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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re MAURICE BOYETTE, On Habeas Corpus	Capital Case No. S092356 Related to Automatic Appeal No. S032736

PETITIONER'S REPLY TO RESPONDENT'S INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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INTRODUCTION

Petitioner, MAURICE BOYETTE, by and through counsel, submitted a Petition for a Writ of Habeas Corpus (hereafter "Petition") on October 19, 2000, which consists of twelve (12) claims, supported by more than 500 pages of factual allegations. To demonstrate the *bona fides* of his factual allegations, petitioner included all reasonably available declarations and other documentary evidence which comprised thirty volumes. Thus, in full compliance with *People* v. *Duvall,* 9 Cal.4th 464, 474 (1995), petitioner stated "fully and with particularity the facts on which relief is sought" and included "reasonably available documentary evidence supporting the claims." *See also In re Harris,* 5 Cal.4th 813, 827 (1994)("one seeking relief on habeas corpus need only file a petition for the writ alleging facts which, if true, entitle the petitioner to relief.")

In deciding whether the Petition stated a prima facie case for relief, the Court must assume that the facts pleaded are true and may consider supporting documentary evidence. *Duvall*, 9 Cal.4th at 474-475; *In re Bower*, 38 Cal.3d 865, 872 (1985); *In re Clark*, 5 Cal.4th 750, 781 n. 16 (1993). At this stage of the proceedings the Court will make a "*preliminary assessment* [regarding whether] the petitioner would be entitled to relief if his factual allegations are proved. *Duvall*, 9 Cal.4th at 475 (emphasis in original). A clear and critical distinction exists between this, the pleading stage, and the later proof stage of a habeas corpus proceeding. *Id.* at 475. For present purposes the question is limited to "whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief." *Id.* at 474-475.

Under California law, whenever a petition for writ of habeas corpus alleges a prima facie case for relief, the petitioner is entitled to the issuance of an order to show cause, setting in motion the procedures for factual development of the evidentiary bases for the petitioner's allegations. *See* Pen. Code § 1476.

> In a habeas corpus proceeding the petition itself serves a limited function. It must allege unlawful restraint, name the person by whom the petitioner is so restrained, and specify the facts on which he bases his claim that the restraint is unlawful. [Citation.] If taking the facts alleged as true, the petitioner has established a prima facie case for relief on habeas corpus, then an order to show cause should issue. [Citation.]

In re Lawler, 23 Cal. 3d 190, 194 (1979); *see also People v. Duvall*, 9 Cal.4th at 475; *People v. Romero,* 8 Cal.4th 728, 737-738 (1994). This Court has reiterated this principle, acknowledging that if a "habeas petition is sufficient on its face (that is, the petition states a prima facie case on a claim that is not procedurally barred), the Court is obligated by statute to issue a writ of habeas corpus." *People v. Romero*, 8 Cal.4th at 737-738; *see also* Pen. Code § 1476.

Indeed, the issuance of the order to show cause ("OSC") creates a cause of action, which entitles the respondent and the petitioner to file additional pleadings (Pen. Code § 1480 [return] and § 1484 [traverse]), and to obtain discovery relevant to litigating the claim. *People v. Gonzalez,* 51 Cal.3d 1179, 1258 (1990). An OSC initiates a hearing and disposition of the petition. *People v. Duvall*, 9 Cal.4th at 475; *In re Hochberg,* 2 Cal.3d 870, 873-874 & n. 2 (1970). The return and traverse, as the principal pleadings, are the mechanisms by which the parties allege, deny and controvert the material facts – not the informal response and reply. Pen. Code, §1484; *Duvall*, at 475-476; *In re Lawler*, 23 Cal.3d at 194.

California Rules of Court, Rule 60, authorizes this Court to solicit the assistance of the respondent in determining whether a petition for a writ of habeas corpus alleges facts entitling the petitioner to relief, by calling for an "informal response" to the petition. Thus, the sole purpose of an

informal response to a petition for a writ of habeas corpus is to "assist the court in determining the petition's sufficiency [,]" i.e., whether the petition states a prima facie case for relief and whether any claims are procedurally barred. *People* v. *Romero*, 8 Cal.4th at 737, 740-742; *People v. Duvall*, 9 Cal.4th 464, 474-475.

On or about March 28, 2002, respondent filed an informal response to the Petition pursuant to Rule 60 which completely misconstrues the above-described principles. While respondent concedes that petitioner has stated a prima facie case for relief with regard to his jury misconduct claims (and contends that an evidentiary hearing is warranted), she contends that the remaining claims are either procedurally defaulted or fail to state a prima facie case for relief, or both. Respondent repeatedly states that petitioner's claims should have been raised on appeal because the facts supporting the claims were known at the time of the appeal even though such facts are outside the appellate record. Respondent also attempts to challenge the underlying facts of petitioner's claims and focuses on the ultimate question of his entitlement to relief rather than discussing the prima facie sufficiency of petitioner's allegations.

Respondent evidenced a complete lack of understanding of the difference between issues that are appropriately brought for appellate review in Appellant's Opening Brief and those extra-record claims that

must be brought by a writ of habeas corpus. She further relies on a faulty understanding of procedural default rules and ignoring the prima facie sufficiency of the petition, respondent has failed to begin, much less fulfill, the task set out in Rule 60 and in this Court's cases. To the extent the Informal Response disputes the factual basis for any of petitioner's claims, this Court should issue an order to show cause so that factual disputes can be resolved. Such a hearing should take place after petitioner has been allowed discovery, subpoena power, and adequate opportunity to conduct follow up investigation. Pen. Code 1484; *In re Serrano*, 10 Cal.4th 447, 455-456 (1995); *People v. Romero*, 8 Cal.4th at 729; *In re Lewallen,* 23 Cal.3d 274, 278 (1979). At this stage of the proceedings, the Court is not to weigh the evidentiary support for petitioner's allegations, but to consider only the bona fides of petitioner's claims. These well-established principles have dictated the nature of petitioner's pleadings and documentary submissions, including this Informal Reply. [1]

Petitioner is entitled to an order to show cause because, accepting the

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1. In light of the uncertainty of the informal response process, in contrast to the clear legislative and judicial rules for habeas corpus, and the federal constitutional problems resulting from a failure to follow them, petitioner does not understand the informal response to be a means for contesting the facts alleged in the petition. That is the function of a return after issuance of an order to show cause. Rather, petitioner assumes the purpose of the informal response is to notify the Court of any procedural barriers to the claims presented in the petition or any reason why the alleged facts, if true, do not state a prima facie case as a matter of law.

facts pleaded as true, he has made a prima facie case for relief. A denial of his prima facie claims without an order to show cause would arbitrarily deny petitioner of his state-law right to the habeas corpus procedure, and full and fair factual development, in violation of the state constitution and the Fourteenth Amendment of the federal constitution. *People v. Barton*, Cal.3d 513, 519 n. 3 (1972); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

This Informal Reply is submitted to assist this Court and comply with the informal procedures it uses in habeas corpus proceedings. However, petitioner does not waive his right to discovery, subpoena power, and a hearing on all of his claims with regard to which there is any factual dispute. Nor does petitioner concede that the informal response and reply procedure contemplates full factual development of the evidentiary basis of petitioner's claims. Petitioner replies to those points contained in the Informal Response as to which a reply would be most useful to this Court at this stage of the proceedings. He does not waive any individual claim or argument on which he does not comment or present argument or evidentiary support in the instant pleading, but requests that this Court issue an order to show cause to allow him to prove each of the claims presented in the Petition, with discovery, subpoena power, and an evidentiary hearing.

Petitioner hereby realleges all of the claims, statement of facts, and legal argument contained in the Petition and all the exhibits submitted with

regard to this Petition. Once again, petitioner specifically requests this Court to take judicial notice of all the proceedings related to his Petition as enumerated in the Petition. To the extent that petitioner has not presented evidence in support of each fact necessary to support each claim, he believes in good faith that such evidence does exist but has not been discovered, obtained or presented because he requires court-ordered discovery, subpoena power, and an evidentiary hearing in order to present the full factual basis for the claims. Where the Informal Response asserts that petitioner's claims should be rejected as harmless or non-prejudicial, and to the extent that any of petitioner's claims are resolved by a harmless-error or prejudice analysis, petitioner respectfully requests this Court to evaluate and review the cumulative effect of all errors set forth in the Petition under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, their individual clauses and subsections, and the corresponding provisions of the California Constitution. In order to evaluate the harmful or prejudicial impact of any of the errors alleged in the instant habeas proceeding, it is necessary for this Court to consider the cumulative effect of all the claims and legal arguments set forth in petitioner's direct appeal. Petitioner, therefore, requests this Court to take judicial notice of all the claims and arguments contained in his direct appeal.

For the reasons stated in the Petition, as well as those stated below, petitioner respectfully requests this Court to issue an order for respondent to show cause why the relief requested by petitioner should not be granted.

ARGUMENT

I

AN ORDER TO SHOW CAUSE MUST ISSUE REGARDING PETITIONER'S CLAIMS OF JUROR MISCONDUCT

Respondent concedes, as she must, that petitioner has stated a prima facie case for relief with regard to Claim A, which alleges several instances of juror misconduct. An order to show cause must therefore issue, which "signifies the court's preliminary determination that the petitioner has pleaded sufficient facts that, if true, would entitle him to relief." *People v. Duvall*, 9 Cal.4th 464.

However, respondent's call for an evidentiary hearing is premature. It is only after an order to show cause issues, and respondent files a return which alleges facts, not mere general denials as she has done so here, and petitioner then files his traverse, that the factual and legal issues are joined. At that point a determination as to whether or not an evidentiary hearing *may* be required to resolve any factual disputes can be made. Given the strength of petitioner's allegations, it is likely that this issue can be resolved in petitioner's favor without the need to resort to an evidentiary hearing. *See People v. Duvall*, 9 Cal.4th at 478 ("'[w]here there are no disputed factual questions as to matters outside the trial record, the merits of a habeas

corpus petition can be decided without an evidentiary hearing.'")(quoting *People v. Karis*, 46 Cal.3d 612 656 (1988)).

Likewise respondent's request to strike declarations of some of the jurors is premature. In any event the juror declarations of which respondent complains do not reflect "solely the feelings, beliefs, and thought processes." Informal Response, at 17. Rather, these declarations include "evidence of '*statements* made, or conduct, conditions, or *events* occurring, either within or without the jury room, of such a character as is *likely* to have influenced the verdict improperly . . . ." *In re Hamilton*, 20 Cal.4th 273, 294 (1999).

Juror McLaren's declaration includes her recollection of statements made by Ary about crimes he had seen in Oakland. She also remembered a discussion about petitioner's potential for becoming involved with a prison gang and that the movie *American Me* was mentioned. Exhibit 70. Juror Lewis's declaration references Juror Ary's statement about another alleged murder. Exhibit 86. Juror Mann recalled that *American Me* was talked about during the penalty deliberations, and that Juror Ary had recommended that several jurors watch it in order to educate themselves as to what life was like inside California prisons. Exhibit 87. Juror Orgain remembered that one of the jurors suggested to the jurors who were against sentencing petitioner to death to watch a move about prisoners and prisons. Exhibit 95.

Juror Salcedo also recalled a discussion of gangs and that a movie was mentioned during the penalty phase. Exhibit 106.

Respondent concedes that petitioner has stated a prima facie basis for relief with regard to the juror misconduct claim with the exception of allegations having to do with a juror question submitted by Juror Ary. However, this is not a separate stand alone allegation of misconduct but is raised to show further evidence of the juror's bias.

An order to show cause should issue as to Claim A.

II.

PETITIONER'S CONFLICT OF INTEREST CLAIM STATES A PRIMA FACIE CASE FOR RELIEF AND COULD NOT HAVE BEEN RAISED ON APPEAL

Petitioner has alleged in Claim B that trial counsel had an actual conflict of interest due to the fact that Richard Hove, petitioner's second counsel, was being criminally prosecuted in federal court at the time of his representation of petitioner, and because of his prior representation of petitioner's family members.[2]

Respondent first contends that this claim, which relies on extra-record facts should have been raised on appeal because "all of the documents provided in support of the claim were available at the time the

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2. Since the filing of the writ, Richard Hove has been suspended from the practice of law again by this Court. S103872, *In re Richard Eric Hove on Discipline.*

appeal was filed." Informal Reply, at 22. The fact that the factual support for the claim was "available" at the time the appeal was filed is, of course, irrelevant. The extent of Hove's legal difficulties and the fact that he had previously represented petitioner's family members is not in the trial record. Moreover, the facts alleging the adverse impact of the conflict is based on extra-record facts.

It is well established that "when reference to matters outside the record is necessary to establish that a defendant has been denied a fundamental constitutional right resort to habeas corpus is not only appropriate, but is required." *In re Bower*, 38 Cal.3d at 872. This is not an appellate claim, and is properly raised in habeas corpus.

Respondent complains that petitioner's claim fails to include a declaration from Hove himself. This Court requires a petitioner to "include copies of *reasonably available* documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." *People v. Duvall*, 9 Cal.4th at 474 (emphasis added). Petitioner has done so. The claim is amply supported by documentary evidence and a declaration from Mr. Hove is not necessary to establish a prima facie basis for relief.

Respondent states that the factual allegations are incomplete because they fail to show that Hove's federal conviction was reversed after

petitioner's trial was over. However, the conflict stems from Hove's status during his representation of petitioner, not from the subsequent disposition of his case. As alleged, Hove was preoccupied with his own situation, missed numerous court appearances, provided extremely limited assistance to lead counsel, and rushed the case to trial for personal financial reasons. The fact that his case was later reversed has no bearing on the conflict or its effect on his representation of petitioner.

Next, respondent argues that the claim fails to state a prima facie basis for relief because there was a knowing waiver of the conflict. Respondent contends that the record clearly shows that petitioner knowingly and voluntarily waived any potential conflict. As petitioner has alleged, however, his waiver was invalid because he was completely uninformed about the nature and extent of the conflict. *See* Habeas Petition, ¶¶ 292-294. This is at most a factual dispute. As discussed above, any dispute of fact critical to the outcome of the Petition can be resolved only after the issuance of an order to show cause which will give petitioner the right to file additional pleadings, to utilize the Court's compulsory process and subpoena power, to obtain discovery, and to prove his claims at an evidentiary hearing. The existence of factual disputes is relevant to determining whether there is a need for an evidentiary hearing. *See* Pen. Code § 1484, *People v. Romero*, 8 Cal.4th at 739-740; *In re Neely*, 6 Cal.

4th, 901, 907 (1993). It is irrelevant in determining whether the order to show cause should issue. *In re Lawler*, 23 Cal.3d at 194.

Contrary to respondent's assertion, petitioner has adequately alleged prejudice, showing that Hove's need for funds and attention to his own criminal matters took precedence over his duty to petitioner: 1) the extraordinarily brief time between appointment and the commencement of trial precluded adequate preparation; 2) the lack of preparation resulted in the failure to gather records or otherwise investigate petitioner's background and family history, consult with experts in a timely manner or coordinate the guilt and penalty phase strategy; 3) Hove permitted a completely false picture of petitioner's family to be presented at the penalty phase despite his awareness of the extensive family criminal background; 4) Hove's frequent comings and goings were distracting to the jury and his absences demonstrated to them that he did not care about the client or take the case seriously.

Petitioner has established a prima facie case for relief, and an order to show cause should issue.

III

PETITIONER'S CLAIM THAT COUNSEL WAS INEFFECTIVE AT THE GUILT PHASE IS NOT PROCEDURALLY BARRED AND STATES A PRIMA FACIE CASE

Respondent contends that petitioner's claim of ineffective assistance at the guilt phase is procedurally barred because of the failure to include declarations from counsel with regard to most of the allegations of ineffectiveness. Respondent fails to cite to any authority for this so-called rule. Instead, although respondent acknowledges that habeas corpus claims are cognizable on habeas corpus, she argues that without a declaration from counsel the claims are essentially appellate claims that should have been raised on appeal.

The documentary evidence petitioner has submitted in support of his ineffective assistance claims is sufficient to establish a prima facie case for relief. As petitioner has alleged, to the extent that any of counsel's decisions were "tactical," they were not reasonable because they uninformed due to the lack of preparation. *See, e.g.,* Habeas Petition, ¶ 332-336.

It is clear that "counsel must, at minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). Counsel is deemed to have rendered ineffective assistance "where

he neither conducted a reasonable investigation nor made a showing of strategic reasons for failing to do so." *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1999) (quoting *Sanders*, 21 F.3d at 1456). While the inquiry into ineffective assistance employs a presumption that counsel's conduct is within the "wide range of professionally competent assistance," *Strickland v. Washington,* 466 U.S. 668, 689 (1984), that presumption does not excuse counsel's failure to investigate and prepare a defense. *See Turner v. Duncan*, 158 F.3d 449, 456 (9th Cir. 1998).

As with the conflict of interest claim, respondent again contends that the documentary support that petitioner does present in support of his claim was available at the time of the appeal, and therefore should have been raised on appeal. As noted above, it is without question that a claim based on extra record facts, however, must be raised on habeas, regardless of when the facts become available.

Failure to Effectively Litigate Motion to Suppress

Petitioner alleges that counsel failed to effectively litigate the motion to suppress by failing to investigate and present facts of petitioner's mental impairments and relevant background information, or to establish that the tactics used by the Oakland Police Department were coercive.

As alleged, counsel unreasonably and incompetently failed to investigate, obtain or seek to present readily available evidence regarding

Oakland Police Department interrogation practices to corroborate petitioner's suppression hearing testimony, failed to investigate and present evidence of petitioner's background and mental state relevant to his susceptibility to such coercive interrogation practices, failed to establish adequately that the statement was the result of coercion and improper police tactics, and failed to move for suppression of all of the fruits of the government's violations of petitioner's rights. Habeas Petition, ¶ 1067.

Respondent contends that the record shows that counsel vigorously litigated the admissibility of petitioner's statements. However, all respondent can point to is that trial counsel filed a motion, that the recordings of the statements were played for the trial court and that petitioner testified. Given the readily available evidence as alleged, trial counsel's conduct was far from vigorous. Respondent's assertions at most create a factual dispute and do not address the sufficiency of the claim.

Furthermore, counsel's failures in this regard were prejudicial. As alleged, had counsel acted reasonably, the statement would have been suppressed. Petitioner's statements to the police were the key evidence against petitioner. While respondent points to petitioner's trial testimony in which petitioner claimed that the statements were not coerced, petitioner most likely would not have testified if the statements were suppressed. In any event, petitioner has stated a prima facie case for relief.

Failure to Investigate Mental State Defenses

Petitioner alleges that trial counsel was ineffective in failing to investigate and present mental state defenses, supported by expert declarations that demonstrate how petitioner's mental impairments rendered him unable to form the specific intent to commit first degree murder.

Respondent belittles the expert declarations as "psychology-speak." Such comments are not relevant to the question at issue here – the sufficiency of petitioner's pleadings. Petitioner's claim states a prima facie basis for relief and the declarations provide clear and compelling evidence that petitioner was mentally impaired at the time of the crime. At most, respondent's comments create a factual dispute.

Again, respondent contends that the claim fails because of the failure to produce a declaration from trial counsel on the issue. However, given counsel's failure to investigate mental state defenses any so called tactical decision would be uninformed. Therefore a declaration from counsel on this issue would add nothing at this stage of the proceedings.

Respondent also claims that petitioner's allegations are refuted by the fact that counsel did retain experts, including Stephen Pittel. However, as alleged, counsel's contact with Pittel was perfunctory, and counsel failed to heed Pittel's advice to obtain background information. Thus, any decision by counsel to forgo a mental state defense was uninformed, and as

is shown by the expert declarations submitted with the Petition, the failure to present such a defense was prejudicial.

Respondent contends that the substance of the claims raised here were rejected by this Court in *People v. Mayfield*, 5 Cal.4th 142 (1993). However, in *Mayfield*, the allegations were found sufficient for an order to show case and an evidentiary hearing. It was only after the hearing that the Court was able to conclude in that case that trial counsel had reasonably chosen the appropriate defense. *Id.* at 203. In petitioner's case, a prima facie case has been established and such factual development as was provided in *Mayfield* is also necessary here before the claim can be properly adjudicated.

Failure to Effectively Employ Investigators

Trial counsel's sole investigator billed only 62.75 hours prior to the commencement of the trial, during which time he saw petitioner only three times, and never met with petitioner's family members. There can be no plausible explanation for the failure to utilize adequately the services of an investigator in a capital case, and counsel's failure in this case is reflected in the cursory defense presented.

Respondent's assertion that the claim is refuted by the actions of counsel in seeking funds and by the fact that the investigator expended more hours after the trial began merely creates a factual dispute which

requires further factual development after the issuance of an order to show cause.

Failure to Consult and Present Testimony of Criminalist

Petitioner alleges that counsel unreasonably failed to consult a criminalist and had they done so, evidence could have been presented to refute the prosecution's argument that the killing was "cold blooded" or an "execution style" killing. Petitioner further alleges that counsel failed to call lay witnesses who also could have confirmed that the victims were not shot "execution style."

Respondent again points to the failure to provide a declaration from counsel on this issue. However, again, counsel could not add anything to this claim at this stage of the proceedings because any tactical decision would be uninformed due to the failure to consult with a criminalist or conduct an investigation of eyewitnesses to the shootings.

Contrary to respondent's contention, counsel's failures were prejudicial at both the guilt and penalty phases, and particularly when combined with the other aspects of ineffective assistance alleged herein.

Failure to Investigate and Refute Hypotheticals

The prosecutor used many hypotheticals in cross examination that were not based on fact. *See* Claim E. Reasonably competent counsel would have investigated the crime and petitioner's background adequately to have

been able to object to the use of these hypotheticals on the ground that they were based on facts that were not true.

Respondent contends that the improper hypotheticals were not used at the guilt phase but only at the penalty phase. While this is true, the claim is relevant not only to counsel's ineffectiveness at the penalty phase but to the cumulative effect of counsel's ineffectiveness at all stages of the proceedings.

Respondent also characterizes petitioner's claim as merely alleging counsel's failure to object to the prosecutor's argument. However, the claim is that counsel failed to investigate the underlying facts of petitioner's background and the crime which would have provided a basis to object to the use of the hypotheticals.

The hypotheticals, which included both victims' alleged pleas for mercy purportedly based on eyewitness statements, were much more vivid and inflammatory than the actual evidence presented by the prosecution. Furthermore, the use of alleged additional violent acts committed by petitioner through hypotheticals known to be false was highly prejudicial, particularly in this case where there was no violent criminal activity alleged except for the capital murder itself.

Failure to Rebut Evidence About Cole Street

Petitioner's testimony that he had been threatened after he gave

statements to the police was supported by his contention that he asked someone to help move his mother out of Cole Street residence for her protection. The prosecutor was able to undermine petitioner's credibility on this point by showing that the residence had been boarded up after the shootings, and that petitioner's testimony in this regard was false.

Petitioner has alleged that trial counsel was ineffective for failing to present readily available evidence that the house was not boarded up directly after the shootings.

Respondent contends that such evidence would have contradicted the testimony of petitioner and three defense witnesses. That is incorrect. See Declarations of Edward Johnson, Exh. 81 and Bill Ashley, Exh. 54.

Failure to Obtain Jury Background Checks

Petitioner alleges that trial counsel was ineffective in failing to obtain criminal records of the potential jurors and had they done so, they would have discovered the criminal history of Juror Ary, which would have provided a basis for a challenge for cause or at minimum would have caused counsel to exercise a peremptory challenge.

Respondent contends that trial counsel properly relied on the prosecutor to run such background checks, however, as alleged, counsel failed to request and obtain such checks done by the District Attorneys Office.

Respondent next states that since Ary had no criminal history in Alameda County but only in neighboring counties, a routine background check would not have revealed his criminal history since none of his convictions were from Alameda County. Respondent provides no support for the statement that a "routine" or "reasonable" background check would be limited to Alameda County and therefore would not have revealed Juror Ary's felony conviction in Contra Costa County.

Failure to Make Appropriate Objections

Petitioner raised the following claims on appeal: 1) when petitioner testified at the hearing to suppress his statements to the police, on cross-examination the prosecutor was permitted to ask questions regarding not the details and circumstances of the interrogations, but rather the substance and veracity of the underlying statements; 2) the prosecutor committed misconduct by cross-examining petitioner during the guilt phase in a manner which improperly and unnecessarily alerted the jury that the petitioner's prior testimony was from a suppression hearing and by reiterating this point in closing argument; 3) inflammatory evidence relating to the victims, including testimony and photographs, was introduced in violation of petitioner's state law and state and federal constitutional rights; 4) the prosecutor committed misconduct in vouching for and expressing personal beliefs as to the credibility of witnesses, distorting the burden of

proof, misstating the law and facts, inflaming the jury, and misrepresenting the nature of the deliberative process.

Respondent argued in the appellate proceedings that these claims are not cognizable on appeal because of counsel's failure to object. Petitioner has therefore alleged that to the extent that counsel's failure to timely and properly object waives the claim on appeal, the failure to object constitutes ineffective assistance.

Respondent now contends that the claims are not cognizable on habeas either. Respondent states that there is no collateral support for this claim and no showing of prejudice. The claim could not have been raised earlier because it only arose after respondent's assertion in her appellate brief that trial counsel's failure to object constituted a waiver of the claims. Petitioner has alleged sufficient facts to state a prima facie case. Further factual development will provide further support for the claim. Moreover, this claim must be considered in the context of petitioner's other ineffective assistance of counsel claims in order to determine the cumulative effect of counsel's failures.

If this Court finds on appeal that counsel's failure to object waives these otherwise meritorious claims, then counsel's failure to object is prejudicial.

Failure to Make an Adequate Record to Establish Prima Facie Case for Discriminatory Use of Peremptory Challenges

Petitioner has alleged that trial counsel rendered ineffective assistance in failing to show that the prosecutor's explanations for excusing African Americans from the jury were not supported by the record.

Respondent first states that because of the absence of a statement from trial counsel or other extra record evidence to support this claim it is not cognizable on habeas. However, as stated above, claims of ineffective assistance of counsel are more appropriately raised on habeas and not appeal. *See People v. Lucero*, 23 Cal.4th 692, 728-729 (2000).

Respondent next states that the record refutes the claim by showing that counsel vigorously litigated the *Wheeler* motion. Counsel indeed litigated the motion but did nothing more than point out that the prosecutor had challenged four African American women. As alleged, counsel failed to make any additional showing that there was a "strong likelihood that such persons are being challenged because of their group association." *See People v. Howard*, 1 Cal.4th 1132, 1153-54 (1992). Had counsel shown that the prosecutor's reasons for excusing the jurors were a sham, counsel would have established that the prosecutor's peremptory challenges were exercised based on specific group bias.

Conflict of Interest

For the reasons discussed above, this claim is cognizable on habeas

and states a prima facie case for relief.

IV.

PETITIONER'S CLAIM OF PENALTY PHASE INEFFECTIVE ASSISTANCE STATE A PRIMA FACIE CASE FOR RELIEF AND IS NOT PROCEDURALLY BARRED

Petitioner has alleged that trial counsel rendered ineffective assistance at the penalty phase based on detailed allegations supported by voluminous documentation including sworn declarations from experts and lay witnesses.

Respondent contends that the claim is procedurally barred because these facts were known at the time he filed his direct appeal. Again, respondent completely misconstrues this Court's procedures. Claims based on extra record facts cannot be raised on appeal, but only on habeas. *In re Bower*, 38 Cal.3d at 872.

Respondent contends that counsel's pretrial investigation, particularly the fact that he retained two experts and used one, refutes petitioner's allegations that counsel's investigation was untimely, perfunctory and wholly inadequate. Respondent does nothing more than create a factual dispute rather than address the sufficiency of petitioner's allegations. In any event, while respondent states that counsel had a tactical reason for choosing one expert over another, the problem with counsel's performance was that the failure to undertake any meaningful investigation

precluded whatever expert he retained from testifying in a compelling fashion.

Respondent states that the case presented in mitigation was adequate and based on counsel's tactical decisions. According to respondent, counsel made a tactical choice in presenting some but not every possible piece of evidence about petitioner's social history and mental state. As alleged, however, counsel failed to undertake the kind of investigation that would have allowed him to make a tactical decision with regard to the kind of case to present.

It is clear that "counsel must, at minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). Counsel is deemed to have rendered ineffective assistance "where he neither conducted a reasonable investigation nor made a showing of strategic reasons for failing to do so." *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1999) (quoting *Sanders*, 21 F.3d at 1456).

Moreover, petitioner does not allege that every conceivable piece of evidence be uncovered and presented but that counsel failed to conduct a reasonable investigation and had they done so they would have discovered the extensive mitigating evidence that was readily available, including: the history of extreme instability and violence in the immediate family, the

extraordinary pattern of parental and familial neglect, the poverty petitioner endured, his depression and isolation, the social ostracism, the exposure to familial and community violence, his neuropsychological deficits, and the adult psychological, emotional, and behavioral consequences of his history. As the United States Supreme Court has made clear in *Williams v. Taylor*, 529 U.S. 362, 363 (2000), the evidence counsel failed to uncover such as the extensive records documenting a family history of mental illness, poverty and abuse is exactly the type of evidence reasonably competent counsel in a capital case must investigate.[3]

In fact, in *Williams*, the Court in referring to evidence that was arguably not as powerful as that presented here, stated that the very nature and overwhelming amount of evidence that was not introduced would lead the Court to conclude that, "the failure to introduce the comparatively voluminous amount of favorable evidence was not justified by a *tactical decision* and clearly demonstrates that counsel did not fulfill their ethical obligation to conduct a thorough investigation of [petitioner's] background. *Williams* at___.

There could not be any tactical reason for not presenting this

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3. As typified by the Declaration of Ola Harris, attached hereto as Exhibit 1, reasonably competent counsel could have very easily obtained a wealth of moving penalty phase evidence by simply interviewing readily available and completely cooperative witnesses.

information. A reviewing court must be mindful of counsel's tactical decisions, but, if counsel had no tactical reason for failing to present available mitigation, counsel's performance is almost always deemed unreasonable. *Stewart v. Smith*, 189 F.3d 1004 (9th Cir. 1999) ("The failure to present mitigating evidence during the penalty phase of a capital case, where there are no tactical considerations involved, constitutes deficient performance"); *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995) (failure to investigate mitigating evidence in the absence of "strategic choice" may constitute deficient performance); *Kwan Fai Mak*, 970 F.2d 614, 619 (9th Cir. 1992) (deficient performance when "no tactical evaluation" made in deciding not to present humanizing evidence and "no risk would have been incurred" by doing so).

Counsel's failure to investigate and present the wealth of readily available mitigation was prejudicial ineffective assistance of counsel. Not only was the evidence presented extremely limited but it actually portrayed a false picture of petitioner to the jury. Petitioner has stated a prima facie basis for relief which requires the issuance of an order to show cause.

V.

PETITIONER'S CLAIMS OF PROSECUTORIAL MISCONDUCT STATE A PRIMA FACIE CASE FOR RELIEF AND ARE COGNIZABLE ON HABEAS CORPUS

Petitioner alleged several instances of misconduct on direct appeal. On habeas, petitioner has alleged extra record facts supporting the prosecutor's misconduct and has incorporated the claims raised on appeal to demonstrate a pattern of pervasive prosecutorial misconduct. Again, respondent mistakenly asserts that since the extra record facts were available at the time of the appeal, they should have been raised therein.

The extra record facts establish that the hypothetical questions used by the prosecutor were based on facts which were false and misleading, and such evidence could not have been presented on appeal. In addition, the claim that the prosecutor knew or should have known that Juror Ary was disqualified to serve as a juror in petitioner's case is not based on facts in the trial record and could not have been raised on appeal.

These allegations together with the other instances of prosecutorial misconduct demonstrate a pattern of misconduct by the prosecution. This is a claim that is cognizable on habeas corpus. Respondent's contention that they should have been raised on appeal is again misplaced.

On the merits, respondent simply refutes petitioner's allegations, which does not go to the sufficiency of the pleadings and at most creates a

factual dispute that can only be resolved after an order to show cause issues.

VI.

PETITIONER'S CLAIM THAT HIS STATEMENT TO THE POLICE WAS INVOLUNTARY RELIES ON EXTRA RECORD FACTS AND IS COGNIZABLE ON HABEAS CORPUS

Petitioner has alleged that his statement was obtained by the police through coercive police tactics and that he did not knowingly, intelligently and voluntarily waive his rights to counsel and to remain silent. This claim is supported by evidence of petitioner's mental impairments, evidence regarding the tactics used by the Oakland Police Department to obtain confessions, and expert testimony regarding police interrogations.

Respondent contends that the claim was raised on direct appeal and is therefore procedurally barred. However, the claim that was raised on appeal was based only on the trial record. The present claim is based on extra record facts.

On the merits of the claim, respondent merely asserts that the evidence presented at trial, including the tape of the statement and petitioner's testimony, and the testimony of the police officer was sufficient to resolve the issue. However, as discussed with regard to the related ineffective assistance of counsel claim, the facts supporting the voluntariness of the statement were inadequately developed and presented.

Respondent's assertion that petitioner's evidence is not credible at most creates a factual dispute and does nothing to aid this Court in resolving whether or not petitioner's claim states a prima facie basis for relief.

VII.

PETITIONER'S CLAIM THAT THE PENALTY PHASE INSTRUCTIONS ARE VAGUE AND INCAPABLE OF BEING UNDERSTOOD BY JURORS IS BASED ON EXTRA RECORD FACTS AND IS COGNIZABLE ON HABEAS CORPUS

Petitioner alleges that the jury instructions given in this case failed to guide the jury's discretion, are vague and incomprehensible, and resulted in an arbitrary, capricious and unreliable sentencing.

Respondent misconstrues the basis for this claim and states that petitioner's cursory reference to trial counsel's inadequacies cannot transform the claim raised on appeal into a habeas claim. The claim raised here is based on extra record facts, namely a study of actual California jurors who have served in capital cases. Haney et al., *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 (No. 2) J. of Social Issues 149, 167-168 (1994).

Petitioner has stated a prima facie case for relief and seeks an order to show cause so that additional factual development can be obtained to further support this claim.

VIII.

PETITIONER'S CLAIM THAT HIS DEATH SENTENCE IS BASED ON INACCURATE AND UNRELIABLE EVIDENCE AND IS A DISPROPORTIONATE PUNISHMENT IS COGNIZABLE ON HABEAS CORPUS

Petitioner alleges that due to counsel's ineffective assistance, prosecutorial misconduct and jury misconduct, the death sentence imposed upon him was based on inaccurate and unreliable evidence and was disproportionate to his guilt and moral culpability. Thus, this claim is plainly based on extra record evidence and is cognizable on habeas corpus. Respondent's contention that the claim was raised on appeal ignores the allegations that could not have been presented on appeal.

IX.

PETITIONER'S CLAIM OF CUMULATIVE ERROR IS COGNIZABLE ON HABEAS CORPUS

Since respondent contends that there is no error with the exception of juror misconduct, she claims there is accordingly no cumulative error. Petitioner's allegations, taken as true, demonstrate the existence of serious and substantial errors, which taken individually or collectively establish the prejudicial violation of petitioner's constitutional rights. An order to show cause should therefore issue on each and every claim raised herein.

X.

PETITIONER'S CLAIM THAT HIS PROLONGED CONFINEMENT ON DEATH ROW VIOLATES HIS CONSTITUTIONAL RIGHTS IS COGNIZABLE ON HABEAS CORPUS

Petitioner alleges that his execution following his lengthy confinement under sentence of death would be cruel and unusual punishment in violation of the federal constitution and international law. The facts which support this claim, including the delays in the appellate process and the conditions on death row are extra record facts and therefore, contrary to respondent's contention, this is a claim which is cognizable on habeas not appeal.

XI.

PETITIONER'S CLAIM THAT EXECUTION BY LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IS COGNIZABLE ON HABEAS CORPUS

Petitioner alleges that his execution by lethal injection would constitute cruel and unusual punishment in violation of the federal constitution and international law. This claim is based on extra record facts and therefore, contrary to respondent's contention, is a claim which is appropriately raised on habeas not on appeal.

XII.

PETITIONER'S CLAIM THAT HIS DEATH SENTENCE VIOLATES INTERNATIONAL LAW IS COGNIZABLE ON HABEAS CORPUS

Petitioner alleges that his death sentence was imposed in violation of international law. Respondent states this claim should have been raised on appeal. However, the claim necessarily incorporates the other claims raised in the habeas petition, which contain extra record facts, and also alleges the denial of petitioner's right to appeal and habeas corpus review by an independent, impartial tribunal, which could not have been raised on appeal.

Respondent contends that petitioner has failed to state a cause of action under international law because his claims are without merit. Once again, respondent fails to understand that at this stage of the proceedings, petitioner's allegations must be taken as true to determine whether a prima facie basis for relief exists. Respondent's assertion that petitioner fails to state a claim because his allegations are without merit is irrelevant.

CONCLUSION

Based on the foregoing, petitioner respectfully requests that this Court grant the petition for a writ of habeas corpus or, alternatively, issue an order to show cause as to each claim presented.

Dated: Respectfully submitted,

LYNNE S. COFFIN
STATE PUBLIC DEFENDER
OFFICE OF THE STATE PUBLIC DEFENDER

AUDREY CHAVEZ
DEPUTY STATE PUBLIC DEFENDER

BY:

LYNNE S. COFFIN

DECLARATION OF SERVICE

Re: People v. Maurice Boyette, S092356

I, Siobhan Noble, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at 221 Main Street, 10th Floor, San Francisco, CA 94105.

I served the attached **PETITIONER'S REPLY TO RESPONDENT'S INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS** on the following individuals/entities by placing true and correct copies of the documents in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

Christina Kuo
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3664

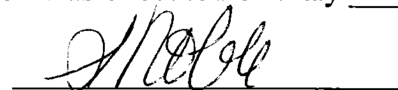
Honorable Thomas J. Orloff
District Attorney
1225 Fallon Street, Room 900
Oakland, CA 94612

Maurice Boyette
P.O. Box H76600
San Quentin State Prison
San Quentin, CA 94974

Clerk of the Superior Court
1225 Fallon Street, Room 107
Oakland, CA 94612

All parties that are required to be served have been served.

I declare under penalty of perjury that service was effected on May 2, 2002 at San Francisco, California and that this declaration was executed on May 2, 2002 at San Francisco, California.



Siobhan Noble