memory

instruction followed the inconsistent statement instruction in no way limited the inconsistent statement instruction to only the one "forgetful" witness. (RT 5578.)

Claim 36 alleges judicial bias is demonstrated by the trial court's denial of petitioner's right to allocution. This is a red herring, completely derived from the trial record. Petitioner was twice offered the opportunity to testify or address the court at the penalty phase. Despite being fully aware when the defense case would be drawing to a close, he insisted that the trial court give him a continuance to decide whether to testify or not. What the court denied was a 24-hour stall in the jury proceedings, after the defense had rested, not the right to allocution. When the proceedings picked up the next morning, the court again gave petitioner the opportunity to testify, but again petitioner protested that he had not made up his mind and would not do so on the spot. (RT 6106-6108.) Had petitioner, at either juncture, asserted his right to testify, he had the opportunity to do so. By twice stating he had not yet decided to testify, he was declining the twice-offered opportunity. As this Court has noted, "[w]hen the record fails to disclose a timely and adequate demand to testify, 'a defendant may not await the outcome of the trial and then seek reversal based on his claim that despite expressing to counsel his desire to testify, he was deprived of that opportunity.' (*People v. Hayes* (1991) 229 Cal.App.3d 1226, 1231-1232; *People v. Guillen* (1974) 37 Cal.App.3d 976, 984-985.)" *(People v. Alcala* (1992) 4 Cal.4th 742, 805-806.) Here there was no demand to testify at the penalty phase, only a demand for more time to think about it.

Claim 37 asserts petitioner was deprived of the opportunity to review his probation report. Petitioner does not here allege that counsel were unable to review the probation report, nor does he allege that the probation report was

delayed or contained any errors, nor does he allege that counsel were prohibited from raising any objections to the probation report. Unanimous agreement on the sentence of death had been reached by the jury following a long and thorough guilt phase and penalty phase. The trial court had been present and attentive throughout the proceedings. It is inconceivable that anything in this probation report, which merely summarizes information presented at the guilt phase, could have influenced the court's ruling on the reconsideration motion or the pronouncement of the sentence fixed by the jury. The appellate opinion in this case is generally cited for the proposition that the court is bound to consider only the evidence that was before the jury in ruling on the automatic motion for modification of the death penalty. Thus this Court has already found: "In the present case, there was nothing more than a passing reference to the probation report. The trial court otherwise focused on the evidence presented at trial, carefully assessing such evidence in reaching its ruling to deny defendant's motion. There is no indication that it was influenced by irrelevant matters." (*People v. Welch, supra*, 20 Cal.4th at p. 775.) If the trial court properly did not consider the probation report, the denial of the request for a continuance to permit petitioner to review the probation report cannot have been prejudicial error.

Claim 38 alleges the trial court demonstrated bias by failing to control juror access to media and trial publicity. Petitioner's specific allegation is that there were some nights during this lengthy trial when the court did not readmonish the jury to avoid media reports of the trial. Petitioner relies on the trial record to show there was media coverage of the trial and that there were adjournments that were not concluded with the media-avoidance admonition. However he does not here allege that any particular media report reached the

jury or that any report that reached the jury contained prejudicial information. This claim on the trial court's failure to repeat the admonishments could have been raised on appeal. That it was not so raised is merely a reflection of its lack of merit. The jury was given the admonition so directly that it is inconceivable the jurors were not aware of their duty to avoid being influenced by media accounts. (See RT 3883-3844, 4031.) Moreover, the jurors were instructed when they began deliberations each time (guilt phase and penalty phase) that they were only to consider the evidence presented in court. (RT 3866.) The combination of admonishments to avoid media reports and instructions to ignore any reports that might have been heard would remove any possibility of prejudice, had there been any prejudice alleged.

Claim 39 alleges judicial bias in permitting petitioner to exercise his absolute right to testify at the guilt phase, despite the recognition of counsel that this was not in petitioner's best interests, and despite the denial of the Faretta motion to represent himself, and in ruling on evidentiary questions. The claim is based upon the record and could have been addressed on appeal, had it been preserved, and had it been at all meritorious. Once petitioner expressed his decision to testify at the guilt phase, neither counsel nor the court could deny him this personal right. (*People v. Robles* (1970) 2 Cal.3d 205, 214-215.) This Court has already found there was no substantial evidence of incompetence to stand trial (*People v. Welch, supra*, 20 Cal.4th at p. 740), so petitioner's fanciful assertion that the trial court exhibited bias by forcing an incompetent to take the stand fails to support a claim for relief. Finally, the trial court's evidentiary ruling to limit examination of a defense witness to matters relevant to the issues in dispute, and not more unduly prejudicial than probative of those issues, was neither an abuse of discretion nor evidence of bias. Specifically, the trial court

ruled irrelevant and found more prejudicial than probative evidence whether a particular defense witness, or anyone else, had used drugs at the Mabrey house on a separate occasion. (RT 5253.) The People's objection to this line of questioning was properly sustained. (Evid. Code, §§ 350, 352; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124 [trial court's broad discretion under Evid. Code, § 352 to exclude evidence if probative value outweighs undue prejudice, confusion or consumption of time]; *People v. Dyer* (1988) 45 Cal.3d 26, 73 [same].) Had the issue been preserved, it would have been properly raised and rejected on appeal. It is not cognizable on petition for writ of habeas corpus.

Claim 40 asserts judicial bias was demonstrated when the trial court "failed to adequately voir dire jurors who had been exposed to extrinsic evidence" and "curtailed voir dire of prospective jurors, preventing petitioner from ascertaining bias." (Pet. 412-413.) What the record reveals, however, is that the prospective jurors were questioned at length on voir dire about their exposure to information about the case and their ability to make a determination based only on the facts presented at trial. No curtailment of voir dire occurred.

The basis for petitioner's claim is that voir dire revealed that one prospective juror in panel one and one prospective juror in panel two had their memories jogged about very rudimentary information on the case (the panel one prospective juror remembered that it was a home invasion murder using an Uzi and the mother escaped; the panel two prospective juror recalled that six people were killed in East Oakland in 1987) by another prospective juror in their panel. (RT 1294-1295; 2837.) What petitioner is complaining about here is the court's denial of a request to reopen voir dire of prospective jurors already questioned at length, on counsel's speculation that some additional prospective juror's

might have been exposed to the potential jurors who were doing the reminding.

The key here is that these were prospective jurors who were in the very process of being questioned on voir dire about their exposure to information about the case at the time petitioner asserts they might have had their memories jogged about the most basic facts of the case. Had they been so reminded by another prospective juror, they would have revealed what they remembered at voir dire, as did the two jurors who spoke up. That is precisely what these panels were being questioned about. In addition, there is neither evidence nor claim that any prospective jurors were exposed to any information that departed from or expanded upon what was revealed to them in the course of voir dire, much less trial. Thus the trial court was well within its discretion to deny the request to reopen voir dire and no evidence of bias is presented. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1353; *People v. Rowland* (1992) 4 Cal.4th 238, 268.)

Claim 41 alleges that the trial court evidenced bias by way of "disparaging comments on petitioner's character and conduct." Specifically, petitioner asserts five incidents when the jury was not present: (1) The trial court commented "It is merely another attempt by Mr. Welch to deliberately not cooperate, to stop the proceeding." (RT 193.) (2) The trial court responded to petitioner's assertion he was incompetent by stating, "No, I feel you're competent. I think you're deliberately attempting to thwart the trial. I think you're competent as can be. You're engaging in fraud and charade in an attempt to stop the trial." (RT 1949-1950.) (3) The trial court responded testily to petitioner's assertion of racial bias. (RT 2216.) (4) The trial court responded to petitioner's assertion that he had been incompetent the previous day by disagreeing, "No, you are just vicious and mean and causing trouble." (RT

3724.) (5) The trial court rejected petitioner's follow-up request for a psychiatric evaluation on the basis he was upset, stating "I believe that you're deliberately trying to continue the case and stall it" (RT 3728) and "you're competent, cunning and wily." (RT 3729.)

He also asserts that bias was demonstrated during two incidents when the jury was present: (1) The trial court, in front of the jury, noted for the record that petitioner was yelling, admonished petitioner not to "blurt out," and explained to the jury, after petitioner had to be removed, that petitioner would have to agree to behave and follow the rules if he wanted to return for the afternoon session. (RT 4583-4593.) (2) The trial court instructed the jury during the guilt phase that "we have seen Mr. Welch absent himself from the court. I want you to understand that we wanted him in court. We set down certain rules. He refused to obey them, and I know that is upsetting to you. It's, in candor, upsetting to me." (RT 5572.)

These matters arise from the record and, if preserved, could have been raised on appeal, had there been any merit to the assertion of bias. However, all are examples of a remarkably patient trial court dealing with a particularly obstreperous and cunning defendant, who was determined at every turn to inject error into the proceedings. The comments to petitioner restored order to the courtroom by conveying to petitioner that the court was aware of his manipulations and not willing to play along. The explanations to the jury, in context, preserved the record and dispelled petitioner's insinuations of bias by showing the efforts the trial court had made to allow petitioner to stay and that the trial court would have preferred that a way be found to keep petitioner in the courtroom, if possible, consistent with the need to maintain order. In petitioner's case the truth hurts, for indeed he was making every effort to derail

the trial. The court's efforts to keep the trial on track were remarkably restrained, given the tenor of petitioner's provocations. These were the "ordinary efforts at courtroom administration" found in *Liteky v. United States* to be "immune." (510 U.S. at p. 556.)

Claim 42 asserts the trial judge committed misconduct when he became unavailable for one Friday of guilt phase deliberations, made another judge available to monitor the deliberations, but indicated to the jurors that questions about jury instructions might have to wait until his return. There is no assertion the jury had any questions of any sort during the partial day they continued deliberations. Had they had a question the bailiff would have conveyed it, and if the court could not answer it, they would have been excused for the day to return on Monday. We know this because the jury's only interaction with the substitute judge occurred as a result of the jury's request to be excused early, which was promptly granted with a standard admonition not to resume deliberations until all were present on Monday. (RT 5647.)

If the judge must be absent during deliberations, the logical options are adjournment or continuation of deliberations with a substitute judge on call. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1162 [counsel chose adjournment, waiving error]; *People v. Santamaria* (1991) 229 Cal.App.3d 269, 277 [error to suspend capital jury deliberations without a showing of effort to appoint a substitute judge to monitor jury deliberations].) Petitioner fails to establish abuse of discretion, much less judicial misconduct, in making arrangements for the jury to continue deliberations, uninterrupted, for the part of the day the jury wanted to continue deliberating, but the court was unavailable.

Next, in claim 43, petitioner asserts judicial misconduct in refusing to

read back the entire testimony of prosecution witness Angela Payton in response to a jury request for a particular statement she testified was made by petitioner. The jury first requested a read back of Payton's statement to a District Attorney employee. That was done, but prompted a further request from the jury for the Payton testimony about petitioner's statement. The prosecutor offered to identify the portion of the Payton testimony dealing with petitioner's statement, but petitioner did not want the prosecutor involved in limiting the read back to the jury. Thus the entire eleven pages of Payton's direct testimony were read back to the jury, without being narrowed by the prosecution. After the read back of direct examination, the jurors were offered Payton's cross-examination testimony, but stated their question had been answered. Petitioner now asserts it was judicial error not to force the jury to sit through cross-examination testimony they had not requested be read back, and did not need to hear again, because petitioner believes he scored some impeachment points during cross-examination of Payton. However, petitioner fails to support a claim of error, much less judicial misconduct. The court responded precisely to the jury's request. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1027-1028 [not prejudicial error to fail to notify counsel, where jury requested specific testimony, declined offer of cross-examination]; *People v. Neufer* (1994) 30 Cal.App.4th 244, 251 fn.4 [cross-examination would not have been included in read back, even if requested, since it did not respond to jury's request].)

Claim 44 raises an issue already addressed on appeal, the trial court's ruling on the automatic motion for modification of sentence, pursuant to Penal Code section 190.4. Specifically, he asserts the trial court improperly considered the probation officer's report. This issue was resolved on appeal and may not be revisited here. This Court found "there was nothing more than a

passing reference to the probation report. The trial court otherwise focused on the evidence presented at trial, carefully assessing such evidence in reaching its ruling to deny defendant's motion. There is no indication that it was influence by irrelevant matters." (*People v. Welch, supra*, 20 Cal.4th at p. 775.) This finding refutes the allegation of trial court error. Absent an error, there was no deprivation of any of the constitutional rights petitioner invokes.

Likewise, the response to claim 45 is found within the record and this Courts opinion on direct appeal. Petitioner asserts, as he did on appeal, that the trial court did not properly re-weigh the aggravating and mitigating circumstances, mistakenly considered the absence of "extreme mental or emotional disturbance" as set forth in Penal Code section 190.3, factor (d), to be an aggravating circumstance, and discounted evidence of intoxication at the time the crimes were committed. "The record shows, however, the trial court did not consider the absence of extreme mental disturbance to be an aggravating circumstance, but was merely explaining why it believed this factor was not present in this case to mitigate his culpability. It was also within its discretion in concluding that the evidence did not support his claim that his actions were greatly influenced by drug or alcohol intoxication." (*People v. Welch, supra*, 20 Cal.4th at p. 775.) Given there was no error in denying the motion to modify the verdict, there was no violation of any of the constitutional rights petitioner now invokes.

Petitioner also asserts he was prejudiced by being shackled when he was transported to and from court, even though he was not shackled in court. Claim 46 asserts one or more jury members saw petitioner in shackles when he was being transported and that this fact establishes prejudicial judicial misconduct because efforts could have been made to lead petitioner into court

at a time when all possibility of being seen by a juror was eliminated. Petitioner assaulted several deputy sheriffs during the course of this trial and has a lengthy history of such assaults, some of which have had career-ending physical consequences for the officers. Petitioner does not even suggest he should have been transported unshackled. The record demonstrates that every effort was made to have defendant unshackled and present in court when the jury entered. If, by accident, one or more jury members observed the defendant in restraints, it must be assumed that this was passed off as a necessary part of jail administration and not any particularly prejudicial comment on petitioner. Given some of petitioner's outbursts and the violence of the crimes with which he was charged, it is not unreasonable to assume the jury was comforted by knowing there were adequate security measures in place. Certainly the trial court could have justified in-court shackling, as the standards were met in this case:

> Defendant recognizes that recent cases of this court have upheld shackling in similar situations involving defendants who have a prior record of violence or who have displayed violent behavior in the courtroom. (E.g., *People v. Sheldon* (1989) 48 Cal.3d 935, 945-946; *People v. Hamilton* (1985) 41 Cal.3d 408, 423-424.) Based on our holdings in those cases, we find no abuse of discretion here, where the record on its face demonstrated a manifest need to shackle defendant following his violent behavior.

(*People v. Medina* (1990) 51 Cal.3d 870, 897.) Petitioner had overturned a chair, sworn at the court, attacked jail personnel, urinated in the jury well, and uttered threats. That he was glimpsed in shackles during transportation is unfortunate, but hardly prejudicial in light of the ample justification for shackling him in court.

Claim 47 asserts judicial error in denying petitioner mental health experts at the guilt phase. This is another version of the issue, raised on appeal,

that the trial court should have ordered a competency evaluation. However, petitioner had two defense mental health experts on his team and refused to cooperate with the court's experts, so the court cannot be faulted for failing to force mental health experts on a defendant who did not want them. Petitioner's requests to be treated at a hospital, rather than the jail, after he fought with jail personnel and had to be subdued was rejected as the deliberate stalling tactic it was. With medical and mental health care available at the jail, the court did not abuse discretion by offering petitioner any care he needed at the jail, rather than endangering the public by ordering him transported to a public facility. Moreover, as this Court found on appeal, there was no substantial evidence of incompetence, so the need to appoint further experts and conduct a hearing on competence was never triggered. (*People v. Welch, supra*, 20 Cal.4th at p. 741.) This issue was thoroughly dealt with on appeal and is not cognizable on habeas corpus.

Claim 48 raises the identical claim with respect to the penalty phase. Petitioner's counsel put on a mental health defense at the penalty phase, over petitioner's objection. He was certainly not denied experts at the penalty phase by any action of the trial court, so no claim of judicial error is supported.

Claim 49 charges the trial court with judicial error for explaining petitioner's absence from court during voir dire in terms of his "choosing" to absent himself and in being too candid with the jury about petitioner's opportunity to obey the rules and return to court. (RT 1917-1918, 3881-3883.) These assertions are based on the record and could have been raised on appeal. That they were not so raised reflects their lack of merit, not the ineffectiveness of counsel. "The court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the

proper determination of the cause." (Cal. Const., art VI, § 10.) The evidence includes the demeanor and behavior of the defendant in court. As this Court noted:

> "'[J]udicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power. [Citations.]' (*People v. Rodriguez* (1986) 42 Cal.3d, 730, 766; *People v. Gates* (1987) 43 Cal.3d 1168, 1207.)"

(*People v. Proctor* (1992) 4 Cal.4th 499, 542.) A trial court has broad latitude in commenting upon the evidence. Commenting upon specific evidence is permissible, such as a comment on the defendant's credibility, so long as there is no direct comment on guilt or innocence. (*People v. Proctor, supra*, 4 Cal.4th at pp. 542-543.) Here the comment is well within constitutional bounds.

The trial court was well within its discretion to explain petitioner's absences in terms of volition, especially since petitioner acted out and absented himself in full view of the jury. (RT 3876, 4583.) To the extent petitioner was accusing the court of bigotry and "judicial hostilities" (see, for example, RT 1948, 2404-2408), the court was entitled to explain that it "would be delighted to have him [return to the proceedings]," whenever petitioner agreed to obey the rules of courtroom behavior. (RT 1917-1918.) Petitioner is particularly concerned that some of the conduct to which the court alluded, when explaining to the jury, took place out of the presence of the jury. However, the court was entitled to explain that it was an ongoing problem that required the patience and understanding of the jury. The court was entitled to explain the need to maintain order in the court, and not have a defendant speaking over the top of the court and counsel. (RT 3881-3883.) Moreover, to the extent any jurors might have

thought the court was just pestering a defendant who really did not want to attend the trial, by calling him in at every recess and assessing his mood and cooperativeness, the court was entitled to explain that it was protecting the defendant's rights to presence and giving him every opportunity to rejoin the trial when he was ready. Not having commented directly on guilt or innocence, the trial court did not err.

Claim 50 returns to the issue of petitioner's presence, asserting the trial court was responsible for petitioner's lack of presence, which itself established a violation of due process, a fair trial, the right to confront and cross-examine witnesses, an impartial judge and jury, and reliable proceedings. These claims were specifically addressed on appeal and are not cognizable here. As this Court ruled, "Our review of the record reveals quite plainly a defendant who was persistently disruptive. We find the trial court did not abuse its discretion by either ordering defendant's removal or consenting to his absence for the sake of maintaining order in the courtroom." (*People v. Welch, supra*, 20 Cal.4th at p. 774.)

Petitioner's claim 51 alleges judicial error in communicating with the attorneys on an ex parte basis. Petitioner alleges that attorneys on this and other causes routinely gathered in Judge Golde's chambers for coffee before court and to unwind after court and that the case was discussed outside the presence of the defendant. Petitioner does not actually support an allegation there were ex parte contacts with the prosecutor alone. Defense counsel's declaration asserts only that defense counsel met with the judge and would be surprised if the prosecutor had not done so as well. (Pet. Exh. 30.) This assumption is not direct evidence supporting a claim and must be ignored. Moreover, allegations that "the case" was discussed when the attorneys entered chambers without petitioner, does not

necessarily imply anything improper, since matters of scheduling and administration relate to the "case," but are appropriately discussed informally with the court or court personnel. (See *Blum v. Republic Bank* (1999) 73 Cal.App.4th 245, 248-249 [not a sanctionable ex parte contact to communicate with court clerk, out of the presence of opposing counsel, about setting a date for a status conference].) Such informal contacts promote the order and efficiency of the court calendar without violating the rights of defendants, since substantive matters are not discussed.

Petitioner has failed to present a factually supported claim of any constitutional violation involving informal contacts with the trial judge or court personnel.

Petitioner's claims 52 through 56 are taken directly from the opening brief, rely solely on the trial record, and are not cognizable on habeas corpus. The jury selection issues, alleging that the trial court erred in excusing four prospective jurors who, petitioner claims, were not solidly against the death penalty, while rehabilitating other jurors who were solidly in favor of the death penalty. As this Court noted, "'[a] prospective juror may be excused for cause if his or her views on capital punishment would "'prevent or substantially impair the performance of his [or her] duties as a juror. . . .'"[Citations] Where a prospective juror's responses are equivocal or conflicting, the trial court's assessment of the juror's state of mind is generally binding. Where there is no inconsistency, but simply a question whether the juror's responses demonstrated a bias for or against the death penalty, the trial court's judgment will not be set aside if it is supported by substantial evidence.' (*People v. Wash* (1993) 6 Cal.4th 215, 254.)" (*People v. Welch, supra*, 20 Cal.4th at pp. 746-747.) This Court specifically analyzed the questioning of prospective jurors Gilens, Gruber,

and Brown, and found no error. The analysis need not be repeated here. The same analysis supports the excuse of juror Grady.

Petitioner's companion claim that the court erred by rehabilitating jurors in favor of the death penalty, is not supported factually or legally. If all the potential jurors who would never vote to impose the death penalty are properly disqualified, in theory, all the remaining prospective jurors are at least willing to consider imposition of the death penalty. The challenge on voir dire is to determine who can be fair and the trial court has considerable latitude in questioning these potential jurors about their views. The appellate courts "will uphold any method of voir dire which results in reasonable examination of prospective jurors." (*People v. Crowe* (1973) 8 Cal.3d 815, 821; *Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1178.) Petitioner has not alleged the court engaged in questioning that exceeded the scope of reasonable examination.

The denial of the change of venue motion was also raised and addressed on appeal. The issue is not cognizable on habeas corpus. *(Ex parte Wright* (1897) 119 Cal. 401, 402; *In re Coon* (1941) 44 Cal.App.2d 531, 534.) This court has already determined on this same record that the motions for change of venue were properly denied. This Court stated the law as follows:

> A change of venue must be granted when the defendant shows a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. "Whether raised on petition for writ of mandate or on appeal from a judgment of conviction, 'the reviewing court must independently examine the record and determine de novo whether a fair trial is or was obtainable.' " (*People v. Douglas* (1990) 50 Cal.3d 468, 495.) "The de novo standard of review applies to our consideration of the five relevant factors: (1) nature and gravity of the offense; (2) nature and extent of the media coverage; (3) size of the community; (4) community status of the defendant; and (5) prominence of the victim." (*People v. Sully* (1991) 53 Cal.3d 1195,

1236-1237.)

(*People v. Welch, supra*, 20 Cal.4th at p. 744.) Finding the first factor weighed in favor of a change of venue, but none of the others did, this Court observed: "The voir dire process confirmed what the above factors suggest: that in a county as large and diverse as Alameda County, it was feasible to obtain an unbiased jury and a fair trial despite the pretrial publicity the crime received." (*Id.*, at p. 745.)

Claim 54 addresses the assertion, raised and resolved on appeal, that seven bench conferences had to be reconstructed through record settlement proceedings because the trial court erred in not holding every conference on the record. This issue is not cognizable on petition for writ of habeas corpus. As this Court noted on appeal, "absent a showing of prejudice, these omissions are not the basis for a reversal of a conviction." (*People v. Welch, supra*, 20 Cal.4th at p. 774, citing *People v. Holt* (1997) 15 Cal.4th 619, 708.) The record as settled is adequate to insure the death penalty has not been arbitrarily imposed. (*Furman v. Georgia* (1972) 408 U.S. 238.)

XII.

NEITHER THE CLAIM OF INSUFFICIENCY OF THE EVIDENCE NOR THE CLAIMS OF INSTRUCTIONAL ERROR ARE COGNIZABLE ON PETITION FOR WRIT OF HABEAS CORPUS

Petitioner raises a series of claims that were raised on appeal and are not cognizable on habeas corpus. Insufficiency of the evidence of deliberation and premeditation, raised in claim 55, is a classic example of an issue that cannot be raised in this forum. (*In re Lindley* (1947) 29 Cal.2 709, 723; *In re Adams* (1975) 14 Cal.3d 629, 635.) The identical issue was resolved on appeal. (*People v. Welch, supra,* 20 Cal.4th at p. 758-759.)

Petitioner's instructional issues, likewise, were raised and resolved on appeal. Claim 56 on the murder instructions is lifted almost verbatim from the opening brief on appeal (compare AOB pp. 76-84 with Pet. 533-538), and was resolved in this Court's opinion. (*People v. Welch, supra*, 20 Cal.4th at pp. 755-756.)

Claim 57 is based on a misreading of the court's instruction concerning petitioner's disruptive behavior. Petitioner states he was prejudiced because the trial court instructed the jury it found his conduct during trial upsetting, when what the court found upsetting was having to remove petitioner from the courtroom in order to preserve his right to a fair trial. (RT 5572.) It is also repetitive of claim 41 and suffers from the same fatal flaws. A court's instructions or comments on the evidence, including that portion of the evidence that arises from the defendant's presence or absence from the courtroom, do not violate the constitution unless they usurp the role of the jury. Since none of these instructions directed the jury to find a particular way on the question of guilt or innocence, they are not constitutionally suspect.

Petitioner reiterates claim 58, that the trial court erred in instructing the penalty phase jury that it should accept as being conclusively proven that defendant had been convicted of three prior felonies. The trial court also instructed the jury that any "factor in aggravation must be proven beyond a reasonable doubt." This latter instruction was overly generous to petitioner, since it is only unadjudicated violent criminal activity which must be proved beyond a reasonable doubt. (*People v. Welch, supra*, 20 Cal.4th at p. 766, citing *People v. Samayoa* (1997) 15 Cal.4th 795, 862.) Petitioner contends the jury would have been confused by the two instructions so as to believe that the conduct underlying the felony convictions had been conclusively proved, rather than the fact of conviction. Such instructional ambiguities trigger an inquiry into "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." (*People v Frye* (1988) 18 Cal.4th 894, 957; *Estelle v. McGuire* (1991) 502 U.S. 62.) This Court has already determined there was no reasonable likelihood that the jury would have misunderstood to defendant's detriment the scope of this reasonable doubt instruction. (*People v. Welch, supra*, 20 Cal.4th at p. 766.)

Claim 59 reasserts petitioner's theory that because the penalty phase jury was instructed that all twelve must agree on the choice of penalty (RT 6220), the jury was prevented from finding evidence to be mitigating unless the jury unanimously agreed it was mitigating. (See *Mills v. Maryland* (1988) 486 U.S. 367.) This argument mixes apples and oranges. As this Court noted in sorting out the issue on appeal, "nothing in the standard California jury instructions 'suggests that any particular number of jurors was required to find a mitigating circumstance. The only requirement of unanimity was for the verdict itself.'" (*People v. Welch, supra*, 20 Cal.4th at p. 769, citing *People v.*

Breaux (1991) 1 Cal.4th 281, 315.) Given the clear instructions on the need to individually weigh aggravating and mitigating factors, this Court has repeatedly found little likelihood of the jury's reading into the instructions a requirement that they agree unanimously on any circumstance or evidence before finding it mitigating. (*People v. Welch, supra*, 20 Cal.4th at p. 769.)

Petitioner next contends, as he could have done on appeal, had he preserved the issue at trial, that a slip of the tongue in giving the circumstantial evidence instruction at the penalty phase hopelessly confused the jury. The instruction as reported by the court reporter informed the jury of their duty to adopt that interpretation of circumstantial evidence "which points to untruth, reject that pointing to truth." The written instructions were correct. If the court misspoke, it was an obvious error and we can assume the jury heard what the court meant or checked the written instructions and set themselves straight. Nothing about the instruction rendered any other part of the instructions unclear, it just would have been an oddity. As this Court has noted frequently, "misreading instructions is at most harmless error when the written instructions received by the jury are correct." (*People v. Box* (2000) 23 Cal.4th 1153,1212; *People v. Osband* (1996) 13 Cal.4th 622, 687.)

Petitioner faults the court, in claim 61, for its shorthand references to aggravating evidence as "bad" evidence about the defendant and mitigating evidence as "good" evidence about the defendant in pre-instructions and voir dire. Petitioner acknowledges, however, that the jury was properly instructed at the close of the penalty phase. Thus there cannot possibly be any harm from the use of the shorthand reference.

Claim 62 is another claim that was raised and resolved on direct appeal and cannot be revived here. Petitioner asserts that CALJIC No. 8.85 misled the

jury to double count the circumstances of the crime that were also special circumstances, unbalancing the relationship between aggravating factors and factors in mitigation, and obliging the trial court to give a sua sponte instruction to head off the double counting. As noted in this Court's appellate opinion, "We have repeatedly rejected claims of reversible error in this regard where the defense did not request an instruction against double counting, and there was no misleading argument by the prosecutor suggesting the same facts should be weighed twice, once under each rubric." (*People v. Welch, supra*, 20 Cal.4th at p. 769.)

Turning to claims 63 and 64, both were raised in the appeal and addressed in this Court's opinion, and thus are completely barred on habeas corpus. Petitioner asserts in claim 63 that the trial court erred in failing to instruct the jury sua sponte that he was presumed innocent of the unadjudicated criminal activity. The trial court did instruct that before it could consider any unadjudicated violent criminal activity as an aggravating circumstance it had to be satisfied "beyond a reasonable doubt" that defendant did, in fact, commit such criminal activity. This Court has repeatedly held that the giving of the instruction on the reasonable doubt standard is all that is required. (*People v. Welch, supra*, 20 Cal.4th at p. 768, citing *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1090-1091.)

The similar complaint regarding a failure to instruct regarding nonviolent criminal activity, raised here in claim 64, was rejected on appeal. Specifically this Court found no obligation to instruct the jury it could not consider as aggravating factors any unadjudicated criminal activity not involving violence. The jury was given a complete list of acceptable aggravating factors. That list included unadjudicated violent criminal activity,

but not unadjudicated nonviolent activity. Thus there was no substantial likelihood that the jurors would believe they could consider both. It follows that there is no error, and no prejudice, and thus no constitutional violation. (*People v. Welch, supra*, 20 Cal.4th at p. 770, citing *Beck v. Alabama* (1980) 447 U.S. 625, 643.)

Petitioner asserts in claim 65 the trial court failed to instruct at the penalty phase on a "presumption of life" analogous to the guilt phase presumption of innocence. First, he never requested such an instruction, so the issue is waived. Second, he borrows this idea from *People v. Arias* (1996) 13 Cal.4th 92, 190, which soundly rejects the issue:

> If a death penalty law properly limits death eligibility by requiring the finding of at least one aggravating circumstance beyond murder itself, the state may otherwise structure the penalty determination as it sees fit, so long as it satisfies the requirement of individualized sentencing by allowing the jury to consider all relevant mitigating evidence. [Citations.]

(*People v. Arias, supra*, 13 Cal.4th at p. 190 [California death penalty law not constitutionally deficient for failing to require a presumption of life without the possibility of parole].)

Petitioner's cumulative error arguments, claims 66 (motion to modify verdict) and 67 (judicial error claims), fare no better than his individual arguments. There being no error, and certainly no prejudicial error, there is nothing to cumulate. (See *People v. Welch, supra*, 20 Cal.4th at p. 775 [rejecting cumulative error argument for same errors asserted on direct appeal].) Thus there is no preserved colorable claim of prejudice, whether any potential errors are considered individually or in the aggregate.

XIII.

APPELLATE COUNSEL PROVIDED EFFECTIVE ASSISTANCE

Petitioner's next set of claims concerns the effective representation of appellate counsel. He claims first that appellate counsel provided ineffective assistance by failing to raise on appeal claims which are now procedurally barred on account of that failure. We have largely addressed these claims in connection with the assertion of the procedural bar as applied to each issue. His second claim asserts that California's system of appointing one attorney to handle both the appeal and the petition for writ of habeas corpus, if any, creates a conflict of interest as to any potential claims of ineffective assistance of appellate counsel that might otherwise be raised on habeas corpus. This second claim has been consistently rejected by this Court.

Generally, as noted previously, a criminal accused has the right to constitutionally effective assistance of counsel, as guaranteed by the Sixth Amendment. The burden is on the convicted defendant to show both a deficient performance by counsel and that actual prejudice resulted. (*Strickland v. Washington, supra*, 466 U.S. at p. 694; *People v. Marquez* (1992) 1 Cal.4th 553, 574-575.) Habeas corpus is a proper vehicle for raising a claim of ineffective assistance of counsel, but "the spectacle of a series of attorneys appointed at public expense whose sole job, or at least a major portion of whose job, is to claim the previous attorney was, or pervious attorneys were, incompetent discredits the legal profession and judicial system, often without benefit in protecting a defendant's legitimate interests. (*People v. Smith* (1993) 6 Cal.4th 684, 695.)

Petitioner's claim 68 is a Sixth Amendment claim. Although he

alludes to other provisions of the state and federal constitutions, the deprivation of constitutionally adequate counsel is itself a violation warranting relief and any rights lost for failure to perform effectively are collateral to the Sixth Amendment claim. Petitioner asserts this claim by incorporating all of his other claims and stating that if "any of the claims raised in this petition should have been, but were not, raised in the direct appeal in this case, the failure was the result of the ineffective assistance of appellate counsel." He further asserts prejudice on the basis that the claims would have been addressed had they been raised on appeal. (Pet. 595-596.) However, the mere prospect of having a claim addressed on appeal does not establish prejudice. Appellate counsel "performs properly and completely when he or she exercises discretion and presents only the strongest claims instead of every conceivable claim." (*In re Robbins, supra,* (1998) 18 Cal.4th 770, 810; citing *Jones v. Barnes* (1983) 463 U.S. 745, 752; *Smith v. Murray* (1986) 477 U.S. 527, 536.) Respondent maintains that the 39 claims of the appeal were the strongest claims, and then some, while the 79 claims of the petition for writ of habeas corpus include many conceivable, but less strong, claims, some of which really undermine what were the strongest claims of the appeal.[16/]

---

16. The *Atkins* claim, for example, all but concedes that competence to stand trial was never an issue (*Atkins v. Virginia, supra*, 536 U.S. at p. 318 ["Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial"]), and gives strength to the obstreperousness basis for denying the self-representation claim(*Ibid.* ["however, by definition they have diminished capacities to . . . control impulses"]) all in an effort to recast petitioner's alleged characteristics in the mold of a different type of mental impairment that is no better fit, since it applies to weak-willed, impulsive followers, who are at mostly aiders and abettors of the crimes of others, not threateners, planners, premeditators, and retributive leaders, who take pleasure in the hunting and killing of their human prey. (*Ibid.*)

Claim 69 proposes that California's appellate review process in capital cases is unconstitutional because representation by the same counsel on appeal and on habeas corpus proceedings creates a conflict of interest in regard to potential claims, on habeas corpus, of ineffective assistance of appellate counsel. This Court has repeatedly rejected this claim. (*People v. Hughes* (2002) 27 Cal.4th 287, 406; *People v. Kipp* (2001) 26 CA.4th 1100, 1139-1140.)

Logically, not wanting to have to assert on habeas corpus his own incompetence as an appellate lawyer would seem a strong incentive to turn in a high quality brief on appeal. As to the effect on habeas corpus representation, a defendant has no right under the federal Constitution to the effective assistance of counsel in a state habeas corpus proceeding. (*People v. Kipp, supra*, 26 Cal.4th at p. 1140, citing *Coleman v. Thompson* (1991) 501 U.S. 722, 756-757; *Murray v. Giarratano* (1989) 492 U.S. 1, 10 (plur. opn. of Rehnquist, C.J.) and id. at p. 14-15 (conc. opn of Kennedy, J.) Effective assistance of habeas corpus counsel is at most a factor in determining the applicability of procedural bars. (*People v. Kipp, supra,* 26 Cal.4th at p. 1140, citing *In re Sanders, supra*, 21 Cal.4th 697, 719.) Thus the dual representation system violates neither the state nor the federal Constitution.

This issue (that habeas counsel would be burdened by a conflict) would not have been congnizable on appeal, so there could be no ineffective assistance of appellate counsel in failing to raise it on direct appeal. (*People v. Kipp, supra*, 26 Cal.4th at p. 1139.)

XIV.

PETITIONER'S GENERAL ATTACKS ON THE DEATH PENALTY LAW FAIL TO STATE A COLORABLE CLAIM FOR RELIEF

Petitioner's final group of claims concern the constitutionality and legality of the death penalty, beginning with the assertion that imposition of the death penalty in this case is grossly disproportionate to the offense. With few exceptions, these are general attacks on the California capital punishment statutory scheme, which have been rejected by this Court. Indeed many of these issues were specifically raised on petitioner's appeal and rejected then. The remainder could have been raised on appeal. Thus the claims are both procedurally barred and fail to state a tenable claim for relief.

A. Petitioner's Sentence Is Not Disproportionate To His Offenses

Petitioner asserts, in claim 70, that because the court of appeal reversed the judgment of a different defendant found by Judge Golde to be competent to stand trial, but incompetent to represent himself (thus finding his *Faretta* rights had been denied), this Court must do the same for him. (Pet. 602, citing *People v. Hightower* (1996) 41 Cal.App.4th 1108.) He also asserts that Rita Lewis, who accompanied him into the Welch house, did not receive the death penalty. This Court has repeatedly observed, however, that neither the California nor the federal constitution requires intercase proportionality review. (*People v. Welch, supra,* 20 Cal.4th at p. 772; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) In addition, "the disposition of codefendants' cases 'is not relevant to the decision at the penalty phase, which is based on the character and

record of the individual defendant and the circumstances of the offense.' (Citation.)" (*People v. Riel* (2000) 22 Cal.4th 1153, 1223.)

Moreover, what petitioner seeks here is not a proportionality analysis so much as a plea to have the particular circumstances of his case disregarded. As this Court found, the record provided "a reasonable basis for the trial court's conclusion that defendant could not or would not conform his conduct to the rules of procedure and courtroom protocol, and that his self-representation would be unacceptably disruptive." (*People v. Welch, supra*, 20 Cal.4th at p. 735.) On the basis of the obstreperousness finding by the trial court in the present case, this Court concluded "that the trial court did not abuse its discretion in denying the *Faretta* motion." (*Ibid.*) No such finding was made in *Hightower*. There any disruptive behavior was only discussed in the context of whether it overcame the presumption of competence, not whether the behavior provided an independent basis for the denial of the right to self-represent. The situations are not the same. In the *Hightower* case, the trial court did abuse discretion, but in the present case it did not.

Intracase proportionality analysis, which reviewing courts do employ, contemplates a comparison between "the gravity of the offense," measured in terms of the injury caused and the defendant's culpability, and "the harshness of the penalty." (*Solem v. Helm* (1983) 463 U.S. 277, 292.) Applying the correct analysis, petitioner loses a bit of his thunder. It is hard to imagine a more grave offense than the present one, since petitioner threatened to kill an entire family to prevent the family matriarch from testifying against him in a case involving prior assaults against family members, then did so, down to the execution-style murder of the toddler granddaughter. There could be no greater injury than mass murder and there could be no greater culpability than that

demonstrated by petitioner. Given the nature of the current crimes, and petitioner's previous criminal conduct, it simply cannot be said that petitioner's punishment is disproportionate to the crimes he committed. (*People v. Riel, supra*, 22 Cal.4th at p. 1224.)

B. California's Death Penalty Statutes Perform The Narrowing Function

Petitioner raises an issue that has been rejected by this Court many times. He asserts that California's death penalty statutes fail to limit the class of persons eligible for the death penalty. Had he raised this issue on appeal, as he could have, *People v. Welch* would no doubt be among the string cites. This Court recently addressed and rejected a nearly identical claim:

> The Eighth Amendment to the United States Constitution requires that the 1978 death penalty law serve a narrowing function to "circumscribe the class of persons eligible for the death penalty." (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) This function is performed by the requirement that a capital jury sustain at least one statutorily enumerated special circumstance. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 467-468.) Defendant contends the law contains so many special circumstances that it fails to provide the constitutionally required narrowing function and thus violates the Eighth Amendment by permitting the death penalty to be imposed in an arbitrary and unpredictable fashion. (*California v. Brown* (1987) 479 U.S. 538, 541 ["The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion"].)
>
> We have held many times that the 1978 law is constitutional. Specifically, as defendant concedes, we have rejected the claim that the number of special circumstances set forth in section 190.2 fails to provide sufficient narrowing of the death-eligible class. (*People v. Bolin* (1998) 18 Cal.4th 297, 345.) Because we conclude the 1978 law is sufficiently narrow to satisfy the Eighth Amendment, we reject defendant's further argument that there is "[b]lanket eligibility for the

death sentence" in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

(*People v. Boyette, supra*, 29 Cal.4th at pp. 439-440.)

Petitioner's identical arguments must be rejected. (See also, *People v. Barnett, supra,* 17 Cal.4th at p. 1179; *People v. Burgener* (2003) 29 Cal.4th 833, 884.)

C. International Law Does Not Prohibit A Sentence Of Death Rendered In Accordance With State And Federal Constitutional And Statutory Requirements

Petitioner asserts his death sentence violates international law, specifically the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Declaration of the Rights and Duties of Man, the International Convention Against All Forms of Racial Discrimination, the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and other treaties he does not specify. His argument is that if he was deprived of state and federal constitutional rights, these violations would also constitute violations of international law. Two observations follow from that assertion: (1) if he was not deprived of a fair trial under the state and federal constitutions, then he was not deprived of whatever parallel rights are included under the rubric of "international law;" and (2) if he was prejudicially deprived of his state or federal constitutional rights, this Court would grant him relief on that basis, without need to resort to international treaties. The claim could have been raised on appeal, but was not, so it is procedurally barred. If this Court reaches the merits, it should reject this claim as it has done before in similar cases. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 511; *People v. Jenkins, supra,*) 22

Cal.4th at p. 1055.)

D. Prosecutorial Discretion In Charging, Within The Special Circumstance Framework, Does Not Render The Death Penalty Law Unconstitutional

Petitioner raises another issue (claim 73) which was addressed and rejected on direct review in this case, as in many others. (*People v. Welch, supra,* 20 Cal.4th at p. 772.) He asserts that a prosecutor's "unbridled discretion" whether to seek the death penalty introduces "arbitrary and capricious elements into the decision-making process." (Pet. 633.) The claim is procedurally barred since it was presented on appeal. If addressed on the merits, it runs afoul of the reasoned rejection in *People v. Arias* (1996) 13 Cal.4th 92, 189, and cases there cited. (See also *People v. Steele* (2002) 27 Cal.4th 1230, 1269; *People v. Kraft* (2000) 23 Cal.4th 978, 1078.)

E. Neither Due Process Nor The Right To Meaningful Review Necessitate Written Findings Regarding The Factors In Aggravation

Petitioner raises yet another issue (claim 74) which was addressed and rejected on direct review in this case, as in many others. (*People v. Welch, supra,* 20 Cal.4th at p. 772.) He asserts that the failure of the death penalty statute to require written findings from the jury as to which aggravating factors it found to be true prohibits meaningful review of the judgment and thwarts due process. For the reasons stated in *People v. Montiel* (1993) 5 Cal.4th 877, 943, and cases there cited, this claim, if addressed on the merits, should be denied.

F. Petitioner Has No Right To A Speedy Appeal That Fails To Take Into Account "The Unique Demands Of Appellate Representation In Capital Cases," Nor Has He Been Deprived Of Meaningful Appellate Review, Due Process, Counsel, Or The Right To Be Free Of Cruel And Unusual Punishment By Virtue Of The Appellate Timetable.

In *People v. Welch, supra*, 20 Cal.4th at pp. 775-776, this court declined to find a right to speedy appeal, comparable to the right to speedy trial, and noted the United States Supreme Court has never recognized such a right. This Court resolved the issue, *arguendo*, on the assumption that such a right exists, upon a finding there had been no nonspeculative assertion of prejudice. Petitioner's current assertion should fare no better, even if it survives the procedural bar.

Any analysis of appellate delay must, as this Court observed, account for "the unique demands of appellate representation in capital cases." (*Id.* at p. 776, quoting *People v. Holt, supra*, 15 Cal.4th at p. 709.) Given those unique demands, including in particular the need to screen and appoint competent appellate counsel, and the fact that much of the schedule after that is in the hands of the defendant and his attorney, it is not at all clear that a right to a speedy capital appeal exists, or that a capital petitioner would benefit from such a right. In claim 75, petitioner again raises this issue, asserting: (1) that he was deprived of the assistance of counsel during the period in which counsel was being appointed; (2) that the three years it took to appoint appellate counsel and the six years counsel was working on the appeal prejudiced petitioner's ability to develop evidence in support of his collateral attack on the judgment; and (3) that "excessive delay" has denied him due process of law.

Aside from an unsupported assertion that potentially exculpatory witnesses may have died or become unavailable in the 13 years since his

judgment was entered, and a sparse allusion to his *Brady* claim, petitioner adds nothing new to his delay claim on habeas corpus. Speculation is still required to conjure up any prejudice attributable to the period during which appellate counsel was being recruited, screened, and selected. After the appointment of appellate counsel, much of the delay must be attributed to petitioner and his attorney. That counsel was working on the appeal did not preclude the development of habeas corpus issues and evidence. Quite the contrary, most of the issues in this petition were developed by appellate counsel during that period. " Delay between the judgment and the actual execution does not render the punishment unconstitutional. *(People v. Massie* (1998) 19 Cal.4th 550, 574; *People v. Frye* (1998) 18 Cal.4th 894, 1030-1032.)" (*People v. Steele* (2002) 27 Cal.4th 1230, 1269 [cruel and unusual punishment].)

G. The Method Of Execution Is Neither Cruel Nor Unusual

Petitioner next asserts that he cannot be executed by the default method of execution (Pen. Code, § 3604), lethal injection, because the method is cruel and unusual. We note, first, that this is an attack on the method of execution and not on the judgment. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1110.) So even in the unlikely event that petitioner succeeded with this claim, he would still remain under sentence of death. That said, this claim has been repeatedly rejected. (*People v. Hughes, surpa*, 27 Cal.4th at p. 406; *People v. Samayoa, supra*, 15 Cal.4th at p. 864.) In particular, a claim based upon "anecdotal evidence of the administration of lethal injection in other states" does not support a conclusion that this method as administered in California violates the Eighth Amendment." (*People v. Holt, supra*, 15 Cal.4th at p. 702.)

Petitioner's assertion that San Quentin has failed to institute

procedures and standards for implementing lethal injection, based on his inability to find such standards in the California Code of Regulations, is spurious. He is not looking in the right places. (See *Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 126-127, alluding to the relevant internal regulations.)

H. Petitioner's Claim That He Falls Within The Category Of Condemned Inmates Whose Execution Would Violate The Recently Recognized Eighth Amendment Proscription Against Executing The Mentally Retarded Is Unsupported

Opportunistically seizing upon *Atkins v. Virginia* (2002) 536 U.S. 304, petitioner, whose strongest claim on appeal was that he was improperly deprived of his right to represent himself, now asserts he is so mentally deficient that neither purpose underlying capital punishment, "retribution [nor] deterrence of capital crimes by prospective offenders" would be served by his execution. However, *Atkins* makes it clear that deliberate, premeditated murderers like petitioner are properly subject to the death penalty. Describing why the deterrence justification is not served by executing the mentally retarded, our high court observes "'it seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation."'" (*Atkins v. Virginia, supra*, 536 U.S. at p. 319, quoting *Enmund v. Florida* (1982) 458 U.S. 782, 799.) Exempting the mentally retarded from that punishment will not affect the "cold calculus that precedes the decision" of other potential murderers. (*Atkins v. Virginia, supra*, 536 U.S. at p. 319, quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 186.) Petitioner is precisely one of those coldly calculating other (not mentally retarded) murderers, as the jury found and as the facts overwhelmingly establish. Dealing with a likely aider and abettor with a

full scale IQ 20 points[17] below what petitioner claims is his full scale IQ, *Atkins* acknowledges the reduced moral culpability of those weak-willed, mentally deficient, followers of more dynamic and articulate leaders. (*Atkins v. Virginia, supra,* 536 U.S. at p.318.) Far from falling into that category, however, petitioner threatened, planned, recruited two confederates, bided his time until he knew the police who were watching for him had departed, armed himself, and killed over and over again, hunting room to room for particular victims and keeping track of whom he had not yet found and executed. Petitioner has been actively and articulately involved in his defense from the start and continues to communicate lucidly with this and other courts. While petitioner certainly establishes he has some antisocial tendencies, lacks impulse control, and boasts a limited attention span for math problems, petitioner has not and cannot support a claim of mental retardation such as to reduce his level of moral culpability for these crimes.

I. Whether Considered Individually Or Cumulatively, Petitioner's Claims Do Not Require Reversal

Finally, petitioner asserts that even those errors which fail, individually, to establish entitlement to relief, necessitate reversal when considered as a group. However, given the lack of merit in the new issues, and the fact that most of these issues had been rejected already on appeal, both individually and in the aggregate, and in light of the overwhelming evidence of a particularly heinous series of crimes, and his history of criminal violence, the

---

17. The evidence in *Atkins* was that his IQ was 59, and that "the cut-off IQ score for the intellectual function prong of the mental retardation definition" was 70 to 75. (*Atkins v. Virginia, supra,* 536 U.S. 308 & fn. 5.) Petitioner's claimed IQ of 78 is above this cut-off.

claims alleged here, whether considered individually or as a whole, fail to establish prejudice as to the guilt or penalty phase. (*People v. Welch, supra,* 20 Cal.4th at p. 775; *People v. Bolden* (2002) 29 Cal.4th 515, 567-568; *People v. Koontz* (2002) 27 Cal.4th 1041, 1094.)

CONCLUSION

Accordingly, respondent respectfully requests that the petition be denied.

Dated: April 11, 2003

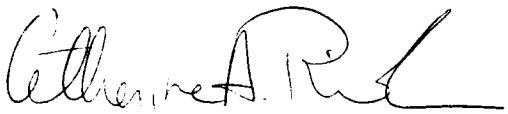
Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California[18/]

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

BRUCE ORTEGA
Deputy Attorney General



CATHERINE A. RIVLIN
Supervising Deputy Attorney General

Attorneys for Respondent

CAR/car/gm
SF2002XH0003
c:\dat\car\welchinfopp.wpd

---

18. The Attorney General acknowledges the research contributions of law graduate volunteer Naya Urla (prosecutorial misconduct claims), law student Michelle Rutledge (judicial bias claims), and Legal Analyst Gregory D. Hebert (capital statute and method claims) to the preparation of this brief.

DECLARATION OF SERVICE

Case Name: **In re David Esco Welch** No.: **S107782**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; 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 **April 11, 2003**, the attached **INFORMAL RESPONSE 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, 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102, addressed as follows:

Stephanie Ross
Attorney at Law
600 Winslow Way East Ste. 130
Bainbridge Island, WA 98110

Wesley A. Van Winkle
Attorney at Law
P. O. Box 5216
Berkeley, CA 94705-0216

California Appellate Project
One Ecker Place, 4th Fl.
San Francisco, CA 94105

Honorable Thomas Orloff
District Attorney
County of Alameda
1225 Fallon St., Rm. 900
Oakland, CA 94612

Clerk of the Superior Court
County of Alameda
1225 Fallon St.
Oakland, CA 94612-4293

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 **April 11, 2003**, at San Francisco, California.

GLORIA MILINA
Typed Name


Signature