IN THE SUPREME COURT OF CALIFORNIA

In re

RENO,

On Habeas Corpus.

CAPITAL CASE

No. S124660

(Los Angeles County Superior Court Case Number A445665)

INFORMAL REPLY TO INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

PETER GIANNINI
State Bar No. 61257
12304 Santa Monica Boulevard, Suite 105
Los Angeles, California 90025
Telephone: (310) 207-5772
Fax: (310) 207-5779
Email: p.giannini@verizon.net

JAMES S. THOMSON
SAOR STETLER
Thomson & Stetler
819 Delaware Street
Berkeley, California 94710
Telephone: (510) 525-9123

Attorneys for Petitioner

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A.
Claims Previously Raised on Appeal or Habeas Are Not Procedurally Barred

Respondent asserts in numerous places that many claims were previously brought before this Court. While petitioner respectfully disagrees with this Court's prior rulings rejecting these claims, petitioner recognizes that the Court has so ruled. Petitioner has presented these claims again for the purpose of incorporation into the cumulative error claims, Claims 140 through 143, and to exhaust the cumulative error claims in his now pending federal petition for writ of habeas corpus.

Respondent has said that the following claims have been previously denied on their merits by this Court, and not found procedurally barred, on direct appeal or in habeas proceedings: Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 44, 45, 47, 48, 49, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 73, 77, 80, 81, 83, 85, 86, 87, 89, 90, 93, 94, 96, 98, 100, 101, 102, 107, 109, 109, 110, 112, 113, 118, 120, 121, 122, 125, 126, 127, 128, 129, 130 and 140. (Informal Response (IR)) at 107-108).

To the extent that these claims have previously been exhausted, other procedural defaults are inapplicable. These claims were denied on their merits. They were not denied on procedural grounds previously, and thus should not be denied now as untimely or successive, as they are only brought now for the limited purposes described above. Petitioner also invites the Court to re-examine its prior rulings on these claims in the context of this petition, which is more complete and detailed than the prior appellate and habeas briefing in this Court.

B.
The Petition is Not Untimely

Respondent asserts that the petition, and claims in the petition, are untimely and thus procedurally barred (IR at 7-10), and that all claims previously presented to this Court, in either appellate briefing or in his prior habeas petition, are untimely. (IR at 8-9).[1] In so doing, respondent disregards the purpose for which these claims were brought (*See* Section B, above), and ignores the cases interpreting *In re Waltreus* (1965) 62 Cal.2d 218. "The corollary of the rule in *Dixon, supra,* 41 Cal.2d 756, 264 P.2d 513, is, of course, the *Waltreus* rule, i.e., that in the absence of strong justification, any issue that was *actually* raised and rejected on appeal cannot be renewed in a petition for a writ of habeas corpus." *In re Harris*, 5 Cal.4th 813, 829 (1993). In *Ylst v. Nunnemaker* 501 U.S. at 805, the United States Supreme Court concluded that a *Waltreus* citation is neither a ruling on the merits nor a denial on procedural grounds. It held that, since petitioners in California are not required to go to state habeas for exhaustion purposes, "a *Waltreus* denial on state habeas has no bearing on their ability to raise a claim in federal court." *Hill v. Roe* (9th Cir.2003) 321 F.3d 787 (emphasis added); *see also Ylst v. Nunnemaker* (1991) 501 U.S. 797, 805; *LaCrosse v. Kernan*, 244F.3d 702, 705 & fn. 11; *Calderon v. United States Dist. Court* (9th Cir.1996) 96 F.3d 1126, 1131; *Forrest v. Vasquez* (9th Cir.1996) 75 F.3d 562, 564 (recognizing that *Waltreus* has no bearing on a petitioner's ability to raise a claim in federal court). Thus, federal courts "look through" a denial based on *Waltreus* to previous state court decisions. *Ylst* at 805-06.

Were respondent correct, any finding under *In re Waltreus* would necessarily result

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[1] Specifically, respondent asserts that the following claims are untimely for this reason: Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 44, 45, 47, 48, 49, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 73, 77, 80, 81, 82, 83, 84, 85, 86, 87, 89, 90, 92, 93, 94, 96, 100, 101, 102, 107, 108, 109, 110, 111, 112, 113, 128, 129, and 130.

in a finding of untimeliness as well. Certainly, any time a claim was brought in an appeal and was later brought in a second habeas petition, it would not be presumptively timely. There is no hint, however, in *Waltreus* or its progeny that it encompasses a timeliness ruling as well.

Were respondent correct, the federal court would be faced with two separate rulings on the same claim. The first ruling from this Court would be a merits denial of the claim, which would allow federal review of the claim. The second ruling would be a procedural ruling on the claim, which could bar federal review if the federal court found that the procedural rule in question had been regularly and consistently applied. It would be unclear which ruling the federal court should follow. Under respondent's theory, a petitioner who brought all claims in an exhaustion petition in order to exhaust a cumulative error claim would be subject to punishment for doing so in the form of having claims previously denied on their merits then subject to an additional procedural bar. Such a result borders on the absurd.

Respondent asserts that the remainder of the claims are barred as untimely as well. (IR at 9).[2] Respondent argues that these claims were based on factual and legal bases available at trial or during the pendency of the appeal, and that petitioner has failed to show that counsel rendered ineffective assistance in failing to raise these claims previously. In addressing respondent's assertions of untimeliness, petitioner will first address problems with

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[2] Respondent includes Claim 14 both as having been previously brought before this Court and denied (IR at 8-9) and not having been previously raised and thus time-barred (IR at 9). It cannot be both. In fact, Claim 14 was not previously raised before this Court. Respondent also claims that Claim 34 was both raised before and raised for the first time here. (IR at 8-9). Claim 34 was also not previously raised before this Court. Respondent claims that Claim 69 was previously raised and raised for the first time here. (IR at 8-9). In fact, it was previously raised. Respondent claims that Claims 108 and 109 were previously raised and raised for the first time here. (IR 8-9). They were raised for the first time here.

the untimeliness bar itself, and then address the specific claims.

1.
The Untimeliness Bar

One problem a petitioner faces when pleading in this Court is understanding when the Court's analysis will apply to the entire petition, and when they will apply to individual claims and even "subclaims." Respondent ignores this important distinction and merges discussions of the petition with individual claims in the petition. (IR at 7-10). Respondent at times refers to the petition as untimely or successive, while at other times respondent refers to individual claims as untimely, successive or the like. (Id).

The language used by this Court in *In re Robbins* (1998) 18 Cal.4th 770 suggests that the continuously expanding presumptive timeliness date applies to petitions in their entirety, and the remaining analyses apply "with respect to each claim." However, *In re Stankewitz* (1985) 40 Cal.3d 391, stated that even a petition filed simultaneously with the *opening* brief on direct appeal could be deemed untimely if the petitioner had known for some time the facts underlying at least one of his claims. *Stankewitz*, 40 Cal.3d at 396, n.1. In such cases, the court said, the petition "must point to particular circumstances sufficient to justify substantial delay."[3] *Ibid.*

In re Clark (1993) 5 Cal. 4th 750 relied upon the quoted footnote in *Stankewitz* for the proposition that "a petition should be filed as promptly as the circumstances allow." *Clark*, 5 Cal.4th at 765, n.5. The analysis became murkier when this Court in *In re Sanders* (1999) 21 Cal.4th 697 said timeliness could be established by showing "the petition was filed *without substantial delay*," or that "even if the petition was filed after substantial delay, *good*

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[3] Case precedent states that timeliness may be measured from a date "'as early as the date of conviction.'" *Clark*, 5 Cal.4th at 765 n.5, in turn citing other cases.

cause justifies the delay."[4] *Sanders*, 21 Cal.4th at 705 (underlining added, italics in original).

This issue has critical practical consequences for petitioners who have no right to amend already-filed petitions with newly developed claims, *Clark*, 5 Cal.4th at 781 n.16, and who face a "successor" bar if they file a new petition containing previously unpresented claims. *See Siripongs v. Calderon* (9th Cir. 1994) 35 F.3d 1308, 1318 (discussing impact of *Clark*'s standards regarding successive petitions).

This situation places petitioners in a legal quandary. There are no fixed guidelines to employ. The fear of being found untimely encourages the petitioner to file a claim the moment it can be formulated. The problem with doing so is that rapid filing can generate a host of successive petitions as single claim petitions are filed each time a claim is uncovered, and potentially before the claim can be fleshed out adequately through thorough investigation and research. Doing so would engender the ire of this Court, and lead to at least one additional procedural default.

2.
Petitioner's claims are not barred as untimely

As this Court has explained:

> The manifest need for time limits on collateral attacks on criminal judgments, however, must be tempered with the knowledge that mistakes in the criminal justice system are sometimes made. Despite the substantive and procedural protections afforded those accused of committing crimes, the basic charters governing our society wisely hold open a final possibility for prisoners to prove their convictions were obtained unjustly. (U.S. Const., art. I, §§ 9, cl. 2 [limiting federal government's power to suspend writ of habeas corpus]; Cal. Const., art. I, §§ 11 [limiting state government's power to suspend writ of habeas corpus].) A writ of "[h]abeas corpus may thus provide an avenue of relief to those unjustly incarcerated when the normal method of relief– i.e.,

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[4] *Cf. Sanders*, 21 Cal.4th at 720 n.13 (explaining that court "[n]ormally . . . would evaluate the justifications for delay in the presentation of claims individually," but because cases of abandonment necessarily affect petitioner's "ability to raise any and all his claims" court dispenses with claim-by-claim analysis).

> direct appeal– is inadequate" (*In re Harris* (1993) 5 Cal.4th 813, 828 fn. omitted), and the Great Writ has been justifiably lauded as "'the safe-guard and the palladium of our liberties'" (*Clark, supra,* 5 Cal.4th at p. 764, *quoting In re Begerow* (1901) 133 Cal. 349, 353; *see also Lonchar v. Thomas* (1996) 517 U.S. 314, 322, *quoting Smith v. Bennett* (1961) 365 U.S. 708, 712 [writ of habeas corpus is the "highest safeguard of liberty"]).

In re Sanders (1999) 21 Cal. 4th 697, 703-704.

As discussed, respondent agues that the untimeliness bar applies to claims this Court has already found to be timely. See, e.g., Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 44, 45, 47, 48, 49, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 73, 77, 80, 81, 83, 85,.86, 87, 89, 90, 93, 94, 96, 98, 100, 101, 102, 107, 109, 109, 110, 112, 113, 118, 120, 121, 122, 125, 126, 127, 128, 129, 130 and 140. As these claims were timely filed, they cannot now be found untimely.

In making this argument, respondent applies the rule of *Robbins* to facts arising three years before that rule was announced. Such an application is inapposite. Despite respondents wish, petitioner is not required to predict the future and comply with rules which do not yet exist. The *Robbins* rule cannot be applied to conclude that the petition filed here was presumptively untimely after December 20, 1995.

3.

The Claims Not Previously Raised are Being Raised Without Substantial Delay

In federal court, petitioner has been represented by a series of attorneys. The first attorney who represented him was Stanley Greenberg. Mr. Greenberg was the sole attorney initially appointed to represent petitioner, and was appointed on Jun 14, 1996. Subsequently, Nicholas Arguimbau was appointed as second counsel on January 30, 1997. The District Court issued an order on August 29, 1997 granting Mr. Greenberg's motion to withdraw as counsel. On December 4, 1997, the District Court issued and order appointing Michael

Abzug as second counsel, with Mr. Arguimbau remaining, but as lead counsel.

On September 8, 1998, petitioner filed his federal petition in the District Court. On May 7, 1999, the District Court issued an order striking the unexhausted claims and holding the exhausted federal petition in abeyance while petitioner exhausted the unexhausted claims in this Court. At that point, petitioner's counsel, Nicholas Arguimbau, attempted to exhaust the unexhausted claims. Mr. Arguimbau sought to be appointed only for the limited purpose of filing the exhaustion petition pursuant to the District Court's Order. This Court refused to make such a limited appointment. See S004770, February 4, 2000; April 26, 2000.

On August 16, 2001, the District Court issued an Order relieving Michael Abzug as counsel and appointing Peter Giannini as new counsel. On November 13, 2001, Nicholas Arguimbau moved to be relieved as counsel, and the District Court granted that request on November 19, 2001. Peter Giannini was then petitioner's lead counsel, although he had only been appointed to the case three months prior. On December 18, 2001, James Thomson was appointed as second counsel by the District Court.

On October 16, 2002, Mr. Giannini, Mr. Thomson and Mr. Stetler were appointed to represent petitioner in this Court. The exhaustion petition was filed in this Court on May 10, 2004.

Under these circumstances, petitioner acted as diligently as possible. He cannot be held responsible for the multiple counsel who have withdrawn from his case. Each time new counsel was appointed, it took additional time for new counsel to gain familiarity with the case in order to be able to file a petition on petitioner's behalf. Under these circumstances, the petition was filed as soon as was possible.

Respondent also argues that ineffective assistance of counsel does not excuse any delay. (IR at 9). However, as discussed above, those claims that were previously raised in the appeal and in the prior habeas corpus proceedings are not delayed. As to those claims which were not previously raised, petitioner has demonstrated in the petition that he is

entitled to relief for each claim. Respondent asserts that the facts underlying these claims were available to prior counsel. Assuming, *arguendo,* that respondent is correct, then prior counsel provided ineffective assistance in not raising the claims previously, as the claims are meritorious for the reasons raised in the petition. If, however, respondent were incorrect and the facts were not previously available, then they constitute newly discovered facts and the claims should not be considered untimely.

All of these circumstances also demonstrate good cause for any delay. Respondent argues that this Court's procedural rules are not constitutionally invalid and that the rules have not been applied inconsistently. In so doing, however, respondent relies on *Clark*, and argues that the rules established therein have been applied consistently. (IR at 10). Respondent fails to reconcile this assertion with its earlier observation that the timeliness standards were only established in *In re Robbins* in 1998.

Respondent also errs in asserting that timeliness standards have been applied consistently. Nothing could be further from the truth. On August 3, 1998, in *In re Robbins* 18 Cal.4th 770, this Court made clear that it would no longer consider federal law in denying a petition on untimeliness grounds. This Court recognized that, when reviewing state habeas petitions for the untimeliness ground embodied in *In re Clark* 5 Cal.4th 750 (as well as for distinct procedural grounds embodied in *In re Dixon* 41 Cal.2d 756, 759 and *In re Harris* 5 Cal.4th 813), California courts previously considered the federal constitutional merits of the petition in determining whether the petition qualified for an exception to the rule of procedural default. *Robbins,* 18 Cal.4th at 812 n. 32, 814 n. 34.

The Court then declared that *henceforth*, California courts would no longer determine whether an error alleged in a state petition constituted a federal constitutional violation:

> [W]e shall assume, for the purpose of addressing the procedural issue, that a federal constitutional error is stated, and we shall find the exception inapposite if, based upon our application of state law, it cannot be said that the asserted error "led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner.

Id. at 811-812 (quoting *Clark,* 5 Cal.4th at 797). The Court further announced that:

> [W]henever we apply the first three *Clark* exceptions, we do so exclusively by reference to state law. When we apply the fourth *Clark* exception, we apply federal law in resolving any federal constitutional claim.

Robbins, 18 Cal.4th at 812 n. 32; *Bennett v. Mueller* (2002) 296 F.3d 752, *amended on denial of reh'g* (9th Cir. 2003) 322 F.3d 573, 581-582.

The Ninth Circuit has concluded that California's untimeliness rule is an independent state ground for cases initiated after *Robbins. See Bennett v. Mueller* (2002) 296 F.3d 752, *amended on denial of reh'g* (9th Cir. 2003) 322 F.3d 573, 574, 582-583. Of course, implicit in that ruling was the fact that before *Robbins*, untimeliness was not considered an independent state ground. Other Ninth Circuit precedent recognized as much. When habeas proceedings have been initiated before the *Clark/Robbins* decisions were announced, the untimeliness rule cannot stand as an independent and adequate state ground barring federal habeas review. *See, e.g., Fields v. Calderon* (9th Cir. 1997) 125 F.3d 757, 759; *Calderon v. United States Dist. Court (Hayes)* (9th Cir. 1996) 103 F.3d 72, 73; *Calderon v. United States Dist. Court (Bean)* (9th Cir. 1996) 96 F.3d 1126, 1131 (evaluating procedural default "at the time [petitioner] filed his direct appeal"). *See also Bennett v. Mueller, supra* at 579. This Court's opinion in *Robbins* dictates this result as well:

> Although the exception is phrased in terms of error of constitutional magnitude– which obviously may include federal constitutional claims– in applying this exception and finding it inapplicable we shall, *in this case and in the future,* adopt the following approach as our standard practice: We need not and will not decide whether the alleged error actually constitutes a federal constitutional violation.

In re Robbins 18 Cal.4th at 810-812 (emphasis added). This decision specifically limited its application to cases arising after the decision was published in 1998. The rules governing timeliness have changed since petitioner's reply brief was filed in 1995. It cannot be said that the rules have been consistently applied in the interim.

In California, there is considerable ambiguity over when a petition should be filed in

order to avoid application of the untimeliness bar and substantial delay. There are at least three component rules within the analytical framework for judging substantial delay. First,

> [s]ubstantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim.

Robbins, 18 Cal.4th at 780. "Only if and when" the petitioner obtains *enough* information to support what may be a "prima facie claim ... does the time for promptly filing the claim commence." *Gallego*, 18 Cal.4th at 834. Time is not running against a petitioner who has an "undeveloped and unsubstantiated claim" because "he or she has no prima facie case to present." *Id.* at 835.[5]

Although *Robbins* and *Gallego* state the conditions *from* which the Court measures "substantial delay," neither of those cases nor any others provide notice of when substantial delay arises.[6] There is no published "rule" regarding when a petition is due. Thus, *Robbins* is not the "narrowing judicial construction" the Ninth Circuit looked for to "establish[] what amount of delay the [state] court would consider 'substantial.'" *Morales*, 85 F.3d at 1392.

The second component of the "absence of substantial delay" framework is the pleading requirements. *Robbins* clarified that a petitioner must provide the state court with the "particulars from which [it] may determine when the petitioner knew, or reasonably should have known, of the information offered in support of the claim." *Robbins*, 18 Cal.4th

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[5] *Cf. Clark*, 4 Cal.4th at 781 ("petitioner who is aware of facts adequate to state a prima facie case for habeas corpus relief should include the claim based on those facts in the petition even if the claim is not fully 'developed'").

[6] Although *Robbins* emphasizes that timeliness is measured from the time the basis for a claim becomes known, or should have become known, in the later case of *Sanders*, the Court said "in *Robbins* ... we insist a litigant mounting a collateral challenge *to a final criminal judgment* do so in a timely fashion." *Sanders*, 21 Cal.4th at 703 (emphasis added). This is vague because the presumptive timeliness date may *precede* the date on which the judgment becomes final.

at 787. In other words, *Robbins* clarified not the *when* but some of the *what* that goes into the state court's *ad hoc* timeliness determination. *Id.* at 780 ("A petition must allege, *with specificity*, facts showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time."). At the same time the Court was emphasizing the petitioner's burden "of *establishing* ... the absence of substantial delay," *ibid.* (emphasis in original) – which is to say the petitioner must prove a negative with another negative[7] – the Court withheld any definition, example, or illustration of what "substantial delay" is in this setting.

Petitioner met this requirement in the introductory portion of the petition. (Petition at 10-95). Respondent did not meaningfully respond to this discussion at all. Instead, respondent included generic blanket assertions of all possible defaults.

With the pleading requirements emphasized in *Robbins* it became clear that there are at least two distinct rules related to determining the absence of substantial delay. Under *Robbins*, *Clark*, and *Stankewitz*, claims in a petition filed on the ninety-first day following the reply brief due date could be deemed untimely solely because the petitioner was not specific enough in describing what and when his counsel learned. Conversely, a petition filed many years after the presumptive timeliness date could be deemed timely because the petitioner's counsel satisfied the Court with the specificity of its allegations.

In sum, a petition or claim(s) could be deemed untimely either (a) because the petitioner actually delayed too long or, (b) because, although he did not delay too long, he was insufficiently specific in explaining the delay or, (c) because, although he neither delayed too long, nor was unspecific, but he delayed because he pursued information that did not amount to "triggering facts."

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[7] The petitioner must prove the *absence* of substantial delay by showing that he did *not* know, or *should not* have known, the basis for his claim earlier.

Although a petitioner has no way of knowing whether his petition or a particular claim therein was filed "without substantial delay," he must justify the delay.

> A claim or a part thereof that is substantially delayed nevertheless will be considered on the merits if the petitioner can demonstrate good cause for the delay. Good cause for substantial delay may be established if, for example, the petitioner can demonstrate that because he or she was conducting an *ongoing investigation* into at least one potentially meritorious claim, the petitioner delayed presentation of one or more other claims in order to avoid piecemeal presentation of claims . . . .

Robbins, 18 Cal.4th at 780. Although an "ongoing bona fide investigation into other *potentially meritorious* claims" may justify substantial delay, *Gallego*, 18 Cal.4th at 834 (emphasis added), if the "petitioner delays filing the petition in order to investigate potential claims of *questionable merit*," the court may not find good cause for the delay. *Clark*, 5 Cal.4th at 781 & n.17 (emphasis added). There is no explanation as to how a petitioner would know, in advance, whether his investigation into a potentially meritorious claim would result in the revelation that the claim was of questionable merit. If the investigation shows the claim to be of questionable merit, so that a petitioner decides to forego the claim, he runs the substantial risk that this Court will apply a procedural bar for the delay. The rules require a petitioner to guess whether sufficient facts will be found in order to justify conducting an investigation and delaying the filing of a petition.

Respondent is not asserting any such delays, as he does not attack with particularity the delay in bringing of any claim. Instead, respondent simply makes blanket assertions against virtually every claim.

Ineffective assistance of state post-conviction counsel also may constitute good cause to justify substantial delay. *Sanders*, 21 Cal.4th at 719; *Robbins*, 18 Cal.4th at 810; *Clark*, 5 Cal.4th at 780.[8]

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[8] These cases illustrate how this Court's cases engender confusion about the "rules." *Clark* first held that the ineffectiveness of prior counsel *could* constitute good cause for substantial delay; *Robbins* said it reached the issue

> The petitioner must . . . allege with specificity . . . that the [previous omitted or poorly presented] issue is one which would have entitled the petitioner to relief had it been raised and adequately presented in the initial petition, and that counsel's failure to do so reflects a standard of representation falling below that to be expected from an attorney engaged in the representation of criminal defendants.

Clark, 5 Cal.4th 780. As discussed in the petition, there was no strategic reason to omit the claims included in the instant petition. Absent any such reason, it was ineffective assistance of counsel not to include those claims previously.

Petitioner's prompt filing of the instant petition, supported by substantial evidence, following investigation related to the federal habeas corpus proceedings, establishes the absence of substantial delay as to claims based on that investigation, and good cause for any delay in filing claims which could have been filed earlier.

Even if the petition was untimely, there are exceptions to a finding of untimeliness where:

> the petitioner demonstrates (I) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (ii) the petitioner is actually innocent of the crime or crimes of which he or she was convicted; (iii) that the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death; or (iv) that the petitioner was convicted or sentenced under an invalid statute.

In re Robbins, 18 Cal.4th at 780-781.

Petitioner has demonstrated that errors of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner. Petitioner has demonstrated that the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of petitioner that, absent the

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> "[w]ithout deciding whether, and to what extent, ineffective assistance of prior counsel may establish good cause for substantially delayed presentation of claims," and *Sanders*, one year later, said the court had "recognized that prior counsel's actions (or inactions) may be relevant to the proper application of the procedural rules that affect the availability of relief on habeas corpus."

trial error of omission, no reasonable judge or jury would have imposed a sentence of death. Petitioner also has demonstrated that he was convicted and sentenced under an invalid statute.

When it comes to the penalty phase of a capital trial, "[i]t is imperative that all relevant mitigation information be unearthed for consideration." *Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1227. "[C]ounsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." *Sanders v. Ratelle* (9th Cir. 1994) 21 F.3d 1446, 1456-57 (emphasis omitted); *see also Jennings v. Woodford* (9th Cir. 2002) 290 F.3d 1006, 1014 ("[A]ttorneys have considerable latitude to make strategic decisions ... once they have gathered sufficient evidence upon which to base their tactical choices."). "Counsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert." *Caro,* 165 F.3d at 1226. Here, as in *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 847, counsel "could not make a reasoned tactical decision about the trial precisely because 'counsel did not even know what evidence was available.'" (quoting *Deutscher v. Whitley* (9th Cir. 1989) 884 F.2d 1152, 1160 *vacated and remanded on other grounds,* 500 U.S. 901 (1991)). "It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." *Caro,* at 1227. "The Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy." *Hendricks,* 70 F.3d at 1044 (quoting *Deutscher v. Whitley* 884 F.2d at 1161); *see also Penry v. Lynaugh* (1989) 492 U.S. 302, 319. Here counsel presented a single penalty phase mitigation witness who provided no meaningful testimony. Counsel also presented as well as petitioner's testimony wherein he asked the jury to sentence him to death. That is not a meaningful, nor constitutional, penalty phase.

As discussed in the petition and herein, each claim is individually meritorious. There was no strategic reason not to bring these claims. It is unquestionable that petitioner would have had a much stronger case had prior counsel included these claims in petitioner's prior habeas petition. Petitioner was entitled to have all available evidence presented on his behalf. The failure to do so was the result of negligence, not strategy.

C.

Claims Not Previously Raised on Appeal

Respondent claims that petitioner has failed to even attempt to establish that any of the above claims fall within one of the exceptions to the *Waltreus/Dixon* bar set forth in *In re Harris* (1993) 5 Cal.4th.813, 829-841. Respondent is wrong. However, it is unnecessary to provide an exception when the claim does not fall under the rule. The *Waltreus* rule is intended to prevent a defendant from foregoing the raising of a claim on appeal in favor of seeking relief on habeas corpus. (*See Harris*, at 827.) The *Dixon* rule is intended to preclude any claim that was actually raised and rejected on appeal from being renewed in a petition for a writ of habeas corpus. (*Id.*, at 829.) Additionally, if any of petitioner's claims fall within the *Waltreus/Dixon* rules, they also fall within an exception. The allegations and supporting evidence establish that the violations of petitioner's rights are clear and fundamental, and strike at the heart of the trial process, i.e., prosecutorial misconduct, presentation of false evidence, and trial court errors violating petitioner's rights to a fair jury and the presentation of accurate evidence. (*Waltreus*, at 834.)

However, as explained below, neither of these exceptions are necessary. Each of petitioner's claims required and included significant evidentiary materials not found within the record on appeal. In order to get around this obvious fact, Respondent breaks down each claim into subparts and argues that the evidence supporting that subpart was either raised on appeal, or could have been raised but was not.[9] Each subpart, however, is not the claim presented to this Court. If this method is approved, such efforts would preclude a defendant from adequately raising a claim that was partially based on the record and partially based upon evidence outside the record. If a defendant referenced a portion of the evidence on direct appeal because it was within the record, the latter part of the evidence outside the

9. To the extent that the latter is true, the ineffective assistance of appellate counsel caused the failure to raise the claims to the prejudice of petitioner and which should excuse any procedural default.

record would not be considered, even if material, and would dilute the significance of the claim. (This does not make the claim improper for direct appeal, only less effective.) However, under Respondent's analysis, on habeas, the petitioner would be unable to argue the evidence from the record supporting the claim, but could argue only the evidence outside the record, diluting the evidence supporting the habeas claim. This would require courts to consider skewed, partial, misleading, and incomplete claims.

Practically, if any significant claim requires evidence outside the record on appeal, it must be raised on habeas or it is lost. This requirement cannot preclude petitioner from also pointing to evidence from the record that also supports that claim. Otherwise, the significance of the claim is lost and the defendant loses valid constitutional rights based not on substance, but upon an artificial division divined by respondent.

Respondent's artificial and unreasonable application of *Dixon/Waltreus* would preclude any complete and adequate evaluation of claims on habeas. For example, if the trial court has committed ten errors, but evidence supporting three of those errors existed on the record, Respondent argues that those three errors could not be brought in a habeas claim arguing that the trial court made cumulative egregious errors. Respondent's argument also implies that, even if the evidence supporting these errors also included evidence outside the record, the claims could not be raised in a habeas petition because they could have been raised with the limited evidence on the record.

If the court were willing to find that one of those three errors that could have been or was presented on appeal combined with one of the errors that could only be raised in a habeas petition, when combined, were sufficient to grant relief, that relief should not be denied on the basis that the evidence to support the claim included evidence both within and without the record on appeal. Tellingly, respondent has provided no authority that requires petitioner to break down the evidence supporting his claims into their smallest possible components and then divide them up between an appeal and a habeas petition. Because each

claim, as a whole, requires significant evidence outside the record, each lies outside the *Waltreus/Dixon* rules and are properly before this Court in this habeas petition.

Citing *In re Dixon,* respondent argues that the following claims are defaulted for failure to raise them on appeal: Claims 7, 11, 13, 14, 22, 23, 26, 34, 35, 42, 43, 46, 50, 51, 52, 53, 54, 55, 64, 69, 72, 74, 75, 76, 78, 79, 82, 84, 85, 88, 89, 90, 92, 95, 97, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 110, 111, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 127, 130, 133, 134, 135, 136, 137, 138, 139, 140, and 143. (IR at 12). Petitioner will address these claims in turn.

Respondent admits that Claim 7 was brought by petitioner in his prior habeas petition. (IR at 5). That petition was denied on its merits, without any finding of procedural bar. (*See In re Memro*, S044437, Order of June 28, 1995). This Court thus has already found that the claim was properly raised in habeas proceedings.

Claim 11 incorporates by reference Claims 13, 15 and 16. (*See* Petition at 72). Respondent concedes that Claims 15 and 16 were raised in petitioner's first habeas petition. (IR at 5). That petition was denied on its merits, without any finding of procedural bar. (*See In re Memro*, S044437, Order of June 28, 1995). This Court thus has already found that these claims were properly raised in habeas proceedings. As Claim 11 relies on arguments and facts supporting these habeas claims, it could not properly be raised on direct appeal.

Claim 13 addresses the double jeopardy bar of a first-degree felony murder theory despite the fact that the jury was not allowed to consider first degree murder in Count I. (Petition at 77). The claim references rulings and verdicts from a different trial and thus could not properly be the subject of a claim on direct appeal.

Claim 14 addresses the trial court's error in refusing to appoint counsel to represent petitioner during his first penalty phase. This claim necessarily involves the nature of the conflict between petitioner and his first attorney, Peter Williams, and his second attorney, Robert Villa. It also involves the nature of preparation for that penalty phase. All of these

matters go beyond the trial record of the second trial, and thus the claim is not barred for failure to raise it on direct appeal.

Claim 22 addresses the error in assigning his trial to a commissioner, rather than a superior court judge. The claim alleges that petitioner did not knowingly and intelligently waive his right to have his case tried by a superior court judge. (Petition at 123). Any purported waiver was not knowing and intelligent for reasons including but not limited to (a) the lack of adequate communication and advice from his attorney at the time, and (b) his inability, as a result of mental incompetence, to make a knowing and intelligent waiver. The quality of any waiver, as well as the nature of explanations made to him are matters outside of the trial record.

Claim 23 addresses the commissioner's bias against petitioner. This claim of judicial bias references the commissioner's feelings and thoughts, which are matters outside of the trial record. Further discovery, including depositions, may be necessary before resolving this claim. It could not have been resolved on direct appeal based upon the trial record.

Claim 26 is not barred for failure to raise it on appeal. Respondent concedes that Claim 26 was brought by petitioner in his prior habeas petition. (IR at 5). That petition was denied on its merits, without any finding of procedural bar. (*See In re Memro*, S044437, Order of June 28, 1995). This Court thus has already found that the claim was properly raised in habeas proceedings.

Claim 34 is not barred for failure to raise it on appeal. Respondent concedes that Claim 34 was brought by petitioner in his prior habeas petition. (IR at 5). That petition was denied on its merits, without any finding of procedural bar. (*See In re Memro*, S044437, Order of June 28, 1995). This Court thus has already found that the claim was properly raised in habeas proceedings.

Claim 35 addresses the failure to order transportation for petitioner apart from the numerous jailhouse snitches housed at the Los Angeles County Jail. (Petition at 170). The

Claim refers to numerous matters outside the record, including problems between petitioner and Anthony Cornejo, as well as the procedures for transporting prisoners employed by the Los Angeles County Sheriff's Office. It also references transportation orders set in place at another of petitioner's trials. Efforts by Sheriff's deputies to comply with the trial court's orders are also implicated. The use of the informants is also alleged to have hampered trial counsel's preparation for trial (Petition at 173, ¶12). All of these matters are beyond the record.

Claim 42 addresses matters outside the trial record, including the conduct of viewing the crime scene by the jury, as well as their ability to view petitioner, who was shackled and held in a squad car at the scene. (Petition at 190). The claim complains that part of the trial took place outside of the record. As such, it is clearly not part of the record. The proceedings at the crime scene were not transcribed. (Petition at 191, ¶8). The claim also alleges ineffective assistance of trial and appellate counsel (Petition at 193, ¶¶16-17), which is more properly raised in habeas proceedings. *People v. Pope* (1979) 23 Cal.3d 412, 426-417, fn. 7.

Claim 43 addresses the unlawful, visible shackling of petitioner, and involves matters outside of the trial record, including the visibility of those shackles. The record is silent on this issue. (Petition at 194).

Claim 46 involves matters outside of the trial record, including whether trial counsel had ever received information via discovery regarding the particular manner in which a plastic milk bottle found at the scene had been cut. (Petition at 205). The effect of this unfair surprise upon trial counsel is also a matter beyond the trial record.

Claim 50, which addresses shackling, incorporates Claim 37, which also addressed shackling. Respondent concedes that Claim 37 was brought by petitioner in his prior habeas petition. (IR at 5). That petition was denied on its merits, without any finding of procedural bar. (*See In re Memro*, S044437, Order of June 28, 1995). This Court thus has already found

that the claim was properly raised in habeas proceedings. Further, as Claim 50 relies on arguments and facts supporting this habeas claim, it could not properly be raised on direct appeal.

Claim 51 addresses the circumstances surrounding petitioner's purported confession to law enforcement, and the trial court's instruction to the jury that petitioner was properly advised regarding his rights and waived those rights. The alleged circumstances of the confession exist outside of the trial record, and thus are appropriately brought in habeas proceedings.

Claim 53 relates to instructions on Count I and II, which related to the maximum degree of murder the jury could find. (Petition at 219). Trial counsel filed a motion asking that the jury be instructed that the maximum degree for Count I could only be murder in the second degree. The motion was based on the trial court's verdict during the *first* trial in 1979 that the Fowler killing was a second-degree murder. The claim references rulings and verdicts from a different trial and thus could not properly be the subject of a claim on direct appeal.

Claim 54 relates to the erroneous instruction to the jury regarding an inapplicable theory of second degree murder. (Petition at 221). The Claim argues that the jury did not unanimously find petitioner guilty of second degree murder under an allowable theory.

Claim 55 relates to an erroneous instruction given to the jury regarding Counts II and III, and the trial court's bias and hostility against petitioner. (Petition at 224). The court's bias and hostility are matters outside of the trial record, and are properly raised in habeas proceedings.

Respondent concedes that Claim 69 was brought by petitioner in his prior habeas petition. (IR at 5). That petition was denied on its merits, without any finding of procedural bar. (*See In re Memro*, S044437, Order of June 28, 1995). This Court thus has already found that the claim was properly raised in habeas proceedings.

Claim 74 addresses prosecutorial misconduct during guilt phase argument, relating to improper instructions given. It references material outside of the trial record, namely rulings in a different trial and thus could not properly be the subject of a claim on direct appeal. (Petition at 269).

Claim 85 alleges ineffective assistance of counsel in failing to adequately cross-examine Lloyd Carter on his purported notes from his alleged interrogation of petitioner. (Petition at 288). Ineffective assistance of counsel claims regularly rely on matters outside the record, and are thus properly raised in habeas proceedings. *Pope*, 23 Cal.3d at 426-417, fn. 7.

Claim 88 alleges ineffective assistance of counsel in failing to adequately cross-examine police officers. (Petition at 288). It also references materials outside the trial record.

D.

The Claims Are Not Barred as Successive

Respondent contends in numerous places that the petition, and the claims contained in it, are successive. In the petition, petitioner has explained the circumstances which justify the filing of this petition. Petitioner will not repeat these assertions, and instead incorporates them by reference. Respondent complains that the petition contains claims previously raised. Respondent asserts, erroneously, that the inclusion of these claims somehow renders this petition barred as successive.

"The corollary of the rule in *Dixon, supra,* 41 Cal.2d 756, 264 P.2d 513, is, of course, the *Waltreus* rule, i.e., that in the absence of strong justification, any issue that was *actually* raised and rejected on appeal cannot be renewed in a petition for a writ of habeas corpus." *In re Harris*, 5 Cal.4th at 829. In *Ylst v. Nunnemaker,* 501 U.S. at 805, the United States Supreme Court concluded that a *Waltreus* citation is neither a ruling on the merits nor a denial on procedural grounds. It held that since petitioners in California are not required to go to state habeas for exhaustion purposes, "a *Waltreus* denial on state habeas *has no bearing on their ability to raise a claim in federal court.*" *Hill v. Roe*, 321 F.3d 787 (emphasis added). See also *Ylst v. Nunnemaker*, 501 U.S. at 805; *LaCrosse v. Kernan*, 244 F.3d at 705 & fn. 11; *Calderon v. United States Dist. Court*, 96 F.3d at 1131. Federal courts "look through" a denial based on *Waltreus* to previous state court decisions. *Id.* at 805-06. *See Forrest v. Vasquez*, 75 F.3d at 564.

California's *Waltreus* rule provides that "habeas corpus ordinarily cannot serve as a second appeal." 62 Cal.2d 218. Thus, under the *Waltreus* rule, the California Supreme Court will not review in a habeas petition any claim raised on direct appeal. A citation to *Waltreus* does not bar federal review, *see Hill v. Roe* 321 F.3d 787. *See Forrest v. Vasquez* 75 F.3d at 564 (recognizing that *Waltreus* has no bearing on a petitioner's ability to raise a claim in federal court). Instead, it is simply an expression that the claim has been denied in a previous

proceeding before this Court.

Respondent argues that the petition is barred as successive under *In re Clark*, (IR at 4) which articulates the general rule that successive and/or untimely state petitions for a writ of habeas corpus will be summarily denied. 5 Cal.4th at 797. *In re Miller* articulates the rule that a successive petition will be denied absent a change in the facts or law. 17 Cal.2d at 735. Petitioner is resubmitting many claims pursuant to respondent's arguments in federal court, and the subsequent rulings of the District Court, which questioned the exhausted nature of these claims. Should this Court deny this petition based on *In re Clark, In re Swain* and *In re Miller,* that is simply an indication that petitioner had not presented any new basis for reconsideration of the Court's original denial of the claims as untimely. *Accord LaFlamme v. White,* 1997 WL 488358, at *2; *Allard v. Olivarez* (N.D.Cal.1998) 1998 WL 19468.

Petitioner brings all the claims in the federal petition in this exhaustion petition in order to allow this Court to view the totality of the circumstances in assessing petitioner's claims. It is well settled that claims cannot be evaluated in a vacuum, and must be assessed in the full context of a trial. *See, e.g., Kyles v. Whitley* 514 U.S. 419; *United States v. Ortega* (9th Cir. 1977) 561 F.2d 803; *United States v. McLister* (9th Cir. 1979) 608 F.2d 785. Without presenting the previously-presented claims in an exhaustion petition, the only other option for petitioner would have been to utilize the disfavored procedure of incorporation by reference

A petitioner may justify the filing of a successive petition where he:

1. Establishes that "the factual basis for a claim was unknown to the petitioner [at the time of the first petition] and he had no reason to believe that the claim might be made." *In re Clark* (1993) 5 Cal.4th 750, 775;

2. Includes claims which are based on a change in the law which are retroactively applicable to final judgments. *Ibid*;

3. Demonstrates that a fundamental miscarriage of justice occurred. *Ibid.*; or

4. Shows that counsel failed to afford adequate representation in a prior habeas corpus application. *Id* at 780.

Here, petitioner's claims are meritorious and demonstrate that a fundamental miscarriage of justice occurred, involving errors of a federal constitutional dimension, all to petitioner's prejudice, under any of these standard which this Court may find applicable.

Most importantly, petitioner is actually innocent of the crimes charged. *See Schlup v. Delo* (1995) 513 U.S. 298 (distinguishing stand-alone actual innocence claims under *Herrera v. Collins* (1993) 506 U.S. 390 from *Schlup* actual innocence accompanied by constitutional error claim; holding that actual innocence standard in the latter case is whether the constitutional violation probably resulted in the conviction of one who is actually innocent).[10] Petitioner lacked the mental state required for murder. Petitioner is innocent of the charged crime of first degree murder and the special circumstance and the resulting death sentence.

In *In re Hall* (1981) 30 Cal.3d 408, relying on *In re Weber* (1974) 11 Cal.3d 703, this Court articulated a standard of review of claims of actual innocence: The evidence supporting such claims should be "conclusive" and "'point unerringly to innocence.'" *Hall,* 30 Cal.3d at p. 423. The Court rejected, however, the suggestion that this standard imposes "either the hypertechnical requirement that each bit of prosecutorial evidence be specifically

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[10] "Schlup's claim of innocence, on the other hand, is procedural, rather than substantive. His constitutional claims are based not on his innocence, but rather on his contention that the ineffectiveness of his counsel, see *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and the withholding of evidence by the prosecution, see *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), denied him the full panoply of protections afforded to criminal defendants by the Constitution. Schlup, however, faces procedural obstacles that he must overcome before a federal court may address the merits of those constitutional claims."

Schlup v. Delo, at 314.

refuted, or the virtually impossible burden of proving there is no conceivable basis on which the prosecution might have succeeded. It would be unconscionable to deny relief if a petitioner conclusively established his innocence without directly refuting every minute item of the prosecution's proof, or if a petitioner utterly destroyed the theory on which the People relied without rebutting all other possible scenarios which, *if* they had been presented at trial, might have tended to support a verdict of guilt." (*Ibid; see also People v. Gonzalez* (1990) 51 Cal.3d 1179, 1246.) Petitioner need not show that each independent piece of evidence was unreliable or otherwise unconstitutionally admitted. Instead, he must simply show that the verdict is unreasonable. The petition demonstrates the unreasonableness of the verdict and sentence.

Because his trial was marred by numerous constitutional errors, "a more relaxed standard of proof must be applied" in assessing whether he has established his innocence. *Strickland v. Washington*, 466 U.S. at 694 ("The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged.") As discussed in the petition and below, petitioner received ineffective assistance of counsel during his first habeas proceedings in this Court. Petitioner satisfies this exception, and any default is excused. *People v. Gonzalez* 51 Cal.3d at 1246 [a criminal judgment may be collaterally attacked on the basis of "newly discovered" evidence where the "new" evidence casts fundamental doubt on the accuracy and reliability of the proceedings].

The evidence presented in mitigation was woefully inadequate, and left the jury with an unfair negative view of petitioner. Had counsel presented adequate mitigation, no reasonable judge or jury would have sentenced petitioner to death. *In re Clark* 5 Cal. 4th at 759. *See also Sawyer v. Whitley* (1992) 505 US 333 (discussing actual innocence in the context of a death sentence). Moreover, this negative view of petitioner prejudiced petitioner in the jury's eyes, and allowed the jury to find that petitioner harbored the required mental

states of the charged offenses. Had the jury not received this distorted view, they would not have found the required mental state, and petitioner would have been found guilty, at most, of lesser-included offenses. Petitioner's claims satisfy these standards and should be heard on their merits.

To the extent that any claims included in the petition could have been brought by prior state counsel, prior counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment, associated provisions of the California Constitution, as well as case law of the state and federal courts, by not bringing those claims. (*Strickland v. Washington*, 466 U.S. at 684-685, 688.) Had counsel rendered effective assistance, the claims could have and would have been brought in the first instance.

> When, as here, an attorney representing a capital defendant essentially abandons his client and fails, in the face of triggering facts, to conduct an investigation in order to determine whether there exists potentially meritorious claims, such abandonment constitutes good cause for substantial delay in the presentation of potentially meritorious claims by subsequent counsel.

In re Sanders, 21 Cal.4th 697, 701. As this Court explained:

> Irrespective, however, of whether or not a criminal defendant enjoys the right, under the federal Constitution, to appointed counsel as a matter of due process or equal protection, a state may choose, as a matter of state law, to appoint an attorney to assist a death row prisoner in investigating, preparing and filing a petition for a writ of habeas corpus. If a state thus chooses to appoint an attorney for that purpose, the absence of a federal constitutional right to the appointment does not obligate this court to tolerate abandonment of a capital defendant by that attorney. Consequently, notwithstanding the above-stated rule of federal constitutional law, nothing prohibits this court from considering habeas corpus counsel's actions (or inaction) when evaluating whether, *under policy 3 of the Supreme Court Policies*, good cause exists for filing a petition for a writ of habeas corpus after a substantial delay.

Id. at 716-717 (italics in original).

The Court further explained:

> If a death row prisoner can show he or she is otherwise entitled to relief due to an error in his or her trial, the cause of justice is hardly advanced by the highest court in the State of California refusing even to consider the claim because the prisoner's former attorney abandoned the case at a time state law required him or her to be conducting a reasonable investigation into issues of potential merit.

Id. at 723. Because prior counsel's ineffective assistance necessarily effected petitioner's ability to raise all the claims set forth here, this Court need not determine whether any particular claim raised in this petition could have been raised earlier. 21 Cal.4th at 720, n. 13.

Here, each claim is meritorious and warrants relief, both individually and in conjunction with petitioner's other claims. *Douglas v. California* (1963) 372 U.S. 353, held that an indigent criminal defendant has a right to appointed counsel in his first appeal as of right in state court. *Evitts v. Lucey* (1985) 469 U.S. 387, 396, explained that this right encompasses a right to effective assistance of counsel for all criminal defendants in their first appeal as of right. *See also Coleman v. Thompson* (1991) 501 U.S. 722, 755. To the extent that the claims were available, it was constitutionally ineffective assistance of counsel not to bring these claims during prior proceedings. *See, e.g., Murray v. Carrier* (1986) 477 U.S. 478, 496 ("right to effective assistance of counsel ... may in a particular case be violated by even an isolated error if that error ... is sufficiently egregious and prejudicial." *See also Sanders, supra.*) Petitioner should not be penalized for counsel's ineffective assistance, and these claims should be resolved on their merits.

To the extent that the claims brought herein were discoverable to prior state counsel, prior counsel unreasonably failed to (a) seek funds and (b) investigate these claims. There was no strategic purpose for doing so, and petitioner was prejudiced by these failings. Counsel's performance thus fell below any objective standard of reasonableness under prevailing professional norms, and each such failure subjected petitioner to prejudice, i.e., there is a reasonable probability that, but for each such failing by counsel, the result would have been more favorable to petitioner, on both the automatic appeal and habeas corpus proceeding. *See Strickland v. Washington,* 466 U.S. at 688.

The result was the inadequate, incomplete pleadings previously filed by prior counsel,

as well as the instant petition being filed at the time it was filed. Refusing to hear the instant petition on its merits would violate petitioner's constitutional rights to life, liberty, due process on appeal, equal protection, effective assistance of counsel, and reliability in imposition of the death penalty, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U. S. Constitution,[11] and article I, sections 1, 7, 15, 16, and 17 of the California Constitution. The ineffective assistance rendered by prior counsel was a factor beyond petitioner's control, was prejudicial and should not be held against him.

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[11] *See e.g.*, *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347; *Chessman v. Teets* (1957) 354 U.S. 156; *Frank v. Mangum* (1914) 237 U.S. 309, 327-328; *Cole v. Arkansas* (1948) 333 U.S. 196, 201; *Griffin v. Illinois* (1956) 351 U.S. 12, 37 (Harlan, J., diss.); *Pate v. Robinson* (1966) 383 U.S. 375, 387, *Drope v. Missouri* (1975) 420 U.S. 162, 172, 181.

E.
Respondent Erroneously Asserts That Some of Petitioner's Claims are Barred For Failure to Object at Trial

Respondent alleges that Claim 14 is barred for failure to object at trial. As discussed in that claim, petitioner repeatedly requested that counsel be appointed to represent him at his penalty phase. (Petition at 78-83). The trial court refused to do so. Thus, while petitioner did object on numerous occasions, the trial court failed to act.

Respondent similarly alleges that Claim 22 is waived. Claim 22 is not subject to waiver. First, it alleges that the judge who presided over petitioner's trial lacked jurisdiction to try the case, which would render any judgment null and void. Second, it alleges that any waiver by petitioner was not knowing and intelligent. The claim that a waiver executed at trial was not knowing and intelligent could not logically be brought at the time the waiver was made.

Claim 23 alleges that the commissioner who tried petitioner's case was biased against him. That bias rendered the proceedings fundamentally unfair, both in terms of rulings made as well as the impression left on the jurors from seeing that bias. Objecting to that bias would have been futile, and would have only caused more prejudice. To the extent that trial counsel could have taken steps to alleviate this bias, it was ineffective assistance of counsel not to do so. *See In re Seaton* (2004) 24 Cal.4th 193, 200.

Claim 42 asserts that it was error to confine petitioner in a squad car while shackled, in full view of the jury, as the jury viewed the purported crime scene. Petitioner's counsel did object to this procedure. *See* Petition at 190 (citing RT 2545). Similarly, Claim 43 asserts constitutional error from shackling petitioner *after he had objected to it* and the trial court had ordered it stopped. Claim 50 claims that the trial court failed to give instructions regarding shackling *sua sponte*. By definition, if the instructions were required *sua sponte*, they need not be objected to at trial.

Claims 51, 52 and 54 all demonstrate ways in which the jury's factfinding role was usurped by the trial judge's rulings and the instructions to the jury. In so doing, the trial was rendered fundamentally unfair and violative of due process, resulting in a verdict that was not really that of the jury. To the extent that counsel could have alleviated this harm, trial counsel rendered ineffective assistance of counsel in not raising objections. *See In re Seaton* 24 Cal.4th at 200.

Claim 64 alleges that the trial court's failure to instruct the jury that it must disregard the guilt phase instruction to ignore the consequences of its verdict violated petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Under the Eighth Amendment, the jury must be able to consider sympathy and mercy, and thus the instruction should have been given *sua sponte*.

Claim 69 was previously raised in the prior petition for writ of habeas corpus. It was denied on its merits, and was not found defaulted for any reason. That finding should be considered law of the case here.

Claim 72 alleges prosecutorial misconduct involving the repeated misstatements of the law during closing argument. An objection would have been futile once the harm was done. To the extent that an objection would have alleviated the harm, it was ineffective assistance of counsel not to object. *See In re Seaton* 24 Cal.4th at 200.

Claim 74 raises both prosecutorial misconduct and ineffective assistance of counsel during guilt phase closing arguments. (Petition at 270). First, the misconduct was pervasive and prejudicial, and could not have been alleviated with an instruction, as the bell had already been rung once the prosecutor, in effect, told the jury that a prior trial had occurred. Second, to the extent that harm could have been alleviated, it was ineffective assistance of counsel not to take necessary measures. *See In re Seaton* 24 Cal.4th at 200.

Claims 75, 76 and 77 detail further prosecutorial misconduct in argument. Once again, these remarks could not be undone once they were made. To the extent that they could

have been alleviated, it was ineffective assistance of counsel not to object to them and seek an admonition or other measures. *See In re Seaton* 24 Cal.4th at 200.

Claim 78 details further prosecutorial misconduct at closing argument. Once again, these remarks could not be undone once they were made. To the extent that they could have been alleviated, it was ineffective assistance of counsel not to object to them and seek an admonition or other measures. Moreover, the prosecutor shifted the entire burden of proof to petitioner to prove his lack of culpability for the charged crimes. A prosecutor may not shift the burden of proof to the defendant. *Houston v. Roe* (9th Cir.1999) 177 F.3d 901, 909. Shifting the burden of proof on an element of the crime to the defendant violates due process. *Sandstrom v. Montana* (1979) 442 U.S. 510, 523-24. The prosecutor's comments "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright* (1986) 477 U.S. 168, 181 (quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643).

Claims 79, 80, 81, 82, 83 and 84 detail further prosecutorial misconduct at guilt phase closing argument as well as during the penalty phase. Once again, these remarks could not be undone once they were made. To the extent that they could have been alleviated, it was ineffective assistance of counsel not to object to them and seek an admonition or other measures. *See In re Seaton* 24 Cal.4th at 200.

Claim 99 alleges that petitioner was denied his right to counsel when he asked the trial court to appoint counsel to represent him when a conflict of interest arose between petitioner and his trial counsel. The trial court refused to do so. *In re Seaton* does not apply, because petitioner did ask the trial court to take adequate measures to protect his right to the assistance of counsel, and the trial court refused to do so. Petitioner repeatedly requested that counsel be appointed for him, and the trial court denied those requests. There was no failure to object on petitioner's part.

Claim 114 addresses the denial of a fair cross-section of jurors. It relies on case law

and statistics which were not available at the time of petitioner's trial. Accordingly, the exception respondent identifies (IR at 14) applies to this claim. *See In re Seaton*, at 200.

Claim 115 addresses Juror Zinn's misconduct. It was ineffective assistance of counsel not to follow the trial court's advice (Petition at 404-405; RT 2340) and excuse the juror. *See In re Seaton*, 24 Cal.4th at 200.

Claim 116 addresses biased treatment of prospective jurors by the trial court. As detailed in the petition, trial counsel did object to certain prospective jurors individually. (See, e.g., Petition at 410). Having objected, *In re Seaton* does not apply.

Claim 117 alleges that the trial court and the prosecutor both conveyed to the jury that a prior trial had taken place. Once again, these remarks could not be undone once they were made, so an objection was futile. To the extent that they could have been alleviated, it was ineffective assistance of counsel not to object to them and seek an admonition or other measures. *See In re Seaton* 24 Cal.4th at 200.

Claims 118 and 119 address petitioner's lack of competence to waive his rights at the time of his arrest and to stand trial. They are based on the declaration of Dr. George Woods (Exhibit CC). This information was not available at the time of trial. Accordingly, the exception respondent identifies (IR at 14) applies to this claim. *See In re Seaton*, 24 Cal.4th at 200. To the extent that trial counsel was aware of information supporting these claims, it was ineffective assistance of counsel not to bring these claims earlier.

Claim 120 is brought pursuant to *Ake v. Oklahoma* (1985) 470 U.S. 68. As such, it argues that trial counsel failed to ensure that petitioner received adequate assistance from mental health professionals. Counsel cannot reasonably be expected to have objected at trial to his own ineffective assistance. Moreover, the claim is based in significant part on the declaration of George Woods (Exhibit CC). This information was not available at the time of trial. Accordingly, the exception respondent identifies (IR at 14) applies to this claim. *See In re Seaton*, 24 Cal.4th at 200. To the extent that trial counsel was aware of information

supporting these claims, it was ineffective assistance of counsel not to bring these claims earlier.

Claim 121 is largely an ineffective assistance of counsel claim. Counsel cannot be expected to object to his own ineffectiveness. Rather, it is only when habeas counsel is appointed that claims may be properly brought. This information was not available at the time of trial. Accordingly, the exception respondent identifies (IR at 14) applies to this claim. *See In re Seaton*, 24 Cal.4th at 200. To the extent that trial counsel was aware of information supporting these claims, it was ineffective assistance of counsel not to bring these claims earlier.

Claim 122 alleges that Sgt. Carter's interrogation notes were falsified. This falsification did not arise at the time that the notes were made. The falsification was not made until years later. Accordingly, the exception respondent identifies (IR at 14) applies to this claim. *See In re Seaton*, 24 Cal.4th at 200. To the extent that trial counsel was aware of information supporting this claim, it was ineffective assistance of counsel not to bring the claim earlier.

Claims 123, 124, 125, 127, 133, 134, 135, 136, 137 and 139 are not the type of claims which trial counsel could have waived by failing to object as they are claims having to do with the statute under which petitioner was tried; errors that occurred on appeal; or violations of international law. Thus, they are not barred by *In re Seaton*.

F.

Petitioner's Claims Should be Resolved on Their Merits

Respondent acknowledges that Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 44, 45, 47, 48, 49, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 73, 77, 80, 81, 82, 83, 84, 85, 86, 87, 89, 90, 92, 93, 94, 96, 100, 101, 102, 107, 108, 109, 110, 111, 112, 113, 128, 129 and 130 were previously brought by petitioner either on direct appeal or in prior habeas corpus proceedings. As this Court has denied these claims, further analysis of procedural default is unnecessary. While petitioner disagrees with the Court's conclusions, he recognizes the Court's prior decisions. They are brought now for the limited purpose of exhausting the cumulative error claims and to provide context for assessing the prejudice of other claims. Petitioner also requests that the Court re-examine its prior rulings on these claims in the context of this petition, which is more complete and detailed than the prior appellate and habeas briefing in this Court.

As to those claims for which respondent's only analysis is that they have previously been rejected by this Court, petitioner relies on the claims as asserted in the petition, and on his arguments regarding defaults made in this Response. Those claims will not otherwise be directly addressed. Petitioner's response to respondent's arguments regarding the balance of the claims appear below.

Claim 11. Petitioner's Constitutional Rights Were Violated by the Failure to Follow Statutory Requirements Regarding Charges of Felony-Murder.

Respondent argues that petitioner was not harmed by the failure to charge him at the first trial with the offense underlying the charged special circumstance pursuant to Cal. Penal Code §288 as required by Penal Code §190.1, because at the second trial, the prosecutor did not charge petitioner with a felony-murder special circumstance. (IR at 21). The prosecutor did not charge the §288 felony-murder special circumstance at the second trial because the trial court at the first trial had found that special circumstance to be not true, and thus petitioner stood acquitted of that special circumstance. However, that decision at the second trial did not undo the prejudicial effect of the failure to charge the underlying offense at the first trial because the prosecutor proceeded on a § 288 lewd conduct felony-murder theory on Count 3, which would not have been available to him had he charged the underlying felony as he was required to do by law. *See* Petition at 71-74.

In other words, petitioner would have been acquitted of the 288 substantive charge by the same trier of fact at the first trial who had acquitted him of the 288 special circumstance based on the same evidence. The first degree murder in Count III then could not have been submitted to the second trier of fact on a lewd conduct felony murder theory, as it was, in addition to the wilful, deliberate and premeditated theory. (See CT 484, 486) The jury was then instructed that they did not have to unanimously agree on the theory of liability, but that each juror had to be convinced of one theory or the other beyond a reasonable doubt. (CT 502) Some jurors clearly considered the felony murder theory. In response to a jury question, they were instructed that a lewd act on a child could only be found if the attempt or the act commenced while the child was alive. (RT 2877).

Following the guilt phase verdict, petitioner's request to poll the jury to determine each juror's basis for finding a first degree murder was denied. This refusal by the trial court deprived reviewing courts of critical information for determining whether petitioner was

improperly found guilty of first degree murder on a felony murder theory.

Petitioner's first trial took place in 1980. Petitioner's second trial concluded in 1987 As petitioner pointed out, at that time it was error not to charge the underlying offense separately. (See petition at 72, ¶4). Respondent argues that the failure to charge the underlying felony was "not necessarily error" under *People v. Morris* (1988) 46 Cal.3d 1, 14. (IR at 22). *Morris* was not retroactive, and the harm to petitioner was that he may have been improperly convicted of the only first degree murder which made him death eligible.

Claim 13. **Trying Petitioner Under a Felony-Murder Theory for Count 1 Violated Double Jeopardy Since Petitioner Was Acquitted Under That Theory at the First Trial.**

Respondent argues that no error occurred because the jury was instructed that: "Count 1 charges murder in the second degree as a matter of law. This is for reasons which do not concern your deliberations and about which you must not speculate." (CT 507); Respondent's Brief at 22-23.

At the first trial, the court found that petitioner was guilty of only second-degree murder in Count 1. This finding by the court was an acquittal of first-degree murder and a rejection of the felony-murder theory as applied to Count 1. Had the court found that petitioner killed Fowler during the perpetration of lewd conduct, the trial court would have found petitioner guilty of first-degree murder. Since the court did not do so and rejected a felony-murder theory as applied to Count I, the jury should not have been allowed to use that theory in Count I at the second trial.

The jury was instructed pursuant to CALJIC 8.10, in relevant part:

> Defendant is charged in Counts 1, 2 & 3 of the information with the commission of the crime of murder, a violation of Section 187 of the Penal Code.
>
> The crime of murder is the unlawful killing of a human being with malice aforethought or the unlawful killing of a human being which occurs during the commission or attempt to commit a felony inherently dangerous to human life.

(CT 482).

The jury was also instructed pursuant to CALJIC 8.21, in relevant part:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the commission of or attempt to commit the crime of § 288 lewd act with a child, and where there was in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree.

(CT 486).

The error was allowing petitioner to be tried on a theory of murder which the trial court had rejected at the first trial. Petitioner's jury was instructed that petitioner could be

found guilty of Count 1 on a felony murder theory (CT 486) although he had already been acquitted of murder based on that theory. The fact that the jury was then instructed that Count 1 was at most murder in the second degree, and that the jury need not concern itself with the reason why, did not remove the felony murder theory from their consideration. In other words, it is impossible to tell at this point whether the jury rejected first degree murder and found only the elements of second degree murder, including intent to kill, or whether they improperly found the elements of first degree felony murder, with no intent to kill, as they were instructed, but convicted petitioner of second degree murder because that was the only verdict form they had as to that count.

Claim 14. Denial of Petitioner's Right to Counsel at the Penalty Phase of the First Trial Deprived Petitioner of Due Process at the Retrial.

It was plain error for the trial court to refuse to appoint counsel to represent petitioner in the penalty phase of the first trial. The court had properly relieved petitioner's deputy public defender following a *Marsden* hearing. *See People v. Marsden* (1970) 2 Cal. 3d 118. The court then relieved newly appointed counsel upon his declaration of a conflict of interest. Petitioner repeatedly requested the appointment of counsel, saying that he was not competent to represent himself in a complex and sophisticated penalty phase trial. (See Petition at 78-85). Respondent notes that *no evidence* was presented in the penalty phase. (IR at 23). The prosecutor presented closing argument, while petitioner did not, explaining again that he was not competent to represent himself. (See Petition at 83).

Effective capital case counsel would have presented evidence, as shown in numerous claims in this petition, which would have convinced the trier of fact that petitioner was deserving of a life sentence.

This Court did not deal with petitioner's denial of penalty phase counsel claim in *Memro I* because it reversed his conviction.

The case should have been remanded for retrial on a non-capital basis because of the gross Due Process violations.

Claim 22. Petitioner's Rights Were Violated by Assignment of a Commissioner, Rather than a Judge, to Preside Over His Case

Respondent relies on petitioner's signed stipulation allowing for the Commissioner to try the case. The only authority cited by respondent for this proposition was issued by this Court four years after petitioner's conviction (*In re Horton* (1991) 54 Cal.3d 82, 95-96). (IR at 27). Petitioner agrees that a stipulation was signed. (*See* Petition at 122-23). Petitioner however, did not, and could not, knowingly or intelligently waive his right to have his case tried by a superior court judge. Any purported waiver was not knowing and intelligent for reasons including but not limited to (a) the lack of adequate communication and advice from his attorney at the time, and (b) his inability, as a result of mental incompetence, to make a knowing and intelligent waiver. (Petition at 123).

Contrary to respondent's assertion, petitioner has submitted documentary evidence (Exhibit CC) that his waiver was not knowing and intelligent, in that petitioner was incompetent to stand trial (See Petition, Claim 119). Dr. George Woods explained:

> It is the melange of trauma, hyper vigilance, and hyper arousal, this overwhelming paranoia, that prevented Mr. Reno from rationally assisting his counsel. Unable to filter and make sense of his own misperceptions and fears, Mr. Reno, in the mental state consistent with his interrogation by the officers, was frequently unable to reconcile the needs of his defense with his own impulsive, self-destructive tendencies, precluding him from being able to rationally assist in the preparation of the different phases of his trial.

(Exhibit CC at 15). Mr. Reno's incompetence prevented him from knowingly and intelligently waiving his right to be tried before a judge.

Claim 23. Petitioner's Conviction and Sentence Must be Reversed Because of the Commissioner's Bias

Respondent claims that there was no demonstration that the Commissioner made any biased rulings against petitioner and that the commissioner's statements never affected the jury. (IR at 28). Respondent is wrong. As documented in the petition, the commissioner made comments demonstrating that he was biased against homosexuals in general and petitioner in particular. (Petition at 123-24). The commissioner recognized the impropriety of his statements, and sought to have them removed from the Reporter's Transcript. (RT 2439).

Subsequently, the commissioner allowed the admission of the juvenile male homoerotic magazines, based in large part on the gender of the people depicted in the magazines, and the gender of petitioner. (Petition at 124). He stated that gender was an important part of his ruling. (RT 2457). The court explained, out of the presence of the jury, its rationale for the admissibility of the evidence:

> It seems to me that the photographs and the magazines show a morbid interest in young boys. "It's extremely important to realize that those books and magazines do not deal with adults, they deal with children. I think that under any understanding is something that is an issue in this case. It goes to the defendant's motive and intent which is — which are issues in this case. It is not introduced for any other purposes.

(RT 2725). The commissioner's bias directly affected his ruling on the admissibility of inflammatory material that could not help but prejudice the jury. See Petition, Claim 41, p. 185.

The commissioner's bias against petitioner was again evident in his diatribe against petitioner, during a legal discussion regarding a jury question about Cal. Penal Code §288. (RT 2872). The attack on petitioner once again demonstrated that the commissioner's wrath was apparent whenever homosexuality was addressed.

Respondent asserts that this claim is waived for failure to object on appeal. (IR at 28).

Any objection would have been futile, as the commissioner was biased against petitioner in the first place. A commissioner who was biased could not reasonably be expected to sustain an objection to his own bias. To the extent that an objection was necessary and trial counsel failed to make such an objection, it was ineffective assistance of counsel not to do so.

Claim 35. The Trial Court Erred in Failing to Order Separate Transportation for Petitioner

Respondent makes two arguments against this claim. Respondent first argues that the circumstances under which a criminal defendant is handled outside the courtroom is within the discretion of law enforcement personnel. (IR at 32-33). Respondent's citation to *People v. Hill* (1998) 17 Cal.4th 800, 841, fn. 7 is misleading. The issue raised in *Hill* was the shackling of a prisoner during transport to court. The Court in *Hill* concluded that since the shackling of the prisoner during transport could have no effect on the jury, it was within the discretion of the Sheriff's Department.

In this situation, however, the transport of petitioner with known informants, which resulted in the manufacturing of false "confessions" allegedly made by petitioner, had a devastating effect on his trial in the form of evidence used against him. Petitioner is unquestionably entitled to due process and a fair trial. The transportation of the very informants who were known to be offering testimony against him on the same bus with petitioner provided those informants with a credible claim that petitioner had made admissions and confessions to him. The trial court has the duty to protect petitioner's constitutional trial rights, and has the inherent power to order the Sheriff to protect those rights. The court refused to invoke its power despite ongoing protests from the defense.

The trial court during petitioner's first trial, however, had no problem issuing orders regarding petitioner's transportation. Upon the suggestion of the Sheriff's Department personnel, the court issued an order requiring separate transportation. (1978 RT 678) That order was followed without incident.

Respondent's second argument is that petitioner failed to show how his transportation affected his ability to receive a fair trial since his statements on the bus were not admitted at trial. (IR at 33). While informant Cornejo's testimony was not introduced at trial, that testimony nonetheless had a critical effect on petitioner's trial.

Cornejo did testify at a suppression and admissibility hearing in which the court considered whether law enforcement coerced petitioner into giving statements in 1978. At that hearing, Cornejo testified that while being transported together on a jail bus, petitioner told him that he was involved in a triple murder case which had been reversed. Cornejo testified that petitioner said he had lied about the statements he made to law enforcement having been coerced, when in reality, they had been made freely by petitioner. (RT 993-996). The Court relied on this evidence, as well as other evidence presented at a §402 hearing, in determining petitioner's confession was both free and voluntary. (*See* Petition, Claim 16).

Cornejo's testimony was false. Cornejo was a notorious jailhouse informant who regularly sought to testify against defendants in order to obtain benefits in his own pending cases. (Exhibit D). Cornejo admitted to another informant, Leslie White, that he had perjured himself, and said that he learned about petitioner's case by reading this Court's opinion in the decision reversing the verdict in petitioner's first trial. (Exhibit S-E). Leslie White also testified at the same §402 hearing that petitioner had confessed to him. White admitted that his testimony was perjured as well, and that it was given in exchange for concealed benefits. (Exhibit S-E).

The end result was that perjured testimony from informants was presented at the hearing to determine the voluntariness of petitioner's statements to law enforcement. That perjured testimony was critical in the court's decision finding that the statements were voluntarily made. Evidence that petitioner had admitted that he was lying in claiming that his statements were coerced was extremely powerful evidence. But for the perjured testimony of informants, petitioner's statements would have been suppressed, and the case against petitioner would have disintegrated. It is reasonably likely that the outcome of petitioner's trial would have been different.

Even assuming, *arguendo*, that the testimony of Cornejo was possibly truthful, it was still not admissible, as Cornejo was acting as a government agent, and any statements made

to him by petitioner were inadmissible pursuant to *Massiah v. United States* (1964) 377 U.S. 201. (*See* Petition, Claim 37)

Claim 42. Confining Petitioner to a Marked Squad Car in Full Sight of the Jury While the Jury Viewed the Crime Scene was a Deprivation of Petitioner's Fifth, Sixth and Fourteenth Amendment Rights

Respondent argues that a showing of necessity is not required for restraints during a jury view of a crime scene. (IR at 36). Respondent cites Cal. Penal Code §1119,[12] which makes no mention of shackling a defendant, or in any way grants authority for doing so. Respondent also cites *People v. Hardy* (1992) 2 Cal.4th 86, 180 as supporting his argument. In *Hardy*, however, there is no indication that the jury was going to hear any testimony or any explanation of the crime scene, as occurred in petitioner's case. (*See* Petition at 190-191). Petitioner was confined in a marked squad car away from the jury, and was unable to hear the testimony or the comments of the lawyers and the court. This error was exacerbated by the fact that testimony took place (petition at 190, ¶3), which was not transcribed. (Petition at 191, ¶6).

Respondent cites *People v. Roberts* (1992) 2 Cal.4th 271, 306-307 for the same proposition. *Roberts* does not deal with a situation in which testimony was to be taken during the jury viewing. It also does not address the situation where testimony was taken, but that testimony was not transcribed.

Respondent also argues that a trial court may control the conditions under which a defendant views a crime scene. (IR at 36). The cases cited by respondent are largely

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[12] Penal code §1119 states: When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, or any personal property which has been referred to in the evidence and cannot conveniently be brought into the courtroom, it may order the jury to be conducted in a body, in the custody of the sheriff or marshal, as the case may be, to the place, or to the property, which must be shown to them by a person appointed by the court for that purpose; and the officer must be sworn to suffer no person to speak or communicate with the jury, nor to do so himself or herself, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time.

inapplicable here. *People v. Benjamin* (1975) 52 Cal.App.3d 63, 76-77 addresses a jury view of a crime scene in which testimony was not given before the jury. *People v. Cooks* (1983) 141 Cal.App.3d 224, 323 addresses the trial court's decision to have the jury view the crime scene during the day while the crimes were committed at night. *People v. O'Brien* (1976) 61 Cal.App.3d 766, 779-80 similarly dealt with the question of whether jurors could view the locations where various officers made identifications of a suspect during the day, when their observations actually occurred at night. None of these cases address issues similar to those occurring in petitioner's case.

Respondent then contends that no error occurred because a jury view of the crime scene is not a critical stage of criminal proceedings. (IR at 36). Respondent ignores the fact that testimony was taken at the crime scene, and the taking of testimony is a critical stage of the proceedings, as the case cited by respondent dictates. (IR 36). *See Snyder v. Massachusetts* (1934) 291 U.S. 97, 106-08. The taking of testimony distinguishes petitioner's case from the others which respondent cites. *See, e.g., People v. Benjamin* (1975) 52 Cal.App.3d 63, 76-77; *People v. Lindsay* (1964) 227 Cal.App.2d 482, 507 (relying to a large extent on a perceived lack of objection by the defendant).

Claim 43. Shackling Petitioner in Court Deprived Him of his Fifth, Sixth, Eighth and Fourteenth Amendment Rights

Respondent contends that no error was committed when petitioner was shackled because petitioner was shackled after the guilt verdicts were returned; during a *Marsden* hearing outside the jury's presence; and at a pretrial hearing. (IR at 36-37). Respondent ignores the fact that shackling can have other important effects on a defendant other than prejudicing him in front of the jury. Those effects include impairment of the defendant's faculties, impeding communication, detracting from the dignity of the proceedings and causing pain. (*See also* Petition at 195). Each of these effects may be realized regardless of whether a jury views a defendant in shackles.

In particular, one of the complained-of occurrences took place at a *Marsden* hearing regarding the presentation of petitioner's case in the penalty phase. (RT 2893-1 to 2893-7). Petitioner complained that trial counsel refused to tell him of the witnesses they planned to call or what questions they would ask. This was an important opportunity for petitioner to be able to communicate effectively, with both the trial court and counsel. Moreover, it detracted from the dignity of the proceedings by having petitioner shackled while trying to show the court that he was not being treated fairly by his trial attorneys.

The cases cited by respondent hold that "shackling is to be employed only as a last resort, based on 'a showing of manifest need for such restraints.'" *People v. Sheldon* (1989) 48 Cal.3d 35, 945 (citing *People v. Allen* (1986) 42 Cal.3d 1222, 126; *People v. Duran* (1976) 16 Cal.3d 282, 290-291; *People v. Jacla* (1978) 77 Cal.App.3d 878, 883). There was no demonstration of a manifest need for such restraints here. *See e.g., People v. Duran, supra*. Petitioner did not pose any behavioral problems to the trial court or the sheriff's deputies. He did not have a record of escape attempts or a history of violence as a prisoner. No facts had been uncovered that he was planning to escape or was a flight risk. *See, e.g., People v. Burnett* (1980) 111 Cal.App.3d 661; *People v. Jacla* (1978) 77 Cal.App.3d 878;

People v. Cox (1991) 53 Cal.3cd 618, 651.

Contrary to respondent' arguments, the fact that shackling may occur in the penalty phase does not alter the analysis. *Deck v. Missouri* (2005) 125 S.Ct. 2007, 2014 ("Although the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That decision, given the "'severity'" and "'finality'" of the sanction, is no less important than the decision about guilt. *Monge v. California*, 524 U.S. 721, 732, 141 L. Ed. 2d 615, 118 S. Ct. 2246 (1998) (quoting *Gardner v. Florida*, 430 U.S. 349, 357, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977)). The dangers of hampering communication, causing pain and detracting from the dignity of the proceedings were equally present in the penalty phase as they were in the guilt phase.

Claim 46. The Trial Court Erred by Overruling Trial Counsel's Objection for a Failure to Comply With a Discovery Order by the Bell Gardens Police Department and for Allowing It to be Introduced as Surprise Testimony, in Violation of Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment Rights

Respondent argues that the fact that the police deliberately did not release to the press the information that a milk jug found at the Fowler/Chavez crime scene was cut in a unique manner known only to the killer was not discoverable, and thus it was not error for the prosecutor not to disclose this information until Officer Barclift testified during petitioner's trial. (IR at 39). Respondent argues that this fact was not discoverable because the discovery order referred only to "*lists* of items or evidence not released to the newspapers prior to defendant's arrest." (IR at 39, emphasis in original).

It appears that respondent's position is that the prosecutor was under no obligation to make a list of items or evidence not turned over. Instead, according to respondent, the prosecutor was only obligated to turn over then-existing-lists of such evidence or items. In other words, according to respondent, if there were 100 items not turned over to the newspapers prior to petitioner's arrest, but the prosecutor had deliberately avoided making a list of those items, the prosecutor was under no obligation to turn over any information to the defense about those 100 items, because a list did not currently exist.

Respondent's argument would, in essence, allow the prosecutor to profit from his own wrong by rewarding him for his efforts to hide evidence. The trial court did not accept the prosecutor's interpretation that the information need not be turned over because the prosecution avoided writing it down. Instead, the trial court stated that the issue was largely moot, because petitioner had given two separate confessions to two different police agencies. (RT 2507). The trial court found that this evidence was not important enough to concern itself with, and therefore overruled the objection as moot.

This decision by the trial court was erroneous. The evidence was either inadmissible

because of the failure to comply with the discovery order or it was admissible because of compliance. The court's feelings about the strength of other evidence against petitioner bore no legal relation to the admissibility of this evidence. It appears that the trial court simply threw up its hands and decided that the evidence really wouldn't matter, and let it in because it felt that petitioner would be convicted anyway. That type of reasoning does not comport with due process.

That reasoning, even if it did comport with due process, made no sense. If, in fact, the evidence of petitioner's guilt was so overwhelming, then this evidence was unnecessary and cumulative. If the trial court was unable or unwilling to determine whether it should be admitted, in large part because the trial court was convinced of petitioner's guilt, then it would have been more logical to exclude potentially objectionable evidence than to allow its admission, knowing that doing so could require reversal.

The trial court did not agree with the prosecutor's interpretation. The logical interpretation of the discovery order is that the prosecutor was to create and disclose a list of the items and evidence which had not been disclosed to the press prior to petitioner's arrest. A prosecutor cannot avoid the requirement of turning over a witness list by avoiding writing down such a list. The non-disclosure of the evidence list should be treated in the same manner.

This non-disclosure by the prosecutor was grossly prejudicial. By the time that trial counsel had been made aware of it, counsel had already made critical decisions about how the case would be tried. Trial counsel had chosen to defend the case based on the theory that the officers had coerced a confession out of petitioner, and thus the confession by petitioner to the Chavez/Fowler killings was false. To the extent that petitioner was aware of the unique milk bottle, that was an important fact which trial counsel needed to be aware of and account for if counsel were to adequately defend petitioner.

Trial counsel explained that had they been aware of this information previously, they

could have dealt with it appropriately. Counsel noted, for example, that they had decided not to present psychiatric testimony or evidence. (RT 2510-12). Had counsel thought that they could not defend on factual innocence, they might well have come to a different decision regarding the presentation of mental illness testimony. There was a viable defense based on psychiatric testimony. Dr. George Woods has diagnosed petitioner as suffering from Borderline Personality Disorder and Post Traumatic Stress Disorder. (Exhibit CC at 5). Dr. Woods opines "that the instant offenses for which Mr. Reno was charged and convicted occurred when he was in a dissociative rage reaction, consistent with both diagnostic categories. The lack of control over his impulsive rage reactions precluded him from being able to premeditate and deliberate." (Exhibit CC at 5).

In regard to Borderline Personality Disorder, Dr. Woods explained that "We also see the impulsivity, born of paranoia and misperceptions, that overtook Mr. Reno and prevented him from, secondary to one of the most pervasive of mental disorders, premeditating and deliberating the deaths of Mr. Carter, Mr. Fowler and Mr. Chavez." (Exhibit CC at 8-9). In regard to petitioner's Post Traumatic Stress Disorder, Dr. Woods stated that petitioner's "lack of 'affect modulation' has disrupted Mr. Reno's life most tragically in his inability to control his paranoia, leading to spontaneous, irrational, and, in my professional opinion, unstoppable rage reactions." (Exhibit CC at 14). Dr. Woods stated:

> The emotional instability that is the core of Borderline Personality Disorder, the potential to have immature, infantile sexual relationships, the lack of adequate self-identity, and the complete loss of inhibitory emotional structures lay, in my professional opinion, at the core of the impaired mental processes, the diminished capacity, experienced by Mr. Reno at the time of the instant offense for which he is Mr. Reno was in a fit of rage at the time of the Carter, Fowler and Chavez murders. Mr. Reno's Borderline Personality Disorder, and the impulsive rage that is pathognomic for this disorder, caused him to lack substantial capacity to both premeditate and deliberate before and during these three homicides. These constants of Borderline Personality Disorder have been understood to form the core of this diagnosis, and have been used to diagnose and treat this disorder for decades. It is my professional opinion that competent professionals would have drawn the same conclusions at the time of trial.

(Exhibit CC at 17). Dr. Woods concluded that "the deaths of Mr. Carter, Mr. Fowler, and Mr. Chavez occurred in dissociative rage reactions, consistent with the PTSD and Borderline Personality Structure. This pathological impulsivity prevented Mr. Reno from being able to premeditate and deliberate at the time of the instant offenses for which he was convicted." (Exhibit CC at 22).

A viable mental illness defense had been presented at the first trial. Dr. Michael Coburn testified that petitioner was a very disturbed individual and it was unlikely that petitioner premeditated and deliberated the offenses because of his extreme emotionality and primitive nature. (1978 RT 832). He testified that it was unlikely that petitioner had the capacity to form malice. (RT 835-36). Moreover, the killings were too explosive and primal for premeditation and deliberation. (RT840).

Based on the opinion of Dr. Woods and the testimony of Dr. Coburn, it is reasonably likely that trial counsel's ability to prepare petitioner's case at the second trial was affected by the government's hiding of knowledge that the condition of the milk bottle had deliberately been withheld from the media.

Claim 50. The Trial Court Committed Reversible Error by Failing to Instruct the Jury that Shackling Had No Bearing on the Determination of Guilt or Penalty

Respondent argues that petitioner remained in the back seat of a patrol car during the entire jury viewing of the crime scene, and thus the jury was not aware that petitioner was shackled. (IR at 41). Respondent is mistaken.

Petitioner's claim is that he was erroneously isolated from the jury in a squad car while shackled, and was kept away from the jury by a significant distance. (Petition, Claim 50, ¶1). The thrust of the claim is that it is unconstitutional to telegraph to the jury that petitioner posed such a danger to the jury that such severe measures had to be taken to isolate him from them. The fact that this isolation took place during a jury viewing where testimony was given (see Claim 42) conveyed to the jury that they needed to be separated from petitioner at all costs.

The issue is not whether the jury saw petitioner in handcuffs, but how they were affected by their viewing of petitioner confined in a squad car. Contrary to respondent's argument (IR at 41), they were clearly not unaware of petitioner's confinement.

Petitioner's confinement under these conditions was every bit as prejudicial as viewing petitioner in shackles would have been. The message sent to the jurors was that petitioner was a violent person disposed to commit crimes similar to those charged. (*See also* Petition Claim 50, ¶3).

Under these circumstances, petitioner was entitled to a sua sponte instruction, under both state and federal law, that restraints should have no bearing on the question of petitioner's guilt. *See* Petition at 213-14 (citing *People v. Duran* (1976) 16 Cal.3d 282, 291-92). The failure to give such an instruction violated due process.

Claim 51. The Trial Judge Deprived Jurors of Their Factfinding Role by Ordering Them to Presume that Petitioner's Purported Confession was Voluntary, in Violation of Petitioner's Fifth Amendment, Sixth Amendment, Eighth Amendment and Fourteenth Amendment Rights

Respondent argues that the trial court properly told the jury not to consider whether proper *Miranda* warnings were given before petitioner spoke with law enforcement while in custody. (IR at 42). Respondent argues that under the circumstances of petitioner's case, it was not error or prejudicial.

Here, the error occurred in the way the court gave its "instruction" to the jury. Contrary to respondent's argument, the trial court erred when it told the jury that they were to take "as a given fact" that petitioner was properly advised of his constitutional rights and that he waived them. (RT 2378). "So for your purposes you will assume he's been properly advised of his constitutional rights and that he's waived and given up those rights." (RT 2378). This direction by the court deprived petitioner of the right to have a jury determination of the voluntariness and truthfulness of his purported confession.

It appears that the trial court may have intended to say that the issue of the admissibility of petitioner's statements was not before them. It would have been simple enough to say that. The trial court could have said that without telling the jury that petitioner had been properly apprised of his rights and that he had waived them.

Respondent cites *People v. Markham* (1989) 49 Cal.3d 63 as support for her position. *Markham* addressed the question of whether article I, section 28, subdivision (d) of the California Constitution, commonly referred to as the "truth-in-evidence law" and adopted in 1982 as part-and-parcel of the ballot initiative popularly known as Proposition 8, abrogated the rule of *People v. Jimenez* (1978) 21 Cal.3d 595 requiring proof beyond a reasonable doubt of the voluntariness of a defendant's statement to law enforcement. This Court in *Markham* determined that the truth-in-evidence law did abrogate the *Jimenez* rule.

However, *Markham* does not affect petitioner's claim. Petitioner does not take issue with the burden of proof applicable to deciding whether petitioner's statement was voluntary. Rather, petitioner argues that it was error for the trial court to instruct the jury that petitioner's theory of the case was wrong as a matter of fact.

Respondent cites Cal. Evid. Code §402(b), which states that the trial court may determine, outside the presence of the jury, the admissibility of a defendant's statement. Petitioner does not dispute that determining the admissibility of his statements outside the jury's presence was proper. Once that determination was made, however, it was error to instruct the jury in such a way that the court told them as a matter of fact that petitioner's version of the facts was false.

Respondent also cites Cal. Evid. Code §405, which states that the trial court shall determine the existence of preliminary facts as necessary in order to decide the admissibility of disputed evidence. Section 405(b)(1) states, however, that "The jury shall not be informed of the court's determination as to the existence or nonexistence of the preliminary fact." The trial court did precisely what this section prohibits. Whether or not petitioner had been properly Mirandized and had voluntarily waived his rights were preliminary facts, which the trial court needed to determine in order to decide whether petitioner's statements were going to be admitted. Once the trial court made that determination, however, this section prohibited the trial court from informing the jury of the court's determination of those facts.

Respondent also cites to Cal. Evid. Code §406. (IR at 42). That section states that determinations about admissibility do "not limit the right of a party to introduce before the trier of fact evidence relevant to weight or credibility." Under this section, petitioner was entitled to argue, and attempt to prove before the jury, that he was not properly advised of his rights, that he didn't voluntarily waive those rights, and that the police coerced petitioner into making a statement which was false. The trial court's instruction to the jury eviscerated petitioner's right to attack the credibility of his statements to law enforcement.

Respondent argues that the trial court properly instructed the jury that they should view evidence of petitioner's statements with caution. (CALJIC 2.70 , IR at 42). This standard instruction, given days later at the close of the evidence, did not undo the harm done by the court's prior admonition that petitioner had voluntarily waived his rights. While the jury may have been told to view the statements with caution, that viewing had little effect since the jury had already been told that petitioner's theory of the case was false. The admonishment to view the statements with caution was likely interpreted as an instruction to compare it carefully to the required elements of the crimes in order to determine if the prosecution had met its burden of proof.

In *People v. Ybarra*, 17 Cal. 171, the Court explained:

> "This provision is violated whenever a judge so instructs as to force the jury to a particular conclusion upon the whole or any part of the case, or to take away their exclusive right to weigh the evidence and determine the facts. The meaning of the provision is that the judge shall decide upon the law, and the jury upon the facts, and that the former shall not invade the province nor usurp the powers of the latter. The judge has no more right to control the opinion of the jury upon a matter of fact than the jury have to disregard the directions of the judge upon a matter of law."

The admonition took away petitioner's right to have the jury weigh the evidence and determine the facts regarding the voluntariness and truthfulness of petitioner's statement.

Claim 52. The Trial Court's Improper Instruction to the Jury that Petitioner's Confession was Voluntary was Improper Vouching

Respondent argues that the trial court's instruction (see Claim 51) was not improper vouching for the credibility of the police officers. (IR at 42-43). Just as in regard to Claim 51, respondent errs by characterizing the trial court's instruction as properly instructing the jury as to the sufficiency of *Miranda* warnings given to petitioner. As petitioner discussed above, the court's instruction amounted to a determination of the facts of the case by the trial court which the trial court instructed the jury they had to follow.

To the extent that the jurors felt that they were nonetheless able to decide whether petitioner's statements were coerced or voluntarily given, in order to assess their accuracy, the court's instruction nevertheless amounted to vouching for the law enforcement witnesses. The defense claimed that the officers coerced petitioner into giving an involuntary statement, while the officers claimed that the statements were voluntary. The officers testified that they had properly *Mirandized* petitioner and that he had voluntarily waived those rights. The trial court's instruction told the jurors, in essence, that the officers were truthful in their testimony regarding *Miranda* and the waivers of those rights.

By instructing the jurors that an important part of the officers' testimony was in fact truthful, the court was putting the impression in the jurors' minds that the police officers were generally truthful, and that any credibility determinations should be made in favor of those officers and was thus improper vouching for their credibility.

Claim 53. The Trial Court Erred in Failing to Tell the Jury Sua Sponte that Count 1 Was Charged Only as Second Degree by Law, Which Is the Maximum Charge the Facts Can Support

Respondent argues that it would have been erroneous to instruct the jury that Count 1 was at most second degree murder and that doing so would confuse the issues and create havoc. (IR at 43-44). Respondent cites *People v. Wash* (1993) 6 Cal.4th 215, 252-254. (IR at 43-44). Respondent is wrong.

People v. Wash, is inapplicable to this case. In *Wash*, the issue was the type of questions which would be asked of potential jurors in order to determine their knowledge about that case. Here, the issue is whether the jurors actually deciding the case should have been given accurate instructions as to what offenses were being brought against petitioner.

In *Wash*, at the start of the penalty retrial, defense counsel requested the court to inform the prospective jurors that the first penalty trial had resulted in a hung jury and to specifically question them about their knowledge of the matter. Counsel stated that the request was motivated by two concerns: First, that the publicity surrounding the recent California Supreme Court retention election (in which three justices were removed) might lead some jurors to mistakenly assume that defendant's prior death judgment had been reversed on a legal "technicality"; second, that several newspaper articles had revealed the first jury's vote to be nine to three in favor of death, which might prejudice certain jurors with this knowledge. The trial court in *Wash* denied the motion, but emphasized that counsel could question the jurors generally as to whether they had heard or read anything about the case, and could follow up with specific questions if any indicated an awareness of the earlier hung jury. Counsel renewed the motion midway through voir dire after several jurors had referred to the Supreme Court election in response to questions about their views on the death penalty. The trial court in *Wash* again denied the motion.

Respondent argues that the reasons for charging a particular crime, or for not charging

a higher degree of an offense, are not relevant. (IR at 43). Whether or not the reasons for charging a particular degree of a crime are relevant is not at issue here. The issue is whether the jury should have been instructed as to the degrees of the offense that were being submitted to the jury for decision. Petitioner was entitled to have the jury accurately instructed, particularly in a capital case. *See, e.g., Simmons v. South Carolina* (1994) 512 U.S. 154 (1994).

Respondent also takes issue with the possibility that the jury could analogize between Count 1 and Count 3 and decide that they were both second degree murders. (IR at 43-44). The jury was certainly entitled to determine that the murders were similar, and both were second degree. The fact that they might analogize in that fashion was no reason to refuse to give an accurate and appropriate instruction, which would have directed them accordingly.

The instruction could have been given in such a way as to eliminate any undue prejudice. The trial court could have instructed the jury that Count 1 was charged as second degree murder only, and the jury was not to concern itself with the reasons for that decision. This instruction, in combination with an instruction that each count was to be determined separately and independently, would have sufficed to give the jury accurate instructions without prejudicing the jury's decision on other counts.

The prosecutor was free to argue that the facts of Count 3 were completely separate from the facts of Count 1, and that the facts of Count 3 warranted a first degree murder conviction. What is clear is that the prosecutor did not like the prior trial court's determination that Count 1 at most supported a conviction of second degree murder:

> Well, I'm not sure that the verdicts objectively make a lot of sense from the first trial. And I'm not saying that to be critical or anything like that, I just think that's a fact. And for the jurors to hear essentially two murders that are more or less identical ... and to be told that Count 1 is second degree [would be] very prejudicial to the prosecution.

(RT 2222; *see also* IR at 44). It appears that the prosecutor wanted to be free to "retry" petitioner for first degree murder on Count 1, although he could at most get a conviction for

second degree murder. The prosecutor was limited to a second degree murder conviction on Count 1, and petitioner sought no more than accurate instructions to the jury on this fact.

As discussed in the Petition (*ee* Petition at 220), the facts relating to the Fowler killing and the facts relating to the Carter killing were similar. Both appear to have been killed in a burst of anger, as opposed to a methodical, premeditated decision to kill. A conviction for second degree murder on the Carter killing would have rendered petitioner ineligible for the death penalty, since that was the only killing of the three, which took place after the California death penalty law came into effect. Even if petitioner had been convicted of first degree murder in the Carter killing, thus making petitioner death eligible, if the jury properly viewed Count 1, and perhaps Count 2, as second degree murders, their assessment of the appropriate penalty would have been entirely different.

Claim 54. Instructing the Jury Pursuant to CALJIC 8.31 Unconstitutionally Lessened the Prosecution's Burden of Proof

Respondent argues that because CALJIC 8.31 is a correct statement of law, it was not error to give it in this case. (IR at 44-45). Respondent cites *People v. Swain* (1996) 12 Cal.4th 593, 601-03, in support of his arguments. In *Swain*, the Court addressed whether a defendant could be found guilty of conspiracy to commit second degree murder where the theory of murder was not based on express malice, but was based on an implied malice theory. This Court held that implied malice murder could not be used to convict a defendant of conspiracy to commit murder, and reversed the defendant's conviction on that charge. The facts of *Swain* render it largely inapplicable to petitioner's case.

Petitioner contends that it was error to give CALJIC 8.31 because the effect of doing so was to eliminate the requirement of intent to kill entirely from second degree murder. Under respondent's theory, a conviction of second degree murder is available any time a person dies, because whatever act killed them would inevitably involve a high degree of probability that death would result. In other words, respondent effectively renders express malice murder moot, because any time the elements of express malice murder were found, the elements of implied malice murder would also be found.

The trial court recognized that this was not an implied malice case. (RT 2676). This was not the type of case in which the perpetrator committed an act which was generally dangerous to the public, but not targeted at a specific victim. (*See, e.g., People v. Watson* (1981) 30 Cal.3d 290 [driving at excessive speeds and recklessly while intoxicated]). The perpetrator killed a specific victim by slicing his throat. There was no risk to the public at large, but only to the targeted victim. The implied malice second degree murder instruction, CALJIC 8.31, should not have been given where the court found that the killing was not an implied malice killing.

CALJIC 8.30 and 8.31 must have separate meanings. As discussed in the petition, the

former was an appropriate theory in this case, while the latter was not. It was error to instruct the jury pursuant to CALJIC 8.31.

Claim 55. The Trial Court Erred by Giving a Misleading Jury Instruction, When a More Precise Instruction Was Requested by Trial Counsel and Violated Petitioner's Due Process Rights Under the Fourteenth Amendment

Respondent argues that this claim is not supported by logic or law. (IR at 46). Respondent is wrong. Petitioner's reasoning is entirely logical and based on the law. The instruction told the jury to fill out the verdict form if they unanimously agreed on both counts 2 and 3. (*See also* Petition at 224). The use of the word "both" was problematic, as it informed the jury that they were to fill out verdict forms once they agreed that petitioner was guilty of both counts 2 and 3. It is axiomatic that petitioner was entitled to an individual verdict on each charged offense, as opposed to having certain counts linked together for a joint determination. (*See also* Petition at 224-26).

Trial counsel requested that the word "both" be replaced with "either or". The trial court overruled the objection because the court was tired of editing the instructions. (See petition at 224). Thus, it does not appear that the trial court believed the instruction to be correct, but only that the trial court did not wish to make any more changes to the instructions. These actions by the trial court violated petitioner's right to due process and heightened capital case reliability. It was the trial court's responsibility to provide accurate and complete instructions to the jury.

Assuming that counsel would discuss the verdict forms in argument was not sufficient to excuse the trial court's knowing use of inadequate instructions. "[A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law." *Boyde v. California,* (1990) 494 U.S. 370, 384 (citation omitted). "[A]rguments of counsel cannot substitute for instructions by the court." *Taylor v. Kentucky* (1978) 436 U.S. 478, 489. In *Taylor,* the Supreme Court was faced with

a situation where the trial court did not give instructions on the presumption of innocence. The Court explained:

> Petitioner's right to have the jury deliberate solely on the basis of the evidence cannot be permitted to hinge upon a hope that defense counsel will be a more effective advocate for that proposition than the prosecutor will be in implying that extraneous circumstances may be considered. It was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably. See *Estelle v. Williams*, 425 U.S., at 503.

Taylor v. Kentucky, supra.

Just as Taylor was entitled to instructions on the presumption of innocence, petitioner was entitled to accurate instructions regarding the verdict form, making it clear that the verdicts on each count were not linked. In *Taylor*, the Supreme Court rejected the State's argument that there was no error because the jury had been instructed on reasonable doubt. Here, this Court should similarly reject respondent's argument that there was no error because the jury was otherwise instructed that they should consider the crimes separately. That instruction did not undo the improper linkage in CALJIC 8.75, which was far more specific than a general command to consider each count separately.

Claim 64. The Death Verdict Must be Reversed Because the Court Failed to Instruct the Jury that the Guilt Phase Instruction to Disregard the Consequences of its Verdict Did Not Apply to its Deliberations at the Penalty Phase

The Supreme Court's decisions in *Lockett v. Ohio* (1978) 438 U.S. 586 and *Eddings v. Oklahoma* (1982) 455 U.S. 104 make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any sympathy factor raised by the evidence before it. *See also Woodson v. North Carolina* (1976) 428 U.S. 280, 304 (plurality opn.). Because it is in direct conflict with Penal Code §190.3(k), which permits a jury to consider sympathy during the penalty phase, CALJIC 1.00 is not to be given in the penalty phase of a capital case.[13] *See, e.g., People v. Easley* (1983) 34 Cal.3d 858, overruled on other grounds, *People v. Brown* (1985) 40 Cal.3d 512; s*ee also People v. Bandhauer* (1970) 1 Cal.3d 609, 618; *People v. Polk* (1965) 65 Cal.2d 443, 451; *People v. Anderson* (1966) 64 Cal.2d 633; *People v. Friend* (1957) 47 Cal.2d 749, 767-68.

Here, the jury was entitled to base its decision on sympathy. Mitigating evidence was produced about petitioner's troubled childhood through his sister. (RT 2942-57).

Neither the Sixth Amendment right to a fair trial nor the Fourteenth Amendment right to due process of law may be ensured without a properly instructed jury. *See Sullivan v. Louisiana* (1993) 508 U.S. 275. California law holds that the trial court in a criminal case has the primary duty to help the jury understand, which legal principles to apply. *People v. Moore* (1996) 44 Cal.App.4th 1323, 1329.

It is the trial court's duty to provide the jury with adequate instructions that inform the jury that the jurors are allowed to consider sympathy when deciding on the appropriate penalty. "When a jury is the final sentencer, it is essential to ensure that the jurors be

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[13] To the extent that this Court has previously rejected similar arguments (IR at 50), petitioner respectfully requests that the Court reconsider those rulings in light of the facts and arguments presented in this case.

properly instructed regarding all facets of the sentencing process." *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 836 (*en banc*) (citing *Walton v. Arizona* (1990) 497 U.S. 639, 653. To satisfy the Eighth Amendment, the procedures applied to capital sentencing must guide and limit the jury's discretion. *Godfrey v. Georgia* (1980) 446 U.S. 420. Jurors cannot be presumed to know that they should disregard certain instructions as inapplicable in favor of those which actually do apply. *Bollenbach v. United States* (1946) 326 U.S. 607, 613-14.

Here, the trial court did not instruct the jurors that portions of CALJIC 1.00 did not apply. The jury was thus instructed that they were not be to swayed by sympathy for the petitioner. The fact that the instructions may have been technically correct did not mean that the jurors would understand them that way. In *Easley,* this Court concluded that the harm done by an anti-sympathy instruction in the penalty phase was not undone by the presence of other instructions, including CALJIC 8.84.1, which advised the jurors that they could consider as a mitigating factor "any aspect of the defendant's character or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 878. The same is true here.

Claim 69. The Prosecution's Presentation of Facts was Directly Contrary to Those Contained in the Missing-Juvenile Report

Respondent attempts to argue that the missing-juvenile report, which stated that Scott had seen Carl at 7:00 p.m. was not accurate, while the testimony that petitioner saw Carl around 6:00 p.m. was accurate. (IR at 53). The issue is not, however, which evidence was more credible. Rather, the question is whether the prosecution was allowed to present evidence during a probable cause determination as true when they knew that there was contradictory evidence that showed that the prosecution theory was not true and when that evidence corroborated petitioner's statements that he had dropped Carl off and watched Carl walk toward his home.

Respondent argues that the statement in the report that Scott had last seen Carl around 7:00 p.m. was only an approximation, and thus did not directly contradict the testimony of Officer Sims that petitioner was the last person to see Carl alive. (IR at 53). This argument might go toward the weight to be assigned to the missing-juvenile report, but it does not support the complete suppression of the report. Whether respondent finds the information in the report credible or not, it was still evidence that the court should have to considered when making a probable cause determination.

Moreover, there is no notation in the missing juvenile report that the time Carl was last seen was only an approximation. (Exhibit S-H, at 451). It states unequivocally that Carl was last seen at 7:00 p.m. by his brother Scott. This was the state of the evidence at the time that the probable cause determination was made. That being the state of the evidence, it should have been presented at the time.

Respondent relies on the 1982 declaration of Officer Schoonover in an effort to impeach the missing-juvenile report. That declaration did not exist at the time the probable cause determination was made. Post-hoc rationalizations do not excuse the failure to present available, critical evidence during the probable cause hearing, particularly after presenting

other evidence, which was demonstrably false.

Respondent claims that Officer Sims gave no false testimony because he actually believed petitioner was the last person who saw Carl. (IR at 53). The evidence does not support this contention. The missing-juvenile report was taken by Officer Schoonover. (Exhibit S-H, at 451). According to Officer Schoonover's declaration (IR, Exhibit A), the notation that Scott had seen Carl at 7:00 p.m. was an approximation made by Schoonover. Assuming, *arguendo*, that this is true, there is no indication that Sims was aware of that fact. Sims admitted that he was aware of the missing-juvenile report (Petition at 254), but never stated that he was aware that Schoonover's unequivocal notation that Scott saw Carl at 7:00 p.m. was an approximation.

Respondent claims that there is no evidence that the prosecution was aware of the alleged falsity of any evidence. (IR at 53-54). The prosecution was aware of the missing-juvenile report. The prosecution was not aware of the Schoonover declaration, as it did not exist for another four years. The prosecution presented evidence that petitioner saw Carl around 6:00 p.m. (1978 RT 60-63, 70-72). The juvenile report, which at that point was uncontradicted, stated that Scott saw Carl at 7:00 p.m. This evidence should have been presented at trial.

Respondent ignores the claim that it was ineffective assistance of counsel for trial counsel not to use the missing-juvenile report to cross-examine Sims or as direct evidence before the trial court. *See* Petition at 254; IR at 52-54. Assuming, *arguendo*, that Sims' testimony was not demonstrably false, the juvenile report was nonetheless powerful evidence with which to impeach Sims' testimony. In order to succeed on an ineffective assistance of counsel claim, a petitioner must demonstrate that counsel's representation was deficient and that such deficiency prejudiced his or her defense. *See Strickland v. Washington*, 466 U.S. at 687. Counsel's representation is considered deficient when his performance falls below "reasonableness under prevailing professional norms." *Id.* at 688.

Trial counsel was attempting to demonstrate that probable cause for petitioner's arrest was lacking. The prosecutor conceded that if probable cause to arrest petitioner was lacking, then his arrest was unlawful and all the evidence resulting from it, including petitioner's statements and the discovery of Carter's body, were inadmissible. (RT 63). With the entire case at stake, there was no excuse not to introduce the missing-juvenile report and impeach Sims with that report. There was no information contained in the report which harmed petitioner's case, so this decision cannot be considered a tactical decision made in order to avoid the introduction of damaging evidence.

Claim 71. The Prosecutor Committed Misconduct in Violation of Petitioner's Constitutional Rights in Failing to Disclose Impeachment Evidence Regarding Jailhouse Snitch Anthony Cornejo

Respondent argues that there was no prejudice from any prosecutorial misconduct in presenting Anthony Cornejo's testimony during the motion to suppress. (IR at 54-55). Respondent relies on the arguments he raised in regard to Claims 15, 16, 29, 36 and 37. For all the reasons raised in discussing those claims, and the others regarding Mr. Cornejo, as set forth in the Petition it was misconduct for the prosecutor to present his testimony.

Claim 72. The Prosecutor Committed Misconduct by Misstating the Law During Argument

Respondent contends that the jury was properly instructed regarding lewd conduct by the trial court, and thus the prosecutor's misstatements of law were either not error or were not prejudicial. IR at 56.

The prosecutor deliberately misstated the law. The prosecutor told the jury that the touching of Carl Carter, Jr. with a clothesline was a lewd touching. (*See* Petition at 265). This was not the law. (*See* Petition at 266). Instead, the touching itself had to be lewd in nature, meaning that it was sexual in nature. The prosecutor's argument had the effect of eliminating the element that the touching had to be lewd or sexual in nature. The prosecutor essentially reduced the crime to one where any touching committed with lewd intent amounted to a violation of Penal Code §288.

Under the circumstances of this case, this argument was prejudicial error. The prosecutor was allowed to prosecute Count 3 on both a felony-murder theory and a premeditated murder theory. This was permitted despite the fact that the felony murder special-circumstance had been found not true, which necessarily meant that one of the two theories of first degree murder had been rejected. (*See* petition, Claims 8-12).

The evidence of premeditation regarding the Carter killing was limited at best. It was advantageous for the prosecutor to be able to argue a felony murder theory regarding Carter. There was little evidence, however, that a felony had been committed, as the physical evidence of a violation of Penal Code §288 was sparse. For that reason, the prosecutor's elimination of the lewd act element was particularly prejudicial.

Here, the prosecutor was able to argue that a felony took place, when one of the elements of that offense was not proved. Once the jury found that the felony took place, as a result of the prosecutor's erroneous arguments, the jury was then eligible to convict petitioner of first degree murder. It is certainly possible that petitioner was only convicted

of first degree murder because of the prosecutor's arguments. Thus, the prosecutorial misconduct was prejudicial to petitioner. Count 3 was the only murder count, which rendered petitioner death-eligible.

Claim 74. The Prosecutor Committed Misconduct During Guilt Phase Argument When He Took Advantage of Erroneous Instructions Regarding Count I

Respondent argues that the prosecutor committed no misconduct in arguing to the jury that Count 1 was limited to second degree murder because of a "special legal reason" that the jurors did not "need to concern yourself with." (IR at 57). (*See* RT 2783)

The prosecutor's argument was not true. Count 1 was limited to second degree murder not because of a special legal reason, but because the facts did not support a conviction of first degree murder. Thus, it was not a "special legal reason" which limited Count 1, but a "compelling factual reason" that dictated the lesser degree of the charge. While that reason may not have been before the jury due to the court's prior ruling (see Claim 53), the prosecutor's argument had the effect of implying to the jury that there was a legal technicality that prevented the prosecutor from charging petitioner with first degree murder, but that factually it was otherwise properly considered a first degree murder.

Additionally, the prosecutor's argument that "legally those two crimes are very different" implied that there was some "special legal reason" that he had knowledge, beyond that of the jurors, which rendered count 2 to be first degree murder. He asked the jury to rely on his assurances that there was a particular legal reason justifying a first degree murder conviction.

Claim 75. The Prosecutor Committed Misconduct by Commenting on Petitioner's Sexuality and Potential Punishment

Respondent argues that it was not error for the prosecutor to comment on petitioner's sexuality in the guilt phase because those comments were only designed to show that petitioner had time to deliberate before the killing. (IR at 57). In making this argument, respondent ignores the actual text of the prosecutor's argument, which unquestionably asked the jury to hold petitioner's homosexuality against him, and also asked the jury to consider punishment during the guilt phase.

The prosecutor argued that before killing Chavez, petitioner thought:

> Well, let's see. If I kill this young boy, what will happen? They'll probably send me to prison, but that won't be so bad. They'll feed me and take care of me, and it will be a lot of security. [¶] And since I don't like– I have no interest in women anyway, that part of it won't be so bad.

(RT 2786). The argument does not refer to the amount of time that petitioner had to think. Instead, it was a clear reference to the fact that petitioner was a homosexual. It invited the jury to consider the fact that petitioner was a homosexual, and to use it against him to "prove" the case, and to hold that fact against him. It focused the jury on the question of punishment, when they were supposed to be considering only guilt.

Claim 76. The Prosecutor Committed Misconduct by Arguing Erroneous Definitions of Second Degree Murder

Respondent argues that it was not misconduct for the prosecutor to argue both theories of second degree murder in this case because they both applied. (IR at 68). Petitioner has demonstrated that the "reckless indifference" theory of second degree implied malice murder did not apply in this case. *See* Petition, Claim 54; *see also* discussion of Claim 54.

Claim 78. The Prosecutor Committed Misconduct by Unconstitutionally Shifting the Burden of proof Onto Petitioner and his Trial Attorney

Respondent argues that all of the prosecutor's comments in closing argument (*see* Petition at 278-79) were proper.

Respondent cites to *People v. Clair* (1992) 2 Cal.4th 629, 662, in support of his argument. While this Court in *Clair,* did not find an error regarding the prosecutor's statements during argument, there is no discussion of the facts relating to that argument, other than the Court's ruling that the prosecutor's argument was not error. Without a detailed discussion of the facts in that case, *People v. Clair,* does not rebut petitioner's factual arguments, nor does it foreclose petitioner's legal claim.

Respondent also cites to *People v. Fierro* (1991) 1 Cal.4th 173, 213. (IR at 59). In that case, the prosecutor had made one comment that "Again, the defense is asking you to do something; and that is, find that particular charge is not true. But they're giving you no evidence on which to do that." *Id.* This Court incorrectly found that comment not to be error. In any event, the comments made by the prosecutor in this case were far more extensive. *See* Petition at 278-279. They amounted to far more than a single, isolated remark.

The particular remarks made by the prosecutor were also far more detailed and objectionable than those in found *Fierro*. The prosecutor here directed specific comments to petitioner:

> Why doesn't he tell us about his friend that the police are looking for? Now, according to most of these articles, very prominent in the whole thing is that there were these two people at this park. Now why doesn't he tell us about his pal who presumably got away?

(RT 2794). The prosecutor's reference to "he" is clearly a reference to petitioner. The prosecutor's argument was asking why petitioner did not tell "us", which was clearly a reference to the prosecutor and the jury, who the second man at the park was.

This was an unmistakable comment on the fact that petitioner did not testify at trial, and an exhortation to the jury to hold the exercise of that right against petitioner, in violation of *Griffin v. California* (1965) 380 U.S. 609.

The prosecutor also improperly called the jury's attention to the fact that trial counsel did not ask any witnesses whether petitioner was one of the men who was in the park. This argument asked the jurors to focus not on the evidence before them, but on questions by counsel which had never been asked. The prosecutor was asking the jury to consider as evidence the questions that were not asked by trial counsel. Then, the prosecutor asked the jury to infer - from the questions not asked - that trial counsel knew the answers and those answers would have been harmful to petitioner's case.

Claim 79. The Prosecutor Committed Misconduct in Commenting on Retrials

Respondent argues that the prosecutor's comments (*see* Claim 79 at 280) were not misconduct because he prefaced his remark by stating it was "a small point" and was made completely in jest. (IR at 60). Officer Greene was a large man, apparently a bodybuilder, and was quite muscular. The defense theory was that the officers specifically threatened petitioner with being forced to fight Officer Greene, with the clear message being that Officer Greene would beat petitioner until petitioner told the officers what they wanted to hear.

The prosecutor's remarks were intended to mock the defense theory as untrue. If the theory was correct, then the main piece of evidence, petitioner's statements, were coerced and likely false. The prosecutor's remarks struck at the heart of the defense case. These comments were not a joke, and were objectionable. Trial counsel provided ineffective assistance under the Sixth, Eighth, and Fourteenth Amendments by allowing the prosecutor to commit prejudicial misconduct without an objection. *See e.g. Strickland*, 466 U.S. 668; *Wiggins*, 539 U.S. 510.

Respondent's argument that - perhaps the jury would have speculated that a prior trial had resulted in a hung jury - is not persuasive. (IR at 60). It is far more likely, particularly in conjunction with the instruction that count 1 was second degree as a matter of law for "legal reasons", that the jury would conclude that petitioner had been convicted previously. This knowledge prejudiced petitioner in two ways.

First, by conveying to the jury that a prior jury had already convicted petitioner, the prosecutor could lessen the sense of responsibility to make the decision of whether guilt had been proven beyond a reasonable doubt. The jury would naturally be able to relax its attention in the case, knowing that a prior jury had already found petitioner guilty beyond a reasonable doubt.

Second, the knowledge that petitioner had previously been convicted, only to have that

conviction overturned, had the likely effect of prejudicing petitioner. The most likely conclusion would be that a "legal technicality" resulted in petitioner's conviction, while the evidence against him supported that conviction. The presumption that such a technicality had worked in petitioner's favor would be likely to affect the jurors, and cause them to be unfairly biased in favor of conviction.

Claim 85. Trial Counsel's Failure to Examine Officer Carter's Contemporaneous Notes of the Confession Constituted Ineffective Assistance

Respondent argues that this claim is unsupported by a handwriting expert or document authentication expert to prove that the notes are inconsistent with contemporaneous interrogation notes. (IR at 63-64). Petitioner has alleged a prima facie case that trial counsel were ineffective and respondent's supports the allegation by pointing out the need for a handwriting expert or document authentication expert, which trial counsel failed to retain. Petitioner has requested that this Court provide petitioner with funds to secure expert testimony and conduct further investigation as necessary to further prove the facts alleged in this petition.

Officer Carter's artfully drafted declaration carefully avoids stating that he independently recalls how and when the notes were made (See IR, Exhibit D). This declaration was signed three and one-half (3 1/2) years after Carter's contact with petitioner, and clearly relies on the notes themselves rather than any independent recollection.

Careful examination by counsel, either by cross-examination of Carter, expert opinion testimony or the testimony of other officers would have exposed the creative aspect of Carter's notes. In any event, petitioner does not need to refute Carter's declaration to raise a colorable claim, particularly where this Court itself can view the document.

Claim 88. Trial Counsel Rendered Ineffective Assistance by Failing to Attack the Credibility of the Police Officers

Respondent argues that the allegation, that the negative credibility evidence pertaining to the officers existed - is conclusory and unsupported (IR at 65). To the contrary, petitioner has given a specific example of the officers' attempt to conceal prior misconduct that reflected on credibility. Respondent ignores the facts identified in the Petition.

This Court reversed petitioner's conviction resulting from the first trial because of the denial of *Pitchess* discovery. During the pendency of that appeal, however, the South Gate Police Department destroyed their personnel files, pursuant to their "internal newly-enacted record retention policy." They destroyed them, at a time *when they were on notice* of petitioner's pending appeal of precisely that issue.

Prior to the enactment of Penal Code §§1043 & 1045, *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 held that a defendant is entitled to discover law enforcement personnel records upon a showing that it will "facilitate the ascertainment of the facts and a fair trial." *Id.* at 536. In 1978, the principles articulated in *Pitchess* received legislative approval and §§1043 & 1045 were enacted to provide statutory guidelines regarding discovery of law enforcement personnel records.

Section 1043(b)(2) requires the moving party to provide "[a] description of the type of records or information sought and [a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records." *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85). "... [T]he requisite showing in a criminal matter 'may be satisfied by general allegations which establish some cause for discovery' other than a mere desire for all information in the possession of the prosecution. [Citation.]" (*Ibid.*) This Court acknowledged having "previously held that the Legislature, in adopting the statutory scheme

in question, 'not only reaffirmed but expanded' the principles of criminal discovery articulated by this court in the landmark case of *Pitchess v. Superior Court,* 11 Cal.3d 531. [Citation.]" *City of Santa Cruz v. Municipal Court,* at 84.

Trial counsel could certainly have made the necessary showing in order to demonstrate good cause. The testimony of officers necessary to obtain a ruling that petitioner's statements were admissible at trial. Petitioner contested the voluntariness of those statements, and contested their accuracy as well.

Under these circumstances, files reflecting on the officers' history of truthfulness or lack of credibility were relevant and discoverable. This evidence may have included instances of false reports or complaints, as well as false testimony in court. These records would have provided sources of impeachment material, and perhaps sufficient evidence to convince the trial court that petitioner's statements were inadmissible. Alternatively, if the jury had concluded that the officers were not credible, the jury could have reasonably concluded that the statements were coerced, and thus not worthy of belief. In that situation, it is reasonably likely that petitioner would not have been convicted.

The fact that the personnel records were destroyed during the pendency of petitioner's appeal regarding the improper withholding of the very same records is itself suspicious and requires an assumption of bad faith. The only reason for destroying those records, when the department was on notice that the records were, in part, the subject of a capital appeal, was to deprive petitioner of the exculpatory evidence contained within them. As the result of the department's action, the information has been lost forever.

There was no strategic reason for counsel not to seek discovery of evidence of officer untruthfulness in addition to evidence of violence. There was no strategic reason not to present what information counsel had to the jury. Counsel did not attempt to impeach Officer Greene before the jury with the information counsel possessed. *See* Petition at 301-02. Having decided to try the case on a reasonable doubt theory (and not on a mental state

defense as prior counsel had done), counsel was obligated to seek and present evidence, which supported the theory.

Claim 89. Trial Counsel Was Ineffective for Failing to Raise Issues Concerning the Missing-Juvenile Report

Respondent repeats the same arguments raised regarding Claim 69. (IR at 66). Petitioner reiterates his responses to those arguments and claims that, under these circumstances, it was constitutionally ineffective assistance of counsel not to impeach the witnesses with the missing-juvenile report.

Similarly, it was ineffective assistance not to introduce the report as direct evidence. There was no strategic reason not to use the report in challenging the legality of petitioner's arrest. Having decided to present a reasonable doubt defense, there was no reason not to introduce the report before the jury in order to cast doubt on both the accuracy of petitioner's statements to the officers and on the officers' credibility.

Claim 91. Trial Counsel Rendered Ineffective Assistance When He Failed to Impeach Cornejo Based on Favors Regularly Conferred Upon Him in Exchange for his Testimony

Respondent relies on the same arguments raised in regard to Claim 71 in arguing that this claim lacks merit. Petitioner relies on the arguments previously raised regarding Claim 71 and this Claim.

Claim 92. Trial Counsel Rendered Ineffective Assistance by Failing to Bring the Order from the First Trial to the Court's Attention

Respondent relies on the same arguments raised in regard to Claim 35 in arguing that this claim lacks merit. Petitioner relies on the arguments previously raised regarding Claim 35 and this Claim.

Contrary to respondent's position, this claim is not identical to Claim 35. Counsel had decided to seek a special transportation order in the second trial. The first order should have been used to show that such an order was necessary and had been previously issued. At the second trial, the trial court stated that it doubted that it had the authority to enter the order petitioner requested. The first order was key information, which should have been brought to the court's attention.

Claim 95. Trial Counsel Rendered Ineffective Assistance During Voir Dire

Respondent argues that this claim is conclusory, and states that it lacks a sufficient factual basis. (IR at 70-71). In so arguing, however, respondent fails to respond to any of petitioner's arguments. Respondent contends that petitioner hasn't identified the areas of questioning in which counsel should have engaged. (IR at 70). Respondent is wrong; Petitioner did precisely that. *See* Petition at 320-23.

Respondent alleges that nothing demonstrates that trial counsel lacked tactical reasons for failing to question potential jurors about a series of answers on the jury questionnaires that should have raised suspicion about their impartiality. (IR at 70). Petitioner explained why these areas of questioning were important. (Petition at 328-330). Thus, respondent's conclusory allegation that counsel likely had tactical reasons for not asking these questions is without merit.

Respondent cites *Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 571 in support of his argument. In *Rose*, the Court explained:

> An *informed* tactical decision made by defense counsel does not constitute ineffective assistance of counsel. *In re Ibarra* (1983) 34 Cal.3d 277, 284 [193 Cal.Rptr. 538, 666 P.2d 980].) As a corollary rule, "ineptitude or lack of industry" on the part of counsel falls well short of the mark. (*In re Saunders* (1970) 2 Cal.3d 1033, 1042, fn. 7 [88 Cal.Rptr. 633, 472 P.2d 921].) "'[W]hile acknowledging the wide latitude and discretion necessarily vested in trial counsel in the area of tactics and strategy, we stress that the exercise of that discretion must be a reasonable and informed one in the light of the facts and options reasonably apparent to counsel at the time of trial, and founded upon reasonable investigation and preparation.' [Citation.]" (*In re Hall* (1981) 30 Cal.3d 408, 426 [179 Cal.Rptr. 223, 637 P.2d 690].)

Id. Rose does not apply here because trial counsel's failure to ask these questions cannot be assumed to have been informed, as counsel clearly did not know what the answers to those questions would have been. The failure to ask these questions is more akin to "ineptitude or lack of industry" than it is with thorough representation by trial counsel. It is noteworthy that in *Rose,* the Court found that the petitioner had set forth sufficient factual allegations to

warrant an evidentiary hearing. Petitioner's factual allegations are similarly sufficient.

Respondent cites *People v. Freeman* (1994) 8 Cal.4th 450, 485 and *People v. Montiel* (1993) 5 Cal.4th 877, 911 in support of his arguments. These cases, however, address primarily the exercise of peremptory challenges. Petitioner's claim is far broader. Trial counsel here failed to ask sufficient questions in order to divulge sufficient information to draw reasonable conclusions about the prospective jurors. Without sufficient information, trial counsel could not make reasonably informed decisions. Those decisions would include (1) deciding whether grounds existed for challenging the venire due to pretrial publicity and (2) challenging jurors for cause due to bias or pre-existing opinions about the case, in addition to the exercise of peremptory challenges.

Claim 97. Trial Counsel Rendered Ineffective Assistance for Failing to Excuse a Juror Who Knew One of the Witnesses

Respondent argues that this claim does not state a prima facie case. (IR at 72). Yet, respondent fails to address any of the arguments raised in the petition.

Particularly, respondent ignores the trial court's statement that the court would excuse Juror Zinn because she worked at a casino, which employed Officer Barclift of the Bell Gardens Police Department. As the officers were critical witnesses regarding the arrest of petitioner and his statements, familiarity with the officers was a critically important fact regarding potential jurors.

Respondent also ignored petitioner's arguments regarding the crucial importance of prospective jurors' personal relationships with potential witnesses. *See* Petition at 329. Officer Barclift provided important testimony regarding the fact that a plastic milk bottle had been found at the Fowler/Chavez crime scene. He testified that the bottle had been cut in a particular manner, and this cutting was deliberately kept from the media so that law enforcement would know that a witness had actual information about the case if the witness reported the fact that the bottle was cut. (RT 2496-2505). This testimony was crucial, as it allowed the prosecutor to corroborate petitioner's statements to law enforcement. It was also suspect, as the information had not been disclosed during pretrial discovery before either petitioner's first or second trials. *See* Claim 46, *supra*.

For all these reasons, knowledge of Officer Barclift was not a trifling matter. His credibility was a matter to be tested at trial, for the reasons discussed above. The trial court stated that it would excuse the juror if asked to do so. Under these circumstances, it was ineffective assistance of counsel not to seek to excuse Juror Zinn, who knew Officer Barclift. Officer Zinn was responsible for performing all security checks for people applying for jobs at the casino. He was clearly in an authority role at the casino, and was likely seen as a law-abiding figure. Petitioner has stated a prima facie case of ineffective assistance of counsel.

Claim 99. Petitioner was Denied His Right to the Assistance of Counsel Under the Sixth Amendment by the Trial Court's Denial of his Request to be Represented by Counsel to Litigate the Critical Proceedings Challenging the Inadequate Representation by his Appointed Trial Counsel, Prior to and After the Guilt Phase of the Trial

Respondent mischaracterizes the factual history of the proceedings. Respondent states that the trial court granted petitioner's second *Marsden* motion at the penalty phase, but refused to appoint substitute counsel. (IR at 73). This is incorrect. Petitioner had been represented at the guilt phase by Peter Williams. Petitioner did bring a *Marsden* motion regarding Williams, alleging a complete breakdown in the attorney-client relationship. (1978 RT 894). After noting that it could not permit petitioner to represent himself, the trial court relieved Peter Williams and appointed Robert Villa to represent petitioner. (1978 RT 902).

After a continuance to allow Mr. Villa time to prepare the case, Mr. Villa returned to court and stated that a conflict had arisen between himself and petitioner that affected his ability to represent petitioner. (1978 RT 914). *Upon Mr. Villa's request*, he was relieved as counsel. (1978 RT 916). It was at this point that the trial court refused to appoint counsel to represent petitioner, and required petitioner to represent himself at the penalty phase.

Mr. Villa was not relieved because of a *Marsden* motion raised by petitioner. Instead, Mr. Villa was relieved at his own request. At all times, petitioner made it clear that he wanted counsel appointed to represent him. *See* Petition at 332-34.

Respondent also argues that the trial court did not grant the second *Marsden* motion because any real conflict existed, but because petitioner preferred to proceed in pro per. (IR at 73). As discussed above, petitioner did not bring a second *Marsden* motion at all. Petitioner stated consistently that he did *not* want to proceed pro per, but wished that an attorney be appointed to represent him. Petitioner had stated that he objected to the appointment of Mr. Villa because of their initial conversations, but the trial court appointed

Mr. Villa anyway. (1979 RT 903-04).

After Mr. Villa was relieved on his own motion, the trial court told petitioner that he would either have to retain his own attorney or represent himself. (1979 RT 920). Petitioner requested counsel, which the court refused to appoint. Petitioner continued to ask for counsel, and the court continued to refuse to appoint counsel. (1979 RT 927, 928, 929, 930, 932, 935, 937, 941). Although the court had previously stated that it could not let petitioner represent himself (1979 RT 898), the court reversed itself and stated that it never concluded that petitioner was unqualified to represent himself, but only that *petitioner* felt he was unqualified to do so. (1979 RT 941). Petitioner presented no penalty phase evidence or argument on his own behalf because he was unqualified. (1979 RT 942-45).

It was error to deprive petitioner of his right to counsel in the penalty phase. The penalty phase is a critical stage of the proceedings - in which petitioner was entitled to representation. (Petition at 332-333). Had he been represented at the penalty phase, it is reasonably likely that he would have been sentenced to life in prison without parole. Had he received that sentence, it would have served as an acquittal of the death penalty, and he would not have been eligible for a death sentence at his second trial.

Claim 103. Trial Counsel Rendered Ineffective Assistance by Failing to Challenge the Statements Based on Contradictory Witness Testimony and Inconsistencies Between the Two Confessions

Respondent argues that the inconsistencies petitioner raises are "minor and inconsequential" and fail to overcome the presumption that the attorney's representation was constitutionally effective. (IR at 75). Petitioner has identified no fewer than fifteen inconsistencies between petitioner's purported statements, the statements and testimony of witnesses, and the physical evidence. (Petition at 340-46). Each inconsistency undercut the prosecutor's case. Taken cumulatively, they cast strong doubt on the prosecutor's theory.

There was no strategic reason not to raise these inconsistencies. Trial counsel chose to defend based on a reasonable doubt theory. Having chosen to do so, it was critical to attack the veracity of the statements law enforcement claimed that petitioner made. One method of doing so was to identify and present inconsistencies between those statements and testimony of witnesses who presumably had no reason to lie. Similarly, inconsistencies between the statements and physical evidence would presumably be resolved in favor of the physical evidence. Trial counsel failed to identify these inconsistencies to the jury, which severely prejudiced petitioner's case. Had counsel done so, a more beneficial verdict would have been obtained.

Claim 105. Trial Counsel Rendered Ineffective Assistance by Failing to Argue Effectively to the Jury During the Guilt Phase the Applicability of the Second Degree Murder Maximum on Count One

Respondent erroneously mischaracterizes petitioner's claim as stating that trial counsel should have argued to the jury in a manner which was prohibited by the court's instructions: that trial counsel could not compare Count 1 and Count 3 in order to argue that both were, at most, second degree murders. (IR at 76-77).

Noting the trial court's instruction that Count 1 was at most second degree murder (*see* Claim 53), trial counsel could nevertheless have raised persuasive arguments regarding the similarity between Counts 1 and 3, and argued that both were at most second degree murder. In objecting to petitioner's proposed second degree murder instruction regarding Count 1, the prosecutor agreed that they were identical:

> Well, I'm not sure that the verdicts objectively make a lot of sense from the first trial. And I'm not saying that to be critical or anything like that, I just think that that's a fact. And for the jurors to hear essentially two murders that are more or less identical as to counts 1 and 2 and to be told that count 1 is a second degree murder, I think is very prejudicial to the prosecution.

(RT 2222). While the proposed instruction was refused, the jury argument that they were factually undistinguishable was proper and should have been made. Petitioner has explained how trial counsel could have compared the facts of these two cases in order to support the case for second degree murder convictions on both counts. (Petition at 352-53).

Had trial counsel raised these arguments, it is reasonably likely that petitioner would have been convicted of second degree murder on Count 3. As this was the only death-eligible count, petitioner would not have been subject to the death penalty.

Claim 106. Trial Counsel Rendered Ineffective Assistance of Counsel by Failing to Inform the Jury That the Word "Both" in CALJIC No. 8.75 Should Be Understood As "Either Or"

Respondent repeats identical arguments raised in regard to Claim 55. Petitioner has already demonstrated the error of respondent's arguments, and relies on those arguments here.

Claim 107. Petitioner Was Denied his Right to the Effective Assistance of Counsel as a Result of Trial Counsel's Failure to Investigate and Present Mental Defenses

Respondent argues that petitioner has failed to demonstrate that mental health evidence existed, which could have resulted in a different verdict at the penalty phase. (IR at 79). Petitioner explained what evidence could have been presented. (Petition at 355-357). Additional evidence was presented in the exhibits to the habeas corpus petition, including:

1. Declaration of George Fleck (Exhibit R)– discussing history of Memro family as alcoholics;

2. Declaration of Mary Memro (Exhibit S)– discussing family history, alcoholism, physical abuse, financial trouble, family involvement in molestation;

3. Declaration of Floyd Ziolkowski (Exhibit T)– discussing petitioner's family history, including alcoholism, lack of familial affection, poor financial situation, petitioner's maternal family history of mental illness, physical problems, alcoholism;

4. Declaration of Tony Memro (Exhibit U)– discussing family history of alcoholism, lack of affection, financial difficulties, physical abuse, phobias;

5. Declaration of Michael Martin (Exhibit V)– discussing incident in which petitioner was kicked out of his house during his high school years;

6. Declaration of Pam Davis (Exhibit W)– discussing family history, including alcoholism;

7. Declaration of Donald Memro (Exhibit X)– discussing family history, including alcoholism, abuse, lack of familial affection, phobic behavior, financial difficulties, an incident in which petitioner fell out of a tree and struck his head on a rock, after which he suffered from migraine headaches

8. Declaration of Jack Brunette (Exhibit Y)– discussing family history, including alcoholism, financial and employment difficulties, difficulties between petitioner's parents,

lack of familial affection, petitioner's history of emotional outbursts, petitioner's incidents of waking up swinging fists as if to fend someone off;

9. Declaration of Nancy Brunette (Exhibit Z)– discussion of family history including spousal abuse, alcoholism;

10. Declaration of Gretchen White (Exhibit AA)- discussing family history at length, petitioner's history as a child and young man;

11. Declaration of George Woods (Exhibit CC)– diagnosing petitioner with Borderline Personality Disorder and Post Traumatic Stress Disorder and discussing the effects of those diagnoses on his ability to form the requisite intent to commit the charged crimes.

As demonstrated, Petitioner has provided more than ample detail and factual support for this claim. It conclusively shows that mental health evidence existed.

Claim 111. Petitioner was Denied Effective Assistance with Respect to David Schroeder's Testimony

Respondent argues that counsel did not provide ineffective assistance of counsel, largely because trial counsel had been provided with the district attorney's file on the 1972 assault case on David Schroeder. (IR at 81). Respondent's argument emphasizes the strength of the claim. Since counsel received the entire file, then counsel should have been prepared to cross-examine Schroeder during his testimony.

Counsel failed to cross-examine Schroeder regarding inconsistencies between his trial testimony and his 1972 preliminary hearing testimony. During direct examination at petitioner's trial, Schroeder testified that he was shown nude photos, was then caressed by petitioner, and then was choked and struck. (RT 2920). During his 1972 preliminary hearing testimony, there was no mention of caressing. Trial counsel could have pointed out that events were obviously fresher in Schroeder's mind in 1972, when the events were more recent, then in 1987, fifteen years later.

Moreover, at the 1972 preliminary hearing, Schroeder was largely unsure of the circumstances surrounding him being struck in the head. He was unsure when he was struck, or where he was at the time he was struck. *See* Petition at 283-84. At petitioner's trial, however, Schroeder testified that he was shown nude photos, was then caressed by petitioner, and then was choked and struck. This testimony left the jury to conclude that Schroeder was subject to sexual advances followed immediately by a violent attack. The testimony created the idea that this was a single course of conduct, which was obviously more aggravating than a single blow struck as part of an uncontrollable rage reaction.

There was no tactical reason not to demonstrate inconsistencies in Schroeder's testimony. The failure to do so allowed the prosecution to present a case which appeared more aggravated than it otherwise would have been presented. Had counsel effectively challenged this evidence, the case in aggravation would have been diminished and petitioner

likely would have received a lesser sentence.

Claim 114. The Denial of a Fair Cross-Section of Jurors in the Guilt Phase Violated Petitioner's Constitutional Rights

Respondent argues that this "identical" claim has been rejected by this Court in *People v. Balderas* (1985) 41 Cal.3d 144, 190-91. (IR at 82-83). Respondent is wrong. The issue in *Balderas* was quite distinct from petitioner's claim.

In *Balderas,* the issue posed was whether the trial court's voir dire by using the following questions was error:

> 1) Would you automatically refuse to impose the death penalty regardless of the evidence or the law in the case? 2) If defendant were found guilty of first degree murder with special circumstances at the guilt phase, would you automatically vote to impose the death penalty without regard to the evidence or the law? 3) Would your death penalty views prevent you from making an impartial decision as to the defendant's guilt? 4) Are your views such that you would never vote to impose the death penalty? and 5) Are your views such that you would refuse to consider imposing the death penalty *in this case*?

Id. at 187-88. This Court phrased Balderas claim in the following manner:

> Defendant contends that the form of these questions, posed by the figure to whom jurors most look for guidance, made the jurors unduly guilt- and death-prone. In particular, defendant urges, question (4) unnecessarily repeated question (1), and both concentrated the juror's attention on the judge's opinion that this was a case in which the death penalty might be appropriate. Moreover, defendant suggests, question (5), by warning the juror against absolute opposition to the death penalty "in this case," further implied that "this case" was one in which the court believed the penalty of death might be warranted.

Id. at 188. This Court determined that there was no prejudicial error. *Id.*

Petitioner's claim, on the other hand, is that the process of death-qualifying the jury resulted in a jury selected from an unfair cross-section of society. Petitioner claims that the process of death-qualification, regardless of the wording of the questions asked, resulted in a jury which was less than neutral with respect to guilt. *See* Petition at 402. Petitioner has

cited statistics in support of this claim. *See* Petition at 402-03. Respondent fails to address any of these statistics. (IR at 82-83). The process of death-qualification skewed the pool of jurors who could serve in the guilt phase, and resulted in an unfair trial during the guilt phase.

Claim 116. The Trial Court Was Partial in its Treatment of Potential Jurors During Jury Selection. The Jury Selected Was Biased in Favor of the Death Penalty and Violated Petitioner's Sixth and Fourteenth Amendment Rights to a Fair and Unbiased Jury

Respondent argues that petitioner has failed to show that the trial court allied itself with the prosecution or that the court's questioning was prejudicial. (IR at 85). Respondent offers no support for these conclusory allegations.

The claim identifies numerous examples of biased questioning by the trial court. *See* Petition at 407-13. These instances demonstrate the court's different standards for evaluating jurors who appeared biased in favor of the prosecution.

Respondent relies on *People v. Clark* (1992) 3 Cal.4th 41, 143. (IR at 85). *Clark*, however, addressed a claim of judicial bias during the presentation of evidence. The issues during that phase of a trial are different than those present during the selection of jurors. The presence of biased jurors is structural error, while a court's rulings during the presentation of evidence are not necessarily structural error. *Clark* addressed a different factual and legal scenario, and does not support respondent's argument here.

Similarly, respondent's citation to *People v. Snow* (2003) 30 Cal.4th 43, 78 is inapposite. In *Snow*, the defendant contended that the trial court's hostile and disparaging comments during trial exhibited such a degree of bias against defense counsel, and so interfered with counsel's examination of witnesses, that the defendant was deprived of a fair trial, the effective assistance of counsel, and a reliable penalty determination. Snow's claim differed significantly from petitioner's claim. Petitioner claims that the trial court engaged in biased questioning, and that this biased questioning resulted in a skewed jury selected from an unfair cross-section. Whereas the claim in *Snow,* is that the court's bias may have caused the jurors to derive opinions based on the court's comments; the claim here is that the court's bias resulted in the selection of a biased jury.

Claim 117. Informing the Jury That There Had Been a Previous Trial Violated Petitioner's Right to a Fair Trial

Petitioner has pointed out several instances where the jury became aware of the prior trial, including circulating photos among the jurors that had the prior trial exhibit tag and trial date on it. *See* Petition at 414. The prosecutor also directly referred to transcripts of 1979, which indicated that a prior trial had likely taken place. *See* Petition at 414. These errors were compounded by other indications that a prior trial had taken place. The jury was instructed that Count 1 was first degree murder for reasons, which they should not speculate about. As discussed already, this instruction telegraphed to the jury that prior trial had taken place. *See, e.g.*, Claims 53, 79. One of the jurors had heard about petitioner's case previously. *See* Petition at 415.

In response, respondent speculates that, even if the jurors knew of the prior trial, they "probably assumed that the retrial was the result of a mistrial following a jury deadlock." (IR at 85). Respondent is wrong because the jury was informed that petitioner had previously been tried for the same crimes *eight years earlier*. Thus, the only implication could be that he was convicted and then had received a reversal on appeal due to the length of time between the trials.

The knowledge that a prior trial had taken place likely prejudiced petitioner. *See* Claim 79. The knowledge that he had been previously tried, and thus likely convicted, would serve to lessen the jurors' sense of responsibility in deciding this case, and skewed the result toward conviction. It also prejudiced petitioner in the penalty phase, as the jury could rely on the fact that petitioner had previously been convicted and sentenced to death in order to lessen their feelings of responsibility.

Claim 119. Petitioner was Mentally Incompetent to Stand Trial

Respondent claims that petitioner has not presented adequate evidence of incompetence. (IR at 86). Respondent is wrong. The diagnosis of Dr. Woods, the supporting materials which he relied on in reaching his opinion and the comments of the trial court provide ample support for relief on this claim.

The declaration of Dr. George Woods establishes that petitioner was incompetent to stand trial. Dr. Woods was specifically asked to determine if petitioner was competent to stand trial. (Exhibit CC at 4). He conducted structured interviews with petitioner and reviewed materials typically relied on by mental health experts performing that type of examination. (Exhibit CC at 4).

Dr. Woods concluded that petitioner suffered from Borderline Personality Disorder and Post Traumatic Stress Disorder. (Exhibit CC at 5). He concluded that petitioner's "overwhelming paranoia and pathological defensiveness that derives from that paranoia prevented Mr. Reno from rationally assisting in the preparation of his own defense." (Exhibit CC at 5). Dr. Woods discussed petitioner's life history (Exhibit CC at 9-15), and referred to the declaration of Dr. Gretchen White for support (Exhibit AA). He explained that "[t]he paranoia that pervades all of Mr. Reno's communications derives from an understandable locus. The trauma that he experienced as a child twisted this conduit of perception, and he was forced to become hyper vigilant." (Exhibit CC at 15).

Dr. Woods explained that "It is the melange of trauma, hyper vigilance, and hyper arousal, this overwhelming paranoia, that prevented Mr. Reno from rationally assisting his counsel. Unable to filter and make sense of his own misperceptions and fears, Mr. Reno, in the mental state consistent with his interrogation by the officers, was frequently unable to reconcile the needs of his defense with his own impulsive, self-destructive tendencies, precluding him from being able to rationally assist in the preparation of the different phases

of his trial." (Exhibit CC at 15). Dr. Woods stated that "Over the course of four interviews, [petitioner] was chronically angry, with significant hyper vigilance to frank paranoia." (Exhibit CC at 20). He added that "Mr. Reno's insight and judgment are clearly impaired by his paranoid ideation." (Exhibit CC at 20). Petitioner's thought content "revealed occasional auditory hallucinations, a fear of losing ego boundaries (recognizing where he ends and others start), and tremendous paranoid ideation." (Exhibit CC at 21). In summary, Dr. Woods stated that petitioner's "pervasive paranoid ideation precluded him from rationally assisting in his own defense in the instant offense for which he was convicted." (Exhibit CC at 22).

Respondent states that petitioner's suicidal impulses are insufficient to support this claim. (IR at 86-87). Petitioner stated that he preferred to be sentenced to death. (RT 2961). The trial court recognized that petitioner was, in effect, committing judicial suicide. (RT 2963). In so doing, the trial court commented on petitioner's paranoia. The trial court stated that this judicial suicide was very offensive. (RT 2967). However, the trial court let it happen anyway.

Respondent also argues that petitioner must have been competent to stand trial in 1987 because he was competent at his first trial. Respondent then attempts to prove that petitioner was competent at his first trial. (IR at 88-89). Petitioner's competence at his first trial, which occurred seven years before his second trial, is not relevant. Certainly, a period of seven years, much of which was spent on death row at San Quentin, could drastically change petitioner's mental state.

Claim 120. Petitioner was Deprived of his Right of Access to and Assistance of Competent Mental Health Experts, in Violation of *Ake v. Oklahoma*

This identical claim was rejected on the merits by this Court in its 1995 denial of the petition for writ of habeas corpus (IR 90).

Respondent additionally argues that petitioner "had access to" mental health experts during his *first* trial. (IR 90). As discussed above (*see* Claim 119), seven years passed between the first trial and the second trial. At the first trial, counsel presented a mental state defense, while new counsel at the second trial presented a reasonable doubt defense. The mental health issues relating to diminished capacity, diminished actuality and penalty phase mitigation in the first trial are medically and legally distinct from issues relating to the reasonable doubt defense, such as the ability to form intent to kill, ability to deliberate and premeditate and heat of passion. Whether or not petitioner had access to mental health experts for his first trial bears no relationship to the absence of access to, and the assistance of, competent mental health experts.

Claim 124. By Failing to Preserve a Complete Record on Appeal, the Trial Court Deprived Petitioner of his Due Process Rights and State Created Liberty Interests

Respondent argues that petitioner has failed to demonstrate that he requested corrections to the record and that the trial court erroneously refused to make the corrections. Respondent cites Penal Code Section 190.8. (IR at 92). Section 190.8 has no such requirements, and, in any event, it applies only to trials, which commenced after 1996.[14]

Respondent next argues that petitioner has failed to prove that the cited transcripts existed and were critical to an understanding and proper resolution of any appellate issues. Petitioner has catalogued fifteen undisputed sections where the record is incomplete. *See* Petition at 444-46. Of course, petitioner cannot prove that all claims of error have been raised, due to the failures in the record. Nor can the Court be confident in ruling on the basis of the incomplete record. Petitioner cannot identify precisely what occurred, or what the record would reflect if it were properly complete. Additional claims might have been brought if a complete record was available. Existing claims would have been strengthened by a complete record. As detailed in the petition, petitioner's rights to due process and heightened capital case reliability were violated by these omissions. Given these serious Federal and State Constitutional violations, as well as violations of International Law, Treaties, Norms, and Customs, this Court should grant the petition for writ of habeas corpus and the relief requested.

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[14] §190.8 (k): This section shall only apply to those proceedings in which a sentence of death has been imposed following a trial that was commenced on or after January 1, 1997.

Prior to 1997, the section read: "In any case in which a death sentence has been imposed, the record on appeal shall be expeditiously certified. If the record has not been certified within 60 days of the date it is delivered to the parties or their counsel, the trial court shall monitor the preparation of the record monthly to expedite certification and report the status of the record to the California Supreme Court."Corrections to the record shall not be required to include simple typographical errors that cannot conceivably cause confusion."

Claim 125. Petitioner's Rights Were Violated by Erroneous Rulings and Factual Errors by this Court

Respondent claims that, because this Court has affirmed his conviction, petitioner "by definition," cannot make a prima facie showing. (IR at 93) Respondent is wrong.

This Court relied entirely on *People v. Santamaria* (1994) 8 Cal.4th 903 in rejecting petitioner's double jeopardy claims. The opinion ignored the rule that a reversal for insufficiency of the evidence or a prior implied acquittal bars retrial in the same case. *See Burks v. United States* (1978) 437 U.S. 1; *Gomez v. Superior Court* (1958) 50 Cal.2d 640. The rulings of the trial court in regard to insufficient evidence amounted to an implied acquittal, as discussed in the double jeopardy claims. *See, e.g., United States v. Martin Linen Supply Company* (1977) 430 U.S. 564, 571. The trial on the special circumstances was entitled to the same double jeopardy protections as a standard trial on guilt. *See, e.g, Bullington v. Missouri* (1981) 451 U.S. 430; *Arizona v. Rumsey* (1984) 467 U.S. 203.

Additionally, *Santamaria,* is different because it involved a sentencing enhancement that could not result in death, while petitioner's case involves a capital trial with an *acquittal* on a special circumstance allegation. In *Santamaria*, the enhancement involved the use of a knife that was separate from the elements of murder, while here, the special circumstance and the elements of murder were largely identical. The special circumstance of which petitioner was acquitted required that the murder be premeditated and committed during the commission of a felony, while first degree murder requires premeditation or a murder being committed during the commission of a felony. Having acquitted petitioner of the special circumstance, it was error to retry him on both theories. Petitioner also argues that *Santamaria* was wrongly decided. *See* Exhibit DD.

This Court also misstated the facts regarding petitioner's voluntariness. The Court implied that petitioner presented his case before the prosecution presented its evidence in

regard to the admission of the confession. In fact, petitioner presented several witnesses after the prosecutor presented its witnesses. The opinion relied on certain evidence to support the finding of voluntariness which was not admitted as part of the confession hearing. *See* Exhibit DD at 9-10. Moreover, the Court considered the testimony of former Deputy District Attorney Michael Carney regarding complaints of excessive force against a police officer witness, when that testimony was only admitted in consideration of the issue of the destruction of officers' personnel records. (RT 345-366).

The Court erred in denying petitioner's motion for severance of Count 3 from Counts 1 and 2. Trial counsel brought several motions for severance, based on a theory of inconsistent defenses. (RT A45-A49, CT 233, RT 134-135). Trial counsel had also filed a separate motion to exclude psychiatric testimony from the first trial, which the prosecutor sought to introduce in the second trial. (CT 324; RT 181-182). While recognizing that inconsistent defenses could be a valid ground for severance, the trial court ultimately denied the motion as untimely. (Exhibit DD at 14-15). This Court stated in its opinion that counsel had not stated until the severance hearing that he would not use the psychiatric evidence. A motion had already been filed to exclude it, however. Counsel had repeatedly sought severance based on inconsistent defenses, as discussed herein. (*See also* Exhibit DD).

The Court failed to analyze the destruction of the officers' personnel files as a *Brady* (*Brady v. Maryland* (1963) 373 U.S. 83) violation, and instead analyzes them under *Arizona v. Youngblood* (1988) 488 U.S. 51. There was evidence that the files contained impeachment evidence, including Officer Sims testimony that there was one such personnel complaint in his file, as well as Michael Carney's testimony that a complaint was made against Officer Greene. Whether these complaints were ultimately persuasive or not, they were still impeachment material under *Brady*. *See also Kyles v. Whitley* (1995) 514 U.S. 419. This Court had previously found that these files were material in *People v. Memro* (1985) 38 Cal.3d 658.

The Court stated in its opinion that it was plain to the parties that the prosecution was proceeding on a felony murder theory. The record demonstrates that trial counsel was not aware of that fact, as counsel objected at length during an instructions conference. (RT 2727).

Respondent ignores these and other errors in the Court's opinion and utterly fails to address the merits of this claim. (*See* Exhibit DD).

Claim 126. Petitioner was Denied the Right to Due Process in his Appeal as a Result of this Court's Chief Justice's Political Support for Opposing Counsel in this Case

After this case had been briefed and was set for oral argument before this Court then-Chief Justice Malcolm Lucas spoke at a public gathering and formally endorsed the gubernatorial candidacy of Attorney General Daniel Lungren, the attorney for respondent in this matter at the time of petitioner's appeal. Respondent argues that "the mere fact that justices of the Court have political views and opinions and express them does not create a conflict of interest... ." (IR 94). Petitioner agrees that justices can properly hold political opinions, but the public endorsement of the attorney for a litigant in a pending case certainly creates the appearance of favoritism.

As has often been stated by courts, it is the appearance of impropriety that must be avoided. "[J]ustice," indeed, "must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Marshall v. Jerrico, Inc.* (1980) 446 U.S., 238, 243 (citations and internal quotation marks omitted). Due process requires a "neutral and detached judge". *Ward v. Village of Monroeville* (1972) 409 U.S. 57, 61-62. *See also Arizona v. Fulminante* (1991) 49 U.S. 279; *Chapman v. California* (1967) 386 U.S. 18.

By campaigning for a litigant for governor, Chief Justice Lucas displayed a bias in favor of Attorney General Lungren. It was error to deny petitioner's motion for recusal at the time his case was heard.

Claim 127. This Court Failed to Conduct a Constitutionally Adequate Review of Petitioner's Case and Institutionally Does Not Conduct Such Review in Capital Cases

Petitioner noted defects in the habeas corpus review process, including the failure to grant discovery, an evidentiary hearing or subpoena power, despite petitioner's repeated requests for such. Respondent argues that " the appropriate disposition of a habeas corpus petition must be based on the factual allegation already contained within it." (IR at 95).

To the contrary, a court must afford a habeas petitioner discovery, subpoena power and evidentiary hearing if these are necessary to ensure due process in these proceedings. For a court to say that a petitioner has not proved his allegations when it has denied him appropriate discovery is a denial of due process.

Claim 131. The Unconstitutional Use of Lethal Injection Renders Petitioner's Death Sentence Illegal

Respondent relies on past decisions of this Court and does not address the merits of petitioner's claim. (IR at 97). Petitioner asserts that his claim is meritorious, and to the extent necessary, petitioner requests that the Court reconsider any adverse precedent.

Claim 132. Execution of Petitioner After Prolonged Confinement Violates the Eighth Amendment Prohibition of Cruel and Unusual Punishment

Respondent argues that this claim fails because petitioner has been fighting his death sentence, and that if petitioner wished to avoid lengthy confinement, he could have given up his efforts to overturn his sentence. (IR at 97-98). As demonstrated throughout the petition, however, petitioner's conviction and sentence are unconstitutional. Respondent argues that in order to avoid being executed in an unconstitutional fashion, petitioner should have abandoned his rights to contest his unconstitutional sentence (which has been reversed once by this Court) and should have volunteered for execution. Petitioner's counsel hopes that the official policy of the Attorney General has not degenerated to this level.

Respondent also states that there is no prejudice to this claim, and that if the sentence is found to be unjust, petitioner will have been serving the sentence he is requesting, namely life without parole. First, petitioner is seeking to have his conviction *and* sentence overturned. Second, this argument ignores the psychological toll exacted on petitioner by having to live with a death sentence hanging over him for the last twenty-five years.

The torturous effects of the "death row phenomenon" -- that is, the psychologically devastating effects of a lengthy stay on death row -- have been widely noted by jurists during the last three decades or more.[15] Similar views have been seen in law reviews and have

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[15] *See, e.g., Lackey v. Texas* (1995) 519 U. S. 1045 (opinion of Stevens, J., respecting denial of certiorari) (citing cases); *Coleman v. Balkcom* (1981) 451 U.S. 949, 952 (Stevens, J., concurring in the denial of certiorari) (recognizing that the mental pain suffered by a condemned prisoner awaiting execution "is [a] significant form of punishment" that "may well be comparable to the consequences of the ultimate step itself [*i.e.*, the actual execution]"); *Solesbee v. Balkcom* (1950) 339 U.S. 9, 14 (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."); *Furman v. Georgia*, 408 U.S. at 288-89 (Brennan, J., concurring) ("[W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."); *People v. Anderson* (1972) 6 Cal.3d 628, 649 ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but

been expressed by legal commentators and mental health experts.[16] See testimony of Mark

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also in the dehumanizing effects of the lengthy imprisonment prior to the execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the [protracted] process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."); *Suffolk County District Attorney v. Watson* (Mass. 1980) 411 N.E.2d 1274, 1289-95 & nn. (Liacos, J., concurring) (vivid and detailed description of the type of psychological pain and torture that a condemned person experiences while awaiting execution); *id.* at 1287 (Braucher, J., concurring) (arguing that capital punishment is unconstitutional under Massachusetts Constitution in part because "it will be carried out only after agonizing months and years of uncertainty"); *Commonwealth v. O'Neal* (Mass. 1975) 339 N.E.2d 676, 680-81 (Tauro, C.J., concurring) ("The convicted felon suffers extreme anguish in anticipation of the extinction of his existence."); *State v. Richmond* (Ariz. Dec. 15, 1994) 180 Ariz. 573; *Hopkinson v. State* (Wyo. 1981) 632 P.2d 79, 209-11 (Rose, C.J., dissenting in part) (recognizing "the dehumanizing effects of long imprisonment pending execution"); *State v. Ross* (Conn. 1994) 646 A.2d 1318, 1379 (Berdon, J., dissenting) (same); *Soering v. United Kingdom* (1989) 11 Eur. Hum. Rts. Rep. 439 (European Court of Human Rights refused to extradite a German national from UK to Virginia to face capital murder charges because of anticipated time that he would have to spend on death row if sentenced to death); *Vatheeswaran v. State of Tamil Nadu* (India 1983) 2 S.C.R. 348, 353 (criticizing the "dehumanizing character of the delay" in carrying out an execution); *Sher Singh et al. v. The State of Punjab* (India 1983) 2 S.C.R. 582 ("Prolonged delay in the execution of a death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed."); *Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General* (Zimb. June 24, 1993) No. S.C. 73/93 (reported in 14 HUM. RTS. L. J. 323 (1993)).

[16] *See, e.g.*, Schabas, *Execution Delayed, Execution Denied*, 5 CRIM. L. FORUM 180 (1994); Lambrix, *The Isolation of Death Row* in FACING THE DEATH PENALTY 198 (M. Radelet ed. 1989); Millemann, *Capital Post-Conviction Prisoners' Right to Counsel*, 48 MD. L. REV. 455, 499-500 (1989) ("There is little doubt that the consciousness of impending death can be immobilizing. ... This opinion has been widely shared by [jurists], prison wardens, psychiatrists and psychologists, and writers.") (citing authorities); Mello, *Facing Death Alone*, 37 AMER. L. REV. 513, 552 & n.251 (1988) (same) (citing studies); Wood, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 37-39 (1986) ("The physical and psychological pressure besetting capital inmates has been widely noted .... Courts and commentators have argued that the extreme psychological stress accompanying death row confinement is an eight amendment violation in itself or is an element making the death penalty cruel and unusual punishment.") (citing authorities); Stafer, *Symposium On Death Penalty Issues: Volunteering for Execution*, 74 J. CRIM. L. 860, 861 & n.10 (1983) (citing studies); Holland, *Death Row Conditions: Progression Towards Constitutional*

Fields, a former death row inmate, whose conviction was reversed in 1982 and was serving a life sentence at the time of his testimony.[17] Mr. Fields describes the cruel and dehumanizing and aspects of living under a sentence of death. The testimony of Sr. Helen Prejean, author of *Dead Man Walking,* describes her experiences with death row inmates, and the cruel aspects of living under a sentence of death.[18] Additionally, corrections expert Toni Baer, who testified in the Clarence Lackey case, testified that waiting to be executed for an extended period of time added to the punishment that was imposed by the jury. Courts have slowly realized[19] what legal commentators, criminologists and mental health experts have

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Protections, 19 AKRON L. REV. 293 (1985); Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 LAW & PSYCHOLOGY REVIEW 141, 157-60 (1979); Hussain & Tozman, *Psychiatry on Death Row*, 39 J. CLINICAL PSYCHIATRY 183 (1979); West, *Psychiatric Reflections on the Death Penalty*, 45 AMER. J. ORTHOPSYCHIATRY 689, 694-95 (1975); Gallemore & Parton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AMER. J. PSYCHIATRY 167 (1972); Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death By Execution*, 119 AMER. J. PSYCHIATRY 393 (1962); Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 830 (1972); G. Gottlieb, *Testing The Death Penalty*, 34 S. CAL. L. REV. 268, 272 & n.15 (1961); A. Camus, *Reflections on the Guillotine* in RESISTANCE, REBELLION & DEATH 205 (1966) ("As a general rule, a man is undone waiting for capital punishment well before he dies."); F. Dostoyevsky, THE IDIOT 47-48 (D. Magarshack trans. 1955); Duffy & Hirshberg, EIGHTY-EIGHT MEN AND TWO WOMEN 254 (1962) ("One night on death row is too long, and the length of time spent there by [some inmates] constitutes cruelty that defies the imagination. It has always been a source of wonder to me that they didn't all go stark, raving mad.") (quoting former warden of California's San Quentin Prison).

[17] See testimony of Mark Fields in *Lackey v. Scott,* No. MO-95-CA-068, June 19, 1995, U.S. Dist. Ct., Western District of Texas, Midland Division.

[18] See testimony of Sr. Helen Prejean in *Lackey v. Scott,* No. MO-95-CA-068, June 19, 1995, U.S. Dist. Ct., Western District of Texas, Midland Division.

[19] *See, e.g., Coleman v. Balkcom* (1981) 451 U.S. 949, 952 (Stevens J., concurring in denial of certiorari); *Furman v. Georgia*, 408 U.S. at 288-89 (Brennan, J., concurring); *Solesbee v. Balkcom* (1950) 339 U.S. 9, 14 (Frankfurter, J., dissenting); *Suffolk County District Attorney v. Watson* (Mass. 1980) 411 N.E.2d 1274, 1289-95 (Liacos, J., concurring).

long recognized[20]– that open-ended incarceration on death row, continually under the shadow of death is an extreme form of torture and punishment perhaps more severe than the death penalty itself.

This Court was a pioneer in recognizing the inherent cruelty of executing a death sentence following a lengthy period of waiting. *See, e.g., People v. Anderson* (1972) 6 Cal.3d 628, 649, *cert. denied* 406 U.S. 958

> ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative process essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.")

Two justices of the United States Supreme Court have suggested that prolonged incarceration on death row may so completely rob capital punishment of any constitutionally acceptable purpose as to make imposition of the death penalty after a defendant has been forced to wait long years in limbo cruel and unusual punishment in violation of the Eighth Amendment. *See Lackey*, 514 U.S. 1045 (Stevens, J., joined by Breyer, J., respecting the denial of certiorari). *See also Ceja v. Stewart* (9th Cir. 1998) 134 F.3d 1368 (Fletcher, J., dissenting from order denying stay of execution). Justice Stevens observed that capital punishment might serve the constitutionally acceptable purposes of retribution and

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[20] *See, e.g.*, "Execution Delayed, Execution Denied," 5 Crim. L. Forum 180 (1994); Milleman, "Capital Post-Conviction Prisoners' Right to Counsel," 48 Md. L. Rev. 455, 499-500 (1989); Mello, "Facing Death Alone," 37 Amer. L. Rev. 513, 552 & n.251 (1988); Wood, "Competency for Execution: Problems in Law and Psychiatry," 14 Fla. St. U. L. Rev. 35, 37-39 (1986); Stafer, "Symposium on Death Penalty Issues: Volunteering for Execution," 74 J. Crim. L. 860, 861 & n. 10 (1983); Holland, "Death Row Conditions: Progression Towards Constitutional Protections," 19 Akron L. Rev. 293 (1985); Johnson, "Under Sentence of Death: The Psychology of Death Row Confinement," 5 Law & Psychology Review 141, 157-60 (1979); Hussain & Tozman, "Psychiatry on Death Row," 39 J. Clinical Psychiatry 183 (1979); West, "Psychiatric Reflections on the Death Penalty," 45 Amer. J. Orthopsychiatry 689, 694-95; Gallemore & Parton, "Inmate IRs to Lengthy Death Row Confinement," 129 Amer. J. Psychiatry 167 (1972); Bluestone & McGahee, "Reaction to Extreme Stress: Impending Death by Execution," 119 Amer. J. Psychiatry 393 (1962).

deterrence, but found it "arguable that neither ground retains any force for prisoners who have spend some 17 years under a sentence of death." *Lackey v. Texas*. "Moreover," Justice Stevens wrote, "after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted." *Id.* When the death penalty "ceases realistically to further these purposes ... its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman v. Georgia*, 408 U.S. at 312 (White, J., concurring in judgment).

The United States stands virtually alone among the nations of the world in confining individuals for periods of many years continuously under sentence of death. The international community is increasingly recognizing that, without regard for the question of the appropriateness or inappropriateness of the death penalty itself, prolonged confinement under these circumstances is cruel and degrading and in violation of international human rights law. *Pratt v. Attorney General for Jamaica* (1993) 4 All.E.R. 769 (Privy Council); *Soering v. United Kingdom* 11 E.H.R.R. 439, ¶ 111 (Euro. Ct. of Human Rights). *Soering* specifically held that, for this reason, it would be inappropriate for the government of Great Britain to extradite a man under indictment for capital murder in the state of Virginia, in the absence of assurances that he would not be sentenced to death.

The developing international consensus demonstrates that, in addition to being cruel and degrading, what the Europeans refer to as the "death row phenomenon" in the United States is also "unusual" within the meaning of the Eighth Amendment and the corresponding provision of the Nevada Constitution, entitling petitioner to relief for that reason as well.

Further, the process used to implement petitioner's death sentence violates international treaties and laws that prohibit cruel and unusual punishment, including, but not limited to, the United Nations Convention Against Torture and Other Cruel, Inhuman or

Degrading Treatment or Punishment (the Torture Convention), adopted by the General Assembly of the United Nations on December 10, 1984, and ratified by the United States ten years later. *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984).

The length of petitioner's confinement on death row, along with the constitutionally inadequate guilt and penalty determinations in his case, have caused him prolonged and extreme mental torture and degradation, and denied him due process, in violation of international treaties and law.

Article 1 of the Torture Convention defines torture, in part, as any act by which severe pain or suffering is intentionally inflicted on a person by a public official. *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984). Pain or suffering may only be inflicted upon a person by a public official if the punishment is incidental to a *lawful* sanction. *Id.*

In addition, petitioner has been, and will continue to be, subjected to unlawful pain and suffering due to his prolonged, uncertain confinement on death row. "The devastating, degrading fear that is imposed on the condemned for months and years is a punishment more terrible than death." Camus, *Reflections on the Guillotine*, in *Resistance, Rebellion and Death* 173, 200 (1961). *Pratt v. Attorney General for Jamaica,* 4 All.E.R. 769 (Privy Council); *Soering v. United Kingdom*, 11 E.H.R.R. 439, ¶ 111 (Euro. Ct. of Human Rights).

The violation of international law occurs even when a condemned prisoner is afforded post-conviction remedies beyond an automatic appeal. These remedies are provided by law, in the belief that they are the appropriate means of testing the judgment of death, and with the expectation that they will be used by death-sentenced prisoners. Petitioner's use of post-conviction remedies does nothing to negate the cruel and degrading character of his long-

term confinement under judgment of death.

Further, in addition to the actual killing of a human being and the years of psychological torture leading up to the act, the method of execution employed by the State of California will result in the further infliction of physical torture, and severe pain and suffering, upon petitioner.

The sheer length of time petitioner has spent on California's death row has caused him severe psychological anguish and pain. The sustained stress and pressure that petitioner has been subjected to while on death row have taken an extreme toll on his well-being and mental health. His existence has been filled with severe stress, depression, and anxiety.

Of the approximately 3,500 persons on death row in this country, only a small minority have spent as long a time on death row as petitioner. *Cf. State v. Richmond* (Ariz.1994) 886 P.2d 1329. This delay, according to former Chief Justice Rehnquist, makes "a mockery of our criminal justice system," which "undermine[s] the integrity of the entire criminal justice system." *Coleman*, 451 U.S. at 958-59 (Rehnquist, J., dissenting from denial of certiorari).[21]

The Judicial Committee of the Privy Council of the United Kingdom (the "Privy Council"),[22] sitting *en banc* for the first time in five decades, unanimously held that carrying

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[21] Justice Scalia reiterated this point during oral argument in *McFarland v. Scott* (1994) 531 U. S. 755:"Wasn't the real delay here much before the [habeas corpus appeal]? ... What accounts for that length of time just on ... the direct appeal [which] took so long -- 3 years. ... Well, I must say that that's -- it's hard to expect Federal judges or any judges to get excited about staying a Texas execution when Texas itself diddles around for 3 or 4 years ... If you want us to get serious, you should get serious yourselves." Remarks of Justice Scalia to Margaret P. Griffey, assistant attorney general of Texas, during oral arguments in *McFarland v. Scott*, No. 93-6497 (March 29, 1994), quoted in *Official Transcript [of] Proceedings before the Supreme Court of the United States, McFarland v. Scott*, at pp. 35-37 (Anderson Reporting Co.).

[22] The Privy Council is the highest appellate court for Commonwealth nations. The jurists who sit on the Privy Council are likewise members of England's highest domestic appellate court, the House of Lords ("the Law Lords").

out the death sentences of the two men would be "torture," and "inhuman" and "degrading" punishment. *Pratt & Morgan v. The Attorney General of Jamaica*, Privy Council Appeal No. 10 of 1993, 3 WLR 995, 143 NLJ 1639, 2 AC 1, 4 All ER 769 (Nov. 2, 1993) (en banc). The Privy Council did not hold that capital punishment was cruel and unusual *per se*, but instead focused on the fact that the condemned men had been on death row for a protracted period of time seventeen years.

The Privy Council further stated: There is an instinctive revulsion against the prospect of [executing] a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time. *Id.* at 16.

Pratt & Morgan surveyed the history of English common law regarding the subject of lengthy imprisonment of a condemned man on death row and the repeated setting of execution dates in a single case. The Privy Council concluded that neither practice was condoned historically at common law. *See, e.g., id.* at 2-3 ("It is difficult to envisage any circumstance in which in England a condemned man would have been kept in prison for years awaiting an execution."); *id.* at 5 (noting the "common law practice that execution followed as swiftly as practical after sentence"); *see also Riley v. Attorney General of Jamaica*, 1 AC 719, 3 All ER 469 (Privy Council 1983) (Lord Scarman, dissenting, joined by Lord Brightman) ("[T]here is a formidable case for suggesting that execution after inordinate delay would have infringed the prohibition against cruel and unusual punishment to be found in Section 10 of the Bill of Rights of 1689 . . . "), *majority opinion overruled by Pratt & Morgan v. Attorney General of Jamaica*, 2 AC 1, 4 All ER 769, 3 WLR 557 (Privy Council 1993) (*en banc*). *See also Lackey*, 514 U.S. 1045 (opinion of Stevens, J., respecting denial of certiorari). As Justice Scalia has recognized, "[t]here is no doubt" that Section 10 of the English Bill of Rights of 1689 "is the antecedent" of the cruel-and-unusual-

punishments clause of our Eighth Amendment. *See Harmelin v. Michigan* (1991) 501 U.S. 957, 966 (opinion of Scalia, J.).

Pratt & Morgan, along with U.S. and international authorities discussed herein, offers a firm legal basis for Mr. Sonner's Eighth Amendment claim challenging the State's right to execute the death sentence in this case. Literally hundreds of American courts and jurists have been guided by the decisions of the Privy Council, the highest expositor of law in our Mother Country, whose common law has greatly shaped our own law. *See, e.g., United States v. Raddatz* (1980) 447 U.S. 667, 679 (citing a Privy Council decision with approval); *Kilbourn v. Thompson* (1881) 103 U.S. 168, 186 (same); *Fisher v. United States* (1946) 328 U.S. 463, 486-88 (Frankfurter, J., dissenting) ("This Court in reviewing a conviction for murder ... ought not be behind ... the Privy Council ....") (discussing Privy Council decisions).

Recent Eighth Amendment decisions have, as a threshold matter, focused on whether a challenged punishment was considered unacceptable at the time of the adoption of our Bill of Rights. *See, e.g., Stanford v. Kentucky* (1989) 545 U. S. 645 (in rejecting claim that the execution of 16 and 17 year olds is cruel and unusual, the Court noted that the punishment was not "`one of those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted'") (*quoting Ford v. Wainwright*, 477 U.S. at 405). If a punishment was considered cruel and unusual in 1789, then the Court's Eighth Amendment analysis goes no further; if the Framers considered a punishment cruel and unusual in 1789, then *a fortiori* it is cruel and unusual today. *See Ford*, 477 U.S. at 405-06.

The Privy Council's review of English common law makes it clear that more than a decade stay on death row would *never* have been tolerated at common law under any circumstances. Although elaborate appeals in capital cases (leading to frequent re-trials) are a relatively recent phenomenon -- largely a function of the Supreme Court's post-*Furman* Eighth Amendment capital jurisprudence -- the necessary delay occasioned by these appeals

cannot constitutionally extend to the point where the State keeps a man on death row for well over a decade because of appeals, as in this case. *See, e.g., Pratt & Morgan*, slip op., at 18-20. That is, even factoring in the incidental delay caused by modern appeals, a state cannot justify taking over a decade to obtain a final conviction and death sentence on direct review. *See Pratt & Morgan*, slip op. at 20 ("In their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that an execution follows as swiftly as practicable after sentence . . . ").

Assuming that a particular type of punishment was permitted at the time that the Bill of Rights was adopted -- or, in this case, assuming that the post-*Furman* requirement of meaningful appellate review in capital cases somehow alters the common law requirement described above -- a second, more difficult question arises: whether a punishment that may have been acceptable to the Framers of the Constitution nonetheless now violates modern society's civilized standards. *Compare Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662 (*en banc*) (hanging not a cruel and unusual punishment) *with Fierro v. Gomez* (9th Cir. 1996) 77 F.3d 301 (use of gas chamber for execution violates Eighth Amendment).

Addressing the second prong of the Supreme Court's Eighth Amendment analysis, that Court has interpreted the reach of the Amendment in a "flexible and dynamic manner." *Gregg v. Georgia*, 428 U.S. at 171; *see also Weems v. United States* (1910) 217 U.S. 349, 373 ("a principle, to be vital, must be capable of wider application than the mischief which gave it birth"). The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles* (1958) 356 U.S. 86, 101. As the concepts of dignity and civility evolve, so too do the limits of what is considered cruel and unusual. These factors include the practices among the majority of the states in this country and international practices. *See, e.g., Stanford v. Kentucky* (1989) 492 U.S. 361, 369; *Coker v. Georgia* (1977) 433 U.S. 584; *Enmund v. Florida* (1982) 458 U.S. 782.

The latter is obviously particularly relevant for purposes of the claim presented

here. The weight of international authority strongly supports petitioner's contention that his execution would violate the Eighth Amendment.

Other well-established Eighth Amendment principles of broad application are relevant to this Court's analysis. The Eighth Amendment "embodies `broad and idealistic concepts of dignity, civilized standards, humanity and decency'" against which forms of punishment must be measured. *Estelle v. Gamble* (1976) 429 U.S. 97, 102 (citation omitted). It "expresses the revulsion of civilized man against barbarous acts -- the `cry of horror' against man's inhumanity to his fellow man." *Robinson v. California* (1962) 370 U.S. 660, 676 (Douglas, J., concurring).

The Eighth Amendment's restrictions on the ability of a state to impose certain types of punishment "aim ... to protect the condemned from [unnecessary] fear and pain ... or to protect the dignity of society itself from the barbarity of exacting mindless vengeance." *Ford v. Wainwright*, 477 U.S. at 410. At its core, the Eighth Amendment stands to safeguard "nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. at 100. It cannot be gainsaid that keeping a condemned man on death row -- a place that has appropriately been described as one of the loneliest, most miserable places on earth -- for more than a decade impugns fundamental human dignity when there is no legitimate state interest justifying the inordinate delay.

In the particular context of capital punishment -- where the infliction of some incidental pain is obviously unavoidable -- the Supreme Court's Eighth Amendment analysis of what is "cruel and unusual" turns on whether unnecessary or gratuitous pain is part of the punishment. As the Supreme Court stated in *State ex. rel. Francis v. Resweber* (1947) 329 U.S. 459:

> The traditional humanity of modern Anglo-American law forbids the infliction of *unnecessary pain* in the execution of the death sentence. Prohibition against the wanton infliction of pain has come to our law from the [English] Bill of Rights [of 1689] . . . Mr. Francis' suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to

> require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment . . . [The Constitution does not protect against] the *necessary suffering* involved in any method employed to extinguish life humanely. The fact that an *unforeseen accident* prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict *unnecessary pain* nor any *unnecessary pain* involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block.

Id. at 463-64; emphasis added.

As a result of the abhorrent conditions to which petitioner has been subjected during his stay on death row for over two decades, he has endured a needlessly *lingering* form of torturous psychological punishment that, if the State has its way, will culminate in a lethal injection. *See Gregg v. Georgia*, 428 U.S. at 170-71 (unnecessarily lingering form of execution is unconstitutional under the Eighth Amendment) (*citing In re Kemmler* (1890) 136 U.S. 436, 447).

Finally, the fact that petitioner is challenging the lingering *psychological* anguish resulting from his excessively lengthy stay on death row-- and is not alleging *physical* torture -- does not foreclose an Eighth Amendment claim. In *Pratt & Morgan*, the British Privy Council focused exclusively on the *mental* torture inflicted on two condemned men on Jamaica's death row. *See Pratt and Morgan*, slip op., at 1-2 (describing "the agony of mind that these men must have suffered as they have alternated between hope and despair in the 14 years that they have been in prison facing the gallows. It is unnecessary to refer to the evidence describing ... the *emotional and psychological impact of this experience*, for it only reveals that which is to be expected.").

It is well-established that the infliction of extreme mental anguish can be a form of unconstitutional torture. *See, e.g., Trop v. Dulles*, 356 U.S. at 102 (expatriation as penalty for desertion "subjects the individual to a fate of ever-increasing fear and distress"); *Hudson v. McMillan* (1992) 112 U.S. 995, 1004 (Blackmun, J., concurring) ("I am unaware of any

precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes [under the Eighth Amendment]. If anything, our precedent is to the contrary."); *Furman v. Georgia* (1972) 408 U.S. 238, 271-73 (Brennan, J., concurring) ("[T]he Framers also knew []that there could be exercises of cruelty other than those which inflicted bodily pain or mutilation."); *see also Smith v. Aldingers* (5th Cir. 1993) 99 F.3d 109, 110 n.4 (collecting recent cases holding that mental or psychological torture can violate the Eighth Amendment); *cf. In re Medley* (1890) 134 U.S. 160, 172 (recognizing the "immense mental anxiety" that a condemned man experiences when the authorities intentionally refuse to inform him of the precise date of his scheduled execution, and referring to it as "one of the most horrible feelings to which he can be subjected").

Admittedly, *In re Medley* was an *ex post facto* case. However, its century-old recognition of the "immense" and "horrible" *mental* anguish that a condemned man feels when he does not know the date of his execution -- which the Supreme Court recognized as a form of "punishment" implicating the *ex post facto* clause -- is instructive here. *See Lackey*, 514 U.S. 1045 (opinion of Stevens, J., respecting denial of certiorari). Petitioner does not allege that particular type of mental anxiety caused by his confinement on death row; however, he does contend that the mental anguish that he has faced have been equally or more "immense" and "horrible." Therefore, to permit the State to carry out an execution after requiring petitioner to endure such torturous conditions for over two decades would unquestionably violate the Eighth Amendment.

Given these serious Federal and State Constitutional violations, as well as violations of International Law, Treaties, Norms, and Customs, this Court should grant the petition for writ of habeas corpus the relief requested.

Claim 134. Application of the Death Penalty Violates Customary International Law

Respondent argues that petitioner cannot prevail "because he has failed to establish the premise that his trial involved violations of state and federal constitutional law." (IR at 99). For the reasons stated in the Claim, petitioner disputes this proposition. Even if it were true, the claims made in this petition all "establish violations of state and federal constitutional law."

Respondent's arguments that international law prohibits the death penalty in this case are without merit because they are based on the erroneous presumption that international law is only violated to the extent that state law is violated. "International law and international agreements of the United States are law of the United States and supreme over the law of the several States" Rest.3d. Foreign Relations Law of the United States (1987) § 111, p. 1 . "[T]he customary law of human rights is part of the law of the United States to be applied as such by state as well as federal courts"; *Id.* § 702, Comment c.

International human rights law has now become an established, essential and universally accepted part of the life of the international community. L. Henkin, *The International Bill of Rights: The Covenant on Civil and Political Rights* (L. Henkin ed. 1981) p. 1. Under the Supremacy Clause, customary international law is to be followed even where this is not in line with state law. *Kansas v. Colorado* (1906) 206 U.S. 46; see *Zschernig v. Miller* (1968) 389 U.S. 429, 441; *Clark v. Allen* (1947) 331 U.S. 503, 508; *Missouri v. Holland* (1920) 252 U.S. 416, 433-35. The states, under the Articles of Confederation, had applied international law as common law, but with the signing of the U.S. Constitution, "the law of nations became preeminently a federal concern." *Filartiga, supra*, 630 F.2d. at 877-78.

Given these serious Federal and State Constitutional violations, as well as violations of International Law, Treaties, Norms, and Customs, this Court should grant the petition for

writ of habeas corpus the relief requested.

Claim 135. Petitioner's Death Sentence is Arbitrary Under International Law

Respondent states that petitioner's claim is that the death penalty is arbitrary specifically in this case. (IR at 99). Respondent is wrong. Petitioner's claim is that the California death penalty statute generally violates international law because it is arbitrary, and applying the death penalty to him specifically is arbitrary. *See* Petition, Claim 134.

No principle of international law is more fundamental than the concept that human beings should be free from arbitrary punishment. *See* Universal Declaration of Human Rights, Arts. 3 and 9, U.N.Doc. A/801 (1948); The American Convention on Human Rights, Part I, ch. II, Art. 7, 77 Dept. of State Bull. 28 (July 4, 1977). Petitioner has already demonstrated that the statute is arbitrary because of its lack of standards and its use of imprecise terms susceptible to countless meanings. *See, e.g.*, Petition, Claims 128-130.

For guidance regarding the "norms" of international law, courts and international law scholars look to whether the standard is "universal, definable and obligatory." *Xuncax v. Gramajo* (D.Mass.1995) 886 F.Supp. 162, 184 (holding allegations of torture, summary execution, disappearance, and arbitrary detention constitute fully recognized violations of international law). California's standardless death penalty statute, which is devoid of discernible meaning, violates international norms.

Given these serious Federal and State Constitutional violations, as well as violations of International Law, Treaties, Norms, and Customs, this Court should grant the petition for writ of habeas corpus the relief requested.

Claim 136. Petitioner Has a Right to be Free From Cruel, Inhuman or Degrading Punishment

Respondent argues that the United States Senate, when ratifying the International Covenant on Political and Civil Rights, declared that the phrase "cruel, inhuman, or degrading treatment or punishment" meant no more than "the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and Fourteenth Amendments to the Constitution." (IR at 100). An noted in the Claim, this is contrary to most, if not all, other international interpretations of the clause.

Respondent thus argues that petitioner's claim is not subject to review under international standards to which the United States has agreed to adhere. Because of the multi-year delays between sentencing and execution, and the conditions in which the condemned are kept, imposition of the death penalty in this case constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the International Covenant on Civil and Political Rights ("ICCPR"), as discussed in the petition. The Senate has reserved on this article, saying it "considers itself bound by Article VII to the extent that 'cruel, inhuman or degrading treatment or punishment' means that cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States." Article IV, Section 2 of the ICCPR says no derogations are allowed from Article VII, which thus renders the Senate's reservation void.

Even if the derogation were allowable under the treaty, customary international law regarding the right to be free from cruel, inhuman or degrading treatment constitutes *jus cogens*. *Jus Cogens* denotes a norm of customary international law that permits no derogation. The right to life is the most fundamental human right. *See, e.g.,* Universal Declaration of Human Rights, GA Res. 217A (III) U.N. GAOR, 3d Sess. Art. 3, U.N. Doc. A/810 (1948); ICCPR, Dec. 19, 1966, art. 6, 999 U.N.T.S. 171, 174-175 (*entered into force*, Mar 23, 1976). This basic right cannot be deprived under the circumstances described in the

petition.

Claim 137. Petitioner's Conviction and Sentence Violate his Right to Due Process

Respondent argues that citations to international law are futile. (IR 101). Petitioner has repeatedly demonstrated how due process norms under international law have been violated in his case.

Article 6 of the ICCPR provides:

> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

Thus, while capital punishment is not *per se* outlawed under international law, for its application to be lawful, it is required that the procedural safeguards prescribed by international law have been strictly observed. Petitioner has demonstrated that those procedural safeguards were not observed. *See, e.g.,* Petition at Claims 133-139.

In discussing the notion of 'arbitrariness' Ramcharan, a leading commentator on the right to life, observes that:

> Where a government has imposed a death penalty but failed to comply with procedural safeguards prescribed by international law, it has violated international law and has arbitrarily deprived a person of his life.

Ramcharan, "The Concept and Dimension of the Right to Life," in B. G., Ramcharan (ed.), *The Right to Life in International Law* (1985) 1, at 21. Petitioner has also demonstrated that under international law, his conviction and sentence are arbitrary, both because of the facts and rulings in his case and because of the California death penalty statute as a whole.

In the case *Lynden Champagnie v. Jamaica,* the Human Rights Committee stated:

> The imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant.

Lynden Champagnie et al v. Jamaica, Communication N. 445/1991, 2 *International Human*

Rights Reports (1995) 102, at 106, para. 7.4. as cited in 2000/27, at 10, para. 20. This sentiment was echoed in *Reid vs. Jamaica,* Communication No. 250/1987, in which the Committee determined that:

> The imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes ... a violation of article 6 of the Covenant. As the Committee noted in its general comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal.'

International law thus creates an additional layer of rights which are applicable to petitioner's case. Those rights were violated here.

Claim 138. Petitioner's Right to be Tried Before an Impartial Tribunal was Violated by Death Qualification Procedures

Respondent asserts that this claim is without merit. (IR at 101). Respondent's legal citations do not support his argument.

Respondent cites *People v. Snow* (2003) 30 Cal.4th 43, 127. (IR at 101). The entire discussion of international law in that case is:

> International law does not compel the elimination of capital punishment in California. (*People v. Ghent* (1987) 43 Cal.3d 739, 779 [239 Cal.Rptr. 82, 739 P.2d 1250].)

Id. This statement does not respond to petitioner's arguments. Petitioner asserted that the trial judge was actually biased against him (Petition, Claim 138, ¶3), that the jury was not impartial, in part because it was "death-qualified" (Petition, Claim 138, ¶¶4-5), and that his jury was subjected to inflammatory and irrelevant evidence which aroused their passions and left them biased against petitioner. None of these claims, nor anything similar, was addressed by the Court in *People v. Snow*.

Respondent also relies on *People v. Hillhouse* (2002) 27 Cal.4th 469, 511. (IR at 101). In *Hillhouse*, this Court stated that "we need not consider whether a violation of state or federal constitutional law would also violate international law, 'because defendant has failed to establish the premise that his trial involved violations of state and federal constitutional law'". Here, however, petitioner has shown violations of state and federal constitutional law and international law, distinguishing his case from *Hillhouse*.

Respondent cites *People v. Ghent* (1987) 43 Cal.3d 739, 779, 781. In that case, the Court rejected the argument that the failure to require the jury to return written findings about the reasons why the jury was sentencing the defendant to death violated international law. *Id.* The Court concluded that none of the defendant's arguments warranted overturning the death penalty. *Id.* The claim at issue was much different than the claim brought here.

Respondent also relies on *Buell v. Mitchell* (6th Cir. 2001) 274 F.3d 337. In that case,

the petitioner argued that international law prohibited the death penalty as a whole. *Id.* at 370-71. In this claim, petitioner only argues that international law guarantees petitioner the right to a trial before an impartial tribunal, and that this right was violated.

Accordingly, petitioner has stated a prima facie claim, and is entitled to relief.

Claim 139. Petitioner Has a Right to Litigate Violations of His Rights Before International Tribunals

Respondent argues that petitioner has not stated a prima facie case. (IR at 101-102). Respondent cites the same inapplicable cases as discussed in Claim 138. Those cases are equally inapplicable to this claim.

Claim 140. Trial Counsel Rendered Ineffective Assistance of Counsel

Respondent asserts that petitioner has failed to demonstrate ineffective assistance of counsel. (IR at 102).

This claim alleges that to the extent that trial counsel failed to raise the many objections cited in the various claims in the petition, it was constitutionally ineffective assistance of counsel not to do so. In each claim, petitioner has demonstrated with particularity how that constitutional error occurred. There was no tactical reason not to object to these reversible constitutional violations, and respondent has not offered a scenario where trial strategy would have dictated the decisions or omissions complained of in the petition.

Claim 141. Appellate Counsel Rendered Ineffective Assistance

Respondent asserts that petitioner has failed to demonstrate ineffective assistance of counsel, particularly because "it is difficult, if not impossible, to determine whether the omissions were attributable to a tactical decision which a reasonably competent appellate criminal defense attorney would make." (IR at 103). This Court regularly makes determinations regarding valid capital case appellate strategy in the absence of declarations of counsel. These determinations are common in initial state habeas corpus proceedings.

This claim alleges that, to the extent that appellate counsel failed to raise any of the various claims in the petition when counsel should have done so, it was constitutionally ineffective assistance of counsel not to do so. In each claim, petitioner has demonstrated that constitutional error occurred. There was no tactical reason not to raise these claims, demonstrating reversible constitutional violations.

Claim 142. Habeas Counsel Rendered Ineffective Assistance

Respondent repeats his arguments from Claim 141.(IR at 103-104). Petitioner reiterates his response to that claim.

Claim 143. Cumulative Constitutional Error Requires a Reversal of the Convictions and Death Sentence

Respondent argues that *all* of petitioner's claims are procedurally defaulted and, in addition, they "fall on their face" for one reason or another. (IR at 104). Petitioner has demonstrated numerous constitutional errors in the claims for the relief. While each individually warrants relief, the case for relief is even stronger when they are assessed cumulatively.

G.
CONCLUSION

For all the reasons expressed herein and in the petition, petitioner respectfully requests that relief be granted as requested in the petition.

DATED: January 31, 2006

Respectfully submitted,
PETER GIANNINI
JAMES S. THOMSON
SAOR E. STETLER
Attorneys for Petitioner

By: _____
PETER GIANNINI

DECLARATION OF SERVICE

I am employed in the County of Berkeley, State of California. I am over the age of 18 and not a party to the within action; my business address is 819 Delaware Street, Berkeley, CA 94710.

On January 31, 2006, I served the foregoing document described as INFORMAL REPLY TO INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS on the parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Robert David Breton
Deputy Attorney General
300 South Spring Street
Los Angeles, California 90013

Reno
P.O. Box D-63100
San Quentin, CA 94974

[X] (By Mail)

I deposited such envelope in the mail at Berkeley, California, with postage fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Berkeley, California, in the ordinary course of business.

Executed on January 31, 2006 at Berkeley, California.

[X] I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 31, 2006 at Berkeley, California.

SAOR E. STETLER
TYPE OR PRINT NAME

SIGNATURE