IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

DAVID KEITH ROGERS,

On Habeas Corpus.

CAPITAL CASE

S084292
SUPREME COURT
FILED

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Frederick K. Ohlrich Clerk

Deputy

Kern County Superior Court No. 33477
The Honorable Gerald K. Davis, Judge

RETURN TO ORDER TO SHOW CAUSE

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **DAVID KEITH ROGERS,** On Habeas Corpus.	S084292

Respondent, the Director of the Department of Corrections and Rehabilitation, hereby makes the following return to the order to show cause, issued on December 19, 2007 and amended on December 20, 2007:

I.
CUSTODY

1. Petitioner is in the lawful custody of respondent at the California State Prison at San Quentin, pursuant to a valid judgment of death, rendered by the Kern County Superior Court on May 2, 1988, in case number 33477, upon conviction of one count of murder in the first degree and one count of murder in the second degree; upon the finding of the special circumstance of multiple murder; and upon the jury's verdict of death.

II.
ALLEGATIONS ANSWERED IN THIS RETURN

2. In this return, respondent will not undertake to answer portions of the petition which are merely summaries of claims, characterizations of the record or exhibits, propositions of law, or argument. Respondent will also not undertake to answer portions of the petition as to which the order to show cause was not issued, but which are incorporated in the portions as to which the order to show cause was issued. To the extent that respondent has not specifically

answered any portion of the petition which the Court deems to be a factual allegation which respondent should admit or deny, respondent denies all such portions of the petition.

III.
CLAIM III – NEW OR FALSE EVIDENCE

3. Respondent denies that petitioner is entitled to relief under Claim III (Pet. at pp. 32-61).

4. Specifically, respondent denies that the former Tambri Butler (now Tambri De Harpport, hereafter referred to as Tambri) has recanted her trial identification of petitioner as her attacker in the 1986 incident which was proven at the penalty phase. Tambri has recently confirmed her identification. Based on interviews with Tambri (which will be discovered to petitioner), respondent has reason to doubt the accuracy of much of the contents of Exhibits 16 and 17 [declarations signed by Tambri], but has insufficient information on which to take a position as to each factual statement in the declarations filed with the petition. Respondent alleges that Tambri's identification of petitioner at trial was reliable, credible, and correct. Her identification of petitioner as the person who had attacked her in the 1986 incident was based on her recognition of petitioner's face, voice, and permanent physical characteristics when she encountered him when he was working in the jail, as she testified at the trial. (See further discussion in Argument I, below.)

5. Accordingly, respondent denies the allegations of paragraphs 98-111, 132-134, and 184-199 [the claims of error and related argument].

6. Paragraphs 112-127 consists of a summary of trial evidence, rather than factual allegations.

7. Paragraphs 128-131 consist, in substance, of a summary of a declaration by defense investigator Melody Ermachild with attached documents

and two declarations by Tambri. Respondent disagrees with the substance of many of the characterizations of the contents of the documents. However, respondent expects that there will be an evidentiary hearing at which all of the circumstances relating to Tambri's identifications of petitioner before trial and at trial and her later statements can be presented.

8. Specifically, in response to paragraph 128, respondent alleges: At the time of Tambri's testimony in petitioner's trial on March 23, 1988, she was serving a term in the county jail as a condition of probation upon her conviction pursuant to a plea bargain of possession of a controlled substance for sale, as a lesser offense of a violation of Health and Safety Code section 11352 [transporting, selling, or furnishing a controlled substance] in case number 35464. (Exh. 2 (Vol. I at pp. 124-131, 150-151).) Police reports show that the charges were based on Tambri's arrest on November 29, 1987, when she was found in possession of a syringe containing heroin; she said she had injected heroin into herself immediately before she was detained; and she admitted to police that she had furnished heroin to a companion who then also injected heroin. (Exh. 2 (Vol. I at pp. 158-162, 168-170.) Tambri was placed on probation on February 8, 1988 with conditions including a term of 365 days in the county jail, with 85 days of pre-judgment custody credits. (Exh. 2 (Vol. I at pp. 137 [commitment], 138 [sentence report], 139 [minutes]).) With credits under Penal Code section 4019, she could have expected to be released on August 14, 1988. Judgment was pronounced on petitioner on the morning of May 2, 1998. (CT 729; ser 22RT 5982.) On May 2, 1988, at a hearing which commenced at 3:35 p.m., Tambri appeared without counsel and made an oral motion for modification of her sentence. (Exh. 2 (Vol. I at p. 135).) Deputy District Attorney Ryals was present. The motion was granted and Tambri was ordered released from custody. (*Ibid.*) Respondent alleges that Tambri did not request early release and was not informed at or before the time of her

testimony of any intention by the prosecution to seek her early release.

9. In response to paragraph 129, respondent admits that Tambri was arrested later in 1998 for being under the influence of heroin. (See Exh. 16, ¶ 19.) Respondent currently has no reason to question the account in Tambri's declaration that a man claiming to be from the District Attorney's Office recommended to her that she leave the area because she might be in danger from other police officers. Respondent lacks sufficient information or belief to permit it to state whether the man actually was from the District Attorney's office or whether any representation was made to her with respect to her probation or whether she might later be sought by Kern County authorities.

10. Respondent admits the allegations of paragraphs 130 and 137.

11. Respondent denies the allegations of paragraphs 131, 132, 133, 134, 135, 136, 138, and 139.

12. Respondent agrees that Michael Ratzlaff was convicted of an attack on a prostitute and may have committed attacks on others. However, in response to paragraphs 141 through 183, respondent lacks sufficient information or belief to permit it to address the details of the attacks of which Michael Ratzlaff was convicted or was a suspect and on that basis denies the allegations. Respondent alleges that Ratzlaff's height and weight exclude him as a possible suspect in the attack Tambri attributed to petitioner.

13. Respondent denies the allegations of paragraphs 184 through 195 to the extent that they are not merely argument, with which respondent disagrees.

14. Respondent denies the allegations of paragraphs 196 through 199.

IV.
CLAIM IV – FAILURE TO DISCLOSE EXCULPATORY EVIDENCE

15. Respondent denies that petitioner is entitled to relief under Claim IV (Pet. at pp. 61-68).

16. Specifically, the prosecution had no substantial reason to believe that Michael Ratzlaff was the person who attacked Tambri in the 1986 incident proven at the penalty phase of petitioner's trial.

17. The differences between the description of Tambri's attacker and that of Ratzlaff reasonably excluded Ratzlaff as Tambri's attacker. In addition, Tambri's positive identification of petitioner in a photo line-up also reasonably excluded Ratzlaff.

18. Respondent does not currently possess any indication that the defense in this case was provided with information about crimes committed by Michael Ratzlaff. However, petitioner had access to information about attacks on prostitutes by Michael Ratzlaff and others due to his former patrol assignment in or near the prostitution area of Bakersfield, the fact that he often went to the area off-duty, and through contacts with other law enforcement officers.

19. Tambri did not state in her testimony that she was in custody for simple possession of heroin. (Pet. at p. 67, ¶ 215.) Instead, she testified that she was in custody "For possession of heroin." (22RT 5779.) She also testified that she had been a prostitute for ten years and was addicted to heroin. On cross-examination, she testified that she was in jail for six months during the period of custody when she recognized petitioner as her attacker, that she had been arrested "for heroin" about eight or nine times. (22RT 5795-5796 , 5801.) Under all the circumstances, the difference between a charge of possession of heroin and possession for sale was not material.

20. As to paragraph 215, respondent has not been able to obtain positive

information on the disclosure of Tambri's criminal history to the defense. In reliance on the general presumption that official duty is regularly performed, respondent alleges that, during or before the trial, the District Attorney disclosed information regarding Tambri's criminal record, her incarceration, and any pending criminal cases which was relevant to possible impeachment of her testimony. However, the District Attorney was not required by law to give the defense a copy of her summary criminal history ("rap sheet") and would not have been expected to do so.

21. Respondent further alleges that neither information about Ratzlaff's crimes nor Tambri's criminal history information was material under the standard of *Brady v. Maryland* (1963) 373 U.S. 83 and related authorities (hereafter referred to as *Brady*) and that the failure to disclose any such information was not prejudicial.

22. Accordingly, respondent denies the allegations of paragraphs 200 through 216.

V.
CLAIM V – ADEQUACY OF REPRESENTATION BY COUNSEL

23. Respondent denies that counsel performed inadequately – or that petitioner suffered prejudice – under the standard of *Strickland v. Washington* (1984) 466 U.S. 668 (hereafter, *Strickland*) and related authorities. Specifically:

24. Trial counsel conducted a reasonable investigation into petitioner's background and character, as shown by the evidence which was presented at trial. (Pet. at pp. 140-143, ¶¶ 394-403 [Claim V, part (G)(1)].)

25. Trial counsel's decisions regarding the extent of investigations into the incidents involving Ellen Martinez and Tambri were reasonable in light of the information available to him. (Pet. at pp. 144-145, ¶¶ 404-408 [Claim V,

part (G)(2)].)

26. Trial counsel's handling of the incident involving Tambri at the penalty phase was reasonable. (Pet. at pp. 164-184 [Claim V, parts (K, L, M, N, O)].)

27. A different result was not reasonably probable in the absence of the inadequacies claimed by petitioner. (Pet. at pp. 138-145, 164-190 [Claims V, parts (G, K, L, M, N, O. Q)].)

28. Accordingly, respondent denies the allegations of paragraphs 389 through 393, to the extent that they apply to the portions of the claim on which the order to show cause was issued.

29. Trial counsel Eugene Lorenz has declined to discuss his handling of petitioner's case with representatives of respondent. Under the circumstances, respondent lacks sufficient information and belief to answer the allegations of paragraphs 394 through 400, 402 through 403[1/], and 405 through 470[2/] and on that basis denies those allegations (see *People v. Duvall* (1995) 9 Cal.4th 464, 483-485), with the following exceptions:

30. Respondent admits that Chuck Feer "investigated Petitioner's case to "prepare for the preliminary hearing in March, 1987;" and that Mitchell Rowland and Mr. Feer interviewed petitioner and his two sons, obtained at least some of petitioner's medical and school records, "gathered a list of possible penalty phase witnesses," and interviewed Connie Zambrano. (See Pet. at ¶ 396.)

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1. Paragraph 401 describes a document in the clerk's transcript on appeal. (See 2CT 360.)

2. Paragraph 404 consists of argument.

31. Respondent admits that Susan Peninger interviewed friends and family members of petitioner. (See Pet. at ¶¶ 398, 399.)

32. Respondent affirmatively alleges that Roberta Cowan, who testified at the penalty phase, and Alberta Dougherty, who gave a statement regarding Ellen Martinez (Exh. 34 (Vol. III at p. 282) are the same person.

33. In response to paragraphs 471 through 475, respondent alleges that counsel had no valid legal basis on which to object to evidence of Tambri's in-court or prior identifications of petitioner. Accordingly, respondent denies the allegations of those paragraphs to the extent they are not merely statements of points of law, or argument, with which respondent disagrees.

34. In response to paragraphs 476 through 483, counsel made reasonable tactical choices in his impeachment of Tambri's testimony based on the information which counsel possessed or was reasonably available to him. Accordingly, respondent denies the allegations of those paragraphs to the extent they are not merely statements of points of law, or argument, with which respondent disagrees.

35. In response to paragraphs 484 through 489, counsel made a reasonable tactical choice not to mention the attack on Tambri in his penalty phase argument. His argument was well suited to address the crimes which petitioner had committed – as briefly as possible – while stressing the penalty phase theories that petitioner was "deeply emotionally disturbed" (22RT 5963) but otherwise lived an exemplary life. It permitted him to stress that if the jurors returned a verdict of death they would "kill the good part of David Rogers." (22RT 5964.)

36. In response to paragraphs 490 through 492, to the extent that an order to show cause was granted, counsel made a reasonable tactical choice not to request an instruction on the factors pertinent to an eyewitness identification. Counsel has not informed respondent of his reasons for failing to request such

an instruction, but a number of reasons may be inferred from the record, specifically that the factors are matters of common sense and that several of the factors would not be favorable to petitioner. Counsel could reasonably have focused on testing Tambri's credibility in his cross-examination of her. Moreover, under the circumstances, a different result is not reasonably likely.

37. In response to paragraphs 496 through 506, respondent contends that a different result was not reasonably probable in the absence of any or all of the claimed inadequacies of counsel as to which an order to show cause was granted. Accordingly, respondent denies the allegations of those paragraphs to the extent they are not merely statements of points of law, or argument, with which respondent disagrees.

VI.
CLAIM VI – CUMULATIVE PREJUDICE

38. Respondent denies that petitioner was prejudiced by any of the matters as to which the order to show cause was issued, whether individually or in combination. (Pet. at pp. 229-230 [Claim VI].) Accordingly, respondent denies the allegations of paragraphs 576 through 583.

VII.
PRAYER

WHEREFORE, respondent respectfully requests that the petition for writ of habeas corpus be denied.

Dated: November 19, 2008

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RETURN

STATEMENT OF THE CASE

On February 17, 1987, the District Attorney of Kern County filed a felony complaint in the West Kern Municipal Court charging petitioner with the murders of an unidentified female human being on or about February 8, 1987, and Janine Benintende on or about January 1, 1986 to February 21, 1986, both with the use of a gun (Pen. Code, §§ 187, 12022.5). The complaint also charged a multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)). (1CTS 943-944.)

Also on February 17, 1987, petitioner was arraigned in the West Kern Municipal Court. The matter was continued one day for appointment of counsel. At that time, Eugene Lorenz was appointed to represent petitioner. (1CTS 950.)

Preliminary examination was held on March 16, 17, 18 and 19, 1987 before the Honorable Charles P. McNutt, at the close of which petitioner was held to answer on all charges. (1CT 2 - 2CT 353; CTS 951-953.)

On April 1, 1987, the District Attorney filed an information in the Kern County Superior Court charging petitioner with the murders of Tracie Johann's [sic] Clark on or about February 8, 1987 (Count 1), and Janine Marie Benintende (count 2) on or about January 1, 1986 to February 21, 1986, both with the use of a gun (Pen. Code, §§ 187, 12022.5). The information also charged a multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)). (2CT 354-355.)

Trial commenced on November 16, 1987 with the hearing of motions. (2CT 396-405, 415.) The jury and alternates were sworn on February 10, 1988. (2CT 478-479.)

On February 17, 1988 opening statements were given and the presentation of evidence to the jury commenced. (2CT 480-497.) After the People rested their case-in-chief February 25, 1988, the court granted petitioner's motion for acquittal of premeditated first degree murder as to Count 2, leaving the charge as one of second degree murder. (19RT 5174-5184, 5201-5203.) On March 7, 1988, presentation of evidence in the defense case commenced. (3CT 586-591.) On March 14, 1988, the People presented their case in rebuttal, counsel presented their arguments, the court instructed the jury and the jury retired to deliberate. (3CT 593-594.) The jury was instructed on first degree murder by premeditation (which only applied to Count 1), second degree murder by express and implied malice and voluntary manslaughter by a sudden quarrel or heat of passion. (3CT 629-648.) On March 16, 1988, the jury returned verdicts finding petitioner guilty of murder in the first degree in Count 1 and guilty of murder in the second degree in Count 2. The jury found that both murders were committed with the use of a gun and found the multiple murder special circumstance true. (3CT 596.)

The penalty phase commenced on March 23, 1988 with various preliminary matters, opening statements for the People and the defense and the presentation of the People's case. (3CT 681-683.) The defense case was presented on March 24, 1988. (3CT 689-691.) On the next court day, March 28, 1988, the People and the defense made their arguments to the jury, the court gave the penalty phase instructions and the jury retired to deliberate. (3CT 692-693.) On March 29, 1988, the jury returned a verdict of death. (3CT 694-695.)[3/]

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3. The jury deliberated for 7 hours, 45 minutes, in the penalty phase, assuming that it took one-hour lunches.

The jury retired to deliberate in the penalty phase on March 28, 1988 at 10:50 a.m. At 11:27 a.m. the court read an instruction to the jury. The jury retired for further deliberation at 11:30 a.m. At 4:30 p.m., deliberations were

On May 2, 1988, the court heard and denied a motion for a new trial and the automatic motion to modify the penalty verdict under Penal Code section 190.4, subdivision (e). On Count 1, the court sentenced petitioner to death. On Count 2, it sentenced petitioner to prison for 15 years to life plus two years for the gun use enhancement. However, the court ordered that the sentence on Count 2 would be stayed if petitioner is executed, but if petitioner is not executed, the sentence on Count 2 would run consecutively to the sentence on Count 1. (3CT 729.)

The instant petition was filed on December 14, 1999. Respondent filed an informal response on July 2, 2001.

The judgment was affirmed in its entirety on the automatic appeal in an opinion filed on August 21, 2006. (*People v. Rogers* (2006; S005502) 39 Cal.4th 826.)

On December 19, 2007, this Court issued an Order to Show Cause (amended on December 20, 2007), which ordered respondent to file a return as to: two related claims regarding alleged newly-discovered evidence and the prosecution's alleged failure to disclose exculpatory evidence (claims III and IV); six subclaims of ineffective assistance of counsel at the penalty phase, including the failure to present proffered new mitigating evidence (specified portions of claim V); and claims of cumulative prejudice based on the other claims as to which the Order to Show Cause was issued (within claims V and VI).

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adjourned until the next morning. (3CT 692-693.) The deliberations periods on March 28 were 37, 30 and 210 minutes, for a total of 277 minutes (4 hours, 37 minutes).

On March 29, 1988 at 9:42 a.m., the jury retired for further deliberation. At 1:55 p.m., the jury returned its verdict. (3CT 694.) The deliberation periods on March 29 were 138 and 55 minutes, for a total of 188 minutes (3 hours, 8 minutes).

STATEMENT OF FACTS

GUILT PHASE

The Murder Of Janine Benintende

Rose Benintende, the mother of Janine Benintende [the victim in Count 2], knew her daughter as a manicurist. (18RT 4718-4720; Trial Exh. 81 [photo].)[4/] Janine had been born on February 12, 1965. (18RT 4718-4719.) Her death certificate stated that her race or ethnicity was Caucasian and she was not Hispanic.[5/] (Trial Exh. 14; marked 17RT 4514-4515; admitted 18RT 4714-4715.)

Janine lived with her mother in Los Angeles in February 1986, although she periodically stayed away over weekends. (18RT 4719-4720.) Rose suspected that Janine had a heroin problem. (18RT 4724.) Janine had brought one Billy Williams to Rose's home at some point. (18RT 4720.) Rose thought that Williams had been abusing Janine. (18RT 4723.)

Rose Savastano, who lived in Venice, was a friend of Janine Benintende.

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4. Trial Exhibits will be referred to as "Trial Exh" or "Penalty Exh." Petitioner's exhibits in the instant proceeding will be referred to as "Exh.," followed by the exhibit number. The page number within the exhibit volume may also be noted. For convenience, Respondent's exhibits in the instant proceeding will be designated by letter.

5. Respondent only mentions the race or ethnicity of the victims because, as will be discussed, some of the defense psychiatric witnesses at trial relied on the race of Tracie Clark to argue that petitioner's shooting of Tracie was a sudden emotional reaction to an attack by her and was based in part on previous traumatic incidents involving a person of the same race. However, as respondent will note, petitioner's statements to police showed that he believed her race or ethnicity was different. Janine Benintende was of still another race or ethnicity. Respondent's ultimate point is that the evidence refuted the defense theory that petitioner's shooting of Tracie Clark was triggered in part by a sudden emotional reaction to her race.

(18RT 4735.) She was aware that Janine had been using heroin and working as a prostitute. (18RT 4738.) She knew that Janine had a friend named Billy Williams. (18RT 4736.)

Billy Williams had known Janine Benintende for approximately nine months until around January 19 or 20, 1986. She was living with him. Shortly after he saw her for the last time, he was arrested for being under the influence and went to jail for three days, but the charges were dropped. (18RT 4776-4780; Trial Exh. 90 [jail records].) Rose Savastano knew that Billy Williams was in jail during February 1986. (18RT 4736.) Los Angeles County jail records show that Williams was received on January 23, 1986 and released pursuant to a court order dated January 27, 1986 upon his promise to appear in court on February 18, 1986. (Trial Exh. 90.)

While Williams was in jail, Janine began associating with one Frank Bybee. (18RT 4736.) During the latter part of January 1986, Janine and Frank Bybee were staying at Rose Savastano's house, but Savastano told them to leave because she believed Janine had been stealing things. (18RT 4736-4737, 4740.) Savastano never saw Janine again. (18RT 4738.) The day after Janine left her house, Billy Williams came to the house. (18RT 4738.)

Rose Benintende last saw Janine shortly after January 22, 1986. (18RT 4720.) On that occasion Janine had dinner at Rose's home and was picked up by a person named Frankie. (18RT 4721.) Janine appeared nervous, collected some clothes and expressed a desire to leave Los Angeles. (18RT 4724-4725.) She said she was going to be away for a couple of days. (18RT 4726.)

Frank Bybee knew Janine Benintende in Los Angeles in 1986 when she was staying with a woman named Rose. During January of 1986, Bybee and Janine went to Bakersfield, where they rented a room in a "hotel on the strip." After they rented a room, Janine went out at around 7:30 to 8:00 p.m. to get some money by working as a prostitute. She was wearing a white jacket which

looked like rabbit, some pants and some boots. He never saw her again. He looked for her for about five days. They had planned to go east together. (18RT 4896-4901.)

Katherine Hardie was a prostitute who worked on Union Avenue in Bakersfield in January 1986. One evening at the end of January 1986 she saw a woman (whom she later identified as Janine Benintende) on Union Avenue about a block away from Fourth Street, close to the Townhouse Motel. Hardie suggested to Janine that she get a coat because "it gets pretty cold." Janine walked toward the Townhouse. Hardie was arrested the same day. She never saw Janine again. (18RT 4911-4914, 4917-4918; Trial Exh. 81 [photograph of Janine Benintende].)

When Janine did not return to Los Angeles, her mother attempted to find her, but was unsuccessful. She notified the Los Angeles Police and drove around Bakersfield with Billy Williams looking for Janine. (18RT 4721-4722; cf. 18RT 4776-4780 [Billy Williams].)

On February 21, 1986, William Neff, who farmed in the area of Rock Pile Road and the Arvin-Edison Canal, saw a body floating in the canal where the canal crossed under the road. (18RT 4733.) He reported the body to the water district office. (18RT 4734.)

James Prince, the assistant superintendent of the Arvin-Edison Water District, received a report on February 21, 1986 that there was body in the canal. (18RT 4728.) He went to a location where the canal went under Rock Pile Road through a four-foot pipe and saw a woman's body in the canal among some floating debris. (18RT 4729-4730; Trial Exhs. 1 [map of the water district], 82-87.) There were no crossbars in the pipe or anything else which would prevent any object from flowing through the pipe, although the water was usually three to four feet above the level of the pipe. (18RT 4730, 4732.)

Kern County Sheriff's Homicide Detective Mike Lage was called to the

Arvin-Edison Canal on February 21, 1986 and arrived at approximately 2:00 p.m. He formed the opinion that the body had been in the canal for "some time," "[p]robably more than 24 hours." (18RT 4741-4743.) He walked along the canal banks looking for footprints or other evidence but found none. (18RT 4743-4744.) A fence approximately five feet tall on both sides of the canal blocked access to the canal. (18RT 4744.) Lage had the body removed from the water. (18RT 4743, 4745.) Lage could find no missing persons report to the Sheriff's Office or the Bakersfield Police which might have concerned the victim. (18RT 4745.)

Dr. John E. Holloway, a forensic pathologist on contract with the Kern County Coroner's Office, performed a postmortem examination on an unidentified body, later identified as that of Janine Benintende, on February 24, 1986. (18RT 4786-4789.) The body had "undergone extensive decomposition of the type that can occur after a body is in the water, particularly if there are gunshot wounds where bacteria can enter." (18RT 4790.) The body had been in water long enough to produce gas to make the body buoyant. (18RT 4791.) The body was in a rabbit fur jacket, sweater, blouse, bra, blue jeans, briefs and socks. (18RT 4791.) Dr. Holloway observed a defect in the front of the jacket and two in back which were similar to defects in the sweater or blouse. (18RT 4792.)

Dr. Holloway found an entry wound in the front torso near the sternum and an exit wound on the left side flank near the waist. (18RT 4793-4794.) The path of the wound was slightly from right to left and "rather sharply downward, around 70 degrees from the transverse plane." (18RT 4795.) X-ray films showed two metallic objects in the body which did not appear to be related to the front entry wound or the back exit wound. (18RT 4795.)

Dr. Holloway found a second entry wound on the back just below the shoulder blade. The wound path went to the thoracic spine where it diverged

into two. One wound path went up "rather markedly" into the cervical spine area in the neck where the bullet lodged firmly. The other continued approximately in the original direction where the second bullet was found. There was no soot or tattooing around the entry wound, which would typically mean that the muzzle distance had been greater than sixteen inches. Dr. Holloway noted that the farther back one gets, the less likely it would be to fire two shots into a single entry wound. The cause of death was a penetrating gunshot wound to the torso. (18RT 4793-4800.)[6/]

Cocaine and a breakdown product were found in the victim's blood. (18RT 4798.)

Jerry Roper, a technical investigator with the Kern County Sheriff's Office, attended the postmortem examination. (18RT 4781.) He took custody of two bullets which were removed from the body. (18RT 4782-4785; Trial Exh. 91.)

Glenn Johnson, a sergeant assigned to the technical investigations detail of the Sheriff's Office, also attended the postmortem examination. (18RT 4769-4770.) He took prints of seven of the fingers on the body. (18RT 4770-4771; Trial Exh. 88.) He could not take prints from three of the fingers due to the condition of the fingers. (18RT 4771.) He mailed the card bearing the fingerprints to the State Department of Justice. (18RT 4771-4772.)

Donna Mambretti, a fingerprint analyst employed by the State Department of Justice, identified the fingerprints as matching a fingerprint card on file with the Department bearing the name of Janine Marie Benintende. (18RT 4772-4775; Trial Exhs. 88, 89.)

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6. In discussing the Janine Benintende murder in closing argument, the District Attorney argued, "it's almost impossible for a person who just on sudden impulse shoots somebody three times. . . . [¶] The reasonable interpretation of the facts are, is that the girl was shot once and then killed with the final two shots." (21RT 5622.)

Sergeant Johnson had received a telephone call from the State Department of Justice on March 5, 1986 identifying the fingerprints. (18RT 4771-4772.)

On March 19, 1986, after he was informed of the identity of the body found on Rock Pile Road, Detective Lage spoke to Janine Benintende's mother and stepfather, Rose and Jack Benintende, in Los Angeles. (18RT 4746-4747, 4763.) They told Lage about Janine's friends and acquaintances. (18RT 4748.) Lage contacted the persons about whom he had been informed, including Billy Williams, Rose Savastano, a number of prostitutes in Venice and one Lonnie Murphy, whose nickname was Duck. (18RT 4748-4749, 4762-4763, 4767.) Lage also contacted members of the Pacific Division of the Los Angeles Police Department and spoke to several of their confidential informants. (18RT 4764-4767 [cross-examination].) At the conclusion, Lage had no suspects. (18RT 4749-4750.) In approximately May 1986, there was no further investigation Lage could do and he placed the case in his active file. (18RT 4750-4751.)

The Murder Of Tracie Clark

Tracie Johann Clark's date of birth was June 10, 1971. Her race or ethnicity was listed as "Black" on her death certificate. (Trial Exh. 15, marked 17RT 4514-4515; admitted 18RT 4714-4715.)

Connie Zambrano worked as a prostitute in Bakersfield during January and February 1987 in the area of 8th and Union. She worked with her pimp Rex Harris. (17RT 4638-4640.) She had talked to petitioner many times. (17RT 4640-4642, 4658, 4660-4661.) She did not know that he was a deputy sheriff. (17RT 4652.) He would either be driving his green Datsun pickup truck or his beige Ford pickup with a brown camper shell with darkened windows. (17RT 4642.)

During the early morning hours of February 8, 1987, Zambrano was

standing in front of the El Don Motel, where she lived, when she saw petitioner driving his beige pickup on Union Avenue. Petitioner was wearing the same blue windbreaker he "always" wore. Petitioner's pickup went by the El Don Motel and turned on Belle Terrace, where it stopped at the corner. A girl, later identified as Tracie Clark, jumped into the truck. Zambrano had not seen the girl before. Zambrano saw the girl point toward the El Don Motel, but the pickup kept going straight. The pickup went down Belle Terrace, stopped for about three minutes and then turned onto the street there. It then turned back onto Belle Terrace and continued down the street. Zambrano never saw Clark again, although she saw Clark's pimp later without Clark. (17RT 4639, 4644-4649; Trial Exhs. 13 [diagram], 77 [photo].)[7/]

Knute Berry and his family owned farm land in the area of Hermosa Road near Edison. (17RT 4525.) During the early afternoon of February 8, 1987, Berry and his cousin Jim Knutson drove to the area of Hermosa Road and the Arvin-Edison Canal to shoot squirrels with .22-caliber rifles. (17RT 4525-

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7. Zambrano testified that at the time she told police about seeing the girl, no one had made any promises to her with regard to any other cases she had "or anything like that." (17RT 4560.) Later, when Zambrano met with Tam Hodgson and Steve Tauzer from the District Attorney's office, they said they would "take care of" Zambrano's pending cases. (17RT 4652-4653.) There was no agreement to dismiss any of Rex Harris's cases. (17RT 4653.) After Zambrano testified, she and Harris were sent to Arizona. (17RT 4653.)

Tam Hodgson testified that, as part of his case management assignment, he arranged for food and housing allowances for Connie Zambrano from the time of arraignment until the preliminary examination and sending her to her home town in another state with her boyfriend Rex Harris. (17RT 4516-4518.) Hodgson spoke to another officer about "her cases," but no deals or promises were made to her. (17RT 4518-4519.) Two pending prostitution cases and a drug case were dismissed for safety reasons so that she would not be housed in the County Jail. (17RT 4519-4522.) Another case involving an arrest for being under the influence of a drug was dismissed because no drug test had been given. (17RT 4521.) Zambrano was brought back to California for the trial. (17RT 4521.)

4526, 4532-4534.) Berry looked into the water of the canal, but did not see anything unusual. (17RT 4526-4527.)[8/] They left and came back to the area about an hour later. (17RT 4527.) While standing on the bridge, they saw a body in the water a short distance from the bridge where the fence ended. (17RT 4527-4530; Trial Exh. 16.) It did not appear to be a "normal body" because it "was half naked and submerged in only a few feet of water." (17RT 4530.) Berry reported the body to the sheriff's office on Edison Road. (17RT 4530-4531.)

At around 5:00 p.m. on February 8, 1987, Kern County Sheriff's Deputy J.R. Rodriguez received a call to go to the Arvin-Edison Canal close to Hermosa Road. (17RT 4535-4537.) Rodriguez saw the body about fifty feet down the canal from the bridge where Hermosa Road crossed the canal. (17RT 4537-4538; 17RT 4557.) The water was flowing southbound. (17RT 4538; cf. 17RT 4557-4558.) Deputy Rodriguez saw blood stains on the ground, the bridge, the asphalt and on the green pipe and tire tracks in the dirt. (17RT 4539-4532; Trial Exhs. 3 [map], 16-17 [photos].)

Kern County Sheriff's Department Technical Investigator Helen Sparks went to the Hermosa Road scene at around 5:45 p.m. (17RT 4543-4544.) She took a number of photographs. (17RT 4545-4547; Trial Exhs 18-54.) She seized a Contour condom wrapper and a separate condom, which was "stretched out," near the tire tracks on the south shoulder of the road on the east side of the bridge. (17RT 4547-4548, 4552; see 17RT 4570; Trial Exhs. 19 [photo of condom], 20 [photo of wrapper].) She took several blood samples. (17RT 4551.)

Kern County Sheriff's Senior Deputy Martin Williamson, from the robbery-homicide unit, arrived at around 5:30 p.m. (17RT 4553-4555.) The

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8. Knutson recalled that he could not see into the water where the body was on the first occasion. (17RT 4533-4534.)

lead investigator, John Soliz, assigned Williamson to oversee the crime scene investigation. (17RT 4556-4557; cf. 17RT 4589-4591 [Detective Soliz]; Trial Exh. 3 [map].)

There were blood, tire tracks, shoe tracks and drag marks east of the canal along the dirt shoulder of the eastbound lane (the south side) of the paved road. (17RT 4559-4570, 4577-4579; Trial Exhs. 3 [map], 21, 22.) Helen Sparks took photographs of the tire tracks. (17RT 4560-4561.) There was a pool of blood in the middle of the eastbound lane of the road. (17RT 4561-4562, 4567; Trial Exh. 27.) Blood went in two directions from the pool. (17RT 4562.) There were blood drops, about three feet apart, from a telephone pole to the puddle. (17RT 4562-4564, 4567-4569; Trial Exh. 30.) There was a tennis shoe track in one of the blood spots. (17RT 4563.) There were fresh "disturbance impressions" in the three- to four-foot embankment just to the east of the telephone pole. (17RT 4568, 4579.) Between the embankment and the roadway were apparent shoe impressions in the sandy dirt. (17RT 4568-4569; Trial Exh. 28.) There was also a trail of smeared blood west of the puddle, which corresponded to the drag marks leading toward the center of the bridge. (17RT 4562, 4565-4567, 4577-4578; Trial Exhs. 31, 33, 35, 38.) There were blood spots on the road, the curb, rail of the canal and the center of the bridge. (17RT 4562, 4570; Trial Exh. 40.)

District Attorney's Investigator Tam Hodgson later noted that along a portion of the canal are embankments which are from four to six feet high. (17RT 4509.) A pipe traverses the canal about two feet from the bridge at Hermosa Road. (17RT 4509.)

The head of the body in the canal was to the south. (17RT 4557-4558.) Officers had to go inside the fence around the canal to retrieve the body. (17RT 4558; see 17RT 4564-4565.)

Sheriff's Office search and rescue personnel retrieved the body from the

canal using a raft at around 8:00 p.m. (17RT 4571; 17RT 4580-4586 [Carl Sparks].) The body was placed in a bag and brought to shore. (17RT 4571-4571; Trial Exh. 61.) The search and rescue diver checked for evidence along the bottom of the canal but found nothing of significance. (17RT 4585.)

In the experience of Carl Sparks, who was in charge of the Sheriff's search and rescue team, the body was in "good shape." (17RT 4587, 4588-4589; Trial Exh. 42.) It appeared that the body had moved downstream for about 60 feet while its hands and legs had dragged in the silt along the bottom until it stopped. (17RT 4587.) "The current was very slow." (17RT 4588.) The body "hadn't been in the water long enough to completely settle to the bottom." (17RT 4587.) The body was oozing blood from four or five different places. (17RT 4588.)

Dr. Armand Dollinger, a contract pathologist for the Kern County Coroner's Office, performed a postmortem examination on the body, later identified as that of fifteen-year-old Tracie Clark, on February 9, 1987. (17RT 4604-4608.) He found a number of wounds on the body. (Trial Exhs. 62, 63 [drawings].)[9/] The first wound was an entrance wound in the front of the chest on the right side slightly above the breast. (17RT 4609-4611.)[10/]. The wound path went through the middle lobe of the right lung and exited in the lower portion of the back slightly to the right of the midline. (17RT 4613, 4614, 4617.)[11/] Abrasion around the edges of the exit wound showed that it was

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9. Helen Sparks took photographs at the post-mortem on February 9, 1987. (17RT 4545-4546; Trial Exh. 55-60.) The court excluded Exhibit 55 on petitioner's motion but admitted 56-60. The court also excluded evidence that the victim had been pregnant. (17RT 4598-4601.)

10. Although the testimony described each entry, exit or grazing wound separately, respondent will characterize the wounds caused by a single bullet as one wound.

11. The exit wound of wound one was described as wound nine.

sustained while the skin was against a solid surface, such as the ground. (17RT 4613.)

A second entry wound was toward the center of the body in the right breast slightly below the nipple. (17RT 4611.) The wound path went through the lower lobe of the right lung and stopped near the middle of the back. (17RT 4614.)[12].

A third wound was "just an abrasion" in the right breast closer to the nipple. It did not penetrate the body. (17RT 4611, 4615.)

A fourth wound was on the side of the right chest down from the front of the shoulder at about the level of the nipple. (17RT 4611-4612.) The bullet went through the seventh rib, the right lung, diaphragm, liver, stomach, the left side of the diaphragm, into the chest and lodged just below the skin on the left side of the chest. (17RT 4615.) Near the entry wound was tattooing or stippling on the inside of the right arm, which indicated that the shot was fired at fairly close range. (17RT 4616.)

A fifth wound consisted of a grazing wound on the upper portion of the abdomen at about the waistline, an entry wound slightly below it and an exit wound on the right side at the crest of the pelvic bone. (17RT 4612-6213.)[13] The wound passed through subcutaneous tissue and never entered the body cavity. (17RT 4616.)

A sixth entry wound (described as wound eight in the testimony) was on

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12. Since the bullets which caused the wounds one and two crossed and traveled in parallel paths, the bullet which caused wound one might have stopped near the back and the bullet which caused wound two might have exited, instead of the reverse as described in the text above. (17RT 4614-4615.)

13. The grazing, entry and exit wounds were described as wounds five, six and seven in the testimony. Although Dr. Dollinger stated that the exit wound was "on the *left* side right at the crest of the pelvic bone" (17RT 4612 [emphasis added]), his diagram, Trial Exhibit 62, shows the exit wound (designated as wound 7) as being on the victim's *right* side.

the back at about the midline of the back. (17RT 4613.) The bullet went into the upper lobe of the right lung and was recovered from the right collarbone area. (17RT 4617.)

The three bullets which had remained in the body were recovered and taken by Bernadetta Rickard from the Kern County Regional Crime Lab. (17RT 4575-4576 [Deputy Williamson], 4615-4617 [Dr. Dollinger].) She placed the three projectiles or fragments in three separate boxes. (18RT 4700-4804; Trial Exh. 92.)

There were postmortem abrasions on the skin surface of the buttocks. (17RT 4619-4620.)

Dr. Dollinger concluded that the victim had bled to death from multiple gunshot wounds which perforated the lungs and the liver. (17RT 4617-4618.) In his opinion, she had been dead when she was placed in the water. (17RT 4618.)

The Investigation And Petitioner's Confession

In an attempt to identify the body found in the canal on February 8, 1987, detectives showed Polaroid photographs of the body to deputies who might recognize her as a prostitute from one of the truck stops or Union Avenue. (17RT 4572, 4574-4575.) The same night the body was discovered, Deputy Williamson showed a photograph of the body to petitioner. (17RT 4571-4573; Trial Exh. 61.) He said he did not recognize her and referred Williamson to a deputy who worked the east side of town. (17RT 4574.)

The day after the body was found, on February 9, 1987, Detective Soliz and Deputy Williamson went to the Union Avenue area to ask the females there if anyone could identify the victim. (17RT 4593-4594.) Connie Zambrano, who was a block west of Union at V Street and Brundage, told Detective Soliz she recognized the victim and gave Soliz information on her previous

observations of Tracie. (17RT 4595.) Soliz spoke to a prostitute named Marcia who said that the victim was named Tracie Clark. (17RT 4596.)

The same day, Bernadetta Rickard mentioned to another criminalist, Greg Laskowski, that she had recovered three semi-copper-clad projectiles at the autopsy of a female who had been in the canal off of Hermosa Road. (18RT 4700-4804, 4815-4816.) Laskowski remembered that another female victim had been recovered from a canal approximately a year earlier and that two semi-copper-clad projectiles had been recovered from her body. (18RT 4716, 4882-4883.) Laskowski contacted Detective Willie Nikkel, who suggested that Laskowski compare the bullets from the two victims. He did. (18RT 4716.) The bullets matched. (18RT 4852-4858, 4866-4869, 4884; Trial Exhs. 81, 82.)

Laskowski contacted Detectives Nikkel and Lage with the results of his comparison. (18RT 4871-4872.) Detective Lage gave Laskowski some Sheriff's Department issue W.W. [Winchester-Western] .38-caliber plus P ammunition with semi-jacketed hollow point bullets. (17RT 4622-4623, 4752-4753.) The ammunition had come from the Sheriff's Office range master. (18RT 4761.) The ammunition is available to all deputies. (18RT 4762.) It is also sold commercially. (18RT 4787 [Gregory Laskowski].) Laskowski made the comparison in Nikkel's presence. (17RT 4623.) The bullets were of the same type as those recovered from the two bodies. (18RT 4772.)

Detectives Lage and Nikkel went to petitioner's house at 1420 Penny with a description of the suspect vehicle in the Tracie Clark homicide and photographs of shoe and tire tracks from the homicide scene. (17RT 4623, 4625, 4753-4755; Trial Exhs. 44-50 [tire tracks], 51-54.) The detectives saw a light tan or beige pickup truck with a camper shell with darkened bubble windows. (18RT 4755.) The tires on petitioner's pickup truck matched the tire tracks in the photographs. (17RT 4625-4628, 4755; Trial Exhs. 64-68.)

Lage prepared a photo lineup using photographs from a Sheriff's Office publication, *Behind the Badge*, including a photograph of petitioner. (18RT 4755-4756; Trial Exh. 69.) Connie Zambrano identified petitioner's photograph. (17RT 4628-4630, 4651-4652, 4757; Trial Exh. 70.) She also positively identified petitioner's truck. (17RT 4623, 4626-4628, 4650-4651.)

Tam Hodgson, an investigator for the Kern County District Attorney's Office obtained search and arrest warrants for petitioner. (17RT 4504, 4515-4516.)

Petitioner was arrested on an arrest warrant about a day and a half after a meeting about the case between representatives of the District Attorney's and Sheriff's Offices. (18RT 4757.) He was arrested on February 13, 1987 after driving away from his house with his wife Jo. (1CT 110-111 [preliminary examination]; 17RT 4630-4632, 4635-4636.) Petitioner had his off-duty weapon and his badge on his person. (17RT 4636.) The shoes he was wearing appeared to match the shoe tracks shown in the photographs. (18RT 4757-4758.) The shoes were seized and turned over to the Kern County crime lab. (18RT 4758.)

In executing a search warrant for petitioner's house, Detective Nikkel and other officers found six expended .38-caliber cartridge cases in or near a dresser in the master bedroom, a blue jacket in a drawer of the dresser, and another six expended .38-caliber cartridge cases from the top of a tool chest in a storage shed in the back yard. (17RT 4630-4633; Trial Exhs. 71, 73-75.)

Petitioner's locker at the Sheriff's Office was also searched. (17RT 4634.) Inside his briefcase was a field identification card with Connie Zambrano's picture. (17RT 4634.) Several other field identification cards were also in petitioner's locker. (17RT 4637.) Normally field identification cards are turned in to be entered into the Office computer. (17RT 4637.) Another photograph of Zambrano was found at petitioner's house. (17RT 4634.)

Laskowski sealed petitioner's 1964 beige Ford pickup, license number U 16926, parked in front of petitioner's residence on Perry Street and had it towed to the tow yard where he and a technical investigations team thoroughly examined it. (18RT 4818-4821, 4874.) No blood stains were found in the cab or camper section of the truck. (18RT 4821-4822, 4833.)

In a black zippered canvas bag inside a green box in the back of the pickup, Laskowski found several guns, including a .38-caliber Colt Detective Special with a two-inch barrel. (18RT 4873-4876; Trial Exh. 107 [the gun].)

After his arrest, petitioner agreed to an interview regarding the murder of Tracie Clark. An interview was conducted in an interview room of the county jail on February 13, 1987 by District Attorney's Investigator Tam Hodgson and Sheriff's Detectives John Soliz and Mike Lage. (17RT 4669-4670.)

Petitioner was informed of, and waived, his *Miranda* rights (*Miranda* v. *Arizona* (1966) 384 U.S. 436). (17RT 4670-4671.) Petitioner asked to talk to his wife before any questioning began. (17RT 4671-4672.)

Officers stopped the interview and brought his wife into the interview room. They mostly discussed financial matters. "He asked her to put his pay check into the bank, in the checking account, to go ahead and get the taxes finished up, to have some repairs done on the jeep pickup truck that they owned." Neither of them said anything about the reason he was in custody. He told her to get the other things handled because "it" would take a long time. (17RT 4673, 4926-4928.)

At the outset of the interview, petitioner admitted that he had shot the person whose body was found on Hermosa Road. (17RT 4673.) During the interviews, petitioner was "[v]ery matter of fact, somewhat relaxed." (18RT 4929.)

In the interview, petitioner told the following story:[14/]

Petitioner said that he saw Tracie Clark, whom he described as a "Mexican female," 20 to 30 years old, about five feet seven or eight inches tall and 140 to 150 pounds (17RT 4676), on the Corner of South Union and Belle Terrace. He opened the door of his pickup and she got in. He parked about a block away for about two minutes while they agreed that she would give him oral sex for $30. Petitioner said that he wanted to do it out in the country. "She said no problem." (17RT 4673-4677, 4703.) Later in the interview petitioner said that on the way she was complaining because she didn't like going so far. (17RT 4702-4703.)

He had a gun under the seat of his pickup (17RT 4681-4682) under a rag (17RT 4694-4695) before picking up Tracie.

Petitioner parked at a spot on Hermosa Road where there was "[n]obody around." She was "giving [him] head" while she told him she wanted more money for being so far out of town. "[S]he got real weird," became agitated and started swinging at him. He blocked her blows with his right hand, but was concerned that she would scratch him with her long fingernails.[15/] With his left hand he reached under the seat, retrieved a snub-nose .38 revolver, cocked the hammer and pointed it at her. He said he had bought the gun at a bar about six years before. She did not stop swinging at him and also started to kick at him. The gun went off. She fell back against the door and started screaming. He opened the passenger door and kicked her out of the truck with his feet. "She started running out in front of the headlights and screaming and hollering. . . .

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14. The parties stipulated to the accuracy of a transcript of the tape recordings, which were played for the jury. (17RT 4665, 4670, 4709; Trial Exhs. 79, 80.)

15. The District Attorney argued that the autopsy photographs showed that Tracie had no long fingernails. (22RT 5952.)

"He told her he would take her to town and get her a cab to take her to the hospital. He could see blood in her ribcage area. She started "going crazy again and said she [was] going to report it" and he "was going to jail." He "said yeah and [] shot her again." This time the gun was in his right hand. (17RT 4678-4685, 4693-4695, 4701, 4705, 4707-4708.)

Petitioner said that when he had shot her, he knew he was "in big trouble." He shot her again because he knew he would be "in big trouble if she reported it." He knew "she couldn't testify against" him if she were dead and "that was the bottom line." (17RT 4704-4706.)

She then ran up the road and leaned against a dirt embankment. He shot her until the gun was empty. She ran to the other side of the road, staggered and fell down. (17RT 4686-4687.)[16/]

He drove down the road but came back and pushed her body into an irrigation canal. He then went home, dropping the cartridge cases on the way. (17RT 4687-4690, 4892.)

Petitioner did not think he was wearing a jacket. (17RT 4690.) He denied remembering having seen the gun after that night. (17RT 4695.) He said that the ammunition came from "a bag of bullets" at his house which contained "a variety of .38 ammunition." (17RT 4696.)

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16. Referring to the pathologist's chart of Tracie Clark's gunshot wounds, the District Attorney argued that the first shot may have been either the shot which grazed Tracie Clark on the right side, caused a powder tattoo on the right arm, entered the right chest and lodged in the left chest (which respondent has described in the Statement of Facts as the fourth wound) or the shot which entered the upper abdomen and exited on the side (which respondent has described in the Statement of Facts as the fifth wound). (21RT 5577-5579.) Consistently with either wound, petitioner told detectives that Tracie Clark had blood on her rib cage area on the right side. (21RT 5579.) She suggested that the second shot might have occurred when, as petitioner described it, Tracie Clark ran in front of the truck, and that it might have been the shot in her back. (21RT 5579.)

He said he went back the next afternoon because he was "just curious" and saw the blood in the road. (17RT 4698-4699.)

Petitioner initially said he had "never used" the gun (17RT 4700) but later said that he had fired it once in the country (17RT 4706-4707). He also said he was "not used to guns because that's the only time I ever used them," referring to the shooting, although he admitted that he "qualified" with a gun when he had to. (17RT 4699, 4706.)

Petitioner said he "usually" liked to "drive around" and "look at the whores." (17RT 4697.) At another point in the interview, petitioner said that he frequently "dated the whores." (18RT 4928.)

During the interview process, petitioner would give investigators details of the Clark murder until a certain point in a second interview when he was asked what Clark had said during the time she had been attacking him in the truck. "He started saying, well, I don't remember. I am just starting to have a hard time remembering that." From that point on, he responded that he was having a hard time remembering. (18RT 4928-4929.)

During the interview, petitioner was shown a photograph of Tracie Clark. He said "he remembered feeling a lot of fear when he saw the photograph and believed that he was going to be caught." When asked about how he felt about killing Tracie Clark, petitioner said he knew he had screwed up. (18RT 4926 [Hodgson].)

During the first interview, petitioner denied committing the Benintende murder. During the second interview, when he was asked about the Benintende murder, petitioner started saying he did not remember. At one point he said he hadn't shot anyone else, although none of the investigators had mentioned that the victim had been shot. (18RT 4929-4930.)

In the first interview, petitioner said that no one drove his truck other than himself. (18RT 4928.)

Laskowski and several other people went to the scene of the later homicide with a metal detector to look for more bullets or cartridge cases, but they found nothing. (18RT 4817-4818.)

The Detective Special seized from petitioner's truck had no blood or gunshot residue in the barrel. (18RT 4875; Trial Exh. 107 [the gun].)[17/]

Criminalist Gregory Laskowski was an expert in firearms, tool marks, tire and shoe track analysis, bullet comparison, gunshot residue and ballistics, among other things. (18RT 4805-4815.)

Laskowski test fired petitioner's Detective Special with Lage's ammunition. He found that the trigger pull and firing were normal. He compared the test bullets and found that they all matched. He compared the test bullets with the bullets recovered from the bodies of Tracie Clark and Janine Benintende. The test bullets "had matching or consistent class and individual characteristics" with the bullets from Tracie Clark's body. In comparing the test bullets with the bullets from Janine Benintende's body "they were indeed matching in every characteristic." Laskowski was positive that all of the bullets had been fired from petitioner's gun to the exclusion of all other guns. (18RT 4874-4879.) Laskowski testified that a well-made firearm such as a Colt could be fired hundreds or thousands of times without changing the characteristic marks made by the barrel so as to prevent identification of bullets fired at different times. (18RT 4887-4889; see 18RT 4892.)

Laskowski examined the jacket from Janine Benintende's body. There were two holes in the back, one larger than the other. In Laskowski's opinion, two bullets could have been fired through one hole. (18RT 4879-4880.)[18/]

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17. Respondent observes that the lack of residue in the barrel shows that it had been cleaned after it was used to murder Tracie Clark.

18. Laskowski testified that if the first bullet had stopped in the barrel of the gun and had been pushed out by the second, he would expect the first bullet

Laskowski did not detect any powder burns or residue on Janine Benintende's jacket. (18RT 4890-4891.) Since the victim had been wearing several layers of clothing, it is "quite possible" that there would be no residue on the body. It was also "quite possible" that any gunpowder residue would have washed off of the clothing. (18RT 4880-4881.)

Laskowski determined that Janine Benintende's jacket was rabbit fur. (18RT 4879-4880.) Laskowski found rabbit fur on the floorboard of petitioner's green Datsun pickup, but also found deteriorating rabbit fur gloves. (18RT 4884.)

In the pocket of Tracie Clark's blue button-up-the-front skirt, which had been retrieved at the postmortem examination, there were a $20 bill, some coins, a key and a Contour Lifestyle condom package. (18RT 4881-4882.)

Laskowski compared a pair of Adidas tennis shoes he received from Detective Soliz with shoe tracks which were shown in photographs from the scene at Hermosa Road and the Arvin-Edison Canal. (18RT 4824-4830; Trial Exhs. 93-94.) The shoes and the tracks shared the same "class" characteristics and distinctive individual or "accidental" characteristics. (18RT 4828-4832.) As a result, Laskowski concluded that the shoes made the tracks, "[t]o the exclusion of all other shoes." (18RT 4832.)

Laskowski compared the four tires on the beige pickup with photographs of tire tracks from the scene. Laskowski found that class and distinctive individual characteristics matched, causing him to conclude that all four tires on the pickup made the set of tire tracks found at the scene. (18RT 4832-4843; Trial Exhs. 64-66, 95 [roll of contact paper], 96-98 [sets of photographs].)

Toby Coffey, who lived at 1717 Penny Street, had sold the beige pickup

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to be distorted at the base. Neither of the Benintende bullets was distorted at the base. (18RT 4891-4892.) Laskowski testified that with a snub-nose gun, he would not expect one bullet to push another out. (18RT 4892-4893.)

to petitioner some time after December 5, 1986. (17RT 4666-4668; see Trial Exh. 78 [documents].)

Laskowski initially determined that the bullets had the class rifling characteristics of a Colt Detective Special, Trooper or Cobra. (18RT 4843-4853, 4885-4886; Trial Exh. 99-101 [charts], 102 [cutaway gun barrel].) Some anomalies in the impressions made by the lands of the barrel on the bullet made it appear that the bullet had "skipped a little bit," suggesting a short-barreled gun like a Cobra or Detective Special. (18RT 4853-4854.)

The bullets from the body of Janine Benintende were .38 or .357 caliber semi-jacketed hollow point bullets weighing 110 grains. (18RT 4855, 4858, 4863-4864; Trial Exh. 91.) A 110 grain bullet is very light; it is generally used by law enforcement so that it can be used in smaller frame guns. (18RT 4855, 4858.) A hollow point bullet expands when it hits the target. (18RT 4854.)

The bullets from the body of Tracie Clark were also hollow point bullets which showed rifling marks with a left-hand twist which is characteristic of Colt firearms, and possibly others. (18RT 4864-4866; Trial Exh. 92.)

The bullets from the two bodies shared the same class and accidental rifling characteristics, meaning that they had all been fired from the same gun. (18RT 4852-4858, 4866-4869, 4884; Trial Exhs. 81, 82; see Trial Exhs. 103-106 [photographs of microscopes].)

Investigator Hodgson drove the route petitioner told him between El Don Motel and the bridge over the canal where Tracie Clark's body was found in fourteen minutes. (18RT 4715-4716.) The distance was eleven miles. (18RT 4716.) Between the highway and the bridge, there were dozens of secluded locations where a car could park. (18RT 4716-4717.)[19/]

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19. A Kern County map, with Union Avenue, Hermosa Road east of Edison and the area of Rock Pile Road and the Arvin-Edison Canal was marked and admitted into evidence. (17RT 4505-4506, 4931; Trial Exh. 1.) A map prepared by the Arvin-Edison Water District showing the canal was also

The Detective Special used to murder the two victims was in the Sheriff's Office computer system as having been stolen, citing a particular report number. The report had been written by petitioner. It stated that the gun had been stolen, specifying the serial number. (18RT 4902-4904, 4923-4924, 4930; Trial Exh. 108.)

During the interview with officers, petitioner said he had bought the gun from a bartender at the Four Queens Bar on Edison Highway in about 1983. He said he checked the gun in the computer system and learned that the gun was not stolen. (18RT 4924.)

However, in the report of the theft of the gun, petitioner wrote that on March 23, 1982, he responded to a burglar alarm at the store at 12:27 a.m. after having been dispatched at 12:22. There was a broken window but the building was otherwise secure. He reported he waited about forty minutes for the owner to arrive but left when he was informed that the owner could not be located. About thirty minutes later, he was told to meet the owner at the store, which he did. (Trial Exh. 108.)[20/]

The owner and manager of the Stop and Shop Market on Edison Highway, Ahmed Ubadi, had bought the Detective Special with a friend. The last time he had seen the gun was the day a window of his store had been

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admitted. (17RT 4507, 4931; Trial Exh. 2.) A hand-drawn map of the area of Hermosa Road approximately six-tenths of a mile east of Edison where Tracie Clark's body was found was also admitted into evidence. (17RT 4508-4509, 4715; Trial Exh. 3 [map].) Investigator Hodgson took aerial and ground photos of the area of Hermosa Road where the Arvin-Edison Canal goes under the road. (17RT 4508, 4510-4514; Trial Exhs. 4-8 [ground], 9-13 [aerial].) Hodgson also took aerial photos of the area of the canal where it crosses Rock Pile Road. (17RT 4510.)

20. Inferably, petitioner gained entry in a manner which did not leave visible marks, such as by using a credit card to open a door or window. Petitioner might have broken the window to provide an explanation for the activation of the burglar alarm.

broken. The gun had been under the counter. Ubadi was notified of the incident by the Arvin Police Department, and when he got to the store a deputy sheriff was there. When he went into the store, the only thing missing was the gun. The broken window was too small for anyone to enter. The window had been broken before. (18RT 4919-4923, 4930; Trial Exh 108.)

Steven Howell was the manager and sole bartender of the Four Queens Bar on Edison Highway from June 1981 until it closed in 1982. Petitioner would come into the bar "doing bar checks." Howell never sold petitioner a gun. (18RT 4904-4906.)

Connie Zambrano had had a "date" with petitioner in which he paid her $20 to undress in her motel room while he masturbated. (17RT 4640-4641, 4654-4658.) She did not call him a faggot or a queer or anything like that. (17RT 4662.) He ejaculated. (17RT 4663.)

Another prostitute, Katherine Hardie was on Union Avenue by the Colonial Motel between Eighth and Fourth Streets some time after she was released from jail in August 1986 when she saw "an old white pickup truck" with a camper shell. (18RT 4914-4916.) She identified photos of petitioner's pickup truck as being the same truck. (17RT 4623-4625, 4666-4668;18RT 4833; Trial Exhs. 64-66.) The driver of the truck pulled over. Hardie got in and she asked him if he wanted to "date." The truck then drove down Union Avenue. The driver would not go where Hardie told him but wanted to "go out to the orchard" instead. Hardie jumped out of the truck when the driver would not let her out. (18RT 4914-4916, 4918.)

Defense Case

Petitioner testified that he lived at 1420 Penny Street and had been a deputy sheriff for ten and one-half years. (20RT 5352.) He was married to Joyce Rogers and had two male children and eight grandchildren. (20RT 5352-5353.)

Petitioner testified he did not remember all of the details of the killing of Tracie Clark. (20RT 5353.)

Petitioner said that on the night of the killing he woke up some time after midnight and went out to visit his wife, who worked nights at the Chevron truck stop in Bakersfield. (20RT 5354.) Instead, he drove down Union Avenue at around 2:00 to 2:30 a.m. and saw the person later identified as Tracie Clark standing at the corner at Belle Terrace, which was a frequent location for prostitutes. Petitioner testified he had never seen Tracie Clark before. He said that Tracie looked like she was "anywhere between 20 and 30 years old." He stopped at the corner and opened the passenger door. She got in and asked petitioner if he wanted a date, which meant that she was looking for a customer. Petitioner drove down the street. Tracie wanted to stop at a motel they were passing but petitioner did not want to go there because he did not want to be "rolled" or seen by a pimp. Petitioner turned at the first street and stopped. They agreed on $30 for half-and-half, which was oral sex followed by sexual intercourse. There was no argument at that point. Before they left, Tracie grabbed his crotch in an apparent attempt to confirm that he was not a police officer. (20RT 5353-5358.)

Petitioner testified, "I told her I didn't want to go to the motel room and she said okay and we went out to the country." (20RT 5357.) They went onto the freeway, Highway 58, and then off at Edison Road and to Hermosa Road. (20RT 5357.) On the way, she wanted to know where they were. Petitioner said he pointed out the streets. She never tried to get out. (20RT 5358.)

It took between 15 and 20 minutes to drive to the Hermosa Road location. (20RT 5358.) Petitioner positioned himself on the seat so that he was flat on his back up by the steering wheel and she got down between his legs and started to give him oral sex. (20RT 5358-5359.) He did not have an erection, which seemed to make her angry. (20RT 5359.) Petitioner said he sometimes

has problems with that. (20RT 5359.) It went on for "[m]aybe less than five minutes" but he did not have an erection. (20RT 5359.)

Petitioner said he was "[s]ort of embarrassed, sort of crushed." Tracie asked him if he preferred boys and started getting abusive. She was also waving her arms inside the truck. Petitioner said he liked women and "maybe she wasn't doing her job right." (20RT 5360.)

Petitioner testified that he did not "remember a lot after that." He could only tell what happened from the amytol interview. (20RT 5361, 5364, 5367.) However he said he had no memory of the amytol interview. (20RT 5362.) He remembered seeing her in the middle of the road after she was shot and he drove away. (20RT 5383.)

On cross-examination, petitioner testified that he remembered pushing her out of the truck with his feet while she was calling him names before he fired the first shot. (20RT 5381-5382.) He testified he did not just leave because he "felt she should be able to go back to town." (20RT 5382.)

Based on his viewing of the amytol interview, petitioner testified that he knew that Tracie was walking toward him and he was feeling threatened and was protecting himself. (20RT 5362.) Petitioner testified he remembered firing the gun. (20RT 5362.) Under amytol, he remembered that she was walking toward him with her finger pointed toward him and would not stop so he "pulled the trigger of the gun and shot her." (20RT 5363, 5367.) "There was a brief second or two and then I shot her five more times." (20RT 5363.) She backed up between the first shot and the later five shots. (20RT 5367.) He said he was only thinking of protecting himself and felt only fear. (20RT 5363.) There was no argument about money. (20RT 5363.) After she was shot, Tracie walked into the middle of the road, lay down and died. (20RT 5367.)

On cross-examination, petitioner said, "I don't even know whether the gun was a five shot or six." (20RT 5383.)

Petitioner said that he had $30 in his pocket which he laid on the dashboard of the pickup. After the shooting, the money was gone. (20RT 5363.)

Petitioner testified he then drove down the road but came back to see if she was alive. He turned around, drove past the body and stopped. When he found that she was dead, he rolled her over, dragged her to the canal and put her in the water. He then drove home. He "[t]hrew" the gun in the back of his truck "and left it there and never touched it." He wandered around the house and turned the television on. He felt confused. (20RT 5368, 5383.)

He went back out to the scene of the killing later the same day "to see what happened" because he did not remember everything. He saw a pool of blood in the road, spots of blood in the road and some tire tracks. He saw a possible disturbance on the north side of the road as if someone had been standing there. Tracie was in the bottom of the canal. He knew he had killed her. He then went home. (20RT 5370-5371, 5383-5385.)

On cross-examination, petitioner said he assumed that since there were drops of blood on the road, there would be blood on the body. He testified that he made a lucky guess about the bloodstains on the ribcage area. He did not remember that she had been shot in the back. (20RT 5386.)

Petitioner went to work doing local patrol Sunday night [February 8, 1987] and worked four days that week. He did not tell his wife or anyone else what happened. He assumed he would be arrested. He did not remember making any decisions about what he would do. (20RT 5369.)

On Friday [February 13, 1987], he left the house with his wife to go the bank to deposit his check when he was stopped by a patrol unit on Edison Highway. A detective walked up and said he wanted to talk to petitioner about the homicide of a prostitute. He was placed in a patrol car and taken to the sheriff's department where he was placed in restraints and taken to an interview

room. (20RT 5370.)

Petitioner knew John Soliz because they had worked adjoining beats for several years. They had worked on homicides before. (20RT 5372-5373.) In the interview room, petitioner talked to his wife about taking care of financial matters that they had started to do that day, "so that she would be able to continue while [he] was in jail." He also made out a handwritten will while in jail. (20RT 5373-5374.)

Petitioner testified that in the interview he "just gave them enough to convict [him]." He said that his statements about calling a taxicab after shooting her were a "fabrication" and that there was no discussion after the first shot. He testified, "The only thing I remember her saying, was, 'Oh God.' I'd already shot her six times." (20RT 5374-5375.)

On cross-examination, petitioner said he planned to give them enough to execute him. (20RT 5387.) He denied any involvement in the Benintende homicide because he had no memory of it. (20RT 5387-5388.)

Petitioner did not recall having his feet on the desk but only that he had them stretched out in front of him. (20RT 5375.)

Petitioner said that on some days, he had more trouble controlling his emotions. He was isolated and placed on a suicide watch. (20RT 5375-5376.) Initially, he was "real depressed" and "just wanted to plead guilty." (20RT 5376.) His wife stayed with him after he was arrested. (20RT 5376-5377.) He had received counseling from a Mr. Bingham, Dr. Bird and Joan France who sees him "frequently." (20RT 5377-5378.)

Petitioner testified he had had no homosexual experiences at all. (20RT 5364.) However, he had a fear that he sometimes had an inclination in that direction. (20RT 5364-5365.) Petitioner testified he did not know if he had any homosexual experiences as a child and that he had "some blocks in my childhood" that he was not sure about. (20RT 5365.)

Petitioner testified he "[s]ort of" had some type of sexual contact with Connie Zambrano, whom he knew was a prostitute. (20RT 5354-5355.) He was driving on Union in civilian clothes when Connie was near the Bakersfield Inn and waved at him. He had talked to her twice before and had given her oranges once. She suggested that they have a date but he did not do it. He stopped and drove to a motel, she met "her boyfriend or somebody," she gave the man the money and they went into a room. Petitioner testified, "We both took our clothes off but I wasn't able to get an erection." She did not make fun of him or call him a queer. He did not talk to her again. (20RT 5378-5380.)

Petitioner said he never told his wife about his activities with prostitutes. (20RT 5359.) He testified "It was like a compulsion" and he did not know why he did these things with prostitutes. (20RT 5362.) He said he had a loving and happy relationship with his wife. (20RT 5362.)

Petitioner testified that he had collected women's underwear since he was a child. When he was a child, one of his stepfathers made his mother dress him up as a girl. (20RT 5380.) He had had three stepfathers. (20RT 5380.)

Petitioner remembered speaking to sheriff's officers the day of his arrest, the day after and four days after. (20RT 5365.) His statements regarding an argument about money were not correct. (20RT 5365-5366.) Petitioner denied that he had a plan to kill Tracie and said that he only solicited her for sex. (20RT 5366.)

Brian Bingham, supervisor of the Mental Health Services Units at the Kern County Jail, had spoken to petitioner "initially." (20RT 5389-5390.) Petitioner was on a suicide watch at the time. (20RT 5390.) This meant that the prisoner is in a safety cell and on a fifteen-minute watch. (20RT 5391.) Petitioner appeared depressed and withdrawn but spoke to Bingham. (20RT 5390.) A Dr. Bird worked with petitioner later. (20RT 5390.) Bingham testified on cross-examination that it was not unusual for a person in jail on

murder charges to be depressed. (20RT 5391.)

Dr. David Bird, Ph.D. a clinical psychologist was contacted by defense counsel in February 1987 and asked to initiate a treatment program for depression. (20RT 5456-5461.) Dr. Bird saw petitioner a number of times and then decided to involve a female co-therapist, Joan Franz. (20RT 5461.) Joan Franz is one of the therapists at his center, the Kern Counseling Center. (20RT 5458.)

Dr. Bird gave petitioner a battery of tests. (20RT 5460.) In the Wechsler Adult Intelligence Scale, petitioner had a verbal I.Q. of 110 and a visual-motor I.Q. of 100, with a total I.Q. of 112, which is "typical of a person that goes to college." (20RT 5513-5514.) Dr. Bird gave petitioner the Minnesota Multiphasic Personality Inventory several times, to "chart on a treatment basis his level of depression." (20RT 5513-5515.) Petitioner was given a number of other personality tests. (20RT 5514, 5518.) At the beginning of petitioner's time in jail he was considered an "extreme suicidal threat." (20RT 5515.) At one point, Dr. Bird asked the watch commander to search petitioner's cell. (20RT 5516.)

Dr. Bird prepared charts of petitioner's family history (20RT 5462-5468, 5471-5474, 5484.) He described petitioner's home as a house of repetitive horrors. (20RT 5468.) He said that petitioner had been sexually abused. (20RT 5477-5478, 5481.)[21/]

Dr. Bird testified that blocked memories is consistent with sexual abuse.

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21. Petitioner's statements to the psychotherapists were not admitted for the truth of the matter stated, but instead as the basis of each witness's opinion. (20RT 5226, 5230 [continuing objection].) Quoted statements will be those of the witnesses unless otherwise noted, such as by double quotation marks.

In discussing the psychiatric witnesses in her argument, the District Attorney argued that the jury could not consider information about abuse for the truth of the matter if it was hearsay, but noted that the information could be considered as to the diagnosis. (21RT 5582.)

(20RT 5470.) He stated, "It is a craziness, it is a psychosis, it is a splitting . . . of the child's mind." (20RT 5470.)

Petitioner had unclear memories of the sequence in which he lived in Ukiah, Upland and Pittsburgh from age four to six, which Dr. Bird characterized as "a very pronounced memory problem." (20RT 5477-5478.) Dr. Bird also believed that petitioner's lack of memory of the first grade (except for seeing some playground equipment) was significant. (20RT 5480.)

Dr. Bird testified that even at age two, petitioner "began to experience sexual dysfunction" by being put in girls' dresses and panties. (20RT 5471.)

Dr. Bird showed a chart labeled trauma and blackout profile. (20RT 5474; Trial Exh. A.) Dr. Bird testified that petitioner's first trauma was the breakup of his parents' marriage at age six weeks to six months, after which petitioner's mother took her sons to California, had difficulty breast feeding petitioner and "had to feed him by other means." (20RT 5476.)

Dr. Bird said that one stepfather, Dub, "appears to have been very much involved in a sexual sadist." (20RT 5469.) Specifically, Dr. Bird stated that petitioner's mother dressed him in female panties and female clothing, which "had been going on for some time, since toilet training was successful." (20RT 5469, 5471.) Dub objected to the "cross-dressing" and at one point forced petitioner to "attire himself fully in female clothes, put on makeup, lipstick, hat and go out of the house and stay out of the house all day." (20RT 5469.) Petitioner "hid in the bushes all that day and escaped being seen as far as he knew." (20RT 5469.)

Dr. Bird said that, "the same stepfather, it's not fully clear, . . . took David's brother forcibly into the shower, even though the brother was fully clothed, and that is as far as the picture can go. There is a blank after that episode." (20RT 5469-5470.)

Dr. Bird testified:

> [T]here was a three year period in which Dub Ellis was a boyfriend and stepfather and there was a very tragic and sexually sadistic game that was played. It was called turn and burn. And that would be played at any time. He would force the boys to grasp each other in the nude, either back to back or face to face and then hit them with a silver pointed belt buckle[22/] on a belt when one or the other could turn the other boy to him.
>
> And in the process, there . . . were bruises, welts, not only to the buttocks but the insides of the legs and especially the testicles, and especially the boy that was not actually getting the burn because the belt would wrap around the back of the leg and come up the crotch.

(20RT 5478-5479.) During that time, petitioner engaged in "fire setting behavior." (20RT 5479.) As a result, at one point, Dub took petitioner to the river, picked him up as if to throw him in and threatened to kill petitioner if he got out of hand any more. (20RT 5479.)

At around age four years, petitioner remembered being taken to the bathroom and being sodomized by a strange male. (20RT 5477.)

Dr. Bird testified that around the first grade, a new stepfather, William, appeared who would take petitioner to the bathroom, make him bend over the bathtub and sodomize him. "He would anticipate those nightly visits." Petitioner would cry in his pillow so that his brother would not wake up which might cause the same thing to happen to him. (20RT 5480.) Dr. Bird testified, "The children who suffer an experience like that, often as adults have a fear that they themselves may be an adult person that is going to do that same thing to another individual . . . ." (20RT 5480.)

Petitioner told Dr. Bird that he remembered that his younger half-brother Stephen was physically abused when petitioner was six and one-half to seven.

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22. Based on petitioner's statements, it appears that the silver part was the tip rather than the buckle.

On that occasion, Dub Williams forced Stephen to walk up and down stairs until he was worn out. (20RT 5480-5481.)

When petitioner was six and a half to seven, "in the bedroom," petitioner was dressed as a girl and another girl had intercourse with Stephen. (20RT 5482.)

Petitioner and his brother Dale remembered their mother's "necklace," a belt which she used to administer punishment. (20RT 5482.)

From seven to eleven years, when the family was in Ukiah, petitioner was "able to recall" that there were some strange men in the house and that someone stuck a penis in his bottom and it hurt. (20RT 5483.) Petitioner was emotional when describing the events. (20RT 5483.)

From seven to eleven years, petitioner said that rubber gloves with two fingers cut off were used in "apparently acts of manipulating sodomy, actual sodomy." (20RT 5484.) Petitioner reported remembering attempting to run from a room naked with his hands tied behind him when he hit a door in the genital area and blacked out while his mother and a male were nearby. (20RT 5484-5485.) Also at this time, petitioner's brother began collecting women's undergarments, pornographic material and condoms. (20RT 5485.) Petitioner had "[a]lmost the exact same things" at the time of his arrest. (20RT 5485.) On one occasion, the children were placed in an aunt's home where petitioner was seduced by a cousin during a ritualistic sexual performance involving dancing in a circle. (20RT 5486.) Petitioner was also stealing women's underwear from clotheslines. (20RT 5486.)

At ages 15 to 16, petitioner became addicted to alcohol. (20RT 5487.) He also attempted to have sex with a girl but "could not perform." (20RT 5487.) Petitioner's stepmother Barbara also attempted to seduce him in the bathtub. "He was able to have intercourse but no ejaculation." Dr. Bird commented, "He still cannot perform." (20RT 5488.) Petitioner was also

involved in school vandalism involving defecating on a trampoline, which Dr. Bird associated with problems in toilet training. (20RT 5490; 21RT 5491.)

At age 17 to 18, petitioner attempted a reconciliation with his father. However, his stepmother Barbara attempted to seduce him again and he refused. She accused him of molesting her daughter, which resulted in his being ejected from the house. Dr. Bird characterized this as a loss. (21RT 5491-5492.)

Petitioner was in the Navy when his mother was in a marriage with a stable male. (20RT 5468.) When petitioner was 19 to 20 he was in the Navy and served on a ship in Viet Nam. During this time he continued to drink but apparently did not engage in any sexual activity. (21RT 5492.)

Petitioner returned to Ukiah when he was 21 years old and married his first wife, Kathy, who was 17 years old and was using alcohol and drugs. (21RT 5493.) When they had two small children, Kathy would "suddenly take off" for a week, leaving petitioner to take care of the children. (21RT 5493.) Dr. Bird concluded that "[s]he was essentially castrating him" and said that "after the two children there was constant conflict over sexual behavior." (21RT 5493.) When petitioner was 26, Kathy left for a year. (21RT 5494.) During that time, petitioner became "a devoted and nurturing father" to his children and "was making some progress with the drinking problem." (21RT 5494.) When Kathy came back, petitioner fought for custody of the children. (21RT 5494.)

According to Dr. Bird, petitioner then "met another traumatized female adult, Karen, who was a take-charge kind of person. She was a drill sergeant type of person. She was the big mama," weighing 250 to 300 pounds. (21RT 5494.) Dr. Bird compared petitioner's marriage to Karen with the early stages of his parents' marriage. (21RT 5494.) Dr. Bird testified that "again there was the castration effect partly due to the lack of drive on Karen's part but also just

due to the weight problem." Also during this time, petitioner was unable to hold a job, which Dr. Bird characterized as "flunk[ing] out as a masculine identity." (21RT 5494.)

Petitioner then began having an affair and eventually left Karen. (21RT 5496.) At about this time, his sons Harold and David were delinquents. (21RT 5496.) Dr. Bird testified that the sons had problems with drugs and alcohol. (17RT 96.) He also said, "They are victims of physical abuse and they have institutional and crime records." (21RT 5496.)

When petitioner was 34, he was exposed to PCP, "suffered a serious impairment to the brain" and was "paralyzed for a period of hours." (21RT 5497.) He was exposed again at age 39. (21RT 5497.) Petitioner apparently denied any connection between PCP exposure and "his recent problems" which Dr. Bird characterized as "actively us[ing] his dissociative process." (21RT 5498.) Dr. Bird testified that "[o]ne of the effects of PCP is dissociation." (21RT 5498.) However, Dr. Bird testified that a psychoneurological screening test showed no signs of brain damage. (21RT 5517-5518.)

Dr. Bird testified that petitioner became compulsively involved with prostitutes to compensate for low self-esteem after his "job conflict" involving prostitutes and a "sensation of not being supported." (21RT 5499.)

Dr. Bird testified that petitioner did not mention any sexual dysfunction in his statements to police. (21RT 5471-5472.) Dr. Bird stated that he "was not capable" of telling anyone he had problems with his sexual functioning. (21RT 5472.)

Dr. Bird testified that in his opinion petitioner could not premeditate the killing of Tracie Clark . (20RT 5461-5462; 21RT 5500-5501, 5521-5522.) Dr. Bird testified that the killing of Tracie Clark "was a sexual incident, that extreme fear was provoked on his part and really had nothing to do with money." (20RT 5472.) He thought there was a likely connection in petitioner's

mind between Tracie Clark and the stepmother Barbara who had seduced him in the bathtub because they were both Black. (20RT 5488.)[23/]

Dr. Bird believed that petitioner did not plan the killing of Tracie Clark but that it was "a sudden rush of happenings, a woman that looked like his stepmother Barbara, a comparison of words used, bastard, you like little boys, fingernails and the claws, triggering something in him and his reacting to it." (21RT 5500-5501, 5512-5513, 5520-5521, 5529.) Dr. Bird stated, "the rational policeman in him, was wiped out [by a] fear type of reaction." (21RT 5501.) Dr. Bird testified that petitioner "reached a point of reacting as if he had to do something out of fear of not surviving himself." (21RT 5521.) "In that respect he was definitely a child. That's ridiculous to fear for your own life when somebody is pointing a finger at you." (21RT 5521.)

Dr. Bird did not believe that petitioner weighed the consequences of killing or not killing. (21RT 5522.) He further stated, "There was no reasoning. There was no thinking." (21RT 5522.)

Dr. Bird was present during petitioner's amytol interview and listened to recordings of petitioner's statements after his arrest. (21RT 5519-5520.)

Dr. Bird described a child's stages of development and petitioner's developmental problems at each stage. (21RT 5503-5511; see Erik H. Erikson, *Childhood and Society*, 2nd Ed., Chap. 7, "Eight Ages of Man," describing similar stages.)

In petitioner's last marriage, to Jo, at 33, intimacy began to occur. (21RT 5512.)

On cross-examination, Dr. Bird said that some of the information he received about the killing of Tracie Clark came from therapy sessions with petitioner and other information came from Dr. Glaser. (21RT 5522-5523.) In

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23. Petitioner had described Tracie to officers as "Mexican." (17RT 4676.)

therapy, petitioner "repeated the story as essentially given to the arresting police" up to the point where petitioner was outside the cab of the truck. (21RT 5523-5524.) From that point "to the pool of blood" the information from therapy and from the amytol interview was "mixed." (21RT 5524-5525.) Specifically, petitioner said "that after his first shot he loses it. He didn't integrate what was happening after that." (21RT 5525.) He did not tell Dr. Bird about the first shot. (21RT 5525-5526.)

Dr. Bird also testified that "[t]here are too many variations in response to" sodium amytol to conclude that someone who takes the drug automatically tells the truth. "It does have an effect like that in some people. Some people draw a blank." (21RT 5526.) He agreed that there was literature which stated that a person under the influence of sodium amytol is no more truthful than someone under the influence of alcohol. (21RT 5527-5528.) He noted that the effect of a certain dosage of amytol is not predictable, as is the effect of alcohol. (21RT 5528.) Dr. Bird does not normally use it in his treatment of patients. (21RT 5527.)

Joan Franz had a master's degree in psychology and had been a psychotherapist for two and one-half years. (20RT 5394-5395, 5425.) Her specialty is "adult children of trauma" or "adult children of alcohol." (20RT 5396-5397, 5425.) She saw petitioner on a number of occasions, working under Dr. Bird, as petitioner's "case manager." (20RT 5394-5395, 5397-5398.) She had seen petitioner for a year, starting on March 22, 1987, once a week for an average of two or three hours. (20RT 5395, 5440.) She was instructed to help him stay alive by helping him with his "major affective depression." (20RT 5395, 5398.) She said he was a high suicide risk. (20RT 5395, 5397, 5452.) Ms. Franz said she had taught petitioner a technique of dealing with extreme stress or emotion. (20RT 5401.)

Ms. Franz also testified that, for her "therapeutic stance," "the issue"

"was trying to figure out, sort out what had happened." She explained, "He had experienced so much blackout and memory loss that he, the logical part of him was trying to put together all the pieces." (20RT 5398.)[24/]

Petitioner has many memory blocks "to this day." (20RT 5422.) "[B]lockages of those types of events" are common in sexually abused children. (20RT 5423-5424.) Ms. Franz had read literature stating that 22 percent of children reported being sexually molested. (20RT 5427-5429.)

When Ms. Franz was asked about petitioner's relationships with women, she answered:

> For me going into the conference room with him and knowing what he was charged with, and being a woman myself, that was of [sic] my primary concern personally and professionally.
>
> So, we began to work on that issue immediately for two reasons, because it was what he was charged with that was so very important and the other part is that in order to maintain that strong therapeutic alliance with Mr. Rogers I had to feel at all times that I was safe.

(20RT 5399-5400.)

Ms. Franz said that for the first three months of their sessions, "there was a guard stationed outside the door because he was a high suicide risk." (20RT 5397; see 21RT 5452-5453 [razors and strips of cloth].)

When Ms. Franz was asked, "So it is fair to say that you needed to establish a relationship with him as a therapist and as a woman also?," Ms. Franz answered, "Absolutely." (20RT 5400.)

Ms. Franz initially discussed the Tracie Clark homicide with petitioner as if it were a trauma, prompting him to talk about it over and over. (20RT

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24. The court sustained an objection to hearsay but asked if the information were to be the basis for the witness's opinion. Defense counsel said that it was and suggested that they "give the instruction." The court agreed. (20RT 5399.)

5409.) Ms. Franz said that petitioner's "logical cop" personality was "trying to find motive, premeditation," but he "would hit a brick wall and could not come up against [sic] anything." (20RT 5409-5410, 5439-5440.)

She said, "And in dealing with the Tracie Clark shooting, he had no idea how this could have come about, how he could be so far gone, so bad that he would be compelled to do this act." (20RT 5415-5416.)

Ms. Franz testified that petitioner "has been able to open up in many areas." (20RT 5400.) She said that "[i]nitially there was almost complete blockage" of memory of sexual problems, but that "after a year we had a great deal of information about his sexuality as a child and as an adult." (20RT 5400.)

Ms. Franz testified, that "[a]s we began to uncover some of the traumas," petitioner "began to realize" that "the incident of sodomy created in him a doubt about his sexuality, whether he was heterosexual or homosexual" and that he thought he might have been proving his manhood with prostitutes. (20RT 5416.) Ms. Franz did not have a sense that petitioner's childhood stories were coming from him but came from being told what had happened. (20RT 5445-5446.)

In the initial conversations, petitioner did not talk about any sexual dysfunction ("[t]his memory and these conversations were unavailable") or make an association with childhood trauma. (20RT 5410-5411.) However after about six months he "broke the ice" by asking about impotence. (20RT 5411.) Petitioner made a connection between abuse and a compulsion with regard to prostitutes. (20RT 5406.)

Ms. Franz stated that "the sexual trauma and abuse that he suffered as a child has created in him as an adult sexual problems of impotency and acting out sexually." (20RT 5402.)

In Ms. Franz's opinion, petitioner had multiple personalities, including

the "ish" ("the internal self-helper"), the "logical cop" part which has "not a clue about what is normal, what is healthy in the real world" and a part which is all emotionality. (20RT 5402-5404, 5419-5420, 54305434.) On cross-examination Ms. Franz said that petitioner had additional personalities. (20RT 5429-5430.)

On cross-examination, Ms. Franz said that all people are composed of different emotions but she had "a real sense" that petitioner's emotions did not integrate. (20RT 5438-5439.)

When the District Attorney asked Ms. Franz which of the personalities murdered Tracie Clark, she answered, "David Rogers murdered Tracie Clark, and he was in an emotional state at the time that he pulled the trigger. . . . [. [¶] [H]e was overwhelmed to a point where none of [the personalities] were in charge. . . . [¶] It was basically, you could call it survival." (20RT 5434; see 21RT 5450.) She said that a combination of the personalities pulled the trigger. (20RT 5434.)[25/]

On redirect examination, Ms. Franz testified that petitioner "did not have [the] skills available" to weigh the situation before the killing. (20RT 5450-5451.)

Ms. Franz testified that the information she had "on this case" came from petitioner and that she had verification from "Susan Peninger reports," petitioner's brother Dale and family members. (20RT 5434.)

She felt that there was no question that he had suffered sexual abuse as

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25. The District Attorney argued that Ms. Franz accurately said that petitioner had pulled the trigger and that he did so to save the last shred of himself because if Tracie Clark had filed a report, he would have been destroyed. (21RT 5591.) "So he made the decision not to allow Tracie Clark to do that, and he shot her six times, and he dumped her body in the canal, and he went back home and watched a movie and went to bed. The next night when he was asked about Tracie Clark, he said he didn't know who she was." (21RT 5591.)

a child. (20RT 5405.) She said that he "was not able to give me complete instances," but "blacked out or removed these memories to a much deeper place." (20RT 5405.)

As petitioner got "into the emotional place, he began to become aware of some sexual traumas that occurred to him as a child; and the very specific one that he could in his own mind relate to his compulsion with prostitutes was when he was between five and eight there was a man in the house." He would be sleeping with his brother Dale when the man would take him out of his bed and threaten him to be quiet or else he would do the same thing to Dale. He would take petitioner to the bathroom, put on surgical gloves and cut off two of the fingers. "David has a real sense of being sodomized by him" while being laid over the tub. (20RT 5406.) Ms. Franz said that it took petitioner a long time to give her the "pieces connected with that situation. [¶] And then my therapeutic experience was able to connect other pieces he had given and put it together." (20RT 5407; see 5408.)

She and Dr. Bird reviewed the tape of the interview with him. (20RT 5407.) While watching the tape, "he was traumatized." (20RT 5407.) "Dr. Bird gave him a back massage because you could visually see it, looked like his neck was ready to break. He was in quite an emotional state throughout." (20RT 5407-5408.) In particular, petitioner "begged" them not to continue with the part of the tape dealing with when he shot the gun. (20RT 5408.)

In addition to "the incident of sodomy," petitioner remembered "an incident at another age where his hands were tied together in his waist with, a round cord and he remembers running from a room naked and hitting the edge of a door and hitting his genitals, and that being traumatic." (20RT 5421.) "He remembers . . . other incidents, one involving his brother where they were forced to run around in a circle nude and forced to have an erection before he had reached puberty." (20RT 5421.)

Ms. Franz said that petitioner and his brother had also reported that when petitioner was a young child his mother made clothes out of flour sacks to save money. Some of the clothes were underwear "and sometimes the underwear was female underwear." (20RT 5421.) "And then entered a stepfather who . . . said it was sick and dressed Dave up as a little girl and coerced his mother to put makeup on him and put him outside and left him outside for a long time . . . [¶] He doesn't remember a lot of it." (20RT 5421-5422.)

On another occasion, when petitioner was in junior high school, "he lived with aunts and uncles and cousins. The cousins were promiscuous. On one instance "he cross-dressed and had no underwear on and was spinning in a circle on top of the bed and being manipulated by his cousin," who would also "service all the guys in the neighborhood." (20RT 5422.)

Petitioner had been married twice before. "[B]ecause he came from a dysfunctional home," he first chose a woman who was "seemingly promiscuous in her own right" but also "emotionally unavailable to him" and then a "large woman" like petitioner's mother who was "emotionally unavailable and secretive concerning their relationship and abusive to his children from the prior marriage when his back was turned." (20RT 5412-5414.) In contrast, in his third marriage to Jo, petitioner found an "equal partner," "someone who stood for an even keel in his life, that had some pretty solid morals" and gave him "unconditional love" even after his arrest. (20RT 5413-5414.) She said, "Until about three months ago, it was the solution. It was the lifeline for Dave Rogers to stay alive . . . ." (20RT 5413.)

Petitioner's own family had "no evidence of a moral structure" which could create "toxic shame" in John Bradshaw's phrase. (20RT 5414-5415.)

Ms. Franz believed that if Tracie Clark had called petitioner names suggesting homosexuality, it might trigger an auditory imprint from his childhood, which could cause him to "protect his essence, his soul, that last

thread that was trying to be moral and solid and sane." (20RT 5417-5420; see 21RT 5440-5441.) Petitioner "never slipped into" telling Ms. Franz the facts of what had happened. (20RT 5442; see 21RT 5447-5448.) Ms. Franz never compared her theories with the facts. (20RT 5443-5444.) Ms. Franz had seen clients who have committed homicides, but had never seen a client who had murdered two people. (20RT 5425-5426.)

David Glaser, M.D., had specialized in psychiatry for eight years. (20RT 5218-5219.) He had dealt with police officers in the Los Angeles area with regard to stress. He was involved with the USC Institute of Psychiatry Law which dealt with legal matters. (20RT 5220.)

Defense counsel's office had given Dr. Glaser petitioner's records. (20RT 5220.) They set up an appointment for a general interview and an amytol interview. (20RT 5220.) Dr. Glaser had previously been informed that petitioner had "memory blocks." (20RT 5221.) One of the memory blocks related to petitioner's mental state at the time of the killing of Tracie Clark. (20RT 5224.) Dr. Glaser had met twice with petitioner's treating psychologist, David Bird. (20RT 5221-5222, 5280-5281.)

On cross-examination, Dr. Glaser said that he was contacted by defense counsel and that he was not treating petitioner. (20RT 5275.) He was part of the defense team, whose function was to prepare for trial. (20RT 5276; see 20RT 5301-5302 [payments to Dr. Glaser].) Dr. Glaser referred to the interview plans as battle plans. (20RT 5277.) Defense counsel had initially asked about using sodium amytol. (20RT 5277.)

Dr. Glaser saw petitioner on December 4[, 1987] in an interview room of the Kern County Jail with defense counsel; Elias Munoz and Toni Bovee, the camera operator. (20RT 5221, 5223.) The anesthesiologist Bob Lapay came in after the initial interview. (20RT 5223.)

Dr. Glaser's plan was to identify the "so-called `memory lapses'" and

"form a rapport" with petitioner. (20RT 5223-5224, 5282.) Dr. Glaser was "principally concerned" with the crime. (20RT 5283.)

In the initial interview without amytol, lasting approximately an hour and a half, Dr. Glaser identified "specific memory lapses surrounding the particular crime" and concerning petitioner's own history and past. (20RT 5226, 5231, 5259-5260, 5277.) Dr. Glaser believed that petitioner has a "general loss of memory related to his childhood that have no explainable organic basis." (20RT 5325.)

With regard to petitioner's past, Dr. Glaser stated on cross-examination, that petitioner had a memory lapse with regard to a time when he was four to six years old. (20RT 5278.) He said that an abusive stepparent moved out when he had just started school. (20RT 5278-5279.) Dr. Glaser could not remember whether petitioner had a specific memory lapse when he was about ten years old, but said there were many memory lapses. (20RT 5279.)

Petitioner said that he had a memory lapse "from the time he 'shot her' to the time of seeing her lying in a pool of blood." (20RT 5231, 5235; see 20RT 5252-5253.) When asked "about the memory lapse," "he kept stating he couldn't remember. It was vague, it was fuzzy, and it was no specific recollection per se." (20RT 5232.) Up to the point of the shooting "there was reasonable recounting of facts." (20RT 5232.) Petitioner said he remembered saying, "I like girls. I like women." (20RT 5234.)

Dr. Glaser then had sodium amytol administered to petitioner. (20RT 5236, 5238-5239.) He testified that sodium amytol is a short-acting barbiturate which had an effect similar to being "dead drunk" in that it "disinhibits" the functioning of the cerebral cortex which suppresses "certain information." (20RT 5236-5237; see 20RT 5255, 5259.) Under sodium amytol, petitioner gave Dr. Glaser "numerous pieces of information" he did not give without sodium amytol. (20RT 5237-5239.) Dr. Glaser testified that he received

"crucial" verbal and emotional responses. (20RT 5239.)

Petitioner said he was driving on Union Avenue after midnight, "which was not an unusual situation for him," and "he had planned to possibly visit his wife" but saw a woman on the street. She asked if he wanted a date. He said he did not know, but opened the door. While they were driving, it was agreed that he would pay $30 for a "half and half." He drove out to the country where she said she did not want to go. He was unable to have an erection. She "began getting more impatient and started spewing out various expletives terming him a faggot, calling him a bastard . . . a whole volley of various . . . psychologically significant name tags that particularly were emotionally significant for Mr. Rogers." She said he "'was probably queer for boys'" and that he "'liked little boys more than [he] liked women." She also said, "You bastard, you mother fucker, son-of-a-bitch." "In fact, I believe those were her last words to him." (20RT 5240-5243, 5245.)

Petitioner told Dr. Glaser that, while he was getting his pants up and she was coming at him, he told her that if she could keep her mouth shut, he would give her a ride back to town. She said, "'"Maybe next time you can find a little boy".'" Petitioner answered, "'I don't like little boys. I like women.'" When Dr. Glaser asked what happened then, petitioner said, "'I shot her, I think.'" "'I am standing at my truck and I reached and I picked up the gun.'" (20RT 5244.)

Petitioner also said that while he was pointing a gun at her, she said, "'"Look, just because you are a queer don't mean you can't take me back to town."'" He said he was pointing the gun at her to keep her away from him. (20RT 5245.)

Petitioner said that when she walked toward him, he shot her. She backed over to a bank and then he shot her five more times in succession. "'Seconds'" elapsed between the first shot and the second set of shots. Petitioner told Dr. Glaser, "'I didn't want to shoot her. I didn't want to kill her."

(20RT 5246.)[26/]

Dr. Glaser testified that during this time, tears were rolling down petitioner's face. He was "intensely emotional." Petitioner cried at various portions of the questioning about the killing, but was most frequent and intense "during the questioning concerning particular childhood memories which previous to the amytol interview were stated as 'memory lapses.'" (20RT 5247-5248.)

Dr. Glaser believed that the terms petitioner said Tracie Clark used "pressed all the emotional buttons from his childhood of abuse." (20RT 5248; see 20RT 5252-5253.)

Dr. Glaser formed the opinion, based on "numerous contacts with Dr. Bird, review of extensive records" and his interviews with petitioner with and without amytol that he "was incapable of premeditating and deliberating" at the time of the killing of Tracie Clark. (20RT 5224-5226, 5329.)

Dr. Glaser testified, "[I]t is my opinion that at the time of the killing of Miss Clark that Mr. Rogers was overwhelmed with numerous affective states specifically stemming from his sexual dysfunction and specifically the volley of expletives that followed such dysfunction from Miss Clark." (20RT 5249.)

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26. Respondent observes that petitioner's statement that he picked up the gun and immediately shot the victim is inconsistent with his statements that they had a conversation while he was pointing his gun at her and shot her when she came at him. The former story is consistent with his confession to police.

Moreover, as the District Attorney noted in argument, petitioner's story under amytol that he shot Tracie Clark all six times outside the truck was in conflict with the powder burns on her arm and the shots to the side and the back. (21RT 5586-5587.) As the District Attorney noted, the story petitioner told under sodium amytol was "the impossible story, the one that couldn't have happened." (21RT 5616.) She noted that petitioner remembered that Tracie Clark had been shot in the ribcage. (21RT 5616-5617, 5620.) The District Attorney concluded that there was "no proof whatsoever that he couldn't think" or that "he did not know what was going on out there." (21RT 5617.)

It was his opinion that "the actual shooting and killing was an impulsive heat of passion event." (20RT 5249-5250.)

Dr. Glaser believed that petitioner's "sexual dysfunctioning" was "crucial" in showing how the killing occurred. Dr. Glaser thought it was important that petitioner said in the police interview that the crime was over money. In Dr. Glaser's opinion, "it was part of his larger scheme to essentially either commit suicide at his own hand or commit legal suicide by insuring his demise by, as he puts it, coming up with the perfect first degree murder conviction story." (20RT 5250, 5298-5300.) Petitioner classified himself as a good cop who knew the law. (20RT 5251; see 20RT 5236-5327.)

On redirect examination, Dr. Glaser added he believed it was petitioner's "conscious intention to ensure his demise by giving the prosecution and the interrogating individuals sufficient information to convict him of the most severe charges against him. [¶] It was a willful, conscious, purposeful, intentional act on his part. That is my use of the words legal suicide." (20RT 5326.) Petitioner said his intention was to "Give them exactly what they wanted." (20RT 5327.)[27/]

Dr. Glaser said that during the amytol interview petitioner said nothing about calling a taxi for Clark, a statement by her that she was going to report him, or any intention to kill her because she was a witness. (20RT 5251.) Dr. Glaser thought that "his story about her going to town or taking him to town or things of that sort was part of his fabrication, part of . . . [a] bigger scheme to

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27. In argument, the District Attorney referred to the legal suicide theory as "just hogwash." (21RT 5591-5592.) She noted the circumstances of the theft of the murder gun from the convenience store and petitioner's false story of how he acquired the gun. (21RT 5594-5595.) She asked why, if petitioner had wanted to commit "legal suicide," he did not "tell the truth about [how he had acquired] the gun and . . . about the Benintende murder." (21RT 5594-5595.)

eventually . . . insure his suicide." (20RT 5252.)[28] Dr. Glaser had heard that razor blades had been found in petitioner's cell. (20RT 5252.) Dr. Bird and psychological tests corroborated the conclusion that petitioner was a "legitimate suicide risk." (20RT 5329.)

On redirect examination, Dr. Glaser stated that based on the amytol interview "the argument was strictly over sexual dysfunction" and "had nothing to do with money as he had argued in his confession tapes." (20RT 5328.) He also said nothing about calling a cab. (20RT 5328.)

Dr. Glaser stated, "It was my opinion based on contrasting all the tapes and videos that that was a confabulation that was made up, that was part of his conscious attempt to frame himself." (20RT 5328-5329.)

Based on the amytol interview and from his discussions with Dr. Bird, Dr. Glaser was aware of "numerous instances of childhood abuse." (20RT 5248.) Dr. Glaser testified that "children who are subjected to physical and sexual abuse" sometimes have a tendency to block out those memories through "dissociative states or selected amnesic states." (20RT 5248, 5328, 5335-5336.) It was Dr. Glaser's "impression" that petitioner "suffered from multiple dissociative states and multiple amnesia episodes." (20RT 5249.)

Both from the non-amytol and amytol interviews, petitioner "essentially recounted . . . a museum of childhood sexual and physical abusive traumas starting from age four or five up to the present time." (20RT 5252.) Petitioner described "numerous instances of childhood abuse and sexual abuse," including "the turn and burn game with one of his stepfathers, W.A. in which he would walk [sic] hands back to back with his older brother and they would be turned

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28. In closing argument, the District Attorney argued that the story about calling a cab was logical and that it would be logical for Tracie Clark to threaten to report petitioner to the police. (21RT 5619-5621.) "David Rogers was scared to death that he was going to be reported for shooting a girl. And rather than have that happen to him again, he killed her." (21RT 5621.)

around, and whoever was facing the adult at the time of being hit with the belt would be hit in the genitals." (20RT 5253.) Petitioner had "much emotion" in describing these experiences. (20RT 5253; see 20RT 5345-5346 [further redirect examination].)

On cross-examination, Dr. Glaser could not cite any point in the videotaped and transcribed interviews when petitioner said he had been hit in the genitals. (20RT 5262-5265, 5333-5334 [recross-examination].) When Dr. Glaser asked petitioner if his penis and testicles were immune from being hit, petitioner said "Not necessarily." 20RT 5266.) Petitioner also said that the belt might wrap around the side. (20RT 5266.) Dr. Glaser said he also relied on David Bird's description of the "turn and burn" game. (20RT 5264-5265.)

On recross-examination, Dr. Glaser admitted that petitioner has used the term, "hugging," to describe how he and his brother Dale held on to each other. (20RT 5330-5331.) However, he said, "Well, again, I think you are harping on rather irrelevant features, focusing on specifics. [¶] There is no doubt in my mind that Dave Rogers was involved in a bizarre, inappropriate and intensely psychologically damaging sexual encounter called turn and burn during the crucial developmental years of his life and that it has had a dramatic impact on his sexuality, state of being, and ultimately has led to numerous dissociative states. [¶] There is absolutely no doubt in my mind about that." (20RT 5331; see 20RT 5335.) "[¶] There is no doubt that this event and these events occurred, and there is no doubt it was bizarre, psychologically damaging and extremely relevant to this present situation." (20RT 5322.)[29/] However, Dr. Glaser said that was not the reason petitioner murdered Tracie Clark and that that specific event was not the reason he could not form the specific intent to kill anyone. (20RT 5322.)

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29. In argument, the District Attorney agreed "wholeheartedly" "that it was very cruel, and that it was terrible." (20RT 5332.)

When asked for additional incidents in the "museum" of sexual abuse, Dr. Glaser recounted a story by petitioner that when he was six or seven years old "he enjoyed women's panties, he enjoyed the feeling next to his body, and in fact felt nothing wrong about parading out in public just wearing women's panties." On one occasion, his stepfather W.A. made him put on "girl's panties, a dress, makeup, lipstick and high heels and forced him to stand outside the residence," which Dr. Glaser "termed . . . sexual abuse." Dr. Glaser admitted that petitioner did not remember seeing anyone and said that no one seemed to care. (20RT 5267.) Dr. Glaser did not know if petitioner considered it sexual abuse. (20RT 5268.)

Dr. Glaser believed that W.A. was petitioner's stepfather for three years. (20RT 5269.) Petitioner "was particularly concerned about possibly being molested by one of his other stepfathers" but had no memory of being molested. (20RT 5269, 5272; see 20RT 5335.) Dr. Glaser said that the lapse of memory did not tell him that petitioner was sexually abused. (20RT 5270.) Nevertheless, Dr. Glaser considered that this possible incident was the third in his museum of sexual abuse. (20RT 5272-5273.) He was absolutely positive that petitioner had been abused or molested as a child. (20RT 5330.)

Dr. Glaser could not recall any further specific incidents of sexual abuse. (20RT 5274.)

On redirect examination, Dr. Glaser testified he had no doubt that petitioner "has suffered both physical and sexual abuse over a significant period of his formative years, not just one particular incident, but numerous over a significant chunk of his childhood." (20RT 5323.) Dr. Glaser stated, "it's likely his sexual problems are longstanding." (20RT 5324.)

On a couple of occasions petitioner asked Dr. Glaser if he were crazy. (20RT 5254.) On one occasion, during the end of the interview, petitioner had tears "rolling down his face." (20RT 5259, 5325; see 20RT 5336-5337.) Dr.

Glaser thought that petitioner's statement was "most consistent with the phenomena of dissociative states." (20RT 5254.) In a dissociative state "the person is not in full control of their thoughts, feelings or behaviors whereas with deliberation it involves much higher brain functions and cortical functions." (20RT 5255.) Dr. Glaser quoted from the revised Third Edition of the Diagnostic and Statistical Manual, which stated that the state involves "personalities" which "are aware of lost periods of time or distortions in their experience of time." (20RT 5257-5258; see 20RT 5341-5343.) Such people may be concerned about being considered crazy. (20RT 5258.)

On cross-examination, Dr. Glaser said that a dissociative state "is a very dramatic phenomena [sic]" that involves "forming intention, being able to consider the future" "and emotion, such as feeling fear or depression or panic. But there is essentially a cutting off . . . of those states." (20RT 5290.) When he was asked if petitioner might remember the emotions the day after the murder, Dr. Glaser answered that "there might be some breakthrough thoughts, there might be some breakthrough feelings. It's not necessarily a hundred percent phenomena [sic]." (20RT 5290.) As an example of a dissociative state, Dr. Glaser stated that a patrol leader who is the lone survivor of a patrol might have no recollection of the event. (20RT 5291.) Dr. Glaser implied that the United States government was failing to disclose a "vast array of literature" concerning dissociative states in wartime and amytol interviews. (20RT 5292-5293.)

On cross-examination, Dr. Glaser testified, "I'm not saying he has a dissociative personality. I'm stating that it is my opinion that [petitioner] has had numerous dissociative states. So it is a description at a finite point in time." (20RT 5289-5290.)

Dr. Glaser said, "It is not a mental illness. It is a mental state, a state of mind. . . . [I]t varies considerably from person to person in terms of the

manifestations of that state." (20RT 5294.) It could be manifested in a "complete absence of feeling states" or the person might appear bewildered and unable to perform simple tasks such as answering a question. (20RT 5294-5295.) Childhood abuse or trauma is a predisposing factor for dissociative states. (20RT 5260, 5325-5326.)

Dr. Glaser thought that petitioner was "in an emotional, traumatic state" at the time he killed Tracie Clark. (20RT 5260-5261.) He thought that petitioner did not have "the capacity at that time to coldly weigh the consequences to, for and against" killing her. (20RT 5261.)

On cross-examination, Dr. Glaser "emphasize[d]" that both the nonamytol and amytol interviews "involved a high level of subjectivity." (20RT 5284; see 20RT 5296-5297.) Dr. Glaser admitted, "I could not tell whether a person is telling the truth in any situation." (20RT 5300.) He also admitted, "A person under sodium amytol, a person not under amytol, can lie. There's, in my mind, no way to differentiate." (20RT 5285.)

Dr. Glaser said he corroborated some of the information he received in the amytol interview. (20RT 5285.) He admitted he did not compare his information with the facts of the crime to determine if it was consistent. (20RT 5285-5286.) Dr. Glaser said he did have the police reports and listened to three confession tapes "on numerous occasions." (20RT 5288-5289.)

Dr. Glaser said that petitioner's inability to perform sexually "played no part in [his] formulation" of a diagnosis, although it was relevant to the shooting. (20RT 5287.) The District Attorney asked a question based on statements by petitioner that he had trouble sometimes even with his wife but that it was not normal for him not to be able to perform. Dr. Glaser said that those statements had little to do with his conclusion that petitioner could not form the intent to kill at the time of the crime. (20RT 5287-5288.)

Dr. Glaser was aware that petitioner had told the police that there was

blood on a specific spot on Tracie Clark's sweater which could only have been known by a person who had been there. However, he did not know enough to have an opinion on whether petitioner could have remembered what happened. (20RT 5302-5303.) He was not aware of whether petitioner "had tried to blame the Benintende murder on his own son." (20RT 5303.)

Dr. Glaser stated that, in coming to a conclusion about petitioner's state of mind, he considered that petitioner was involved in improper conduct with a prostitute in 1983. (20RT 5317.) However, he said that the problems in petitioner's life 30 or more years ago had more impact on what he did in February 1987. (20RT 5317-5318.)

When Dr. Glaser asked petitioner why he didn't just drive away and leave her, he said it was because he knew she was a prostitute and would make a report. She would report that he had pulled out a gun and had dumped her out there in the country. (20RT 5318-5320.)

Dr. Glaser testified on re-direct examination that petitioner's casual behavior during the interview with police was "possibly associated with a dissociated state." (20RT 5322.)[30/] Petitioner's emotional responses in the interview with Dr. Glaser were appropriate for the questions. (20RT 5322.)

Dr. Glaser said on recross-examination that during the events, petitioner's inability to perform sexually, Tracie Clark's "expletives and name tags that were particularly disturbing," petitioner's "capacity to understand and think were being compromised at an escalating rate." "[F]inally enough buttons

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30. On redirect examination, Dr. Glaser stated that petitioner, "in the confession tapes, he specifically in my mind, in a very dissociative and unemotional way he [sic] spoke of what transpired between himself and the prostitute, of where[,] down to the shots fired and considerations of alternatives after he had shot her in the belly and she was calling him various names, and he was contemplating the pros and cons of shooting her and ultimately he shot her. That was in dramatic contrast to, in the amytol and non-amytol interviews . . . ." (20RT 5327-5328.)

were pressed and all the rockets went off. [¶] He lost all capacity to reason, to consider, to think. It was at one point maybe raw emotion in terms of being aroused. He was no longer Dave Rogers, the man who could not get an erection with a prostitute. He was Dave Rogers, the little boy who was tormented, who was freaked out, who could not integrate the events that were occurring to him. [¶] It was a Dave Rogers that was emotional, that was unable to reason, unable to consider; and after a certain point I believe he completely lost the capacity to think. [¶] He became fully consumed in his emotional state of arousal." (20RT 5338-5339.)[31/]

Dr. Glaser believed that petitioner's state wore off slowly and that petitioner "had to varying degrees dissociative states relative to what had transpired" "in the hours to six days after the crime." "I think there was a waxing and waning." (20RT 5340.)

Dr. Glaser did "[n]ot necessarily" find it unusual that a man who was a sheriff's officer, who committed one or two murders and was in jail could be depressed. (20RT 5343-5344.)[32/]

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31. The District Attorney argued, "you heard no evidence of any disturbances in this marriage" and that petitioner had been "making decisions on a daily basis" "in stressful situations," even though "as a police officer he has probably been called every name in the works including bastard and those other words that Dr. Glaser likes so much." (21RT 5618.)

32. In closing argument, the District Attorney said that the People had not denied that petitioner was a victim of child abuse. (21RT 5614.) "The extent of the child abuse, I don't know." (21RT 5614.) She noted that there were no reports from social workers or family members. (21RT 5614.)

The District Attorney then asked, "But are we to say because this man was abused as a child, he cannot be a murderer?" (21RT 5614-5615.)

> If you believe all the hearsay evidence that was given by the doctors, then, yes, he is probably a pathetic person and, yes, he was probably extensively abused as a child, even though some of that

Prosecution's Case In Rebuttal

Kern County Sheriff's Lieutenant Paul Kent testified that on February 22, 1983, when he was a sergeant in the internal affairs division, he investigated a complaint by a prostitute named Ellen Martinez to deputy Jodie Marlatt. Kent ultimately filed a report, as a result of which petitioner's employment was terminated. (21RT 5556-5557.) Petitioner appealed the action to the civil service commission, as a result of which he was rehired. (21RT 5557-5558.)

District Attorney's Investigator Tam Hodgson introduced a portion of petitioner's tape-recorded second interview with officers on February 14, 1987.

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evidence is directly contradicted by Mr. Rogers' statements himself.

> And we have nothing to prove that it was true. We only have the words of the doctors, and we don't even know where they got their statements.
>
> But there is no question he was probably sexually abused. But does it follow that he should not be held responsible for the crimes that he committed.

(21RT 5615.)

In closing, the District Attorney argued:

> He had a very hateful, mean, cruel stepfather for about a year and half, that he probably had alcoholics in his background and that he murdered Janine Benintende, and that he murdered Tracie Clark.
>
> And the fact that he was molested as a child had absolutely nothing to do with the murders. It was just very sad that there has to be a person in the world who has that [page 5623] kind of background, but that is not an excuse for murder.
>
> Thank you.

(21RT 5622-5623 [end of argument].)

(21RT 5559-5565.)

In the interview, Hodgson asked petitioner about the 1983 incident and complaint. Petitioner said that he had been fired and that he appealed the firing. Petitioner said that the complainant did not appear for the hearing but that the board had considered her statements. Hodgson asked if he had ever seen her again. Petitioner asked if she were "one of them that's missing." Detective Soliz said he did not know. Hodgson asked petitioner if he knew what had happened to her. (21RT 5562-5563.)

Petitioner answered,

> No, I don't. There for a while I was real pissed at her, but, you know, I got to a point where I -- I just -- I never believed a whore. I don't care if she told me her name was So-and-so and that was her true name, I never believed them again. The way I got, if they told me it's Sunday and if it was Sunday, I'd call them a liar. It didn't make any difference to me. I couldn't believe them from then on. I could not.

(21RT 5564.)

Hodgson asked, "Because they're always lying?" (21RT 5564.)

Petitioner answered, "I guess. I just -- I just -- I don't know. That hearing just -- it just changed my outlook, I guess." (21RT 5564.)

Hodgson asked, "Did you feel like you were done wrong by her?" (21RT 5564.)

Petitioner said, "Yeah." (21RT 5564.)

PENALTY PHASE

People's Case

The "Martinez Incident"

Ellen Martinez worked as a prostitute in Bakersfield in January and February 1983. She was living at the Bakersfield Inn with her husband Troy Martinez. (22RT 5764.) During that time, she was at a cemetery in a car with a customer whom she had picked up on Union Avenue. (22RT 5764-5765.) The man refused to pay her and pulled a switchblade knife on her. (22RT

5765, 5771, 5774.) She was having sex with the man when petitioner, in uniform, drove up in a patrol car, knocked on the window and told them to step out of the car. (22RT 5764, 5766.) The switchblade fell onto the ground. Petitioner told Ellen that they had the knife. (22RT 5773.)[33/] Ellen put her pants and shirt back on but had lost her panties. (22RT 5766.) A female officer drove up in a separate patrol car. (22RT 5766.)

Petitioner told the customer that she was his wife. (22RT 5765-5766.) Petitioner talked to Ellen and the man separately. (22RT 5775.) Ellen told petitioner and the female officer that the man had forced her to have sex by pulling a knife on her. (22RT 5773-5774.) Petitioner's female partner told the customer that he should get checked for VD and let him go. (22RT 5766.) At first, petitioner told Ellen that he was going to take her downtown, but after the customer left, he put her in the back seat of the patrol car. (22RT 5767.)

When Ellen told petitioner that she could not find her underwear, he took her back to the cemetery with a flashlight to look for them. Before they got back into the car, petitioner told her to take her top off. Petitioner took a picture of Ellen's bare breasts and then told her to put her blouse back on. Petitioner told Ellen to take her pants off, lay down on the back seat of the patrol car, spread her legs and hold her vaginal area open while he took a picture of the area. (22RT 5767-5768.)[34/]

Petitioner then told Ellen to put her pants back on and get in the front

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33. Ellen testified, "Well, the switchblade fell on the ground and they picked it up. They said, Mr. Rogers told me that they got the switchblade." (22RT 5773.)

34. Ellen did not specifically state where the female officer was during the events summarized in this paragraph. However, in describing the events, Ellen only referred to petitioner as being present. As a result, the jury could reasonably have inferred that the female officer left when petitioner initially placed Ellen in his patrol car.

seat of the car. He took her to a corner "not too far" from her motel room. He said, "I am going to drop you off right here. I don't want to take you to your motel room. I am not going to take you downtown. I am not going to arrest you, but . . . I don't want to take you up there because I might scare the other girls." (22RT 5768.)[35/]

Ellen went back to her motel room and told her husband what had happened. (22RT 5768, 5771-5772.) Ellen was initially mad because the man was not arrested. (22RT 5775-5776.) However she did not tell any law enforcement officers about it until after a second incident. (22RT 5772.)

In the second incident, Ellen was picked up by another customer on Union Avenue and taken to the parking lot of the Black Angus restaurant where they were having sex when the customer pulled a gun on her and ordered her out of the car. She walked back to her hotel. She was naked until a "little kid on a bicycle" gave her his jacket. Petitioner and another female police officer responded to the call. When Ellen talked to the other female officer, she told the female officer about the incident in the cemetery. (22RT 5768, 5768-5769, 5775.)

Ellen testified that she only worked as a prostitute for a month or two. During that time, she was arrested three or four times. (22RT 5772, 5778.) Ellen commented, "I am lucky, I guess." (22RT 5778.) Ellen left town at a time when there were warrants for her arrest on some prostitution cases. (22RT 5776.)

A detective or investigator named McCathron found Ellen where she was living in Fort Smith, Arkansas, approximately a year before she testified (on March 23, 1988). (22RT 5767, 5770, 5777.)

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35. Respondent notes the Martinez incident showed that petitioner knew how to take a prostitute back to town and let her out of the car without being noticed, if he chose to do so.

The Sexual Assault And Attempted Murder Of Tambri Butler

Around February 1986, at around 10:00 p.m., Tambri Butler was on Union Avenue near Chester walking back to her room after buying some heroin when petitioner stopped his white truck. (22RT 5780, 5785, 5794.) Tambri got in. She told petitioner she wanted to go to her room, but petitioner did not want to go there. Tambri then directed petitioner down White Lane to a field on the other side of Cottonwood. (22RT 5781.) Petitioner offered her $40 for "half and half." (22RT 5782.) After some discussion, in which petitioner said his name was David, Tambri started giving petitioner oral sex inside the truck. (22RT 5782-5783.) His pants were around his legs and both doors were closed. (22RT 5783.) Petitioner them moved to the middle of the seat, Tambri sat on top of him and they had sex, but he did not ejaculate. (22RT 5783.) It was taking "quite a while." (22RT 5783.) She told him he would either have to do something or give her some more money. (22RT 5783-5784.)

Petitioner said that is not what is going to happen. He reached onto the dashboard, got an electric shocking device, put it on her neck and activated it. It made a crackling noise and sparks. The device made red burn marks and a few blisters on her neck. She had five or six scars at the time of trial. (22RT 5784-5785.)

Petitioner wanted to have some more sex, so they did. (22RT 5785.) Petitioner then wanted to have anal sex, but Tambri refused. (22RT 5785.) Petitioner pulled a gun out of the glove compartment. (22RT 5785.) The gun was an automatic, about four or five inches long, and black. (22RT 5785.) Petitioner put the gun to her temple. (22RT 5785-5786.) Tambri told petitioner that he was not going to shoot and she laughed at him. (22RT 5786.) Petitioner then put the gun on the bridge of her nose and fired it. (22RT 5786-

5787.) The bullet went out the open window. (22RT 5786.) A part of the gun came back and nicked her nose. (22RT 5787.) The flash of the gunpowder blurred her vision for about 30 seconds. (22RT 5787-5788.) Petitioner then had anal intercourse with Tambri and then she gave him some more oral sex. (22RT 5788.)

When the sex acts were over, they got back in the truck and drove down White Lane. Petitioner told her to empty her pockets. (22RT 5788.)[36] She had money and a piece of plastic wrap containing what looked like "a little tiny, brown piece of mud about the size of half a dime." (22RT 5788-5789.) Petitioner did not have to ask if it was tar heroin; "he knew." (22RT 5789.) Petitioner made her beg for the heroin. He took back the money he had given her. When she told him she needed the money, he threw $20 at her. He put the heroin back in her pocket. (22RT 5788-5789.)

When they were back at Union Avenue, petitioner slowed down, opened the door and pushed her out. Tambri fell out into some weeds and bushes off the side of the road. Petitioner drove down a little farther, slowed down, stopped and backed up toward her. Tambri "rolled deeper in the bushes" as petitioner hit something which made a loud bang under the truck and made the tires spin. (22RT 5790.) Petitioner spun the tires forward and drove away. (22RT 5791.) Tambri went home to her "common-law husband" Willie and "fell apart." (22RT 5801-5802.)

Shortly after the attack, Tambri went to the jail three times to visit her husband. Tambri testified that the first two times she visited her husband she knew that she "knew him," referring to petitioner, who was working in the jail on the A Deck. (22RT 2780, 5791.) "I didn't know where because the uniform

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36. In her statement to Detective Soliz, Tambri said that her attacker "started to search through her pockets and when he did so, he found her 'dope'." (Exh. 39 (Vol. III at p. 299).)

kept throwing me off, but I knew I knew this man and then it dawned on me when I knew him." (22RT 5791.) Tambri was in jail herself when she realized when she had seen petitioner previously. She had been arrested for being "[u]nder the influence." (22RT 5791.)

When Tambri was in custody in jail, her husband came to visit her. In the process of going through A Deck to the visiting room, she passed through the booking room, where she would see "this man," the man she "had the sexual encounter with." (22 RT 5802.) Tambri asked petitioner if he had ever arrested her before. (22RT 5791.) He said he had arrested her in Arvin. (22RT 5791.) She had never been arrested in Arvin. (22RT 5791.) At that point, she recognized him and said, "you son-of-a-bitch." (22RT 5792.) Petitioner told her that she had better turn around and keep her mouth shut. (22RT 5792.)[37/]

Between September and November 1986, Jeannine Lockhart, a guard at the jail, asked Tambri if she was afraid of being hurt or raped while working as a prostitute. Tambri said, "[Y]es, ma'am, I do, but I am one of Kern County's finest," "making a sarcastic joke." Tambri told Lockhart in general what had happened but would not say who had done it. (22RT 5792, 5796-5797 [Tambri], 5805-5807 [Lockhart].)

Before January 1987, Lockhart showed Tambri a Sheriff's Department annual with photographs. Tambri told her that the person was in it, but she would not say who it was. (22RT 5792-5793, 5797-5799, 5806.)[38/] Tambri did

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37. In the amytol interview, petitioner described using the same phrase with Tracie Clark. He said he told Tracie that if she could keep her mouth shut, he would give her a ride back to town. (22RT 5868.)

38. On cross-examination, Tambri testified that the person who attacked her had a mustache. (22RT 5797-5799, 5802.) She did not testify that she identified a photograph of a person with a mustache in the Sheriff's Department annual. She testified she knew it was the same person. (22RT 5799.) A photograph of petitioner in the 1985 issue of *Behind the Badge* shows him without a mustache. (Exh. 46 (Vol. IV at p. 153) [Trial Exh. 69 at p. 90; see 17

not make a formal report. (22RT 5793, 5806.) She was afraid of the person because he was right below her in the jail. (22RT 5793, 5799, 5806.) Lockhart told a supervisor, but was told not to do anything further because Tambri had not identified anyone. (22RT 5810.)

Petitioner was arrested on February 13, 1987, five days after Tracie Clark's body was found. (CT 92-93, 110-111 [preliminary examination].) After petitioner's arrest, Lockhart had a class with Tam Hodgson and mentioned Tambri's story to him. (22RT 5810.) Tambri was contacted and interviewed by Sheriff's officers and by investigator Tam Hodgson. (22RT 5793, 5795, 5802.) She told them what had happened and made an identification of petitioner. (22RT 5794.)[39/] She was given no promises of leniency but was told instead that she had "nothing coming." (22RT 5794.) She had been in custody for about a month and had recovered from heroin. (22RT 5795.) She was released from jail after about six months in April. (22RT 5796.)

Tambri had been a prostitute for about ten years at the time of trial but had never had a pimp. (22RT 5779.) Tambri was in custody for possession of heroin at the time of trial. (22RT 5778-5779.) She did not expect any assistance as a result of her testimony. (22RT 5801.) Tambri admitted she was a heroin addict. (22RT 5779.) However at the time of the incident she was not getting "loaded," but was only taking enough to avoid going into withdrawal.

RT 4629].) The photo lineup which Detectives Soliz and Lage showed to Tambri also showed petitioner without a mustache. (Exh. 41 [Trial Exh. 39]; see Exh. 39 (Vol. III at p. 297).)

39. She testified that she never saw any photographs of petitioner in a newspaper or on television. (22RT 5795.) She also testified that the details of petitioner's case were not discussed among the females in the jail. (22RT 5803.) She said that she did not tell them the details of her own rape and that it was not a matter of jail gossip. She said, "I kept it to myself." (22RT 5803.)

(22RT 5800.) When she was asked if her prostitution and drug incidents ran together, she answered, "Not when a man holds a gun to your head, no, sir." (22RT 5801.) She also testified, "I can't ever say I will quit[] doing drugs. I hope to. I have got a job. I have got plans too." (22RT 5804.)

District Attorney's Investigator Tam Hodgson testified that a black canvas bag containing three guns had been taken from the rear of petitioner's pickup truck. (22RT 5811; Penalty Exh. 1 [the bag and the guns].) One of the guns was a black Excam .25-caliber automatic pistol. (22RT 5812; Penalty Exh. 1.)

Defense Case

The first penalty phase witness for the defense was Dr. David Bird, Ph.D., a clinical psychologist (20RT 5456-5457). (22RT 5815.) He first introduced a videotape of an interview of petitioner in during which he was administered sodium amytol. (22RT 5816-5818; Penalty Exh. A [an enhanced version of Exh. B, which had been previously introduced in a motion; see 22RT 5816-5817].)[40/41] Near the beginning of the interview, petitioner said that he

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40. The taped interview which was played for the jury was designated Interview Two. Dr. Bird testified that he had reviewed this interview and Interview One in reaching his opinion. (22RT 5817.)

41. At the outset of the penalty phase, the court heard and granted a motion by petitioner to play the tapes of the amytol interview. (22RT 5748-5754.)

Although the court stated that it would admonish the jury not to consider petitioner's videotaped statements to his doctors for the truth of the matter stated (22RT 5754), the court never gave such an admonition or instruction to the jury (see 22RT 5757-5758, 5966-5970; cf. AOB 219, fn. 162). The court had given such admonitions during the guilt phase as to each witness whose testimony was only admitted for a limited purpose. (20RT 5227, 5230 [Dr. Glaser], 5399 [Ms. Franz], 5456 [Dr. Bird].) The guilt phase instruction on the evidence which was admitted for a limited purpose stated, "At the time that evidence was admitted you were admonished that it could not be

had lapses of memory at around the ages of ten to twelve. He said his brother Dale had memory lapses around the same time. Petitioner said it sounded like something had happened to both of them. Petitioner said that Dale was his older brother, who had participated with petitioner in the turn and burn. (22RT 5820.) Dale took care of him a lot. (22RT 5826.)

Petitioner said his mother used a belt which she called her "necklace," which she used for discipline. (22RT 5830-5831.) Petitioner did not recall that she was abusive. (22RT 5830.)

Petitioner did not think he was mad at his mother for not leaving William Ellis or not protecting her children from him. (22RT 5827.) Petitioner remembered that after his mother left William Ellis in Pittsburgh and went to Hopland, there were periods when she was dating. She would go out to bars and meet men. Petitioner said he had gaps in his memory during that time. However, petitioner said he did not think he had a problem with that. She eventually married one of them. (22RT 5822-5824.) He also said he did not remember any men staying overnight after his mother left William Ellis. (22RT 5828-5829.) There were a couple of men he did not like but he didn't know why. He explained, "I was a kid." (22RT 5829.) He did not remember his mother going out when they were young. (22RT 5829.) William Thompson, his younger brother's father, was killed in a car crash a short period of time after his younger brother was born. (22RT 5828-5829.)

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considered by you for any purpose other than that limited purpose for which it was admitted." (21RT 5630; 2CT 613 [CALJIC No. 2.09].) Similarly, neither counsel stated in argument that petitioner's videotaped statements were not admissible for their truth. (22RT 5952-5955; 5957-5964.) Respondent also notes that three photo albums and petitioner's personnel file were presented by the defense at the penalty phase with no suggestion that hearsay contained in them could not be considered for the truth of the matters stated. (22RT 5908-5912; Penalty Exhs B, C, D [photo albums]; 22RT 5912-5914; Penalty Exh. E [personnel file].) Thus, there was no limit on the jury's consideration of the penalty phase testimony of Dr. Bird or the videotaped interviews of petitioner.

Petitioner remembered that after his mother was a widow, she went on welfare and then worked in a restaurant, eventually taking night classes and then became a psychiatric technician, which was her job for 20 years. (22RT 5825.)

Petitioner also thought he had some possible memory problems as an adult. (22RT 5832.) As an example, he said he had "[e]vidently" fired his A.M.T. backup, a small gun and had not noticed that he had fired the gun. (22RT 5832.)

Petitioner said he had only fired his gun on the job once, when he had shot at a 16-year-old but missed, hitting the pole of a cyclone fence. (22RT 5833-5834.)

Petitioner said that on one occasion he took three PCP cigarettes from one or two juveniles and put them in his shirt pocket. Later, after he had turned the cigarettes in, he felt sick, started throwing up and was shaking. His son helped him to the car and he drove himself to the hospital. He could not walk, move his arms or talk. He was in the hospital for four or five days. Various tests were performed. The final diagnosis was some type of viral encephalitis. (22RT 5834-5839.) Petitioner said he had been exposed to PCP on other occasions, which would cause headaches and visual sensitivity to light. (22RT 5839.)

Petitioner said that at one point he was not dealing with the job well and wanted to quit. (22RT 5840.)

Before administering the sodium amytol, the anesthesiologist told petitioner that he would not be completely asleep. (22RT 5841-5842, 5845.) The anesthesiologist said he was used to putting people to sleep all the way. (22RT 5845.)

At the outset of the amytol interview, petitioner expressed the thought that people would not love him because he had killed somebody. (22RT 5850-

5851.) He said, "I'm sorry." (22RT 5851.) He also said that he had always felt loved and that his mother and three brothers love him. (22RT 5852.)[42/]

Petitioner said that sometimes he thinks he is crazy for throwing his life away for prostitutes. (22RT 5852.) He said, "I hurt so much." "I hurt all the time." "When I hurt I want to die." "I don't want this to go on." (22RT 5853.) Later in the amytol interview, petitioner said he did not want to die, although he did when he was first arrested. (22RT 5883.)

When asked for a pleasant memory from his childhood, petitioner remembered that as a special treat, his mother would take him and his brothers out for cherry milkshakes. (22RT 5825, 5851-5852.)

Petitioner said that when he picked up "that woman," he "wanted to help her" by getting her off the streets. (22RT 5853-5854.) He said he wanted to talk to her but she only wanted to talk about selling sex. (22RT 5854-5855.) As a result, petitioner said, he "offered her money for sex." (22RT 5855.) He also said she was attractive and he "wanted to have sex with her." (22RT 5855.) Petitioner said, "I have trouble having sex with women" "in motel rooms," because he is afraid he "might be discovered or rolled." (22RT 5855-5856.) Petitioner said the woman agreed to go to the country, where she would give him "a blow job for thirty dollars." (22RT 5856-5857.) He said he could not get an erection, which is a problem he has had with his own wife. (22RT 5857.) She tried to help him get an erection, but at some point asked what was

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42. Respondent observes that the amytol interview was highly suggestive. (22RT 5819: 11-19 [memory gaps in childhood] 5820: 11-28 [abuse], 5824: 11-16 [problem with mother meeting men in bars], 19-20 [memory gaps], 5825: 1-2 [same], 5826: 13-14 [suggesting that his mother was a prostitute], 5827: 2-28 [William Ellis], 5830: 6-11 [mother], 5831: 2-8, 25-28 [mother], 5859: 13 [Tracie Clark], 5873: 16-18 [Tracie Clark shooting], 5880: 6-20 [same], 5882: 22-25 [same], 5884: 28 [mother], 5885: 1-9 [negative thoughts about mother -- denied by petitioner], 5886: 14 - 5889: 20 [suggesting that Tracie Clark's alleged insults were "stirring up a lot of painful memories of [petitioner's]"], 5891: 2 [second stepfather], 5892: 8 - 5893: 3 [same].)

wrong. (22RT 5857-5858.) He said, "It's not normal for me not . . . to be able to perform . . . ." (22RT 5863.)

Eventually she wanted more money. (22RT 5858.) Petitioner volunteered, "You know, I wanted to help her, I wanted to get her out of that profession." (22RT 5858) Petitioner said he did not want to go for his wallet to prevent her from seeing that he had a couple of hundred dollars in it. (22RT 5858.) He tried to put her off, but she still wanted more money. (22RT 5859.) After more effort on her part, she asked if he liked little boys. (22RT 5859.) Petitioner said, "It upset me." (22RT 5859.) Petitioner said, "I don't think I got angry," but told her no, he liked women. (22RT 5860.) She wanted him to play with her breasts to get him hard. (22RT 5860.) She appeared to be getting upset because she was fidgeting, shrugging her shoulders and holding her hands up as if to ask what she was supposed to do next. (22RT 5860-5861.)

Petitioner said he had no more money and that she should try to earn the money. He said, "We got into an argument over the money." "She started hitting at me but I, I blocked her swings." She was swinging with her open hand. He could see her nails. Petitioner said he "hit the door handle" and "was able to push her out of the truck" on the passenger side. (22RT 5861.)

She almost fell out of the truck but was able to catch her balance. He pulled up his pants as she was standing at the door. "I thought that she would make a report." (22RT 5862.)

He got behind the wheel, started the truck, put it in gear and started to drive, which caused the door to close. However, he stopped because she was in front of the truck. (22RT 5863.)

She was in front of the truck standing in the headlights calling him a son of a bitch, a bastard and a faggot and that he was probably queer for boys. She said only faggots can't get it up. She also said she wanted a ride back to town. He was getting his pants up. (22RT 5864-5865, 5867.) She could not

understand why he "couldn't get it up for her" because she thought she was good-looking. (22RT 5866.)

She had taken the money, $30, which had been on the dash. (22RT 5867-5868.) Petitioner told her if she could keep her mouth shut, he would give her a ride back to town. She was coming at him saying, "Maybe next time you can find a little boy." At that point, petitioner, who was standing at the truck, reached down and picked up the gun from the floorboard of the truck. (22RT 5868.)

Petitioner then said that he pointed the gun at her and said, "You little bitch, I don't like little boys, I like good looking women." (22RT 5868-5869.) She kept coming at him, pointing her finger at him, calling him a queer. She said, "Look, just because you're a queer, don't mean you can't take me back to town." (22RT 5869.)[43/]

Petitioner said his intention in pointing the gun at her was to keep her away. He said, "she was pointing her finger at me, like you do when you shoot people." (22RT 5870.) Petitioner said, "I thought she was going to shoot me." (22RT 5871.) "Her nails were large." (22RT 5880.)

He also said, "I just felt threatened by her finger" and didn't want to have physical contact with her. He said he shot her when she wouldn't quit coming toward him. Dr. Glaser asked, "How come you didn't just get in the car and drive away and leave her?" Petitioner answered, "Because I knew she was a

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43. It appears that, in telling the story, petitioner initially forgot to include the events which he claimed happened while he was pointing the gun at her. In respondent's view, these claimed events are fabricated, as are the other self-serving aspects of petitioner's story. It is far more believable that, after a verbal dispute with Tracie, he pulled out the gun and immediately shot her. As petitioner had described in his statements to police, he first shot Tracie inside the car and there were significant time periods between the first shot and the second shot and between the second shot and the final four shots. As the District Attorney implied in argument, petitioner's description of Tracie's fingernails was a fabrication.

prostitute and she would make a report." (22RT 5872.) Petitioner said he thought she would make a report that a "john, armed with a gun, had pulled a gun out on her." Petitioner then said, he thought she was going to claw his face. He said, "The gun stopped her." (22RT 5873.)

At another point, petitioner said she said, "You take my ass back to town" and called him a queer faggot motherfucker. "And then when she walked toward me, I shot her." (22RT 5874.)

She then backed up to a bank where he shot her five more times. Only seconds elapsed between the first shot and the second set of five shots. (22RT 5874-5875.) He said, "I was panicked after I shot her one time." (22RT 5881.) He said he knew his gun was empty after six shots. (22RT 5880.)[44/]

She then walked forward and fell down in the middle of the road. (22RT 5875.) Petitioner said he then drove away to escape from what he had done. "It was dark and black." (22RT 5876, 5881.)

One or two minutes later he thought he could not leave her body in the middle of the road. (22RT 5877.) He said he was concerned that someone might hurt the body by running over it. (22RT 5878.)

He went back. He explained, "I performed what I call a flip. I learned it in Boy Scouts; you fold the legs over each other and roll the person." He rolled her over and saw that she was "bloody all over her front." (22RT 5877.) She was not breathing. He dragged her over to a bridge and rolled her into the canal. (22RT 5878.) Petitioner said he did this to prevent someone from running over the body, causing more damage. (22RT 5878.) He remembered thinking, "Maybe she would float." (22RT 5878.) He said that after that, he

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44. This description is inconsistent with petitioner's statements to police in which he described delays between the first shot and the second shot and between the second shot and the final four shots. Petitioner's description in the amytol interview is inconsistent with the physical evidence, principally the pattern of gunshot wounds in Tracie's front, side and back.

was "totally confused." (22RT 5878-5879.) Petitioner said he had never killed anybody before. (22RT 5879.)

When Dr. Glaser suggested that it stirred up "a lot of emotionality" when Tracie called him a bastard, petitioner said that he was not a bastard because he knew who his father was and had a father until he died. (22RT 5882.) Dr. Glaser asked petitioner about his mother. (22RT 5882-5883.) Petitioner said, "I have a good mother. She's loud." "She speaks well. She speaks what's on her mind." (22RT 5883.) "She was a good mom to me." (22RT 5885.) However, petitioner said that he was once upset with his mother because she kicked his little brother out of the house. Petitioner found his brother and took him in and protected him. He commented, "Brothers are brothers." (22RT 5883-5884.)

Petitioner said his stepfather [apparently William Ellis] was "very abusive" and was a "mean person." (22RT 5885.) When petitioner was asked if he wished his mother would do something to rescue him and his brother from his stepfather, petitioner said, "Yes. She had to do something, I felt he was going to kill us." (22RT 5884.)

Petitioner said that his stepfather used to beat him and Dale "playing turn and burn." "That's where you have to hold your other brother, and when he gets turned to him and held there, he gets a swat with the belt." When Dr. Glazer commented that the "game" sounded "pretty scary and abusive," petitioner said, "He was an abusive person. I hate him for that." He said he could still see the silver tip of the belt. (22RT 5886.)

Petitioner said that Tracie Clark's actions reminded him of Barbara in calling him names. (22RT 5888-5889.)

Petitioner said his other stepfather was a homosexual. Petitioner stated, "It came out years ago." "He's been dead since the fifties." Petitioner said that he was shocked when he found out and then said he wondered if his stepfather

had molested him and he had blocked it out. (22RT 5889-5891.) His only memories of that stepfather were when the stepfather spanked him once and when he picked petitioner up after he had sprained his ankle. (22RT 5891.) Petitioner said that the latter event made him feel like he had a father. (22RT 5892.)

Petitioner said, "I'm afraid I might be a latent homosexual." (22RT 5893.)

Petitioner asked if he were crazy for destroying his life, noting "A sane person doesn't go out and destroy their life." (22RT 5894-5895.)

Petitioner said he was "so afraid" of "[d]oing this again" because he could not control himself. (22RT 5895-5896.) When Dr. Glaser suggested to petitioner that having killed someone brings him a lot of pain, petitioner replied, "You don't know how much pain. I hurt for the girl I killed." (22RT 5896.)

Dr. Bird testified that in his opinion petitioner was under an extreme emotional disturbance from "a lifetime of sexual abuse, physical abuse, loss of sexual identification" and his "inability to function" at the time. (22RT 5898-5899.) Dr. Bird said his opinion was based on his testing, petitioner's therapy with various people over a year, "court documents, arrest records, court transcripts, the amytol therapy interview, the pre-amytol therapy interview, conferences with members of the family, reports of investigative contacts with other members of the family." (22RT 5899.)

As a sign of petitioner's progress, Dr. Bird noted that petitioner had been able to work with a female therapist. (22RT 5899-5901.) He said that petitioner had "extreme fragmentation, tremendous lapses in memory, and through the year's time some of those gaps were being filled in." (22RT 5900.)

Dr. Bird said that petitioner's wife Jo was "not a competitor, was not a sexual threat, was not acting as a drill sergeant or a Big Mama. He finally had someone that was partner and that was a mutual acceptance, an unconditional

love on her part . . . ." (22RT 5901-5902.) Dr. Bird said there was no violence in petitioner's relationship with his wife. (22RT 5902.)

Dr. Bird thought that petitioner had become involved with prostitutes in about 1983. (22RT 5902.) He thought it was highly unlikely petitioner would be involved with prostitutes again, stating, he would "not dare risk" the possible damage to his character. (22RT 5902-5903.)

Dr. Bird thought that some of petitioner's mental problems and background may have made it difficult to conform to the law at the time of the killing. (22RT 5904.)

Petitioner's older brother Clifford Dale Rogers lived in Clear Lake at the time of trial and worked for Safeway as the "third man" in a store. (22RT 5933-5935.) He testified that he and petitioner grew up in Ukiah. (22RT 5934.) Their mother was married a number of times. (22RT 5934.) He had started therapy "for problems relating to [his] upbringing" which was continuing at the time of trial. (22RT 5934, 5936.) Dale was definitely aware of some of the problems petitioner had had in the years he was growing up. (22RT 5934.) Dale testified that there was physical abuse. (22RT 5934.) Petitioner had been a good brother to him. (22RT 5935.) They were quite close "because of some of the situations." (22RT 5935.)

On cross-examination, Dale said that he had been married twice; his first wife had died. He had two children, 16 and 14 who had never been in custody and had never been in trouble for violent acts. (22RT 5936.)

On redirect examination, Dale testified that he had planned a killing in December 1986 or January 1987 which scared him "pretty bad." (22RT 5936-5937.) He said he never took any steps toward carrying out the killing, such as buying a gun. (22RT 5937.) Petitioner said in the videotaped interview that Dale had started therapy due to these circumstances around the beginning of 1987. (22RT 5820-5821.)

Joyce (Jo) Rogers was married to petitioner in April 1979. (22RT 5905.) She testified he had a "very good" relationship with her children, Carol, who was 31 at the time of trial, and Tony, who was 27 at the time of trial. (22RT 5906.) Carol had eight children. (22RT 5906.) She said petitioner was a good grandfather to Carol's children. (22RT 5906-5907.)

She said they had a good social life, saying "[a]ll of our friends basically were cops, cops' wives, their children . . . ." (22RT 5908-5912; Penalty Exhs B, C, D [photo albums].) Petitioner received on-the-job commendations. (22RT 5912-5914; Penalty Exh. E [personnel file].) She testified, "He is a very kind, generous, warm hearted human being." (22RT 5914.) On cross-examination, she said that they had a normal strong marriage and that he never did anything abnormal or unusual that she knew about. (22RT 5915.)

Jo testified that she had not known anything about the homicides until after petitioner was arrested. (22RT 5907.) She testified he never had a mustache. (22RT 5909-5910.) He had never been convicted of any felonies. (22RT 5914.)

Carol Lynn Truitt had been petitioner's stepdaughter for twelve or thirteen years. He was the only dad she ever knew. At the time of trial she had six children. Petitioner had been a loving grandfather to them. (22RT 5931-5933.)

Deputy Sheriff Ulysses Williams testified that he had been petitioner's close friend and that he had worked with petitioner. (22RT 5916-5917.) Petitioner had a photograph of Williams in his house. (22RT 5919.) He testified that petitioner had "[a] very good, solid relationship" with his wife. (22RT 5917.) Williams did not notice anything abnormal about petitioner. (22RT 5919.) When asked about the appropriate sentence in the case, Williams replied, "It's just hard to say." (22RT 5917-5918.)

Williams described an incident in 1981 in which two Cubans armed with

machetes were interrupted in the middle of a burglary. Petitioner disarmed them without using force. Petitioner received a commendation as a result. (22RT 5918-5919.)

Cecil Swearingen had been petitioner's supervisor at the Sheriff's department. He testified that petitioner was an "excellent employee" who "was always out there doing what he was supposed to do." (22RT 5920-5921.) Petitioner could calm down highly emotionally charged situations. (22RT 5921, 5922.) Swearingen did not know petitioner outside of work. (22RT 5922.)

On cross-examination, Swearingen testified that petitioner was able to determine what the law was and follow it while on duty. (22RT 5921-5922.) Swearingen saw nothing different, unusual or abnormal about petitioner. (22RT 5922.)

Deputy Sheriff William Fisher had worked with petitioner in the jail, in detectives and on patrol. (22RT 5923.) Fisher testified that petitioner did his job very well and professionally handled situations involving danger or excited people. (22RT 5923-5924.) Fisher knew petitioner and Jo socially and could tell that they had a good relationship. (22RT 5924.) Petitioner also socialized normally with the other officers. (22RT 5924.) Fisher never found petitioner to act in an abnormal or unusual fashion. (22RT 5925.)

California Highway Patrol Officer Travis Lee Mitchell, Jr., had first met petitioner when they both worked radar. They became close friends off duty and their families did things together, including a camping trip to June Lake. (22RT 5925-5927.) Petitioner and Jo appeared to have a good relationship and seemed to be affectionate. (22RT 5926.)

Deputy Sheriff Refugio Medina described petitioner as a dedicated and conscientious officer. (22RT 5927-5928.) Medina had never seen petitioner as being too abusive with anyone he had dealt with as an officer. (22RT 5928.)

He could calm down people who were agitated. (22RT 5928-5929.) Petitioner and his wife appeared to have a very good relationship. (22RT 5929.)

On cross-examination, Medina testified that petitioner never appeared to have any difficulty determining what was right and what was wrong. (22RT 5929-5930.) Medina said he had seen petitioner look in the Penal Code to determine the correct charge. (22RT 5930.) Medina said he had seen petitioner encounter people who were belligerent and hostile, who had threatened petitioner and himself and called them names. (22RT 5930.) Petitioner did not kill any of them. (22RT 5930.)

Deputy Sheriff Eric Ricardo Fennell testified that he had worked with petitioner and had been to petitioner's house and socialized with him. (22RT 5938-5939.) He said that petitioner had been efficient in handling the situations he encountered in his job. (22RT 5939.) Petitioner and his wife Jo appeared to have a very good relationship and were affectionate with each other. (22RT 5939.) He described petitioner as a very caring person and a very good and loyal friend. (22RT 5939-5940.)

On cross-examination, Fennell testified that petitioner had dealt with people who had been abusive or called him names. Petitioner did not intervene unless he had to and did not "just fly off the handle and attack them." (22RT 5940.)

Petitioner's last penalty phase witness was Senior Deputy Sheriff Roberta Cowan, who had worked with petitioner and considered petitioner one of her best friends. (22RT 5942.) Her photographs were in petitioner's photograph albums. (22RT 5943-5944.) Cowan described petitioner as a "good man" and a loyal friend. (22RT 5946.) She said she had never had any problems with petitioner "as just between man-woman relationships." (22RT 5946 [quoting counsel's question].) She testified that petitioner was a very good police officer. (22RT 5943.) They had been beat partners from 1981 to 1984 and had dealt

with dangerous or violent suspects "all the time." (22RT 5944.) Most of the time Cowan and petitioner were each in single cars. (22RT 5947.) She believed that death would be an inappropriate sentence. (22RT 5944.) She explained, "I feel my friend got himself into a situation that was wrong. And I feel like it got totally out of hand; but it was not something that he intended to do. . . ." (22RT 5944.) On cross-examination, Cowan testified that petitioner was always in control in situations they encountered on the job. (22RT 5947.)

Cowan remembered the incident involving Ellen Martinez, whose street name was Angel. As far as Cowan knew, Martinez did not have a weapon. Cowan testified that it was a routine situation for officers to check out the cemetery because prostitutes brought their customers there. (22RT 5945.) Cowan did not believe that Martinez had any dispute with the customer. (22RT 5946.) Cowan said she and petitioner caught Martinez with a trick in a car, "coded off on them", pulled them out of the car and ran warrant checks. (22RT 5946.) She said, "it's quite routine." (22RT 5946.)

Hearing On Modification Of The Verdict And Imposition Of Sentence

At the hearing on the automatic motion to modify the death verdict under Penal Code section 190.4, subdivision (e), the court briefly discussed the evidence of second degree murder of Janine Benintende and the first degree murder of Tracie Johann Clark. (22RT 5993.) The court concluded:

> And so I do agree with the jury that the homicide of Tracie Johann Clark was murder in the first degree.
>
> I do not believe the testimony as it was outlined in the sodium amytol interview. I did not believe the testimony of Dr. Glaser.
>
> I do not think the jury believed it either. I found Dr. Glaser's testimony to be incredible.

I want to turn to the testimony of Dr. Bird and Miss Franz because while I might not have agreed with what they had to say, I thought that their testimony was genuine and that they felt what they were saying, and this is especially true of Dr. Bird.

But I don't believe that this man's actions could be excused by the things that have been brought up concerning his past.

Many people have had bad pasts. People have had worse pasts than he had and they have not taken the path that he has chosen to tr[ead].

(22RT 5993-5994.)

The court then discussed the penalty factors. (22RT 5994-5995.) In apparently discussing factor (b), the court said:

Well, of course, both of these murders involve the use of force or violence. But I think that his actions with Tambri Butler shocked me almost more than any other case I have ever heard.

The use of the cattle prod or the taser or whatever you call it, and the firing of the shot across the bridge of her nose, and requiring her to engage in all of these various and sundry sexual activities, that probably influenced the jury, in my view, and this court[,] more than any other because not only has it happened once with Janine Benintende, twice with Tracie Johann Clark; we know it happened with Angela Martinez; we know it happened with Tambri Butler.

How many more times did it happen? But even more importantly, how many more times in the future might it happen?

This man has no criminal record and that is a factor in mitigation. Defendant would have us believe that he committed these acts while he was under the influence of extreme mental or emotional disturbance, and I don't believe it, and neither did the jury. . . .

(22RT 5995.)

The court found that petitioner had the capacity to appreciate his criminality and that "certainly youth was no excuse." (22RT 5996.)

The court concluded:

And so, the court weighing all of them has determined that this man

is a danger to a certain segment of society, and maybe all of society.

> And when you take into consideration the circumstances of these crimes charged in this case and the circumstances of the other crimes that came out, I think that the penalty of death is not unreasonable, and the court will impose it.

(22RT 5996.)

In the commitment the court recited that it had independently reviewed the circumstances in mitigation and aggravation and confirmed the death verdict. (3CT 736.)

ARGUMENT

I.

THERE IS NO NEWLY-DISCOVERED OR FALSE EVIDENCE PERTINENT TO TAMBRI'S PENALTY PHASE IDENTIFICATION OF PETITIONER AS THE PERSON WHO BRUTALLY SEXUALLY ASSAULTED HER IN EARLY 1986; A DIFFERENT PENALTY WOULD NOT HAVE BEEN PROBABLE IF THE NEW EVIDENCE HAD BEEN PRESENTED (CLAIM III)

Petitioner alleges that Tambri has recanted her identification of him as the person who committed a violent sexual assault against her in 1986 and then tried to kill her. He argues that the recantation constitutes newly-discovered evidence. He also argues that Tambri's testimony that he committed the attack against her was false. Respondent disagrees with the factual allegation and with both arguments.

Recently, this Court described the principles governing habeas corpus review of a claim of newly-discovered evidence or false evidence.

> "Habeas corpus will lie to vindicate a claim that newly discovered evidence demonstrates a prisoner is actually innocent." (*In re Hardy* (2007) 41 Cal.4th 977, 1016, 63 Cal.Rptr.3d 845, 163 P.3d 853.) We have long recognized the viability of an actual innocence habeas corpus claim, at least insofar as the claim is based on newly discovered evidence or on proof false evidence was introduced at trial. (*In re Bell* (2007) 42 Cal.4th 630, 637, 67 Cal.Rptr.3d 781, 170 P.3d 153 [false evidence]; *In re Johnson* (1998) 18 Cal.4th 447, 453-454, 75 Cal.Rptr.2d 878, 957 P.2d 299 [both]; *In re Hall* (1981) 30 Cal.3d 408, 415-417, 424, 179 Cal.Rptr. 223, 637 P.2d 690 [both]; *In re Weber* (1974) 11 Cal.3d 703, 724, 114 Cal.Rptr. 429, 523 P.2d 229 [new evidence].) . . .
>
> The standard for determining whether to afford prisoners habeas corpus relief on the ground that newly discovered evidence demonstrates actual innocence is likewise established. Under principles dating back to *In re Lindley* (1947) 29 Cal.2d 709, 177 P.2d 918, "[a] criminal judgment may be collaterally attacked on habeas corpus on the basis of newly discovered evidence if such evidence casts 'fundamental doubt on

the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability. (*In re Hall[, supra,]* 30 Cal.3d [at p.] 417[, 179 Cal.Rptr. 223, 637 P.2d 690]; *In re Weber [, supra,]* 11 Cal.3d [at p.] 724[, 114 Cal.Rptr. 429, 523 P.2d 229].)' (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1246[, 275 Cal.Rptr. 729, 800 P.2d 1159].) '[N]ewly discovered evidence does not warrant relief unless it is of such character "as will completely undermine the entire structure of the case upon which the prosecution was based." ' (*In re Weber,* at p. 724[, 114 Cal.Rptr. 429, 523 P.2d 229], quoting *In re Lindley*[, at p.] 723[, 177 P.2d 918].)" (*In re Hardy, supra,* 41 Cal.4th at p. 1016, 63 Cal.Rptr.3d 845, 163 P.3d 853; accord, *In re Bell, supra,* 42 Cal.4th at p. 637, 67 Cal.Rptr.3d 781, 170 P.3d 153; *In re Johnson, supra,* 18 Cal.4th at p. 462, 75 Cal.Rptr.2d 878, 957 P.2d 299.) If "a reasonable jury could have rejected" the evidence presented, a petitioner has not satisfied his burden. (*In re Clark* (1993) 5 Cal.4th 750, 798, fn. 33, 21 Cal.Rptr.2d 509, 855 P.2d 729.)

(*In re Lawley* (2008) 42 Cal.4th 1231, 1238-1239.)

In *People v. Gonzalez*, this Court had stated:

In contrast with ineffective assistance claims, "[t]he 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. [Citation.] . . . ." (*Strickland v. Washington* [(1984)] 466 U.S. [668,] 694, 104 S.Ct. [2052,] 2068.)

Thus, a criminal judgment may be collaterally attacked on the basis of "newly discovered" evidence only if the "new" evidence casts fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability. (*In re Hall* (1981) 30 Cal.3d 408, 417, 179 Cal.Rptr. 223, 637 P.2d 690; *In re Weber* (1974) 11 Cal.3d 703, 724, 114 Cal.Rptr. 429, 523 P.2d 229.) By analogy, "new" evidence should not disturb a penalty judgment unless the evidence, if true, so clearly changes the balance of aggravation against mitigation that its omission "more likely than not" altered the outcome. (See *Strickland v. Washington, supra,* 466 U.S. at pp. 693-694, 104 S.Ct. at pp. 2067-2068.)

(*People v. Gonzalez* (1990) 51 Cal. 3d 1179, 1246.)

As alleged in the return, Tambri has not recanted her identification of petitioner as the person who assaulted her in 1986. In any event, the information provided by petitioner regarding Michael Ratzlaff does not cast substantial doubt on the evidence presented in the penalty phase of petitioner's trial that he was the person who attacked Tambri. Although Tambri described her attacker as being five feet, six to eight inches tall, and weighing 160 to 175 pounds (Exh. 39 (Vol. III at p. 301)), Ratzlaff was six feet, three inches, tall and weighed 205 pounds (Exh. 44 (Vol. IV at p. 17)).

Moreover, Tambri's description of the events which resulted in her identification of petitioner as her attacker show that she identified him from his face and voice. She testified that when she went to visit her husband in jail, she saw petitioner working in the main jail. She recognized him but did not know where she had seen him. (22RT 2780, 5791.) When she was in custody herself, she had a conversation with petitioner, which led her to recognize him as her attacker from his face and voice. (22RT 5791, 5802.) After Tambri indicated to petitioner that she recognized him, he effectively confirmed her identification with his reaction. (22RT 5792.) These events occurred less than a year after the attack and before petitioner was arrested. (See 22RT 5792.) Also before petitioner was arrested, Tambri told a female deputy working at the jail, Deputy Lockhart, that she had been raped by another deputy who was working there. (22RT 5792-5793, 5795-5797, 5805-5807.) Not long after that, she recognized petitioner from his picture in the Sheriff's Department annual and told Deputy Lockhart that she had seen her attacker's picture in the annual. (22RT 5792-5793, 5797-5799, 5806.) These circumstances confirm the accuracy of her identification to detectives when they came to see her the day after petitioner's arrest.

Petitioner fails to show that it was impossible for him to have been the person who attacked Tambri. Petitioner's proffered evidence does tend to show

that he did not own a white or beige truck at the time of the attack on Tambri, that he never grew a mustache unless he also had a beard, and that he did not own a stun gun. However, he could have borrowed a white domestic pickup truck, put on a false mustache, and obtained a stun gun.

Petitioner apparently relies on Tambri's early release after his sentencing hearing to show that, contrary to her testimony, she was promised consideration for her testimony against petitioner. (Pet. at pp. 41, ¶ 128, 42, ¶ 133.) However, the facts show that she was not informed that she would be released early. Thus, her testimony was correct. In addition, the later recommendation by a person claiming to be from the District Attorney's office that Tambri leave the area because she was in danger from other police officers (Pet. at p. 41, ¶ 129; see Return, ¶ 9), supports the inference that Tambri was released early at the request of the District Attorney's Office because she may have been in danger from Sheriff's officers while she was in jail. The apparent attempts to reduce the danger to Tambri which resulted from her testimony do not constitute a reward for giving that testimony. Thus, the facts fail to show any false testimony by Tambri.

In sum, the proffered evidence does not "so clearly change[] the balance of aggravation against mitigation that its omission 'more likely than not' altered the outcome." (*People v. Gonzalez, supra,* 51 Cal. 3d 1179, 1246.)

Finally, respondent expects that the evidence to be presented on the issue will show that Tambri's identification of petitioner was credible, reliable, and correct.

II.

THE PROSECUTION DID NOT FAIL TO DISCLOSE ANY MATERIAL EVIDENCE (CLAIM IV)

Petitioner argues that the prosecution failed to disclose material evidence favorable to the defense. (Pet. at pp. 61-68.) Petitioner relies on information

regarding attacks on prostitutes in which Michael Ratzlaff was either convicted or was a suspect and on further information about Tanbri's criminal records.

> Before and during trial, due process requires the prosecution to disclose to the defense evidence that is material and exculpatory. (*Kyles v. Whitley* (1995) 514 U.S. 419, 432-433, 437-438, 115 S.Ct. 1555, 131 L.Ed.2d 490; *United States v. Bagley* (1985) 473 U.S. 667, 674-678, 105 S.Ct. 3375, 87 L.Ed.2d 481; *Brady v. Maryland* (1963) 373 U.S. 83, 86-87, 83 S.Ct. 1194, 10 L.Ed.2d 215.) This obligation continues after trial: " '[Even] after a conviction[,] the prosecutor . . . is bound by the ethics of his office to inform the appropriate authority of . . . information that casts doubt upon the correctness of the conviction.' " (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1261, 275 Cal.Rptr. 729, 800 P.2d 1159, quoting *Imbler v. Pachtman* (1976) 424 U.S. 409, 427, fn. 25, 96 S.Ct. 984, 47 L.Ed.2d 128; see also Rules Prof. Conduct of State Bar, rule 5-220 [duty not to suppress evidence]; ABA Model Rules Prof. Conduct, rule 3.8 ["The prosecutor in a criminal case shall: [¶] . . . [¶] (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense"].)

(*In re Lawley, supra,* 42 Cal.4th 1231, 1246.)

"[T]he prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." (*United States v. Agurs* (1976) 427 U.S. 97, 108.) "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*United States v. Bagley* (1985) 473 U.S. 667, 683-684 [opinion of Justices Blackmun, joined by Justice O'Connor, announcing the judgment of the Court as to this Part], 685 [opinion of Justice White, joined by Chief Justice Berger and Justice Rehnquist, concurring in the judgment]; *see Kyles v. Whitley* (1985) 514 U.S. 419, 434 [majority opinion], 460 [dissenting opinion].) The Court stressed in *Bagley*, "such suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. Consistent with 'our overriding concern with the justice of the

finding of guilt,' *United States v. Agurs, supra,* 427 U.S. at 112, 96 S.Ct. at 2401, a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." (*United States v. Bagley, supra,* 473 U.S. 667, 678.) In *Kyles*, the court stated, "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (*Kyles v. Whitley* (1985) 514 U.S. 419, 434.)

The duty of disclosure extends not only to the prosecutor, but also to the law enforcement agency or agencies which investigated the case against the defendant, but not to agencies which the prosecution would not be expected to employ in that case. (See discussion in *United States v. Young* (7th Cir. 1994) 20 F.3d 758, 764.)

As this Court has stated:

> [N]ot every nondisclosure of favorable evidence denies due process. '[S]uch suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. Consistent with "our overriding concern with the justice of the finding of guilt," [citation] a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.' (*United States v. Bagley* (1985) 473 U.S. 667, 678 [105 S.Ct. 3375, 3381, 87 L.Ed.2d 481] (*Bagley*).)

(*In re Brown* (1998) 17 Cal.4th 873, 884.)

"Evidence is 'material' 'only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different.' [Citations.] The requisite 'reasonable probability' is a probability sufficient to 'undermine[ ] confidence in the outcome' on the part of the reviewing court." (*In re Sassounian* (1995) 9 Cal.4th 535, 544.)

This standard has been applied to impeaching evidence:

> In general, impeachment evidence has been found to be material where the witness at issue "supplied the only evidence linking the defendant(s) to the crime," *United States v. Petrillo*, 821 F.2d 85, 90 (2d Cir.1987); see also *Giglio v. United States*, 405 U.S. [150,] 154-55, 92 S.Ct. [763,] 766 [31 L.Ed.2d 104] [(1972)] (*Brady* violation found where government failed to disclose promise not to prosecute cooperating witness on whom government's case against defendant "almost entirely' depended), or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case, see *United States v. Badalamente*, 507 F.2d 12, 17-18 (2d Cir.1974) (same re nondisclosure of "hysterical" letters that would have had "powerful adverse effect" on witness's credibility, where that credibility was "crucial to the determination of [the defendant's] guilt or innocence"); cert. denied, 421 U.S. 911, 95 S.Ct. 1565, 43 L.Ed.2d 776 (1975). In contrast, a new trial is generally not required when the testimony of the witness is "corroborated by other testimony," *United States v. Petrillo*, 821 F.2d at 89 . . . ; [citation]; see also *Giglio v. United States*, 405 U.S. at 154, 92 S.Ct. at 766 (new trial not required where newly discovered evidence is merely "possibly useful to the defense but not likely to have changed the verdict").

(*U.S. v. Payne* (2d Cir.1995) 63 F.3d 1200, 1210, quoted in *People v. Salazar* (2005) 35 Cal.4th 1031, 1050 [other evidence supported the defendant's guilt]; cf. *United States v. Zuno-Arce* (9th Cir. 2003) 339 F.3d 886, 889-891 [evidentiary hearing was not required by unreliable recantation of a witness who was impeached at trial].)

Petitioner alleges that the prosecution committed error under *Brady v. Maryland, supra,* 373 U.S. 83, by failing to give the defense:

(1) Information on sexual assaults on Lavonda Imperatrice, Della Winebrenner, Jeannie Shain, and Deborah Casteneda. (Pet. at pp. 62-67; see Pet. at pp. 47-55.)

(2) A copy of Tambri's criminal record. (Pet. at pp. 67-68.)

As discussed with respect to Claim III, Ratzlaff was reasonably excluded as Tambri's attacker by her positive identification of petitioner and by marked differences between Ratzlaff's height and weight and Tambri's description of

her attacker. As a result, the information about the attacks by Ratzlaff had no exculpatory value to petitioner which would have been apparent to authorities.

Moreover, since Tambri's identification of petitioner was credible, reliable, and correct, the information regarding the attacks by Ratzlaff is not material in that there is no reasonable probability Tambri's identification would have been refuted by the information.

Although the defense was entitled to impeaching *information* from Tambri's criminal record, it is well established that a criminal defendant is not entitled to the discovery of the "rap sheets" which might include that information. (*People v. Roberts* (1992) 2 Cal.4th 271, 307-308.) As a result, the mere failure to disclose a witness's rap sheet has no tendency in reason to show that discoverable information from the witness's criminal record has not been disclosed. Thus, petitioner's allegation that no copies of Tambri's rap sheet was found in defense counsel's trial file fails (Pet. at p. 67, ¶ 215, referring to Exh. 1) to show that the prosecution did not provide the defense with the relevant information before Tambri testified at the penalty phase.

Moreover, further information on the nature of the charge for which Tambri was serving a sentence when she testified could not have affected her credibility. Tambri testified at the penalty phase on March 23, 1988 that she was in custody "[f]or possession of heroin" at the time of trial. (22RT 5778-5779.) Although petitioner argues that this characterization was inaccurate (Pet. at p. 67, ¶ 215), it more accurately describes the underlying facts than the lesser offense of possession for sale to which she pleaded guilty as a result of a plea bargain (Exh. 2 (Vol. I at p. 152)). The reports on the incident show that she had furnished heroin to a companion – with no indication of a sale – and thus could have been guilty of violating Health and Safety Code section 11352. (Exh. 2 (Vol. I at pp. 158-162, 168-170.) She clearly pleaded guilty to an offense she did not commit because it provided for a lesser punishment.

However, the act underlying of the offense to which she pleaded was possession, an act she actually committed. As a result, the most accurate characterization of the conduct underlying her conviction was, as she said, possession of heroin.

As petitioner suggests, the characterization could have been more complete. However, the additional information which might have been provided was not significantly more impeaching than the totality of Tambri's testimony about her lifestyle, criminal conduct, and record. Tambri testified that she was *currently* a heroin addict and a prostitute (22RT 5779) and that she had been a prostitute for about ten years (22RT 5779). She testified on cross-examination that she had about eight or nine heroin arrests and about three or four prostitution arrests and she had been in jail for about a month when she recognized petitioner as her attacker. (22RT 5795-5796, 5801.) She said she was released after serving about six months in April 1987. (22RT 5795-5796.) When she testified, she was again in custody serving a term in jail. (22RT 5778, 5804.) Thus, she described multiple extended terms in jail. She testified that she could not say she was "totally cleaned up" or that she ever would quit using drugs, although she hoped to and had a job and plans. (22 RT 5804.) Under the circumstances, her credibility could not have been affected by testimony that she was in custody for possession of heroin for sale. Moreover, her later arrest supports her testimony that no consideration was offered in exchange for her testimony. (22RT 5794.) As noted in the previous argument, her early release after petitioner's sentencing hearing fails to show that Tambri's testimony was affected by any expectation of a reward. Thus, it fails to contradict her testimony that there were no "promises of leniency or any type of deal." (22RT 2794.)

Finally, it is not reasonably probable that the penalty verdict would have been different if the information now proffered by petitioner had been

disclosed, even if it is assumed arguendo that the result had been that Tambri's identification of petitioner was discredited. At the guilt phase, the jury had found that petitioner committed the intentional, deliberate and premeditated murder of Tracie Clark to prevent her from reporting him to the police. The evidence showed he had shot Tracie six times, in the front, side and back, with hollow-point bullets from a .38-caliber revolver, emptying the gun. One of the shots was fired at very close range and another was fired while her back was against a solid surface, such as the ground. The latter fact coincides with petitioner's admission to detectives that he shot Tracie when she was leaning against an embankment on the road near the canal. (17RT 4686-4687; see 17RT 4568, 4579.) Four of the entry wounds were clustered around Tracie's right breast. The District Attorney noted in argument that petitioner had followed Tracie to the bank and made a deliberate decision to empty his gun into her to prevent her from reporting that he had shot her. (RT 5580-5581; cf. RT 5581-5582.) The jury had also found that petitioner had murdered Janine Benintende a year before Tracie Clark by wilfully shooting Janine three times, in the front and back. He had fired two of the shots through the same entry wound. The two gunshot patterns suggested petitioner had not shot quickly but had made decisions as to where to place at least some of the shots, indicating a callous calculation in how both victims were shot. Upon petitioner's arrest after the Tracie Clark murder, the gun was found well cleaned in the back of his pickup truck. The jury obviously rejected the defense theory that petitioner had been in a highly emotional dissociated state at the time of the Tracie Clark murder. The evidence of the sexual assault on Tambri was no more serious than the two callous murders of prostitutes which were shown at the guilt phase.

As a result, it is not reasonably probable that the jury would have imposed a sentence of life without parole even if it had concluded that petitioner had not attacked Tambri.

III.

DEFENSE COUNSEL MADE REASONABLE TACTICAL DECISIONS IN REPRESENTING PETITIONER AT THE PENALTY PHASE; A DIFFERENT RESULT WOULD NOT HAVE BEEN REASONABLY PROBABLE IF THE CASE HAD BEEN HANDLED AS PETITIONER NOW SUGGESTS

This Court has issued an order to show cause as to several sub-claims of constitutionally inadequate representation by counsel. As alleged in the return, the facts fail to show that counsel's performance was deficient or that petitioner was prejudiced.

The constitutional standard for inadequate assistance of counsel was defined in *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*):

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. *Engle v. Isaac*, 456 U.S. 107, 133-4, 102 S.Ct. 1558, 1574-5, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' . . .
>
> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's

> function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."

(*Strickland v. Washington, supra*, 466 U.S. 668, 689-90; see also *Kimmelman v. Morrison* (1986) 477 U.S. 365, 382 ["highly demanding" standard of "gross incompetence"].)

The court stated:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

(*Strickland, supra,* 466 U.S. 668, 690-691, quoted in *In re Thomas* (2006) 37 Cal.4th 1249, 1258 and *In re Lucas* (2004) 33 Cal.4th 682, 722; see *Burger v. Kemp* (1987) 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed. 2d 638; *Bonin v. Calderon* (9th Cir. 1996) 59 F.3d 815, 833, 835, cert. denied, 116 S.Ct. 718, 133 L.Ed. 2d 671.)

The duty to investigate "'is not limitless: it does not necessarily require that every conceivable witness be interviewed. . . .'" (*Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1040, quoting from *United States v. Tucker* (9th Cir. 1983) 716 F.2d 576, 584.)

"The correct approach to investigation reflects the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources." (*Rogers v. Zant* (11th Cir. 1994) 13 F.3d 384, 387, cert. denied 115 S.Ct. 255, 130 L.Ed. 2d 175.)

In *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 482, the United States Supreme Court specified the prejudice inquiry from *Strickland* which applies to situations other than a complete deprivation of representation. In that case, the defendant was deprived of an appeal due to counsel's failure to consult with the defendant. Although the defendant had been completely deprived of an appeal proceeding, the court applied a prejudice test, inquiring whether a notice of appeal would have been filed if counsel had performed adequately. The court explained:

> [I]n cases involving mere "attorney error," we require the defendant to demonstrate that the errors "actually had an adverse effect on the defense." *Strickland*, *supra*, at 693. See, e.g., [*Smith v.*] *Robbins* [(2000) 528 U.S. 259] at 286, 120 S.Ct. 746 (applying actual prejudice requirement where counsel followed all required procedures and was alleged to have missed a particular nonfrivolous argument); *Strickland*, *supra*, at 699-700 (rejecting claim in part because the evidence counsel failed to introduce probably would not have altered defendant's sentence).

The court further stated:

> [W]e follow the pattern established in *Strickland* and *Cronic*, and reaffirmed in *Robbins*, requiring a showing of actual prejudice (i.e., that, but for counsel's errors, the defendant might have prevailed) when the proceeding in question was presumptively reliable, but presuming prejudice with no further showing from the defendant of the merits of his underlying claims when the violation of the right to counsel rendered the proceeding presumptively unreliable or entirely nonexistent. See *Strickland*, 466 U.S., at 493-496; [*United States* v.] *Cronic*, 466 U.S., [648,] 658-659 [(1984)]; *Robbins*, at 286-287, 120 S.Ct. 746.

(*Flores-Ortega, supra*, 528 U.S. 470, 484; cf. *Bell v. Cone* (2002) 535 U.S. 685, 696-698.)

This Court has stated, in assessing a claim of inadequate representation at the penalty phase:

> "Prejudice is established when ' "there is a reasonable probability that, absent the errors [of counsel], the sentencer . . . would have concluded

> that the balance of aggravating and mitigating circumstances did not warrant death." [Citations.] As in the guilt phase, reasonable probability is defined as one that undermines confidence in the verdict.' [Citations.]"

(*In re Hardy* (2007) 41 Cal.4th 977, 1032.)

In *Lockhart v. Fretwell* (1993) 506 U.S. 364, the court emphasized that merely demonstrating that the outcome would have been different was insufficient to show prejudice. (*Lockhart v. Fretwell*, 506 U.S. 364, 369, fn. 2, relying on *Nix v. Whiteside* (1986) 475 U.S. 157, 175-176 [defense counsel was not required to offer perjured testimony].) In addition, it noted that a harmless error inquiry was proper even if deficiency and prejudice were found. (*Nix*, *supra*, at p. 163, fn. 3, 113 S.Ct. at 843, fn. 3; cf. *Strickland* v. *Washington*, *supra*, 466 U.S. 668, 699 [overwhelming evidence].)

> In a habeas corpus petition alleging trial counsel's investigation or presentation of evidence was incompetent, "the petitioner must show us what the trial would have been like, had he been competently represented, so we can compare that with the trial that actually occurred and determine whether it is reasonably probable that the result would have been different." (*In re Fields* (1990) 51 Cal.3d 1063, 1071, 275 Cal.Rptr. 384, 800 P.2d 862.) After weighing the available evidence, its strength and the strength of the evidence the prosecution presented at trial (*In re Thomas, supra,* 37 Cal.4th at p. 1265, 39 Cal.Rptr.3d 845, 129 P.3d 49), can we conclude petitioner has shown prejudice? That is, has he shown a probability of prejudice "sufficient to undermine confidence in the outcome"? (*Strickland, supra,* 466 U.S. at p. 694, 104 S.Ct. 2052; *In re Thomas,* at p. 1256, 39 Cal.Rptr.3d 845, 129 P.3d 49.)

(*In re Hardy* (2007) 41 Cal.4th 977, 1025.)

"'In assessing prejudice [at the penalty phase], we reweigh the evidence in aggravation against the totality of available mitigating evidence.'" (*In re Hardy,supra,* 41 Cal.4th 977, 1032, quoting *Wiggins v. Smith* (2003) 539 U.S. 510, 534.)

A. Alleged Inadequate Background Investigation (Subclaim G)

Petitioner argues in subclaim G of Claim V that his trial counsel's performance was deficient in failing to perform an adequate investigation of his background, particularly in failing to have investigators interview his friends, family, and co-workers, and in failing to adequately investigate the prosecution's evidence regarding the incidents involving Ellen Martinez and Tambri Butler in preparation for his penalty phase case for the defense. (Pet. at pp. 140-145.)[45/] Respondent expects that the evidence will show that counsel made reasonable tactical decisions under the circumstances and that a different result would not have been reasonably probable if the case had been handled as petitioner now suggests.

In its informal opposition (IO 92-93), respondent noted that the petition failed to account for all of the investigation which was shown in the trial record. For example, defense therapist Joan Franz testified that she received information from petitioner, his brother Dale, "family members" and from the "Susan Peninger reports." (20RT 5434; cf. 20RT 5421 [information from Dale].) Dale's declaration shows that he imparted family history information to defense investigator Susan Peninger before trial. (Exh. 5 at p. 1.) In addition, Dr. Bird testified that both petitioner and Dale provided him with family history information. (E.g. 20RT 5482.) Although petitioner complains

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45. Respondent notes that the Court did not issue an order to show cause on a more specific allegation in subclaim I that counsel performed inadequately in failing to investigate the Ellen Martinez incident. (See Pet. at pp. 154-159.) The court also did not include subclaims H and J involving Martinez in the order to show cause. (See Pet. at pp. 145-153, 160-164.) Nevertheless, respondent will discuss Ellen Martinez in addressing subclaim G. However, in the event that the Court did not intend to issue an order to show cause as to any allegations regarding the evidence of the Ellen Martinez incident, respondent requests clarification in a later order by the Court, such as by excluding the Ellen Martinez evidence from a reference order.

about the investigation of his friends and family members (Pet. 141-142), the witnesses in mitigation included members of petitioner's family, co-workers and friends testified as mitigating witnesses (see RB 84-89, describing the testimony of petitioner's brother Dale, wife Jo, stepdaughter Carol Truitt; Deputy Sheriffs Ulysses Williams, Cecil Swearingen, William Fisher, Refugio Medina, Eric Ricardo Fennell, and Roberta Cowan; and California Highway Patrol Officer Travis Lee Mitchell, Jr.).

As to Ellen Martinez, the substance of petitioner's allegation is that his trial counsel performed no independent investigation.[46] Specifically, he faults his trial counsel for failing to employ an investigator to interview these witnesses. However, petitioner's exhibits show that his trial counsel was in possession of the documents which contained the pertinent information. (Exhs 1 at pp. 2-3 [Sparer declaration, discussing trial counsel's file], 33 [civil service commission letter and decision; proposed decision discussing the evidence] 34 [Internal Affairs Division investigative reports, including interviews with Ellen Martinez, Roberta Cowan nee Alberta Dougherty (see return at ¶ =) and others], 35 [personnel complaint by Martinez – sustained], 36 [dismissal letter], 37 [letter notifying county counsel of appeal], 38 [radio log].) Thus petitioner fails to show that his trial counsel did not have the pertinent information.

This Court has stated, "As proof of ineffectiveness, [defendant] Thomas points to [attorney] Chaffee's decisions to resist the assistance of a second attorney or public defender investigator in preparing for trial. We need not second-guess the procedures Chaffee employed. Different counsel may choose

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46. Petitioner also discusses allegations from other claims: the failure to object to the Martinez evidence at the penalty phase (subclaim H), the failure to impeach Martinez with the information in counsel's possession (subclaim I), and the failure to request certain instructions pertinent to Martinez (subclaom J). Since no order to show cause was issued as to these subclaims, respondent concludes that they are beyond the scope of the instant return.

to conduct investigations in different ways, and it is for counsel, not this court, to decide how to obtain the information needed to prepare adequately for trial. (See *In re Hall* (1981) 30 Cal.3d 408, 425, 179 Cal.Rptr. 223, 637 P.2d 690 [declining to criticize counsel for electing to forgo use of trained investigator].)" (*In re Thomas* (2006) 37 Cal.4th 1249, 1264.) Moreover, "there is no fixed rule requiring counsel to confirm all key facts stated in law enforcement investigation reports." *(In re Cudjo* (1999) 20 Cal.4th 673, 694.)

B. Alleged Inadequacies In Addressing The Attack On Tambri (Subclaims G(2), K, L, M, N, And O)

In Subclaim G, petitioner also discusses counsel's alleged failure to investigate Tambri Butler's identification of him as the man who assaulted her. Since petitioner discusses counsel's performance in addressing the attack on Tambri Butler in other subclaims, respondent will address the allegations in one subargument.

Petitioner alleges that his trial counsel: failed to conduct any investigation into Tambri's identification of him as the man who assaulted her (Pet. at pp. 144-145 [subclaim G(2)]; failed to use available information to impeach Tambri's identification (Pet. at pp. 164-174 [Subclaim K]); failed to object to the admission of Tambri's testimony and related evidence (Pet. at pp. 175-176 [subclaim L]); failed to impeach or rebut Tambri's testimony (Pet. at pp. 177-179 [subclaim M]); failed to discuss the evidence of the incident in argument (Pet. at 179-181 [subclaim N]); and failed to request CALJIC No. 2.92 on eyewitness identification factors (Pet. at pp. 181-184 [subclaim O]).

Respondent has alleged above that Tambri's identification of petitioner was reliable, credible, and correct. Moreover, Tambri has recently confirmed her facial identification of petitioner. (Return, ¶ 4.) Under the circumstances, the claimed discrepancies between Tambri's description of her attacker and petitioner are insignificant. (See Pet. at pp. 164-174 [subclaim K]; Pet. at pp.

177-179 [subclaim M].)

Petitioner specifically argues that counsel should have impeached Tambri with information that she was serving a term in jail for a violation of Health and Safety Code section 11351 (possession of a controlled substance for sale), although she testified she was in jail for "possession of heroin." (Pet. at pp. 172-174 [subclaim K]; see 22RT 5779-5780.) As noted in argument II [Claim 4], Tambri also testified that she was currently a heroin addict and a prostitute and had been a prostitute for about ten years. (22RT 5779.) She testified that she could not say she was "totally cleaned up" or that she ever would quit using drugs, although she hoped to and had a job and plans. (22 RT 5804.) She had about eight or nine heroin arrests and about three or four prostitution arrests. (22RT 5779-5780, 5796, 5801.) Her testimony showed that she served six months in jail during the time she recognized respondent as her attacker, was released, and was again in custody serving a term in jail at the time she testified. (22RT 5778, 5795-5796, 5801.) Further information about the nature of her current conviction would not have affected her credibility.

Petitioner further argues that counsel was ineffective in failing to conduct an investigation to show that Tambri's identification of him as her attacker was influenced by her knowledge of petitioner's arrest and having seen his image on television (Pet. at pp. 171-172 [subclaim K]) and to present evidence based on that investigation (Pet. at pp. 177-178 [subclaim M(1)].) Petitioner argues that "[i]nterviews with Mr. [sic] Butler's cellmates would have also established this point." (Pet. at p. 172.) However, petitioner only relies on Tambri's alleged statement in a 1999 declaration that she had seen petitioner's image on television and had discussed the case with her cellmates. (Pet. at p. 172, citing Exh. 16.) The allegation fails to show that Tambri's cellmates would have provided testimony in 1988 to contradict Tambri's testimony.

Petitioner also argues that counsel was ineffective in failing to discover that he had signed Tambri's notice to appear on April 24, 1985 after she was arrested the previous evening by Deputy J.C. Paul for being under the influence of a drug and trespassing at a truck stop. (Pet. at p. 173; see Exh. 2 (Vol. 1 at p. 23).) However, the possibility that petitioner was in contact with Tambri at the jail has no reasonable tendency to undermine her identification of him as her attacker in light of the other contacts with petitioner at the jail as she testified. As she described, she did not initially recognize him at the jail because he was wearing a uniform (22RT 5791), as he apparently was when he signed her notice to appear. If Tambri's identification of petitioner as her attacker could be based on seeing him in uniform before the attack, it could equally have been based on seeing him in uniform after the attack. Thus, the possible 1985 contact was inconsequential.

In any event, Tambri's testimony shows that she recognized petitioner well before he was arrested. Tambri was attacked around February 1986. Tambri testified that she saw petitioner working at the jail on two occasions when she went to visit her husband in jail. She knew she had seen him before but was not sure when. (22RT 2780, 5791.) Later, when she was in jail herself, she was taken through the A Deck to the visiting room, saw petitioner and asked if he had arrested her before. He told Tambri he had arrested her in Arvin, but she had never been arrested there. (22RT 5791.) At that point, she recognized that he was the man who had attacked her, which led to an angry exchange with petitioner. (22RT 5792.) In discussions which occurred around late October to early November 1986, before petitioner was arrested, she told Jeannine Lockhart, a deputy at the jail, that when she was working as a prostitute that she had been raped by a sheriff's deputy who was working at the

jail. (22RT 5790, 5792-5796, 5805-5807.)[47] Lockhart showed Tambri a *Behind the Badge* magazine with photos of Sheriff's personnel, including petitioner without a mustache. She saw a photo of the person who had attacked her, but refused to tell Lockhart who it was. (22RT 5692-5793, 5797-5799, 5608; Trial Exh. 69 at p. 90; Exh. 46.) At some time after petitioner was arrested, Lockhart told investigator Tam Hodgson about Tambri's report. (22RT 5810.) Tambri was contacted and interviewed by Sheriff's officers and by investigator Tam Hodgson. (22RT 5793, 5795, 5802.) She told them what had happened and identified a photo of petitioner. (22RT 5794, 5802-5803.)

There appears to be no dispute that Tambri saw petitioner working in the jail before she identified him to Detectives Soliz and Lage and Investigator Hodgson. Thus, the jury was aware of a possible basis for an erroneous identification by Tambri. If Tambri had testified falsely that she identified petitioner in the Sheriff's annual such a conclusion was possible. The jury was also aware of evidence that petitioner did not own a white or tan pickup at the time of Tambri's attack (17RT 4666-4668; see Trial Exh. 78) and did not have a mustache (22RT 5909-5910). The prosecution never offered any evidence to the contrary. However, whether petitioner owned a white or beige pickup truck was a minor point in light of Tambri's rather vague description of her attacker's vehicle and the possibility that petitioner could have borrowed a truck to pick up prostitutes. Similarly, in light of Tambri's identification of petitioner – without a mustache – and her testimony of how she came to recognize him, whether he had a mustache was also a minor point.

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47. The records obtained by the defense investigator indicate that on October 25, 1986, Tambri was ordered to serve 66 further days in jail after credit for time served for being under the influence of heroin in case number 354233, after having been ordered to serve five days for prostitution and giving a false name to an officer in case number 357533. (Exh. 2 (Vol I at pp. 12-13, 56, 71).)

Tambri was firm in her in-court identification of petitioner and her story was compelling and believable. Under the circumstances, the additional impeachment as now argued by petitioner was not reasonably likely to have led the jury to conclude that petitioner was not Tambri's attacker.

Next, petitioner argues that his counsel was ineffective in failing to object to the admission of evidence of the attack on Tambri. (Pet. at pp. 175-176 [subclaim L].) Petitioner argues that there was insufficient evidence that he was the person who attacked Tambri. However, Tambri's identifications of him in court, from the Sheriff's Department annual, and from a photo line-up were clearly sufficient. Thus, the claim can only be sustained on new evidence which might be presented pursuant to the order to show cause.

Petitioner also argues that counsel was ineffective in failing to present an expert witness on eyewitness identification. (Pet. at pp. 178-179 [subclaim M(2)]) and to request CALJIC No. 2.92 on eyewitness identification (Pet. at pp. 181-184 [subclaim O to the extent that an order to show cause was issued]).

Respondent contends that the circumstances of Tambri's identification obviate any issues particular to eyewitness identifications. Instead, the issue was simply one of credibility, on which the jury was adequately instructed at the guilt phase. (3CT 617-618 [CALJIC No. 2.20].) Respondent notes that several factors in CALJIC No. 2.20 would have been detrimental to petitioner's defense, particularly:

> The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act; . . .
>
> The witness' capacity to make an identification; . . .
>
> Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup; . . .
>
> The extent to which the witness is either certain or uncertain of the identification;

Whether the witness' identification is in fact the product of [his] [her] own recollection . . . .

(CALJIC No. 2.92 (1984) (quoted at Pet. at pp. 182, fn. 131).)

Petitioner argues that counsel performed inadequately in failing to address the correctness of Tambri's identification in argument. (Pet. at pp. 179-181 [subclaim N].) As noted in paragraph 34 of the Return, counsel could reasonably decide not to address the attack on Tambri in his penalty phase argument. Counsel could properly conclude that, having convicted petitioner of the brutal and callous murders of two prostitutes, the jury would not be swayed by an argument of mistaken identity as to the attack on Tambri, even if it succeeded. The argument counsel did give effectively stressed the defense theories that petitioner was "deeply emotionally disturbed" (22RT 5963) but otherwise lived an exemplary life. It permitted him to argue that if the jurors returned a verdict of death they would "kill the good part of David Rogers." (22RT 5964.) In light of the facts, it was the most effective argument counsel could have given.

In any event, respondent expects the evidence to show that Tambri's identification of petitioner was reliable, credible, and correct, and, as a result, there is no reasonable probability of prejudice from counsel's alleged failings with respect to her testimony.

C. Prejudice (Subclaim Q)

As discussed in Argument IV, the jury found petitioner guilty of the first degree premeditated murder of Tracie Clark and the intentional second-degree murder of Janine Benintende a year earlier. The placement of the shots into the two victims' bodies showed a callous calculation in how both victims were shot. As described in the Statement of Facts, defense counsel presented ample evidence of mitigation in petitioner's abusive background, resulting emotional

disturbances, as well as positive character evidence. The prosecutor did not dispute the most significant mitigating evidence, which was that petitioner had been sexually abused as a child. (21RT 5615, 1622-5623.) In light of these factors, the additional evidence or motions petitioner now argues counsel should have presented could not reasonably have led to a different result.

IV.

THE ERRORS CLAIMED, EITHER ALONE OR IN COMBINATION, DID NOT AFFECT THE PENALTY PHASE VERDICT

The jury convicted petitioner of the brutal, callous, and calculated murders of two prostitutes the first night each was in Bakersfield and were less likely to be missed if they disappeared. (See RB 7, 12, 268-269.) He dumped both of their bodies in secluded locations and inferably cleaned his gun. (See RB 15, citing 18RT 4875 .) Although the attack on Tambri was also brutal, the evidence showed that it was, to some extent, situational since it arose from a dispute over prostitution services, as petitioner said occurred with Tracie Clark. As a result, it had some mitigating effect. However, the fact that petitioner emptied his gun into Tracie Clark *after* the dispute was highly aggravating. Combined with the unexplained but similar shooting of Janine Benintende, the circumstances in aggravation were very strong. In light of the aggravating circumstances, the jury could only have been expected to return a verdict of life without parole if it had heard compelling mitigating evidence. In an evident attempt to provide that, defense counsel presented an extensive penalty defense which built on the mental defenses presented at the guilt phase. In light of the facts of the offenses of which petitioner was convicted at the guilt phase and the quality of the defense at the penalty phase, none of the errors urged by petitioner, either alone or in combination, affected the verdict.

CONCLUSION

For the reasons discussed, respondent will request the petition be denied after the presentation of evidence.

Dated: November 19, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RETURN TO ORDER TO SHOW CAUSE uses a 13 point Times New Roman font and contains 35,874 words.

Dated: November 19, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re David Keith Rogers**

No.: **S084292**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On November 19, 2008, I served the attached **RETURN TO ORDER TO SHOW CAUSE** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 19, 2008, at Sacramento, California.

_____
Declarant

30592807.wpd