IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S107782

IN THE MATTER OF	Related to Automatic Appeal
DAVID ESCO WELCH	Case No. S011323
ON HABEAS CORPUS	Alameda County Superior Court No. 90396 (Hon. Stanley Golde Presiding)

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

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DAVID ESCO WELCH

DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN THE MATTER OF	)	Related to
	)	Automatic Appeal
DAVID ESCO WELCH	)	Case No. S011323
	)	
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN THE MATTER OF DAVID ESCO WELCH ON HABEAS CORPUS	**CAPITAL CASE** S011323

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

I. INTRODUCTION

Petitioner David Esco Welch, by and through his attorneys of record, Wesley A. Van Winkle and Stephanie Ross, submits this informal reply to respondent's informal response to the petition for a writ of habeas corpus.[1]

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[1]The following abbreviations are used to refer to the record on appeal: Clerk's Transcript (CT): The Clerk's Transcript consists of eleven volumes and is consecutively numbered. Citations refer to the page number. Reporter's Transcript (RT): The Reporter's Transcript for the trial consists of twenty-six volumes of consecutively numbered transcripts. (A Master Witness and Exhibit List accompanies these transcripts.) Citation to the trial transcripts refer to the page number. Other transcripts are not consecutively numbered; any citation refers to the date of the proceeding and the page number. Citations to the Petition for a Writ of Habeas Corpus are referenced as (Pet.); Respondent's Informal Response to Petition for a Writ of Habeas Corpus as (IR); Appellant's Opening Brief as (AOB).

Petitioner replies specifically and generally to respondent's informal response. Petitioner specifically and generally denies each and every allegation made in the informal response that is in contravention of the claims raised and allegations made in the petition for a writ of habeas corpus. Petitioner does not waive any claim, legal contention or factual assertion raised in the petition, even if such claim, legal contention or assertion is not specifically addressed in this informal reply. Petitioner re-alleges and reaffirms each and every legal and factual claim, contention, allegation and assertion raised in the petition. Petitioner fully incorporates all exhibits submitted with the petition, as well as all subsequent filings and exhibits in this Court. These are fully incorporated as if set forth in this reply.

Petitioner's analysis is set forth in two parts. The first refutes respondent's contentions that procedural bars prevent determination on the merits of specific claims. This is set forth as section II-A. The second component of petitioner's analysis specifically and generally contests respondent's argument on the merits of certain claims, and further delineates petitioner's support of such claims. Petitioner fully incorporates section II-A and section II-B, and states that all claims are properly before this Court on the merits.

Petitioner does not reply specifically to certain claims, arguments and issues raised by respondent in its informal response to the petition for a writ of habeas corpus. However, petitioner does not waive or concede any claim, sub-claim, issue, or factual or legal contention set forth in his original petition and subsequent filings in this Court.

As the foregoing analysis further illustrates, respondent's arguments are meritless. The petition plainly establishes prima facie grounds for habeas relief and the writ or an order to show cause should therefore issue.

II. ANALYSIS

A. The Procedural Bars Asserted by Respondent Do Not Prevent Consideration of the Merits of This Petition

Confronted with a host of egregious legal deficiencies that marred petitioner's trial, respondent attempts to blunt the force of petitioner's claims by reliance on multiple purported procedural bars. Respondent's emphasis on these alleged procedural bars is a hallmark of its hyper-technical approach to capital litigation.

The lack of rules governing the informal response process allows the State to proceed in this fashion, rather than requiring it to attempt to genuinely address the factual allegations or present factual material uniquely within its reach, as the Court would in a return. (Contrast *People v. Duvall* (1995) 9 Cal.4th 464 [return must respond specifically to facts alleged in petition, set forth with specificity why information was not readily available to state, explain what steps were taken to obtain information inform court of existence of good reason to dispute facts or credibility] with *People v. Romero* (1994) 8 Cal.4th 728 [informal response performs a screening function; it "is not a pleading, does not frame or join issues, and does not establish a 'cause'" and respondent may choose to respond factually or legally and limit its response as it deems appropriate].) This process thereby

deprives petitioner of any meaningful ability to fully develop the facts in support of his claims.

In 1983, this Court decided "no authority exists for the 'informal response' procedure." (*In re Ibarra* (1983) 34 Cal.3d 277, 283, n. 2.) It recognized that denial of a petition for writ of habeas corpus based on factual assertions in an informal response deprived a petitioner of his statutory right "to obtain an order to show cause based solely on his factual allegations and the record." (*Ibid.*) Soon thereafter, in 1984, Rule 60 of the California Rules of Court was amended to authorize an informal response that was limited to factual matters. A year later this limitation was removed. In *Romero*, the Court traced this history before concluding that the drafters of Rule 60 never intended that the informal response procedure "could" function as a substitute for a formal return and traverse. (*Id.*, 8 Cal.4th at 741.) Petitioner agrees and therefore verifies this pleading so that the Court will consider whether the facts and legal principles in the petition and in this reply, as supported by exhibits appended to each document, merit the issuance of an order to show cause.

To avoid the merits of petitioner's claims, respondent asserts that "most" or "all but a handful" of petitioner's claims are procedurally barred on timeliness and other grounds. (IR at p. 39.) Petitioner disagrees and will explain below in detail why respondent is wrong. However, since respondent agrees that at least some of the claims are properly before this Court, petitioner will begin by attempting to identify the claims over which there is no contention of procedural default.

Respondent never explicitly identifies which claims she deems cognizable by this Court. However, she appears to admit that "at least portions of claims 1, 6, 16, 51, 68, and 77" are not procedurally barred.[2] (IR at p. 54.) Petitioner deduces that respondent has no procedural quarrel at all with claims 68 and 7. (Compare lists on IR pp. 50 and 41.) Her procedural objections to claims 1 and 16 are limited to those portions which involve the prosecutor coaching the witnesses to describe petitioner as "evil" or in terms other than "crazy," as they had done previously (IR at p. 41; see Pet. claim 1, pars. 35-38, pp. 55-57; claim 16, par. 2 [second sentence], pp. 205-206); and her objection to claim 6 is expressly limited to paragraph 10 of that claim, which respondent characterizes as a "subclaim." (IR at p. 42.)[3] Thus, it appears that

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[2] Although respondent at one point agrees that claim 51 is based on matters outside the record (IR at p. 54), she also includes this claim in her list of claims that could have been raised on appeal. The claim alleges federal constitutional error arising from the court's pattern of ex parte contacts with the parties and relies entirely on extra-record material obtained from the declaration of trial counsel. Because respondent's references to this claim are confusing, and because petitioner cannot fathom how he could have raised a claim regarding ex parte contacts based solely on the trial record, he presumes respondent erroneously included the claim in her list of claims cognizable on appeal. However, in an abundance of caution, he will also treat this claim separately under the discussion of alleged *Dixon* default (subpart B, *infra*).

[3] Respondent does not include the supposed "subclaim 10" in either her "*Waltreus*-barred" list or her "*Dixon*-barred" list, but instead asserts that this "subclaim" presents only "conclusory allegations" and should be dismissed for this reason. Because there is no "subclaim 10" to claim 6, petitioner assumes that respondent is referring to paragraph 10 of this claim. That paragraph alleges that the jurors received extrinsic evidence throughout the trial in the form of media reports which were not only prejudicial but also became the main focus of their deliberations.

respondent concedes that all of claims 51, 68 and 77 and all but the noted paragraphs of claims 1, 6 and 16 are not procedurally barred and are therefore cognizable in this Court.

Accordingly, with the exception of the disputed paragraphs noted above and discussed in more detail below, petitioner will focus his reply on procedural issues to the remaining claims in the petition. However, for the record, petitioner strenuously objects to respondent's attempt to dissect and repackage his claims in this manner. Respondent is simply attempting to find ways to evade the merits of entire claims by inviting this Court to chop them up and default their component parts, and this Court should resist this invitation.

For ease of reference, petitioner will organize this discussion of alleged procedural bars into the same subcategories utilized by respondent.

1. Claims That Respondent Alleges Were Raised on Appeal

It is a general rule that claims already raised and rejected on direct appeal may not be raised a second time in the habeas petition because writ proceedings may not be used as a "second appeal." (*In re Waltreus* (1965) 62 Cal.2d 218, 225.) Where no new information is presented in the habeas corpus petition, the use of

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(Pet., at p. 140.) Contrary to respondent's contention, this paragraph is not "conclusory" but factually specific and relies upon the declarations of two jurors as the source of its factual allegations. Thus, while petitioner objects to respondent's attempt to unilaterally petition petitioner's claims into "subclaims" in the hope of eliminating integral parts of those claims, her baseless contentions regarding this alleged "subclaim" must be rejected.

habeas merely to present an issue that was presented on appeal is improper. (*People v. Guzman* (1991) 226 Cal.App.3d 1060, 1066.)

However, "where a habeas corpus petitioner's claim depends on facts that were not, and could not have been, placed in the record, the *Waltreus* rule does not apply, since the petitioner could not have raised the issue on direct appeal." (*In re Harris* (1993) 5 Cal.4th 813, 834, n.8.) Thus, a habeas petitioner demonstrates that the *Waltreus* bar is inapplicable if he presents a claim which depends on facts "of substance" which are outside the record on appeal and could not reasonably have been placed there by trial counsel. (*Ibid.*, see also *In re Robbins* (1998) 18 Cal.4th 770, 814, n.34 [supporting exhibit must contain something "of substance not already in the appellate record"].)

Even where a claim does not rely on facts outside the record on appeal, there are a number of exceptions to the *Waltreus* bar. Of particular note are the exceptions for claims in which "the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process" (*In re Harris, supra,* 5 Cal.4th at p.834); the exception for claims arising from changes in the law affecting the petitioner (*Id.*, at p. 841; and the exception for all claims of ineffective assistance of counsel. (*In re Robbins, supra,* 18 Cal.4th at p.814, n.34).)

Respondent contends that claims 2, 3, 4, 8, 9, 10, 11, 12, 14, 15, 17, 19, 20, 23, 24, 25, 32, 33, 44, 45, 50, 52, 53, 54, 55, 56, 58, 59, 62, 63, 64, 66, 70, 71, 74, 75 and 76 are procedurally barred because they were already raised in his direct appeal. In other words, respondent asserts that the enumerated claims are subject to the *Waltreus* bar. Petitioner disagrees. Many of the claims included in respondent's

list were simply not raised or discussed in the direct appeal at all in any form. In particular claims 8, 23, 24, and 25[4] were not raised in the direct appeal in any form, and claims 17, 33, 66 and 67[5] are simply specific claims of cumulative error which were never raised below because the appellant's opening brief included only a single, "global" cumulative error issue. These claims are simply not subject to the *Waltreus* role.

Of the remaining claims, many include or refer to facts which were discussed in some form in issues raised in the direct appeal, but were raised in the context of legal issues so different from the claims here that no reasonable person could have confused the claim with the issue raised on appeal. Furthermore, even with respect to claims or subclaims which are legally or factually similar to issues raised in the direct appeal, these claims are not procedurally barred because they rely substantially on additional material outside the record which petitioner has presented as exhibits to the habeas corpus petition, or because they involve issues of fundamental constitutional error or ineffective assistance of counsel and therefore fall within specific exceptions this Court has created to the alleged procedural bar.

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[4] As noted below, claims 23, 24 and 25 are also ineffective assistance of counsel claims and are exempt from *Waltreus* for this separate reason. *(In re Robbins, supra,* 18 Cal.4th at p. 814, n. 34.)

[5] While respondent includes these four cumulative error claims in her list of claims which allegedly were already raised on appeal, she includes claim 78 – petitioner's overall cumulative error claim – in her list of claims which were not, but should have been, raised on appeal. Respondent provides no explanation for this odd distinction. However, for reasons explained below, none of these claims are procedurally barred under either theory.

These remaining claims, viewed in light of the legal principles stated above, are not procedurally barred under the *Waltreus* rule for the following reasons:

Claim 2, that petitioner was tried while actually incompetent and without a constitutionally mandated Penal Code section 1368 proceeding, was not raised in its current form in the opening brief. The second issue in the opening brief alleged that the court erred in failing to hold a competence proceeding, but did not allege or prove that petitioner was incompetent in fact. (AOB, at pp. 49-64.) Moreover, claim 2 relies heavily upon facts found outside the record on appeal and which could not have been placed there by counsel. Among other exhibits, the claim depends upon the declaration of petitioner's prior attorneys, Thomas Broome and Robert Cross; the declarations of county jail inmates Dwight Jackson and David Irving; the declaration of psychologist Dr. William Pierce; and the declaration of psychiatrist Dr. Samuel Benson, all regarding petitioner's mental state at the time of trial. (Pet., at pp. 62-63, 70-80.) This claim also depends substantially on the declaration of Dr. Karen Froming, the neuropsychologist who completed her testing of petitioner only one week prior to the filing of the petition in this case (Pet., at pp. 81-82); the declaration of Sarah Perrine, petitioner's maternal aunt, regarding petitioner's history of abuse and neurotoxicant exposure (Pet., at p. 82); and the declaration of psychiatrist Dr. Pablo Stewart, regarding petitioner's grandiose and persecutory delusions. (Pet., at pp. 83-84.) Accordingly, petitioner did not raise this claim in his direct appeal, and indeed, it would have been impossible for petitioner to have done so. The claim is not subject to the *Waltreus* bar.

Claim 3 (i.e., that the trial court violated petitioner's federal constitutional rights by imposing an unworkable form of hybrid representation on him and his counsel) was raised in the direct appeal. The claim appeared as a subpart of the appellate *Faretta* issue but was presented primarily to demonstrate prejudice from the court's failure to grant petitioner's *Faretta* motion rather than as a free-standing issue. (AOB, at pp. 36-48.) As presented in the petition, claim 3 appears as a free-standing claim. The claim also incorporates a number of other claims necessary to establish the factual background for other claims into which they are incorporated, such as claim 20, regarding the ineffective assistance of counsel in failing to object to the hybrid form of representation, and claim 68, alleging ineffective assistance of appellate counsel. Furthermore, the claim raises an issue of clear and fundamental constitutional error which strikes at the heart of the trial process. Accordingly, under these *Harris* exceptions, the claim is not affected by the *Waltreus* rule or other procedural bars.

Similarly, claim 4, the claim of judicial error in denying petitioner's *Faretta* motion, incorporates other claims, such as claims 2, 18, and 19, which demonstrate the prejudicial impact of the denial of the motion on petitioner's mental state, and vice versa, and these claims rely substantially on facts outside the record. (Pet., at p. 114; see discussion of claim 2, *supra.*) For the same reason, this claim also incorporates claims 47 and 48 regarding the deprivation of petitioner's right to expert assistance (Pet., at p. 114), and the two latter claims also rely substantially on facts outside the record. Claim 4 also incorporates all ineffective assistance of counsel claims, which are always properly raised in habeas even if they could have

been raised on direct appeal. (Pet., at p. 114; *In re Robbins, supra,* 18 Cal.4th at p. 814, n. 34) The claim also raises an issue of clear and fundamental constitutional error which strikes at the heart of the trial process. Accordingly, this claim is also unaffected by the *Waltreus* bar.

Claim 8, that the state violated petitioner's federal constitutional rights by tampering with exculpatory forensic evidence, was never raised in the direct appeal in any form and therefore is not subject to the *Waltreus* bar. Moreover, the claim relies substantially on evidence outside the record, i.e., the declarations of Judy Stewart and William Welch (Pet., at pp. 149, 153), and therefore could not have been raised on appeal. In addition, the claim is part of a pattern of prosecutorial and state misconduct and ineffective assistance of counsel and must be included as part of the factual basis for claims on these issues into which it is incorporated. For similar reasons, the claim also incorporates claim 9 through 17, 21 and 25, which also rely on extra-record evidence. Finally, and most importantly, tampering with exculpatory forensic evidence raises an issue of clear and fundamental constitutional error which "strikes at the heart of the trial process" and the claim is not barred by *Waltreus* for this additional reason. (*In re Harris, supra,* 5 Cal.4th at p. 834.)

Claims 9, 10, 11, 12, 14 and 15 are prosecutorial misconduct claims which arise from the prosecutor's shocking conduct, including his repeated attempts to taunt and provoke petitioner, egregious misconduct in argument, and pattern of misconduct throughout the trial. Though some of the legal issues and facts alleged in these claims were discussed in the direct appeal, petitioner has substantially

relied in each of these claims on extra-record facts establishing the prosecutor's bias and prejudice (see Pet., pp. 172, 178, 184, 191-192, 196, 197), and has incorporated other claims, such as claim 1, which establish a pattern of misconduct and which themselves rely upon extra-record evidence. The claims also form part of the factual basis for allegations of ineffective assistance, and are incorporated into the respective claims. (See, e.g., Pet. claim 9, at p. 164; claim 10, at p. 172.) In addition, these claims all allege clear and fundamental constitutional error which "strikes at the heart of the trial process" and are therefore subject to this exception to the *Waltreus* bar. (*In re Harris, supra,* 5 Cal.4th at p. 834.)

Claims 19, 20, 23, 24, 25, 32 and 33 are all ineffective assistance of counsel claims. As noted above, all of these claims are therefore subject to the ineffective assistance exception to the *Waltreus* bar. (*In re Robbins, supra,* 18 Cal.4th at p. 814, n. 34.) In addition, many of these claims rely substantially on extra-record material, such as the declarations of trial counsel, prior counsel, and other exhibits, and also involve fundamental constitutional error striking at the heart of the trial process, and are thus outside the *Waltreus* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at p. 834.)

Claims 44 and 45 raise fundamental constitutional errors occurring during the trial court's consideration of improper factors and failure to properly weigh mitigation and aggravation in assessing petitioner's motion for modification of sentence. As clear and fundamental constitutional error going to the heart of the trial process, these claims are exempt from the *Waltreus* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at p. 834.)

Claim 50 raises fundamental constitutional error occurring when petitioner was on numerous occasions removed from the courtroom during substantial portions of the proceedings, including the presentation of evidence. As clear and fundamental constitutional error going to the heart of the trial process, this claim is exempt from the *Waltreus* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at p. 834.)

Claim 52 raises fundamental constitutional error in the trial court's removal from the jury panel of jurors who were not "automatic life" jurors and the court's "rehabilitation" and retention on the panel of jurors who were "automatic death" jurors. As clear and fundamental constitutional error going to the heart of the trial process, this claim is exempt from the *Waltreus* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at p. 834.)

Claim 53 raises fundamental constitutional error in the court's denial of petitioner's request to change venue, denying petitioner a fair and impartial tribunal and other fundamental constitutional rights. As clear and fundamental constitutional error going to the heart of the trial process, this claim is exempt from the *Waltreus* bar under the first *Harris* exception (*In re Harris, supra,* 5 Cal.4th at p. 834.)

Claim 54 raises fundamental constitutional error in the trial court's failure to make a record of many of the proceedings or to provide petitioner with transcripts of those proceedings, depriving petitioner of due process and crippling his right to appeal. As clear and fundamental constitutional error going to the heart of the trial process, this claim is exempt from the *Waltreus* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at p. 834.)

Claim 55 raises fundamental constitutional error in the conviction and sentencing of petitioner for first degree murder without constitutionally sufficient evidence of premeditation and deliberation, in violation of petitioner's right to due process of law. As clear and fundamental constitutional error going to the heart of the trial process, this claim is exempt from the *Waltreus* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at p. 834.)

Claim 56 raises fundamental constitutional error in the trial court's issuance of numerous improvised instructions which failed to distinguish adequately between first degree murder, second degree murder, and manslaughter and confused the jury in many other respects. As clear and fundamental constitutional error going to the heart of the trial process, this claim is exempt from the *Waltreus* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at p. 834.)

Claim 58 raises fundamental constitutional error in the trial court's instruction that the jury must take as a conclusive presumption that petitioner's prior convictions were proved, thereby violating petitioner's constitutional rights to due process and reliable sentence, among others. As clear and fundamental constitutional error going to the heart of the trial process, this claim is exempt from the *Waltreus* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at p. 834.)

Claim 59 raises fundamental constitutional error in the court's instruction that the jury must be unanimous with regard to the penalty imposed, even if that penalty was less than death, a violation of petitioner's Eighth and Fourteenth Amendment rights. This claim was not raised in the direct appeal, although appellate counsel did

assert the court erred in failing to instruct that unanimity was not required for mitigating evidence. (AOB at p. 218.) Accordingly, it is not subject to the *Waltreus* bar. In addition, as clear and fundamental constitutional error going to the heart of the trial process, this claim is exempt from the *Waltreus* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at p. 834.)

Claim 62 raises fundamental constitutional error in the court's use of CALJIC No. 8.85 in a manner which misled the jury to double count the circumstances of the crime as aggravation, in violation of the prohibition against double jeopardy and other constitutional rights. As clear and fundamental constitutional error going to the heart of the trial process, this claim is exempt from the *Waltreus* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at p. 834.)

Claim 63 raises fundamental constitutional error in the court's failure to instruct the jury that the prosecution bore the burden of proving other criminal activity beyond a reasonable doubt, a violation of petitioner's right to the due process of law, among other rights. As clear and fundamental constitutional error going to the heart of the trial process, this claim is exempt from the *Waltreus* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at p. 834.)

Claim 64 raises fundamental constitutional error in the trial court's instruction permitting the jury to consider in aggravation criminal acts which did not involve violence, a violation of petitioner's rights under the Eighth and Fourteenth Amendments. As clear and fundamental constitutional error going to the

heart of the trial process, this claim is exempt from the *Waltreus* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at p. 834.)

Claim 70 raises fundamental constitutional error in the court's imposition of a disproportionate sentence in violation of petitioner's rights under the Eighth and Fourteenth Amendments, among others. The claim incorporates contentions in a number of other claims, including claims 2 through 5 and the ineffective assistance of counsel claims, which in turn rely substantially on extra-record evidence, and is outside the scope of *Waltreus* for this reason. In addition, as clear and fundamental constitutional error going to the heart of the trial process, this claim is exempt from the *Waltreus* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at p. 834.)

Claims 71, 74 and 76 raise fundamental constitutional error in, respectively, the failure of California statutes to perform the constitutionally mandated narrowing function, the failure of the statutory scheme to require written findings by the jury, and the statutory requirement that death be imposed by lethal injection. This Court has fond that attacks on the constitutionality of a statute fall outside the general habeas rules regarding prior resort to appeal. (*In re Bevill* (1968) 68 Cal.2d 854, 862; *In re Dixon* (1953) 41 Cal.2d 756, 762; see also *In re King* (1970) 3 Cal.3d 226, 229, n.2 [challenge to state's constitutionality always proper in habeas corpus].) Accordingly, these claims are not subject to the *Waltreus* bar for this reason. In addition, as clear and fundamental constitutional error going to the heart of the trial process, these claims are exempt from the *Waltreus* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at p. 834.)

Claim 75 raises fundamental constitutional error in the infliction upon petitioner of cruel and unusual punishment, as well as other constitutional violations, resulting from the extraordinary appellate delay in this case. This claim differs materially and substantially from a similar issue presented in the direct appeal because many years have passed since the opening brief was filed or the direct appeal decided, and the prejudice from appellate delay has been exacerbated by the passage of time. Indeed, it has been fourteen years since the judgment was imposed, and this fact alone means that the claim is now in a substantially different factual posture from the issue raised in the direct appeal. In addition, as clear and fundamental constitutional error going to the heart of the trial process, this claim is exempt from the *Waltreus* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at p. 834.)

2. Claims That Respondent Asserts Should Have Been Raised on Appeal

"The general rule is that habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." (*In re Dixon* (1953) 41 Cal.2d 756, 759.)

However, as is the case with claims allegedly subject to the *Waltreus* bar, there are a number of exceptions to the *Dixon* bar. This Court has indicated that all four of the *Harris* exceptions also apply to the *Dixon* bar. (*In re Harris, supra,* 5 Cal.4th at p. 825.) In addition, the exception for ineffective assistance of counsel claims also applies to allegedly *Dixon*-barred claims. (*People v. Tello* (1997) 15

Cal.4th 264, 267; *In re Robbins, supra,* 18 Cal.4th at p. 814, n. 34.) Thus, whether the failure to raise a claim resulted from ineffective assistance of appellate counsel, it is proper to raise the claim in a habeas petition in order to assert this ground for relief. In addition, a number of pre-*Harris* exceptions apply, such as the exception for attacks on the constitutionality of a statute, which is always proper in habeas without regard to whether the claim could have been raised in direct appeal (*In re King, supra,* 3 Cal.3d at p.229, n.2), and the exception for claims which raise a constitutional issue of extraordinary importance. (*In re Antazo* (1970) 3 Cal.3d 100.)

Respondent asserts that petitioner's claims 1 [in part], 5, 7, 13, 16 [in part], 18, 21 22, 26, 27, 28, 29, 30, 31, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 46, 47, 48, 49, 51, 57, 60, 61, 65, 69, 72, 73 and 78 could have been, but were not, raised on direct appeal. In short, respondent asserts that these claims are subject to the *Dixon* bar. These contentions are erroneous and without merit.

With respect to claim 1, petitioner again notes that respondent has no apparent procedural quarrel with regard to most of the claim and only appears to assert that paragraphs 35 through 38 are *Dixon*-barred. Petitioner again objects to respondent's effort to chop this claim into subparts in an effort to have portions of procedurally defaulted. The gravamen of the claim is that the prosecution withheld essential impeachment evidence which concerned prosecution witnesses, and these paragraphs are essential components of this claim. Moreover, all the preceding paragraphs in the claim concern the prosecution withholding material impeachment information pertaining to Stacey and Barbara Mabrey, and these four paragraphs

allege withholding of impeachment evidence pertaining to these two witnesses, as well as three others. The paragraphs are thus an integral part of claim 1, and respondent should not be permitted to officiously edit petitioner's claim in this manner.

However, even if these paragraphs were to be cut out of the claim and renumbered as a separate claim, this "claim" would still not be barred under *Dixon* because it could not possibly have been raised in the direct appeal. To the extent that these paragraphs allege that the witnesses in question were coached by the prosecutor to falsely testify that petitioner was not intoxicated at the time of the crimes and was not mentally ill, the allegations in these paragraphs depend substantially on the declarations of Rita Lewis, Thomas Broome, Konolus Smith, Billy Williams and Robert Cross. (Pet. Exhibits 6, 7, 18, 26, 36, cited at Pet. p. 56.) This extra-record material establishes that petitioner was in fact intoxicated by alcohol, cocaine and morphine at the time of the incident, and that he was in fact widely known in the Sobrante Park neighborhood to be mentally ill. In short, the extra-record material, in addition to the prior statements of the witnesses, establishes the falsity of the testimony. This dependence upon extra-record material for the factual predicate of the claim establishes that it is not subject to the *Dixon* bar.

In addition, claims of *Brady* error, such as this one, are not procedurally barred because they necessarily involve situations in which the government has itself hindered compliance with the procedural rule. (See, e.g., *Stickler v. Greene* (1999) 527 U.S. 263, 269, 289; 2 Hertz & Liebman, Federal Habeas Corpus

Practice and Procedure (4th ed. 2001) p. 1205 and n. 33; cf. *In re Robbins, supra,* 18 Cal. 4th 770.) This "subclaim" is therefore not subject to the *Dixon* bar for this additional, independent reason. Finally, the claim involves fundamental constitutional error striking at the heart of the trial process and is therefore outside the *Dixon* bar for this additional reason.

Claim 5, that petitioner was mistreated in the county jail prior to and throughout the trial, also is not subject to the *Dixon* bar. First, the claim relies in large part on information in the possession of the prosecution, much of which remains to be discovered during these proceedings. Most significantly, the prejudice aspect of this claim relies upon the declarations of trial counsel and of psychiatrist Dr. Samuel Benson. (Pet., at p. 132.) Dr. Benson's declaration showed that petitioner's mistreatment in the jail greatly exacerbated his persecutory delusions, and were a significant contributor to his behavior in court, largely because he suffered from profound frontal lobe brain damage. This information was unavailable to Dr. Benson at the time of trial. Neuropsychological testing data revealing the presence and extent of petitioner's brain damage was available only in the week prior to the filing of the petition. Accordingly, this claim could not have been raised on direct appeal and is not subject to the *Dixon* bar. In addition, to the extent that any portion of the claim could have been raised on direct appeal, the failure to do so constituted ineffective assistance of appellate counsel, and the facts alleged in the claim constitute the factual predicate to the claim set forth in claim 68. Finally, the claim involves fundamental constitutional error striking at the heart of the trial process and is therefore outside the *Dixon* bar for this additional reason.

Claim 7, that petitioner was prejudiced by a hostile courtroom atmosphere, obviously could not have been raised at trial because the prejudice from the error is demonstrated by the declarations of the trial jurors, whom the defense was *prohibited* from contacting during the trial. (Pet., at p. 143.) Plainly, since the defense could not have obtained this information at the time of trial, the claim could not have been made then. In addition, to the extent that any portion of the claim could have been raised on direct appeal, the failure to do so constituted ineffective assistance of appellate counsel, and the facts alleged in this claim constitute the factual predicate to the claim set forth in claim 68. Moreover, the claim involves fundamental constitutional error striking at the heart of the trial process and is therefore outside the *Dixon* bar for this additional reason.

Claim 13, that the prosecutor violated the gag order and engaged in other conduct prejudicial to the case, depends in large part upon facts outside the record; i.e., newspaper articles quoting the prosecutor. (Pet., at pp. 189-190.) The claim could not have been raised on appeal and is not subject to the *Dixon* bar. In addition, this claim also constitutes part of petitioner's showing of a pattern and practice of misconduct by this prosecutor and his office. Many of the facts pertaining to this pattern and practice did not become apparent until the Johnnie Lee Barnes case in 1994, and the claim partly relies upon those facts. (Pet., at p. 192; Exhibit 43.) Other facts required for this showing, and incorporated into this claim in claims 1 and 6 through 17, also did not become apparent until very recently. In addition, to the extent that any portion of the claim could have been raised on direct appeal, the failure to do so constituted ineffective assistance of appellate counsel,

and the facts alleged in this claim constitute the factual predicate to the claim set forth in claim 68. Finally, the claim involves fundamental constitutional error striking at the heart of the trial process and is therefore outside the *Dixon* bar for this additional reason.

With respect to claim 16 (*Brady* error for the suppression by the prosecution of favorable evidence), as discussed *infra,* the only portion of this claim which respondent appears to challenge as *Dixon*-barred is the second sentence of paragraph 2, on pages 205 and 206, to the effect that the prosecution suppressed the fact that five witnesses had been induced to change their testimony. Once again, petitioner objects to respondent's attempt to redraft petitioner's claims in this manner to permit her to assert that individual sentences are procedurally barred. However, for the reasons given in the discussion of claim 1, *supra,* this claim is not *Dixon*-barred. The allegations regarding the prosecutor coaching the witnesses depend substantially on the declarations of Rita Lewis, Thomas Broome, Konolus Smith, Billy Williams, and Robert Cross (Pet. Exhibits 6, 7, 18, 26 36, cited at Pet. p. 56), which collectively establish the falsity of the testimony. In addition, claims of *Brady* error, such as this one, are not procedurally barred because they necessarily involve situations in which the government has itself hindered compliance with the procedural rule. (See, e.g., *Stickler v. Greene* (1999) 527 U.S. 263, 269, 289; 2 Hertz & Liebman, Federal Habeas Corpus Practice and Procedure *supra,* p. 1205 and n. 33; cf. *In re Robbins, supra,* 18 Cal.4th 770.) In addition, to the extent that any portion of the claim could have been raised on direct appeal, the failure to do so constituted ineffective assistance of appellate counsel, and the facts

alleged in this claim constitute the factual predicate to the claim set forth in claim 68. Finally, this "subclaim" involved fundamental constitutional error striking at the heart of the trial process. This "subclaim" is therefore not subject to the *Dixon* bar.

Claims 18, 21, 22, 26, 27, 28, 29, 30 and 31 are all ineffective assistance of counsel claims. Accordingly, they fall within the ineffective assistance exception to the *Dixon* bar. (*People v. Tello, supra,* 15 Cal.4th at p. 267; *In re Robbins, supra,* 18 Cal.4th at p. 814, n. 34.) In addition, as clear and fundamental constitutional error going to the heart of the trial process, these claims are exempt from the *Dixon* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at pp. 825, 834.)

Claim 34, that the court erred in failing to control the proceedings, the prosecutor, or the jury's access to media during the trial, relies substantially on extra-record evidence (i.e., newspaper articles revealing the prosecutor's violation of the gag order: Pet, at p. 383) to demonstrate prejudice from the court's error. Accordingly, this claim could not possibly have been raised on appeal and is not subject to the *Dixon* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at pp. 825, 834.) In addition, claim 41 incorporates other claims which rely on matters outside the record, and is exempt from the *Dixon* bar for this separate reason.

Claims 42 through 49 set forth claims of judicial misconduct and judicial errors of constitutional dimension, including misguiding and abandoning the jury during the proceedings, precluding consideration of the entire testimony of one witness, improper consideration of the probation report in ruling on the modification motion, failure to independently re-weight mitigation and aggravation,

prejudicial shackling of petitioner, denial of petitioner's right to mental health expert assistance at the guilt and penalty phases, and the introduction by the judge of prejudicial and extrinsic information regarding petitioner's conduct. To the extent that any portions of these claims could have been raised on direct appeal, the failure to do so constituted ineffective assistance of appellate counsel, and the facts alleged in these claims constitute the factual predicate to the claim set forth in claim 68. Furthermore, as clear and fundamental constitutional error going to the heart of the trial process, these claims are exempt from the *Dixon* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at pp. 825, 834.) In addition, claim 46 relies substantially upon matters outside the record (i.e., the declarations of two jurors: Pet., at p. 454) to establish the prejudice component of the claim and is exempt from the *Dixon* bar for this separate reason.

Claim 51 alleges facts establishing a pattern of ex parte contact between the court, the prosecutor, and counsel. The claim relies upon the extra-record declaration of trial counsel (Pet., at p. 499) and is therefore exempt from the *Dixon* bar for this reason. In addition, the claim incorporates by reference claim 31, a claim of ineffective assistance of trial counsel, and is therefore exempt for this separate reason. (*People v. Tello, supra,* 15 Cal.4th at p. 267; *In re Robbins, supra,* 18 Cal.4th at p. 814, n. 34.) To the extent that any portion of this claim could have been raised on direct appeal, the failure to do so constituted ineffective assistance of appellate counsel, and the facts alleged in this claim constitute the factual predicate to the claim set forth in claim 68. Furthermore, as clear and fundamental constitutional error going to the heart of the trial process, this claim is exempt from

the *Dixon* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at pp. 825, 834.)

Claim 57 sets forth a claim of judicial bias in the reading of a prejudicial instruction on petitioner's conduct. To the extent that any portion of this claim could have been raised on direct appeal, the failure to do so constituted ineffective assistance of appellate counsel, and the facts alleged in this claim constitute the factual predicate to the claim set forth in claim 68. Furthermore, as clear and fundamental constitutional error going to the heart of the trial process, this claim is exempt from the *Dixon* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at pp. 825, 834.)

Claims 60, 61 and 65 set forth claims of instructional error in the reading of penalty phase instructions which violated the requirements of the Eighth Amendment, among other federal constitutional provisions. To the extent that any portions of these claims could have been raised on direct appeal, the failure to do so constituted ineffective assistance of appellate counsel, and the facts alleged in these claims constitute the factual predicate to the claim set forth in claim 68. Furthermore, as clear and fundamental constitutional error going to the heart of the trial process, these claims are exempt from the *Dixon* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at pp. 825, 834.)

Claim 69 sets forth a claim of ineffective assistance of appellate counsel arising from counsel's conflict of interest in accepting appointment as both appellate and habeas counsel. The claim relies upon material outside the appellate record (i.e., appellate counsel's failure to file a habeas petition) to establish

prejudice from the error (Pet., at p. 601), and is therefore exempt from the *Dixon* bar for this reason. In addition, the claim sets forth a claim of ineffective assistance of trial counsel, and is therefore exempt for this separate reason. (*People v. Tello, supra,* 15 Cal.4th at p. 267; *In re Robbins, supra,* 18 Cal.4th at p. 814, n. 34.) Furthermore, as clear and fundamental constitutional error going to the heart of the trial process, this claim is exempt from the *Dixon* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at pp. 825, 834.) In addition, to the extent the claim asserts that California's system of dual appointment on appeal and habeas corpus denied petitioner his Sixth Amendment rights to competent, conflict-free counsel, the claim is exempt from the *Dixon* bar under the exception for attacks on the constitutionality of a statute, which are always properly raised in habeas corpus without regard to whether the claim could have been raised in direct appeal. (*In re King, supra,* 3 Cal.3d at p. 229, n. 2.)

Claim 72 alleges that petitioner's conviction and sentence of death violate several international treaties to which the United States is a party, and which therefore constitute the law of the land under the supremacy clause of the Untied States Constitution. To the extent that any portion of this claim could have been raised on direct appeal, the failure to do so constituted ineffective assistance of appellate counsel, and the facts alleged in this claim constitute the factual predicate to the claim set forth in claim 68. Furthermore, as clear and fundamental constitutional error going to the heart of the trial process, this claim is exempt from the *Dixon* bar under the exception for attacks on the constitutionality of a statute, which are always properly raised in habeas corpus without regard to whether the

claim could have been raised in direct appeal. (*In re King, supra,* 3 Cal.3d at p. 229, n. 2.)

Claim 73 sets forth a claim that this state's statutory scheme unconstitutionally permits unbridled prosecutorial discretion in charging. Accordingly, the claim is exempt from the *Dixon* bar under the exception for attacks on the constitutionality of a statute, which are always properly raised in habeas corpus without regard to whether the claim could have been raised in direct appeal. (*In re King, supra,* 3 Cal.3d at p. 229, n. 2.) In addition, to the extent that any portion of this claim could have been raised on direct appeal, the failure to do so constituted ineffective assistance of appellate counsel, and the facts alleged in this claim constitute the factual predicate to the claim set forth in claim 68. Furthermore, as clear and fundamental constitutional error going to the heart of the trial process, this claim is exempt from the *Dixon* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at pp. 825, 834.)

Claim 78 is a claim of cumulative error. The claim incorporates all other claims in the petition, most of which rely upon extra-record material, and is therefore exempt from the *Dixon* bar for this reason. In addition, to the extent that any portion of this claim could have been raised on direct appeal, the failure to do so constituted ineffective assistance of appellate counsel, and the facts alleged in this claim constitute the factual predicate to the claim set forth in claim 68. Furthermore, as clear and fundamental constitutional error going to the heart of the trial process, this claim is exempt from the *Dixon* bar under the first *Harris* exception. (*In re Harris, supra,* 5 Cal.4th at pp. 825, 834.)

Accordingly, this alleged procedural bars asserted by respondent do not prevent consideration of merits of any claim presented in this petition.

3. Contention of Substantial Delay

Respondent contends that petitioner's petition is presumptively untimely, substantially delayed without justification, and not subject to any of the relevant exceptions. Since petitioner addressed all of these issues in his petition, he will not repeat this material here. In any event, this portion of respondent's informal response constitutes mere nay-saying.

Petitioner showed in detail that he was abandoned by his state-appointed habeas counsel, George Boisseau, who never conducted any substantial investigation or filed a state habeas petition. (Petition, at pp. 9-25.) Petitioner supported this showing with the declarations of Daniel Abrahamson, Mr. Boisseau's California Appellate Project (hereafter "CAP") adviser, and Mr. Boisseau himself. (Exhibits 1 and 5.) These declarations demonstrate that Mr. Boisseau did nothing to investigate petitioner's habeas corpus claims. He failed to cooperate with CAP or his CAP adviser, failed to provide CAP with copies of requested documents, failed to conduct any record-gathering, and failed to prepare any of the essential preliminary documents necessary to the identification of habeas issues. He prepared no transcript notes, no summary of the trial file, no issues lists, no witness lists, no crime chronology, no social history chronology and none of the other basic working documents competent counsel would have used to begin a habeas corpus investigation. Even his opening brief in the direct appeal was inexcusably delayed to the point that both CAP and this court were finally forced to

demand an explanation, at which point Mr. Boisseau blamed his tardiness on unspecified family problems. (See Petition, at pp. 20-23.) At some point, Mr. Boisseau finally hired an investigator and paid him to conduct interviews with petitioner's mother and, apparently, two or three other witnesses. However, because he had failed to even begin the process of record gathering and had not prepared any of the preliminary documents needed to begin a habeas corpus investigation, these witness interviews were premature and valueless. (Pet. at pp. 23-24.)

In spite of this showing, respondent simply asserts that petitioner substantially delayed in filing his petition because he was continually represented by counsel from 1992 until 2002, when current counsel replaced Mr. Boisseau, and was "well represented" during this ten-year period. (IR at pp. 47, 50.) As the foregoing brief summary shows, this unsupported contention defies reality. Mr. Boisseau did nothing to provide petitioner with competent habeas corpus representation. Respondent attempts to excuse Mr. Boisseau's nonfeasance by arguing that he had no duty to conduct an investigation unless he was first aware of "triggering facts" in the record sufficient to put him on notice that there were matters which required investigation, and she argues that there were no such facts. However, in her next breath respondent admits that petitioner specifically identified a number of such "triggering facts" in his petition, including: the need for a more complete social history, the need to interview prior counsel, the need to interview a mental health expert, the need to investigate the prosecution's failure to prosecute Stacey Mabrey for an assault, the fact that there was never a quantitative analysis

performed on petitioner's blood, the fact that the prosecutor appeared to have violated the gag order, and the circumstances surrounding the pretrial denial of the Penal Code section 1368 motion and Judge Golde's denial of petitioner's *Faretta* motion, which should have triggered a mental health investigation. (IR 51.)

Having conceded that such facts were both present and pleaded, respondent declares that "none of these facts would necessarily trigger an investigation" and advances her own speculative analysis of why Mr. Boisseau might conclude that investigating these matters would not be likely to turn up anything useful. (*Ibid.*) Neither respondent nor Mr. Boisseau are experts in habeas investigation. Mr. Boisseau had no experience in habeas work prior to this case and was accordingly obliged as a matter of common sense and legal ethics to cooperate with the California Appellate Project in identifying "triggering" facts and pursuing an investigation. This he clearly did not do. Moreover, it is clear from the declaration of Daniel Abrahamson that the California Appellate Project, which has considerable expertise in habeas investigation, plainly believed there were a number of triggering facts in the record which required investigation, and that Mr. Boisseau failed utterly to pursue any of these leads. However, the short answer to respondent's contentions in this regard is that petitioner's current counsel do have experience in conducting habeas investigations, identified the foregoing triggering facts among others, and in 94 days, managed to conduct an investigation and file a 78-claim, 664-page petition on the basis of these triggering facts.

Respondent closes this portion of the informal response by taking federal counsel to task for supposedly "sitting" on these claims for a year before filing a

state petition and suggests that counsel somehow misled the federal court. (IR 52.) Neither of these accusations are true, nor does respondent even attempt to provide factual evidence to support them.

The suggestion that counsel have engaged in dilatory conduct is absurd. It is generally accepted within the defense community that the process of conducting a capital habeas corpus investigation and completing the petition requires about two years, assuming the work is performed by competent, experienced counsel, and assuming that the record has already been reviewed and the initial habeas issues have been identified during the direct appeal process.[6] Although petitioner requested that the federal court provide him with counsel in June, 2000, counsel were not appointed in this case until March, 2001. At that point, no habeas investigation had been conducted, the record had not yet been reviewed by counsel, and no trial files or records had been obtained. Counsel promptly began record review and began examination of the trial file in the fall of 2001. One of petitioner's appointed counsel withdrew in February, 2002. Substitute counsel was not appointed until March 21, 2002. The state petition was filed on June 23, 2002—a mere 94 days later. Thus, far from "sitting" on petitioner's claims, counsel promptly investigated and filed the petition and, indeed, did so in record time.

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[6]/ This court's own policies for capital cases also assume that two years are required to conduct a habeas investigation and file a petition. Policy Statement 3 provides that a petition for writ of habeas corpus shall be filed either 90 days after the reply brief or "within 24 months after appointment of habeas counsel, whichever is later." (Cal. Supreme Ct., Policies Regarding Cases Arising from Judgment of Death, policy 3.)

With respect to respondent's outrageous suggestion that petitioner's counsel have somehow deceived the federal court by expending federal funds and then filing a state petition, it is apparent that a state petition would have to be filed in order to exhaust petitioner's claims before those claims could be heard in federal court. Because petitioner's state appointed counsel abandoned him without conducting an investigation or filing a petition, it came as no surprise to anyone that the state petition was filed first.

Respondent's attempts to blame petitioner or his current counsel for Mr. Boisseau's abandonment of petitioner all fail. Thus, although petitioner submits that his petition was filed without substantial delay, good cause for any delay would be clearly established by the facts set forth in the petition. Petitioner's claims are not barred from collateral review, and an order to show cause should issue so the merits of those claims can be litigated.

B. Each and Every Claim Presents compelling Grounds for Relief on the Merits

1. Petitioner's *Brady/Napue* Claim Is Neither Procedurally Barred Nor Substantively Inadequate

In claim 1 of his petition, petitioner alleged that his conviction and sentence of death were unconstitutional because the prosecution suppressed impeachment evidence relating to key prosecution witnesses in contravention of *Brady v. Maryland* (1963) 373 U.S. 83, 87, *Napue v. Illinois* (1959) 360 U.S. 264, and their progeny. In particular, petitioner alleged that the prosecution withheld evidence that: (1) its star witnesses, Stacey and Barbara Mabrey, had received substantial

benefits, including cash payments, in exchange for their testimony; (2) on five occasions the prosecution dropped or declined to press charges against Stacey Mabrey even though he had been arrested for a combined total of sixteen felony counts on those occasions; (3) Stacey Mabrey, a purported eyewitness to the crimes with which petitioner was charged, was not actually present at the scene, and his eyewitness testimony was therefore entirely false; (4) the prosecutor instructed police not to arrest Stacey Mabrey for a series of bank robberies until after he finished testifying in petitioner's case; and (5) the prosecution coached witnesses to alter earlier statements or testimony regarding petitioner's mental state in order to avoid the possibility of a mental defense. (Pet., at pp. 38-58.)

Respondent contends that petitioner's *Brady/Napue* claim is procedurally barred and fails to state a claim on which relief could be granted.[7] (IR at p. 56.) Respondent is in error.

Respondent first claims that petitioner's *Brady* claim has been unreasonably delayed. (IR at p. 58.) Respondent argues that since appellant himself moved for

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[7] Respondent cites no authority in support of its contention that petitioner's *Brady/Napue* claim is procedurally barred. Although respondent's contention is meritless, petitioner notes that even procedural default would not bar consideration of a *Brady/Napue* claim. Indeed, recent and controlling United States Supreme Court authority suggests that procedural default will not bar consideration of the merits of most *Brady* claims because the prosecution's failure to disclose information on which the claims are based will ordinarily be deemed "cause" sufficient to overcome any procedural bar. (See, e.g., *Strickler v. Greene* (1999) 527 U.S. 263, 283.) However, as explained in the text, petitioner's claim is not procedurally barred and respondent's contention is wrong both on the facts and the law.

mistrial and an acquittal on the grounds that Barbara and Stacey Mabrey had perjured themselves and were not actually present when the murders were committed, petitioner knew the information on which the claim is based at the time of trial and is at fault for not raising this claim earlier. Respondent then asserts that petitioner must at least account for his failure "to follow up on his motions" and "rule out the possibility that petitioner has had the information" supporting this claim since prior to trial. (*Ibid.*) These contentions are patently absurd.

First of all, respondent is wrong on the facts. Petitioner plainly did not have the information from Troy Barnes' declaration, or any other hard evidence of perjury, at the time of trial or at any time substantially prior to the filing of his petition. Although petitioner did claim at the time of trial that Barbara and Stacey Mabrey perjured themselves in their testimony, his motions for mistrial and acquittal were denied primarily because he was unable to present the court with any factual evidence to support his motions at the time of trial, apart from his own assertions. (RT 4525, 4937.) Petitioner's motion for dismissal simply alleged, without evidence, that the prosecution "has subordinated (sic) perjury against me within the last three eyewitness testimony . . ." (RT 4525.) In his motion for an acquittal, the only evidence petitioner advanced that Barbara and Stacey Mabrey had perjured themselves was the assertion that in his preliminary hearing testimony Leslie Morgan had stated that Barbara and Stacey Mabrey were not present at the scene of the killings. (RT 4937.) However, a review of Morgan's preliminary examination testimony shows that Morgan actually said only that he did not know whether the Mabreys were present in the house and that he did not see them there

when he left. (CT 1468.) Thus, although subsequent investigation proved petitioner was correct in asserting that Stacey Mabrey was not present, petitioner had no facts at the time of trial with which to support his assertion.

Prior to last year, petitioner did not have and could not have had the principal evidence presented in support of this claim, i.e., the declaration of Troy Barnes. Petitioner could not personally investigate this matter prior to or during trial, since he was in custody without bail from the time of his arrest through the judgment and sentencing. He could not personally investigate it after that time because he has been in continuous custody on Death Row since his conviction. Furthermore, as set forth in detail in the petition, petitioner's state counsel abandoned him after conducting essentially no investigation. Petitioner requested federal counsel almost immediately following the denial of certiorari in his direct appeal. Federally appointed counsel discovered the evidence as soon as they could have conducted an investigation, and then promptly filed a petition. Accordingly, petitioner has been as diligent as his circumstances permitted him to be in pursuing this claim and can hardly be faulted for failing to raise this claim earlier.

Moreover, even if petitioner had somehow been in possession of this information at some earlier time, his possession of that information would be legally irrelevant. Whether the defense is aware of the falsity of evidence presented by the prosecution is "beside the point." (*Belmontes v. Woodford* (9th Cir. 2003) 335 F.3d 1024, 1044.) Respondent "overlooks the fact that the prosecutor's duty to correct false testimony arises, not simply out of a duty of fairness to the defendant, but out of 'the free standing constitutional duty of the State and its representatives

to protect the system against false testimony.'" (*Id.*, at pp. 1044-1045, quoting *Commonwealth of the Northern Mariana Islands v. Bowie* (9th Cir. 2001) 243 F.3d 1109, 1114.) The prosecutor has an independent constitutional duty to prevent fraud upon the court, to avoid presenting false testimony, and to correct false testimony if it has been presented. (*Napue v. Illinois, supra,* 360 U.S. 264.) A prosecutor's failure to do so compels reversal. "[I]f it is established that the government knowingly permitted the introduction of false testimony 'reversal is virtually automatic.'" (*Commonwealth of the Northern Mariana Islands v. Bowie, supra,* 243 F.3d at 1114; cf. *Franks v. Delaware* (1978) 438 U.S. 154.) Accordingly, and contrary to respondent's unsupported assertion, it is not petitioner's responsibility to "rule out the possibility that petitioner has had the information provided by Barnes, in one form or another, since trial, . . ." (IR at p. 58.) There is simply no procedural bar to the presentation of this claim.

Respondent's backup contentions – that the prosecutor's presentation of false evidence was either not material, not misconduct, or harmless – are also without merit. As noted above, "if it is established that the government knowingly permitted the introduction of false testimony 'reversal is virtually automatic.'" (*Commonwealth of the Northern Mariana Islands v. Bowie, supra,* 243 F.3d at 1114.) The evidence uncovered by petitioner's counsel shows that the prosecutor either knew Stacey Mabrey was not present or is at least chargeable with such knowledge. It is immediately apparent from the evidence petitioner has provided that Stacey Mabrey was not only a prosecution witness but a favored prosecution informant. In exchange for his testimony at petitioner's trial, Mr. Mabrey received

favorable treatment from the prosecution through the receipt of cash payments and other favors, the delay of his arrest for bank robbery until after his testimony, the prosecution's decision not to pursue those charges, and the prosecution's repeated refusal to prosecute Mr. Mabrey whenever this one-man crime wave was arrested for a plethora of felonies. Mr. Mabrey's relationship with the prosecution, and his willingness to lie in exchange for favorable treatment from the police and the prosecution, was well understood by the prosecutor.

As the Ninth Circuit has repeatedly warned, a "prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system." (*United States v. Bernal-Obeso* (9th Cir. 1993) 989 F.2d 331, 333; *Commonwealth of the Northern Mariana Islands v. Bowie, supra*, 243 F.3d at p. 1116.) Particularly in cases involving testimony from informants, the courts must expect " prosecutors and investigators to take all reasonable measures to safeguard the system against treachery." (*Ibid.*) At a minimum, the prosecutor had a duty to disclose the favorable treatment which Mr. Mabrey received and would continue to receive in exchange for his testimony. Separate and apart from this duty, the prosecutor also had a particular duty to ensure that any testimony Mr. Mabrey was to give at petitioner's trial was the truth.

However, in this case it is abundantly clear not only that the prosecutor failed to adequately investigate the accuracy of Mr. Mabrey's story but also that the prosecutor knew that Mr. Mabrey's entire testimony was a lie. Petitioner's counsel have performed a newspaper search and have discovered that the *Oakland Tribune* reported on December 16, 1986, only eight days following the homicides, that

Stacey Mabrey "was not present during the attack." (Supplemental Exhibit B, *Oakland Tribune* News Article.) If the local newspaper was aware immediately after the killings that Mr. Mabrey was not present, it is highly implausible that a prosecutor with a well-known interest in publicity, and with all the investigative resources of the Oakland Police Department at his disposal, was not also aware of this fact, particularly in a case which the prosecutor and respondent never tire of describing as "the worst mass murder in Oakland history." (IR at p. 1.) It is especially difficult to believe the prosecutor was not aware of Mr. Mabrey's perjury in light of the fact that employees of the district attorney's office, and perhaps even the prosecutor himself, paid frequent visits to Stacey and Barbara Mabrey prior to trial, made cash payments to them, and prepared them to testify at trial. (Exhibit 2, Declaration of Troy Barnes.) However, even if the prosecutor himself was somehow not actually aware that Mr. Mabrey was lying, he nevertheless had a duty to investigate Mr. Mabrey and was at a minimum legally responsible for finding out what the Oakland police (and the *Oakland Tribune*) knew. (See, e.g., *Kyles v. Whitley* (1995) 514 U.S. 419, 437.)

With respect to the portions of petitioner's claim to which the usual *Brady* rules apply, this evidence was clearly favorable and "material" and the suppression of that evidence was therefore prejudicial. Favorable evidence is material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*United States v. Bagley* (1985) 473 U.S. 667, 682.) A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." (*Ibid.*) As the Supreme Court explained

in *Kyles v. Whitley, supra,* 514 U.S. 419, the materiality standard is not an outcome determinative test, and the non-disclosure cannot be deemed harmless simply because sufficient evidence to convict remains. That is, petitioner need not show that he would have been found innocent on either guilt or punishment had the evidence been disclosed. (*Id.*, at p. 453 [*Brady* violation even though jury could have found eyewitness testimony, coupled with impeachment evidence on two other prosecution witnesses, sufficient to convict].)

Under the foregoing rules, Stacey Mabrey's perjury was clearly "material." Respondent admits that both the Mabreys' testimony was "powerful" (IR, at p. 60), and Stacey Mabrey's testimony was particularly crucial to the prosecution. Unlike Barbara Mabrey, Stacey Mabrey testified that he had actually seen petitioner with an Uzi inside the house. (RT 4127-4128, 4173-4174.) With respect to the homicide incident, Barbara Mabrey testified only that she heard shooting and saw Rita Lewis with a gun, and her only testimony connecting petitioner with the homicide was that she heard Rita Lewis and Dellane Mabrey use the name "Moochie." (RT 4235.) Thus, Barbara Mabrey never actually saw petitioner in the house at all.

Stacey Mabrey's testimony also provided other prejudicial information supplied by no other witness. For example, unlike Leslie Morgan, the only other witness to testify regarding the incidents in the house that night, Stacey Mabrey testified that petitioner came into his room armed with the Uzi and asked, "Where's Chuck," indicating that he was attempting to find, and presumably kill, Stacey's younger brother. (RT 4129-4130, 4180.) This testimony that petitioner sought to kill yet another young victim was particularly damning. Also alone among the

prosecution's alleged "eyewitnesses," Stacey Mabrey testified that he saw petitioner still holding the Uzi as he left the house and was helped into a car, thus suggesting that petitioner, and not co-defendant Rita Lewis, had wielded the Uzi throughout the incident. (RT 4132-4134.) Finally, as petitioner noted in the petition itself, the materiality of this testimony is underscored by the fact that the prosecution relied heavily upon Stacey and Barbara Mabrey's testimony in his closing argument to prove intent and other elements of the crimes and to argue for a death verdict (RT 3877-3878, 5480, 5490-5491, 5494, 5512, 5520, 5522, 5557), and also by the fact that the jury specifically requested read-backs of this testimony. (RT 5460.)

Respondent's contention that Leslie Morgan's testimony was the central testimony for the prosecution, and that the Mabreys' testimony was merely supportive of Mr. Morgan's testimony, simply defies reality. Respondent forgets that Mr. Morgan's credibility, and particularly his testimony that he witnessed petitioner shoot Dellane Mabrey and their child, was thoroughly impeached by Mr. Morgan's own initial statement to Officer Medsker. Immediately after the crimes, Mr. Morgan told Officer Medsker that he had been asleep at the time of the shootings, did not see petitioner shoot anyone, and did not wake up until he found himself wrestling with petitioner after Dellane Mabrey and the child had already been shot. (RT 4503-4505.) When confronted with these statements on cross-examination, Mr. Morgan underscored his lack of credibility by providing evasive and implausible answers. (*Ibid.*) Thus, contrary to respondent's contention, it was the Mabreys' testimony, and particularly Stacey Mabrey's purported eyewitness

testimony, which was the most damning evidence the prosecution presented against petitioner.

The revelations that the Mabreys were receiving substantial benefits in exchange for their testimony, that Stacey Mabrey had virtually been given a "get out of jail free" card in exchange for his testimony, and that Stacey Mabrey's entire testimony was a lie all obviously would have devastated the prosecution, called the testimony of Stacey's mother, Barbara, into serious doubt, and left the prosecution with only the testimony of Leslie Morgan to support its case. The revelation that prosecution witnesses had been coached to avoid revealing that petitioner was mentally ill, and that Beverly Jermany testified falsely when she testified that petitioner did not appear to be intoxicated when she saw him immediately after the incident,[8] would have undermined the prosecution's case for first degree murder in the guilt phase and bolstered the defense mental health testimony in the penalty

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[8]/ Respondent contends that the portion of the claim pertaining to Jermany could have been raised on appeal and is therefore subject to the *Dixon* bar. (IR at pp. 59-60.) However, respondent admits that petitioner has presented additional evidence outside the record in support of this claim, i.e., the declaration of Rita Marie Lewis. This declaration establishes that on the night in question, petitioner was "wasted and out of it" on whiskey and cocaine and was "not making a lot of sense." (Exhibit 18, Declaration of Rita Marie Lewis, at p. 5.) Although respondent argues that this information is duplicative of the qualitative blood analysis evidence, that analysis merely showed that alcohol and cocaine were present in petitioner's blood; no quantity was established. The Lewis declaration shows that at the time of the incident, petitioner was so intoxicated as to be incoherent, and that Beverly Jermany testified falsely when she said petitioner did not appear to be high on drugs when she saw him immediately after the incident.

phase, potentially changing the outcome in both phases. Accordingly, respondent's claim that the suppressed evidence was not material or prejudicial is without merit.

2. The Juror Misconduct Was Material and Prejudicial

a. Introduction

Petitioner's claim 6 alleged that the bailiff improperly communicated extrinsic information to the jurors. Respondent denies that any such communications took place and states that any misconduct would not have been material. Respondent is wrong.

Respondent offers no evidence to support the contention that no misconduct took place, but instead simply speculates that the jurors might have acquired this information through other means. Since respondent's speculation is directly contradicted by petitioner's evidence, in the form of juror declarations, there is no need to address it further.

With regard to respondent's contention that the misconduct would not in any event be material, respondent significantly underestimates the scope and breadth of the unparalleled juror misconduct in this case. As set forth in the declarations of juror Joanne Gonzalez (Exhibit 11), juror Richard Mignola (Exhibit 20), juror Yvonne McGrew (Exhibit 19), juror Joe Cruz (Exhibit 8), alternate juror David Larson (Exhibit 16) and alternate juror Bernard Wells (Exhibit 35), this misconduct included, but was not limited to:

- the bailiff's establishment of an exceptionally close, social relationship during trial with the jury, and the bailiff's repeated improper communication

of material, extrinsic information which was significantly relied upon by the jury in convicting petitioner and sentencing him to death;

- the improper introduction into the jury room of material, extrinsic information from newspapers and other media, brought in by jurors and communicated to other jurors during the proceedings, including, but not limited to, false information on petitioner's alleged threats and presumed future dangerousness, which was significantly relied upon in convicting petitioner and sentencing him to death;
- the presence and interaction of alternates with the jurors during the proceedings and the active participation of at least one alternate as a thirteenth juror during the guilt and penalty phase deliberations;
- discussions among the jurors and determinations of both guilt and the sentence of death during the guilt and penalty phase trial, but prior to deliberations of the verdict.

Neither petitioner nor his defense counsel were made aware of: the bailiff's conduct; private communications with jurors on material facts; the jurors' knowledge of and reliance upon outside media during trial and penalty; the jurors' determinations prior to deliberations; or the active participation of alternates. (Exhibit A, Supplemental Declaration of Spencer Strellis.)

No limiting instructions were issued on any of the material, extrinsic evidence. Nor was the primary information discovered until petitioner's investigation by appointed counsel Wes Van Winkle and Stephanie Ross. (See Cal. Code Civ. Proc., § 206; § 237.) Although the court had an opportunity to question

the bailiff regarding his interactions with petitioner and on the case itself, the court limited itself to questioning on an incident when petitioner chose not to return to court. This occurred during the end of the penalty phase proceedings, and out of the presence of the jury. The sole concluding comment which the court had regarding the bailiff was "Mr. Dimsdale is the bailiff and has handled [petitioner] beautifully so far." (RT 5960.)

As set forth in the petition and as delineated below, each of these errors was fundamental, requiring reversal as a matter of federal constitutional law. Petitioner further alleges that the juror misconduct errors, cumulatively, set forth a claim upon which the requested relief must be granted.

b. Discussion

i. Relationship With Bailiff

The bailiff in charge of the jury developed an unconstitutional, uniquely close, personal relationship with the jurors during the guilt and penalty phase of petitioner's case. This closeness grew to such an extent that, during the trial, the jurors threw the bailiff and his wife a party. As juror Joanne Gonzalez explained, "I recall that the bailiff was having a baby. During a two-hour lunch break, we jurors threw him a baby shower. His wife was present as well." (Exhibit 11, Declaration of Joanne Gonzalez at p. 3.) Further, the bailiff took jurors shopping during the trial, took them out to nice meals, joined them at the meals and joined them in *discussions* of the case. As alternate juror Bernard Wells explained:

> *We became a family of sorts, with our bailiff acting as the head of our family.* One time the bailiff drove us in the van out to Alameda to try a Mexican restaurant, and at the same time to let one of the female jurors get some work done at her office. Within the first two weeks or so, jurors began sharing their opinions about witness testimony, their opinions of Mr. Welch, and what they had read in the newspaper. I was initially extremely uncomfortable with these discussions because the judge specifically warned against discussing any part of the testimony and court proceedings. *However, since our bailiff was with us and talked in some of these discussions, I realized that he was okay with our discussions.*

(Exhibit 35, Declaration of Bernard Wells at p. 1, italics added)

The bailiff's social outings with the jurors, at which the case was discussed, are documented by other jurors and alternate jurors present. (See Exhibit 11, Declaration of Joanne Gonzalez at p. 2, italics added ["*During deliberations*, we jurors were taken out to lunch at different restaurants. I recall that *the bailiff joined us on occasions*"]; Exhibit 8, Declaration of Joe Cruz at p. 3 ["Throughout the trial, we ate lunch together at different places around town. A few times the bailiff took us in a van to restaurants outside the vicinity of the courthouse"].)

This close relationship was malignant to petitioner's constitutionally guaranteed rights, and the material, extrinsic evidence, imparted by the bailiff, directly impacted the jurors' verdicts of guilt and sentence of death. (Exhibit 35, Declaration of Bernard Wells at pp. 2-3; Exhibit 11, Declaration of Joanne Gonzalez at p. 2; Exhibit 20, Declaration of Richard Mignola at pp.

1-2; Exhibit 19, Declaration of Yvonne McGrew at pp. 3-5; Exhibit 8, Declaration of Joe Cruz at pp. 2-3.)

ii. Material, Extrinsic Evidence: False Information on Petitioner's Character

During the trial, *"The bailiff fed some jurors information that focused on what a bad man Mr. Welch was."* (Exhibit 35, Declaration of Bernard Wells at p. 2, italics added.) Respondent contends that this information had been provided to the jury because petitioner had threatened the Mabrey family. (IR, at p. 77.) This simply is incorrect. As evidenced by the jurors' declarations, the bailiff explicitly and expressly told them that petitioner had threatened witnesses in the courtroom. There was absolutely no evidence admitted at trial to substantiate that such threats to witnesses in the courtroom had been made. The bailiff:

> said that Mr. Welch was threatening witnesses and that even though there were more witnesses against him, some refused to testify because they were too scared of Mr. Welch. On one occasion, the bailiff told us that one of the prosecution witnesses had specifically been threatened and that something might happen to the witness. Sure enough, during his testimony, from the back of the room came a sudden, loud noise that made all of us startle and look over. *It turned out to be nothing but an excellent indicator of how much influence the bailiff had over us and our fear.*

(Exhibit 35, Declaration of Bernard Wells at p. 2, italics added)

Juror Cruz declared that this extrinsic information about threats to courtroom witnesses contributed to the jury's actual fear of petitioner, which in turn contributed to their verdict.

> Contributing to the jurors' fear of Mr. Welch was the fact that we learned from the bailiff that witnesses in the case had been threatened, which contributed to the tense atmosphere in the court room. For example, the bailiff told us about threats made to a specific witness. While that witness was testifying, a loud, bang-like noise came from the back of the court room. Because we were expecting something to happen we all startled and looked to the back. It turned out to be nothing, but we did talk about the noise. I started to become concerned about my own safety, and used to keep an eye out on my way to and from the car. I thought about possible connections Mr. Welch had to the outside world.

(Exhibit 8, Declaration of Joe Cruz at p. 2.)

In the words of juror Yvonne McGrew:

> I remember being aware that at least one witness felt threatened. The surviving mother, Barbara Mabrey, had to leave the area to feel safe. Into the first week or two, the court atmosphere became extremely tense. This was brought home for me on one particular occasion. On this occasion, as a witness was testifying, a loud, sharp noise came from the back of the courtroom. All of us simultaneously turned our heads to the area of the noise, completely startled and alert. The deputies and bailiff turned with their hands to their hips as if to go for their weapons.

(Exhibit 19, Declaration of Yvonne McGrew, at p. 2.)

This extrinsic evidence was not duplicative of any evidence admitted at trial. In fact, there was no evidence at all that petitioner had threatened witnesses to keep them from appearing in court at his trial. Respondent can cite no such testimony, because it did not exist. The jurors themselves state that this information "came from the bailiff." (See, e.g., Exhibit 8, Declaration of Joe Cruz at p. 2, italics added [*"We learned from the bailiff that a witness in the case had been threatened."*]; accord, Exhibit 35, Declaration of Bernard Wells at p. 2 ["The bailiff . . . said that Mr. Welch was threatening witnesses"].)

This extrinsic, material information provided by a trusted officer of the court, who had managed to create a unique relationship with the jurors and had a persuasive power over them and their decision-making, was overwhelmingly prejudicial and tainted the entire guilt and penalty phase proceedings. This information, inter alia,

> was provided to us early on in the trial and played into the beliefs and was influential in the decisions of a lot of the jurors. The information we received outside the courtroom became the main focus of our deliberations. The information provided by the bailiff and the newspapers jurors read during the trial about this case really made a number of jurors think badly of Mr. Welch.

(Exhibit 35, Declaration of Bernard Wells at pp. 2-3.)

Although this prejudicial misconduct compels reversal of the entire judgment, the misconduct was even more prejudicial in the penalty phase deliberations. The extrinsic information provided by the bailiff, and

newspapers about petitioner's alleged threats to those participating in the trial, and during the trial, played:

> a large part in the jury's initial and lasting impression of Mr. Welch's character and our decision to sentence Mr. Welch to death. For example, during penalty deliberations, jurors stated they believed it was important that Mr. Welch be executed so that he could not retaliate against us for our guilty verdict. They said that if we did give him a life sentence, and if he did get out, he surely would come to kill us.

(*Id.* at p. 3.)

Juror Yvonne McGrew recalls other jurors "who were afraid that David Welch would retaliate against them and so wanted to sentence him to death." (Exhibit 19, Declaration of Yvonne McGrew at p. 2.) The fact that this information was imparted to the jurors by the bailiff, who had used his unique access to the jury to develop a relationship of trust, made this false, extrinsic information even more prejudicial. Petitioner had no opportunity to explain, rebut or deny this false information, because neither he nor his counsel were given any indicia that this occurred.

iii. Material, Extrinsic Bad Character Evidence

The bailiff used his personal relationship with the jurors to impart other, highly damaging, extrinsic evidence about petitioner. As delineated below, this information was not duplicative and significantly weighed in the jurors' determinations of guilt and imposition of the sentence of death.

During the voir dire of the jurors, prosecutor Anderson engaged in a verbal altercation with petitioner. No jurors were present during this dispute. The argument triggered a severely unstable, emotional and dysfunctional mental state in petitioner. Petitioner was taken into the well of the courtroom, outside the judge's chambers, where he proceeded to urinate. The bailiff improperly informed the jury of this incident and pointed out to them where this had occurred.

Explaining "how much influence the bailiff had over us", alternate juror Wells declared that "the bailiff also told us that Mr. Welch urinated in the stairwell on the way to and from court. *The bailiff actually showed us where he urinated.*" (Exhibit 35, Declaration of Bernard Wells at p. 2, italics added; see Exhibit 11, Declaration of Joanne Gonzalez at 1 ["I recall that David urinated in the stairwell on the way into the courtroom"]; see also Exhibit 20, Declaration of Richard Mignola at 1 ["I recall hearing that David Welch urinated in the stairwell in the courthouse. I did not recall from whom I heard this, it might have been the bailiff"].)

The jurors' declarations also establish that the information was extremely prejudicial. The jurors discussed the petitioner's conduct in this instance and expressly relied upon it as a significant factor in the prosecution's favor. With regard to the urination in the stairwell, juror Mignola declared: "We jurors discussed this fact in deliberation and agreed that it was just an awful thing for him to do." (Exhibit 20, Declaration of Richard Mignola at pp. 1-2.) Juror Cruz testified that the incident of urination

in the well was a significant factor in Mr. Cruz's determination of petitioner's character, warranting conviction and imposition of the sentence of death:

> Some of us wondered if this, along with other behaviors, meant that Mr. Welch was incompetent. Others of us, myself included, thought that this was an attempt by Mr. Welch to have himself declared incompetent. We resolved the issue when we came to the conclusion that Judge Golde must have already decided that Mr. Welch was competent, otherwise, he would not be facing trial. For those who already believed that Mr. Welch was faking incompetency by urinating, the fact that Judge Golde had already reviewed the matter and found Mr. Welch only reinforced the belief that Mr. Welch was faking.

(Exhibit 8, Declaration of Joe Cruz, at p. 3.)

As set forth in more detail in the next section, the highly prejudicial effect of the bailiff's conduct was also confirmed by alternate juror Wells, who discussed the extent to which the bailiff's influence, statements and bias against petitioner played into the deliberative proceedings. (Exhibit 35, Declaration of Bernard Wells at pp. 4-6.)

iv. Petitioner's Competence

The foregoing is illustrative of how paramount the extrinsic evidence of petitioner's "bad" character was in the determinations in both the guilt and penalty phase of the proceedings. Indeed, "[t]he information we received outside the courtroom became the main focus of our deliberations. The information provided by the bailiff and the newspapers jurors read during the

trial about this case really made a number of jurors think badly of Mr. Welch." (*Id.* at p. 3.)

Unfortunately, jurors received only extrinsic information regarding petitioner's "competence." They were not informed during the trial that petitioner had requested a 1368 competency hearing or that the judge had refused his request. They were also not told that the judge found petitioner was *not* competent to represent himself, nor were they told the court ruled petitioner did not "have the mental capacity to waive" his right to counsel. (RT 84-86.) Nonetheless, as evidenced by the jurors' declarations, information regarding petitioner's "competency" made its way to the jury through unauthorized sources, including the bailiff and newspapers that jurors read during the capital proceedings against petitioner. When Mr. Wells was told that petitioner had urinated in the stairwell, he:

> commented that Mr. Welch must not even be competent. The other jurors stated they believed he was faking crazy to get out of the trial. *One of the jurors told us that the judge had already decided that Mr. Welch was competent. I do not know where she got this information but it settled the question of whether or not he was competent and bolstered the opinion that Mr. Welch was manipulative and deceptive.*

(Exhibit 35, Declaration of Bernard Wells at p. 5, italics added; see Exhibit 8, Declaration of Joe Cruz at p. 3 ["As jurors, several of us had questions about Mr. Welch's competency to be standing trial at all. What stands out most in

my mind about this is learning from the bailiff that Mr. Welch urinated in the stairwell on the way to the courtroom"].)

The prejudice here also was manifest: "For those who already believed that Mr. Welch was faking incompetency by urinating, *the fact that Judge Golde had already reviewed the matter . . . only reinforced the belief that Mr. Welch was faking.*" (*Id.* at p. 3, italics added.) Petitioner's competence or incompetence to stand trial, as well as his mental state at the time of the offense, were crucial factors in the determination of both guilt and penalty.

At a minimum, this extrinsic evidence, garnered from outside news sources and communicated by the bailiff to the jury, prevented jurors from basing their penalty phase judgment on the mitigating evidence presented in the courtroom. The jury's false assumptions that petitioner was "faking" incompetence and that the judge must have determined he was competent precluded the jury from giving effect to mitigating evidence regarding petitioner's actual mental state. The jury in a capital case *must* be able to hear, consider and give full effect to all relevant, mitigating evidence. (*Penry v. Lynaugh* (1989) 492 U.S. 302; *Hitchcock v. Dugger* (1987) 481 U.S. 39; *Eddings v. Oklahoma* (1982) 455 U.S. 104; see *Atkins v. Virginia* (2002) 536 U.S. 304, 350 [mentally retarded persons' diminished mental capacities justifies their exemption from death penalty].) The extrinsic information received and considered by the jury actually precluded them from engaging in this constitutionally mandated duty.

v. Material, Extrinsic Evidence of Co-Defendant's Guilty Plea

Additional material, extrinsic information which the jurors received, and which "became the main focus" of the jurors' deliberation (Exhibit 35, Declaration of Bernard Wells at p. 3) concerned the guilty plea and sentence of the co-defendant:

> An example of the information brought in from a juror who said she had read about it in the newspaper was the fact that Mr. Welch's girlfriend, Rita Lewis, went to trial before Mr. Welch, and took a deal from the district attorney for a life sentence.

(*Id.* at p. 2.)

However, no information about Rita Lewis's guilty plea was admitted to the jury during the proceedings. (See RT 4980-4984 [co-defendant Rita Marie Lewis takes the stand, out of presence of jury, and takes the Fifth Amendment].) Thus, in addition to the harm done by the other misconduct detailed previously, the unlawful consideration of the co-defendant's plea also factored into the jury's determination. (See *Bruton v. United States* (1968) 391 U.S. 123, 134-137 [implication of non-testifying co-defendant guilt violated defendant's rights to confrontation and due process].)

> The court gave no instruction which limited the jury's consideration of this material, extrinsic evidence. Neither defendant nor defense counsel were made aware of the fact that the jurors had received and considered this evidence as transmitted through jurors and the media. This material, extrinsic information was not admitted in open court.

vi. Jurors and Bailiff's Discussion of Case Prior to Deliberations

The jurors were admonished "not to discuss the case among yourselves, with anyone else, let anybody talk to you about it." (RT 5599; RT 5599 ["You're admonished not to discuss the case among yourselves, with anyone else, let anybody talk to you about it"]; RT 5625 ["Now remember, you can't talk about the case until the foreman calls everybody into session ... and likewise, when all twelve of you get your belongings, you can't talk to the alternates about the case"].)

Nonetheless, the jurors not only discussed the case among themselves prior to deliberations, but also discussed the case with the alternates. The misconduct did not stop at this juncture. The bailiff injected both his presence and opinions in these discussions. (See, e.g., Exhibit 8, Declaration of Joe Cruz at pp. 1-2; see also *id.* at p. 3) ["A few times the bailiff took us in a van to restaurants outside the vicinity of the courthouse. I remember we ate at the Gingerbread House and Mexicali Rose in Alameda. Even the alternates were included with us, ate with us, and joined in our discussions"]; see also Exhibit 11, Declaration of Joanne Gonzalez at p. 2 ["The bailiff joined us on occasions"].)

Juror Yvonne McGrew declared:

> During penalty phase, all of us talked about our thoughts on sentencing. I was vocal about sentencing David Welch to death given my belief that if you deliberately kill more than one person, you lose the right to live. There were others, a younger Hispanic woman among them, who were afraid that David Welch would retaliate or have a

> family member or associate against them and so wanted to sentence him to death.

(Exhibit 19, Declaration of Yvonne McGrew at p. 3.)

These proscribed discussions tainted petitioner's guilt and penalty phase case:

> Within the first two weeks or so, jurors began sharing their opinions about witnesses' testimony, their opinions about Mr. Welch, and what they'd read in the newspaper. I was initially extremely uncomfortable with these discussions because the judge specifically warned against discussing any part of the testimony and court proceedings. However, since our bailiff was with us and talked in some of these discussions, I realized he was okay with our discussions.

(Exhibit 35, Declaration of Bernard Wells, at p. 1.)

Although these discussions initially may have been benign, they quickly progressed into conversations concerning fundamental, core elements of the offense, as well as juror-created, non-statutory aggravating factors which became gravamen to the imposition of the death penalty.

> As time went on, the conversations became more disturbing. Jurors started complaining about the length of time it was taking, saying, "We know he's guilty, why not get it over with and go home." At one point, one of the jurors said, "I knew he was guilty by day two." Another comment I remember is, "Oh come on, you can tell he's guilty just by looking at him."
>
> . . .
>
> By the time it came to deliberations the overwhelming sentiment of the jurors was that Mr. Welch was bad and

> dangerous and could retaliate against the jurors if he was not executed. Again, the information provided by the bailiff helped us form this opinion.

(*Id.* at pp. 1-2, 5.)

vii. Participation of Alternate Jurors in Prejudicial Discussions and Deliberations

As delineated *supra,* the alternates actively participated in proscribed discussions of the case throughout the proceedings, as well as in the deliberations themselves. (See, e.g., Exhibit 8, Declaration of Joe Cruz at p. 1 [discussing the participation of "one juror, and African American named Bernard, who was a boater"]; see also Exhibit 35, Declaration of Bernard Wells at pp. 1-6 [alternate juror who actively participated in discussions and deliberations in guilt and penalty phase of petitioner's case].) This not only contravened the court's instructions, but also, and more importantly, the Constitution of the United States and the laws and Constitution of the State of California.

At the time of petitioner's trial, the participation of alternates in a criminal case was guided by California Penal Code Section 1089. This authorized the court, in specific circumstances, to call an alternate juror and substitute that person for a sitting juror. However, it does not authorize the participation in discussions and seating of an alternate juror as a thirteenth juror on a criminal case.

This Court has long held that the active presence of an alternate juror in the jury room while the jury is deliberating is reversible per se. (See

People v. Britton (1935) 52 P.2d 217; *People v. Adame* (1974) 36 Cal.App. 3d 405, 408 [holding presence of alternate juror in jury room was reversible per se]; *People v. Brenneman* (1935) 4 Cal.App. 2d 75 [presence of alternate jurors in jury room constituted invasion of defendant's right to trial by jury as guaranteed by art. I section 7 of the California Constitution].)

This is not a case where the court substituted in the alternate jurors participating in deliberation, such as alternate juror Bernard Wells, for good cause. Rather, this is a case on all fours with *Britton*, and the California Constitution, wherein an alternate juror or jurors participated as extra jurors in the capital case deliberations. Indeed, as a capital case, this error is even more egregious. The United States Constitution requires a higher degree of reliability and exacting scrutiny in capital case proceedings. (*Godfrey v. Georgia* (1980) 446 U.S. 420 [Eighth Amendment requires higher degree of scrutiny in capital proceedings].) Moreover, defense counsel did not acquiesce in the alternates' presence because they were never informed that the alternates were deliberating with the jury in petitioner's case.

c. Conclusion

This, and the other secret, extrinsic information and outrageous misconduct by the jury and the bailiff mandates reversal of petitioner's sentence of guilt and death sentence.

Contrary to respondent's claims, these individual as well as cumulative errors are presumptively prejudicial, requiring reversal, as a matter of federal constitutional law. (*United States v. Harber* (9th Cir. 1995) 53 F.3d 236, 240.) In

United States v. Olano (1993) 113 S.Ct. 1770, 1780, the United States Supreme Court instructed that "There may be cases where an intrusion should be presumed prejudicial." As the Ninth Circuit explained:

> The court in *Olano* referred, inter alia, to *Turner v. Louisiana* 379 U.S. 466 (1965) and *Parker v. Gladden* 385 U.S. 363 (1967), to illustrate the principle that some forms of governmental intrusion into a jury's deliberations are inherently and presumptively prejudicial.

(*United States v. Harber* 53 F.3d at 240.)

The mandated reversal in *Parker v. Gladden* controls the directly analogous facts in the instant case.

> In *Parker v. Gladden,* a bailiff who was in charge of a sequestered jury, stated to a juror, in the presence of other members of the panel: "Oh that wicked fellow [petitioner], he is guilty." 385 U.S. at 363, 87 S.Ct. at 470. The bailiff also told another juror that the Supreme Court would correct any error in the trial proceedings if the accused were to be found guilty. *Id.* at 364, 87 S.Ct. at 470.

(*United States v. Harber* 53 F.3d at 240.)

The persuasive, unlawful and biased conduct of the bailiff in influencing the jury similarly manifests an inherent lack of due process. (*Parker v. Gladden, supra,* 385 U.S. at 365.) Further, this juror misconduct compels reversal even if only one juror was impermissibly influenced. (See *People v. Holloway* (Cal. 1990) 269 Cal.Rptr. 530, 538 [parenthetical citations omitted] (en banc) [reversing judgment on the basis of misconduct] ["It is settled that a conviction cannot stand if even a single juror has been improperly influenced."]; see also *Sassounian v. Rowe* (9th Cir. 2000) 230 F.3d 1097 [citing *Jeffries v. Wood* (9th Cir. 1997) 114 F.3d 1484, 1490 (en banc) cert. den. (1997) 522 U.S. 1007] ["Reversing special circumstance

conviction on habeas where extrinsic evidence received: 'even a single juror's improperly influenced vote deprives the defendant of an unprejudiced, unanimous verdict.'"]; see *id.* at p. 1110, and case citations therein.)

Accordingly, respondent's contentions are supported by neither the facts nor the law. Petitioner was entitled to an impartial jury; due process of law; a fair trial; his right to confront witnesses against him; and a fair and reliable capital proceeding. None of these constitutional safeguards were present in petitioner's case. This extreme and outrageous juror misconduct was highly prejudicial in both the guilt and penalty phases. The relief requested should be granted.

3. Prejudicial Mistreatment of Petitioner at Crucial State in the Proceedings

Respondent contends that petitioner was not subjected to physical and psychological abuse as a pretrial detainee. Alternatively, respondent argues that if such mistreatment occurred, it did not prejudice petitioner. Respondent's contentions find no support in the governing law of the United States Supreme Court or the unique and shocking facts of mistreatment in this case. The constitutional errors and prejudice flowing directly therefrom are set forth below.

Respondent presents no evidence to refute the facts that petitioner was subjected to a multitude of unlawful disciplinary diet punishments during his pretrial detention. (Pet., at pp. 125-127.) These punitive, non-sanctioned deprivations not only had no rational connection to any lawful pretrial detainee objectives, but also were exacted in direct, continuing and uncontroverted contravention of the prison's own regulations and requirements. (Pet., at pp. 127-

128.) The trial court itself expressly refused to intervene in this unlawful and willful punitive conduct. (Pet., at pp. 128-129.)

These and other willful degradations, provocations and deprivations of petitioner occurred during crucial proceedings in his case; e.g., when the court refused to determine petitioner's competency to stand trial yet specifically ruled that petitioner was incompetent to represent himself. The dates of the punishments imposed and court rulings, as a matter of record, underscore and illustrate the prejudice.

Petitioner was subjected to willfully harsh and unsanctioned mistreatment for an extensive period of time. The disciplinary diets alone were ordered on thirteen separate and distinct occasions, beginning November 4, 1987 through May 30, 1989. (Pet., at pp. 125-126.)

The court's decision to hold petitioner incompetent to represent himself, as well as its refusal to conduct a competency hearing regarding petitioner's ability to stand trial, occurred on and around November 17, 1988. (RT 63-86.) On November 17, petitioner requested that the court hold a competency hearing, pursuant to Penal Code section 1368, and argued that such competency hearing was required before proceedings could continue. The court forbid such hearing. Petitioner, who was in a severely troubled and confused mental state, due in part to the punitive and unsanctioned hostile actions of the prison staff, was unsuccessful in arguing to the court that competency hearings were required. This is evidenced in the following colloquy:

THE DEFENDANT: It's still 1368 proceedings, Your Honor.

I'm going to request to reinvoke my right to 170.6 on that grounds I believe is separate and independent.

THE COURT: Your motion for peremptory challenge under 170.6 is denied.

THE DEFENDANT: Your Honor, I'm going to state that I believe once the Court inquires about my mental capacity that all proceedings at that time are supposed to cease to my knowledge, Your Honor, and I shouldn't be before the Court.

THE COURT: Your knowledge is incorrect.

THE DEFENDANT: That's within the new –

THE COURT: No, your knowledge is incorrect.

THE DEFENDANT: Excuse me. I brought – I brought case precedents, recent case precedents before me right now. I'm reading from it, People versus Mayes, M-a-y-e-s. The accused may present own witnesses in competency proceedings, Your Honor.

THE COURT: This is not a competency proceeding, Mr. Welch.

THE DEFENDANT: I'm going to request that I be entitled to retain my own personal experts to observe me, Your Honor.

THE COURT: Go ahead and hire them.

THE DEFENDANT: Huh?

Before the proceedings that scheduled for Monday – I believe that's what, five days away.

THE COURT: The matter's on Monday for me to decide whether or not you should represent yourself.

THE DEFENDANT: I'm going to request that that hearing be delayed, Your Honor, and ask for a three-week continuance on that motion, Your Honor. It's in order that I can retain my own examine – psychiatrists to examine me, Your Honor. I'm entitled –

THE COURT: I hired Dr. Satten at the Court's expense to examine you.

Your motion for continuance on the Faretta will be denied.

I'm going to decide it Monday morning.

THE DEFENDANT: Not to the Faretta, Your Honor. My request that – is that I be able to retain my own psychiatrists, experts to examine me and not accept the exerts of the Court.

THE COURT: Your motion to have your own experts is denied. (RT 68-69).

Petitioner continued:

> THE DEFENDANT: I'm going to state for the record, Your Honor, that I'm requesting a full-blown trial, bull-blown trial on the issue I'm competent to stand trial, competent to waive my right to assistance of counsel.
>
> I don't think the Court can be fair and make that determination. I believe the Court has now turned into – is sitting adversely to the defendant's claims at this time, Your Honor. I think I be more entitled to a full-blown jury trial to determine the issue of my competency.

(RT 70.)

Petitioner's distraught and confused conduct in the court during these fundamental decisions, which impacted his entire case, are further manifest in the continuing dialogue:

> THE DEFENDANT: What's the ruling on my right to have a jury trial?
>
> THE COURT: On what?
>
> THE DEFENDANT: To determine my –
>
> THE COURT: On Faretta?
>
> THE DEFENDANT: – competency? My competency.
>
> THE COURT: Your motion for jury trial on Faretta is denied.
>
> THE DEFENDANT: Well, I'm requesting, Your Honor, that the Court particularly is explaining – which basis does it – did it choose to offer and invoke these types of competency examinations, Your Honor?
>
> Is it some – some – It hasn't been no outbursts. It hasn't been no bizarre behavior.

(RT 72.)

The unlawful disciplinary diets were not the only type of ongoing harassment, invasion of constitutional rights and injury inflicted on petitioner during his pretrial detention. Rather, these punishments included, but were not limited to: direct interference with the attorney-client relationship; and restriction on family visits. As petitioner stated in court before Judge Golde, such prohibitions

drove petitioner to a mental state which contributed to his inability to assist and aid in his defense and competently be present throughout the proceedings. (See RT Misc. Vol. II at pp. 4-7 and 7 ["I'm at a total mental breakdown at this point in time in these proceedings"].)

Thus, the mistreatment of petitioner prejudicially impacted his ability to competently proceed before and during his guilt and penalty phase, as well as prejudicially impacted his continuing efforts to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806.

Petitioner filed a motion, which was underscored by his attorney, regarding the harassment and severe mistreatment in jail, including imposition of disciplinary diets, in November, 1988. That motion was pending on the date that the court considered the *Faretta* motion. (RT 60; 73-74.) On November 21, 1988 the court ruled that petitioner could not represent himself because he did "not have the capacity to waive." The court ruled that the petitioner was "not mentally competent to waive counsel and represent himself." (RT 75, 86). Much of the court's rationale was predicated upon petitioner's conduct and decision-making, during the time that petitioner was subjected to the barrage of unlawful disciplinary diets and harassment in jail. The court held:

> THE COURT: I find Mr. Welch is a defendant who does not appreciate the extent of his own disability and, therefore, cannot be fully aware of the risk of self-representation. I find the disability of Mr. Welch significantly impairs the capacity to function in a courtroom.

(RT 74-85.)

Petitioner's attorneys were well aware of petitioner's lack of competence to stand trial, as well as the exacerbating impact of the mistreatment in prison on petitioner's mental state. Attorney Thomas Broome declared that petitioner suffered serious, grievous and prejudicial injuries as a result of beatings while in pretrial detention in this case:

> Mr. Welch was continually harassed by the deputies in the jail. I remember that during the first or second appearance I made in the case, at the arraignment in Municipal Court, Mr. Welch had a problem with a deputy. The arraignment was in the old court building on 600 Washington, and we were in one of the courtrooms on the second or third floor. In those days the courtrooms were on the side of the building facing 7th Street, and the police department occupied the other side of the building. The holding cells were behind the courtrooms and could be accessed from both the police side or the courtroom side. Mr. Welch was brought into court in shackles, and I insisted that he be unshackled for the hearing. When this motion was denied, Mr. Welch began speaking out and he and the deputy got into a shouting match. After the arraignment, the deputy took Mr. Welch into one of the holding cells and really worked him over. He used a black sap and punched him in the stomach with it several times, then he started hitting him in the head. The deputy had a lot of experience doing this, and the sap left no marks. He took great pleasure in beating Mr. Welch. I cannot remember the name of the deputy in question, but recall that he was a Caucasian deputy. I didn't find out about the beating until the next day, and because we did not come back into court again for several weeks I did not raise the issue in open court. After that beating, Mr. Welch complained of severe headaches. He said he had occasional headaches before that, but from then on they were nearly constant. He also said he had trouble sleeping after the beating, and his memory problems were also worse. Mr.

> Welch also had many complaints about his treatment in the jail itself. During almost every meeting we had with him, he told us about many ailments he was having, or injuries he had suffered at the hands of the guards. I specifically recall him telling me about stomach problems he had in the jail.

(Exhibit 6, Declaration of Thomas Broome at pp. 2-3.)

Petitioner's attorney in the guilt and penalty phases of this proceeding believed that the mistreatment in prison severely compounded petitioner's ability to behave rationally and to aid and assist in his defense.

> In my opinion, Mr. Welch's mental problems were exacerbated by several circumstances which arose prior to and during trial. Mr. Welch was treated very harshly in the jail. After his arrest, he was placed in administrative segregation in the jail, ostensibly for his own protection. He was also placed on a disciplinary diet that consisted of a brick or loaf of mixed food. The mistreatment he was receiving in the jail continued throughout the trial, and it was clear that Mr. Welch's mistreatment was on his mind constantly. Mr. Welch was not competent from the beginning, and I believe Mr. Welch needed psychiatric treatment.

(Exhibit 30, Declaration of Spencer Strellis at p. 3).

The constitutional prohibition of punishment to pretrial detainees has been underscored by the United States Supreme Court. In *Bell v. Wolfish* (1979) 441 U.S. 520, the Court held that the due process clause protects a pretrial detainee from punishment.

> . . . Under the Due Process Clause a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. See *Ingraham v. Wright* 430 U.S. 651, 571-572,

> n. 40, 674 (1977); *Kennedy v. Mendoza-Martinez* 372 U.S. 144, 165-167, 186 (1963); *Wong Wing v. United States* 163 U.S. 228, 237 (1896). A person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had only a "judicial determination of probable cause as to a prerequisite to the extended restraint of his liberty following arrest." *Gerstein v. Pugh, supra,* at 114; see *Virginia v. Paul* 148 U.S. 107, 119 (1893).

(*Bell v. Wolfish* 441 U.S. at pp. 535-536.)

The *Bell* court reiterated the general parameters within which determination of punitive conduct is to be made:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry . . ."

(*Bell* at 535-538 quoting *Mendoza-Martinez* 372 U.S. at pp. 168-169.)

The *Bell* court concluded that if a restrictional condition is not reasonably related to a legitimate goal, the purpose is punishment and it therefore may not constitutionally be inflicted upon detainees. "Courts must be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact, rather than a court's idea of how best to operate a detention facility." (*Id.* at 539, citations omitted.) The historic recognition of a detainee's

particular due process rights has been reaffirmed in the subsequent opinions of the United States Supreme Court. (See, e.g., *Sandin v. Conner* (1995) 515 U.S. 472, 484, quoting *Bell* 441 U.S. at 535 [pretrial detainee's interests different from those of convicted prisoners; a detainee "may not be punished prior to an adjudication of guilt in accordance with due process of law"].)[9]

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[9]Federal courts have found a clear due process violation where living conditions, far less punitive than those experienced by petitioner in this case, existed. *Thompson v. City of Los Angeles* (9th Cir. 1989) 885 F.2d 1439, 1448 (county jail's failure to provide pretrial detainee with suitable sleeping accommodations violated due process.) Relying upon the longstanding and well settled principles enunciated by Blackstone, the Eighth Circuit stated that pretrial detainees "are unconvicted of any crime. . . . Over two hundred years ago, Blackstone said of this "dubious interval" between commitment and trial:

> "Upon the whole, if the offense be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the mittimus of the justice . . .; there to abide till delivered by due course of law. . . [**17] But this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and the trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only..."

(*Campbell v. McGruder* (1978) 580 F.2d 521, 527 quoting 4 W. Blackstone, *Commentaries* at 300; see *The Jailed Pro Se Defendant and the Right to Prepare a Defense* 86 L.J. (1976) 292, 307) [deleterious impact of pretrial punitive detainment]; see also *Campbell v. McGruder* at 532 [conditions of confinement that impede a defendant's preparation of his defense or impact his mental alertness at trial are constitutionally suspect and can be justified only by the most compelling necessity]; and see *Dillard v. Pitches* 399 F.Supp. 1225 (C.D. CA 1975) [punitive

The punitive mistreatment of petitioner is unequivocal. He was put on thirteen separate and distinct disciplinary diets, all of which expressly violated both the letter and policy of prison regulations. (Pet., at pp. 125-126.) He was beaten by deputies and prison guards, and such beatings commenced early on in the pretrial process. (Exhibit 6, Declaration of Thomas Broome at pp. 2-3; see also Exhibit 7, Declaration of Robert Cross at pp. 2-3 ["Mr. Welch's ability to concentrate on the legal questions we were attempting to discuss with him also clearly deteriorated over time. Both Mr. Broome and I tend to believe that part of the reason for this was that the staff in the jail were intentionally agitating and harassing him"].)

As set forth above, this continuing and purposeful physical abuse had a direct material, egregious impact on petitioner's ability to aid in his defense and even function throughout his entire pretrial, guilt and penalty phase proceedings. Such prejudicial mistreatment was wholly violative of petitioner's rights to due process, equal protection and to be free from cruel and unusual punishment.

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condition of pretrial detainee violated constitutional guarantee of equal protection, due process, and prohibition on cruel and unusual punishment]; *Rutherford v. Pitches* 475 F.Supp. 104, 108) (C.D. Cal. 1978) citing *Brenneman v. Madigan* 343 F.Supp. 128, 138 (N.D. Cal. 1972) [pretrial prisoners are not incarcerated "to receive punishment for their misdeeds, for their guilt has not been established. They are there because it has been deemed necessary to incarcerate them to ensure their presence at trial. Thus they are entitled to the least restrictive alternatives consistent with the purpose for their incarceration."]; *accord Jones v. City and County of San Francisco* 975 F.Supp. 896, 906 (N.D. Cal. 1997) ["Pretrial detainees enjoy the greater protections afforded by the Due Process Clause of the Fourteenth Amendment; which ensures that no state shall 'deprive any person of life, liberty or property, without due process of law'"].)

Respondent's reliance upon this Court's previous decisions is equally unavailing. These decisions actually undermine respondent's argument. In *People v. Smith* (1985) 38 Cal.3d 945, the defendant alleged that he was improperly denied a continuance on the ground that he had not been permitted eight full hours of sleep. This Court rejected the defendant's contention, relying upon a detailed review of the record in that case. The Court found "factually, the record reflects that defendant was attentive, lucid and articulate throughout the trial." (*Id.* at pp. 953-954.) The Court further found that no evidence in that case suggested that jail officials were deliberately harassing the defendant. This Court then held as follows:

> It is clear that defendant was awake, capable of participating in the proceedings and that he did so. Accordingly, the trial judge did not err in denying defendant's motion for continuance.

(*Id.* at 956.)

In this case, the opposite was true. In fact, petitioner's trial judge made specific findings, throughout the proceeding, that the petitioner was not mentally alert, functional or capable of participating in the proceedings. (See, e.g., RT 2269, italics added ["*The Court feels you're totally incompetent to represent yourself*"].)

The court made similar, specific findings in its *Faretta* ruling:

> On November 18th, when he first appeared in front of me, he asked for a continuance because he's unable to proceed with Faretta or any other motion based upon stress.
>
> October 14th, transcript page 12, he hearing before Judge Ballachey, he said, and I'm quoting: I'm looking at you, Your Honor. I feel uncomfortable with you, Your Honor. I haven't been able to talk to my psychologist. I feel intimidated every

time I come into the courtroom.

October 4th, transcript, seven: I'm at a total mental breakdown. That's a quote.

October 4th, transcript, 18, he accused Judge Ballachey of causing the defendant mental stress. Quote: And Your Honor has really caused me psychological, mental strain and stuff.

Again, the defendant in terms of filing a motion seems to have some difficulty determining the issues. I indicated I wanted Judge – a judge – Dr. Joseph Satten – and that's S-a-t-t-i-n (sic) – that's Joseph – actually the police have S-a-t-t-e-n. It's I-n. In any event, Dr. Joseph Satten. And when I told Mr. Welch I was appointing him on the question of whether or not he had the mental capacity to waive his constitutional rights, Mr. Welch seemed to indicate that – referring to either a 1026, present insanity, or 1368 – 1026, insanity at the time, or 1368, unable to proceed at this point.

. . .

I find Mr. Welch is a defendant who does not appreciate the extent of his own disability and, therefore, cannot be fully aware of the risk of self-representation. I find the disability of Mr. Welch significantly impairs the capacity to function in a courtroom.

(RT 79-80, 84-85; see also RT 3233, 3761, 3783.)

In *People v. Jenkins* (2000) 22 Cal.4th 900, also cited by respondent, this Court rejected a claim that a defendant was denied his right to assist in his own defense. This Court specifically noted that certain conditions of confinement of pretrial detainees:

may so impair the defendant's ability to communicate with

> counsel or otherwise participate in the defense that a due process violation or an infringement of their right to effective assistance of counsel results. (See *Johnson-El v. Schoemel* 8th Cir. 1989) 878 F.2d 1043, 1051 [observing that pretrial detainees have a substantial due process interest in effective communication with counsel and that if this interest is respected inadequately, the fairness of trial may be compromised]; *Campbell v. McGruder* (D.C. Cir. 1978) 580 F.2d 521, 531-532 [188 App.D.C. 258][stating that conditions of confinement, apart from the fact of confinement itself, that impede a defendant's ability to prepare a defense or damage the defendant's mental alertness at trial are "constitutionally suspect" and must be justified by compelling necessity]; *Jones v. City and County of San Francisco* (N.D.Cal. 1997) 976 F.Supp. 896, 913 [lack of privacy for pretrial detainee's consultation with counsel may implicate Fourteenth and Sixth Amendments if attorney's ability adequately to prepare a defense is impaired]; *Dillard v. Pitches* (C.D.Cal. 1975) 399 F.Supp. 1225, 1236 [sleep deprivation due to transportation schedule between jail and courthouse may violate due process of law by affecting defendant's ability to assist counsel].)

(*People v. Jenkins* 22 Cal.4th at p. 1002.)

An analysis of the facts of that case persuaded this Court that the defendant's confinement and treatment had no prejudicial effect on his ability to assist in his defense or on counsel's ability to defend him. This Court's reasoning in *Jenkins* is crucial and manifests why petitioner in the instant case was prejudicially deprived of his constitutional rights. This *Jenkins* decision noted the significance of defendant's being "well prepared and in a good position to defend himself . . ."

> The court commented that the attorney client relationship had been working well and that defendant and counsel conferred regularly. The

> trial court intervened with jail authorities to ensure that defendant would have access to his legal materials, and also contacted jail authorities to arrange, to the extent possible, that discipline for defendant's jail infractions would not interfere with defendant's ability to participate in the proceedings by leaving him too hungry or tired.

(*Id.* at p. 1004.)

Significantly, *Jenkins* expressly relied upon the fact that "defendant's statements to the court regarding conditions of confinement were coherent and even incisive, demonstrating no sign of mental confusion." (*Id.* at p. 1005.)

None of these factors are present in this case. Here, the trial court specifically refused to intervene in the unlawful imposition of disciplinary diets. (RT 74.) Petitioner was agitated, mentally unsound and prejudicially confused throughout the proceedings. (Misc. Vol. II at 4; RT 65-66, 101, 206, 3711, 3726, 3733, 3803, 4581-4582, 4963.) There was a total breakdown of any attorney client relationship. Accordingly, respondent's reliance upon this Court's decisions is misguided.

For the foregoing reasons, and those set forth in the petition, petitioner was denied his constitutional rights before and during trial. This denial was evidenced in each single event and the cumulative impact of each and every incident of mistreatment and harassment experienced by petitioner while incarcerated. This individual and cumulative error compels granting of the writ on this claim. Further, as set forth *supra,* adjudication of this claim is not procedurally barred, and indeed, compels a granting of relief, on the merits, in view of the fundamental and grave nature of the unconstitutional conduct.

4. Unconstitutional Excusing of Qualified Jurors

Relying upon this Court's decision in the direct appeal, respondent contends that the trial court lawfully excused jurors for cause who automatically would not have unequivocally voted to impose life without parole as the appropriate punishment in this case. (IR, at pp. 124-125.) Respondent cites this Court's stated guidepost for assessing the constitutionality of excusing such jurors and concludes:

> Where a prospective juror's responses are equivocal or conflicting, the trial court's assessment of the juror's state of mind is generally binding. Where there is no inconsistency, but simply a question whether the juror's responses demonstrated a bias for or against the death penalty, the trial court's judgment will not be set aside if it is supported by substantial evidence.

(IR, at p. 124.)

Respondent's contentions and this Court's analysis are erroneous as a matter of federal constitutional law. The standard enunciated by this Court in *People v. Wash* (1993) 6 Cal.4th 215, 254 and relied upon by this Court in petitioner's direct appeal, is constitutionally infirm under the governing United States Supreme Court precedent. As discussed below, this precedent was firmly established long before petitioner's trial, judgment of guilt and sentence of death. (*Gray v. Mississippi* (1987) 481 U.S. 648, 664-666, 668; *Davis v. Georgia* (1976) 429 U.S. 122, 123; see *People v. Heard* (August 28, 2003, S035769) __ Cal.4th __ 2003 D.A.R. 9773.)

A decade before the jury selection of petitioner's case, the United States Supreme Court held:

> Unless a venireman is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and

> circumstances that might emerge in the course of the proceedings," he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.

(*Davis v. Georgia* 429 U.S. at 122, quoting *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522, n. 21.)

This standard was reaffirmed and clarified in *Gray v. Mississippi, supra,* 481 U.S. 648:

> [T]his Court in *Davis* surely established a per se rule requiring the vacation of a death sentence imposed by a jury from which a potential juror, who has conscientious scruples against the death penalty but who nevertheless under *Witherspoon* is eligible to serve, has been erroneously excused for cause.

(*Id.* at p. 659.)

This standard of per se reversal is applicable not only where there was erroneous exclusion of several jurors, but also "where a death penalty was imposed after the improper exclusion of one member of the venire." (*Davis v. Georgia, supra,* 429 U.S. at p. 122.)

Under this governing authority of the United States Supreme Court, it is clear that petitioner's sentence of death cannot stand. The court excused seventy-five jurors during voir dire because of their pro-life responses. (See Pet. at p. 504.) Of these, there were at least four jurors who, although they may have had "conscientious scruples against the death penalty", were "nevertheless under *Witherspoon* eligible to serve." (*Gray v. Mississippi* 481 U.S. at pp. 659-660.)

The trial court's findings on these jurors' eligibility cannot be given

deference when such action flies in the face of federal constitutional law. (*Gray, supra; Davis, supra; Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137; U.S. Const., art. IV.) The lawful eligibility, and the unconstitutional exclusion of these jurors by a biased court (see Pet. claims 2-4, pp. 59-121; claims 34-54, pp. 379-533) is a matter of record. Just one example of this is found in the voir dire of prospective juror Patty Acuna:

A. I don't think I'm against the death penalty in all cases.

Q. You do not think you're against –

A. I do not think I'm against it across the board in all cases.

Q. In a case involving six murders, do you think you could ever vote to impose death? I'm not asking how you would vote.

A. *Yes, I think I could.*

Q. *You think you could?*

A. *Right.*

(Pet., at pp. 504-505; RT 2121-2122, italics added.)

One prospective juror was excused only because he had reservations about the death penalty (RT 3552); the court excused prospective juror Grady on the basis of her response to whether she could put someone to death, although she was clearly qualified to serve (RT 2027); prospective juror Gilens also was unconstitutionally excused, although he too was fully qualified as a matter of constitutional law (RT 3526). Petitioner's counsel and petitioner made numerous objections to the court's excusing of individual jurors for cause who were merely equivocal in their responses. In fact, there was a continuing defense objection to its glaringly biased and unconstitutional excusing of jurors who had even mild

concerns regarding potential imposition of the punishment of death. (See RT 1443-1444 [prospective juror Renee Weber merely uncertain of whether death penalty would be appropriate in this case]; RT 1837 [prospective juror Laura Zuckerman has concerns about imposition of death, just not "one hundred per cent sure" she could not impose death penalty]; RT 3548-3549 [prospective juror Paul Podvin states he simply does not know if he could impose capital punishment].)

Neither these jurors nor those whose voir dire is set forth in more detail in the petition are "automatic" in any sense. Each had some concern about the imposition of the death penalty, but their voir dire does not manifest that they would "invariably vote . . . against the death penalty." (*People v. Heard* __ Cal.4th __ 2003 D.A.R. 9773. at 9776, quoting *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.)

Should this Court determine that some of these jurors were properly excused, per se reversal of the death sentence is mandated, even when only one juror is unconstitutionally excused for cause. (*Gray v. Mississippi, supra,* 481 U.S. at 659-660.) The record manifests that, at a minimum, several of the prospective jurors were clearly qualified, but were unlawfully removed by court in its assurance of a jury significantly pre-disposed to vote for petitioner's death as the appropriate punishment. For the foregoing reasons and those set forth in the petition, the sentence of death must be reversed

5. Prosecutorial Misconduct

a. Introduction

Respondent contends that prosecutorial misconduct claims in the guilt and penalty phases of petitioner's trial are either procedurally barred or fail to state a

prima facie basis for relief on the merits. These contentions are erroneous. For the reasons set forth in Part II-A *supra,* these claims are properly before this Court on the merits. Petitioner's appellate counsel was wholly ineffective as a matter of law, for failing to raise claims not presented on direct appeal and for failing to fully present those prosecutorial misconduct claims previously raised. Moreover, many of the claims set forth in the petition, regarding prosecutorial misconduct, concern unique situations necessitating factual development appropriate to habeas. Each and every instance of prosecutorial misconduct stands alone as requiring relief. Each, additionally, is a component of broad scale pattern and practice of misconduct and related constitutional errors. (See, e.g. Pet., claim 1.) These constitute individual and cumulative error pursuant to the cases set forth in the petition, including, but not limited to *Caldwell v. Mississippi* (1985) 472 U.S. 320; *Napue v. Illinois* (1959) 360 U.S. 264; and *Brady v. Maryland* (1963) 373 U.S. 83.

Petitioner stands on the claims of prosecutorial misconduct set forth in his petition, as sufficient reply to respondent's contentions. Petitioner further underscores the existence of genuine issue material facts throughout these claims, particularly in view of respondent's denials to matters of fact on the record. Specific issues raised by respondent, however, necessitate the following response.

b. Discussion

i. Prejudicial Violation of Court Order

It cannot be reasonably controverted that the prosecutor willfully and knowingly violated the court order imposed by Judge Golde on any and all comments to the media. (RT 36-37; Pet., at pp. 188-189.) The plethora of

proscribed press interviews provided widespread information on issues of critical importance to petitioner's penalty phase.

Petitioner had questioned the impartiality of the jury. (RT 188-190.) Prior to the penalty phase deliberations, the prosecutor stated to the *Oakland Tribune* that petitioner's concern about an impartial and unbiased jury were "a figment of his imagination." "This is a man who's just been convicted of six firsts and a special circumstance, and so what's he got to lose by making wild claims." (Exhibit 19, newspaper articles re Gag Order; Pet., at p. 189.) This pronouncement, however, did not square with the prejudicial and relentless juror misconduct in this case. (See Pet., at pp. 132-141.)

Respondent finds no fault in this outrageous conduct. However, the grounds for respondent's position are flawed. First, respondent contends that, because the court responded that it would "handle the prosecutor", and because there were no further quotes in the press, that "the situation was handled." (IR at p. 95.) The situation was not handled. In fact, nothing was done to sanction the prosecutor or to investigate petitioner's claims that there was some type of jury tampering.

When the prosecution violated this court order, willfully and repeatedly, speaking of petitioner's case to numerous media, he was in violation of California Penal Code section 166. This provides, in pertinent part:

> [E]very person guilty of any contempt of court, of any of the following kinds, is guilty of a misdemeanor: . . . (4) Willful disobedience of the terms as written of any

> process or court order or out of state order, lawfully issued by any court, including orders pending trial.

For almost a century, this Court has recognized that the prosecutor's conduct, such as that which occurred in this case, fits squarely within the parameters of the discipline and sanctions envisioned by the relevant penal codes. (See *Selowsky v. Superior Court* (1919) 180 C. 404.) However, nothing was done to sanction the prosecutor's conduct. Accordingly, the "situation" was not "handled."

Respondent next asserts that there was no prejudice because the jury ostensibly did not look at newspapers after the guilt phase and during the penalty phase of the trial. Specifically, respondent argues:

> Given the jury had been instructed from the outset of the trial, to avoid news accounts of the trial, and was still under that obligation between the guilt and penalty phases, there is no likelihood of any of this innocuous information reaching the jury.

(IR, at p. 95.)

The jurors' declarations dramatically refute respondent's hypothesis. (See Exhibit 35, Declaration of Bernard Wells at pp. 2-5 [information gleaned from newspaper articles discussed and relied upon by jurors in imposing penalty]; Exhibit 8, Declaration of Joe Cruz at pp. 1-2 [newspaper articles discussed during case].)

ii. Unconstitutional Comments on Petitioner During Trial

Respondent appears to contend that the prosecutor's outrageous and

provocative name-calling of petitioner, including that which was done in expressly urging jury to sentence petitioner to death, was vitiated by the petitioner's conduct. This is an unconstitutional equation. When representing the State in a criminal case, the prosecutor has a high ethical duty and legal obligation. His duty is not to obtain a conviction and a sentence however possible, but rather to seek justice. In executing his duty, he may not utilize methods or make statements in violation of the United States Constitution. (*Berger v. United States* (1935) 295 U.S. 78, 88, overruled on other grounds by *Stirone v. U.S* (1960) 361 U.S. 212.) It is constitutionally impermissible to equate the conduct expected of this representative of the State, with that of a criminal defendant whom even the trial judge had held to be mentally incompetent to represent himself. (RT 75-86.)

> . . . Justice George Sutherland correctly said in *Berger* that the prosecution is not the representative of an ordinary party to a lawsuit, but of a sovereign with a responsibility not just to win, but to see that justice be done. 295 U.S. at 88, 55 S.Ct. 629. Hard blows, yes, foul blows no. The wise observation of Justice Louis Brandeis bears repeating in this context:
>
> > "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . if the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself." *Olmstead v.*

> *United States*, 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed. 944 (1928).

(*Commonwealth of the Northern Mariana Islands v. Bowie* (9th Cir. 2001) 243 F.3d 1109, 1124.)

As a representative of the State in a capital proceeding, the duty of the prosecutor in petitioner's case was even greater. As the United States Supreme Court held in overturning a death sentence for prosecutorial misconduct:

> [T]he State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.

(*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

This is the commensurate with the Eighth Amendment's greater "need for reliability." (*Id.* at 340, citing *Woodson v. North Carolina* 428 (1976) U.S. 280, 305 [plurality opinion].)

In petitioner's case, the prosecutor did not restrict his outrageous name-calling and provocation to a private forum. (Pet., at pp. 168-170.) Rather, he specifically degraded petitioner *throughout his penalty phase arguments*. (See, e.g., RT 6112 [petitioner "has led a life replete with violence not related to any mental defect or disease, for truly he is a sociopath, a miserable thug who hates people, pure and simple"]; RT 6123 [petitioner "would have to have an IQ of two and be a zombie to excuse his

acts by a mental defense"]; RT 6142 ["You should show no mercy to this miserable, miserable violent thug sociopath"]; RT 6143 [petitioner is "bloodthirsty assassin of the weak and innocent"].)

This outrageous conduct by the prosecutor, particularly in the penalty phase of a capital case, was significantly more egregious than portrayed by respondent. (See IR, at p. 91 ["The prosecutor's response is more colorful than necessary, but clear and on the record, and not made in front of the jury"].) The objectionable, unconstitutional comments by the prosecution primarily were made to the jury, and were utilized as arguing points to the jury to persuade them to sentence petitioner to death. The jury followed this advice. (RT 6227.) This misconduct was uniquely prejudicial, and supports petitioner's request for relief.

iii. Prosecution's Unconstitutional and Prejudicial Arguments to the Jury

Respondent contends that this Court was correct in its original holding that the prosecutor's repeated plea to the jury to execute petitioner on the basis of God's authority and religious morale duty, was not prejudicial error. The governing law and the unique facts of this case compel a different conclusion.

The multitude of errors, in the prosecutor's arguments, were extreme and perhaps even unparalleled. In his penalty phase argument, the prosecutor went so far as to make emotional reference to meeting the victims in an afterlife:

> When he confronts them [the children] again they are going to be whole. When they see Moochie again they will be whole. There will be no disfiguring again and they will look at him and before the final witnesses they will say but two words, two words. Why, Moochie? That is what they will say.
>
> And Ladies and Gentlemen, if ever a case called for the imposition of a death penalty, this is it. You should show no mercy to this miserable, miserable violent thug sociopath.

(RT 6141-6142.)

Additionally, in direct appeal, this Court did not consider this error in the context of the prosecutor's biased jury selection. The prosecutor specifically and repeatedly searched for individual jurors, to sit on petitioner's panel, who were religious or who had deep spiritual beliefs. The prosecutor continuously queried jurors who did not immediately come forth with their religious persuasions. (RT 1092; 1523; 2683; 2784.) The prejudice from this carefully picked jury is manifest. (*Sandoval v. Calderon* (9th Cir. 2000) 241 F.3d 765; *Lemon v. Kurtzman* (1971) 403 U.S. 602.)

These errors were compounded by the prosecutor's explanation to the jury that their duty was to "advise the court as to the appropriate penalty." This purposefully misleading argument was immediately followed by the prosecutor's urging the jury, again, to adhere to religious principles. "And as I indicated, there is a religious sanctioning for the death penalty and it goes all the way back to the Old Testament." (RT 6140.) The constitutional errors

are manifest. Indeed, the United States Supreme Court has not deviated from its holding in *Viereck v. United States* (1943) 318 U.S. 236, 247, that the prosecutor's suggesting that others were relying on jurors for protection compromised a defendant's right to a fair trial. Here, the same compromise not only occurred, but also was magnified by the prosecutor's repeated, unconstitutional grounds for persuading the jury to "advise" the court that execution would be the appropriate punishment.

c. Conclusion

The conduct of the prosecutor, as an officer of the State in petitioner's case, was shocking. The multitude of constitutional errors in arguments to the jury were calculated to achieve an end; not to achieve justice, but to convict petitioner and sentence him to death. Moreover, these errors were interwoven with outrageous governmental misconduct, *Brady* and *Napue* error, in garnering and utilizing false and perjured testimony to reach the prosecutor's goal. (See Pet., claim 1.) These errors, individually as well as cumulatively, prejudicially denied petitioner's rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Nor can these errors be dismissed as de minimus. They were designed to and did prejudicially impact the determinations of guilt and punishment. Further, these errors cut to the core of the prosecutor's constitutional duty in our democratic Republic.

> The prosecuting attorney represents a sovereign whose obligation is to govern impartially and whose interest in a particular case is not necessarily to win, but to do justice. It is the sworn duty of the prosecutor to assure that the defendant has

a fair and impartial trial.

(*Commonwealth of the Northern Mariana Islands v. Bowie* 243 F.3d at 1124; see *United States v. Lapage* (9th Cir. 2000) 231 F.3d 488, 492 ["A prosecutor has a special duty commensurate with a prosecutor's unique power, to assure that defendants receive fair trials"].)

Accordingly, petitioner respectfully requests that this Court reconsider its original ruling in his direct appeal regarding this outrageous misconduct, properly assess the individual as well as cumulative impact of these errors set forth in State habeas and grant the relief requested.

6. Petitioner's Claims of Ineffective Assistance of Counsel are Neither Procedurally Barred Nor Substantively Inadequate

In his petition, petitioner raised a number of claims of ineffective assistance of counsel. (See Pet., claims 18 through 30, 68 and 69.) Predictably, respondent asserts that these claims are all defaulted and, in any event, without merit. Respondent is wrong.

Respondent first admits that petitioner's ineffective assistance of counsel claims are not subject to either the *Waltreus* or *Dixon* bars. (IR at p. 100.) Respondent is certainly correct in this regard. However, her concession at this point in her informal response conflicts with the position she took earlier in her general procedural discussion, in which she asserted that virtually all of petitioner's ineffective assistance claims *were* subject to either the *Waltreus* or *Dixon* bars. (See IR, p. 40 [respondent asserts claims 23, 24, and 25 subject to *Waltreus* bar]; IR at p. 41 [respondent asserts that claims 18, 21, 22, 26, 27, 28, 29, and 30 subject to

Dixon bar].) It would save time if respondent would adopt consistent positions throughout her informal response.

Although she properly concedes the absence of a *Waltreus* or *Dixon* bar as to these claims, she nevertheless argues that these claims are all time-barred without justification or excuse. Petitioner has previously demonstrated in his petition, and again in this informal reply, that petitioner was abandoned by his state habeas counsel, George Boisseau, and supported his showing with the declarations of Daniel Abrahamson, Boisseau's CAP adviser, and Mr. Boisseau himself. (Petition at pp. 9-25; Exhibits 1 and 5.) Accordingly, petitioner will not repeat this material here. Although there has been no substantial delay, any delay would be excused for good cause due to Mr. Boisseau's abandonment of his client.

Respondent next appears to tacitly admit that trial counsel failed to conduct adequate social history and mental health investigations, but asserts that trial counsel's inadequacies were not prejudicial. She cites *In re Scott* (2003) 29 Cal.4th 783, 828 for the proposition that the post-conviction discovery that a defendant had a "difficult childhood and troubled family history" does not always compel reversal when a crime involves "particularly egregious circumstances" and the defendant has "a history of brutal sexual violence." (IR 101.) Clearly, *Scott* is inapposite here. In *Scott,* the referee found the evidence of the defendant's mental problems, troubled childhood, and family history not to be credible, so it is hardly surprising that counsel's failure to investigate this material was not prejudicial. (*In re Scott,*

supra, 29 Cal.4th at pp. 827-828.)[10]

By contrast to the situation in *Scott*, counsel's failure to conduct adequate social history and mental health investigation was overwhelmingly prejudicial. Contrary to respondent's assertion (IR, at p. 101), trial counsel did not present the jury with petitioner's social history. A minimal amount of information about petitioner's background came in through the testimony of Dr. William Pierce and Dr. Samuel Benson, the two defense mental health experts, but this evidence was presented primarily to show what materials these two experts had reviewed in formulating their opinions of petitioner's mental health. No social history witnesses, such as petitioner's friends, family members, teachers, neighbors, or other individuals who had known petitioner and were sympathetic to his problem were

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[10]/ It should also be noted that *Scott* was decided six months before the United States Supreme Court's decision in *Wiggins v. Smith* (2003) ___ U.S. ___, 123 S.Ct. 2527, 156 L.Ed.2d 471, in which the high court held that the failure of trial counsel to investigate and present evidence of the defendant's troubled history and disadvantaged background at the penalty phase is prejudicial, without regard to the egregious nature of the homicides, if it "might well have influenced the jury's appraisal" of the defendant's moral culpability." (*Id.*, 123 S.Ct., at pp. 2543-2544.) Counsel has a duty not merely to conduct some investigation, but must conduct a *complete* social history investigation and cannot stop investigating if a reasonably competent attorney would have been led by the evidence to investigate further. If counsel fails to investigate social history evidence completely, they cannot shield themselves from allegations of ineffective assistance of counsel behind the assertion of strategic choice. (*Id.*, 123 S.Ct., at pp. 2541-2542.) Respondent's contention that counsel have no obligation to investigate mental defenses in a capital case (IR 102) is also largely answered by *Wiggins*. Counsel clearly do have such an obligation in capital cases if the evidence suggests that the client may be mentally ill. (*Id.*, 123 S.Ct., at p. 2542.)

called upon to testify. Petitioner submits that under *Wiggins v. Smith* (2003) __ U.S. __, 123 S. Ct. 2427, 156 L.Ed.2d 471, the failure to investigate and present any social history witnesses cannot be held harmless when so much was available that "might well have influenced the jury's appraisal" of petitioner's moral culpability.

With respect to petitioner's mental health, trial counsel were aware of the symptoms of petitioner's brain damage and his reputation within the criminal justice system for being mentally ill, yet failed to investigate and present this evidence. Respondent asserts that the two defense mental health experts who testified stated that petitioner knew what he was doing and knew right from wrong at the time of the crime, and further asserts that the evidence of petitioner's brain damage or its origin in childhood neurotoxin exposure and other sources would not have altered their conclusion. Petitioner disagrees. Such an investigation would have generated information which would have led to the conclusion that petitioner was not competent to stand trial at all. It is therefore absurd to argue that counsel's failure to investigate in this area was not prejudicial.

Moreover, at a minimum, this information would have greatly assisted the jury at the penalty phase and would have demonstrated that petitioner was not merely "antisocial," as respondent claims, but that his conduct and often difficult personality resulted directly from his brain damage and mental illness. The entire prosecution case turned on the state's contention that petitioner made knowing choices to kill. Competently performed social history and mental health investigations and presentations would have shown that petitioner's capacity for making meaningful choices was in reality severely diminished. He did not choose

to be exposed to neurotoxins in infancy, or to suffer from brain damage and mental illness, and this evidence alone would have convinced the jury to spare his life. Respondent's contentions that counsel's failure to investigate in these areas was harmless must be rejected.

Respondent's contention that counsel acted reasonably in not investigating Stacey Mabrey's criminal record or inducements to testify is also without merit. Respondent contends that Mr. Mabrey was merely "a victim" and "not a co-conspirator or jailhouse informant" and that efforts to "dirty him up" would have failed. In fact, the evidence suggests that Mr. Mabrey was a prosecution informant and that he received and continued to receive numerous benefits in exchange for his testimony. Moreover, such an investigation would have shown that Mr. Mabrey was lying on the stand throughout his guilt phase testimony and was not present at all. For example, competent counsel would have at least conducted a media search for articles on the case and would have discovered that even the *Oakland Tribune* knew only eight days after the killings that Stacey Mabrey was not present in the house when the killings took place. (Supplemental Exhibit B: *Oakland Tribune* Article.) Far from merely sullying Mr. Mabrey's reputation, this evidence would have decimated his credibility, as well as that of the prosecution's other witnesses.

Respondent contends that counsel were not prejudicially ineffective in failing to move for a competence examination or a private psychiatric examination. Respondent appears to argue that counsel should be forgiven for this failing because petitioner was "resistant to further psychiatric investigations and his performance in court would indicate that lack of competence was not a fruitful path of inquiry."

(IR, p. 104.) However, the record contradicts respondent's contention. Respondent ignores the fact that petitioner himself moved for Penal Code section 1368 proceedings, and the problem in conducting a psychiatric examination was not petitioner's own "resistance" but the fact that neither petitioner nor counsel wanted to conduct a psychiatric examination in a monitored room, the only facilities the sheriff would provide. Respondent also ignores that fact that the court itself found petitioner mentally incompetent to represent himself. (RT 86.) Respondent further ignores the fact that both the defense mental health experts concluded that petitioner was mentally ill. Furthermore, petitioner strongly disputes the proposition advanced by respondent that a defense attorney is absolved from investigating or acting upon a belief that the defendant may be mentally incompetent simply because a defendant "resists" such an investigation. Under *Wiggins v. Smith, supra,* a reasonably competent attorney would be led to suspect that such a defendant was far more likely to be mentally ill than one who was more cooperative. Accordingly, under the circumstances, and particularly under *Wiggins v. Smith, supra,* counsel was required to conduct a further investigation into petitioner's competence, move for a private psychiatric examination, and move for competence proceedings.

Respondent is also incorrect in asserting that counsel's failure to challenge the loss of blood evidence was harmless. The fact that there was testimony on the lack of a quantitative analysis of petitioner's blood, as respondent notes, in no way suggests that there was nothing to be gained by investigating the reasons for the absence, loss, or destruction of this evidence. Nor was counsel in "the best possible situation" because they had "the freedom to speculate" about the amount of alcohol

and drugs in petitioner's system, as respondent argues. (IR, p. 104.) In fact, the opposite is the case; the lack of a quantitative analysis operated in the prosecution's favor. All the available evidence shows that petitioner was so intoxicated at the time of the killings as to have been virtually unconscious, but the prosecution's failure to preserve evidence to prove that fact made it possible for the prosecutor to argue he was not intoxicated and was therefore fully responsible for his actions. Accordingly, counsel's inadequate performance in this regard was prejudicial.

Respondent next asserts both that counsel performed competently in not objecting to the trial court's hybrid representation arrangement, and that petitioner could not have been prejudiced by this arrangement. (IR, p. 104; *People v. Welch,* (1999) 20 Cal.4th 701,736, cert. den. (2000) 528 U.S. 1154.) Respondent argues that the arrangement permitted petitioner to blow off steam and gave him an "outlet" for his particular strengths as an advocate. (IR, p. 105.) These contentions are meritless. The court's hybrid arrangement, and failure to consistently apply it, resulted in utter chaos within the defense. Neither petitioner nor his counsel were sure from minute to minute who was in charge of the defense, or even who was permitted to speak. Without a clear and consistent indication from the court regarding who was in charge of the defense, the defense was left to squabble openly over such fundamental strategy questions as whether petitioner should testify or not (RT 4986) or whether he would testify in a narrative fashion. (RT 5002.) Petitioner even made several objections on relevancy grounds to questions asked by his own attorneys. (RT 5012, 5056.) Indeed, the arrangement was so chaotic that at one point, one attorney actually objected to a question asked by his co-counsel on

hearsay grounds. (RT 5031.) Respondent's contentions should be rejected.

Respondent has argued that petitioner's remaining claims of ineffective assistance of counsel in counsel's performance at trial have previously been dealt with by this court in its appellate decision. (IR, p. 106.) Respondent makes no attempt to address any specific claim, but instead merely argues that counsel's "strategic decisions were reasonable." (IR, p. 106.) Petitioner has addressed counsel's inadequacies in the petition and will not reiterate his claims here. However, petitioner notes that to the extent counsel's allegedly "strategic" decisions were made on the basis of inadequate investigation, counsel cannot shield their actions behind a claim that the decisions were strategic. (*Wiggins v. Smith, supra*, 123 S.Ct. at pp. 2541-2542.) In addition, although this court addressed in the direct appeal some claims similar to those raised in the petition, the court has not addressed every claim raised in the petition. Furthermore, claims raised in the petition were not competently presented on appeal as a result of ineffective assistance of appellate counsel, and because additional evidence outside the record was required to provide evidentiary support for the claims. Consequently, respondent's arguments with respect to these claims are without merit.

III. CONCLUSION

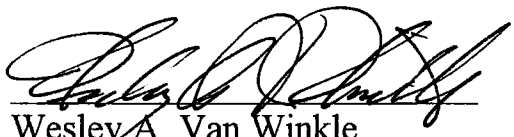
Petitioner has reviewed respondent's remaining responses and has concluded that they do not merit a separate, specific reply. With respect to these responses, petitioner rests on the basis of the petition and accompanying exhibits. Petitioner again notes that his decision not to specifically address particular facts, claims, or

legal arguments made by respondent's informal response should not be construed as a waiver of any claim.

For the reasons set forth herein, petitioner's claims are not procedurally barred, and the petition plainly establishes prima facie grounds for habeas relief. Petitioner respectfully requests, therefore, that the writ or an order to show cause be issued.

Dated: October 13, 2003.

Respectfully submitted,



Wesley A. Van Winkle
for: Stephanie Ross, Esq. and
Wesley A. Van Winkle, Esq.

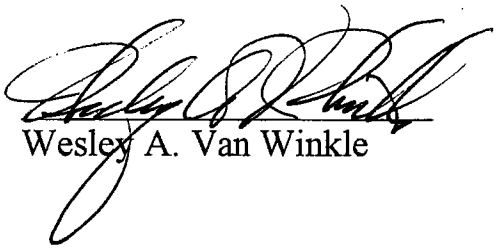
Attorneys for Petitioner,
DAVID ESCO WELCH

VERIFICATION

I am an attorney at law duly licensed to practice in all courts of the State of California. My office is in Alameda County. I am counsel for Petitioner in this action, who is restrained of his liberty and confined in a California State Prison at San Quentin, California, a county different from the county in which counsel practices. I am authorized to file this informal reply.

All facts alleged in the above petition, not otherwise supported by citations to the record, exhibits, or other documents are true of my own personal knowledge. I declare under penalty of perjury the above is true and correct. This verification was executed on October 14, 2003, at Berkeley, California.

Respectfully submitted,



Wesley A. Van Winkle

CERTIFICATE OF SERVICE BY MAIL

I declare that I am over the age of eighteen years and am employed in a law office in the City of Berkeley, County of Alameda, State of California. On this date, I personally filed this Informal Reply and one volume of exhibits, together with ten copies thereof, at the California Supreme Court and also served the party listed below by placing a true and correct copy thereof in an envelope or with postage thereon fully prepaid in the United States mail at Berkeley, California, addressed as follows:

Catherine Rivlin, Esq.
Supervising Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

In addition, I have arranged to make personal service upon the petitioner in this matter at the address listed below on or before November 15, 2003.

Mr. David Esco Welch
P.O. Box E-25702
San Quentin State Prison
San Quentin, CA 94974

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 15, 2003.

Wesley A. Van Winkle