IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE	)	
	)	
ALFREDO REYES VALDEZ,	)	No. S107508
	)	
Petitioner.	)	Related Appeal S026872
	)	
	)	CAPITAL CASE
	)	

FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE , THOMAS NUSS, JUDGE PRESIDING

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

MARILEE MARSHALL
Attorney at Law
State Bar No. 101046
MARILEE MARSHALL & ASSOCIATES
48 North El Molino Avenue
Suite 202
Pasadena, CA. 91101

(626) 564-1136

Attorney for Petitioner

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

CONSTITUTION S

MISC.

STATE STATUTES

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IN RE	)	
	)	
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INFORMAL REPLY TO INFORMAL RESPONSE

TO PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to this Court's order of June 14, 2002 Petitioner, ALFREDO REYES VALDEZ submits this Informal Reply to Respondent's Informal Response to his Petition for Writ of Habeas Corpus.

A. PRELIMINARY STATEMENT

Petitioner re-alleges and incorporates by reference all the allegations, prayers for relief, and accompanying exhibits set forth in his Petition for Writ of Habeas Corpus filed in this Court on June 13, 2002, as though set forth in full. The accompanying exhibits DD through EE in support of this Informal Reply are incorporated herein by reference as though set forth in full. .

Petitioner has submitted a Petition for Writ of Habeas Corpus alleging that he is unlawfully restrained because his conviction and sentence resulted from proceedings that violated his rights under the federal and state constitutions and

.the Treaties, Covenants and Agreements of International law. Petitioner has offered documentary evidence in support of his claims for relief and has stated "fully and with particularity the facts on which relief is sought" and included copies of reasonably available documentary evidence supporting the claims." ***(People v. Duvall*** (1995) 9 Cal. 4th 464, 474.) Petitioner bears the burden to initially *plead* sufficient grounds for relief and later to *prove* those grounds. The petition states fully and with particularity the facts on which relief is sought and includes copies of reasonably available documentary evidence supporting the claims (***Id.***) A 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 his petition even if the claim is not fully "developed." (***In re Clark*** (1995) 5 Cal 4th 750, 781). Petitioner has included claims which, due to lack of adequate funds, discovery and subpoena power, are not as yet fully developed but which he believes state at least a prima facie case for relief. These claims are included because failure to include all potentially meritorious habeas corpus claims, of which counsel was or should have been aware, in Petitioner's first state habeas corpus petition may result in those claims being deemed untimely and procedurally defaulted. ***(In re Clark, supra.)***

As was pointed out in the Petition for Writ of Habeas Corpus, and as will be specifically addressed below, additional funding and discovery is necessary in order to properly investigate some of Petitioner's claims. This court's guidelines

state that there shall be no funds issued over and above $25,000 prior to the issuance of an order to show cause. Counsel has completed the investigation only as far as ***available funding will allow.*** Available funding was depleted and over expended in investigating Petitioner's social history and retaining an expert to evaluate him, a duty which trial counsel did not perform.

Whenever a petition for writ of habeas corpus alleges a prima facie case for relief, the petitioner is entitled to the issuance of an order to show cause, thereby allowing for the factual development of the evidentiary bases for the claims (***In re Lawler*** (1979) 23 Cal. 3d 190, 194 , ***People v. Duvall, supra,*** 9 Cal. 4th at p. 475.) " If the petition is sufficient on its face, this court is obligated by statute to issue a writ of habeas corpus." (***People v. Romero*** (1994) Cal. 4th 728, 737-738.)

Pursuant to California Rules of Court, Rule 60, this Court requested an informal response from Respondent to assist the court in determining the Petition's sufficiency. (***People v. Romero, supra***, at p. 737.) Respondent in his Informal Response has for the most part failed to address the only relevant inquiry before this Court: whether the Petition alleges facts that if proven, entitle petitioner to relief . Indeed, Respondent appears to merely repeat language he has used in other cases, that does not fit the facts of this case. Respondent's apparent lack of enthusiasm for defending the judgment herein is fully warranted. However, in so far as any of Respondent's comments can be construed as disputing the factual

basis for any of petitioner's claims, this Court should issue an order to show cause so that any factual disputes can be resolved at a hearing after Petitioner has access to discovery, subpoena power, and adequate funding to conduct the necessary investigation. (Pen. Code § 1484; ***In re Serrano*** (1995) 10 Cal. 4th 447, 455-456; ***People v. Romero, supra*** 8 Cal. 4th at p. 740; ***In re Lewallen*** **(1979)** 23 Cal. 3d 274; 278.)

Respondent states that the factual statement will be found in his brief on appeal. (I.R. p. 5 However, that statement of facts is necessarily limited to facts which were presented at Petitioner's trial. The facts presented at trial are inappropriately slanted in favor of respondent due to the errors and omissions complained of in the petition, and are only a part of the complete facts on which this Court must adjudicate this petition. A complete statement of facts cannot be accomplished until the completion of discovery and an evidentiary hearing in this Court. (See ***Williams (Terry)*** **v.** ***Taylor*** (2000)592 U.S. 362, 398 [120 S.Ct. 1495, 1515, 146 L.Ed. 389.]) ["the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – in re-weighing it against the evidence in aggravation"].)

Throughout his Informal Response, Respondent complains that no declaration of trial counsel or of Petitioner was submitted. (I.R. p.p. 1,9,12,13,26,29,30,32,34,36, 37,38,39,40.) There is no authority for the

proposition Petitioner must provide or explain his failure to provide a sworn statement from trial counsel regarding his actions or omissions. The rule urged by Respondent would allow recalcitrant or hostile trial counsel to preclude any inquiry into his conduct, however, egregious, by refusing to cooperate. The petitioner in such a case would have no recourse because he has no means to compel discovery or witnesses prior to issuance of an order to show cause. This court has stated clearly that in "habeas corpus proceedings, there is an opportunity in an evidentiary hearing to have trial counsel fully describe his or her reasons for acting or failing to act in the manner complained of." (***People v. Pope***, (1979) 23 Cal. 3d 412.) This court's jurisprudence contradicts Respondent's unsupported contention that Petitioner's claim must be rejected at the informal briefing stage on the ground that trial counsel's declaration is not attached. Instead ***Pope*** contemplates full factual development of trial counsel's representation in an evidentiary hearing which Petitioner has not yet been afforded. Similarly respondent alleges that Petitioner's declaration is necessary to make a prima facie cases for relief based on his claims not only of ineffective assistance of counsel but of factual innocence. Respondent is wrong. Respondent cites no authority for the proposition that habeas relief can be had only if Petitioner submits a declaration. By contrast the Fifth Amendment against compulsory self-incrimination prohibits the scenario that respondent urges.

Respondent has failed to respond to many of petitioner's allegations. These

omissions should be taken as concessions that an order to show cause should issue to permit factual development and presentation of the bases of his claims.

Respondent through out his pleading filed in July 2002, repeatedly cites to ***People v. Karis*** 1988 46 Cal. 3d 612, 656 2,2, 12, 23, 16, 17, 20, 31, 23, 24, 26, 27, 28, 30, 32, 34, 35, 36, 37 38, 39, 40, 41, 42, 43, 44, 45, 46 without any acknowledgment or reference to ***Calderon v. Karris*** (9th Cir.2002) 283 F. 3d 1117. As Respondent knows, in ***Karris***, the Ninth Circuit, affirmed the district court's granting of a petition for writ of habeas corpus with respect to the penalty portion of the trial due to ineffective assistance of trial counsel. (***Id. at 1139.***) Similarly Respondent throughout his pleading cites repeatedly to ***In re Visciotti*** (1996, 14 Cal. 4th 325, (I.R. p.p. 2, 4, 21, 22, 23, 224, 26, 27, 20, 21, 33, 36, 37, 39, 43, 42, 44, 46.) without any acknowledgment that ***Visciotti's*** habeas petition with respect to the penalty phase of the trial was ultimately granted based on ineffective assistance of counsel similar to that alleged herein. (***Visciotti v. Woodford***, (9th Cir. 2002) 288 F.3d 1097.)

Petitioner replies to those points and arguments in the Informal Response on which a reply would assist the Court. Petitioner does not waive any individual claim or argument on which he does not comment or present argument or evidentiary support in this Reply.

Petitioner does not waive his right to discovery, the Court's processes, and a hearing on all of his claims with regard to which there is any factual dispute or

concede that the informal briefing process contemplates full factual development of the evidentiary basis for any claims. To the extent that petitioner does not present all evidence in support of each fact necessary to support each claim, he believes in good faith that such evidence exists but has not been able to discover, obtain, or present it because he requires court-ordered discovery, adequate funding, subpoena power, and an evidentiary hearing in order to present the factual basis for the claim.

Contrary to Respondent's numerous assertions to the contrary,(IR, p.p. 8, 10, 11, 14, 17, 40, 46.) the Petition and all its claims are timely. Petitioner filed his Petition according to this court's guidelines. A petition filed within 90 days from the last due date of the reply brief is presumed timely without an explanation. (1.1.1). Since the filing of the instant Petition that guideline has been amended and now provides : 1.1.1 A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 90 to 180 days after the final due date for the filing of appellant's reply brief on the direct appeal, or within 24 months after appointment of habeas corpus counsel, whichever is later. [As amended effective Sept. 19, 1990, Jan. 22, 1998, and July 17, 2002.]. ***In re Clark*** (1995) 5 Cal 4th 750, 784 condemned "piecemeal litigation" of habeas corpus claims, held that all claims must be presented in one petition and determined that presentation of claims could be delayed if a potentially meritorious claim could not be presented without additional investigation. Thus,

as respondent well knows, although "counsel was appointed five years ago" and may have been aware at an earlier point of some of the claims presented in the Petition, she was, nevertheless, required to investigate and develop all potentially meritorious claims, as far as available funding would allow, and to file this one single petition. Petitioner will not, therefore, waste this Court's time belaboring Respondent's multiple references to the untimeliness of any of Petitioner's claims

> Respondent continually faults Petitioner for either restating appellate claims raising claims and/or raising claims in his Petition that could have been raised on appeal. However, Petitioner's appeal is still pending and Petitioner wishes this court to consolidate his Petition with the direct appeal or at least consider his Petition concurrently with the appeal. (***People*** v. ***Apodaca*** (1978) 76 Cal.App.3d 479,489 n.3, ***People*** v. ***Thomas*** (1977) 74 Cal.App. 3d 75,78). The record on appeal is not adequate for review of many of Petitioner's claims and habeas corpus is, therefore, the appropriate vehicle to bring errors of constitutional magnitude before this Court. It is well settled that on appeal, the appellate court is limited to a consideration of matters contained in the record of "trial proceedings" and that those matters not presented by the record cannot be considered. (***In re Hochberg*** (1970) 2 Cal.App.3d 870, 875.) Since Petitioner's claims are based in part on evidence not contained within the record, specifically the declarations and other exhibits attached to his Petition, these claims could not be

effectively presented were Petitioner limited to direct appeal. (***People*** v. ***Pope***, (1979) 23 Cal.3d 412). Other issues of constitutional magnitude are not properly presented on appeal due to trial counsel's inexcusable failure to present them in the trial court, or may be procedurally defaulted on appeal due to trial counsel's inexcusable failure to properly preserve them. As this Court noted in ***People v. Mendoza Tello*** (1997) 15 Cal. 4th 264. "We recommended in ***Pope*** that, '[t]o promote judicial economy in direct appeals where the record contains no explanation, appellate counsel who wish to raise the issue of inadequate trial representation should join a verified petition for writ of habeas corpus.' Because claims of ineffective assistance are often more appropriately litigated in a habeas corpus proceeding, the rules generally prohibiting raising an issue on habeas corpus that was, or could have been, raised on appeal would not bar an ineffective assistance claim on habeas corpus." ***(People v. Mendoza Tello, supra*** 15 Cal. 4th 264, 266-267. Citations omitted.) Respondent's repeated reliance on ***In re Dixon*** (1953) 41 Cal. 2d 756, 759 is obviously misplaced. Petitioner is not asking this court to reconsider issues rejected on appeal as Petitioner's appeal is still pending.

While Petitioner is not aware which, if any, of his appellate claims will be be addressed on the merits and which claims, if any, will be procedurally defaulted on appeal, any failure of trial counsel to preserve the record for appeal and to present argument to the trial court on all appropriate theories deprived Petitioner of

the effective assistance of counsel. (***Strickland*** v. ***Washington*** (1984) 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674). The question under the second prong of ***Strickland*** is not solely one of outcome determination but whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair (***In re Harris,*** (1993) 5 Cal.App.4th at 833 ***citing Lockhart*** v. ***Fretwell,*** (1993) 506 U.S. 364, 372, 113 S. Ct. 838, 844, 122 L.Ed. 2d 180, 191).

Similar concepts have been used to measure the performance of appellate counsel [inexcusable failure of appellate counsel to raise crucial assignments of error that arguably could have resulted in a reversal deprived defendant of effective assistance of appellate counsel]. ***(In re Harris, supra*** 5 Cal.App.4th 813, at 833 citations omitted). Should this court find that any of the issues raised in Petitioner's habeas petition could and should have been raised on the direct appeal, then these issues should be considered on habeas because the failure to raise them deprived Appellant/Petitioner of the effective assistance of counsel on direct appeal. Petitioner's appellate counsel intended to raise all potentially meritorious issues on appeal that were supported by the record and certainly had no tactical reason for waiting until the Petition for Writ of Habeas Corpus to raise an issue that could and should have been raised on direct appeal.

B. CLAIM SPECIFIC ARGUMENTS[1]

Petitioner offers claim specific replies to only some of Respondent's assertions, where he feels clarification may be helpful to the court. On those claims on which he offers no further commentary, he stands on his Petition and on the other sections of this Informal Reply which are incorporated by reference into each specific reply.

CLAIM I
FACTUAL INNOCENCE CLAIMS

Other than arguing that Petitioner's claims of factual innocence are untimely, Respondent makes no serious attempt to refute them and in fact confines his substantive argument to a single footnote. (IR, p. 9, note 2.) Contrary to Respondent's footnote argument the Report from Cellmark is not part of the appellate record, nor are most of the police reports referenced in Claim I, subpart , 1, 2, and 3. Petitioner agrees that all of these claims should have been discovered sooner, and the fact that they were not discovered is no fault of his own but of a combination of court error, ineffective assistance of trial counsel, and prosecutorial misconduct.

1. (Petitioner's I A) Blood on the Pants in the Monte Carlo

Respondent acknowledges that the blood on the pants in the Monte Carlo

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[1] Since Respondent uses his own numerical sequence in responding to Petitioner's claims, to avoid further confusion Petitioner will maintain Respondent's numerical sequence and cross reference the numerical/alphabetical sequence in his Petition.

was proven by DNA testing to have come from someone other than the victim and that the blood on the gun was only subjected to serology testing, not DNA testing. (IR, at p. 8, Exhibit F.) Respondent does not even attempt to negate the significance of this claim. The prosecution's case was built around blood on the gun belonging to the victim and Petitioner's fingerprints in the blood on that gun. Since the gun was never proven to be the murder weapon, if the blood on the gun did not belong to the victim, it is of no significance if petitioner's prints were on the gun, ***if*** the prints were in the blood, or how the prints were placed there. While, of course, there ***could*** be a different person's blood on the pants than on the gun, the fact that there was blood belonging to someone other than the victim on the pants, which were found in such close proximity to the gun, at the very least creates a vast chasm in what was already a very weak case and thus renders the outcome of this capital trial fundamentally unreliable. As respondent well knows, Petitioner has no means absent an evidentiary hearing and access to subpoena power to obtain any further evidence in support of this claim that the blood on the gun did not belong to Macias. (See Exhibit DD,. Letter to Los Angeles County Sheriff's Department which has not been answered.) [2]

2. (Petitioner's I B .) "The True Killer."

The presence of blood not belonging to the victim on the pants in the

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[2] For clarity Petitioner refers to the next exhibit in order utilizing the same series of letters used in his petition

Monte Carlo when taken together with the fact that other persons such as Arturo, Pato and Liberato, who have not even been tested, and who had the opportunity and motive to kill Ernesto renders Petitioner's conviction even more unreliable than it would be if he were the only one who had access to Ernesto.

3. (Petitioner's I C) "The Robbery"

As Petitioner alleged and fully briefed on appeal, the evidence presented at trial did not support a finding that Ernesto was robbed by anyone, let alone Petitioner. Respondent does an excellent job of restating appellant's claim, including the additional facts adduced from the Exhibits to the Petition which clarify that Ernesto and Pato were drug dealers, that the trip to Pato's house was to purchase cocaine, and that Petitioner, actually had been told he could come back in when the others returned with the cocaine. (Exhibits D, C,). These exhibits make clear, a point not as clear from the record, that, if petitioner was there, he knew the others were coming right back.

4. (Petitioner's I D.) " Petitioner's Mental State"

Respondent does not attempt to refute the fact that Petitioner's adult behavior is the result of post traumatic stress syndrome and organic brain damage due to child abuse, head trauma and ingestion of toxic substances. (IR, p. 11., Exhibit AA.) Petitioner, has presented a prima facie case of his impairment. His case is is set forth in his Petition and in his informal responses to Claim 1D, Claim IV H and Claim V, in Exhibit AA, the declaration of Dr. Kaser Boyd and

its appended drawings by Petitioner, in the evidence upon which she relied, Exhibits R through X, all of which is incorporated herein by reference. However additional funding is required in order to further investigate and factually develop the extent of his impairment and its effect on the formation of the criminal intent required for this capital crime. Dr. Kaser Boyd, after examining Petitioner and reviewing social history recommended that he undergo neurological testing as his symptoms and history were indicative or of organic brain damage. Unfortunately funding was depleted and in fact over expended after Dr. Kaser Boyd's billing. Petitioner has not as of yet been able to obtain the recommended testing and will not be able to do so unless and until this court issues an order to show cause and authorizes additional funds for investigation .

CLAIM II

COURT ERROR

1. (Petitioner's II A) Petitioner's ***Marsden/Faretta*** Claim is "restated" on habeas because habeas counsel found new evidence that supports the allegations Petitioner made during the Marsden hearings. Counsel has interviewed William Copeland, one of the witnesses that was the subject of the discussion at the Marsden hearing which took place during the Penalty Phase. (C.R.T. 1722, Exhibit P.) At that hearing, Petitioner attempted to explain to the court that if counsel would find and interview Mr. Copeland, Copeland's testimony would likely be favorable to him. (C.R.T 1722.) Mr. Copeland states in his declaration

that while he was in prison with Petitioner and he had no problems with him. Mr. Copeland, who has now been out of prison for several years, tells of how we was pressured to falsely accuse Petitioner of the stabbing by correctional officers and by the prosecution's agents. (Exhibit P.) The Copeland incident was no doubt viewed as a serious incident by the jury and was in all likelihood a factor weighing heavily against Petitioner in the jury's penalty deliberations. Had counsel listened to his client and made some effort to interview Mr. Copeland, this aggravating factor would have been neutralized, if not entirely abrogated, by Mr. Copeland's testimony.

Habeas counsel has also found and appended a prison chrono from Petitioner's C-File demonstrating that Petitioner's assertions to the court at his Marsden Hearing were truthful. (C.R.T. 1726-1727, Exhibit O.) Petitioner was, as he claimed, an unaffiliated inmate who was subject to being assaulted or killed in prison due to his unwillingness to engage in violence at the bidding of prison gangs. (Exhibit O.) Petitioner wanted his particular problem to be made known to the jury so that they might understand why he may have been on his guard or may have needed to defend himself. (C.R.T. 1726-1727.) Trial counsel had no interest in listening to client, much less presenting any such evidence.

Petitioner had developed this claim as far as available funding will allow. Further funding and investigation is required to find and interview other important witnesses.

The evidence thus far developed, however, states a prima facie case in support of Petitioner's ***Marsden/Faretta*** claims. Trial counsel's refusal to even try to investigate, counter or explain the evidence in aggravation should have signaled to the court that there had been a total breakdown in the adversarial process.

2. (Petitioner's II B.) Third Party Culpability Evidence at Guilt Phase

Petitioner stands on his petition, his appellate briefing briefing of the issues and earlier sections of this Reply which are incorporated herein by reference..

3. (Petitioner's II C.) Standing To Challenge Admission of the Gun.

Petitioner stands on his petition, his appellate briefing, and earlier and later sections of this Reply which are incorporated herein by reference.

CLAIM III

PROSECUTORIAL MISCONDUCT

1. (Petitioner's III A.) False Evidence and Argument at the Guilt Phase

Respondent' alleges that Petitioner's claim that the prosecutor committed misconduct by arguing that the blood on the pants found in the Monte Carlo came from the victim when she knew that was false is a record based claim that could have been raised on appeal. As Respondent should be aware, the record on appeal does not reveal that the prosecutor knew that the argument was blatantly false as opposed to a reasonable inference from the evidence and a reasonable response to trial counsel's argument. (See Petition Claim IV A). Exhibit F, the Cell Mark

DNA report is not contained in the record on appeal but was part of the discovery that was given to trial counsel by the prosecutor. Thus the claim of misconduct was not supported by the record and could only be raised by way of habeas corpus.

Petitioner is aware that trial counsel failed to object, and his failure to do so is assigned as ineffective assistance of counsel. (See Claim IV.). Petitioner also, however, believes that this error was so egregious that even in the absence of an objection or a finding of ineffective assistance of counsel that Petitioner has stated a claim for relief. The evidence of Petitioner's guilt as to the robbery, felony murder and special circumstances was not, as Respondent claims, strong, but extremely weak.. The fallacious theory that the victim's blood was on the gun, and on the pants, was the whole sum and substance of the prosecution's case. The remarks by the prosecutor 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 [106 S.Ct. 2464, 91 L.Ed.2d 144]; ***Donnelly*** v. ***DeChristoforo*** (1974) 416 U.S. 637, 642 [94 S.Ct. 1868, 40 L.Ed.2d 431).

2-5. (Petitioner's III B, III C, III D, III E,) . Eliciting "Prior" Offense Testimony at Guilt Phase, 3. The Prosecutor "Testified ," 4. Penalty Phase Argument Concerning Petitioners's Relatives, 5. Penalty Phase Argument Inviting Gang Speculation

While these claims of prosecutorial misconduct were, as Respondent notes, raised on appeal, and fully briefed on appeal and that briefing is incorporated

herein, they are raised as well in the Petition for Writ of Habeas Corpus because there was no objection by trial counsel and, therefore, this Court may find them procedurally defaulted in the absence of a finding of ineffective assistance of counsel as alleged in the Petition in Claim IV. Petitioner also requests that this Court view the prosecutorial misconduct cumulatively, considering those record based claims in conjunction with the claims developed in the instant Petition and Informal Reply and the exhibits appended thereto.

6. (Petitioner's III F.) The Penalty Phase Argument About Witness Intimidation.

While this claim was addressed on appeal, the record does not contain the evidence gathered by habeas counsel who found and interviewed William Copeland, the inmate whom Petitioner was alleged to have stabbed at Tracey prison. Mr. Copeland's declaration is appended to the petition as Exhibit P . Mr. Copeland's declaration makes clear that he was not intimidated by Petitioner. In fact it was the prosecutor's own agents who, at the time of trial, were attempting to intimidate him into testifying falsely against petitioner. (Exhibit P.) Additional funding is needed to find and interview other witnesses and to further investigate the prosecutor's evidence in aggravation, all of which trial counsel inexcusably took at face value and did not subject to adversarial testing.

Petitioner is aware that there was no objection on the part of his trial counsel to the instances of prosecutorial misconduct alleged in this petition. Such

failure to object was inexcusable and deprived Petitioner of the effective assistance of counsel. Petitioner further reiterates that singly and in combination, prosecutorial misconduct and ineffective assistance of counsel deprived him of due process a fair trial and reliable penalty determination.

CLAIM IV

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner alleges that the errors and omissions assigned to trial counsel in his petition are inexcusable and can not be explained away as tactical decisions. Respondent's repeated assertions that these are record based claims that should have been raised on appeal are tiresome. (IR, passim.) As Respondent knows or certainly should know, this Court has stated that ineffective assistance of counsel claims, even ones that are record based, are best raised by way of a verified petition. (***Mendoza Tello, supra.***)

1. (Petitioner's IV A) Blood on Pants in Monte Carlo

Neither Respondent nor anyone else can think of any conceivable reason trial counsel would not have presented available DNA evidence that the blood on the pants was not the victim's blood. Respondent is correct that the conclusive proof that the blood on the pants did not come from the victim would not have led to the ***inescapable conclusion*** that the blood on the gun did not come from the victim. However it certainly would have created ***a reasonable doubt*** just as it does now, as to whether the blood on the gun came from the victim and that reasonable doubt would have been sufficient for a jury to acquit Petititioner of capital murder. Instead the failure to present the available DNA evidence, while at the same time eliciting testimony about the blood on the pants, led to the ***inescapable and false conclusion,*** argued by the prosecutor, that the blood on the pants did come from

the victim and the defense knew it did or they would have offered evidence to the contrary.

Respondent goes on in a paragraph that could have come from appellant's brief to expound upon how Petitioner's connection to the gun and the car and the car's connection to the murder were extremely tenuous. (IR p. 20, note 4.) Petitioner is painfully aware that the prosecution's whole case was built on these tenuous connections and that the only shred of evidence linking petitioner to the murder was the blood that ***supposedly belonged*** to the victim on the gun in the Monte Carlo. Contrary to respondent's suggestion, the fact that the whole case depended on this shred of evidence renders counsel's failure to expose that shred as false, all the more prejudicial.

2. (Petitioner's IV B) Third Party Culpability Evidence

At trial counsel did attempt to introduce evidence with respect to Liberato Guiterrez, a drunk, extremely nervous young man who was found in the alley near the crime scene with blood on his clothing. The claim is also presented on habeas in case this Court finds the claim procedurally defaulted on appeal because counsel failed to make an adequate offer of proof or cite appropriate authority. Contrary to Respondent's contentions, once trial counsel made a tactical decision to try to introduce third party evidence, there could be no tactical reason for not making an adequate offer of proof or citing appropriate authorities. The claim is also expanded on habeas as set forth in the petition, to include other suspects which are

apparent from the police reports including Arthur, and Pato. (Exhibit B, C, D, V .) As previously noted in the preliminary statement to this Informal Reply, a declaration from trial counsel is not required.

3. (Petitioner's IV C .) Eliciting Proof that Petitioner Was Suspect in Another Killing.

It is ludicrous to state, as Respondent does, that the jury in this purely circumstantial evidence case was not affected by hearing that Petitioner was a suspect in another homicide. At least Respondent does not claim counsel had a tactical reason for eliciting this information.

4. (Petitioner's IV D.) Standing to Challenge Gun Seizure

Respondent actually alleges that trial counsel may have wanted the jury to learn about the gun found in the car and the blood on the gun because it may not have been the victim's blood on the gun. The prosecution's whole case was premised on the victim's blood on the gun and the prints in the blood. Petitioner was only one of many who had access to Ernesto. Absent the gun and the blood there would have been no case. Any defense attorney would have wanted to suppress the gun and obviously trial counsel wanted to suppress it or he would not have written the motion. Unfortunately, however, he was ignorant of the law on standing and complicated his ignorance by making unnecessary and unwarranted concessions. His ignorance and negligence deprived Petitioner of an opportunity to even litigate his suppression motion. Speculation on Respondent's part will not

substitute for evidence on alleged tactical reason on the part of counsel. (In re Wilson (1992) 3 Cal. 4th 945.)

5. (Petitioner's IV E.) Failing to Request Cited Instructions.

The reasons that the omitted instructions were important to Petitioner are fully addressed in the appellate briefing and need not be fully set forth again here. It was not inconsistent with Petitioner's claim of innocence to instruct the jury fully on the elements of the crime and on the elements of the special circumstance . The prosecution was proceeding on a theory of robbery/ murder and had an obligation to prove that a robbery or attempted robbery had in fact occurred, and that the murder was in furtherance of the robbery. Counsel's dereliction relieved the prosecutor of that burden.

Respondent cites to his own brief for the proposition that counsel's failure to request lesser included instructions in this capital case was not prejudicial because the evidence shows that Petitioner was a "cold blooded killer." (I.R. p. 28.). Actually the evidence shows anything but a cold blooded killing. Whoever killed Ernesto was probably a hot head who was willing to get into a gun fights at the slightest provocation. There was an argument and a fierce bloody struggle continuing out into the street. Hardly the "cold blooded killer" type of case even from the prosecution's perspective. There was ample evidence to suggest that the killing of Ernesto was something short of capital murder. Counsel's choice, even assuming arguendo, it was a choice, to go for all or

nothing in a capital case was not a reasoned and considered choice within the range of reasonable trial tactics. Again no declaration from trial counsel is needed here. Petitioner alleges that there could be no reasonable tactical choice for counsel's actions and inactions. If Respondent disputes this allegation an order to show cause should issue where inquiry of counsel can be made.

6. (Petitioner's IV F.) The Vienna Convention.

In his Petition, Claim IV F, Petitioner alleges that trial counsel's failure to advise petitioner of his rights under the Vienna Convention constituted ineffective assistance of counsel. Respondent appears not to realize that while the law and facts with respect to the Vienna Convention presented in Claim IV F are incorporated in Claim XII A, these are two separate claims. Claim IV F alleges that Petitioner was prejudiced by trial counsel's failure to advise him of his rights. Claim XII A alleges that law enforcement officials should have done so at the time of his arrest and that he was prejudiced by their failure to do so. As noted in the Petition and in the declaration from the Mexican Consulate the services which would have been available to Petitioner would have included help in preparing his defense.(Exhibit LL.). As his Petition, and the record on appeal make clear, Petitioner was in dire need of and prejudiced by the lack of the assistance of an attorney who was willing to work with him in investigating and presenting guilt and penalty phase defenses, and in rebutting the prosecution's evidence in aggravation.

7. (Petitioner's IV G.) Failing to Object to Instances of Prosecutorial Misconduct.

The prosecutorial misconduct in this case, as set forth in the appellate briefing and in the petition for writ of habeas corpus should be viewed cumulatively. Counsel's continued failure to object and seek an admonition from the court was unreasonable and inexcusable and resulted in a miscarriage of justice. The claim that counsel unreasonably failed to object or to take other steps to protect his client's rights is not merely based on what is apparent from the record, as respondent suggests (I.R. p. 30-31.) but on the new material adduced on habeas such as the Cellmark report (Exhibit F, and Copeland's declaration (Exhibit P.)

8. (Petitioner's IV H.) Failure to Present Mental State and Abuse Evidence

Contrary to Respondent's assertions, Dr. Kaser Boyd does not opine that Petitioner was incompetent to stand trial or could not formed the requisite intent for felony murder although this may well be true, further testing is required. Most of Dr. Boyd's declaration is directed to mitigating evidence which was not produced at the penalty phase of the trial . Dr. Kaser Boyd's focus is on mitigation not only of the crime for which Petitioner was on trial but for any other violent adult behavior which was adduced at the penalty phase. She opined that Petitioner's adult behavior is a result of the abuse he sustained as a child and the resulting psychological disorders. Dr. Kaser Boyd did opine that petitioner

presents with a history and symptoms consistent with organic brain damage and should have a thorough examination by a neurologist . (Exhibit A.). Such as examination may well have led to guilt phase defenses (See Claim I. And Claim V).

The failure of trial counsel to conduct an adequate and competent investigation meant that his decision to proceed as he did was not an informed one and was not a tactical decision. Merely presenting certain categories of evidence is not enough. Rather, counsel must sufficiently investigate and prepare the case, including providing experts with the information necessary to support their conclusions, so that the defense can be effective. (See ***Wallace v. Stewart*** (9th Cir. 1999) 184 F. 3d 1112, 1116, cert. denied, (2000) 528 U.S. 1105; ***Bean v. Calderon*** (9th Cir. 1998) 163 F.3d 1073, 1078-1081, cert. denied, (1999) 528 U.S. 922; ***In re Gay*** (1998) 19 Cal.4th 771, 807-808.) Perhaps Respondent's most absurd statement is that trial counsel was justified in not putting on mitigating evidence because of the "overwhelming aggravation evidence." (I.R. p. 31.) Assuming arguendo, that the aggravation evidence was overwhelming, one would assume that the more overwhelming it was the harder counsel would try to muster mitigating evidence. Here counsel failed to even conduct in- depth interviews with the witnesses he utilized. Counsel only presented evidence of what life was like for a poor immigrant family. This ineffective attempt to present a cultural defense or as Respondent calls it, counsel's efforts "to humanize" Petitioner failed miserably and only gave the jury

the wrong impression of Petitioner and his family. The jury was led to believe that they were a close knit loving family who had worked hard and if Petitioner had gotten on the wrong track it was his own fault. After all, his sisters were doing okay. Counsel did not introduce any evidence of the abuse Petitioner suffered, of his constant battle with drug addiction, of his previous traumatic injuries and worst of all no mental health expert to testify as to Petitioner's mental state. The failure to do so could not have been a tactical decision since no doctor was ever appointed to examine Petitioner and consult with counsel. Counsel's failure in this regard was particularly inexcusable and prejudicial because testimony similar to Dr. Kaser Boyd's declaration would have enabled the jury to understand the causes of appellant's adult behavior at the time of the crime and while in custody, thus mitigating not only the offense for which they convicted him but all of the prosecution's aggravating evidence.

9, 10, 11, Petitioner's IV I, J, K.).. Failure to Seek Third Party Culpability Reconsideration, Failure to Object to Proof of Texas Prior Felony Conviction; , Failure to Object to CALJIC No. 2.06,

Petitioner stands on his petition and his appellate briefing. .

12. (Petitioner's IV L Failure to Investigate and Rebut Aggravating Evidence.

Petitioner stands on his petition and his earlier reply in Claim II, 1 which is incorporated herein by reference as if full set forth herein. Counsel would not

investigate, would not discuss the aggravating evidence with his client or make any effort to call reasonably available witnesses such as Mr. Copeland to rebut the prosecution's evidence in aggravation.

13. (Petitioner's IV M.) Failure to Uncover Jury Bias During Voir Dire Process

This claim, like other ineffective assistance claims, could hardly, have been raised on appeal since there is nothing in the record about why counsel failed to question jurors or at least request that the court ask appropriate questions to uncover jury biases. For example, the record reveals that one juror and her husband were personal friends of the judge. No questions were asked of this juror as to how that would impact her capacity to be a fair and impartial juror.. (R.T.549.) This claim, like all of Petitioner's claims has been investigated and developed only as far as available funding will allow. Further investigation may lead to the discovery of facts supporting substantive claims of jury misconduct and a subsequent request to amend this petition.

14. (Petitioner's IV N) Failure to Attack Priors On Incompetency and IAC Grounds.

This claim like all of Petitioner's claims has been investigated and developed only as far as available funding will allows. Further investigation may lead to the discovery of facts supporting petitioner's claim.

15. (Petitioner's O.) Petitioner Was Prejudiced by Counsel's Errors and

Omissions.

Petitioner has alleged facts sufficient to demonstrate that absent counsel's errors and omissions he would not have been convicted or sentenced to death.(***Strickland v. Washington, supra***, 466 U.S. at p. 694 [104 S. Ct. at p. 2068].) . Since "investigation and preparation are the keys to effective representation," (***People*** v. ***Ledesma, supra***, 43 Cal.3d at 222) counsel has a duty to interview potential witnesses read the discovery provided to them, and "make an independent examination of the facts, circumstances, pleadings and laws involved." (***Von Moltke*** v. ***Gillies, supra,*** 332 U.S. at 721; ***Strickland*** v. ***Washington, supra***, 466 U.S. at 691).

Had counsel engaged in appropriate investigation with respect to both the guilt and penalty phase evidence, put before the jury that the blood on the pants did not belong to Ernesto Macias, had he timely objected to misconduct by the prosecutor, requested appropriate instructions, cited appropriate legal authorities to the court for admission of third party culpability evidence, refrained from eliciting damaging evidence, consulted with and utilized appropriate experts and developed mitigation evidence, it is reasonably probable that Petitioner would not have been convicted of capital murder or sentenced to death. (***Strickland*** v. ***Washington, supra*** 466 U.S. at 694). All of the errors and omissions of counsel separately and collectively contributed to the guilty verdict, the true finding on the special circumstance and the death penalty verdict. As there could be no explanation or

excuse for not thoroughly reviewing the police reports, including the DNA report, there could be no excuse at the penalty phase for not discussing the evidence with petitioner, investigating the allegations and at least interviewing those individuals whom petitioner indicated would provide facts impeaching the prosecutor's contentions; one such witness was William Copeland, who has in fact given a declaration as to what his testimony would have been. (Exhibit P.) Counsel had obviously conducted no independent investigation at all into any of the aggravating evidence and had simply taken the reports provided to him at face value. This was especially inexcusable since the prosecutions's information itself was hardly conclusive or even reliable. Copeland and Robinson did not testify and there was apparently insufficient evidence for Petitioner to be criminally charged or even administratively disciplined in jail or in prison for any of the offenses. Petitioner meets his burden under ***Strickland*** v ***Washington, supra,*** of demonstrating that it is reasonably probable that absent counsel's errors and omissions, he would not have been convicted or sentenced to death. Had the jury heard that the blood on the pants in the Monte Carlo did not belong to Ernesto Macias. If they had heard about Liberato Gutierrez, El Pato and Arturo Vasquez, had they not been subjected to the prosecution's improper argument that petitioner's own family wanted him to die, had they not heard that he may have threatened witnesses, and had they heard about the extreme unrelenting mental and physical abuse he had suffered at the hands of this father, and the resultant

post traumatic stress and neurological impairment he suffers to this day, they may well have decided that he did not deserve to die and voted for life instead of death.

Respondent offers nothing to refute Petitioner's claim of prejudice. An order to show cause should, therefore, issue.

CLAIM V

PETITIONER'S CONSTITUTIONAL RIGHT TO AN APPROPRIATE EXAMINATION BY A COMPETENT EXPERT.

As fully set forth in Claim IV H of his petition no expert was every appointed to examine Petitioner until habeas counsel retained Nancy Kaser Boyd, PH.D, who. reviewed Petitioner's social history, and declarations R through X and examined Petitioner. Dr. Kaser Boyd opined that Petitioner on multiple occasions experienced the specific traumatic stressor of severe child abuse, physical and psychological, and as a result developed chronic Post Traumatic Stress Disorder. (Exhibit AA, par. 7.) See also Claim I, subpart 4 (Petitioner's D.) and Claim IV, subpart 8 (Petitioner's H.). Had Doctor Kaser Boyd testified at Petitioner's trial it is likely that the jury would not have imposed the death penalty. Had Doctor Kaser Boyd, or another competent expert, examined petitioner and advised counsel accordingly, Petitioner would have had the benefit before trial of the recommended neurological testing which may have led not only to the obvious penalty phase mitigation but to a guilt phase defense. Habeas counsel, as previously stated has not been provided with sufficient funding to undertake such

an examination prior to the issuance of an order to show cause. Respondent does not assert that Petitioner in fact received the assistance of a competent expert . Nor could he even attempt to do so since petitioner had no expert.

Respondent, citing to a footnote in ***In re Gay*** (1998) 19 Cal. 4th 771, 779, fn.3, suggests that this claim is not timely and that counsel should have raised it five years ago. (I.R. P. 40 .) As respondent know this claim was not raised on appeal nor could it have been and it timely raised for the first time in this petition.

Ake v. Oklahhoma (1985) 470 U.S. 68, 83, [105 S. Ct. 1087, 84 L.Ed. 53 requires an expert who is available to assist in the evaluation, preparation and presentation of all mental health issues that might arise during any phase of the defense. (***Starr v. Lockhart*** (8th Cir. 1994) 23 F.3d 1280, 1291.) It contemplates "a psychiatrist who will work closely with the defense by conducting an independent examination, testifying if necessary, and preparing for the sentencing phase of the trial." (***Buttrum v. Black*** (N.D. Ga. 1989) 721 F.Supp. 1268, 1312-1313, aff'd on the opinion below (11th Cir. 1990) 908 F.2d 695.) Thus, courts have found ***Ake*** violations where the court did appoint an expert, but that expert only reported on an insanity defense and competency to stand trial and did not offer any conclusions that would address the degree of the defendant's responsibility or mitigating factors (***Starr***, 23 F.3d at pp. 1289-1290), where the expert failed to render an opinion on the defendant's mental state at the time of the crime (***Ford v. Gaither*** (11th Cir. 1992) 953 F.2d 1296), and where the

psychiatrist did not evaluate the defendant to rebut the prosecution's evidence concerning future dangerousness (***Buttrum, supra,*** 721 F.Supp. 1268).(See also ***Wallace v. Stewart , supra,*** 184 F.3d 1112, 1118 fn. 7; ***Hendricks v. Calderon*** (9th Cir. 1995) 70 F.3d 1032, 1038-1039.) The apparently narrower view of ***Ake*** taken in ***In re Gay,, supra,*** 19 Cal.4th 771, 798, is inconsistent with federal law as set forth in ***Ake*** and accordingly cannot be followed. In this case, however, this Court is not being asked to evaluate the competency of the expert utilized by trial counsel. Petitioner, due to the ineffective assistance of trial counsel had no expert at all. Appellant has demonstrated through the social history developed on habeas and the declaration of Dr. Kaser Boyd that he was prejudiced by the lack of the assistance of a competent expert. Further investigation will no doubt reveal even more prejudice. An order to show cause must, therefore, be issued; whether an evidentiary hearing will be necessary, or whether relief can be granted without such a hearing, will depend on the manner in which respondent joins the issue in his return.

CLAIM VI

THE TOTAL BREAKDOWN OF THE ADVERSARIAL PROCESS .

Petitioner incorporates all of the facts set forth in Claim II A in his Petition and in this Informal Response, as well as in his appellate briefing on the court's denial of his Marsden Motions. In addition to a ***Strickland*** showing of prejudice, (See Claim IV.) Petitioner has established that as a result of counsel's inadequacy, the prosecution's case was not subject to meaningful adversarial testing, thereby raising a presumption that the result is unreliable. (***United States v. Cronic*** (1984) 466 U.S. 648, 658-659 [104 S. Ct. 2039, 2046-2047, 80 L. Ed. 2d 657].) Respondent has said nothing to refute this claim. An order to show cause should,

therefore, issue.

CLAIM VII

INEFFECTIVE ASSISTANCE OF APPELLATE HABEAS COUNSEL.

Respondent faults Petitioner's counsel for not pointing out her own errors of which she is not yet aware. As previously stated Petitioner's appeal is still pending and Petitioner has no way of knowing which if any of Petitioner's appellate claims will be procedurally defaulted by this Court, or which if any of Petitioner's habeas claims this Court will find should have been raised on direct appeal. Ironically, according to Respondent they all should have been raised on appeal. He, therefore, implicitly concedes that appellate counsel is ineffective. If such be the case, Petitioner should not be penalized. Similarly the failure to raise or fully develop any claims on habeas through lack of funding or insight on the part of counsel should not attributed to Petitioner. Counsel has not, as Respondent suggests, either on appeal or on habeas, deliberately excluded as a matter of tactics any meritorious claims. (I.R., p. 42.). It has been and remains counsel's intention, even absent badly needed subpoena power to submit every potentially meritorious claim and to find and develop all claims as far as available funding will allow.

CLAIM VIII

PETITIONER IS ENTITLED TO DISCOVERY

Petitioner has investigated potential claims as fully as available funding permitted and has presented a prima facie case on all known claims . He is entitled to discovery, additional funding and an opportunity to fairly litigate this

petition as well as an opportunity to amend this petition should additional claims come to be known. The prohibition on discovery set forth in ***People v. Gonzalez*** (1990) 51 Cal.3d 1179, 1259, is inconsistent with other doctrines of state and federal law and cannot be applied consistently with the Constitution. The prohibition on discovery in ***Gonzalez*** cannot coexist with habeas counsel's broader obligations under federal law. Habeas counsel's duties under ***In re Clark , supra*** 5 Cal.4th 750, 783-784 & fn. 19, cannot be interpreted to be less than what is required to fulfill counsel's duty to his or her client under federal habeas corpus law. ***McCleskey*** **v.** ***Zant*** (1991) 499 U.S. 467, 498, imposes a very broad duty to investigate: a "petitioner must conduct a *reasonable and diligent* investigation aimed at including *all relevant claims and grounds* for relief in the first federal habeas petition." (Emphasis added.) (Cf. ***In re Robbins*** (1998) 18 Cal.4th 770, 792-793 & fnn. 12-15; ***In re Clark, supra***, 5 Cal.4th at pp. 783-784.) The obligation imposed by the United States Supreme Court cannot coexist with the rule stated in ***Gonzalez***, prohibiting all discovery prior to issuance of an order to show cause without regard to the particularized showing in an individual case. ***Gonzalez*** must give way.

The constitutional violation set forth in this claim could be avoided by either granting an order to show cause in this case and thereafter ordering discovery, or by reconsidering ***Gonzalez*** and authorizing Petitioner to conduct pre-OSC discovery.

CLAIM IX

LETHAL INJECTION IS UNCONSTITUTIONAL

Claim IX explains how death by lethal injection pursuant to the protocols used by the California Department of Corrections constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Nothing in respondent's brief discussion of this claim obviates the need for an order to show cause and an evidentiary hearing. Nor is respondent's assessment that the claim is palpably without merit an accurate one. (IR p. 43,42.). Petitioner has alleged and provided evidence that California's method of execution by lethal injection is cruel and unusual punishment under Article 1, section 17 of the California Constitution, and the Eighth and Fourteenth Amendments to the United States Constitution. Respondent argues, or rather just states, that a challenge to the method of execution cannot be a ground for reversal of a death judgment, citing ***Samayoa*** (1997) 15 Cal.4th 795, 864, because the claim only challenges the legality of the execution of the sentence and not the validity of the sentence itself. (I.R. p. 43.) Petitioner's claim, contrary to respondent's assertion, is that his sentence is unconstitutional and invalid because the method of carrying out the sentence is cruel and unusual. Federal courts have recognized that an unconstitutional method of execution would be grounds for reversal of a death sentence if such a method created unnecessary and wanton infliction of pain. (***Campbell* v. *Wood*** (9th Cir. 1994) 18 F.3d 662, 683.)

While the Ninth Circuit has rejected cruel and unusual punishment claims concerning the lethal injection protocols used in other states, no court has yet held an evidentiary hearing or rendered a reported decision on the constitutionality of

California's protocol. Petitioner has set forth a prima facie case in his petition that the California protocol differs in constitutionally relevant particulars from the protocols that have been upheld in other states and is entitled to an evidentiary hearing at which he has an opportunity to prove this claim. Respondent's tiresome refrain that this claim should have been raised on appeal bears no comment, as there is obviously ***nothing*** in the record with respect to lethal injection on which such a claim could even be contemplated. (I.R. p. 43.). Petitioner was sentenced in 1992 to die in the gas chamber. As respondent well knows California had not yet switched to lethal injection. (***Fierro* v. *Terhune*** (9th Cir. 1998) 147 F.3d 1158.)

CLAIM X

DENIAL OF EQUAL PROTECTION

Respondent argues as he does with respect to every claim that this claim should have been raised on appeal. (I R 44.) He apparently fails to notice that this claim was raised on appeal and is repeated on habeas corpus out of an abundance of caution. Both on appeal and on habeas corpus, the claim relies on published scholarly research which was not the subject of an evidentiary hearing before or during trial. In ***People v. Welch*** (1999) 20 Cal.4th 701, 773, this Court said it was disinclined to grant relief on a claim of that nature without an evidentiary hearing, suggesting that the claim was appropriately presented on habeas corpus.

The reasoning of ***Welch*** appears to require that an order to show cause an

evidentiary hearing be granted on this claim.[3] Nothing in the informal response sets forth any reasons to the contrary.

CLAIM XI

LENGTHY CONFINEMENT

This claim, like Claim X, is based on published scholarly research which was not addressed at an evidentiary hearing in the trial court. The length of confinement that Petitioner would have to undergo prior to his execution was also not known at the time of trial and could not have been considered by the court. This claim is, therefore, not, as respondent suggests, a record based claim that should have been properly raised on appeal.

CLAIM XII

INTERNATIONAL LAW

Petitioner has alleged and presented facts to support his contention that his conviction and sentence were imposed in violation of international law and treaties, including customary international law prohibitions against unlawful seizure, torture, and race discrimination. Moreover, petitioner was denied fundamental rights guaranteed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Declaration, and other international treaties and covenants. Respondent makes the inconsistent argument "this claim," presumably the Vienna Convention, should

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But see *United States* v. *Cheely* (9th Cir. 1994) 36 F.3d 1439, 1441-1446, and *Wade* v. *Calderon* (9th Cir. 1994) 29 F.3d 1312, 1319-1320, both granting relief on failure-to-narrow claims based on legal analysis alone, without an evidentiary hearing.

have been raised on appeal and that petitioner has not alleged facts showing that he was entitled to its protections. (I.R. 44, 46,) Lest there be any serious question as to whether Alfredo Valdez is a Mexican national, a copy of his birth certificate is appended hereto as Exhibit LL and a two page INS record from 1989 makes clear that he was still a Mexican National, and by virtue of his criminal record was not eligible for any adjustment of status. [Exhibit MM]

The United States is bound by these international treaties. For example, Articles 9 and 14 of the International Covenant on Civil and Political Rights explicitly guarantee fair trial proceedings – a guarantee which was denied to petitioner.

Once ratified, international treaties, such as the ICCPR and the Torture Convention, are the "supreme law of the land." (U.S. Cons. Art. VI § 2) and compel adherence. As the recent decisions of the Canadian Supreme Court (***United States v. Burns,*** 2001 SCC 7, File No. 26129) in March 2001, the Interamerican Court of Human Rights (OC-16/99, Inter-Am. Ct. H.R. on Oct 1, 1999) concerning violation of the ICCPR prohibition against "arbitrary deprivation of human life," and the International Court of Justice in the **LaGrand** case (***Germany v. United States*** (LaGrand) 2001 I.C.J. 104 (J6127/2001)) make clear, United States agents may not flout its obligations to these treaty obligations without consequences. In ***LaGrand,*** the International Court of Justice specifically provided that where U.S. courts failed to allow full effect to international treaties' provisions, individual defendants have standing to seek redress.

In addition, petitioner's claim relies on customary international law as well as treaties. Respondent does not offer any rebuttal of this portion of the

claim. Respondent's only comment that could be construed as addressing petitioners's claims is that this Court has determined that international law does not prohibit California law from imposing the death penalty. (***People v. Jenkins*** (2000) 22 Cal.4th 900, 1055.)

In ***Jenkins***, this Court "rejected" the international law claims, because the defendant predicated his claims of international law violations on his claims of constitutional and statutory violations, and because no violations under domestic laws were found. (***Jenkins***, 22 Cal.4th at 1055.) However, in Petitioner's case, as demonstrated in both appellate proceedings and in h is verified Habeas Petition and this Reply, numerous state and federal constitutional violations occurred.

United States Courts have recognized that "international law affords substantive rights to individuals and places limits on a State's treatment of its citizens." (***Abebe-Jira* v. *Negeno*** (11th Cir. 1996) 72 F.3d 844; ***Filartiga***, 630 F.2d at 880-87.)

The factual and legal issues presented demonstrate that petitioner was denied his right to a fair and impartial trial in violation of Articles 6 and 14 of the International Covenant on Civil and Political Rights. *See* ***Ma* v. *Ashcroft*** (9th Cir. 2001) 257 F.3d 1095, 1114 (recognizing the force and effect of the International Covenant in courts in the United States)and the substantive provisions of the Universal Declaration, as well as Articles 1 and 26 of the American Declaration. These violations of international law require reversal of petitioner's conviction and death penalty sentence.

In addition, the application of the death penalty to racial and ethnic minorities such as petitioner in the United States violates the protections of the

Race Convention, International Covenant, and American Declaration which establish an affirmative obligation of the United States to redress racial discrimination. This Court must view the application of the death penalty in this case in light of the recent international commitments the United States has made in the protection of individuals against racial discrimination. Because the death penalty as applied in the United States – with discrimination and racism – violates international law, petitioner's death sentence is tainted and must be reversed.

Finally, to the extent that the **Jenkins** case can be read as precluding relief under international law in this case, petitioner respectfully requests that the Court reconsider its holding. If ***Jenkins*** concludes that international law need not be considered as long as standards of domestic law are met, then the opinion in ***Jenkins*** effectively relegates international legal principles to the dead letter bin, holding that international law is effectively no broader than the law of a sovereign state. If this were the case, then every nation on earth could claim that international law is only binding to the extent it reiterates domestic law. Under this reading, international law would be meaningless. As noted above, the United States Constitution and Supreme Court jurisprudence recognize that international law is part of the law of this land. International treaties have supremacy in this country. U.S. Const. Art. VI, § 2. Customary international law, or the "law of nations," is equated with federal common law. (Restatement Third of the Foreign Relations Law of the Untied States (J1987), pp. 145, 1058; see ***Eyde v. Robertson*** (1884) 112 U.S. 580; U.S. Const. Art. I, § 8 (Congress has authority to "define and punish . . . offenses against the law of nations").) This Court therefore has an obligation to fully consider possible violations of international law.

CLAIM XIII

CUMULATIVE ERROR

As demonstrated in the petition and by Respondent's lack of substantive responses in his Informal Reply to Petitioner's claims, numerous constitutional errors contributed to a fundamentally unfair and unreliable conviction and judgment of death. Petitioner submits that each one of these errors independently compels post-conviction relief. However, even in cases in which no single error compels reversal, a defendant may nevertheless be deprived of due process if the cumulative effect of all the errors in the case denied him fundamental fairness. (***Taylor v. Kentucky*** (1978) 436 U.S. 478, 487, and fn. 15 [98 S. Ct. 1930, 56 L. Ed. 2d 468], ***People v. Holt*** (1984) 37 Cal.3d 436, 459; see also, ***People v. Ramos*** (1982) 30 Cal.3d 553, 581, rev's'd. on other grounds in ***California v. Ramos*** (1985) 463 U.S. 992; ***In re Rodriguez*** (1981) 119 Cal.App.3d 457, 469-470; ***People v. Vindiola*** (1979) 96 Cal.App.3d 370, 388; ***People v. Buffum*** (1953) 40 Cal.2d 719, 726; and ***see Harris v. Wood*** (9th Cir. 1995) 64 F.3d 1432, 1438-1439; ***United States v. McLister*** (9th Cir. 1979) 608 F.2d 785, 791.)

As explained in detail in the separate claims and arguments on these issues, the errors in this case individually and collectively violated federal constitutional guarantees under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Accordingly, the errors and their cumulative effect must be evaluated under the ***Chapman*** standard of review, and and the requested relief granted.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that this Court:

1. Order respondent to show cause why Petitioner is not entitled to the relief sought;

2. Grant Petitioner a reasonable opportunity within which to amend his petition to include claims which become apparent from further investigation or from allegations made in the return or informal opposition to the Petition;

3. Grant Petitioner sufficient funds and opportunity to secure investigation and expert assistance as necessary to fully develop and prove the facts alleged in this petition;

4. Take judicial notice of the record on appeal and all pleading filed in this Court in ***People v. Valdez, S026872*** and consider that matter in conjunction with this petition.

5. Permit Petitioner, who is indigent, to proceed without prepayment of costs and fees and grant him authority to obtain subpoenas without fee for witnesses and documents necessary to prove the facts alleged in this petition;

6. Grant Petitioner the right to conduct discovery, including the right to take depositions, request admissions, and propound interrogatories and the means

to pursue the testimony of witnesses;

7. Permit petitioner a reasonable opportunity to supplement the petition to include claims which may become known as a result of further investigation and information which may hereafter come to light;

8. Appoint a special master or referee to conduct an evidentiary hearing at which proof may be offered concerning the allegations in his petition, or any amended or supplemental petition, and appoint counsel to represent Petitioner for such hearing;

9. After full consideration of the issues raised in the Petition, considered cumulatively and in light of the errors alleged on direct appeal, order that Petitioner's conviction and death judgment be set aside;

10. Issue a writ of habeas corpus to have Petitioner brought before it to the end that he might be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional sentence of death; and

11. Provide such other and further relief as the Court may find appropriate in the interests of justice.

Dated: August 26, 2002

Respectfully submitted,

MARILEE MARSHALL
Attorney for Petitioner

MARILEE MARSHALL* & ASSOCIATES

ATTORNEYS AT LAW

*CERTIFIED CRIMINAL LAW SPECIALIST
THE STATE BAR OF CALIFORNIA BOARD OF LEGAL SPECIALIZATION

48 NORTH EL MOLINO AVENUE
SUITE 202
PASADENA, CA 91101
(626) 564-1136 FAX (626) 564-1264

Marilee Marshall — Jennifer L. Peabody
Arthur Corona, Law Clerk

June 13, 2002

Los Angeles County Sheriff's Department
Scientific Services Bureau
2020 West Beverly Blvd
Los Angeles, CA. 90057

Re: Your Case No. 8970954
People v. Alfredo Reyes Valdez , Supreme Court No. S026872
Capital Case

To Whom It may Concern:

Pursuant to an appointment from the California Supreme Court, I am representing Alfredo Reyes Valdez on his automatic appeal and related habeas corpus proceedings.

Under the direction of Ronald R. Linhart, serology testing was performed at your facility in 1991 on blood evidence collected from a gun, from a piece of vinyl and a pair of gray pants. The reports I have appear incomplete, and the district attorney, who tried the case has assured me that everything she had was turned over to the defense. I am requesting that you provide me with a copy of all written reports , notes, data and results of tests performed on the above items.

I will of course, at your request, either pay in advance or reimburse you for costs of copying. Your prompt response would be most appreciated. If you have any questions with respect to this request, please do not hesitate to contact me.

Very truly yours,

Marilee Marshall

MARILEE MARSHALL
Attorney For Alfredo Valdez

cc: Linda Chilstrom, Deputy D.A.

JJ - 46

ESTADO DE CHIHUAHUA
REGISTRO CIVIL

EN NOMBRE DEL ESTADO LIBRE Y SOBERANO DE CHIHUAHUA, CERTIFICO QUE EN LA OFICIALIA 01 DE ESTA MUNICIPALIDAD OBRA ASENTADA UNA ACTA DE NACIMIENTO QUE CONTIENE LOS SIGUIENTES DATOS :

ACTA DE NACIMIENTO

OFICIALIA : 01 *LIBRO No. :* 0656 *FOLIO No. :* 0085 *ACTA No. :* 10444 *CURP :*
FECHA DE REGISTRO : 13 de SEPTIEMBRE de 1965 *HORA DE REGISTRO :* 00:0
LUGAR DE REGISTRO : JUAREZ, JUAREZ, CHIHUAHUA

NOMBRE : ALFREDO VALDEZ REYES *SEXO:* MASCULINO
FECHA DE NACIMIENTO : 12 de ENERO de 1963 *HORA DE NACIMIENTO :* 05:00
LUGAR DE NACIMIENTO : CD. JUAREZ, JUAREZ, CHIHUAHUA
PRESENTADO : VIVO *COMPARECIO :* AMBOS PADRES

NOMBRE DEL PADRE : ANTONIO VALDEZ *EDAD :* 29 AÑOS
DOMICILIO : COL. LOPEZ MATEOS S/N *NACIONALIDAD :* MEXICANA
NOMBRE DE LA MADRE : ROSA EMMA REYES *EDAD :* 25 AÑOS
DOMICILIO : EL MISMO *NACIONALIDAD :* MEXICANA

ABUELO PATERNO: ANTONIO VALDEZ - FINADO *NACIONALIDAD :* --------
ABUELA PATERNA: VICTORIA LASCANO *NACIONALIDAD :* --------
ABUELO MATERNO: SANTOS REYES *NACIONALIDAD :* --------
ABUELA MATERNA: FELICITAS CHAVEZ - FINADA *NACIONALIDAD :* --------

TESTIGO No.1 : PEDRO ALVARADO *EDAD:* 24 AÑOS *NACIONALIDAD :* --------
TESTIGO No.2 : HUMBERTO BENITEZ *EDAD:* 30 AÑOS *NACIONALIDAD :* --------

SE EXTIENDE ESTA CERTIFICACION, EN CUMPLIMIENTO DEL ARTICULO 49 DEL CODIGO CIVIL DEL ESTADO, EN CD. JUAREZ, CHIH. A LOS VEINTISIETE DIAS DEL MES DE DICIEMBRE DE UN MIL NOVECIENTOS NOVENTA Y NUEVE DOY FE.

OFICIALIA DEL REGISTRO CIVIL
CD. JUAREZ CHIH.

OFICIAL DEL REGISTRO CIVIL
LETICIA CHAVEZ FARIAS

1430759

KK - 47

Memorandum

Subject	Date
Inmates Claiming Benefits Under Section 245A or 210	9/6/89

To Director, RPF
Laguna Niguel

From DIINV/LOS
ACAP Unit

Name Valdez-Reyes, Alfredo
DOB 01/12/63
POB Mexico

File A29 203 646/A92 594 189
Booking # C71429
Institution RCC

Subject was encountered while conducting an investigation at a penal institution. Information developed indicates that Subject may have applied for benefits under Section 245A or 210 of the Immigration Reform and Control Act.

It appears that Subject may not be eligible for adjustment of status. Detainers have not been placed pursuant to 8 CFR 242.2.

The attached is forwarded to you for appropriate action.

Please return the attached with your findings to the attention of D. Parker.

ENCLOSURES:

I-213	X	
Conviction documents	X	
Other	X	CLETS printout

RECEIVED
SEP 13 1989
Denial Unit

Form G-2
(Rev. 1-2-80)

LL-48

18

RECORD OF DEPORTABLE ALIEN

(See A.M. — 2790.31 - 34 for Instructions)

Family Name (Capital Letters)	Given Name	Middle Name
Valdez - Reyes	Alfredo	

PLEASE TYPEWRITE OR PRINT IN BLOCK CAPITAL LETTERS

Sex	Hair	Eyes	Complexion
m	Blk	Bro	med

Country of Citizenship	Passport Number and Country of Issue	File Number	Height	Weight	Occupation
Mexico	c/n	A29 203 646	5'7	110	Laborer

U.S. Address (Residence) (Number) (Street) (City) (State) (Zip Code): 1206 W. 9th Pomona CA

Scars or Marks: multiple tattoos

Date, Place, Time, Manner of Last Entry: Subsequent to 01/28/83 nr. POE SYS

Passenger Boarded At:

F.B.I. No.: 929933W1

Marital Status: ☒ Single ☐ Married ☐ Widow(er) ☐ Separated ☐ Divorced

Number, Street, City, Province (State) and Country of Permanent Residence: NFA

Method of Location/Apprehension: 511.2

Birthdate	Date of Action	Location Code	(At/Near)	Date & Hour
01/12/63 (26)	8/18/89	LOS	RCC	8/18/89

City, Province (State) and Country of Birth: Juarez, Ch.h, mex

AR Form (Type & No.): ☒ ☐ Lifted ☐ Not Lifted

By: [redacted] b7C

Visa Issued At—NIV No	Social Security Account Name	Status at Entry	Status When Found
c/n	c/n	EWI	In Institution

Date Visa Issued	Social Security No.	Send C.O. Rec. Check To	Length of Time Illegally in U.S.
c/n	c/n	LOS	over 1 year

Immigration Record: Claims Prior Deport 1/25/83

Criminal Record: see narrative

Name, Address, and Nationality of Spouse (Maiden Name, if appropriate): N/A

Number & Nationality of minor Children: ø

Father's Name and Nationality and Address, if Known: Antonio Valdez (mex) unk

Mother's Present and Maiden Names, Nationality, and Address, if Known: Rosa Reyes (mex) Pomona, CA

Monies Due/Property in U.S. Not in Immediate Possession: ☒ None Claimed ☐ See Form I-43

Fingerprinted: ☒ Yes ☐ No

Lookout Book Checked: ☐ Not Listed ☐ Listed, Code ____

Deportation Charge(s) (Code Words): ROXE6

Name and Address of (Last) (Current) U.S. Employer	Type of Employment	Salary	From:	To:
VARIOUS	Day Labor	$ ____ hr	Since	entry

Narrative (Outline particulars under which alien located/apprehended. Include details, not shown above, re time, place, manner of last entry, and elements which establish administrative and/or criminal violation; indicate means and route of travel to interior. Alien has been advised of communication privileges pursuant to 8 CFR 242.2(e).
Initial DS Date 9/12

Vallejo notice given.

SUBJECT interviewed at RCC

Institution/Booking name: Valdez, Alfredo — Bkng.#: C71429

Equities/Appl Pndg: Amnesty — Health: App. Good

CII#: A06556406 — Release date: UNK — File requested:

Offense date: 6/1/83 — Hold Placed: — Card:

Conviction date: 8/3/83

Code Violation: 459 PC

Offense: Burglary

Court: LOS CAST

Case #: A530354 \ A529204

Sentence: 7y 7m

G-304/G-305: — Military Svc: No

G-875 CRIMINAL ALIEN

OSC/WA Institution case. Bond recommended upon release to USINS: $30,000

Bond justification: extensive Criminal history - likely to abscond

b7C [redacted] Special Agent

(Signature and Title)

(If space insufficient, show "continued" and continue on reverse, from bottom up):

DISTRIBUTION

1-file
1-stats

Received (subject and documents) (report of interview) from

Officer: [redacted]

09/12/ 19 89 at 11:00 (☐) A M

OSC/WA Institution

Disposition:

(Receiving Officer)

Form I-213 (Rev. 4-16-79)Y UNITED STATES DEPARTMENT OF JUSTICE Immigration and Naturalization Service

LL-49-

19

DECLARATION OF SERVICE

I, the undersigned declare under penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause and employed at 48 North El Molino Avenue, Suite 202, Los Angeles, CA. 91101. On the date of execution hereof I served the attached document by depositing in the U.S. mail before the close of business a true copy thereof, enclosed in a sealed envelope with postage prepaid addressed to the following:

California Appellate Project
One Ecker Place
Suite 400
San Francisco, CA. 94104
Attn: Mel Greenlee

CARL HENRY
Deputy Attorney General
300 South Spring Street
Los Angeles, Ca. 90013

Alfredo Valdez
#H-37100
5-E4-41
San Quentin State Prison
San Quentin, CA 94974

Executed at Pasadena, California, this 27th day of August 2002

Jami Williams