No. S084292
(Related Appeal No. S005502)
(Kern County Superior Ct. No. 33477)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE DAVID KEITH ROGERS,

Petitioner.

On Habeas Corpus, Following A Judgment Of Death Rendered In The State Of California, Kern County (Hon. Gerald K. Davis, Judge Of The Superior Court)

PETITIONER'S REPLY TO ATTORNEY GENERAL'S INFORMAL OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

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DEATH PENALTY CASE

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INTRODUCTION

The Attorney General has already conceded that an order to show cause should issue in response to the Petition for Writ of Habeas Corpus in this case, and that an evidentiary hearing should be held. The only question now pending is how much of his case Petitioner will be permitted to prove.

The Attorney General admits that a hearing is warranted in connection with the vicious assault on Tambri Butler, evidence of which was introduced as a an aggravating factor at the penalty phase, and cited by the trial judge in upholding the imposition of the death penalty. The Attorney General acknowledges that this hearing should include: Petitioner's claims concerning newly discovered evidence and use of false evidence which show Petitioner was misidentified as Ms. Butler's attacker (Claim Three); the prosecution's failure to disclose material evidence relating to the assault (Claim Four); and trial counsel's failure to investigate the incident (Claim Five, part K). We submit that a *prima facie* case has similarly been made for relief in regard to Petitioner's claims of jury misconduct (Claim One), unlawful pre-trial shackling (Claim Two), and myriad other instances of ineffective assistance on the part of trial counsel (Claim Five).

In particular, it would be unprecedented for the Court to dismiss out of hand Petitioner's allegations (supported by competent declarations) establishing multiple instances of jury misconduct. The cases cited by the Attorney General do not support such an abbreviated and peremptory response. On the contrary, all the cases relied on by the Attorney General were decided only *after* an evidentiary hearing at which the petitioner had an opportunity to submit first-hand evidence and formal argument. Notably, the juror misconduct already shown here by declaration is far more egregious than that which was alleged in the cases cited by the Attorney General. But throughout his "informal response" the Attorney General repeatedly asserts that Petitioner needs to adduce more evidence in order to merit relief. Petitioner asks of the Court to grant him the opportunity to present that evidence.

Finally, despite the need for a show cause order as to matters the Attorney General has conceded require a hearing (and those he has not), we respectfully submit that the most prudent and economical course

would be for this Court first to consider and decide our direct appeal. Many of the claims contained in the Petition—particularly those concerning trial counsel's ineffectiveness—turn on legal issues that will not be fully resolved until the direct appeal is determined. And as serious as Petitioner's habeas corpus claims are, the Court need not reach them, because the record of the trial itself already contains substantial reversible error.

ARGUMENT

I.

JURY MISCONDUCT.

The evidence submitted in support of David Rogers' Petition for Habeas Corpus relief ("Pet.") clearly demonstrates that jury misconduct occurred in this case in several different forms, on numerous occasions, involving various jurors. The Attorney General devotes much of his response to discussing the procedure used to assess such claims, and he offers extensive quotes from this Court's cases, sometimes reiterating the same passages several times. However, the Attorney General nowhere states the primary procedural rule set forth in this Court's cases over the last century or so:

> [J]ury misconduct raises a presumption of prejudice; and unless the prosecution rebuts that presumption by proof that no prejudice actually resulted, the defendant is entitled to a new trial. (*People v. Pierce*, 24 Cal. 3d 199, 207 (1979) (citing, *inter alia*, *People v. Honeycutt*, 20 Cal. 3d 150, 156 (1977)))

See People v. Conkling, 111 Cal. 616, 628 (1896); *Remmer v. United States*, 347 U.S. 227, 229 (1954); *accord*, *e.g.*, *People v. Majors*, 18 Cal. 4th 385, 417 (1998); *People v. Nesler*, 16 Cal. 4th 561, 578 (1997); *People v. Zapien*, 4 Cal. 4th 929, 994 (1993); *People v. Marshall*, 50 Cal. 3d 907, 949 (1990) (once juror misconduct shown, the Attorney General "must then rebut the presumption or lose the verdict"). As this Court has explained:

> "The presumption of prejudice is an evidentiary aid to those parties who are able to establish serious misconduct of a type likely to have had an effect on the verdict or which deprived the complaining party of thorough consideration of his case,

> yet who are unable to establish by a preponderance of the evidence that actual prejudice occurred." (*People v. Holloway*, 50 Cal. 3d 1098, 1109 (1990) (quoting *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 416 (1982)))

While we believe Petitioner can demonstrate prejudice by a preponderance of the evidence, according to long-established law Petitioner has done his part by demonstrating that misconduct occurred, and it is now the Attorney General's burden to dispel the presumption of resulting prejudice.

The reason for the Attorney General's failure to acknowledge his legal obligation is patent: He cannot rebut the presumption of prejudice that flows from the misconduct in this case, and thus he must inevitably "lose the verdict." The nature of the egregious misconduct, especially when combined with the fact that it was concealed for so many years, renders it impossible for the Attorney General to prove (as he must under the law) that there is no "substantial likelihood," that the verdict was tainted by the votes of one or more of the implicated jurors. It is no longer possible to determine precisely which extra-record "facts," inflammatory pictures, emotional appeals, editorial comments and the like were seen or heard by Juror Sauer as he systematically monitored television coverage of the trial. Nor is there any reliable method to measure the avidly pro-prosecution statements Mr. Sauer heard from his wife, or the similar remarks from co-workers that pressured Juror Tegebo. We likely will never know the precise content (much less the effect) of the patently improper discussion of the case that took place between two sitting jurors, overheard by Alternate Juror Morton. Likewise, we will never know what was seen during the unlawful site visits undertaken by one of those jurors.

It is plain, however, that at least one juror prejudged the most important issue in the case and rendered a death verdict in accordance with a long-held bias that he had concealed on voir dire. We know this because he said so.

In case the Attorney General fails to persuade the Court to ignore more than a century of its own law regarding the presumption of prejudice, he has a "fallback" position. The Attorney General asserts that—except for Juror Sauer's television viewing—none of the foregoing constituted jury misconduct at all. Thus, he would have the Court believe,

the presumption of prejudice did not otherwise arise. As will be discussed presently, that argument also is contradicted by black letter law announced by this Court and the United States Supreme Court. In fact, there were at least *six* classic examples of unlawful conduct of different sorts effected by, or affecting, the jury in this case. Regardless who bears the burden at this point there is more than enough evidence to show that Petitioner was deprived of a fair trial by these many instances of misconduct.

A. Improper Receipt Of News Media Accounts.

The Attorney General concedes that Juror Sauer committed misconduct when he and his wife together systematically monitored television news coverage of the trial, but the Attorney General insists that the misconduct was by its nature so innocuous that there is not even a possibility, much less a "substantial likelihood," that Petitioner's constitutional rights were compromised as a result. We disagree.

The Attorney General fails to reckon with how egregious the misconduct was in this instance—and how the egregiousness of the misconduct spells irrebuttable prejudice. This is not a case in which a juror received news accounts or other extraneous information inadvertently (*see, e.g., People v. Nesler*, 16 Cal. 4th at 579; *People v. Lucas*, 12 Cal. 4th 415, 486-87 (1995); *People v. Zapien*, 4 Cal. 4th at 994; *People v. Cummings*, 4 Cal. 4th 1233, 1331 (1993); *People v. Holloway*, 50 Cal. 3d at 1110; *People v. Hogan*, 31 Cal. 3d 815, 844-46 (1982); *People v. Andrews*, 149 Cal. App. 3d 358, 363-65 (1983)), or could otherwise be said to be a "passive" recipient of such information (*see, e.g., In re Carpenter*, 9 Cal. 4th 634, 655-56 (1995)).[1] Nor—in contrast to all of the cited cases and virtually every similar case we have been able to find—was Juror Sauer's exposure to outside information limited to one or two occasions. Rather, defying the trial court's repeated admonitions against such conduct, Juror Sauer repeatedly sought out television news

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[1]In a different portion of his brief, the Attorney General pointedly notes that "this Court has found . . . there is a difference between active and passive receipt of extraneous information." Informal Opposition to Petition for Writ of Habeas Corpus ("IO") at 15 (citing *In re Carpenter* and *In re Hamilton*, 20 Cal. 4th 273, 305 (1999)).

reports in a manner specifically designed to ensure that he was exposed to as much of that forbidden information as possible.[2] Ex. 8 at 1:5-15 (Sauer Decl.) (emphasis added).

This case also differs from those discussed by the Attorney General—and virtually all of the pertinent precedent—in another important respect. In the vast majority of cases, the misconduct is revealed (often by the malfeasant juror himself or herself) during the trial, or shortly afterwards. *See, e.g., People v. Nesler*, 16 Cal. 4th at 570 (issue raised on motion for new trial); *People v. Zapien*, 4 Cal. 4th at 994 (issue arose during trial); *People v. Cummings*, 4 Cal. 4th at 1331 (issue arose between guilt and penalty phase). In this case, Juror Sauer concealed his misconduct for more than eight years after the trial ended.

Those facts not only make the misconduct in this case worse than in prior, similar cases, but also make it impossible to dismiss that misconduct as somehow non-prejudicial. If the "rebuttable presumption of prejudice" has any meaning whatsoever, it means that the Attorney General bears the burden of showing both (1) that none of the material viewed by Juror Sauer during his bouts of channel surfing was "so prejudicial in and of itself that it [was] inherently and substantially likely to have influenced [the] juror," and (2) "even if the information is not 'inherently' prejudicial," the nature of the misconduct and surrounding circumstances do not demonstrate substantial likelihood that the "juror was 'actually biased' against the defendant." *People v. Nesler*, 16 Cal. 4th at 578-79. He can show neither, for the extent of the misconduct and the length of time during which it was concealed render his task impossible.

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[2]Remarkably, the Attorney General attempts to dispute this assertion, *contending* that Juror Sauer's declaration does not contain any such damning admission. IO at 11 n.4. In response we quote the pertinent part of the declaration:

> My wife and children were interested in the trial because I was on the jury. Also, my wife knew the lawyers and sometimes came to watch the trial during her breaks (she worked next door to the courthouse). We would watch the television coverage together. Sometimes I turned it on to see if they showed me. We get three local channels and I flipped back and forth to see the trial coverage. (Ex. 8 at 1:7-13 (Sauer Decl.))

As the Petition and supporting declarations demonstrate, it is now too late to identify with any confidence *which* news reports Juror Sauer watched—let alone to reconstruct the content of all of the stories he was likely to have seen. Of the three local television channels that Juror Sauer regularly "surfed," one has long since destroyed all of its on-air coverage of Petitioner's trial; the other two were able to recover only a fraction of the videotapes shown on the air, and most of those are without the "sound-over" narration and commentary that accompanied them. *See* Pet. at 16 n.10 (and declarations discussed therein). Since it is not possible to identify, even approximately, the illicit images, words, and "facts" absorbed by the errant Juror, the Attorney General also cannot possibly upset the presumption that they were "inherently prejudicial"—much less can he demonstrate that they were wholly unlikely to have created bias.

There is another respect in which the passage of time resulting from the juror's concealment makes the Attorney General's task futile. At this late date, the memories of Juror Sauer and the other members of his family cannot be taken as reliable sources either for determining the specific content of the material that he viewed during those evenings in 1988, or for assessing the influence that material had upon him.[3] *See United States v. Resko*, 3 F.3d 684, 695 (3d Cir. 1993) (holding that passage of one year made it impossible to assess effect of misconduct; presumption of prejudice required reversal). There is, in short, no way for the Attorney General to rebut the presumption of prejudice flowing from Juror Sauer's flagrant misconduct.

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[3]The Attorney General takes Juror Sauer's admitted lack of specific memory of the newscasts to mean that nothing of substance was presented, and that (in any event) the coverage made little impression on him. IO at 10. Such speculation is contrary to common experience: clearly everyone has seen or read things in the popular media that influenced their opinion on a given subject—but how many of those specific statements and images do we specifically recall eight years later? A simpler and more sensible inference to be drawn from Juror Sauer's lack of specific recollection is that he was unable, eight years after the fact, to recall whether and to what extent the various things that shaped his view of the case were conveyed to him properly in court, as opposed to improperly, through watching television.

Moreover, even without a presumption of prejudice, Petitioner would be entitled to relief on this claim, because the available evidence demonstrates far more than a substantial likelihood that prejudice resulted from the acknowledged misconduct. While it is impossible to reconstruct just how much of the television coverage Juror Sauer saw, it is clear from his declaration that he (and his family) watched repeatedly, and when they did watch they did so methodically, "flipp[ing] back and forth" among the three local channels to catch all of the available reports. Ex. 8 at 1:11-13 (Sauer Decl.).

As set out in the Petition, among the contemporary "news" accounts that have been recovered was a televised interview with the sobbing mother of victim Janine Benintende, in which she appeals for Petitioner to be put to death. Accompanied as it was by compelling pictures of the attractive young Ms. Benintende alive—and gruesome footage of her bloated corpse—the coverage constituted nothing less than an "infomercial" for the imposition of the death penalty.[4]

No part of this "victim impact" material lawfully could have been presented to Juror Sauer or any of the other jurors under the provisions of the Constitution as it was interpreted by the United States Supreme Court at the time of Petitioner's trial. *See Booth v. Maryland*, 482 U.S. 496, 509 (1987). Indeed, even though *Booth*'s absolute prohibition on victim impact information was later overruled in *Payne v. Tennessee*, 501 U.S. 808, 828-30 (1991), the televised reportage of Rose Benintende, if offered in evidence, would still be barred as violative of the Eighth Amendment, both because of its direct appeal for imposition of a death sentence and because of its gratuitously sensational and inflammatory nature. *Id.* at 830 n.2 (noting that the portions of *Booth* prohibiting "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate

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[4]The report is before the Court as part of Exhibit 49 to the Petition (KERO tape, No. 3 (2/23/88)), and is described in more detail in the Petition at pages 16-17. The Attorney General attempts to shrug off this material as "merely show[ing] that [Ms. Benintende's] mother was upset about her daughter's murder, together with facts which were proved by the evidence." IO at 12 n.5. We invite the Court to view the material and make its own assessment.

sentence" were not challenged and remain law); *see also id.* at 831-32 (O'Connor, J., concurring); *People v. Edwards*, 54 Cal. 3d 787, 836 (1991) (holding that, even after *Payne*, the Constitution requires that "inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed").

If the category of "inherently prejudicial" information set forth in the test for prejudicial misconduct contains anything, it must perforce include professionally packaged, demonstrably inflammatory material of a sort that has been condemned by the United States Supreme Court as offensive to the Eighth Amendment when shown to jurors in a capital case.[5]

Similarly, it would have been difficult for anyone watching the news to miss the widely-reported remarks of Petitioner's employer—the Kern County Sheriff—to the effect that he did not care if Petitioner was executed. The Sheriff's remarks were particularly damaging when viewed against the background of the other contemporary new accounts, which contained a wealth of false and damaging statements regarding Petitioner's conduct as a deputy sheriff, and which wrongly portrayed him as engaging in a pattern of abusive, sadistic, illegal and generally

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[5]The Attorney General asserts that the televised appeal for a death sentence was insignificant, and, in support, quotes a phrase from one of this Court's cases to the effect that there is nothing unusual about a victim's friends wanting the murderer to receive the death penalty. IO at 12 n.5 (quoting *People v. Breaux*, 1 Cal. 4th 281, 295 (1991)). The assertion is without legal or factual support. The *Breaux* case concerned something quite different (as the Attorney General obliquely concedes): The issue there was whether a prosecutor should have been recused from a death case because he had social contact with a friend of the victim, who had opined that the defendant should be executed. There is a world of difference between what a prosecutor knows and what the Constitution permits a capital juror to hear. Specifically, many a prosecutor knows whether the victim's family supports a death sentence, but the Constitution forbids the prosecutor from bringing the family into court to plead for the defendant's execution. Nor is the Attorney General's implied factual premise—that the victim's parents would obviously support death—an accurate one. In this very case, Janine Benintende's other parent (her father) appealed to the Judge in open court for the imposition of a life sentence. RT 5991.

inappropriate behavior both on the job and in his personal life.[6] Pet. at 18; CT 532-61. Individually and together, these things would have completely undermined the effect of the mitigating evidence put on by defense counsel in the penalty phase, almost all of which was designed to portray Petitioner as someone who had contributed to society as a good and effective law enforcement officer, and a loyal and conscientious family man.

Nor was the likely prejudice limited to the penalty phase. Inaccurate and improper interpretations of the trial by newscasters—such as the repeated misstatement that "in order to avoid the death penalty the defense must prove there was no evidence of premeditation in the [Clark] murder" (*see* Pet. at 18 (quoting Ex. 50 (KBAK videotape)))—could well have confused the juror (who was obviously not listening to the court's legal instructions)[7] as to who bore the burden of proof on the most important issue in the case. There is, in short, ample evidence to demonstrate a substantial likelihood that Juror Sauer's conceded misconduct prejudiced Petitioner in regard to all phases of the case. *See People v. Martinez*, 82 Cal. App. 3d 1, 22 (1978) (holding that whether a defendant has been injured by jury misconduct depends, *inter alia*, on "whether the prosecution's burden of proof has been lightened . . .").

In opposition, the Attorney General relies principally on this Court's opinion in *In re Carpenter*, 9 Cal. 4th 634 (1995). IO at 9-14. That case is inapposite.[8] To begin with, *Carpenter* was decided after a

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[6]The Attorney General dismisses out of hand the printed news accounts contained in the trial court's record on the basis that those accounts were published pre-trial, and thus were not themselves viewed by the juror, who swore that he did not see any pre-trial accounts. IO at 11 n.4. The Attorney General misses the point: The documentation of false and misleading pre-trial news accounts supports the inference that similar misinformation was also broadcast shortly afterwards—during the trial itself—and was viewed by the errant Juror at that time.

[7]It should also be recalled that the trial court's instructions—particularly in regard to the *mens rea* elements of the various offenses—were unusually muddled and confusing, as outlined in Petitioner's briefs on direct appeal.

[8]The present discussion is limited to the juror's misconduct in viewing news accounts pertinent to the trial. His factually related (but analytically distinct) misconduct in discussing the case with his wife and family, and (continued . . .)

full evidentiary hearing regarding juror misconduct and prejudice, held pursuant to an order to show cause. 9 Cal. 4th at 642-43. Such a hearing is precisely what the Attorney General's "Informal Opposition" seeks to forestall in the instant case. In *Carpenter*, after all of the evidence was adduced, it appeared that the only potentially prejudicial information received from the media by the errant juror was the fact that the defendant had already been convicted and sentenced to death for other crimes in a separate trial, held in a different county. *Id.* at 643-44. Although the trial court found such information to be inherently prejudicial (*id.* at 644), the United States Supreme Court subsequently held that such information does not compromise the constitutional rights of a defendant when published to the jury in a capital case. *Romano v. Oklahoma*, 512 U.S. 1, 9-10 (1994). This Court accordingly held that *Romano* disposed of the question of whether the information improperly obtained in *Carpenter* was "inherently" prejudicial. *Carpenter*, 9 Cal. 4th at 655. The alternative prejudice inquiry—*i.e.*, whether there was "a substantial likelihood" that Carpenter was nonetheless prejudiced (*id.* at 654)—was essentially answered by the trial court's finding "beyond a reasonable doubt[,] any jury would have sentenced the defendant to the death penalty based upon the evidence presented," for that evidence was "overwhelming." *Id.* at 645; *see also id.* at 658-59. Even so, this Court only denied the claim provisionally, holding that it could not rule out all possibility of prejudice until it had thoroughly reviewed the entire appellate record. *Id.* at 659.

In a real sense, the Attorney General is asking this Court to do the opposite of what the Court indicated in *Carpenter* was required to evaluate a claim of the kind presented here. Not only has there been no review of the entire appellate record (the absence of which precluded any final disposition in *Carpenter*), there has not even been a full development of all the facts pertinent to the claim. Indeed, the Attorney General's entire effort is to convince the Court not to take even the initial step that was the predicate for decision in *Carpenter* and every related precedent: He insists that the Court should not so much as issue

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(. . . continued)
the significance of *Carpenter* in that regard, is discussed in Section I(B)(2), *infra*.

a show cause order to inquire into the effects of what he admits is juror misconduct.

The instant case is also the opposite of *Carpenter* in another essential respect: The news accounts in that case were limited to information of a sort which the Supreme Court had held to be non-prejudicial in *Romano*, while the reports in this case included material of a sort that the Supreme Court condemned as being inherently prejudicial in the part of *Booth v. Maryland* that remains good law. Further, this is not the sort of exceptionally horrible murder case in which no reasonable jury could spare the defendant from a death sentence—the sort of case that led the dissenting justices to complain that *Carpenter* was "the easy case that makes bad law." 9 Cal. 4th at 660 (Mosk, J., dissenting). On the contrary (as set out in detail in our Opening Brief on appeal), the jury clearly struggled with the question of whether to bring back a death-qualifying first-degree murder verdict at all—and might not have done so, if proper instructions had been given.[9]

It also bears repeating that Petitioner "was entitled to be tried by 12, not 11, impartial and unprejudiced jurors. 'Because a defendant charged with crime has a right to the unanimous verdict of 12 impartial jurors, it is settled that a conviction cannot stand if even a single juror has been improperly influenced.'" *People v. Holloway*, 50 Cal. 3d at 1112 (citation omitted). In short, to the extent that *Carpenter* is instructive here at all, it teaches—both by direct and negative example—that the Attorney General's position is not well taken, and that Petitioner's

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[9]The Attorney General contends that an important parallel between *Carpenter* and the instant case is that (he says) the errant juror did not reveal what he saw on television to the other jurors. IO at 13-14. But the Court does not know that to be the case, which is further reason why an evidentiary hearing is needed. As discussed below, there is competent evidence that two jurors—one of whom was apparently Juror Sauer—had one or more improper discussions about the case before deliberations began, and we cannot pretend to know at this point whether those conversations included what Juror Sauer saw on television. Accordingly, this case also differs from *Carpenter* in that the evidence points to a likelihood that the contamination spread past the one delinquent juror. Far from asking the Court to "presume greater misconduct than the evidence shows" (IO at 13 (quoting *Carpenter*, 9 Cal. 4th at 657)), Petitioner asks only that the Court refrain from making any assumptions about what the evidence will or will not show until the record is complete.

claim appears meritorious and certainly may not properly be dismissed on the basis of the existing record.

The Attorney General's other arguments are similarly unavailing. The repeated assertion—that Juror Sauer was solely interested in seeing himself on television, and paid no attention to anything else he saw regarding the case—is not at all what the juror *said* in his declaration, nor is it a fair inference to be drawn therefrom. Rather, he first states that his wife and children were interested in the case—so much so that his wife came to watch the trial during breaks from work—and that they "would watch the television coverage together." Ex. 8 at 1:10 (Sauer Decl.). He next states that "*[s]ometimes* I turned it on to see if they showed me." *Id.* at 1:11 (emphasis supplied). Read together and in context, these statements show that seeing himself on television was not the only reason he watched. Indeed, Juror Sauer goes on to say that, although he never saw himself on television, he watched repeatedly, and made sure to see all of the coverage available at those times by "flipp[ing] back and forth" between the stations. Ex. 8 at 1:12 (Sauer Decl.).

The Attorney General's fall-back defense is the presumption that Juror Sauer followed the trial court's instructions—for example, to rely only on the trial evidence, to weigh the evidence for himself (*see* IO at 11 n.4), and to draw his own conclusions regarding what he saw (presumably instead of relying on those of the newscasters). *See* IO at 13 n.6. The Attorney General forgets that this particular juror made a habit of blithely, and flagrantly, disregarding the instructions of the trial court. Thus the simplest answer is found in this Court's repeated observation: "'When a person violates his oath as a juror, doubt is cast on that person's ability to otherwise perform his duties.'" *In re Hitchings*, 6 Cal. 4th 97, 120 (1993) (quoting *People v. Cooper*, 53 Cal. 3d 771, 835-36 (1991)). Beyond that, the Attorney General's argument proves too much, for similar instructions are given in virtually all cases. If they were enough in and of themselves to dispel any possibility of bias resulting from juror misconduct, then juror misconduct of this sort would never be held to violate a defendant's fair trial rights. Clearly that is not the law, for this Court and countless others have required new trials where jurors have been improperly exposed to information from the

news media and elsewhere—standard jury instructions notwithstanding. *See, e.g., People v. Holloway*, 50 Cal. 3d at 1111-12; *People v. Nesler*, 16 Cal. 4th at 578-90; *People v. Andrews*, 149 Cal. App. 3d at 364-66; *United States v. Resko*, 3 F.3d at 693-95.

Juror Sauer's channel surfing was unfortunately not the only instance of a juror in this case receiving information from the popular media and other sources outside the courtroom. As the Attorney General observes, this "case generated substantial publicity" (IO at 14), and the sworn statement of the jury foreman, Bruce Wahl, demonstrates that the media were aggressively attempting to contact jurors before the trial was completed. Ex. 10 ¶3 (Wahl Decl.). There remains a very real possibility that other jurors also received extraneous information from the media, inadvertently or otherwise, and the full extent of that pollution will not be known until after a show cause order is issued and a hearing is held.[10]

One juror that definitely did receive extraneous information was Debra Tegebo, whose co-workers gave her a (distorted) report of the remarks made by the Sheriff in regard to the death penalty, as reported in the local media. Ex. 7 at 1:12 to 2:7 (Tegebo Decl.). According to the Attorney General, this news report—the supposed fact that the Sheriff supported the execution of Petitioner, who was a Sheriff's Deputy—was not "information" at all, as that term is used in the cases dealing with jurors' exposure to extraneous material. IO at 15 (citing *People v. Nesler*, 16 Cal. 4th at 578-80, 583-85). But the dictionary definition of the word "information," when used in this noun form, is: "Knowledge communicated or received concerning a particular fact or circumstance; news: *information concerning a crime*." RANDOM HOUSE UNABRIDGED DICTIONARY (2d ed. 1993). While the Sheriff's statement was itself one of opinion, the fact that he expressed it, publicly, was a significant event, knowledge of which was communicated to Juror Tegebo. The reported comments were obviously "news"—they were in fact the highlight of a news conference reported in newspapears and on television and radio

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[10]Because several of the jurors declined to be interviewed when contacted by Petitioner's investigator, we do not know at this time the extent of media exposure.

news shows. Indeed, this information was passed on to the unfortunate jurors for just that reason.[11]

Suffice it to say that neither *Nesler* nor any other of this Court's cases support the Attorney General's attempt to pick a fight with the English language. Nonetheless, on the basis of his narrow definition of the word "information," the Attorney General has chosen not to respond to this aspect of Juror Tegebo's experience under the heading of "exposure to news media accounts," but instead groups it with the other comments she received from co-workers. IO at 14-17. For the Court's convenience in tracking the argument, we reply accordingly.

B. Discussions About The Case With Non-Jurors.

1. Juror Tegebo.

As a threshold matter, the Attorney General claims that Petitioner has improperly accused Juror Tegebo of misconduct. According to the Attorney General, the fact that Juror Tegebo was subjected to the comments, opinions and lobbying of her co-workers—and to their reports regarding the Sheriff's pronouncements—cannot be described as "misconduct," for it was entirely involuntary on her part.

The Attorney General is mistaken, both about what we said and what the law provides. Petitioner never asserted that Juror Tegebo herself "committed misconduct," as the Attorney General puts it. Rather, we said that what occurred constituted "jury misconduct" as that phrase

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[11]The Attorney General also tries to argue that Petitioner somehow "waived" any claim regarding jury exposure to the Sheriff's statement when his trial attorney declined the trial court's offer to question the jurors about the matter. IO at 11 n.4. The Attorney General does not offer any legal authority to support that argument because there is none. At the time the trial court offered to question the jurors, there was no indication of juror misconduct and no particular reason to believe that the jurors had been exposed to the Sheriff's comments. On the contrary, at that point in time, it was entirely proper to assume that the jurors were obeying the court's directions against outside contact and extraneous information. Counsel did not sacrifice any of Petitioner's rights by making a reasonable tactical decision against having the trial court raise the matter with the jurors, lest their interest be piqued or they become otherwise confused by the existence of out-of-court statements which they presumably had never heard. *See* RT 5745-47.

has been defined in the law. In the words of a leading treatise: "The term 'jury misconduct' often is used to describe both action by jurors that is contrary to their responsibilities and conduct by others which contaminates the jury process with extraneous influence." 5 W. LAFAVE ET AL., CRIMINAL PROCEDURE §24.9(f), at 601. (2d ed. 1999). This Court has employed the phrase in exactly that fashion. *See People v. Zapien*, 4 Cal. 4th at 994 ("Although the juror did nothing improper, his inadvertent receipt of information outside the court proceedings is considered 'misconduct' and creates a presumption of prejudice which, if not rebutted, requires a new trial") (citing *People v. Holloway*, 50 Cal. 3d at 1108).

The misconduct in question here consisted of the improper efforts of Juror Tegebo's co-workers to affect her thinking and her verdict: asking her why she did not "just get it over with?," and talking about "hanging" Petitioner; telling her that the Sheriff had "called for the death penalty" for Petitioner and remarking that Petitioner must "really be bad" for other police to turn against him; and creating the (undoubtedly correct) impression that "any vote for less than a death verdict would subject [her] to a great deal of community disapproval." Ex. 7 at 2:1-22 (Tegebo Decl.).

The Attorney General mocks (as "hyperbolic ventilations") Petitioner's claim that this misconduct was at least "substantially likely" to have had a prejudicial effect. IO at 15. Yet courts which have examined similar claims have readily found prejudice. In *Stockton v. Virginia*, 852 F.2d 740 (4th Cir. 1988), jurors in a highly publicized capital case were at lunch when they were approached by the owner of the restaurant, who asked if they had reached a verdict and then gratuitously opined: "I hope they fry that son-of-a-bitch." *Id.* at 745 & n.2. The Fourth Circuit held that the prosecution could not rebut the presumption of prejudice that arose from "so pointed an expression of community displeasure . . . communicated directly to members of the jury." *Id.* at 745-46, 747. As that court explained, in terms equally applicable to the experience of Juror Tegebo:

> Although . . . jurors attempted dutifully to ignore expressions of public opinion and to avoid commenting on the case, they were powerless to avoid contact with the public. As a result they were exposed to the type of pointed and prejudicial

> suggestion whose utterance encourages the all too human tendency to pursue the popular course. (*Id.* at 746)

Similarly to the point is a federal drug case in which a juror discussed the evidence with two friends, who urged her to convict, arguing that it was her "duty to make sure that people like [the defendant] were kept off the streets." *United States v. Maree*, 934 F.2d 196, 199 n.2 (9th Cir. 1991). Emphasizing that the statements of the two friends were merely opinion, and did not contain extraneous "information" about the case, the Ninth Circuit nonetheless held that the aggressive presentation of strong opinions in that context resulted in "actual prejudice" to the defendant. *Id.* at 202-03; *see also Parker v. Gladden*, 385 U.S. 363, 363-65 (1966) (bailiff's statements to jurors—that the defendant was a "wicked fellow . . . , he is guilty" and that the Supreme Court would correct any error in finding him guilty—deemed prejudicial, requiring new trial).

The thrust of those cases is that even conscientious jurors are likely to be swayed by forceful expressions of community sentiment, presented to them personally, regarding how they should perform their duties and, particularly, regarding what verdict they should reach. In this case, Juror Tegebo was repeatedly forced to listen to such communications in the socially vulnerable context of her place of work, and was given every reason to believe that she would suffer the consequences, personally, if she did not return the verdict that her co-workers wanted and expected—a verdict of guilt for first degree murder and a sentence of death for the Petitioner.

In addition to the invidious opinions of her co-workers (pernicious enough in themselves to constitute prejudice), Juror Tegebo received the (somewhat distorted) reports regarding the Sheriff's support for a death sentence. These reports were indeed significant "information," for they demonstrated that the pro-death sentiments she heard were not limited to the intermeddlers at work, but also expressed the will of the larger community in which she and her family passed their lives.[12] This was

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[12]The Attorney General insists that the Sheriff's statements were inconsequential, as "it would be expected that he would personally hold other peace officers to a higher standard." IO at 11 n.4. Perhaps that is what the Attorney General would expect, but that was clearly not the (continued . . .)

precisely the sort of pressure that "encourages the all too human tendency to pursue the popular course" (*Stockton v. Virginia*, 942 F.2d at 746)—the sort of pressure from which jurors are supposed to be free when they exercise their consciences and cast their votes in a capital case. *See Remmer v. United States*, 347 U.S. 227, 229 (1954).

The Attorney General responds to this proof of actual prejudice with first by insisting that, under this Court's decisions, statements of opinion improperly conveyed to a sitting juror can *never* result in cognizable prejudice. As *Stockton* and other cases discussed above demonstrate, the opinions of outsiders can certainly influence jurors' decisions (which is, finally, what prejudice means in this context)—particularly when the juror can discern that an unpopular verdict will result in strong public disapproval. Neither the *Carpenter* case (relied upon by the Attorney General), nor any other of this Court's cases either explicitly or implicitly support the rule that he proclaims.

The Attorney General also reiterates the argument that a juror is presumed to follow the instructions he or she received from the trial court to decide the case solely on the evidence and the dictates of his or her own conscience, and thus could not possibly have been swayed. IO at 16-17. If it were that easy—if the law were prepared to blind itself so thoroughly to human reality—then myriad cases regarding improper communications, attempted jury tampering, threats and the like, including the Supreme Court's decisions in *Remmer* and *Parker v. Gladden* would never have been decided as they were. It is good news for the institution of jury trials and the protections of the United States and California constitutions that the courts have never taken the view espoused by the Attorney General on facts such as these.

(. . . continued)
interpretation of Ms. Tegebo's co-workers, who "remarked that they expected that police would stick together, so when the Sheriff called for the death Penalty, they thought David Rogers must really be bad." Ex. 7 at 2:5-7 (Tegebo Decl.). Contrary to the position taken by the Attorney General, the foregoing portion of Juror Tegebo's Declaration, recounting the statements made to her by co-workers, is not made inadmissible by Evidence Code Section 1150. Rather, it is specifically sanctioned by that statute, which permits the receipt of evidence "as to statements made . . . either within or without the jury room, of such character as is likely to have influence the verdict improperly." EVID. CODE §1150(a).

2. Juror Sauer.

Juror Sauer's conversations regarding the case with his wife (and, apparently, with other family members) constituted misconduct in their own right—distinct from the television viewing which sometimes accompanied those conversations. The Attorney General does not offer any reason—and none appears—why such improper contact between a juror and his or her spouse should somehow be exempt from the Supreme Court's declaration that, "[i]n a criminal case, *any* private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed prejudicial . . . ." *Remmer*, 347 U.S. at 229 (emphasis added). Certainly the courts have treated such illicit interspousal communications as serious, potentially prejudicial misconduct. *E.g.*, *United States v. Tucker*, 137 F.3d 1016, 1030 (8th Cir. 1998).

Rather, the Attorney General seems to rest his defense on the similarity of the reported statements of Juror Sauer's wife (that the trial was "a waste of the taxpayer's money") and those of the errant juror's husband in *Carpenter* (that the juror was "just wasting your time on this trial . . ."). [13] IO at 13; Ex. 8 at 1:19-20 (Sauer Decl.); 9 Cal. 4th at 643. The Attorney General reasons that, because the *Carpenter* court did not find the husband's remarks prejudicial, nor even particularly significant, it somehow "impliedly found" that such statements of opinion are never prejudicial. IO at 15.

As discussed above, the implicit rule that the Attorney General purports to derive from *Carpenter* is not to be found there, and is in any event untenable. He misses what is implicit in the *Carpenter* decision, that only after a full evidentiary hearing, could the trial court make a finding that the husband's remarks were limited to what was reported there, and that his statement of opinion did not particularly affect his juror wife, one way or the other. *See also United States v. Tucker*, 137

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[13] The Attorney General overplays his hand a bit by asserting that "the spouses of the jurors in *Carpenter* and the instant case said that the trial was a waste of money." IO at 13. In fact, the spouse in *Carpenter* did not mention money, and was making a somewhat different point—namely that the defendant had already been sentenced to death elsewhere, rendering his wife's efforts somehow pointless. *See* 9 Cal. 4th at 643.

F.3d at 1030-33 (remanding for hearing to determine full nature and extent of alleged communications between juror and husband) (distinguishing *United States v. Williams-Davis*, 90 F.3d 490, 495-99 (D.C. Cir. 1996) (after hearing, trial court found juror's contact with husband harmless, since juror did not appear to be influenced by husband's "two cents' worth")).

The Attorney General seeks to convince the Court not to compel such a hearing in this case, but there is every reason to believe that a hearing would yield evidence of prejudice far different and greater than what was shown in *Carpenter*. In this case, Mrs. Sauer actually attended parts of the trial, and was in a position to discuss what occurred there knowledgeably—including, perhaps, matters that were intentionally kept from the jury. And unlike the juror in *Carpenter*, who was clearly at odds with her husband (*see* 9 Cal. 4th at 642-43), Juror Sauer attended to his wife's opinion, and subscribed to her "two cents' worth."

It remains to be seen whether, when all the evidence is in, the Attorney General will be able to rebut the presumption of prejudice that flows from Juror Sauer's improper discussions with his wife. At this point the Court is constitutionally compelled to make further inquiry and gather all the facts before determining whether and to what extent the admitted misconduct was prejudicial. *See Church v. Sullivan*, 942 F.2d 1501, 1508-09 (10th Cir. 1991) (discussing *Smith v. Phillips*, 455 U.S. 209, 215 (1982)).

C. Premature Deliberations And Site Visits.

During a break in the guilt phase of the trial, Alternate Juror Deborah Jane Morton overheard two of the regular jurors privately discussing the case. Ex. 6 ¶2 (Morton Decl.). In the few moments of the conversation that Ms. Morton overheard, one of the jurors (apparently Juror Sauer)[14] told the other of visiting the scene of one of the killings

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[14]As set forth in the Petition, Ms. Morton's description of the juror in question was conveyed to defense investigator Melody Ermachild, who in turn declared that she had met all of the male jurors in the case, and Juror Sauer most closely resembled the description. Ex. 2 ¶26 (Ermachild Decl.). The Attorney General's insistence that the pertinent portions of both declarations are merely hearsay is addressed at pages 22-23, *infra*.

and other sites mentioned in trial evidence. *Id.* In responding to these facts, the Attorney General addresses only one of the forms of juror misconduct portrayed—namely, the unauthorized site visits that were the subject of the snippets of conversation Ms. Morton overheard. IO at 17-19. What he ignores is the potentially more serious misconduct that occurred in the very fact that the two jurors were having such a conversation about the substance of the case.

As the Circuit Court of Appeals observed, citing federal and state case law and numerous treatises: "It is a generally accepted principle of trial administration that jurors must not engage in discussions of a case before they have heard both the evidence and the court's legal instructions and have begun formally deliberating as a collective body." *United States v. Resko*, 3 F.3d at 688; *accord State v. Cherry*, 20 S.W.3d 354, 358-59 (Ark. 2000); *Holland v. State*, 587 So. 2d 848, 873 (Miss. 1991); *see also People v. Brown*, 61 Cal. App. 3d 476, 480 (1976). The *Resko* court set out numerous "reasons for this prohibition on premature deliberations in a criminal case," including the following: (1) since the prosecution presents its case first, it is probable that any premature discussions will take place before the defendant has had a fair chance—and thus "likely that any initial opinions formed by the jurors, which will likely influence other jurors, will be unfavorable to the defendant . . ."; (2) once a juror expresses his or her view, he or she is likely to pay more attention to evidence that supports that view, and thus no longer holds an open mind; (3) such conversations thwart the design of the jury system, which "is meant to involve decisionmaking as a collective, deliberative process"; (4) "jurors who engage in premature deliberations do so without the benefit of the court's instructions"; (5) premature conclusions reached by jurors before the defendant has had a chance to present all of his or her evidence, in effect, shift the burden of proof from the government to the defendant who has "the burden of changing by evidence the opinion thus formed"; and (6) "requiring the jury to refrain from prematurely discussing the case with fellow jurors in a criminal case helps protect a defendant's Sixth Amendment right to a fair trial as well as his or her due process right to place the burden on the government to prove its case beyond a reasonable doubt." *United States v. Resko*, 3 F.3d at 689-90. All of those concerns come into play in the instant case.

Indeed, there is a particular danger that Juror Sauer's apparent tendency to adopt strong positions regarding guilt and punishment before hearing all the evidence (or any instruction) could have contaminated the other juror involved in the conversation.

The Attorney General assumes that, if any such conversations took place, the only things discussed were the juror's unauthorized (but presumed benign) site visits. The assumption is obviously unwarranted. Alternate Juror Morton reported the fact of premature discussions between sitting jurors, but she did not purport to describe the full content of those discussions. She could only recount what she heard in the few seconds as she walked by the two men. Ex. 6 at 1 ¶3 (Morton Decl.). There is no reason to conclude that the conversing jurors, having violated the court's admonitions in at least two ways (the site visit and the conversation itself), would have had a sudden attack of propriety and have refrained from sharing opinions about the evidence and likely outcome of the case.

When premature deliberations have taken place, and it is not possible fully to reconstruct their content or assess their effects—because of the passage of time, or otherwise—the courts have held that the convictions must be vacated and a new trial held. *United States v. Resko*, 3 F.3d at 695; *State v. Cherry*, 20 S.W.3d at 358-59; *Holland v. State*, 587 So. 2d at 873-74. It is, simply, the Attorney General's burden to show that this clear misconduct did not influence the outcome of Petitioner's case, and if he cannot do so, Petitioner is entitled to a new trial. *People v. Marshall*, 50 Cal. 3d at 949.

Similarly, there can be no dispute that the "juror's unauthorized visit to the scene of the crime . . . constitute[d] misconduct." *People v. Sutter*, 134 Cal. App. 3d 806, 819 (1982). Again, the Attorney General tries to shrug off that misconduct with the assumption that the juror could not have seen anything important there, or even anything different than what was introduced into evidence at trial. IO at 18-19. But unless and until the evidence is fully explored, we cannot know what the juror saw at the sites he visited, or more importantly what he *thought* he saw there—nor is it possible to assess what likely effect those visits had on his thinking or the thinking of other jurors who heard about them. Once again, having demonstrated juror misconduct, Petitioner has—at a

minimum—a right to a hearing at which the scope and consequences of that misconduct are fully explored. *See Smith v. Phillips*, 455 U.S. 209, 215 (1982).

The Attorney General's remaining argument is that the evidence Petitioner submitted in support of this claim "consist[s] entirely of hearsay statements, which may not be considered." IO at 17. But the challenged evidence is not hearsay, *i.e.*, not: "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." EVID. CODE §1200(a). The most significant aspect of Alternate Juror Morton's statement—that she overheard other jurors prematurely discussing the content of the trial—is merely that such a conversation took place. It is offered not to prove the truth of what those jurors were saying about the case, or about anything else. As such, it is simply not hearsay. *Cf. Weathers v. Kaiser Found. Hosps.*, 5 Cal. 3d 98, 110 (1971). As Justice Jefferson summarizes:

> Evidence of a declarant's statement is not hearsay evidence if it is not being offered to prove the truth of the facts stated in the statement but to prove the making of the statement as being relevant to prove a disputed fact in issue in the action, irrespective of the truth of any matter stated therein. (1 B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK §1.44 (3d ed. 2001); *see also, e.g.*, 1 B. WITKIN, CALIFORNIA EVIDENCE, *Hearsay* §5 (4th ed. 2000) (and cases discussed therein))

Moreover, the portion of Ms. Ermachild's declaration that is at issue—her statement that Juror Sauer most closely matches the description she received from Ms. Morton—is a first-hand percipient report, and also not hearsay.

The closest that the Attorney General comes to finding hearsay is when the statement of Ms. Morton, setting out the juror's admissions that he visited the scene of the crime and other sites, is employed to prove the truth of those admissions. To the extent that those admissions are significant, however—which is to say, to the extent they concern visits made during the course of trial—they clearly concern a matter as to which the juror making them could be the subject of disgrace and even to criminal prosecution. *See* PENAL CODE §96; *People v. Carpenter*, 9 Cal. 4th at 645. As such, those statements are classic

"declarations against interest," and thus are excepted from the hearsay rule. EVID. CODE §1230. Such sworn statements by jurors, setting out other jurors' admissions of misconduct, have often provided the basis for orders overturning the tainted judgments. *E.g.*, *Weathers v. Kaiser Found. Hosps.*, 5 Cal. 3d at 103-04; *People v. Castaldia*, 51 Cal. 2d 569, 571-72 (1959). In short, there is sufficient admissible evidence demonstrating that both unauthorized site visits and premature deliberations took place to compel the full exploration of the matter and to require the Attorney General to demonstrate that Petitioner's rights were not prejudiced as a result.

D. Concealment Of Bias On Voir Dire.

In his notably candid declaration, Juror Edward Sauer asserts his "belie[f] in the death penalty, and that if you kill someone you should die. So after David Rogers confessed on the witness stand to killing that woman, I thought there was no point in us (the jury) being there." Ex. 8 at 1:16-19 (Sauer Decl.). As set out in the Petition, the Juror was certainly entitled to those beliefs. But he was not entitled to conceal them when he was asked on voir dire about his views regarding the death penalty, and said (in answer to the court's questions) that he was "one of those neutral people on the issue of punishment in this case," who would not "automatically vote for a verdict of death . . . ."[15] RT 3310-11. To quote a case upon which the Attorney General regularly relies:

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[15]The Attorney General contends that Juror Sauer never said any such thing in his declaration or on the record at trial. IO at 29 n.12. These precise words, though not formulated by the juror, were adopted by him in response to the trial court's *voir dire*, as follows:

> [The trial court]: Do you entertain such a conscientious opinion concerning the death penalty that if we ever get to that point you *would automatically vote for a verdict of death* and under no circumstances ever vote for a verdict of life imprisonment without the possibility of parole?
>
> [Juror Sauer]: No.
>
> Q: So, I gather, sir that you are *one of those neutral people on the issue of punishment in this case* who would want to hear the evidence. You are not inclined to vote one direction or the other right now?

(continued . . .)

> [D]uring jury selection the parties have the right to challenge and excuse candidates who clearly or potentially cannot be fair. Voir dire is the crucial means for discovery of actual or potential juror bias. Voir dire cannot serve this purpose if prospective jurors do not answer questions truthfully. "A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct." (*In re Hamilton*, 20 Cal. 4th at 295 (citing *In re Hitchings*, 6 Cal. 4th at 111))

Juror Sauer's prejudgment of the central issue in this case was obviously prejudicial, and entitles Petitioner to a new trial. *People v. Nesler*, 16 Cal. 4th at 587-88; *In re Hitchings*, 6 Cal. 4th at 122-23; *Province v. Center for Women's Health & Family Birth*, 20 Cal. App. 4th 1673, 1678-80 (1993).

The Attorney General devotes the bulk of his response to arguing that the Court is barred from considering the pertinent portions of Juror Sauer's declaration by what this Court has described as "the rule against impeaching a verdict with evidence of jurors' subjective 'mental processes' (Evid. Code, § 1150) . . . ." *In re Hamilton*, 20 Cal. 4th at 298 n.19. This Court recently rejected precisely the same argument when it was pressed by the Attorney General in *Hamilton*. *Id.* As the Court reiterated then: "[T]he rule against proof of juror mental processes is subject to the well-established exception for claims that a juror's preexisting bias was concealed on voir dire." *Id.* at 298-99 n.19 (citing *People v. Hutchinson*, 71 Cal. 2d 342, 348 (1969); *People v. Castaldia*, 51 Cal. 2d at 571-72; *People v. Hord*, 15 Cal. App. 4th 711, 724 (1993)).

Nonetheless, the Attorney General insists that the Court overrule *Hamilton* and the body of precedent on which it rests, abolish the "exception" described in that case, and instead require that jurors' concealed bias be established exclusively through "'proof of overt acts, objectively ascertainable . . . .'" IO at 20. The Attorney General's arguments in support of this proposition are not easy to follow: He appears to be saying, variously, that the "exception" permitting juror affidavits to prove concealed bias was somehow "superceded" by the passage of Section 1150 of the Evidence Code; that the different rule he

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(. . . continued)

A: Right, yes. (RT 3310-11 (emphasis added))

now proposes was in fact always applied by the courts, *sub silentio*; and finally that *Hamilton* itself actually holds the opposite of what the Court in *Hamilton* said that it was holding. IO at 19-26.

The Attorney General begins with a reading of Section 1150 that is insupportable. That statute provides as follows:

> (a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.
>
> (b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict. (EVID. CODE §1150)

By its own terms Section 1150(a) itself does not bar the use of Juror Sauer's declaration—regardless of whether an exception is implied. While Juror Sauer's statement certainly casts light on his mental process in reaching a verdict, that is not what it is offered to prove here. Rather, it is tendered (and clearly admissible) to show what he believed at a different and a much earlier point—*i.e.*, when he was being questioned on voir dire. As a leading commentator on the law of evidence observes, in discussing the admissibility of statements made by jurors: "When the comments indicate that the juror had preconceived notions of liability or guilt . . . , the statements may be admissible to prove that the juror lied on the voir dire, a separate question from that of impeachment of verdicts." 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S FEDERAL EVIDENCE §606.04[5][a], at 606-37 (2d ed. 2001). The language of Section 1150(a) simply does not limit the evidence to be considered regarding the "separate question" of whether bias was concealed on voir dire.

Any doubt in that regard is removed by the remaining subdivision of the statute—Section 1150(b)—which codifies the aspects of the common law that do not explicitly conflict with the earlier portion. *See Hutchinson*, 71 Cal. 2d at 349-50. It will be recalled that prior to the enactment of Section 1150, the California rule was far more restrictive,

forbidding entirely the use of jurors' affidavits to impeach their own verdicts—even if those affidavits merely reported entirely objective matters (*e.g.*, the egregious misconduct of a bailiff). *Id.* at 346-47. That more restrictive approach (often referred to as "the Mansfield rule"), could indeed have barred the use of a declaration such as Juror Sauer's—but it was subject to a "judicial exception" that "allows jurors' affidavits to be used to prove that one or more of the jurors concealed bias or prejudice on *voir dire*." *Id.* at 348. Thus Section 1150(b) is meant, *inter alia*, to reiterate the efficacy of that "exception" which—according to this Court—was already "well settled" decades ago. *Id.*; *see* CAL. EVID. CODE §1150 comment—Assembly Committee on the Judiciary (West 2002) ("Section 1150 makes no change in the rules concerning when testimony or affidavits of jurors may be received to impeach or support a verdict . . . . [T]he courts have held that affidavits of jurors may be used to prove that a juror concealed bias or other disqualification by false answers on voir dire . . .").

Having thus failed to establish that the Court is compelled by statute to overrule any number of its own holdings, the Attorney General still does not indicate why it should do so as a matter of policy. On the other hand, the reasons for rejecting the Attorney General's proposal are readily discerned and were articulated by Justice Cardozo nearly seventy years ago:

> Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. The force of these considerations is not to be gainsaid. But the recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of a court to mediate between them, assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the judicial process. The function is the more essential where a privilege has its origin in inveterate but vague tradition and where no attempt has been made either in treatise or in decisions to chart its limits with precision. [¶] Assuming that there is a privilege which protects from impertinent exposure the arguments and ballots of a juror while considering his verdict, we think the privilege does not apply where the relation giving birth to it

has been fraudulently begun or fraudulently continued. (*Clark v. United States*, 289 U.S. 1, 13-14 (1933))

What the Attorney General offers in place of either statutory analysis or policy argument is a lengthy and tortured tracing of the various cases that led the Court to reaffirm in *Hamilton* the "concealed bias" exception to the rule limiting jurors' evidence. IO 21-24. The review is aimed at showing that in earlier cases in which the exception was invoked (or at least endorsed) the proof of concealed bias involved "overt, objective events"—and thus would have been permitted under Section 1150(a) irrespective of the exception. *Id.* at 22-23 (discussing, *inter alia*, *Noll v. Lee*, 221 Cal. App. 2d 81, 82-83 (1963); *Sopp v. Smith*, 59 Cal. 2d 12, 14 (1963); *People v. Castaldia*, 51 Cal. 2d 569, 570-571 (1959); *Kollert v. Cundiff*, 50 Cal. 2d 768, 772-73 (1958); *People v. Gidney*, 10 Cal. 2d 138, 146 (1937); *Williams v. Bridges*, 140 Cal. App. 537, 540 (1934); and *People v. Galloway*, 202 Cal. 81, 86-89 (1927)). Of course, the courts in those cases did not even suggest as a basis for their decisions the distinction set out in Section 1150—which is not surprising, given that Section 1150 was not adopted by the Legislature until 1965, after all of those cases were decided. Rather, the principle invoked in each of them (and the *ratio decidendi* of most) was the same exception that the Attorney General now decries.

Nor does the distinction that the Attorney General attempts to make find logical support in the cases he cites. In *People v. Castaldia*, for instance, the misconduct of two jurors in giving false answers on voir dire was proved by, among other things, admissions both jurors made to other jurors during deliberations, and statements made by one of them to a bus driver while the trial was going on, regarding what they believed and what they "knew" prior to voir dire. 51 Cal. 2d at 571. It remains a mystery why statements made to a bus driver or another juror should be regarded as somehow more "overt" or "objective" than Juror Sauer's statements to the defense investigator, which he memorialized under penalty of perjury. The Attorney General never explains why the *Castaldia* affidavits (or those tendered in the other cited cases) would be preferable to the sworn statement presented herein. *See* 8 WIGMORE ON EVIDENCE §2354, at 716-17 (McNaughton rev. 1961) (should facts regarding misconduct "be evidenced at all by jurors, they should be

evidenced by the juror's own account under oath, either by affidavit or on the stand, and not by hearsay statements of others as to his account") (emphasis omitted). Indeed, if *Castaldia*'s third-party affidavits had been offered in this case, the Attorney General surely would have challenged them as allegedly inadmissible hearsay. *See* IO at 17-18.

The Attorney General next attempts to rewrite the holding in *Hamilton*. IO at 24-25. The Attorney General quotes a lengthy passage from *Hamilton*, which, after noting that there are "narrow exceptions" to the rule against using as evidence the internal thought processes of jurors, then proceeds to quote the statutory provision restricting evidence of jurors' misconduct and prejudice to proof of overt, objectively manifested matters such as "'statements made, or conduct conditions, or events . . . .'" *Hamilton*, 20 Cal. 4th at 294 (quoting EVID. CODE §1150). He reads this passage to mean that the only "narrow exceptions" to the restrictions spelled out in Section 1150(a) are ones that meet the restrictions spelled out in Section 1150(a)—which is to say that there are no exceptions. Thus in one fell swoop, the Attorney General manages to turn the Court's exposition into gibberish, and to put it directly at odds with the Court's explicit holding in footnote 19 of the same opinion.

The Attorney General's principal argument *on the merits* of the claim is that Juror Sauer did not really commit misconduct by concealing his belief that anyone who kills should be automatically executed. The Attorney General is wrong, for reasons that were best explained by this Court, less than a decade ago:

> A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct. [¶] Without truthful answers on voir dire, the unquestioned right to challenge a prospective juror for cause is rendered nugatory. Just as a trial court's improper *restriction* of voir dire can undermine a party's ability to determine whether a prospective juror falls within one of the statutory categories permitting a challenge for cause, a prospective juror's *false answers* on voir dire can also prevent the parties from intelligently exercising their statutory right to challenge a prospective juror for cause. (*In re Hitchings*, 6 Cal. 4th 97, 111 (1993) (citations omitted))

False answers or concealment on voir dire also deprive the injured party of the statutory right to remove by peremptory challenge a prospective

juror believed not to be fair and impartial. This Court has recognized that:

> the peremptory challenge is a critical safeguard of the right to a fair trial before an impartial jury . . . . [J]uror concealment, regardless whether intentional, to questions bearing a substantial likelihood of uncovering a strong potential of juror bias, undermines the peremptory challenge process just as effectively as improper judicial restrictions upon the exercise of voir dire by trial counsel seeking knowledge to intelligently exercise peremptory challenges. (*Id.* at 111-12)

The denial of the right to reasonably exercise a peremptory challenge, by the trial court or by a juror through concealing material facts, is not a mere matter of procedure, but the deprivation of an absolute and substantial right historically designed as one of the chief safeguards of a defendant against an unlawful conviction.

> [W]here a party has examined the jurors concerning their qualifications, and they do not answer truly, it is manifest that he is deprived of his right of challenge for cause, and is deceived into foregoing [sic] his right of peremptory challenge. The prosecution, the defense and the trial court rely on the voir dire responses in making their respective decisions, and if potential jurors do not respond candidly the jury selection process is rendered meaningless. Falsehood, or deliberate concealment or nondisclosure of facts and attitudes deprives both sides of the right to select an unbiased jury and erodes the basic integrity of the jury trial process. (*Id.* at 111-12 (citations omitted))

The Attorney General devotes several pages of argument to the proposition that Juror Sauer's views—about imposing the death penalty on all defendants who kill—did not render him subject to challenge for cause. IO at 27-31. Although his point is not entirely clear, the Attorney General appears to be arguing that, because the juror would not have been excused for cause in any event, his dissimulation was either not misconduct or not prejudicial to Petitioner. In either event, the argument fails, for at least two reasons.

First, the argument fails on its own premises, for it is far from clear that the juror's tenure would have survived a challenge for cause. In the cases cited by the Attorney General, prospective jurors were quite open about their pro-death penalty views, and were only allowed to participate as jurors after they had gone through extensive voir dire on the subject

and had satisfied the trial court that they would put their views aside and vote for a lesser sentence if appropriate. *See People v. Staten*, 24 Cal. 4th 434, 453-54 (2000); *People v. Crittenden*, 9 Cal. 4th 83, 122-23 (1994); *People v. Mincey*, 2 Cal. 4th 408, 456-57 (1992). By concealing such views in this case, Juror Sauer rendered both the necessary follow-up examination impossible, and his own avowals of neutrality on the death penalty worthless. *Cf. People v. Holloway*, 50 Cal. 3d at 1111 (juror's concealment of misconduct "prevented the court and counsel from taking any action to remedy the situation"). Moreover, his concealment was itself evidence of bias and prejudgment. *In re Hitchings*, 6 Cal. 4th at 119-20.

Similarly, the Attorney General's assertion that Juror Sauer must be presumed to have followed the Court's instructions (to weigh all the evidence regarding penalty) fails, both because his own statement indicates that he did not do so, and because—as noted earlier in regard to this juror—"[w]hen a person violates his oath as a juror, doubt is cast on that person's ability to otherwise perform his duties." *Id.* at 120. In short, given what initially occurred, there is every reason to doubt the Attorney General's speculation that—had accurate answers been given on voir dire—Juror Sauer would have been passed for cause as someone with pre-existing views but an open mind, as opposed to being removed as someone who was committed to his own, pre-formulated opinion. *Cf.*, *Province*, 20 Cal. App. 4th at 1679-80; *Andrews v. County of Orange*, 130 Cal. App. 3d 944, 957-60 (1982).

Second, as *Hitchings* makes quite clear, even the fact that Petitioner was deprived of the opportunity to make an informed peremptory challenge is sufficient to render Juror Sauer's concealment another instance of prejudicial misconduct. *Hitchings*, 6 Cal. 4th at 111-12 (citing, *inter alia*, *People v. Galloway*, 202 Cal. 81, 92-94 (1927), and *People v. Diaz*, 152 Cal. App. 3d 926, 932 (1984)). The Attorney General responds by suggesting that the pertinent portion of *Hitchings* was mere *dicta* (because the juror in that case had committed other misconduct and had "actually prejudged the case"), and in any event should be disregarded. IO at 34. It may be remembered that the juror in this case has also admitted to other misconduct, and has admitted to having made up his mind about the penalty before even hearing the penalty phase evidence.

Ex. 8 at 1:16-20 (Sauer Decl.). But in any event, the Attorney General has not explained why those facts in *Hitchings* rendered the Court's holding something less than a holding. He certainly has not even tried to explain why this Court should overrule long-standing precedent, in this instance caselaw that goes back at least to *Galloway*, in 1927.

Buried near the end of the Attorney General's argument is a half-hearted attempt to assert that Justice Sauer's declaration does not really evidence concealment of pre-existing views. The pertinent portion of the declaration states as follows: "I believe in the death penalty, and that if you kill someone, you should die. So after David Rogers confessed on the witness stand to killing that woman, I thought there was no point in us (the jury) being there. As my wife put it, it was a waste of the tax-payer's money." Ex. 8 at 1:16-20 (Sauer Decl.). According to the Attorney General, because the first sentence is phrased in the present tense ("I believe . . ."), the passage only reflects the juror's view that formed after the confession was heard. IO at 33. In context, however, the statement refers to a belief that Juror Sauer had prior to the time that "David Rogers confessed on the witness stand . . . ." It beggars common sense to assume that this pre-existing opinion had suddenly developed in the relatively short time between voir dire and the early portions of the trial; the far more logical inference is that Mr. Sauer is describing a long-held view—one that at least predated his tenure as a juror.

Even putting aside logical probabilities, there are at least two fatal defects in the Attorney General's argument. First, the declaration indisputably establishes that Juror Sauer had made up his mind about the penalty before the guilt phase of the case had even been concluded. "For a juror to prejudge the case is serious misconduct." *Province*, 20 Cal. App. 4th at 1679-80 (quoting *Clemens v. Regents of the University of California*, 20 Cal. App. 3d 356, 361 (1971)); *see People v. Nesler*, 16 Cal. 4th at 587-88 (and cases cited therein). That misconduct in itself is sufficient to compel a new trial in this case. *Id.* Second, even if there were any uncertainty about what Juror Sauer believed and when he believed it, such uncertainty would, at a minimum, require this Court to order that it be resolved at an evidentiary hearing.

II.

UNLAWFUL SHACKLING.

For 130 years it has been unlawful in this state to bring an unconvicted defendant to court in shackles, absent proof of a "manifest need" for doing so. *People v. Fierro*, 1 Cal. 4th 173, 218-20 (1991), (discussing, *inter alia*, *People v. Duran*, 16 Cal. 3d 282, 290-91 (1976); *People v. Harrington*, 42 Cal. 165, 167-68 (1871), and PENAL CODE §688). More recently, the same principle has been recognized as a matter of federal constitutional right by the United States Supreme Court. *Illinois v. Allen*, 397 U.S. 337, 344 (1970). Thus California and federal courts alike recognize that "it is a denial of due process if a trial court orders a defendant shackled without *first* engaging in a two step process." *Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995) (emphasis added). Those two steps are: (1) a prior determination that the defendant poses a credible threat of violence or other "nonconforming conduct"—such as unruliness or planned escape (*People v. Hawkins*, 10 Cal. 4th 920, 943-44 (1995); *People v. Cox*, 53 Cal. 3d 618, 651 (1991)), and (2) a prior determination that no less onerous alternative could adequately address the demonstrated security problem. *People v. Duran*, 16 Cal. 3d 282, 290-91 (1976); *accord Duckett v. Godinez*, 67 F.3d at 748 (and cases cited therein).

The record shows that—without notice, hearing or prior determination—Petitioner was brought first to his arraignment, and later to his preliminary hearing in shackles. *See* CT 11-12. Indeed, at the earlier hearing, before counsel was appointed to represent him, he was not only shackled but also displayed in a jail jumpsuit, slovenly and unshaven.[16] It is undisputed that there was extensive pre-trial publicity. Television and newspaper cameras captured Petitioner in that alarming state and continued to record images of him in court, in shackles, until a hearing

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[16]As Petitioner's attorney described it: "Initially Mr. Rogers was photographed in a very unfavorable light that was prior to his representation by counsel. He was brought to court and he obviously hadn't shaved for four or five days, he was brought in unshaven and in shackles and in jail garb. He really looked quite bad." CT 81. The declaration of juror Debra Tegebo paints a similar portrait (Ex. 7 at 1:9-15 (Tegebo Decl.)), as do the television news clips in the record. Exs. 49, 50 (news videotapes).

was held during his second preliminary examination appearance, on the afternoon of March 16, 1987.

Prior to the hearing, the Magistrate revealed that he had been heeding an "off the record" request from the bailiffs to continue shackling Petitioner. At the hearing, the only evidence tendered in support of the continued shackling consisted of the bailiff's assertions that Petitioner was considered a suicide risk, based on facts, reasons and decisions of which the witness had no personal knowledge and only a vague awareness.[17] CT 13-20. Following the hearing, the Magistrate ordered that the cameras be turned off—but the press was not forbidden to use what they had recorded that day or previously. CT 20-21. Rather, it was not until the following afternoon—after the Magistrate had denied Petitioner's motion to be free from shackles—that the press was ordered to cease "disseminating [pictures] to the public revealing that he is in shackles." CT 82.

Given that Petitioner was displayed like a chained beast first, with questions deferred until later, it is remarkable that the Attorney General denies that there was even error. As discussed, the law requires at a minimum that there be a determination of manifest need for such restraints *before* a criminal defendant is subjected to such depredations. *People v. Duran*, 16 Cal. 3d at 290-91; *accord Duckett v. Godinez*, 67 F.3d at 748. Moreover, the fact that Petitioner was initially brought to court not only in shackles, but in jail clothes, unshaven and unkempt demonstrates an unjustifiable and constitutionally offensive procedure in and of itself. *See Estelle v. Williams*, 425 U.S. 501, 505 (1976).

In asserting that there was no error, the Attorney General does not even acknowledge these points, much less respond to them. Rather, he offers a series of unpersuasive arguments, beginning with the contention that the restrictions on shackling of defendants reaffirmed in *Fierro* simply do not apply to arraignments or other events prior to the preliminary hearing. IO at 35-36.

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[17]The bailiff conceded that he had no "specific reports of attempted suicides or threats to kill" by Petitioner, and he could point to nothing else to justify his desire to shackle Petitioner other than the fact that Petitioner had been on a "suicide watch." CT 20.

Among the several defects in this contention is the fact that the pertinent law itself is clearly to the contrary. Penal Code Section 688 provides that "[n]o person charged with a public offense may be subjected, *before conviction*, to any more restraint than is necessary for his detention to answer the charge." (Emphasis added). There is no ambiguity in the language, and unless the Attorney General wants to argue that arraignments are somehow post-conviction events, it would seem that his contention has already failed.

Again, the Attorney General ignores this obvious defect, and proceeds instead to explain why, in his view, the reasons given in *Fierro* for applying such restrictions to preliminary hearings do not apply to arraignments. Thus he asserts that jurors and witnesses do not need to be insulated from prejudice because they are not present at such hearings; that there is generally not much need for communication between client and counsel; and that the effect of the restraints on the defendant's dignity and decorum is "highly attenuated." He also claims that there are special security needs at such hearings because so many different defendants can be on the same calendar.

Not only is there is no record support whatever for any of the Attorney General's statements, but both the record and the case law directly contradict almost every point he makes. The fact that jurors are not present at arraignments is hardly a basis for distinguishing this case from *Fierro*—there are no jurors at preliminary examinations, either. Even more to the point, the fact that jurors and witnesses were not physically present in the courtroom clearly did *not* serve to insulate them from prejudice in this case—instead, they were all given free access to the most prejudicial representations of the shackled Petitioner, compliments of the local media. The assumption that Petitioner did not need to communicate with counsel is baseless, and the assertion that his dignity and composure were not gravely compromised is contradicted by the record evidence that shows how he appeared to himself and others. As for the special danger of a crowded arraignment calendar, the Attorney General himself elsewhere points to record evidence that Petitioner was kept completely separate from other prisoners and "not transported with anyone else." CT 19. In short, if there is a reason why the rule reiterated in

Fierro should not apply to this case, the Attorney General has not articulated it.

The Attorney General next argues that any claim based on Petitioner's shackling at the arraignment was waived, citing authority that "'the use of physical restraints in the trial court cannot be challenged for the first time *on appeal*.'" IO at 36 (emphasis added) (quoting *People v. Tuilaepa*, 4 Cal. 4th 569, 583 (1992), *aff'd*, 512 U.S. 967 (1994)). The holdings he cites are obviously inapposite. It will be recalled that Petitioner was not given any notice or opportunity to object before being presented at his arraignment in shackles. It appears that he was initially not represented by counsel (*see* CT 81:11-12), and he could hardly have been expected to stand up then and there and assert an objection on the basis of rights he did not know he had. The attorney finally appointed to represent Petitioner asserted that he had made prompt objection to the manner in which Petitioner was brought into court.[18] This is clearly *not* a situation in which the defendant made his objections "for the first time on appeal."

In the final analysis, however, the Attorney General's arguments regarding the arraignment matter little, for the unlawful shackling of Petitioner continued through the preliminary examination, and well past the point at which even the Attorney General concedes that timely objection was made. *See* IO at 36. The Attorney General contends that the shackling of Petitioner during his preliminary examination was justified by the "evidence" presented during the hasty and belated hearing held by the Magistrate, and that this Court should defer to the Magistrate's exercise of discretion following that hearing.

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[18]Counsel stated on the record and without contradiction that: "I did object to the fact that the sheriff's department and the district attorney's office held an initial news conference in the case discussing their evidence in the case and also their portrayal of Mr. Rogers in the jail clothing, chained and shackled, in such a condition that he just looked bad, not having shaved or anything for several days." CT 12. While parts of the pretrial record in this case seems to have disappeared, there is certainly nothing to contradict this account of events by trial counsel, "an officer of the court whose representations of fact, made without objection or rebuttal" are sufficient to establish them. *People v. Medina*, 11 Cal. 4th 694, 731 (1995).

The first and most obvious flaw in that contention is that both the hearing and the Magistrate's ruling came *after* the fact—Petitioner had already been brought to court repeatedly in shackles, and he had been extensively photographed and otherwise displayed to the public (including potential witnesses and jurors) in that condition. The Constitution and case law require that the need for shackling be established in court, and a determination made, *before* anything of that sort transpires. *See People v. Duran,* 16 Cal. 3d at 290-91; *accord Duckett v. Godinez*, 67 F.3d at 748. The fact that Petitioner was shackled in open court before any such notice, hearing or ruling was completed makes this case different from the pertinent precedent upon which the Attorney General seeks to rely. *See, e.g., People v. Pride*, 3 Cal. 4th 195, 231 (1992) (shackling ordered following two-day hearing); *People v. Medina*, 51 Cal. 3d 870, 897 (1990) (shackling ordered following pretrial motion by prosecutor). If the required advance procedures had taken place in this case, the most prejudicial aspect of the shackling—the wide dissemination of Petitioner's image in chains—would have been avoided, for that Magistrate could (and presumably would) have barred the cameras before the fact. Thus Petitioner's rights would have been violated in this case, even if the Attorney General was correct in arguing that the shackling was justified.

In any event, the Attorney General is not correct. An obvious problem with deferring to the discretion of the Magistrate is that he did not so much exercise his own discretion as defer to the discretion of the Sheriff's Department. The Magistrate's holding, in totality, was as follows:

> I intend [sic] to agree with [defense counsel], as a practical matter, *I don't have any apprehension that Mr. Rogers is going to cause a disruption or seek to escape or seek to create any injury.* However, unfortunately as it may be, it's exactly those types of situations where no apprehension exists that the greatest danger often lies. The sheriff's department has put on testimony through Senior Deputy Poeschel that in their estimation Mr. Rogers poses a risk to himself and potentially a risk to others and I am convinced by that testimony that he should remain shackled in the manner in which he has been shackled. So I will therefore deny your request to have him unshackled. (CT 80-81)

The meaning of these remarks seems clear enough: Though the Magistrate had not himself heard any evidence that would persuade him of the necessity of shackles, he was "convinced" that he should rely on the opinion of the Sheriff's Department in the matter. If that were sufficient, there would never be any need for such hearings, for shackling does not become an issue until the jailer decides that shackles are appropriate. As another state's Supreme Court said under similar circumstances, after surveying cases across the nation:

> [T]he deference given to the correctional officers is error. Courts have specifically found reversible error where the trial court based its decision solely on the judgment of correctional officers who believed that using restraints during trial was necessary to maintain security, while no other justifiable basis existed on the record. (*State v. Finch*, 975 P.2d 967, 1003 (Wash. 1999) (citing *People v. Vigliotti*, 611 N.Y.S.2d 413 (App. Div. 1994); *People v. Thomas*, 510 N.Y.S.2d 460 (App. Div. 1986)))

At best, the Magistrate's ruling is a far cry from an articulated finding, "upon a proper showing . . . of violence or a threat of violence or other nonconforming conduct" that is required for a proper exercise of discretion under *People v. Duran*, 16 Cal. 3d at 291-92, and its progeny.

Even more to the point, the underlying "evidence" that was presented was far from adequate to support the ruling. As this Court has reiterated, such restraints can only be used when a "manifest need" for them has been demonstrated, and:

> "[m]anifest need" arises only upon a showing of unruliness, an announced intention to escape, or "[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained . . . ." Moreover, "[t]he showing of nonconforming behavior . . . must appear as a matter of record . . . . The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion." (*People v. Cox*, 53 Cal. 3d 618, 651 (1991) (citation omitted) (quoting *People v. Duran*, 16 Cal. 3d at 291-92))

The reason tendered for shackling David Rogers came to nothing more than that someone (never identified) had concluded that he was potentially suicidal. As this Court has held, in making a shackling

determination "the [trial] court is obligated to base its determination on facts, not rumor and innuendo." *People v. Cox*, 53 Cal. 3d at 652.[19]

The Attorney General also tries to bolster this insufficient evidentiary showing with other evidence that was adduced at trial nearly a year later, showing that Petitioner was indeed suicidal at some point—which the Attorney General, with no record support, asserts was "around th[e] time" of the shackling hearing. IO at 38 n.15. If those facts, never presented to the Magistrate, are properly within the Court's consideration here, then so is the fact that Petitioner went through the entirety of an extremely long trial *without* being shackled, and with neither any untoward incidents nor the suggestion of any need for restraints of any kind. For what it is worth, the evidence cited by the Attorney General demonstrates that Petitioner was also suicidal at that later point (*i.e.*, during trial) as well. RT 5452.

Nor was the proffered reason adequate even if it had been solidly proved. The Attorney General spins a hypothetical scenario from the bare allegation that Petitioner was suicidal. He supposes that Petitioner would have successfully overpowered or tricked his wary captors long enough to wrest a gun from one of them. However, there is nothing whatever in the record to suggest that Petitioner had ever tried to do anything of the sort, or that he ever would, or that he ever even entertained such a notion. Indeed, given Petitioner's expressed remorse and depression over the fact that he harmed others and disgraced his family and his badge, it seems an unlikely scenario. Thus the holding on this point in *Cox* is equally applicable here:

> While the instant record may be rife with an undercurrent of tension and charged emotion on all sides, it does not contain a single substantiation of violence or the threat of violence on

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[19]The Attorney General correctly notes that all of the evidence offered in support of shackling was hearsay (IO at 37 n.14), but he is not correct in his assertion that there was no objection to it. *See* CT 18 (defense objection on grounds of hearsay and lack of personal knowledge, overruled). Even assuming that there was some formal defect in the objection, the fact remains that the bailiff's testimony *was* based on entirely on secondary and tertiary sources, and was hardly the solid and reliable sort of evidence that a Magistrate should require before intruding on the constitutional protections afforded a criminal defendant.

> the part of the accused. Although the shackling decision was not based on a "general policy" to restrain all persons charged with capital offenses, neither did it follow "a showing of necessity" for such measures. (See *People v. Duran*, *supra*, 16 Cal.3d at p.293.) Accordingly, the trial court abused its discretion in ordering defendant physically restrained in any manner. (*People v. Cox*, 53 Cal. 3d at 652)

See also State v. Finch, 975 P.2d at 1002 (holding that a defendant's prior suicide attempts could not justify shackling him during his trial).

The justification for the shackling order is even weaker when examined in terms of the other prerequisite to such an order: a finding that no less onerous means will suffice, and that shackling is indeed the "last resort" to be employed. *See People v. Medina*, 51 Cal. 3d at 897; *People v. Duran*, 16 Cal. 3d at 290; *Jones v. Meyer*, 899 F.2d 883, 884-85 (9th Cir. 1990). The Attorney General claims that nothing less than shackling could guarantee that Petitioner—"well trained and obviously experienced in the swift use of firearms"—would not wrest a gun from one of the many armed officers in the courtroom, and cause violent harm to himself and perhaps others. IO at 38. Let us put aside for a moment how implausible that scenario would be, given that each of those several officers (deputy sheriffs, just like Petitioner) were equally "well trained and obviously experienced in the swift use of firearms"—and were specifically on guard against just that possibility. Given that there were between three and eight armed deputies in the courtroom at all times (CT 15, 20), one quite obvious remedy would be for the one deputy immediately handling Mr. Rogers not to wear a gun in the courtroom—leaving no gun within grabbing distance, and leaving that deputy's colleagues with ample firepower should something else (something as yet unimagined by the Attorney General) happen.

Neither this nor any other alternative was considered by the Magistrate. Instead, he simply decided that he would not second-guess the bailiff's decision to shackle the petitioner. As discussed, however, it was his job to make just such an independent determination, and in failing to do so, he abused his discretion.

That leaves the issue of prejudice. Although, as the Attorney General acknowledges at the outset, shackling causes a multitude of harms, even egregiously improper shackling orders are not grounds for reversal unless the restraints have been seen by jurors or prospective

witnesses who could have been influenced by their presence. *E.g.*, *People v. Fierro*, 1 Cal. 4th at 220; *People v. Cox*, 53 Cal. 3d at 652.

We have shown that, in this case, the news pictures taken in court by the media potentially exposed all of the jurors and witnesses to that improper spectacle—and definitely exposed Juror Debra Tegebo, who was impressed in the most negative fashion. The Attorney General responds by citing cases in which jurors' brief, inadvertent glimpses of shackles were held not to be prejudicial.[20] IO at 39 (citing *People v. Ochoa*, 19 Cal. 4th 353, 416-17 (1998); *People v. Osband*, 13 Cal. 4th 622, 674 (1996); *People v. Rodrigues*, 8 Cal. 4th 1060, 1179 (1994)). Those cases are inapposite, for at least two reasons. First, the newspaper and television news images of Petitioner were neither accidental nor inconsequential. They were *meant* to create an image of Petitioner in the viewers' minds—the very image that the prohibition on shackling is meant to prevent, the "unmistakable indication[] of the need to separate a defendant from the community at large [because] he is particularly dangerous or culpable." *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986). That is certainly how they impressed Juror Tegebo.

Second, the fact is that we do not yet know how thoroughly the image was disseminated, or in what sort of "packaging," or how widely or deeply all of the various jurors were affected by it. Unlike the cases cited by the Attorney General, no hearing has been held on the subject in this case, and Petitioner has had neither subpoena powers nor any other investigative authorization, but has had to rely on the willingness of jurors and others to speak with and assist his representatives voluntarily. It is simply premature to draw any conclusions regarding the full extent of prejudice, and it would be unfair to do as the Attorney General insists and close the matter without even a hearing.

The Attorney General's remaining arguments require little discussion. He repeatedly attempts to confuse the nature of the error asserted with the proof of prejudice offered. Thus he contends that Petitioner's

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[20]In the same string of citations, the Attorney General includes several other cases in which there was no prejudice because jurors did not see the restraints at all. *People v. Medina*, 11 Cal. 4th 694, 732 (1995); *People v. Tuilaepa*, 4 Cal. 4th at 584; *People v. Bolin*, 18 Cal. 4th 297, 317-18 (1998). Given the claim here, those citations are a *non sequitur*.

complaint is one of prejudicial pretrial publicity, which can be denied on the basis of *In re Hamilton*, 20 Cal. 4th at 295; or that we are merely offering yet another claim of improper receipt of extraneous materials, and thus must make out a substantial likelihood of juror bias. IO at 40-41 (citing *In re Carpenter*, 9 Cal. 4th at 653). These arguments must fail. The *legal error* that is claimed here is the same one found in *Fierro* and described in the cases we have discussed—that Petitioner was shackled (and at times dressed in jail clothes) in court, without any "manifest need" established for doing so. The *prejudice* is the same that sufficed in those shackling cases that have led to reversals and new trials—that Petitioner was improperly exposed to the jury in that light. The fact that the jurors got that improper view through the media rather than in person makes this case different, but the Attorney General has not explained why that difference merits some legal distinction or changes the outcome, and neither reason nor precedent suggest that it should.

Finally, the Attorney General falls back on the "fix-all" that the jurors must be presumed to have remained unfazed by the negative images of the shackled Petitioner, because after all they were instructed to decide the case solely on the evidence, and they are presumed to follow the instructions. IO at 41-42. As before, the contention proves far too much. If true, then no jury trial error would ever be considered prejudicial, save and except some errors in the instructions themselves. In this context, it is appropriate to remember, as the Supreme Court has reiterated: "'The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction . . . .'" *Bruton v. United States*, 391 U.S. 123, 129 (1968) (quoting *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)). That presumption (fictional or otherwise) has undeniable utility in situations in which a explicit admonition is given to prevent the jury from being swayed by a specific error. *E.g.*, *Greer v. Miller*, 483 U.S. 756, 766 (1987); *People v. Holt*, 15 Cal. 4th 619, 662-63 (1997). There is no precedent whatever, though, for employing it as a sort of general absolution for all trial error, nor is there any reason to do so.

III.

NEWLY DISCOVERED EVIDENCE.

The Attorney General has agreed that an evidentiary hearing is required to resolve the issues set forth in Petitioner's Third Claim for Relief (Newly Discovered Evidence and Use of False Evidence).

IV.

PROSECUTION FAILURE TO DISCLOSE MATERIAL EVIDENCE.

The Attorney General has agreed that an evidentiary hearing is required to resolve the issues set forth in Petitioner's Fourth Claim for Relief (Prosecutorial Failure to Disclose Material Evidence).

V.

INEFFECTIVE ASSISTANCE OF COUNSEL.

The great majority of Petitioner's habeas corpus claims regarding the ineffectiveness of his trial attorney correspond to related claims of trial error—*e.g.*, the habeas claim that trial counsel improperly failed to move for severance of the two murder counts obviously relates to the claim on direct appeal that joinder of the counts violated due process; similarly, the assertion that trial counsel was incompetent for failing to request needed jury instructions reflects in great part the claims made on direct appeal regarding the trial court's failure to give necessary and required instructions.

In responding to Petitioner's ineffective assistance claims, the Attorney General has thus confined himself (with a few exceptions that will be addressed in order, below) to invoking one or both of two obvious devices. First, he simply reiterates—at greater or lesser length—precisely the same arguments that he offered in Respondent's Brief on direct appeal. Second, he asserts that the specific ineffective assistance claim could and should have been brought on direct appeal as well, and thus is barred by the rule announced by this Court in *In re Waltreus*, 62 Cal. 2d 218, 225 (1965), which prohibits the use of habeas corpus as a "second" vehicle for raising direct appellate claims.

In the interests of economy, we will not follow the Attorney General's lead, and again argue precisely the same points that have been thoroughly briefed on direct appeal; rather, we will respectfully direct the Court to the pertinent portions of earlier briefs, and ask that they be incorporated by that reference. Likewise, we will not respond individually to each of the Attorney General's invocations of the *Waltreus* bar. Suffice it to say—as this Court has repeatedly said—"[b]ecause claims of ineffective assistance are often more appropriately litigated in a habeas corpus proceeding, the rules generally prohibiting raising an issue on habeas corpus that was, or could have been, raised on appeal [citations, including *Waltreus*] would not bar an ineffective assistance claim on habeas corpus." *People v. Tello*, 15 Cal. 4th 264, 267 (1997); *accord*, *In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998) ("We do not apply [*Waltreus*] bars to claims of ineffective assistance of trial counsel, even if the habeas corpus claim is based solely on the appellate record").[21]

We will also refrain from entering a prolonged debate regarding the abstract standards by which ineffective assistance of counsel claims are to be measured. Although the Attorney General's summary of that material (IO at 44-48) is tendentious at best and simply inaccurate at worst, Petitioner will not reiterate the general case law in this well-traveled area, reserving discussion of the applicable legal standards until they can be given concrete application. We pause only to make one point. The Attorney General strongly relies on language in *Lockhart v. Fretwell*, 506 U.S. 364, 369 & n.2 (1993), to the effect that the essential issue

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[21]For much the same reason, the Attorney General enjoys no better luck with his suggestion that Petitioner's claims be denied on the ground that the cold record fails to illuminate the reasons for trial counsel's apparently incompetent acts and omissions. IO at 47-48 (citing *People v. Pope*, 23 Cal. 3d 412, 425 (1979) and cases following *Pope*). The point made in *Pope* and its progeny is that direct appeal is generally an inappropriate vehicle for ineffective assistance of counsel claims because there is no proper mechanism for questioning counsel about his actions and lapses within that context. 23 Cal. 3d at 425-26 & n.17. That is precisely why Petitioner has raised the instant claims on habeas corpus, so that trial counsel can have an opportunity at an evidentiary hearing to illuminate his reasons—and, more important, so that Petitioner can have the opportunity, enforced by the subpoena and contempt powers, to ask counsel to do so. *See id.*; *see also People v. Pensinger*, 52 Cal. 3d 1210, 1252 & n.14 (1991) (cited in IO at 48).

regarding ineffective assistance is not the likelihood of a different result, but whether the result reached was "fundamentally unfair." IO at 46-47. That approach was specifically disapproved by the United States Supreme Court in *Williams v. Taylor*, 529 U.S. 362, 391-92 (2000) (discussing *Lockhart*).

A. Failure To Move For Severance.

Virtually all of the Attorney General's comparatively lengthy response to Petitioner's claim regarding trial counsel's failure to seek severance consists of a *verbatim* repetition of the corresponding portion of Respondent's Brief ("RB") on direct appeal.[22] *Compare* IO at 48-63 *with* RB at 120-22 & 127-141. Rather than follow suit, Petitioner respectfully directs the Court's attention to, and incorporates by reference, Appellant's Reply Brief on direct appeal ("ARB") at pages 104-114, which addresses those same arguments.

B. Failure To Ensure Petitioner's Presence.

The Attorney General's substantive arguments consist again of a repetition of the same arguments offered on direct appeal (RB at 147-59), which were fully addressed in our Reply. ARB at 114-17. Petitioner respectfully draws the Court's attention to that material and incorporates it herein by reference. The attempt to invoke a *Waltreus* bar is also insupportable. *See In re Robbins*, 18 Cal. 4th at 814 n.34.

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[22]The largest difference between the Attorney General's two briefs that we have been able to detect in this context consists of a slight shift in tone in his discussion of *People v. Carpenter*, 15 Cal. 4th 312, 361-63 (1997). After setting out the same extended block quote from *Carpenter* that he offered earlier, the Attorney General now suggests that *Carpenter* is not only persuasive but itself completely dispositive of Petitioner's claim that joinder was unfair. See IO at 51. His assertion that *Carpenter* is dead on point is betrayed by the very passage he has (twice) block-quoted. As the Court discussed in that passage, in *Carpenter* "[t]he evidence of identity was strong for both incidents"—even without regard to the ballistics evidence showing that the same gun had been used in both murders. *Carpenter*, 15 Cal. 4th at 362-63. Petitioner's claim in this case is founded on the fact that the common ballistics evidence was *the only evidence of any sort* pointing to Petitioner as the perpetrator of the Benintende killing—a fact that made the joinder of the two offenses manifestly unjust.

C. Failure To Ensure A Complete Record Of Proceedings.

The Attorney General's arguments on the merits again consist only of the same points he made on direct appeal (RB at 160-79), which were fully addressed in our Reply. ARB at 87-103. Petitioner respectfully draws the Court's attention to this material and incorporates it herein by reference. His attempt to invoke a *Waltreus* bar fails again. *Robbins*, 18 Cal. 4th at 814 n.34.

D. Failure To Offer Evidence Proving Petitioner's Abusive Childhood.

The Attorney General reluctantly concedes that Petitioner's defense depended on whether the jury accepted the testimony of the three mental health professionals who testified that, as a result of the sexual and violent physical abuse Petitioner suffered as a child, he did not have the requisite mental state to be culpable of the crime of first-degree murder. IO at 70. The Attorney General also concedes, as he must, that trial counsel offered no competent evidence from anyone with direct knowledge of the childhood abuse Petitioner suffered, or of its effects on him prior to the time of the charged crimes. IO at 67. Indeed, as the Attorney General recounts, the prosecutor repeatedly attacked the accounts of his early abuse as "hearsay." She noted emphatically that no one from Petitioner's family had testified in that regard, concluding "we have nothing to prove that it was true. We have only the words of the doctors, and we don't even know where they got their statements." RT 5615; *see* IO at 69.

As the Petition shows, there was powerful and readily available evidence "to prove it was true." Petitioner's brother, Clifford Dale Rogers, was prepared to testify regarding these matters and badly wanted to do so, but trial counsel failed to call him as a guilt phase witness. In fact, trial counsel did not even *ask* Dale Rogers about his memory of the facts that comprised the predicate for the defense.[23] Ex. 5 ¶¶1, 24, 25

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[23]The Attorney General tries to distinguish *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995), on the basis that "the *Hendricks* decision was based on *lack of investigation*, rather than the failure to call witnesses." IO at 72 (emphasis in original). Actually, both the claim in *Hendricks* and the claim in this case encompass both the failure to investigate *and* to adduce (continued . . .)

(Dale Rogers Decl.). This failure to investigate and adduce extremely persuasive evidence in support of the core claims of the defense constituted ineffective assistance on the part of trial counsel.

The Attorney General responds that Dale Rogers' testimony could not have made a significant difference, inasmuch as "the District Attorney essentially conceded that the bulk of the underlying abuse had occurred." IO at 71. But there was no genuine concession on this point. While the prosecutor occasionally seemed to acknowledge that there was abuse, it was only a point made to emphasize that such abuse "had nothing to do with the murders." RT 5622. More often she made a different, more limited concession, that: "*[I]f you believe all the hearsay evidence that was given by the doctors*, then, yes, . . . he was probably extensively abused as a child." RT 5615 (emphasis added); *see* RT 5562-63.[24]

Still more often, the prosecutor took a third approach, repeatedly attacking the evidence of abuse as being vague, third-hand, unsubstantiated and unpersuasive. *See* RT 5582, 5583, 5614, 5615. Even in the prosecutor's "concession" that the hearsay testimony of the health care professionals, if true, demonstrated abuse, she added that "some of that evidence is directly contradicted by Mr. Rogers' statements himself." In the very next breath, she emphasized "we have nothing to prove that it was true. We have only the words of the doctors, and we don't even know where they got their statements." RT 5615. And elsewhere she hammered on the point:

> Their [the experts'] entire and complete testimony to you is based on things that they got from someone else, from some other person who did not choose to come into this court, be questioned and be cross-examined. Those people chose not to come in, and you as a jury were denied your right, you were denied your responsibility, and you were denied your duty to determine whether or not what those people had to say was the truth. . . .

(. . . continued)
available evidence.

[24]Of course, she went on to argue that such abuse, even if proved, would not excuse Petitioner's conduct.

> *Where are they? Where are the people who could come in here and testify as to this man's behavior and these things that supposedly happened to him from the time he was six months old until he was 41 years old?* (RT 5582-83 (emphasis added))

The Attorney General insists that the jury must have accepted the prosecutor's hypothetical argument (*i.e.*, "okay, suppose he was abused, but that is no excuse") rather than her primary, oft-repeated assertion ("there is no real evidence proving any of this childhood abuse occurred"). That is pure speculation. Further, the Attorney General simply ignores that the prosecutor's qualified concession was only offered to strengthen her primary challenge to the evidence of abuse. After all, if the jurors could not be sure that the abuse had even occurred, they certainly were not going to conclude that the effects of the alleged abuse had vitiated the *mens rea* required for the charged crimes.[25] The prosecutor's back-up "concession" simply allowed her to make the alternative argument—that any childhood mistreatment was irrelevant to guilt—without appearing inconsistent, callous or unsympathetic.

There is at least a reasonable likelihood that the result would have been different had the jury actually heard the painful, eloquent account set forth in Dale Rogers' declaration; the first-person testimony of the most knowledgeable of (to borrow the prosecutor's mocking phrase) "the people who could come in here and testify as to this man's behavior and these things that supposedly happened to him from the time he was six months old . . . ." RT 5582-83. The jury would have known that the mental health experts were not building castles in the air, and thus it could have credited the conclusions the experts reached as to how this

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[25]Challenging what he mischaracterizes as "petitioner's premise," the Attorney General insists that "the jury was not authorized to simply reject all of the testimony of the defense experts simply because it was based (in part) on hearsay." IO at 71. That was never Petitioner's "premise." Our point is that the jury was *urged* by the prosecutor and was *permitted* by the instructions or absence thereof to reject any and all of the allegations of childhood abuse—and all of the psychiatric testimony based on those allegations—to the extent it did not credit the accuracy of those second-, third-, and fourth-hand accounts of abuse by the mental health professionals. For *this* reason, the omission of Dale Rogers' first-hand testimony was material, and constituted ineffective assistance.

horrible suffering had so altered Petitioner's mental processes as to render his killing of Tracie Clark something less than capital, first-degree murder.

The balance of the Attorney General's argument consists of his renewed insistence that reasonable jurors could not possibly have accepted Petitioner's testimony regarding the Clark killing—the version of events that was consistent with the psychiatric testimony that he acted impulsively, and perhaps unconsciously, out of deep irrational fears springing from his early traumas. Rather, the Attorney General asserts that the jury could *only* have accepted the truth of the earlier, more inculpatory version of the killing that Petitioner gave to police in his post-arrest confession, in which he described a calculated decision to finish off his wounded victim. According to the Attorney General, it just did not matter to the jurors whether the evidence regarding Petitioner's childhood abuse was credible, because the entire psychiatric defense was irrelevant to them. IO 72.

To begin with, the premise of this argument is demonstrably false. The record shows that the jurors indeed took the psychiatric evidence quite seriously: One of their requests during deliberations was for "the final conclusions of [Dr.] Bird, [Dr.] Glaser, and [Ms.] Franz." RT 5695-96. They would have had no reason to make that request if, as the Attorney General insists, they had simply rejected Petitioner's testimonial account as "a lie," and ignored the psychiatric defense predicated upon that account. IO at 74. On the contrary, to the same extent that they were concerned with the accuracy of the doctors' "final conclusions," they were necessarily concerned with the strength of the evidence underlying those conclusions. It is in precisely this regard that the failure to adduce Dale Rogers' testimony—direct evidence of Petitioner's childhood abuse—left the defense fatally vulnerable.

Nor can the Attorney General's argument survive even on its own terms. The essence of the argument is that only the more inculpatory confession (as contrasted with Petitioner's later trial testimony) was consistent with the physical evidence of the Clark killing. IO at 72-73 & n.29. If anything, the opposite is true. While the Attorney General emphasizes that "[t]he confession was consistent with the evidence that Tracie [Clark] was shot from various angles" (IO at 73), he does not

point to anything about Petitioner's testimony that was *in*consistent with that same evidence. On the other hand:

> it is almost impossible to square [the confession] version with the forensic evidence: If (as [Petitioner] stated in his post-arrest "confession") he first shot Ms. Clark and then struggled with her while they were *inside* the cab of his truck (RT 4683), why was there absolutely *no trace whatsoever* of a gunshot, blood, or anything related, inside the truck? RT 4821-22. And if the killing was a calculated, deliberate effort on [Petitioner's] part to keep from being apprehended for the (much less serious) crime of wounding the prostitute (RT 4686; 4705), why did he make no effort whatever to avoid detection? The fact that [Petitioner] left his unobscured tire tracks at the scene and even left the murder weapon in his truck is far easier to square with his later statements to the effect that his "confession" was a deliberately inculpatory attempt at "legal suicide." (AOB at 56-57)

The foregoing is blocked as a quotation because it is taken from Appellant's Opening Brief. The Attorney General has had ample opportunity since then to address these points, but has never done so. The closest that he now comes to responding is to deride "the 'legal suicide' theory [as] 'just hogwash.'" IO at 73. Yet the explanation offered for that characterization is not factually accurate, let alone persuasive. The Attorney General contends that "if petitioner had actually intended to commit suicide, he would have told police he had stolen the murder weapon, instead of falsely saying he had bought it from a bartender, and would have admitted that he had also murdered Janine Benintende, instead of saying he did not remember if he had killed her." IO at 74 (record citations omitted). The fact is that Petitioner *did* try to admit to killing Janine Benintende—but the investigators taking his statement would not accept that "confession" because he could not provide any details of the killing. Challenged by his examiners, Petitioner could only ask to plead guilty and reiterate that he had no memory at all of the crime.[26] "[Rogers:] Then convict me with whatever evidence you have and I will plead guilty [to] it." RT 188 (vol. I-A).

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[26]The pertinent portion of the post-arrest interview is as follows:

> [David Rogers:] I want to go ahead and plead guilty. I did it. I am going to go ahead—

(continued . . .)

As for the point about the murder weapon, the Attorney General does not explain how admitting that the gun was stolen would have made a difference in terms of whether Petitioner was culpable for the homicides committed with the gun. The obvious answer as to why the suicidal Petitioner did not want to admit to that tangential misdeed is that he wanted at least to preserve his self-image as a police officer who functioned honorably when on duty—even if he was to be executed for his off-duty actions.

In short, there was sufficient evidence and a sound logical basis for the jurors seriously to consider Petitioner's testimonial account of the killing of Tracie Clark. The record of their deliberations demonstrates that they did in fact entertain the psychiatric defense that accompanied, explained and depended upon that version. The jury did not have an easy time finding first-degree murder, as the Attorney General suggests. Rather it took almost two days to reach its verdict—despite the ineffectiveness of trial counsel and errors of the trial court. It was in fact a close case. *See, e.g., People v. Rucker*, 26 Cal. 3d 368, 391 (1980) (nine

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(. . . continued)

[Det. Soliz:] We are charging you with two murders, Dave. Are you going to plead guilty to both?

[Rogers:] I will plead guilty to both.

[Soliz:] We are not going to let you plead guilty to the second unless you explain to us right now on tape—

[Rogers:] I will plead guilty to—

[Soliz:] Listen, you cannot plead guilty to the second murder until you have convinced the judge and us beyond a reasonable doubt you did it, meaning only the killer would know the facts of the case. If you did the second murder, then tell us the facts. How was the girl shot? Where was she picked up?

[Rogers:] I don't remember. It's my gun.

[Soliz:] That is not good enough any more, Dave. If you are going to plead guilty to it you are going to have to give us the facts or they are not going to let you plead guilty, and we are going to trial on the second case . . . . If you don't know the facts, there is no way we are going to let you plead guilty to it. We are going to trial and convict you of it based on the evidence. But we will not let you plead guilty to it. That is just the way the court system works. (RT 187-88 (vol. I-A))

hours of deliberations demonstrated that case was close); *People v. Woodard*, 23 Cal. 3d 329, 341 (1979) (six hours deemed a long time); *People v. Fuentes*, 183 Cal. App. 3d 444, 456 (1986) (nine hours: case was close).

We respectfully submit that, had the jurors been allowed to hear Dale Rogers' shocking and truly persuasive evidence regarding the violence and sexual depredations suffered by his brother, there is a reasonable probability that they would have accepted a psychiatric defense based on that abuse. Trial counsel's failure to investigate and adduce that evidence constituted ineffective assistance. *See People v. Ledesma*, 43 Cal. 3d 171, 215, 222-23 (1987).

E. Failure To Request Standard, Necessary Jury Instructions.

1. Lack Of Instruction On Intentional Second Degree Murder.

As set out in the Petition, perhaps trial counsel's single most egregious omission was his failure to request instruction on the lesser offense that most closely mirrored the defense theory—namely, unpremeditated, intentional murder, also known as "express malice second degree murder." In response, the Attorney General offers only the arguments he made on direct appeal, where the issue was whether the trial court erred by failing to give such instruction *sua sponte*. IO at 75-76. Thus, despite the fact that neither the standard instruction on that theory (CALJIC No. 8.30), nor any non-standard replacement was provided to the jury, the Attorney General insists on direct appeal that the jury somehow received sufficient guidance on the subject. In the alternative, he offers the remarkable argument that the jurors' first degree murder verdict demonstrated that they necessarily rejected the lesser offense—even though they were never informed of its existence. IO at 75-76. These arguments were fully addressed in our Reply Brief submitted on direct appeal. ARB 2-16. Petitioner respectfully draws the Court's attention to this material and incorporates it herein by reference.

2. Instructions On The Defense Of Provocation.

Although a keystone of the defense concerned the effect of Tracie Clark's undisputedly provocative conduct, trial counsel also did not request the standard instruction pertaining to that issue (CALJIC No. 8.73). The Attorney General responds that this failure did not comprise ineffective assistance, for two reasons. First, the Attorney General relies on his arguments on direct appeal, to the effect that the jurors were fully instructed on this subject—despite the fact that they were not instructed on it at all. *See* RB 228-43. This series of arguments was fully addressed in our Reply Brief (ARB at 18-27), and Petitioner respectfully directs the Court's attention to this material and incorporates it herein by reference.

The Attorney General's second argument is rather more surprising: He claims that there was no reason for trial counsel to ask for a provocation instruction, because provocation was the focus of so much of the evidence and the arguments of counsel. However, it is when the evidence and argument place a matter squarely at issue that pertinent instruction is most needed (*see People v. Wharton*, 53 Cal. 3d 522, 570-71 (1991)), and counsel's duty to request such instruction is at the highest. *E.g.*, *United States v. Span*, 75 F.3d 1383, 1389 (9th Cir. 1996); *In re Cordero*, 46 Cal. 3d 161, 189-91 (1988).

3. Instruction On Mental Disease Or Defect.

Despite the fact that the most important single issue in the case was whether the premeditation and deliberation elements of the first-degree murder charge were vitiated by Petitioner's undeniable mental deficits, trial counsel made no effort to have the elements of premeditation and deliberation included (as the CALJIC Use Note mandated they should have been) in the standard instruction given regarding the effect of mental disease or defect (former CALJIC No. 3.36). Not only did trial counsel thus miss an opportunity to direct the jury's attention to the law supporting his most fundamental argument, his lapse ensured that the

jury would receive an instruction that arguably forbade it from applying the law in the manner that would support Petitioner's defense.[27]

The Attorney General offers the same responses he used in regard to the preceding claim. First, he again asserts that the instructions as given fully covered the subject matter (IO at 77)—an assertion we fully addressed in the Reply Brief filed on direct appeal. ARB at 27-29. As before, we respectfully direct the Court's attention to this material and incorporate it herein by reference. Second, the Attorney General again contends that no instruction was called for because the matter was already central to the evidence and arguments of the parties. IO at 78. As before, we respectfully submit that those very facts demonstrate that competent counsel should and would have requested the pertinent instruction.

4. Failure To Request Instruction On "Imperfect Self-Defense" Manslaughter.

The Attorney General asserts that trial counsel was not incompetent for failing to request instruction on the "imperfect" or "unreasonable self-defense" form of voluntary manslaughter because the instruction that was given on "sudden quarrel or heat of passion" manslaughter "fit the defense evidence better than the theory of imperfect self-defense." IO at 78-79. In itself, the underlying assertion is incorrect. As set out in the briefs on direct appeal, the doctrine of "sudden quarrel/heat of passion" manslaughter directly conflicted with every theory tendered by both the prosecution and the defense regarding what actually occurred in the case. *See* AOB 66-70; ARB 39-40. While (as we conceded in the Reply Brief), that fact did not necessarily make it improper to instruct on the doctrine (ARB at 40), it certainly rendered that statutory form of

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[27]As discussed more fully in our briefs on direct appeal, the instruction as given required the jury to consider mental disease or defect evidence "*solely*" for the purpose of determining whether Petitioner formed the mental state elements of the crimes of murder and voluntary manslaughter. RT 5640. The only mental state elements included in the definitions given the jurors for murder and manslaughter were "malice aforethought" and (its synonym) "specific intent to kill." CALJIC Nos. 8.10, 8.40 (former sections). Premeditation and deliberation were thus excluded by implication. *See* AOB 40-47.

voluntary manslaughter an inappropriate choice for the *only* lesser included offense alternative to be offered to the jury.

More to the point, the Attorney General's argument is at best a *non sequitur*. Even if it were permissible to instruct on the statutory form of voluntary manslaughter, that would not make it inappropriate *also* to seek instruction on "unreasonable self-defense." We believe that a systematic review of the matter would demonstrate that it is far more common for both instructions to be given as "lessers" in a murder case, than for just one or the other.

That brings us to the Attorney General's argument that failure to instruct on unreasonable self-defense was "harmless" because "there was no evidence that appellant had any fear of death or great bodily injury." The Attorney General's representation regarding the record evidence is incorrect and repeats the same misstatements contained in Respondent's Brief on direct appeal (RB at 254-55), which we noted in the Reply Brief. ARB at 37-39. As we pointed out, there was in fact ample record evidence demonstrating that Petitioner was deeply (if absolutely irrationally) afraid of being harmed by Tracie Clark, and that he "honestly felt that he needed to shoot his attacker in order to ensure his own survival." ARB at 38 (citing RT 5419-21, 5434, 5501, 5521). The Attorney General's continued claim that the record shows Petitioner's only fear was of being scratched a little—despite the clear references to the contrary in the record—is inexplicable.

The Attorney General's final argument in this regard—that the jury's finding of premeditation and deliberation necessarily entailed a rejection of "imperfect self-defense"—is not only logically faulty, but has been decisively rejected by this Court in a case on point. *People v. Breverman*, 19 Cal. 4th 142, 178 n.25 (1998); *see* ARB at 39.

5. Failure To Request Instruction On Involuntary Manslaughter.

As set out in the Petition (at 105-07), trial counsel presented expert testimony to the effect that Petitioner could not and did not intentionally kill Tracie Clark (RT 5288, 5290, 5332, 5338, 5529), and counsel argued strenuously to the jury that Petitioner did not act with an intent to kill Ms. Clark. RT 5601, 5602, 5613. As the prosecutor noted in her

closing, "[t]he defense in this case has put on evidence which says that this was not a willful or an intentional act." RT 5570. Yet trial counsel inexplicably failed to request (and indeed agreed to omit) instruction on the *only* lesser included offense that reflected that evidence and argument—the offense of involuntary manslaughter. *See People v. Saille*, 54 Cal. 3d 1103, 1116-17 (1991); *People v. Webber*, 228 Cal. App. 3d 1146, 1162 (1991).

We recount these matters because the Attorney General's response seriously misstates the record evidence underlying it. According to the Attorney General, the trial evidence unequivocally demonstrated that Petitioner must have acted intentionally (IO at 79-80), precluding the option of an involuntary manslaughter instruction. To support this point, the Attorney General essays a synopsis of Petitioner's version of events, as related by Petitioner under the influence of sodium amytol and introduced at the *penalty* phase. Of course, none of what the Attorney General now quotes was before the jury at the close of the guilt phase—the only time pertinent to counsel's decision regarding jury instruction requests. Moreover, the synopsis takes liberties with the record which go beyond zealous advocacy. It quotes, out of context, statements cropped in such a fashion as to imply that Petitioner was making a series of calculated decisions during the encounter with Tracie Clark. IO at 80. Worse still, the Attorney General completely omits the more pointed of Petitioner's statements, in which he specifically describes the moments in which he fatally shot Ms. Clark, saying that he "didn't want to shoot her. I didn't want to kill her," and that he could not explain why he did. RT 5875-76. When asked what he was thinking when he pulled the trigger, Petitioner said that all he thought was that he needed to protect himself from Ms. Clark physically, and that he kept pulling the trigger because she kept coming and he "was panicked." RT 5880-81. Far from being conclusive evidence of intent on Petitioner's part, this narrative, examined in the context of Petitioner's life-long psychological disorders, led the medical experts to opine, unanimously, that Petitioner did not *intentionally* kill Tracie Clark.

The balance of the Attorney General's arguments—that even if the killing was unintentional, it was at least committed with implied malice and that the jury's rejection of an implied malice verdict necessarily

resolved the issue of involuntary manslaughter—merely repeat the same points he made on direct appeal. RB 256-62. They were fully addressed in our Reply Brief (ARB at 43-46), and we respectfully direct the Court's attention to that material and incorporate it herein by reference.

6. Failure To Instruct On Unconsciousness.

There was substantial evidence that Petitioner was in a dissociative, or fugue state when he killed both Tracie Clark and Janine Benintende (the latter event being one that he has never been able to recall at all). On direct appeal, we asserted that he was entitled to an instruction that he was unconscious as a legal matter when he committed one or both of those crimes. *See People v. Newton*, 8 Cal. App. 3d 359, 376-77 (1970). The Attorney General responded that there was no evidence to support such an instruction (RB 262-64), and we demonstrated in our Reply Brief that there was indeed ample evidence to require an unconsciousness instruction. ARB at 61-65.

The Petition asserts that trial counsel was ineffective for failing to request such an instruction, and the Attorney General contents himself with a brief reiteration of the same arguments offered in the Response Brief on direct appeal. IO at 80-81. Rather than reiterate our points, we respectfully direct the Court's attention to pages 61 through 65 of the Reply Brief and incorporate that material herein by reference.

7. Failure To Instruct On Concurrence Of Act And Implied Malice.

The Attorney General concedes that the standard "concurrence" instruction given by the trial court erroneously failed to require the jury to find the necessary element of concurrence of act and mental state that is essential to the crime of "implied malice" second degree murder, of which Petitioner was convicted. IO at 81; RB at 209. However, he denies that trial counsel was ineffective for failing to request such instruction. The Attorney General again rests on arguments he made on direct appeal, to the effect that the instructions given were adequate, and that correct instruction could not have made a difference in any event. IO at 81-82 (citing RB 209-28). These arguments were fully addressed

in our Reply Brief. ARB at 46-51. We respectfully direct the Court's attention to that material and incorporate it herein by reference.

The only new argument tendered by the Attorney General is that this claim could have been raised on direct appeal, and thus is barred by *Waltreus*. For reasons already discussed, the Attorney General's argument must fail. *People v. Tello*, 15 Cal. 4th at 267; *accord In re Robbins*, 18 Cal. 4th at 814 n.34.

8. Failure To Request Instruction On The Sufficiency Of Circumstantial Evidence.

As set forth in the Petition, the case against Petitioner in regard to the killing of Janine Benintende depended entirely on two pieces of circumstantial evidence: the fact that Petitioner possessed the gun that killed her, and the fact that he killed someone else with that gun a year later. Under these circumstances, both the trial court and trial counsel had a clear duty to ensure that the jury was instructed regarding the sufficiency of circumstantial evidence to prove the crime. *See People v. Marquez*, 1 Cal. 4th 553, 577 (1992); *see United States v. Span*, 75 F.3d at 1389.

The Attorney General asserts that the instruction was not needed and the failure to request it was not prejudicial because the "defense" asserted by trial counsel to the Benintende charge did not depend on any conflicting inferences to be drawn from the physical evidence. IO at 82. The truth, however, is that trial counsel did not assert *any* defense to the Benintende charge, apart from his successful motion to have the charge reduced to second-degree murder. It is illogical to assert that trial counsel's specific incompetent omission was somehow excused by his overall incompetence.

The arguments tendered by the Attorney General merely reiterate those he raised on direct appeal (RB at 265-77), which were fully addressed in our Reply Brief. ARB at 51-61. We respectfully direct the Court's attention to that material and incorporate it herein by reference.

9. Failure To Object To Instructions Which Diluted Reasonable Doubt.

Responding to our claim that trial counsel was ineffective for failing to object to various instructions that diluted the concept of reasonable doubt, the Attorney General only cites his arguments on direct appeal (RB 278-82), which we answered in the Reply Brief. ARB at 75-78. We respectfully direct the Court's attention to that Reply Brief material and incorporate it herein by reference.

The Attorney General then goes on to argue that, because he did not assert on direct appeal that trial counsel had "waived a correct instruction," Petitioner has not, under *Waltreus*, raised a claim cognizable as habeas corpus. IO at 83. We simply observe, again, that *Waltreus* bars do not apply to claims of ineffective assistance of counsel, like the one asserted here. *People v. Tello*, 15 Cal. 4th at 267; *accord In re Robbins*, 18 Cal. 4th at 814 n.34.

10. Failure To Request That Trial Court Respond Properly To Jury Notes.

Petitioner asserted on direct appeal that the trial court did not respond appropriately to two separate requests for clarification made by the jurors during the course of their deliberations. AOB at 98-103. On habeas corpus, Petitioner claims that trial counsel was ineffective for failing to ensure that trial court did so. Pet. at 117-19. In response, the Attorney General rests on the arguments he tendered on direct appeal. IO at 83-84. His arguments were fully addressed in our Reply Brief. ARB 66-74. We respectfully address the Court's attention to that material and incorporate it herein by reference.

11. Failure To Request Limiting Instruction On Prejudicial Effects Of Joinder.

In conjunction with Petitioner's broader claim that trial counsel was ineffective for failing to seek severance of the two murder counts, we have also urged that counsel was ineffective for failing, at a minimum, to request an instruction limiting the use which the jurors could make of the evidence concerning the separate offenses. The Attorney General counters that Petitioner has not shown that a competent trial attorney would seek such limiting instructions in regard to joined counts. IO at 84.

Suffice it to say that for decades before the trial in this case, such limiting instructions were recognized as essential tools in mitigating the prejudice likely to flow from joinder of counts. The point has been made emphatically by the courts here (*e.g.*, *People v. Burns*, 270 Cal. App. 2d 238, 252-53 (1969)), and in other jurisdictions (*e.g.*, *Panzavecchia v. Wainwright*, 658 F.2d 337, 341 (5th Cir. Unit B Oct. 1981)), and by forensic experts and commentators who have researched the matter (*e.g.*, Tanford, Penrod & Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions* 9 LAW & HUM. BEHAV. 319 (1985)). The failure to seek a limiting instruction where one is appropriate to protect the defendant from the unfairly prejudicial use of admitted evidence constitutes ineffective assistance. *United States v. Myers*, 892 F.2d 642, 647-49 (7th Cir. 1990); *see also Crotts v. Smith*, 73 F.3d 861, 867 (9th Cir. 1996).[28]

Beyond that, the Attorney General merely repeats arguments that he submitted in connection with the direct appeal (*see* RB at 120-41), and again in connection with trial counsel's failure to seek severance (*see* IO at 48-63). These arguments have been fully addressed in our Reply Brief at pages 104-114. We respectfully direct the Court's attention to this material and incorporate it herein by reference.

12. Failure To Request Limiting Instruction Regarding Martinez Evidence.

In response to Petitioner's claim that trial counsel was ineffective for failing to seek an instruction limiting use of evidence arising out of an incident with prostitute Ellen Martinez, the Attorney General offers a one-page synopsis of the same arguments he tendered on direct appeal, when the issue was whether the trial court erred in admitting the evidence at all. IO at 85 (recapitulating RB at 180-93). Those arguments were also fully addressed in our Reply Brief, and shall not be repeated

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[28]The Attorney General also declares, without citation, that the allegations of the Petition in regard to prejudice are inadequate. IO at 84. Since the Attorney General provides neither authority nor analysis beyond his own unsupported statement of opinion, we are at a loss to respond except by saying the position is without merit.

here. ARB at 117-122. We respectfully direct the Court's attention to this material and incorporate it herein by reference.

F. Failure To Present A Coherent Guilt Phase Defense.

Although trial counsel strenuously argued that the jurors should "bring in an appropriate verdict in this case" (RT 5614)—meaning, some verdict less than first-degree murder in regard to the Clark killing[29]—he never told them what (lesser) verdict he thought that should be. Worse, what he did tell them so hopelessly confused the elements and legal standards pertinent to the various possible verdicts that it would have been difficult, if not impossible, for the jurors to do their job—that is, to apply the legal measures to the evidence before them—in such a manner as to reach a result favorable to Petitioner.

The most egregious example of trial counsel's ineffectiveness was in regard to the lesser offense of second-degree "express malice" murder—murder committed with a specific intent to kill, but without premeditation or deliberation. That lesser verdict most closely conformed to the evidence counsel presented, and obtaining that verdict was the strategy he claimed both before and after trial to be pursuing. *See* RT 4490; Ex. 14 ¶6 (Lorenz Decl.).[30] Nonetheless, trial counsel (1) did not even *mention* that lesser offense to the jury in his closing argument; (2) did not request the standard instruction defining that offense (CALJIC No. 8.30); (3) did not submit any new instruction to take its place, or request either standard or new instructions regarding the effects of provocation (CALJIC No. 8.73) or mental disease or defect (CALJIC No. 3.36) in vitiating premeditation and deliberation; and (4) repeatedly argued to the jury, in effect, that "premeditation and deliberation" and

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[29]As set out in the Petition, trial counsel did not present a shred of evidence—let alone a viable defense argument—in regard to the killing of Janine Benintende. *See* Pet. at 132-34.

[30]In his declaration, trial counsel states unequivocally that: "My primary theory of defense with regard to the Clark charge was that Mr. Rogers lacked premeditation and deliberation and therefore could be found guilty of nothing more than second degree murder." Ex. 14 ¶6 (Lorenz Decl.). For his part, the Attorney General agrees that "petitioner's best chance to avoid the death penalty was to avoid a premeditation finding as to Tracie Clark." IO at 91.

"specific intent to kill" were *interchangeable concepts*, thus completely erasing the distinction between express malice second-degree murder and the first-degree murder charge that won Petitioner a death sentence. *See, e.g.*, RT 5598, 5601, 5603, 5605-07, 5609. By the time counsel was done, it would have been a miracle if the jurors even understood the relevant legal distinction—let alone applied it to the facts of Petitioner's case.

These and many similar confusions, incoherencies and omissions (*e.g.*, his contradictory arguments regarding the doctrines of diminished actuality and heat of passion; his failure to suggest any verdict supported by the evidence in regard to the Benintende killing; his failure to assert the lesser offense—involuntary manslaughter—that corresponded to his continued insistence that Petitioner lacked the intent to kill Ms. Clark) are fully set out in the Petition at pages 123 to 138. The Attorney General responds with an extended pastiche of arguments from his Response Brief on direct appeal, including several serious misstatements of the trial record. IO at 85-92.

The Attorney General first asserts that it is "ludicrous" to say that the jurors were not instructed on express malice second-degree murder (despite the fact that they received neither the standard instruction on the subject nor any replacement therefor). IO at 86. As authority, the Attorney General cites to his brief on direct appeal (RB at 195-205). The arguments he presented there were thoroughly addressed in our Reply Brief (ARB at 2-17), and we respectfully direct the Court's attention there, and incorporate that material by reference.

The Attorney General next contends that there was nothing wrong in trial counsel's repeated conflation of the concept of "premeditation and deliberation" with that of "specific intent." The concepts are related, he asserts—after all, "[i]t would be nonsensical to refer to a deliberate and premeditated *lack* of intent to kill." IO at 87. Correct or not, that is beside the point. There is nothing "nonsensical" about referring to an intent to kill formed *without* premeditation and deliberation—which is the intentional or "express malice" second-degree murder verdict which trial counsel sought but never presented to the jury.

The Attorney General's next argument is even more of a disappointment. He accuses Petitioner of criticizing trial counsel for

"combining the concepts of deliberation and premeditation." IO at 87 (citing Pet. at 125 n.86). We never tendered such a "criticism." Rather, the point we made in the cited footnote is the same one we made throughout that portion of the Petition: Trial counsel used the phrase "premeditation and deliberation" as a synonym for "intent," which is something else entirely. The point is crucial. If, as trial counsel repeatedly suggested, there were no difference between "premeditation/deliberation" and "specific intent to kill," then there is no difference between intentional murder of the first and second degrees—and the jury had nothing to decide between the two.

Next the Attorney General asserts that there was nothing wrong with trial counsel's similar intermixing of the concepts of "malice" and "premeditation and deliberation." IO at 87-88; *see* RT 5601. He reads the Petition as equating the term "malice" with "intent to kill" and accuses Petitioner of a "failure to understand . . . California legal doctrine." IO at 87. But that failure is apparently shared by the Court and commentators. *See People v. Saille*, 54 Cal. 3d 1103, 1114, 1116-17 (1991) (holding that the "intent unlawfully to kill" is exactly the same thing under the law as express malice); *see* 1 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against the Person* §165 (3d ed. 2000). The interplay between the intent-to-kill and the manslaughter doctrines that negate malice is a somewhat more subtle matter (*see* Pet. at 132-33), but we dispute the Attorney General's contention that trial counsel was somehow conveying this subtlety in his argument—rather than simply throwing out terms in a nearly random and utterly confusing fashion.

We also dispute the Attorney General's assertion that trial counsel's summation can be defended as correctly using the term "'specific intent' . . . in its general English sense rather than as a legal term of art." IO at 88. There is no "general English" usage of the term "specific intent"; its sole application is as a "legal term of art." Further, since it was defined in the court's instructions (*see* CALJIC Nos. 3.31, 8.20), it is implausible to suggest that the jury understood the term as meaning anything other than the intention to kill another human being. In any event, it is impossible to discern—and the Attorney General does not explain—how trial counsel's intermingling of "specific intent" (under

whatever usage) with "premeditation and deliberation" could have had failed to confound any effort by the jury to distinguish between first- and second-degree murder.

Similarly, the Attorney General finds no profit in his contention that trial counsel never meant to show Petitioner's lack of intent to kill Tracie Clark because "lack of intent to kill did not fit the theory of defense." IO at 89. That was not how trial counsel saw things, for he explicitly tried to elicit testimony from one of the psychiatric experts regarding Petitioner's intent (RT 5521), and he explicitly argued to the jury that it should take into account Petitioner's emotional deficits when determining "whether or not the defendant had the specific intent at the time he committed the crime." RT 5609. The unvarnished truth is simply that there was no coherently presented "*theory of defense*."[31]

The Attorney General also tries to excuse trial counsel's failure to argue evidence in support of the only clear lesser offense offered the jury—"heat of passion" voluntary manslaughter. According to the Attorney General, trial counsel was just trying to avoid arguing the "more difficult" element—*i.e.*, the element requiring that the provocation experienced by the defendant was *objectively* sufficient to "arouse heat of passion in a reasonable person"—and hoping that the jury would instead "focus on petitioner's subjective 'heat of passion.'" IO at 90. In other words, the Attorney General is suggesting that trial counsel was placing his hopes (and Petitioner's life) on the possibility that the jury would ignore the instructions and enter a verdict unsupported by the evidence and contrary to the law. The truth, again, is much simpler. Trial counsel relied on a legal doctrine ("heat of passion manslaughter") that the jury could never have adopted, for it conflicted with *both sides'*

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[31]Similarly, the Attorney General's attempts to explain away trial counsel's confusion regarding unintentional homicide are unpersuasive. *See* IO at 89-90. The Attorney General asserts that trial counsel either did not mean what he said in his declaration, or must have misrecollected matters because counsel's declaration does not conform to the Attorney General's reading of the trial evidence. The simpler and more logical explanation for the disconnect is that trial counsel did mean (as his declaration states) to establish that the Clark killing was unintentional as a legal matter, but did not carry out that task at trial in a competent manner.

evidence, and as a result sacrificed other, pertinent defenses that could have saved Petitioner's life.

According to the Attorney General, these and the other accompanying claims are "vacuous." IO at 91. He concludes by repeating that the overwhelming evidence, rather than any inadequacies on trial counsel's part, led to the jury's first-degree murder verdict. The record tells a different tale. Lacking both adequate instructions and a coherent argument regarding the alternatives, the jury twice called for assistance in reaching its verdict. There is more than a reasonable probability that a different result would have obtained had Petitioner received the competent representation guaranteed him under the Constitution. *Strickland v. Washington*, 466 U.S. 668, 694-95 (1984).

G. Failure To Conduct An Adequate Penalty Phase Investigation.

The incomplete and haphazard nature of trial counsel's penalty phase investigation is extensively catalogued in the Petition, at pages 140 to 145. The Attorney General's response—that *some* investigation occurred (IO at 92)—is really no answer to the fact that an *adequate* investigation was not completed. In addition to the statements of the investigators that were used—Chuck Feer, a law student with no experience in penalty phase investigations, who did not intend to undertake one, and Susan Peninger, an experienced investigator who was taken off the job when less than half of her work was completed—the inadequacy of the investigation is proved by what was not found. That evidence included the apparently mistaken identification by Tambri Butler (which the Attorney General concedes merits an evidentiary hearing) and the riveting statement of Dale Rogers regarding Petitioner's childhood abuse, which trial counsel never heard and never adduced when Dale was on the witness stand.

The Attorney General responds that, after all, trial counsel did call mitigating witnesses "from among petitioner's family and friends." IO at 93. Clearly he did call such witnesses—but as is equally clear from reviewing the testimony they gave, *he never talked to them about their testimony in advance.* This left trial counsel unable to establish points that he should easily have been able to make, both about Petitioner's

wretched early life and the fine work that Petitioner had done as a police officer. *See* Ex. 5 (Dale Rogers Decl.); RT 5918, 5928. This investigative failure also left counsel in the position that no competent trial lawyer is ever in—asking a vital question of one's own witness without knowing what answer will be given. Thus when trial counsel asked Sheriff's Deputy Ulysses Williams—identified as Petitioner's closest friend and work partner—whether Petitioner should be put to death, the answer he received was, "It's just hard to say." RT 5918.

Trial counsel's failure to investigate the penalty phase of this case was not merely embarrassing; it was ineffective assistance of counsel at the most crucial possible phase of a criminal proceeding.

H. Failure To Challenge Admissibility Of Martinez Testimony.

In response to Petitioner's claims regarding trial counsel's failure to challenge or limit the use of evidence concerning the Ellen Martinez incident, the Attorney General again relies almost entirely on arguments that have been extensively rehearsed at earlier points in this case. A relatively new argument, however, is that counsel may not have objected to this prejudicial, inadmissible evidence because he thought it would be "futile" to do so—*i.e.*, that his objection would be overruled. IO at 93. But to fail to make appropriate objection simply because counsel believes that it will be (improperly) overruled is not a reasonable tactical choice—it is ineffective assistance of counsel. *See Sparman v. Edwards*, 26 F. Supp. 2d 450, 470-71 (E.D.N.Y. 1997), *aff'd*, 154 F.3d 51 (2d Cir. 1998); *Quartararo v. Fogg*, 679 F. Supp. 212, 243-44 (E.D.N.Y.), *aff'd*, 849 F.2d 1467 (2nd Cir. 1988). Finally, it is too late for the Attorney General even to attempt this argument, given that he argued (correctly, as we conceded (ARB at 127)) that the effect of trial counsel's failure to object was to waive the issue on direct appeal. RB at 290.

The Attorney General's next contention is that the Martinez evidence was admissible to help explain Petitioner's motive for killing Tracie Clark. IO at 93. However, as the Attorney General implicitly acknowledges, his point only pertains to the more limited evidence regarding the incident which was admitted in the guilt phase and will not justify the more extensive penalty phase presentation. Moreover, even

admission of that limited, less inflammatory guilt phase evidence, was not proper. Pet. at 150-52; ARB at 117-22. More on point, the Attorney General also argues that the entirety of the evidence regarding the incident was admissible as showing a crime involving an implied threat of violence. IO at 93. However, as the petition showed, this evidence did not prove *either* a crime (Pet. at 147-48) *or* an "implied threat of violence." *Id.* at 148-50; *see People v. Raley*, 2 Cal. 4th 870, 907-08 (1992).

To Petitioner's allegation that counsel failed to impeach Ms. Martinez with readily available evidence, the Attorney General responds that the inconsistencies contained in the impeachment evidence were not, in themselves, sufficient to undermine the witness, and so counsel was right to instead rely on the other impeachment evidence he had available. The response is a *non sequitur*: Why would not a competent attorney have made use of *all* of the impeachment at his disposal, so long as it did not otherwise undermine his case? The Attorney General has no answer. His further argument that limiting instructions were unnecessary merely echoes the same assertion he tendered in regard to counsel's failures to seek limiting instructions regarding the joined offenses, and the use of the Martinez evidence at guilt phase; it has been addressed above. Finally, his bold assertion that the evidence was not prejudicial is again contradicted by the record.

I. Failure To Investigate And Adduce Evidence Regarding Attack On Tambri Butler.

The Attorney General has conceded that an order to show cause should issue and a hearing should be held regarding the identity of Ms. Butler's assistant and the faulty identification of Petitioner which was set forth as Claim V, subsection K in the Petition. *See* IO at 43; Pet. at 164-74.

J. Failure To Challenge Admission Of Automatic Pistol Not Used In Any Crime.

As set out in the Petition, trial counsel was ineffective for failing to challenge the admission into evidence of an automatic pistol found in Petitioner's truck. The weapon had not been used in connection with

any crime charged, and although Tambri Butler (who testified in aggravation at the penalty phase) mentioned that her attacker had an automatic pistol, she was never asked to identify this gun as the one she had seen. In short, there was no legitimate purpose for admitting the weapon, and any competent trial attorney would have sought to exclude it. *See* Pet. at 184-85.

The Attorney General responds by reiterating an argument he made on direct appeal, to the effect that the gun was indeed admissible to corroborate Ms. Butler's testimony. IO at 95. He is wrong, for reasons set forth in the Petition (at 185 n.136), where this same argument was fully and directly addressed. The Attorney General neither acknowledges nor replies to the points made there. Accordingly, the Court is respectfully directed to the rest of our argument in the Petition, which is incorporated herein by reference.

K. Failure To Present A Coherent Penalty Phase Defense.

In the Petition, we explained that trial counsel's ineffectiveness included the failure to present a consistent theory of mitigation, resulting instead in the portrayal of Petitioner as an incorrigible sexual deviant and a dangerous and manipulative sociopath, likely to kill again. Pet. at 190-93. It was no wonder that, in the face of such "mitigation," the jury imposed a sentence of death.

The Attorney General strongly defends every point of this "strategy," explaining that trial counsel was faced with the contradictory task of "humanizing" Petitioner while still portraying him as a victim of an "abused childhood" who could not control his actions at the time of the killings. IO at 95. We agree that competent counsel could and should have undertaken to create empathy for Petitioner by dramatizing and documenting his abused childhood and by humanizing him as a person. We disagree that there is anything inherently contradictory about the task.

The fundamental and inexcusable mistake made by trial counsel (which the Attorney General cannot afford to admit) was confusing the goal of "humanizing" Petitioner with that of portraying him as a "normal" human being. Humanizing the Petitioner required trial counsel to elicit testimony to show how Petitioner was victimized as a child and

turned against his will into a person who could, under certain circumstances, lose control and react violently despite other values he might have. This family background testimony was never offered, as our earlier discussion of the failure to elicit critical childhood abuse testimony from Dale Rogers illustrates. See Section V(D), *supra*.

Instead, trial counsel portrayed Petitioner as a "normal" and loving father of his stepchild, and as a cool and self-controlled deputy sheriff. The result was not to humanize someone just convicted of two homicides, but to reinforce the image of a calculating killer which the prosecutor had attempted to create. Instead of supporting the testimony of the health care professionals, the portrayal of the "normal" David Rogers only confirmed the prosecutor's claim that he was a deceptive manipulator who could fool the mental health experts and his friends and family.

Accordingly, the Attorney General's valiant attempts to find a tactical rationale for a simple confusion between the concepts of "human" and "normal" rings hollows. The Attorney General notes that the jury had already found Petitioner to be "dangerous" and "obsessed with sex." IO at 95. It is a little late to say no harm was done by then seeking to portray him as a normal family man in direct contradiction to the evidence of the pathetic sodium amytol interview and the psychiatric testimony. The inherent inconsistency—undermining as it did any remaining credibility the defense may have had—was almost worse than offering no mitigation at all.

As for the ritual allegation that no prejudice resulted from trial counsel's failure to make a coherent case at the penalty phase, the argument is flawed. The Attorney General asks the Court to disregard trial counsel's ineffectiveness in explaining Petitioner's psychological and emotional make-up because the jury had already found that Tracie Clark was killed with premeditation and deliberation. This ignores the possibility that the jury could have found that, under the circumstances, Petitioner was deserving of consideration because of the manner in which he had been victimized as a child. The rejection of the mental state defense to a charge of homicide (if that is what really occurred) does not imply a rejection of all consideration for the defendant. If it

did, mitigation in the penalty phase would always be a useless exercise, which certainly it is not and should not be.

L. Failure To Deliver Adequate Or Effective Penalty Phase Argument.

Petitioner has set out in detail why and how the penalty phase argument delivered in this case was below the standard of what would be offered by reasonably competent counsel, and was prejudicial to Petitioner's chances of avoiding the death penalty. Pet. at 202-12. The Attorney General responds, in a paragraph, by going down the list of things that trial counsel failed to do and flatly asserting without authority or explanation that competent counsel could decide not to do any of those things. IO at 97-98. Thus faced with this *ipse dixit*, we can only reply that the Attorney General is wrong for the reasons already stated in the Petition, which he has not discussed, much less rebutted.

M. Failure To Request Complete And Accurate Penalty Phase Instructions.

In response to Petitioner's detailed claims (*see* Pet. at 212-22) regarding the failure of trial counsel to request *any* penalty phase instructions (or the modifications to those instructions that were given), the Attorney General offers a paragraph, mainly repeating the arguments he made on direct appeal. IO at 98. To the extent that those arguments required a response, they were fully addressed in our Reply Brief. ARB at 123-26. We respectfully direct the attention of the Court to that material and incorporate it herein by reference. The Attorney General's remaining, unsupported assertions have already been answered in the Petition itself, with perhaps one exception: He asserts that there was no need for an instruction regarding Petitioner's lack of intent in killing Janine Benintende "because the jury clearly found intent to kill Janine Benintende under the evidence and the prosecutor's arguments." IO at 99. It is telling that the Attorney General offers no record citation for that assertion; in any event, none exists, nor could it. The jury found—and all it found regarding Janine Benintende—was that Petitioner was guilty of *unintentional* second-degree murder ("implied malice" murder). CT 596. That was the most serious charge Petitioner

faced in connection with the Benintende killing because the trial court found, as a matter of law, that there was no evidence that Petitioner acted with the specific intent to kill Ms. Benintende. *See* CT 584.

N. Incompetence In Post-Trial Proceedings.

In response to Petitioner's claims regarding trial counsel's failure to protect Petitioner's rights and interests in post-trial proceedings (including the "automatic modification" hearing), the Attorney General reiterates arguments he made on direct appeal, to the effect that nothing untoward occurred in those proceedings. IO at 99-102. Those arguments were already addressed in our briefs on direct appeal. AOB 335-47; ARB 128-29. Petitioner respectfully directs the Court's attention to that material and incorporates it herein by reference.

CONCLUSION

For all the foregoing reasons, Petitioner requests that the Court grant, in addition to the relief which Respondent has conceded is appropriate, all other and further relief prayed for in the Petition for Writ of Habeas Corpus.

DATED: February 25, 2002.

Respectfully,

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WD 022502/F-531300/PB9/970098/v3

PROOF OF SERVICE BY MAIL

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is Three Embarcadero Center, 7th Floor, San Francisco, California 94111.

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PETITIONER'S REPLY TO ATTORNEY GENERAL'S INFORMAL OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

on the persons listed below by placing the document(s) for deposit in the United States Postal Service through the regular mail collection process at the law offices of Howard, Rice, Nemerovski, Canady, Falk & Rabkin, A Professional Corporation, located at Three Embarcadero Center, 7th Floor, San Francisco, California, to be served by mail addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California, on February 25, 2002.

BRYAN JAY GRESHAM

WD 022502/F-531300/PB12/970098/v3