SUPREME COURT COPY

S117235

No.____________________

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

ROBERT LEWIS, JR.

On Habeas Corpus

No.________________

(Related Automatic Appeal
No. S020670

Los Angeles Superior
Court No. A027897

PETITION FOR WRIT OF HABEAS CORPUS

SUPREME COURT
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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re ROBERT LEWIS, JR., On Habeas Corpus	Case No. PETITION FOR WRIT OF HABEAS CORPUS; REQUEST FOR JUDICIAL NOTICE; REQUEST FOR DISCOVERY AND LEAVE TO AMEND [Related Automatic Appeal Pending in Criminal No. S020670]

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

Petitioner, Robert Lewis, Jr., by and through his attorneys, Sanger & Swysen and Robert M. Sanger, Esq., petitions this Court for a Writ of Habeas Corpus and for such other and further relief as the Court may deem just and proper. By this verified Petition, including each and every claim and fact set forth in the accompanying Memorandum of Points and Authorities as if set forth in full herein, Petitioner alleges as follows:

INTRODUCTION

Robert Lewis, Jr., is a poor man who suffered unspeakable abuse as a child. He is mentally retarded and suffers from learning disabilities. He is of African descent. Mr. Lewis was charged with murder in 1983 in Long Beach. He was appointed the infamous Ron Slick, a defense attorney whose dubious claim to fame is to have sent more people to death row than any prosecutor in the state; all of them poor, almost all of them Black and all of them undefended in any sense of the word.

Ron Slick's egregious behavior in defending many of his homicide clients has been the subject of both public and judicial review. It has been Slick's pattern and practice in capital cases not to present exculpatory evidence to a jury, to decline to challenge prosecution evidence, to fail to object to the presentation of improper evidence, to not cross- examine the People's witnesses, and to offer little or no evidence to the jury.

This case, the case of Robert Lewis, Jr., was no different. Ron Slick

put on no meaningful defense on behalf of Mr. Lewis despite exculpatory evidence available to him. Slick put on no meaningful mitigation evidence. The whole trial took four days – the penalty phase took 1 hour and 36 minutes which included the argument of counsel and the instructions by the judge.

This case is a paradigm example of what is wrong with the death penalty system in this country. It is a shame that it occurred in California. It should not be swept under the rug. Robert Lewis, Jr. did not have a real trial, he did not have a real penalty phase and he did not have a real defense lawyer.

This is a second Petition for Writ of Habeas Corpus in that a first Petition was filed in 1988 under case number S005412. That Petition was denied without opinion[1] but Mr. Lewis' death sentence was reversed on direct appeal.[2] We respectfully submit that this Petition should be heard, and the relief granted, in order to avoid extreme injustice and to allow Petitioner to 1) further develop claims which were raised in the first Petition

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[1] Order of September 6, 1989, denying Petition for Habeas corpus in Case number S005412. Note that Lexis, Westlaw, and West have variously and incorrectly reported this date as September 7, 1986 (*People v Lewis*, (1990) 50 Cal.3d 262, 290, fn 10) and September 7, 1989 (*In re Robert Lewis, Jr.* (1989), 1989 Cal. LEXIS 2737).

[2] *People v. Lewis* (1990) 50 Cal.3d 262, 267, Supreme Court Case number 24135.

but which have been subject to discovery of new facts and substantiated by further expert opinions; 2) to present claims which were not raised by the first Petition; 3) to give this Court the opportunity to review the conviction and sentence in light of the cumulative effect of all errors; and 4) to avoid a miscarriage of justice.

We respectfully submit that prior habeas counsel was operating under different rules and limited funding. Furthermore, Slick and others associated with him failed to deliver their entire files either to prior habeas counsel or to the undersigned. This situation is exacerbated by the fact that the District Attorney's Office of the County of Los Angeles claims to have lost its files and the Long Beach Police Department have destroyed theirs. Petitioner's present counsel has been able to obtain some information previously unavailable to counsel handling the first petition through the expenditure of additional funds and through research and investigation not available in 1988.

Whatever the procedural mechanism by which this case comes before this Court, it is clear that this is such a blatant case of incompetence of counsel and a fundamental denial of justice that it would be unconscionable to allow this conviction or this sentence of death to stand.

I.

Petitioner, Robert Lewis, Jr., is unlawfully held in custody by the State of California Department of Corrections and is confined at Condemned Row in San Quentin State Prison. The Warden of the prison is Jeanne S. Woodford and the Director of the Department of Corrections is Edward S. Alameida, Jr.

II.

Petitioner was convicted of murder with special circumstances, robbery and use of a gun; four prior convictions were found to be true. Petitioner was sentenced to death on November 1, 1984. Petitioner's automatic appeal came before this Court and was decided on March 1, 1990 (*People v. Lewis* (1990) 50 Cal.3d 262; case number 24135). The Court affirmed the conviction but reversed the judgment of death. (*Id.* at 292.) The case was remanded to the Los Angeles Superior Court and a judgment of death was again entered on March 20, 1991. Petitioner's automatic appeal is pending before this Court. (Crim. No. S020670.)

III.

Petitioner's judgment of conviction and sentence of death have been unlawfully and unconstitutionally imposed in violation of his federal constitutional rights as guaranteed by the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; his state

constitutional rights as guaranteed by Article I, Sections 1, 7, 13, 15, 16, 17, 24 and 31 of the California Constitution; and relevant statutory and decisional law, in that the Petitioner was deprived of the effective assistance of counsel, Due Process, a fair trial, Equal Protection, Privileges and Immunities, and the right against Cruel and/or Unusual Punishment and for all of the reasons set forth in the Memorandum of Points and Authorities and the claims therein, as if set forth fully at this point. Petitioner's claims are summarized as follows:

Claim I:	Incompetent trial counsel, Ron Slick, deprived Mr. Lewis of the effective assistance of counsel, of the right to procedural Due Process of Law, of the right to substantive Due Process of Law, of the right to a fair trial, of the right to Equal Protection of the Laws, of the right to guaranteed Privileges and Immunities and of the right against Cruel and/or Unusual Punishment under the federal and California Constitutions.
Claim II:	Mr. Lewis is entitled to have this petition for writ of habeas corpus heard.
Claim III:	The District Attorney has lost or destroyed his file and the Long Beach Police Department has

destroyed its files therefore preventing Petitioner from reviewing materials to which he may be Constitutionally entitled.

Claim IV: The District Attorney, the Long Beach Police Department, and Ron Slick have all lost or destroyed their files, therefore depriving Petitioner of a thorough and meaningful petition for Writ of Habeas Corpus.

Claim V: Petitioner's conviction, sentence, and confinement were unlawfully obtained because he was denied the right to the Effective Assistance of Counsel throughout the pre-trial stage of the proceedings.

Claim VI: Petitioner was denied his Constitutional rights, including the right to the Effective Assistance of Counsel, when Trial Counsel failed to adequately investigate and prepare the guilt phase of Petitioner's trial by locate failing to, interview and call as a witness Lewis Wong.

Claim VII: Petitioner was denied his Constitutional rights, including the right to the Effective Assistance of

Counsel, when Trial Counsel failed to adequately investigate and prepare the guilt phase of Petitioner's trial by failing to determine whether a mental defense was available.

Claim VIII:	Petitioner was denied his constitutional rights by Trial Counsel's failure to fully prepare and present Mr. Lewis's defense of alibi.
Claim IX:	Petitioner was denied his Constitutional rights when Trial Counsel conceded Petitioner's alibi defense during closing argument.
Claim X:	The Trial Court erred in giving certain jury instructions during the guilt phase of the trial and it was Ineffective Assistance of Counsel to fail to object to said Instructions.
Claim XI:	Trial Counsel's failure to conduct meaningful voir dire was Ineffective Assistance of Counsel and deprived Petitioner of a Constitutionally guaranteed impartial jury.
Claim XII:	Trial Counsel's failure to competently move to challenge potential jurors for cause or to

competently exercise peremptory challenges was Ineffective Assistance of Counsel and deprived Petitioner of a constitutionally guaranteed impartial jury.

Claim XIII: The robbery special circumstance provision pursuant to which Petitioner was determined to be death-eligible is unconstitutional.

Claim XIV: Trial Counsel's failure to introduce any meaningful mitigating evidence resulted in an unconstitutionally unreliable sentence.

Claim XV: Trial Counsel's failure to investigate and present mitigating evidence regarding Petitioner's life trauma, mental retardation and learning disabilities was Ineffective Assistance of Counsel.

Claim XVI: Trial Counsel's failure to investigate and present mitigating evidence regarding the impact of Petitioner's institutionalization was Ineffective Assistance of Counsel.

Claim XVII: Petitioner was denied his constitutional rights by the Court's failure to instruct the jury as to

the true nature of life without the possibility of parole and his trial attorney's failure to so object.

Claim XVIII: The execution of Petitioner would constitute Cruel and Unusual Punishment in that Petitioner is mentally retarded within the meaning of the *Atkins* decision.

Claim XIX: The failure of the Court to allow proportionality review violates Petitioner's rights to substantive Due Process and his right against Cruel and/or Unusual Punishment.

Claim XX: If substantive Due Process and the right against Cruel and/or Unusual Punishment did not require proportionality review, the right to Equal Protection of the Laws and to Privileges and Immunities require that people facing the penalty of death be treated equally to people facing monetary fines.

Claim XXI: Petitioner raised issues on direct appeal and, to the extent that they are not properly raised on appeal, Petitioner raises those issues in this

Petition.

Claim XXII: Petitioner was denied Due Process and Equal Protection of the Law by the Trial Court's refusal to consider or permit presentation of evidence in support of a motion to strike the special circumstance finding.

Claim XXIII: Petitioner was denied his rights to Due Process of Law and to a fair, reliable, and individualized capital sentencing determination when the Trial Court denied him the opportunity to present relevant mitigating evidence in support of a sentence less than death.

Claim XXIV: Petitioner's Constitutional rights were violated because the death penalty jury instructions are unconstitutionally vague and incapable of being understood by jurors.

Claim XXV: Petitioner was denied fundamental Due Process of Law when the trial court denied his request for pre-sentencing discovery.

Claim XXVI: The death penalty is wrong and the Court should say so now.

Claim XXVII:	California's death penalty statute, as interpreted by this Court and applied at Petitioner's trial, violates the federal Constitution.
Claim XXVIII:	The penalty of death and execution in California are arbitrarily and capriciously imposed depending on the county in which the defendant is charged in violation of the right to Equal Protection of the Law.
Claim XXIX:	Petitioner's conviction and death sentence violate International Law.
Claim XXX:	Execution following lengthy confinement under sentence of death would constitute Cruel and/or Unusual Punishment in violation of Petitioner's state and federal Constitutional rights and International Law.
Claim XXXI:	Petitioner cannot be lawfully executed because the method of execution in California is forbidden by state, federal and international law.
Claim XXXII:	Petitioner's convictions and death sentence must be vacated because of the cumulative effect of all the errors and constitutional

violations shown in this Petition, in Petitioner's automatic appeals and in his prior petition.

IV.

Petitioner's claims and entitlement to relief are based upon this Petition, the accompanying Memorandum of Points and Authorities, the Exhibits and Declarations appended thereto which are all incorporated herein by this reference, and all the records, documents, transcripts, pleadings, exhibits and papers on file with this Court in *People v. Lewis*, Crim. No. S020670, (the currently pending direct appeal) and *People v. Lewis*, Crim. No. 24135 (the first appeal). Petitioner also incorporates by this reference, as if set forth in full at this point, all of the records, documents, transcripts, pleadings, exhibits and papers on file with this Court in *In re Robert Lewis, Jr.*, S005412 (the first habeas). Furthermore, Petitioner repleads and incorporates by this reference all of the claims and supporting materials therefor set forth in said first habeas as if set forth in full at this point.

V.

One prior petition for Writ of Habeas Corpus has been filed by Petitioner relating, in part, to the detention and restraint complained of herein. (*In re Robert Lewis, Jr.*, S005412 denied without opinion September 6, 1989.) We respectfully submit that this Petition should be heard, and the relief granted, in order to avoid extreme injustice and to allow Petitioner to

1) further develop claims which were raised in the first Petition but have been subject to discovery of new facts and substantiated by further expert opinions; 2) to present claims which were not raised by the first Petition; 3) to give this Court the opportunity to review the conviction and sentence in light of the cumulative effect of all errors; and 4) to avoid a miscarriage of justice.

Prior Habeas counsel was operating under different rules and limited funding. Furthermore, trial attorney Ron Slick and others associated with him failed to deliver their entire file. This was exacerbated by the fact that the District Attorney of the County of Los Angeles and the Long Beach Police Departments claim to have lost or destroyed their files. Petitioner has been able to obtain some information previously unavailable to counsel handling the first Petition through the expenditure of additional funds and through research and investigation not available in 1988. Finally, some matters are based in whole or in part on circumstances arising after the filing and denial of the first Petition.

VI.

Article 6, Section 10 of the California Constitution vests this Court with jurisdiction over a Petition for Writ of Habeas Corpus and it is properly filed directly with this Court during the pendency of the automatic direct appeal following the judgment of death.

VII.

This Petition is presumptively timely in that it is filed within six months of the final due date of the Reply Brief on the direct appeal in this matter.

VIII.

Petitioner believes that he is entitled to relief on his direct appeal but, to the extent that he is not, he has no plain, speedy or adequate remedy at law.

IX.

Due to the fact that Petitioner has had less than full cooperation from trial counsel and that the District Attorney and Police Department lost or destroyed their files, discovery is particularly important for the full examination of Petitioner's claims and, if discovery is conducted and/or an evidentiary hearing held, Petitioner will seek leave to amend his Petition to include any claims or information which might be revealed as a result of those procedures.

WHEREFORE, Petitioner requests that this Court:

a. Take judicial notice of all the records, documents, transcripts, pleadings, exhibits and papers on file with this Court in *People v. Lewis*, Crim. No. S020670 (the currently pending direct appeal), *People v. Lewis*, Crim. No. 24135 (the first appeal) and *In re Robert Lewis, Jr.*, S005412 (the

first habeas) pursuant to Evidence Code Section 452(d);

b. Issue a Writ of Habeas Corpus or an order to show cause returnable before this Court why Petitioner's conviction and judgment of death should not be set aside;

c. Permit Petitioner to conduct discovery, to participate in an evidentiary hearing and to have leave of the Court to amend this Petition;

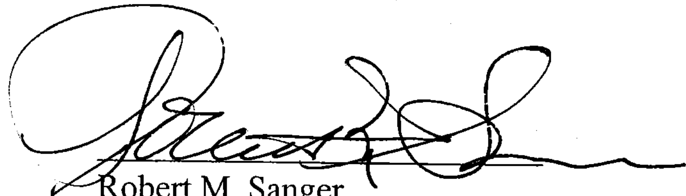
d. Upon final review of the Petition, order that Petitioner's conviction and judgment of death be set aside; and

e. Provide such other and further relief as the Court may deem just and proper.

Dated: June 30, 2003.

Respectfully submitted,

SANGER & SWYSEN



Robert M. Sanger,
Attorney for Petitioner,
Robert Lewis, Jr.

VERIFICATION

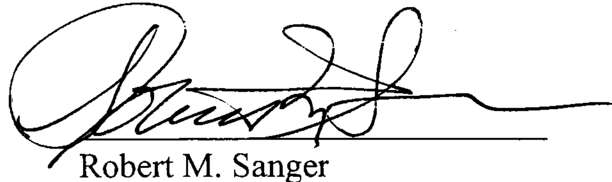
I, Robert M. Sanger, declare under penalty of perjury:

I am an attorney admitted to practice law in the State of California. I was appointed by the Court to represent Petitioner, Robert Lewis, Jr., who is unlawfully confined and restrained of his liberty at San Quentin State Prison, Tamal, California, in violation of the state Constitution, the federal Constitution, international law and relevant statutory and decisional law.

I am authorized to file this Petition for Writ of Habeas Corpus on behalf of Petitioner. I am making this verification because Petitioner is incarcerated in Marin County, while my law office is in Santa Barbara, and because these matters are more within my knowledge than Petitioner's.

I have read the foregoing Petition for Writ of Habeas Corpus and know the contents to be true.

Executed under penalty of perjury this 30th day of June, 2003, at Santa Barbara, California.



Robert M. Sanger

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

STATEMENT OF FACTS

A. The Guilt Phase

In August 1984, Judge Elsworth M. Beam presided over the trial of Petitioner, Robert Lewis, Jr., in Department G of the Los Angeles Superior Court, Long Beach. Petitioner was represented, such as it was, by Ron Slick. On August 15, 1984, the guilt phase commenced. The evidentiary portion of the guilt phase lasted only one and a half days. (1CST 322, 323, 324, 325 and 389.)[3]

During the month of October 1983, Milton Estell was trying to sell his 1980 Cadillac. He parked his Cadillac in a Long Beach shopping center with a "for sale" sign attached. (3RST 531:15-17.) Michael and Allen Washington, Mr. Estell's neighbors, were aware that Mr. Estell was selling his car. (3RST 530:22-24, 555:28-556:2.) They observed Mr. Estell talking to a man they later identified as Petitioner. (3RST 533:13-16,

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The citations to the record are to the Reporter's and Clerks Transcripts filed with this Court on the current direct appeal pending under case number S020670. These Transcripts will be denoted as follows: "RTA" is the Reporter's Transcript of the proceedings after remand; "RST" is the Reporter's Supplemental Transcript of the trial proceedings; "CT" is the Clerk's Transcript of the proceedings after remand; "CST" is the Clerk's Supplemental Transcript of the trial proceedings.

541:2-23, 555:2-16, 559:4-13.) They believed that this occurred on October 27, 1983 because it was their bowling night. (3RST 542:7-11, 554:28-555:10.)

Jacqueline Estell, Milton Estell's ex-wife, tried to telephone Mr. Estell several times on October 27, 1983. (3RST 507:12-508:2.) She was attempting to make arrangements to leave their children with him for the weekend. (3RST 509:19-22.) She continued to call the next morning without success. (3RST 508:3-509:4.) Eventually Ms. Estell left the children with one of Mr. Estell's neighbors and went to Las Vegas. (3RST 510:7-9.)

On October 28, 1983, at approximately 11:00 p.m., Officer Laduca responded to Mr. Estell's house. (3RST 566:21-28.) After speaking to the neighbors, he entered the house through an open window. (3RST 566:26-567:15.) Both the front and back doors were locked with no sign of forced entry. (3RST 570:3-16.) Officer Laduca searched the house and found Mr. Estell's body in the closet. (3RST 568:26-569:18.) Mr. Estell had three stab wounds in his chest and a bullet hole in his back. (3RST 595:17-19.) Dr. Leena Jariwala, a deputy medical examiner, performed an autopsy on October 30, 1983. (3RST 593:1-5.) He determined that the stab wounds were the immediate cause of death. (3RST 603:23-604:1.)

Lynette Atwood, an identification technician with the Long Beach Police Department Crime Lab, was assigned to take pictures and obtain fingerprints at the scene. (3RST 607:7-10.) She lifted 12 latent prints at the scene. (3RST 612:5-9.) One of them was a partial latent palm print found on the doorjamb behind the bathroom door. (3RST 608:7-15.) William Corson, also an identification technician, testified that, in his opinion, the partial palm print belonged to Petitioner. (3RST 656:9-24.) Of the eleven other latent prints, two were identified as Mr. Estell's. (3RST 656:7-8.) The Long Beach Department only compared the latent prints with the known prints of Mr. Estell and Petitioner. The other nine latent prints were never matched. (3RST 663:9-16, 664:4-23.)

Jacqueline Estell accompanied police officers to Mr. Estell's house on October 31, 1983. She told the police that the following property was missing: a television, television stand, camera, radio and cassette player. (3RST 511:10-512:3.) In addition, Mr. Estell's car was missing. (3RST 513:10-15.) When Ms. Estell returned the next day, she noticed that a gold chain and a ring were also missing. (3RST 512:19-513:5.) The ring was found at the coroner's office with Milton Estell's belongings. (3RST 517:8-10.) Ms. Estell testified at the preliminary hearing on December 15, 1983. (1CST 247-252.) The prosecutor directed her attention to a gold chain Petitioner was wearing. (1CST 249:26-250:1.) Ms. Estell testified

that the gold chain looked like Mr. Estell's missing gold chain. (1CST 250:14-16.) At trial, Ms. Estell also testified that she had seen Mr. Estell's gold chain on Petitioner's neck at the preliminary hearing. (3RST 519:8-19.) However, Petitioner's sister, Gladys Spillman, testified that the gold chain taken from Petitioner at the preliminary hearing was the one she had purchased in January, 1983. (4RST 690:24-691:11, 692:4-5.) She gave the gold chain to Petitioner in July, 1983. (4RST 691:17-18.) Petitioner wore it regularly. (4RST 691:22-23.) No receipt for the purchase of the gold chain was introduced into evidence. Furthermore, Lewis Wong, the jeweler who sold the chain to Gladys Spillman was never called.

On November 1, 1983, two Long Beach police officers spotted the missing Cadillac parked on the street. No one was in the car. (3RST 620:6-15.) About 35 minutes later, Petitioner and a woman entered the car and drove off. (3RST 622:1-17.) The officers initiated a traffic stop. (3RST 622:12-17.) Petitioner was driving the car. (3RST 622:21-17.) Officer Woodall placed Petitioner under arrest. (3RST 623:4-5.)

Petitioner was taken to the police station where he was interviewed by Detective MacLyman. (3RST 629:18-26.) Detective MacLayman testified that Petitioner told him that he looked at the Cadillac on October 24, 1983, at the owner's residence. He bought the Cadillac that same day for $11,000 cash. (3RST 632:3-28.) The owner made out the bill of sale to

Petitioner's girlfriend because Petitioner did not want the car in his name. (3RST 633:10-13.) Petitioner said the entire transaction took place on the front porch. He never went in the house. (3RST 634:7-10.) According to Russell Bradford, a handwriting examiner employed by the Long Beach Police Department, Milton Estell's signature on the bill of sale was not genuine. (3RST 648:2-12.)

Petitioner's father, Robert Lewis, Sr., testified that he registered Petitioner at the Kaialoha Motel on October 24, 1983, because Petitioner had no identification. (4RST 676:1-10.) Robert Lewis, Sr. wrote his driver's license number and the license plate number of Milton Estell's Cadillac on the motel registration card three days before Mr. Estell's death. (4RST 674:5-23.) The hotel manager identified the registration card. (4RST 682:21-24.) She testified that she filled out the following information on the registration card: the date, room number, and the amount of money paid. She also testified that the date on the card, October 24, 1983, corresponded to the first day the guest registered. (4RST 683:1-684:15; 685:17-23.) Finally, she testified that the customer filled out the name, address, car license number, and number of guests. (4RST 684:12-15.) No evidence was introduced regarding how the registration card was found, to lay a foundation for the card as a business record or to establish the change of custody of the card.

On August 24, 1984, the jury found Petitioner guilty of the crime of murder in the first degree in violation of Penal Code section 187 and the crime of robbery in violation of Penal Code section 211. In addition, the jury found the special allegation that Petitioner personally used a firearm and a deadly weapon in the commission of the offenses in violation of Penal Code sections 12022.5 and 12022(b) and the special circumstance that the murder was committed during the commission of a robbery within the meaning of Penal Code section 190.2(a)(17) to be true. (1CST 394-395.)

B. The Penalty Phase

On August 28, 1984, at 10:12 a.m., the penalty phase commenced. The entire penalty phase, including evidence, jury instruction and argument, lasted one hour and 36 minutes. (1CT 408; 4RST 807:6-8.)

The prosecutor elicited a stipulation from Petitioner's trial counsel, Ron Slick, that Petitioner had suffered four prior robbery convictions. (4RST 809:22-810:14.) The prosecutor presented no other evidence in aggravation of sentence.

Ron Slick presented only one witness, Rose Davidson, one of Petitioner's sisters. Her testimony covers only two pages in the trial transcript. (4RST 811-812.) She testified that she had one sister, Gladys Spillman, and two brothers, Petitioner and Ellis Williams. (4RST 810:11-17.) She testified that her brother Ellis and her father had been in and out of

prison. (4RST 811:19-812:4.) She testified that their mother died in 1967. (4RST 812:5-9.) Finally, she told the jury that she loved Petitioner and cared about what happened to him. (4RST 812:16-24.) Ron Slick presented no other evidence.

During his penalty phase opening statement, Ron Slick asked the jury to consider Robert Lewis, Sr.'s testimony given at the guilt phase five days earlier on August 23, 1984. (4RST 809:4-12.) Robert Lewis, Sr., Petitioner's father, had been called as a witness to testify that he had registered his son at the Kaialoha Motel a few days before the homicide and that his son already had the Cadillac at that time. (4RST 672-677.) He was also asked about his own felony convictions, and testified that he had been convicted of four felonies, including forgery, child molestation and theft-related charges. (4RST 677:11-678:18.) Ron Slick had also asked Robert Lewis, Sr., a brief series of leading questions. He asked whether he cared for his son, whether he cared about what happened to him, whether he loved him and whether he cared if harm came to him. Mr. Lewis responded affirmatively to each of these questions. (4RST 677:1-6.)

Slick also asked the jury to consider the guilt phase testimony of Gladys Spillman, Petitioner's sister. She had been called to testify that the gold chain worn by Petitioner at the preliminary hearing was the one she had given Petitioner. (4RST 690:12-692:8.) At the end of her testimony,

Ron Slick also asked her three questions concerning her feelings about Petitioner. She responded that she loved Petitioner, that she cared about what happened to him and did not want any harm to come to him. (4RST 692:9-15.)

The entire penalty phase lasted from 10:12 a.m. until 11:48 a.m. including opening statements, Rose Davidson's testimony, closing arguments and instructions to the jury. The jury returned a verdict of death at 2:25 p.m. (4RST 807:6, 849:11, 850:1-15, 1CST 408.)

C. Post-Verdict Proceedings

The automatic motion for modification of the death verdict pursuant to Penal Code section 190.4(e) and sentencing took place before Judge Beam on November 1, 1984. (1CST 439.) Judge Beam erroneously read and considered the probation report before ruling on the 190.4(e) motion. (5RST 877:3-5.) He imposed a death sentence. (1CST 439.)

D. First Direct Appeal and Habeas Corpus Petition

The automatic appeal ensued following the judgment of death. Because of Judge Beam's error and resulting exposure to prejudicial information, this Court reversed the sentence of death on direct appeal, and remanded the case for further proceedings. *People v. Lewis* (1990) 50 Cal.3d 262, 287. The remittitur was issued on May 23, 1990. (1CT 1.)

A Petition for Writ of Habeas Corpus was also filed with this Court. Said Petition was denied without opinion on September 6, 1989. (*In re Robert Lewis, Jr.*, (1989) 1989 Cal. LEXIS 2737.)

E. Proceedings in the Trial Court on Remand

On June 28, 1990, Donald Specter, the lawyer who represented Petitioner on appeal, was appointed to represent him on remand. (1CT 55.) On August 24, 1990, Petitioner filed a motion to disqualify Judge Beam for bias pursuant to Code of Civil Procedure section 170.1(a)(6). In a declaration in support of the motion Petitioner's counsel stated his belief that Judge Beam was prejudiced against Petitioner's interests because he had erroneously considered prejudicial information, and that, as a result of Judge Beam's bias, Petitioner could not have a fair and impartial hearing before him. (1CT 61-96.) On September 10, 1990, Judge Beam filed a Verified Answer to Motion for Disqualification. Judge Beam denied that there was any basis for his disqualification. However, he consented, without conceding his disqualification or lack of impartiality, that the matter be transferred. (1CT 98-101.)

On September 14, 1990, the case was sent to Judge Sutton of the Los Angeles Superior Court before being sent to the Judicial Council for assignment of a judge to hear the motion to disqualify Judge Beam. (1RTA 14.) However, Deputy District Attorney Hodgman stated to the court that

he believed it would be prudent to follow the invitation of Judge Beam and transfer the hearing on the remand of the case itself to another judge. (1RTA 16:4-8.) He also stated that he and Mr. Specter had agreed on Judge Charvat. (1RTA 16:9-14.) Mr. Specter stated that he believed that Judge Beam, by using the language he did in his answer, had taken himself out of the case and could not be appointed. (1RTA 16:15-19.) Judge Sutton assigned the case to Judge Charvat. (1RTA 17:17-19.)

Mr. Specter filed several motions on Petitioner's behalf: a Motion for Pre-Sentence Discovery on September 26, 1990 (1CT 103-126); a Motion to Set an Evidentiary Hearing for a Motion to Strike the Special Circumstances on November 8, 1990 (1CT 144-149, 164-166); a Motion to Hear Live Testimony in Lieu of Reading Transcripts on November 8, 1990 (1CT 150-156, 169-170); and a Motion to Present Mitigation Evidence on November 8, 1990 (1CT 157-163, 167-168).

Judge Charvat denied Petitioner's Motion for Pre-Sentence Discovery on October 5, 1990. (1CT 137.) He denied the remaining motions on November 14, 1990. (1CT 171.) Mr. Specter also filed a Memorandum in Support of the Automatic Motion for Modification of the Penalty Verdict on March 5, 1991. (1CT 176-197.) Mr. Hodgman filed a Memorandum in Support of Appropriateness of Death Verdict on March 20, 1991. (1CT 199-211.)

Judge Charvat heard the automatic motion for modification of the death verdict pursuant to Penal Code section 190.4(e) on March 20, 1991. He considered the Court's Exhibit 1, which contained the evidentiary portion of the trial transcript. He denied the motion. (1CT 225.) Judge Charvat signed the Commitment Pursuant to the Judgment of Death on the same day. (1CT 226-232.)

F. Current Appeal and Habeas Corpus Petition

Petitioner's Opening Brief was filed in the automatic direct appeal to this Court on April 16, 2002. A Respondent's Brief was filed by the Attorney General dated July 15, 2002 and a Reply Brief was filed on January 6, 2003. This Petition is filed in a presumptively timely fashion on or before July 2, 2003.

CLAIMS

CLAIM I: INCOMPETENT COUNSEL, RON SLICK, DEPRIVED MR. LEWIS OF THE EFFECTIVE ASSISTANCE OF COUNSEL, OF THE RIGHT TO PROCEDURAL DUE PROCESS OF LAW, OF THE RIGHT TO SUBSTANTIVE DUE PROCESS OF LAW, OF THE RIGHT TO A FAIR TRIAL, OF THE RIGHT TO EQUAL PROTECTION OF THE LAWS, OF THE RIGHT TO GUARANTEED PRIVILEGES AND IMMUNITIES AND OF THE RIGHT AGAINST CRUEL AND/OR UNUSUAL PUNISHMENT UNDER THE FEDERAL AND CALIFORNIA CONSTITUTIONS.

Before addressing the individual issues relating to incompetence of counsel, Petitioner asks this Court to simply look at the big picture. There is no way that a conscientious legal observer, reviewing the paltry record in

this case, could conclude that Robert Lewis, Jr., on trial for his life, received a fair trial or anything approaching the effective assistance of counsel.

The facts supporting this claim, among others to be presented after adequate funding, full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to, the following.

Robert Lewis, Jr., is a poor man who suffered unspeakable abuse as a child. He is mentally retarded and suffers from learning disabilities. He is of African descent. Mr. Lewis was charged with murder in 1983 in Long Beach. He was appointed the infamous Ron Slick, a defense attorney whose dubious claim to fame is to have sent more people to death row than any prosecutor in the state; all of them poor, almost all of them Black and all of them undefended in any sense of the word.

Ron Slick's egregious behavior in defending many of his homicide clients has been the subject of both public and judicial review. Ron Slick's abject failure to defend Robert Lewis, Jr. was consistent with his pattern and practice of incompetence.

Ron Slick has been known not to present exculpatory evidence to a jury. Such was the case with Robert Glover who, in 1990, was awarded a new trial by Superior Court Judge James Sutton. The Honorable Judge

Sutton said, after hearing the available but unpresented testimony, that he would not have even sent Mr. Glover's case to the jury had Ron Slick acted competently. (Exhibit 1 , Ted Rohrlich, *The Case of the Speedy Attorney*, Los Angeles Times (Sep. 26, 1991), page A1). Far from being an isolated incident, Ron Slick failed to present *any* evidence in defense of Andre Burton (who was subsequently sentenced to death for murder). (Exhibit 2, Howard Mintz, *Lawyer Noted for Speedy Defense*, The Mercury News (Apr. 22, 2002).)

Ron Slick is known for declining to challenge prosecution evidence. In 1992, the California Supreme Court vacated Robert Paul Wilson's judgment - including a sentence of death - in its entirety, finding that Ron Slick's failure to object to the presentation of incriminating evidence was "due to ignorance or a misunderstanding of the holding of clearly applicable precedent of the United States Supreme Court, rather than ... an informed tactical determination." (*In re Wilson* (1992) 3 Cal.4th 945, 955-956.) So too, Paul Tuilaepa's Slick-Death-Penalty defense included *no* cross-examination of the People's witnesses. (Exhibit 4) Ron Slick did not bother to challenge the only supposed witness to the armed robbery for which Senon Grajeda was convicted - witness who was a known enemy of the Defendant's and who was found in possession of what may have been

the murder weapon. (*Id.*) Neither did he feel it necessary to offer *any* evidence to the jury in the capital defense of Andre Burton.

Ron Slick has left behind a trail of victims; men and women whose presumed innocence never enjoyed the benefit of a reasonable defense. Ron Slick allowed Charles Edward Moore, Jr. little say in the way that he conducted Mr. Moore's defense, refusing even to challenge the credibility of the People's chief witness in his closing argument - a woman who received prosecutorial immunity in exchange for testimony against Mr. Moore and his co-defendant. (See *Moore v Calderon* (C.D. CA 1995) Order of Judgment in Case No. CV 91-5976 KN [unpublished opinion, not cited for any point of law], attached as Exhibit 62.) Only a death-bed confession by the real culprit freed Oscar Lee Morris 16-years after his conviction at the hands of Ron Slick. (Exhibit 3, John Roemer, *Free From Death Row, Man Sues City, Police*, Los Angeles Daily Journal (Oct. 29, 2002), page 1.) Donrell Thomas was unwilling to wait that long; he took his life while in his death row prison cell. (Exhibit 2) The pattern is clear.

So too in this case, Ron Slick put on no meaningful defense on behalf of Mr. Lewis despite exculpatory evidence available to him. Slick put on no meaningful mitigation evidence. The whole trial took four days – the penalty phase took 1 hour and 36 minutes which included the arguments of counsel and the instructions by the judge.

This case is truly one of the worst examples of the failure of the system and stands out among terrible examples of failure throughout the country. It is an embarrassment to the jurisprudence of California. Mr. Lewis did not have a real trial, he did not have a real penalty phase and he did not have a real defense lawyer. The correct thing for this Court to do is to vacate the sentence and the conviction.

This Court has recently reaffirmed the seriousness with which it regards the criminal process, particularly when the death penalty is sought. In *People v. Hernandez* (2003) 30 Cal.4th 835 [2003 Cal. LEXIS 3493, at *76 (S020244, June 2, 2003)], this Court observed, "we expect the trial court and the attorneys to proceed with the utmost care and diligence and with the most scrupulous regard for fair and correct procedure." Applying the same standard to this case, it is obvious that here, as in *Hernandez*, "the proceedings fell far short of this goal."

Failure to reverse this conviction and sentence would result in a deprivation of the effective assistance of counsel, of the right to procedural Due Process of Law, of the right to substantive Due Process of Law, of the right to a fair trial, of the right to Equal Protection of the Laws, of the right to guaranteed Privileges and Immunities and of the right against Cruel and/or Unusual Punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7,

13, 15, 16, 17, 24, and 31 of the California Constitution. Petitioner's trial counsel unreasonably and prejudicially failed to investigate and present exculpatory evidence at the guilt phase and evidence in mitigation at the penalty phase of Petitioner's trial. (*Wiggins v. Smith* (2003) __ U.S. __, 2003 U.S. LEXIS 5014; *Ake v. Oklahoma* (1985) 470 U.S. 68; *Strickland v. Washington* (1984) 466 U.S. 668; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Green v. Georgia* (1979) 442 U.S. 95; *Gardner v. Florida* (1977) 430 U.S. 349, 358; *Jurek v. Texas* (1976) 428 U.S. 262, 276; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Horton v. Zant* (11th Cir. 1991) 942 F.2d 1449, 1462; *People v. Ledesma* (1987) 43 Cal.3d 171,215; People v. Easley (1983) 34 Cal.3d 858, 878, fn. 10, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

A criminal defendant has the right to the assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 15, of the California Constitution. (See, e.g., *Strickland v. Washington*, 466 U.S. at 684-685; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218; *In re Cordero*)1988) 46 Cal.3d at 161, 179-180; *People v. Pope* (1979) 23 Cal.3d 412, 422.) This right "entitles the defendant not to some bare assistance but rather to effective assistance. Specifically, it entitles him to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate." (*People v. Ledesma*, *supra*, 43 Cal.3d at

215 [quoting *United States v. DeCoster* (D.C. Cir. 1973) 487 F.2d 1197, 1202, (emphasis in original citations omitted)]; see also *Strickland v. Washington*, *supra*, 466 U.S. at 686; *In re Cordero*, 46 Cal.3d at 180; *People v. Pope*, *supra*, 23 Cal.3d at 423-424.) The defendant can reasonably expect that before counsel undertakes to act or not to act, he or she will make a rational and informed strategic and tactical decision founded on adequate investigation and preparation. (*In re Fields* (1990) 51 Cal.3d 1063, 1069; *In re Hall* (1981) 30 Cal.3d 408, 426; *People v. Frierson*, (1979) 25 Cal.3d 142, 166; see also *Wiggins v. Smith*; *Strickland v. Washington*, 466 U.S. at 690-691.) If counsel fails to make such an informed decision, his action - no matter how unobjectionable in the abstract - is professionally deficient. (See, e.g., *In re Hall*, *supra*, 30 Cal.3d at 426; *People v. Frierson*, *supra*, 25 Cal.3d at 166; see also *Strickland v. Washington*, *supra*, 466 U.S. at 690-691.)

"Counsel's first duty is to investigate the facts of his client's case and to research the law applicable to those facts." (*People v. Ledesma*, *supra*, 43 Cal.3d at 222.) Applying this primary duty to the penalty context, counsel has an obligation to investigate the client's character and background to become informed of "what mitigating evidence is available and what aggravating evidence, if any, might be admissible in rebuttal." (*In re Marquez* (1992) 1 Cal.4th 584, 606.) Moreover, "[c]ounsel have an

obligation to conduct an investigation which will allow a determination of what sort of experts to consult." (*Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1226; see also *Wallace v. Stewart* (9th Cir. 1999) 184 F.3d 1112, 1117.)

Defense counsel preparing for a capital trial must conduct "a reasonably diligent preliminary investigation" so that counsel has "the factual framework within which to make a competent, informed tactical decision" regarding trial strategy. (*People v. Frierson, supra*, 25 Cal.3d at 164; *Caro v. Calderon, supra*, 165 F.3d at 1227 ["It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase."].)

An adequate investigation to support a tactical decision involves "substantial factual inquiry" (*In re Saunders* (1970) 2 Cal.3d 1033, 1048-1049; *People v. Frierson, supra*, 25 Cal.3d at 162-164) and is not satisfied by simply reviewing reports prepared by the police or defense investigators (*In re Neely* (1993) 6 Cal.4th 901,919; *In re Hall, supra*, 30 Cal.3d at p. 425; *Lord v. Wood* (9th Cir. 1999) 184 F.3d 1083, 1093-1095) or by relying on statements of the client (see *People v. Mozingo* (1983) 34 Cal.3d 926, 933-934; *Blanco v. Singletary* (11th Cir. 1991) 943 F.2d 1477, 1502).

To the extent that Ron Slick's failure to investigate or present evidence was purportedly based on strategic considerations, those

considerations do not withstand Constitutional scrutiny. Before an attorney can make a reasonable strategic choice not to pursue a certain line of investigation, the attorney must obtain the facts needed to make the decision; an attorney's "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (*Strickland v. Washington*, 466 U.S. at, 690-691; see also *Griffin v. Warden, Maryland Correctional Adjustment Center* (4th Cir. 1992) 970 F.2d 1355, 1358; *Horton v. Zant* (11th Cir. 1991) 941 F.2d 1449, 1462.)

This case, the four day trial of Robert Lewis, Jr., is a paradigm example of ineffective assistance of counsel. As set forth in detail hereinbelow, Ron Slick failed to investigate the guilt or penalty issues, he failed to employ experts and, he failed to present a competent defense as to any part of Mr. Lewis' trial. If Robert Lewis, Jr. can be put to death based on a record like this, there would be no meaning to the right to counsel, to a fair trial or to any of the other rights to which a person is entitled in this state and country. We respectfully submit that the conviction and sentence must be reversed.

CLAIM II: PETITIONER IS ENTITLED TO HAVE THIS SECOND PETITION FOR HABEAS CORPUS HEARD.

Petitioner has both state and federal statutory rights to a writ of habeas corpus if he is illegally restrained. (Penal Code § 1473; 28 U.S.C § 2254.) An illegal restraint arises from a violation of a Petitioner's federal and/or state constitutional rights including his or her rights to Due Process, Equal Protection, a fair trial, Effective Assistance of Counsel, and protection against Cruel and/or Unusual Punishment. An implied right to petition for writ of habeas corpus also exists under Article I, Sect. 9, Cl. 2 of the federal Constitution and Article I, Section 11 of the California Constitution. More explicitly, the California Supreme Court has held that the availability of coram nobis, habeas corpus or other corrective judicial process is a fundamental Due Process right under the Fourteenth Amendment to the United States Constitution. (*People v. Shorts* (1948) 32 Cal.2d 502, 506). In the context of a capital case, this fundamental Due Process right also implicates Petitioner's right to a fair and reliable determination of guilt and punishment as required by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 15, 17, 24, and 31 of the California Constitution.

This is Mr. Lewis's second petition for writ of habeas corpus. The first was filed in April of 1988 and denied without opinion by this Court in

September of 1989. (Order of September 6, 1989, denying Petition for Habeas Corpus in Case number S005412). Importantly, the denial of a petition for a writ is not *res judicata* for the claims made therein (*In re Clark* (1993) 5 Cal.4th 750, 773) or law of the case (*Kowis* v *Howard* (1992) 3 Cal.4th 888, 894). However, to prevent potential abuse of the writ, the this Court in *Clark* announced a general rule denying unjustified, successive or untimely petitions for writ of habeas corpus. (*Clark*, *supra*, 5 Cal.4th at 797.) In doing so, the Court was careful to note that the rule is not absolute but must bend where its application would work a fundamental miscarriage of justice. (*Id.* at 797-98.) Because barring this second petition would violate Mr. Lewis's rights under both the federal and California Constitutions, he is entitled to have this Petition heard. Even if the Court were to find that the *Clark* rule applied to this second petition, Petitioner is justified in bringing all of his claims in this Petition because applying bar to Petitioner's claims would work a fundamental miscarriage of justice. Finally, even if the Court were to conclude that it would be permissible under both the federal and California Constitutions to bar some of Petitioner's claims, and that the rule operates to do so, nonetheless all of Petitioner's claims which are not barred should be heard.

A. Petitioner is entitled to have his claims heard because it would violate his rights to Due Process, Equal Protection, and protection against Cruel and/or Unusual Punishment under both federal and California Constitutional provisions to hold him to a standard announced after his initial petition was filed.

Mr. Lewis's initial petition for writ of habeas corpus was filed on April 29, 1988. (See *In re Robert Lewis, Jr.*, case number S005412.) At the time of filing, his appointed appellate counsel had no duty to investigate potential habeas claims, and certainly no duty to conduct an investigation of all potential claims or of any particular scope. Counsel's duty to investigate possible habeas claims was created by the Supreme Court Policies Regarding Cases Arising From Judgments of Death, which did not go into effect until June 6, 1989. (*In re Clark, supra*, 5 Cal.4th at 785.) Further, as the *Clark* opinion itself notes, no prior opinion of the Court had

> "expressly noted the problem of belated presentation of claims that may not have been identified, but with due diligence should have been known to the petitioner and presented in an earlier petition. On occasion, the merits of successive petitions [were] considered regardless of whether the claim was raised on appeal or in a prior petition, and without consideration of whether the claim could and should have been presented in a prior petition." (*In re Clark, supra*, 5 Cal.4th at 769.)

In short, not only did prior habeas counsel have no affirmative duty to exhaustively investigate all of Petitioner's possible habeas corpus claims,

but neither he nor Petitioner was on notice that a failure to include all potentially available claims in the initial petition could bar Mr. Lewis from presenting them in a future petition.

As such, it would be patently unfair to hold Mr. Lewis to a procedural rule announced (or, at least, clarified) more than five years after the filing for his first petition. To do so would render illusory his right to habeas corpus review, violating his rights to substantive and procedural Due Process, Equal Protection, Effective Assistance of Counsel, and his right to a reliable verdict, all guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the federal Constitution and Article I, Sections 1, 7, 15, 17, 24, and 31 of the California Constitution.

B. Even if the Court finds that *Clark* applies to Petitioner, he is entitled to have his claims heard because he is justified in bringing them in this second petition.

A Petitioner is justified in bringing his claims in a second Petition for writ when he did not know, and could not reasonably have known, the facts which give rise to the claim at the time of the initial petition. (*Id.* at 775.) So too, there is no bar where Petitioner was unable to present his claim in the first petition. (*Id.*) Because all of Petitioner's claims are justifiably brought in this second Petition for one of the above reasons, he is entitled to have them heard now.

1. Petitioner did not know, and could not have known, the facts which give rise to all of the claims contained herein at the time of his initial petition.

The claims presented in this second Petition are based in whole or in part upon newly-discovered facts that Petitioner did not know, and could not have known at the time of his first petition. Therefore, Petitioner is justified in bringing all of his claims in this successor petition, and is entitled to have them heard.

a. Petitioner has discovered facts that give rise to the included claims.

The newly discovered facts supporting Petitioner's claims, among others to be presented after adequate funding, full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include all those facts specifically noted in the attached declarations and investigation reports, as well as those facts specifically given in support of each claim. These facts include, without limitation, 1) the reconstruction of some of the materials lost or destroyed by the Los Angeles District Attorney, the Long Beach Police and the trial lawyer; 2) the testimony of Lewis Wong; 3) the testimony relating to the business record foundation for the registration card; 4) evidence relating to Petitioner's life history of trauma; 5) evidence of Petitioner's mental retardation; 6) evidence of

Petitioner's learning disabilities; 7) evidence of the profound effects of institutionalization; 8) evidence of Petitioner's good acts.

b. Petitioner did not know, and could not have known, of these newly-discovered facts at the time of his initial petition because he lacked the funding to perform thorough investigation.

When considering whether a petitioner is justified in bringing claims in a successor petition, the Court must consider whether Petitioner and his prior counsel knew or could have known the triggering facts upon which they were based. When making this determination this Court has considered Petitioner's funding status highly relevant:

> "If (i) discovery of the information offered in support of a claim requires the expenditure of funds, (ii) the petitioner is indigent and cannot fund the investigation personally, and (iii) the petitioner timely files a request for funding of a specific proposed investigation, fully disclosing all asserted triggering information in support of the proposed investigation, then the petitioner's appointed counsel has exercised reasonable diligence with respect to the proposed claim. When our court denies such a request for investigation funds -- having determined that the petitioner has failed to present sufficient "triggering facts" to support the proposed investigation -- we cannot properly find that the petitioner *should have discovered* such information without first obtaining funding from some other source or learning of the information in some other manner. Appointed counsel for the petitioner has no obligation personally to fund a habeas corpus investigation

> (whether or not the investigation is supported by "triggering facts").
>
> "Thus, a denial of a request for investigation funds is, under the described circumstances, relevant to whether a petitioner "should have known" of the information earlier." (*In re Gallego* (1998) 18 Cal.4th 825, 828-29.)

The newly discovered facts specifically listed above required the expenditure of significant funds. Experts were re-hired and consulted. Extensive investigation was conducted by a team of investigators. Even the assembly of the original trial record was a costly process. (Exhibit 4, Declaration of Catherine Swysen) The cost of these experts investigators and staff were far beyond the funds allocated to prior habeas counsel. There is no question that Petitioner is, and has been throughout all of the proceedings, indigent. Petitioner was appointed trial counsel due to his indigency, and has been represented by appointed lawyers at each stage since. Petitioner's appointed counsel for his first petition for writ of habeas filed a timely application for funds for investigation and experts, specifically attempting to discover the sort of information detailed above. (Exhibit 5, Application of April 16, 1986, For Funds for Investigation and Experts in Case No. 24135) However, his request was denied by the Court without prejudice to refiling after the submission of a petition for writ of habeas corpus. (Exhibit 6, Order of September 19, 1986, denying funds for

investigation and experts in Case No. 24135) Therefore, under the *Gallego* test, it would be improper to consider that Petitioner knew or should have known the facts which form the basis of the second Petition at the time of his first petition.

2. Petitioner was unable to present many of his claims at the time of his first petition for writ of habeas corpus.

All of Petitioner's claims are presented in this Petition with the benefit of additional investigation, expert consultation, record collection and development of facts. Without limiting the generality of the foregoing, the following claims are particularly based on newly discovered information, new developments in the law or facts which arose after the filing of the first petition.

Claim XIII (Failure to Narrow Special Circumstance) is based in significant part upon empirical data collected and analyzed by Professor Steven F. Shatz. His work relied, in turn, upon data obtained in 1995 in discovery pursuant to federal court proceedings. (See Exhibit 7, Declaration of Professor Steven F. Shatz.) As such, Petitioner could not have brought this claim in his first petition.

Claim XVIII (Atkins) relies upon the Supreme Court's decision in *Atkins v. Virginia* (2002) 536 U.S. 304, holding that the execution of a mentally retarded person is constitutionally cruel and/or unusual

punishment. (*Atkins*, 536 U.S. at 350.) Because the Supreme Court did not arrive at this conclusion until 2002, Petitioner could not have raised this claim in his 1988 petition.

Claim XIX (Substantive Due Process) relies upon extending the Supreme Court's renewed economic Substantive Due Process jurisprudence following its decision in *Honda Motor Co. v Oberg* (1994) 512 US 415. Prior to this 1994 decision, there would have been no reasonable basis for Petitioner to argue that there was an Eighth Amendment right to proportionality review based on this theory.

Similarly, Claim XX (Equal Protection Proportionality) relies upon an extension of the Supreme Court's *Honda Motor Co.* jurisprudence, and could not have been reasonably brought in 1988.

Claim XXI (Appeal Claims) raises any issues that the Court finds were improperly raised in Petitioner pending appeal. As the issues raised on appeal are related to proceedings that have occurred since Mr. Lewis's prior petition was filed, they could not have been brought at that time.

The legal power and persuasiveness of Claim XXXVI (Death Penalty is Wrong) is based upon evolving standards of decency, developing legal principles and factual analyses that have continued to mature since Mr. Lewis's first petition. Because this precedent and these data were not yet available in 1988, Petitioner could not have raised this claim then.

Claim XXVII (Failure to Narrow Generally) is also based in significant part upon empirical data collected and analyzed by Professor Steven F. Shatz. His work relied, in turn, upon data obtained in 1995 in discovery pursuant to federal court proceedings. (Exhibit 7, Declaration of Professor Steven F. Shatz) As such, Petitioner could not have brought this claim in his first petition.

Claim XXVIII (Equal Protection: California County) is based in large part on statistical findings and analysis that have been gathered and performed since 1988. Without this information, Petitioner could not have presented this claim in good faith in his first petition. Additionally, this claim is predicated upon the Supreme Court's decision in *Bush v Gore* (2000) 531 U.S. 98, recognizing that disparity between counties within a state is violative of Equal Protection where fundamental rights are at issue.

Claim XXIX (International Law) is pleaded, in large part, on the basis of all of the other claims contained herein, as well as issues raised in the pending appeal. Evolving standards of international law and American participation in treaties has developed since 1988. Lacking this basis in 1988, Mr. Lewis could not raise this claim in his prior petition.

Claim XXX (Lengthy Confinement) is based upon the amount of time that Petitioner has remained on Death Row prior to the filing of this

claim. As such, there was no factual basis for this claim during his prior Petition.

Claim XXI (Method of Execution) is based upon California legislative amendments made subsequent to Mr. Lewis's prior petition, establishing lethal injection as the means of execution in California. Petitioner now argues that lethal injection, is cruel and/or unusual and, therefore, California has no Constitutional means by which to execute him. Because his earlier petition was filed prior to this legislative enactment, Mr. Lewis could not have brought this claim then.

Claim XXII (Cumulative Claim) is based upon the cumulative effect of all of Petitioner's other claims in this Petition, in Petitioner's pending appeal, in Petitioner's first petition and in Petitioner's first appeal. As such, this claim was uniquely unavailable to Petitioner prior to this filing.

C. Even if the Court finds that the general rule of *Clark* applies to Petitioner's claims, he is nonetheless entitled to have them heard because to bar his claims would work a fundamental miscarriage of justice.

Even if a successor petition for writ of habeas corpus contains claims that were - or should have been - included in a prior petition, the Court must hear the claims where they allege facts which, if proven, would establish that a fundamental miscarriage of justice occurred as a result of the proceedings leading to Petitioner's conviction and/or sentence. (*In re*

Clark, *supra*, 5 Cal.4th at 797.) A fundamental miscarriage of justice will have occurred in any proceeding in which it can be demonstrated,

> "(1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; [Fn omitted] (2) that the petitioner is actually innocent of the crime or crimes of which the petitioner was convicted; [Fn omitted] (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed a sentence of death; [Fn omitted] (4) that the petitioner was convicted or sentenced under an invalid statute." (*Id.* At 797-98.)

Each of Petitioner's claims meet one or more of these criteria, a), b), c) or d), as set forth in *Clark*. The criteria which each claim meets is summarized below. As a result of meeting one or more of the *Clark* criteria, each claim qualifies to be heard in this second Petition, even if the Court finds that they should have been brought in the initial petition.

Claim I (Overall Incompetence of Ron Slick) contends that Petitioner's trial counsel, Ron Slick, acted so egregiously as to deprive him of any meaningful defense. Slick failed to investigate, failed to put on evidence and failed to try the case as a competent lawyer. Further, as a result of these errors, Petitioner was sentenced to die by a jury that had virtually no information about him despite the fact that the evidence which

should have been presented was overwhelming. This meets the *Clark* criteria a), b) and c) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim III (DA and Police Lost / Destroyed Files) contends, below, that the loss and destruction of Petitioner's files was a constitutional error of such magnitude that Petitioner is now at a significant disadvantage to demonstrate (a) the errors at trial that led to a fundamentally unfair trial, (b) his actual innocence, and (c) that the jury sentencing him to death had a grossly misleading profile of him. This meets the *Clark* criteria a), b) and c) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim IV (Lost / Destroyed Files - Meaningful Petition) contends, below, that the loss and destruction of Petitioner's files was a constitutional error of such magnitude that Petitioner is now *per se* unable to fully demonstrate (a) the errors at trial that led to a fundamentally unfair trial, (b) his actual innocence, and (c) that the jury sentencing him to death had a grossly misleading profile of him. This meets the *Clark* criteria a), b) and c) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim V (IAC - Pre-Trial) contends, below, that trial counsel committed Constitutional errors of such magnitude during his pre-trial

representation that the resulting trial was so fundamentally unfair that absent the errors, no reasonable judge or jury would have convicted him. Further, the trial which resulted from Ron Slick's pre-trial representation culminated in a sentence of death imposed by a jury which had such a grossly misleading profile of Petitioner that absent these errors, no reasonable jury would have sentenced Petitioner to death. This meets the *Clark* criteria a), b) and c) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim VI (IAC - Lewis Wong) contends, below, that Ron Slick's failure to properly investigate and present the testimony of a defense witness was an error of Constitutional magnitude, and that had the jury received his testimony, no reasonable jury would have convicted Petitioner. This witness support Petitioner's claim of actual innocence. This meets the *Clark* criteria a) and b) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim VII (IAC - Mental Defense) contends, below, that Ron Slick's failure to properly investigate and present a mental defense was an error of constitutional magnitude, and that had the jury received this defense, no reasonable jury would have convicted Petitioner of a capital offense. Further, the actual availability of mental defenses supports Petitioner's

claim of actual innocence. This meets the *Clark* criteria a), b) and c) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim VIII (IAC - Failure to Investigate/Present Alibi) contends, below, that Ron Slick's failure to properly investigate and present Petitioner's defense of alibi was an error of constitutional magnitude, and that had the jury received a properly investigated and presented alibi defense, no reasonable jury would have convicted Petitioner. This error goes to Petitioner's claim of actual innocence. This meets the *Clark* criteria a) and b) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim IX (IAC - Conceded Alibi) contends, below, that Ron Slick's decision to concede Petitioner's defense of alibi during his closing argument was an error of constitutional magnitude, and that had the jury been able to properly evaluate this defense, no reasonable jury would have convicted Petitioner. This meets the *Clark* criteria a) and b) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim X (Guilt Phase Jury Instructions) contends, below, that the Court's improper instructions to the jury at the guilt phase, along with Ron Slick's failure to object and request proper instructions, was an error of constitutional magnitude, and that had the jury been properly instructed, no reasonable jury would have convicted Petitioner. This meets the *Clark*

criteria a) and b) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XI (IAC - Meaningful Voir Dire) contends, below, that Ron Slick's failure to conduct a meaningful voir dire resulted in a jury so biased against defendant as to result in an error of constitutional magnitude, and that had trial counsel done a proper voir dire, the resulting jury would not have convicted Petitioner. This meets the *Clark* criteria a), b) and c) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XII (IAC - Peremptory / Cause Challenges) contends, below, that Ron Slick's failure to move to challenge admittedly-biased venire persons for cause or to use his available peremptory challenges resulted in a jury so biased against Petitioner as to result in an error of constitutional magnitude, and that had trial counsel properly challenged biased venire persons, the resulting jury would not have convicted Petitioner. This meets the *Clark* criteria a), b) and c) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XIII (Robbery Spec Circ) contends, below, that the special circumstance under which Petitioner was convicted and sentenced to death, is invalid under both the federal and California Constitutions. This meets

the *Clark* criteria a) and d) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XIV (Failure to Produce Mitigating Evidence) contends, below, that Ron Slick's failure to introduce any meaningful mitigation evidence presented the jury with such a grossly misleading profile of the Petitioner that, had Ron Slick presented the available mitigation evidence, no reasonable jury would have sentenced Petitioner to death. This meets the *Clark* criteria a) and c) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XIV (IAC - Mental Retardation / Learning Dis) contends, below, that Ron Slick's failure to investigate or introduce mitigation evidence of Petitioner's life trauma, mental retardation, and learning disabilities presented the jury with such a grossly misleading profile of the Petitioner that, had Ron Slick presented this evidence, no reasonable jury would have sentenced Petitioner to death. This meets the *Clark* criteria a) and c) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XV (IAC - CYA) contends, below, that Ron Slick's failure to investigate or introduce mitigation evidence of the impact of Petitioner's institutionalization presented the jury with such a grossly misleading profile of the Petitioner that, had Ron Slick presented the available mitigation

evidence, no reasonable jury would have sentenced Petitioner to death. This meets the *Clark* criteria a) and c) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XVII (LWOP Means LWOP) contends, below, that the Court's failure to instruct the jury as to the true nature of life without the possibility of parole presented the jury with such a misleading description of their options that, had the Court instructed them appropriately, no reasonable jury would have sentenced Petitioner to death. This meets the *Clark* criteria a) and c) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XVIII (Atkins) contends, below, that, because of Petitioner's mental retardation, the statute under which he was convicted and sentenced to death is invalid under both the federal and California Constitutions as applied to him. This meets the *Clark* criteria a), c) and d) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XIX (Substantive DP - Proportionality) contends, below, that, because the trial court failed to allow for proportionality review of his sentence, the statute under which he was convicted and sentenced to death, is invalid under both the federal and California Constitutions. This meets the *Clark* criteria a), c) and d) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XX (Equal Protection - Proportionality) contends, below, that, because the trial court failed to allow for proportionality review of his sentence, the statute under which he was convicted and sentenced to death is invalid under both the federal and California Constitutions as applied to him. This meets the *Clark* criteria a), c) and d) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XXI (Issues Raised on Appeal) contends, below, that the fundamental issues raised on appeal, if they are held not to be cognizable there, are grounds for relief by way of Writ. Those issues meet the *Clark* criteria a), b) and c) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XXII (Trial Court - Evidence to Strike Spec Circ) contends, below, that, because the Trial Court failed to allow Petitioner to present evidence in support of a motion to strike the special circumstance finding, the statute under which he was convicted and sentenced to death is invalid under both the federal and California Constitutions as applied to him. This meets the *Clark* criteria a), c) and d) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XXIII (Trial Court - Present Mitigating Evidence) contends, below, that, because the trial court failed to allow Petitioner to present relevant mitigating evidence in support of a sentence less than death, the

statute under which he was convicted and sentenced to death is invalid under both the federal and California Constitutions as applied to him. This meets the *Clark* criteria a), c) and d) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XXIV (DP Jury Instructions are Vague) contends, below, that, because the death penalty jury instructions given by the Court during his penalty phase were Unconstitutionally vague, the death penalty was imposed by a jury which had such a grossly misleading understanding of their duty that, had they been properly instructed, a reasonable jury would not have sentenced Petitioner to death. This meets the *Clark* criteria a) and d) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XXV (Trial Court Denied Pre-Sentencing Discovery) contends, below, that, because the trial court denied Petitioner's motion for pre-sentencing discovery, he was deprived of fundamental rights under both the federal and California Constitutions as applied to him. This meets the *Clark* criteria a), b), c) and d) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XXVI (DP Is Wrong) contends, below, that any imposition of the death penalty is simply wrong and invalid under both the federal and

California Constitutions. This meets the *Clark* criteria a) and d) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XXVII (General Narrowing) contends, below, that the statute under which he was convicted and sentenced to death is wrong and invalid under both the federal and California Constitutions. This meets the *Clark* criteria a) and d) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XXVIII (Equal Protection - By County) contends, below, that, the statute under which he was convicted and sentenced to death is unconstitutionally imposed under both the federal and California Constitutions, and so invalid. This meets the *Clark* criteria a), b) c) and d) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XXIX (International Law) contends, below, that the statute under which he was convicted and sentenced to death is invalid under international law. This meets the *Clark* criteria a), b), c) and d) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XXX (Lackey) contends, below, that execution following a lengthy confinement under sentence of death is unconstitutional under the state and federal Constitutions. This meets the *Clark* criteria a) and d) and

not to consider this claim would result in a fundamental miscarriage of justice.

Claim XXXI (Method of Execution) contends, below, that, the statute under which he would be executed is invalid under both the federal and California Constitutions. This meets the *Clark* criteria a) and d) and not to consider this claim would result in a fundamental miscarriage of justice.

Claim XXXII (Cumulative) contends, below, that, the cumulative effect of all the asserted errors are such that, (a) his trial was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted him, (b) Petitioner now possesses evidence supporting his actual innocence ,(c) the death penalty was imposed by a jury which had such a grossly misleading profile of him that absent the errors no reasonable jury would have imposed a sentence of death, and (d) Petitioner was convicted and sentenced under statutes that are invalid under both the federal and California Constitutions. The cumulative effects of all of these claims meet the *Clark* criteria a), b), c) and d) and not to consider this cumulative claim would result in a fundamental miscarriage of justice.

D. Petitioner is entitled to have any of his claims heard that are not barred by the *Clark* rule.

Even if the Court finds that some of his claims are barred by the successor petition rule announced in *Clark*, the remaining clauses should be

heard. This Court has not announced a rule that it will refuse to hear any surviving claims. Petitioner respectfully urges that he is entitled to have any claims heard which survive the *Clark* rule as though they were the only claims brought forth in this Petition. To do otherwise would be to deny Petitioner his rights to substantive and procedural Due Process, a meaningful habeas corpus review of his case, and protection from Cruel and/or Unusual Punishment as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the federal Constitution and Article I, Sections 1, 7, 15, 17, 24, and 31 of the California State Constitution.

CLAIM III: THE DISTRICT ATTORNEY HAS LOST OR DESTROYED HIS FILE AND THE LONG BEACH POLICE HAS DESTROYED ITS FILES, THEREFORE, PETITIONER HAS BEEN PREVENTED FROM REVIEWING MATERIALS TO WHICH HE MAY BE CONSTITUTIONALLY ENTITLED.

A. Introduction

Petitioner is in a unique situation in this case. The District Attorney has lost or destroyed his file. The trial lawyer Ron Slick, has been singularly uncooperative and did not turn over a complete file. The Police Department purged its file. All diligent efforts on the part of Petitioner and his present and past habeas counsel to reconstruct the file have been thwarted. Only recently, for the first time, Petitioner has come into possession of some of the police reports in this matter.

Petitioner's conviction and sentence of death were obtained in violation of his rights under the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the California Constitution, Article I, sections 7, 13, 15, 16, 17, 24, and 31, and Penal Code section 1473, insofar as the state withheld, concealed and/or destroyed evidence favorable to the defense and material to the guilt and penalty determinations, as well as evidence material to Petitioner's ability to demonstrate his entitlement to post-judgment collateral relief. The violations of Petitioner's Constitutional rights include but are not limited to deprivations of the right to Due Process and a Fair Trial; the right to present a defense; the right to the Effective Assistance of Counsel; the right to Confront and Cross-Examine witnesses; the right to Compulsory Process; the right to an accurate and reliable determination of guilt, death eligibility and penalty; and the prohibition against Cruel and Unusual Punishment. (See *Kyles v. Whitley* (1995) 514 U.S. 419; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 61-65 (conc. opn. of Blackman, J.); *Id.* at 62-72 (dis. opn. of Brennan, J.); *Holbrook v. Flynn* (1986) 475 U.S. 560; *Zant v. Stephens* (1983) 462 U.S. 862, 462; *United States v. Bagley* (1985) 473 U.S. 667; *Estelle v. Williams* (1976) 425 U.S. 501, 505; *Brady v. Maryland* (1963) 373 U.S. 83.)

The facts supporting this claim, among others to be presented after adequate funding, full investigation, discovery, access to this court's subpoena power, and evidentiary hearing, include, but are not limited to, the following:

B. Efforts to Obtain the File of Prior Counsel

Upon appointment to this case, present Counsel made efforts to obtain the files of Ron Slick and prior appellate and habeas discovery. Petitioner requested the file from trial counsel, Ronald Slick, by letter on July 19, 1996 and August 26, 1996. Ronald Slick responded on September 17, 1996, by enclosing a portion of the Lewis file which did not include the police reports or any physical evidence examination reports. (Exhibit 8, Letter from Ron Slick To Catherine J. Swysen dated September 17, 1996.)

Petitioner obtained the files of prior appellated counsel, Don Specter and McCutchen & Morrissey. Don Specter sent his file on November 9, 1995. It did not include the police reports or any physical evidence examination reports. McCutchen & Morrissey sent their file on January 1997. It did not include the police reports or any physical evidence examination reports. (Exhibit 4, Declaration of Catherine J. Swysen.)

Petitioner also attempted to obtain the police reports from Kristina Keinbauer, the investigator retained by Ron Slick, but she was unable to locate her file. (Exhibit 9, Declaration of Reggie Stewart)

Petitioner finally obtained 52-pages of police reports from Dr. Michael Maloney, an expert who was retained by Ron Slick in 1983. Petitioner had requested the file from Dr. Maloney on May 8, 2002. Dr. Maloney did not provide the file. Petitioner requested the file again a year later on March 25, 2003. Dr. Maloney finally responded by sending his file indicating "difficulty locating the file." (Exhibit 4, Declaration of Catherine J. Swysen.)

To date, Petitioner has recovered only 52 pages of police reports and those were only recently recovered from a third party. The remaining police reports, "murder book," and other documents and materials which were part of the Los Angeles District Attorney's file, the Long Beach Police Department files, even Ron Slick's files, have never been recovered despite diligent efforts to recover or reconstruct them.

C. Efforts to Reconstruct the File from Police Records

Petitioner attempted to obtain a copy of the law enforcement file from the Long Beach Police Department in order to reconstruct the missing defense lawyer files and in order to determine if any *Brady* materials were contained therein. The only items Petitioner was able to obtain were 43 photographs of the crime scene. On October 6, 2000, Reggie Stewart, licensed private investigator, assisting Petitioner's counsel, contacted the Long Beach Police Department to order the case file. On October 12, 2000,

Rebecca, from the Long Beach Police Department, informed Reggie Stewart that the file was not there. She told him to contact the District Attorney's Office. (Exhibit 9, Declaration of Reggie Stewart.)

D. Efforts to Reconstruct the File form the Records of the District Attorney.

Petitioner attempted to obtain the prosecutor's file in this case. Despite numerous attempts it appears that the file has been lost. Investigator, Reggie Stewart, contacted the Los Angeles District Attorney on September 17, 2000, to review the prosecutor's file in *People v. Lewis*. He left messages with Patti Jo at the District Attorney's office to search for the file on September 19, 2000 and September 20, 2000. On September 26, 2000, Patti Jo told Reggie Stewart that the file was ordered. Patti Jo informed Reggie Stewart on October 13, 2000 that Deputy District Attorney Hodgman had the file in his office when he was assigned to the Long Beach District Attorney's office. Reggie Stewart contacted Deputy District Attorney Hodgman's office on October 14, 2000. He never returned the called. Patti Jo, however, told Reggie Stewart that she could not locate the file on October 16, 2000 and again on November 9, 2000. Reggie Stewart left two more messages for Deputy District Attorney Hodgman on January 22, 2001 and April 9, 2001. He never returned the calls. (Exhibit 9, Declaration of Reggie Stewart.)

In July 2001, Jessica Kraft called the Long Beach District Attorney's office to obtain a copy of the file. She was directed to call the Archives Department and the Appellate Division of the District Attorney's office. She left a message with Deputy District Attorney Mahon (phonetic spelling) who was supposed to locate the file and call her back. He did not. (Exhibit 10, Declaration of Jessica Kraft.)

On July 10, 2001, Jessica Kraft called the Appellate Division again. She spoke to Audree Jackson. Audree Jackson told her she was going to call the Archives Department to obtain a copy of the file. (*Id.*)

On November 1, 2001, Jessica Kraft called Deputy District Attorney Hodgman who prosecuted Robert Lewis. He was not there. She left a message with the receptionist, Allison. (*Id.*)

Deputy District Attorney Field called Jessica Kraft on November 6, 2001. He told Ms. Kraft that he was very concerned because they did not have the file and that the file seemed to be missing. He told Ms. Kraft to call Deputy District Attorney Hodgman directly and gave her the number to contact him. (*Id.*)

Jessica Kraft called the number Deputy District Attorney Fields gave her on November 6, 2001. She spoke to an individual named Peter. She gave him all the pertinent information. Peter told her that he would have Deputy District Attorney Hodgman call her back.

Deputy District Attorney Hodgman called Jessica Kraft back on November 7, 2001. He told her he would look for the file. (*Id.*)

Having not heard from Deputy District Attorney Hodgman, Jessica Kraft called him back on January 29, 2002 and February 4, 2002. Each time she left a detailed message on his voice mail. (*Id.*)

Deputy District Attorney Hodgman called Jessica Kraft back on February 12, 2002. He indicated that the appellate office did no have the file and that he was working with a competent secretary to locate the file. Deputy District Attorney Hodgman indicated also that he would keep Jessica Kraft posted. As of this date, she did not receive a return telephone call from him. (*Id.*)

E. The Failure to Preserve the File or any Means to Reconstruct it Violates Petitioner's Rights to Due Process, Equal Protection, and Protection Against Cruel and/or Unusual Punishment.

The state's duty to disclose material evidence favorable to the defense is an essential element of due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7 and 15 of the California Constitution. Evidence is deemed "material" if:

> "... there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*United States v. Bagley*,

at p. 682 (plur. opn.); see also, id., at p. 685 (conc. opn. of White, J.).)

In determining materiality, a court must consider the cumulative effect of all of the suppressed evidence, rather than considering each item individually. (*Kyles v. Whitley*, *supra*, 514 U.S. at 436-437.) Once the reviewing court has found materiality, there is no need for further harmless-error review. (*Kyles v. Whitley*, 514 U.S. at 435.)

The "duty [to disclose] exists regardless of whether there has been a request for such evidence, and irrespective of whether the suppression was intentional or inadvertent." (*People v. Morris* (1988) 46 Cal.3d 1, 30 (citations omitted), overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544.)

The duty to disclose extends to evidence which can be used to impeach a prosecution witness. (*United States v. Bagley*, *supra*, 473 U.S. at 676, citing *Giglio v. United States* (1972) 405 U.S. 150, 154, and *Napue v. Illinois* (1959) 360 U.S. 264, 269.) Evidence in this category would include evidence of promises, inducements or benefits which the prosecution has offered to its witnesses. (See *People v. Morris*, *supra*, 46 Cal.3d at 30; *People v. Phillips* (1985) 41 Cal.3d 29, 46; see also *Bagley v. Lumpkin* (9th Cir. 1986) 798 F.2d 1297.)

The duty to disclose also extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge "any favorable evidence known to others acting on the government's behalf in the case." (*Kyles v. Whitley*, *supra*, 514 U.S. at 437.) "As a concomitant of this duty, any favorable evidence known to others acting on the government's behalf is imputed to the prosecution." (*In re Brown* (1998) 17 Cal.4th 873, 879; see *United States v. Payne* (2nd Cir. 1995) 63 F.3d 200, 1208.) In addition, the prosecution has an ongoing post-conviction duty to disclose information casting doubt on the correctness of a defendant's convictions and judgment of death. (*Imbler v. Pachtman* (1976) 424 U.S. 409, 472, fn. 25; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1261; see also *Thomas v. Goldsmith* (9th Cir. 1992) 979 F.2d 746, 749-750.)

Here the District Attorney and the Long Beach Police Department both failed to take steps to preserve their files and, despite diligent attempts on the part of counsel, there is no way to reconstruct them. This is compounded by the failure of Ron Slick, trial counsel, to preserve and transmit his file to subsequent counsel. There is no way to determine what would have benefitted the Petitioner or harmed the prosecution because the government failed to preserve it. Given the presumptive incompetence of

Ron Slick, it is reasonable to assume that the government files would have material which would be helpful to Petitioner's counsel post-conviction.

F. Petitioner is Entitled to Post-Conviction Discovery and Will Seek Leave of This Court to Amend This Petition Upon the Receipt of Same.

Section 1 of Senate Bill 1391, passed by the Legislature and approved by Governor Davis, became effective on January 1, 2003. This provision broadens the post-conviction discovery rights of defendants sentenced to death or to life without possibility of parole. In part, this legislation created the newly-enacted Penal Code section 1054.9. Subdivision (a) of this statute provides as follows:

> "Upon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment in a case in which a sentence of death or of life in prison without the possibility of parole has been imposed, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided in subdivision (c), order that the defendant be provided reasonable access to any of the materials described in subdivision (b)." (Pen. Code §1054.9, subd. (a).)

For the purposes of this subdivision, the Legislature defined the term "discovery materials" as "materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at the time of trial." (*Id.*, subd. (b).) Provided that the requisite

showing has been made, the statute is mandatory and requires that the order be issued. (*Id.*, subd. (a).) The statute also empowers this Court to order that the defense be given access to physical evidence for the purposes of examination if reasonably necessary to the defendant's effort to obtain relief. (*Id.*, subd. (c).)

Thus, under this statute, a defendant is entitled to a court order permitting him or her to obtain reasonable access to "discovery materials" following conviction in a capital case, or a case in which a life-without-parole sentence has been imposed, upon a showing that he or she has attempted to obtain such materials from trial counsel and has been unsuccessful. To obtain post-conviction access to physical evidence for purposes of examination, the defense must make this showing and must also show good cause to believe such access is reasonably necessary to his effort to obtain relief.

Although the final language of the statute is not absolutely clear[4] it suggests that the post-conviction discovery motion be filed after the Petition is filed. It does not specify in which court the motion is to be filed but it

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For example, the statute begins with the rather ambiguous phrase "Upon the prosecution of a writ of habeas corpus, . . ." Technically, such a writ is not "prosecuted" but is instead sought by a criminal defendant through the filing of a petition and is actually issued by a court. Also, the final language of the statute states merely that "the court shall" issue the requested order, without specifying which court was intended.

appears that it may be filed in the Supreme Court. In light of that, it would be appropriate to allow the Petitioner to amend his Petition if and when additional materials are provided.

Prior to the enactment of this legislation, the right to post-conviction discovery was limited to habeas proceedings in which a petition had been filed and an order to show cause had issued. In *People v. Gonzalez* (1990) 51 Cal.3d 1179, the California Supreme Court held that a defendant's discovery rights terminated upon conviction and that he had no entitlement to examine official files (apart from the Public Records Act) unless he first filed a petition for writ of habeas corpus which established a prima facie case for relief. (*Id.*, at pp. 1258-1261.)

The legislative history of Penal Code section 1054.9, introduced by Senator John Burton during the 2002 legislative session, shows that the Legislature recognized that in many situations, the *Gonzalez* ruling created a grossly unfair situation in which the defendant, through no fault of his own, was unable to file a petition demonstrating a prima facie case for relief because he was unable to obtain discovery materials from trial counsel. The legislative history materials show that the Legislature enacted Penal Code section 1054.9 in order to address this problem by creating a limited right to post-conviction discovery which enabled a defendant to obtain access to discovery materials in the possession of the prosecution or law enforcement

agencies when he or she has been unable to obtain discovery materials from trial counsel. (See, e.g., Bill Analysis of SB 1391 (4/10/02), Assembly Public Safety Committee.)[5]

Petitioner has made all reasonable efforts to obtain discovery informally pre-Petition. Trial Counsel, Ron Slick, has failed to preserve or turn over his complete files. The District Attorney and the Long Beach Police Department claim that their files have been lost or destroyed. In an abundance of caution, it appears that a motion will have to be filed in this Court. Since this Court does not have jurisdiction over the Petition for Writ of Habeas Corpus until the Petition is filed, Petitioner will file a motion in this Court after the filing of this Petition. In order to accomplish the purposes of this discovery statute, particularly under the specific facts of this case, Petitioner will ask leave of this Court to amend the Petition if and when additional information is made available by virtue of this new discovery statute. However, in stating this intention, Petitioner does not waive his arguments that the government, and the District Attorney of the County of Los Angeles and Long Beach Police Departments in particular, have breached their Constitutional duties to preserve and disclose all materials so required to be preserved and disclosed.

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Complete legislative history materials pertaining to this bill may be accessed at the Legislature's website, found at www.leginfo.ca.gov.

CLAIM IV: PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS, EQUAL PROTECTION, PROTECTION AGAINST CRUEL AND/OR UNUSUAL PUNISHMENT, AND EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE DISTRICT ATTORNEY AND TRIAL COUNSEL HAVE LOST OR DESTROYED THEIR FILES, AND THE LONG BEACH POLICE HAS DESTROYED ITS FILES, DEPRIVING PETITIONER OF A THOROUGH AND MEANINGFUL PETITION FOR WRIT OF HABEAS CORPUS.

Petitioner has both state and federal statutory rights to a writ of habeas corpus if he is illegally restrained. (Penal Code § 1473; 28 U.S.C § 2254.) An illegal restraint could arise from a violation of his federal and/or state constitutional rights including his rights to Due Process, Equal Protection, a fair trial, effective assistance of counsel, and protection against cruel and/or unusual punishment. An implied right to petition for writ of habeas corpus also exists under Article I, Sect. 9, Cl. 2 of the Federal Constitution and Article I, Section 11 of the California Constitution. More explicitly, the California Supreme Court has held that the availability of coram nobis, habeas corpus or other corrective judicial process is a fundamental due process right under the Fourteenth Amendment to the United States Constitution. (*People v. Shorts* (1948) 32 Cal.2d 502, 506). In the context of a capital case, this fundamental due process right would also be implicated in the right to a fair and reliable determination of guilt and punishment as required by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and

Article I, Sections 1, 7, 15, 17, 24, and 31 of the California Constitution. Further, as Petitioner is entitled to have this Petition heard under Penal Code § 1473, this Court's denial would give rise to a federal Due Process claim under the Fourteenth Amendment to the federal Constitution.

The facts supporting this claim, among others to be presented after adequate funding, full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to, the following.

Petitioner has had excessive difficulties in acquiring even the most basic records from the original case. (See Claim III, supra.) This has largely been the fault of the District Attorney, Long Beach Police Department, and Ron Slick, who lost or destroyed their files. (*Id.*)

Both the District Attorney and Long Beach Police Department are governmental agencies and were acting for, or on behalf of, the state during Petitioner's original trial and post trial proceedings.

Quite apart from the claim that these state agents have violated Petitioner's rights to discover information that the Constitution might have guaranteed to him (See Claim III, supra), their failures to preserve their trial files is a *per se* violation of Petitioner's right to a meaningful Petition for Writ of Habeas Corpus. The files that were lost or destroyed by the District Attorney and Long Beach Police Department, would have - whatever their

contents would have contributed to the necessary foundation of information from which Petitioner would have sought his guaranteed right to a writ of habeas corpus. Therefore, any petition that Mr. Lewis files now will necessarily be less complete that it would have been if the files were preserved.

Although there may be circumstances in which state agents might destroy their original trial files, this cannot be one of them. The case has remained in the trial or appellate process from its inception to the present. This case contained extraordinary circumstances - a four day capital murder trial and a defense attorney with a pattern of ineffective assistance - which should have led any reasonable person to believe that a Petition for Writ of Habeas Corpus would be filed. Certainly the District Attorney and Police Department are aware of the automatic appeal and habeas procedurs which follow any case resulting in a death sentence.

Therefore, because the state unreasonably failed to preserve documents which would have served as the basis for Mr. Lewis's statutorily and constitutionally guaranteed write to Petition for Writ of Habeas Corpus, the state has denied Petitioner his rights to Due Process, Equal Protection, protection against Cruel and/or Unusual punishment, and Effective Assistance of Counsel as guaranteed by the Fifth, Sixth, Eighth, and

Fourteenth Amendments to the federal Constitution and Article I, Sections 1, 7, 15, 17, 24, and 31 of the California Constitution.

CLAIM V: PETITIONER'S CONVICTION, SENTENCE AND CONFINEMENT WERE UNLAWFULLY OBTAINED BECAUSE HE WAS DENIED THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT THE PRE-TRIAL STAGE OF THE PROCEEDINGS

Petitioner had a right to the assistance of a reasonably competent attorney during the pretrial stages of his case. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., Article 1, §§ 1, 7, 13, 15, 16 and 17; *Strickland v. Washington*, 466 U.S. 668; *Kirby v. Illinois* (1972) 406 U.S. 682, 689; *Coleman v. Alabama* (1970) 399 U.S. 1, 7-10; *United States v. Pace* (9th Cir. 1987) 833 F.2d 1307, 1310; *People v. Coleman* (1988) 46 Cal.3d 749, 773; *People v. Ledesma*, 43 Cal.3d 171.) He had a right to develop defenses at the preliminary hearing and to discover mitigating evidence. Adequate counsel at the preliminary hearing and through pre-trial discovery would have done so, and the information developed could have been used to defend petitioner at the guilt and penalty phases of his trial.

The facts supporting this claim, among others to be presented after adequate funding, full investigation, discovery, access to this Court's subpoena power, and evidentiary hearing, include, but are not limited to, the following.

Here, Ron Slick failed to render effective assistance throughout the pre-trial proceedings. Trial counsel's errors and omissions included: failure to competently investigate the charged crimes, including consultation with forensic experts; failure to litigate the charged crimes, including appropriate pre-trial litigation; failure to perform competently during the preliminary hearings, failure to make pre-trial discovery motions and, failure to perform competently during jury selection.

Ron Slick's egregious behavior in purporting to represent many of his clients charged with homicide has been the subject of both public and judicial review as set forth in more detail herein above. Ron Slick has been known not to present exculpatory evidence to a jury, to fail to present *any* evidence in defense, to decline to challenge Prosecution evidence, to fail to object to the presentation of unlawful evidence, not to cross-examine the People's witnesses. Here, Ron Slick failed to conduct meaningful investigation, failed to bring a discovery motion, failed to employ experts including without limitation, his failure to establish a foundation for the motel registration card, his failure to prepare for and handle jury voir dire, his failure to ascertain that Robert Lewis, Jr. suffered a traumatic life, his failure to ascertain that Robert Lewis, Jr. suffered from the effects of institutionalization, his failure to determine that Robert Lewis, Jr. was

mentally retarded and suffered from learning disabilities, and his collective failure to do all of these things.

CLAIM VI: PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS, INCLUDING THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, WHEN TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE THE GUILT PHASE OF THE TRIAL BY INTERVIEWING LEWIS WONG.

As the Supreme Court held in *Strickland v. Washington* (1984) 466 U.S. 668, 691, counsel must, at a minimum, conduct reasonable investigation enabling him or her to make informed decisions about how best to represent his or her client. "There is nothing strategic or tactical about ignorance...."

The failure of trial counsel to adequately investigate the facts of the case and possible defenses is ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 424-425.) Although trial counsel has wide discretion to make decisions based on strategy or tactics "'the exercise of that discretion must be a reasonable and informed one in light of the facts and options reasonably apparent to counsel at the time of trial, and founded upon reasonable investigation.'" (*In re Jones* (13 Cal.4th 552, 565 quoting *People v. Frierson* (1979) 25 Cal.3d 142, 166.) "[T]he constitutional right to be represented by counsel embodies a right to be represented by a

'diligent, conscientious advocate.'" (*In re Jones*, supra, at 59 quoting *Pope*, *supra*, 23 Cal.3d at p. 424.)

The facts supporting this claim, among others to be presented after adequate funding, full investigation, discovery, access to this Court's subpoena power, and evidentiary hearing, include, but are not limited to, the following:

Ron Slick failed to interview Lewis Wong, the owner of Lewis Jewelry. (Exhibit 11 , Declaration of Lewis Wong.)

At trial, one of the significant pieces of physical evidence that the People used to implicate Petitioner in the alleged robbery was a gold chain that was missing from the victim's person and home. (4RST 725.) Jacqueline Estelle testified that a chain worn by Petitioner at a preliminary hearing was the same chain reported missing. (3RST 519.) Gladys Spillman, Petitioner's sister, challenged this assertion, testifying that she had purchased the chain worn by Mr. Lewis at the preliminary hearing prior to the crime. (4RST 690-92.) Although she had a receipt, dated January, 1983, Ron Slick never offered it into evidence.

Lewis Wong examined that receipt, and would have testified that it appeared to be from his store. (Exhibit 11, Declaration of Lewis Wong) He would have testified that the stamp upon it was his; that it is filled out in his handwriting and in a way that had been customary for him in 1983; and

that the phone number in the receipt was that of Lewis Jewelry in that same year. (*Id.*) Further, he would have told the jury that he had sold chains like the disputed necklace in 1983. (*Id.*)

But Ron Slick never contacted Mr. Wong. The phone number for Lewis Jewelry, written on the receipt given to Ron Slick, was the same from 1982 through at least 1999. (*Id.*) Lewis Jewelry did not change physical locations between 1982 and 1986; a period wholly-encompassing Petitioner's arrest through trial. (*Id.*) Mr. Wong could have authenticated the receipt for evidentiary purposes, significantly challenging the People's credibility on this crucial piece of evidence, no one related to Petitioner's defense contacted him until April 7, 2003, nineteen years after Petitioner's trial. (*Id.*) Perhaps this was because Ron Slick only authorized his trial investigator to work for approximately thirty hours. (Exhibt 12, Declaration of Kristina Kleinbauer,)

Ron Slick had Mr. Wong's business phone number and the testimony of Ms. Stillman that he was an important witness to a key piece of evidence that linked Petitioner to the crime. Ron Slick's failure to even attempt to contact Mr. Wong was an unreasonable unwillingness to investigate and prepare Petitioner's defense at the guilt phase and, therefore constituted Ineffective Assistance of Counsel, as well as a denial of the right to Due Process, to a fair trial, to equal protection, to privileges and necessities, to

be free from Cruel and/or Unusual Punishment, and to a reliable determination of guilt under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution and Article I, Sections 1, 7, 15, 16, 17, and 24 of the California Constitution.

CLAIM VII: PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS, INCLUDING THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, WHEN TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE THE GUILT PHASE OF THE TRIAL BY DETERMINING WHETHER A MENTAL DEFENSE WAS AVAILABLE.

The Supreme Court explicitly requires that an attorney make reasonable investigation before making strategic or tactical choices. (*Strickland v. Washington,* (1984) 466 U.S. 668, 691; see also *Jennings v. Woodford* (9th Cir. 2002) 290 F.3d 1006, 1014 citing *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032.) Trial counsel has the further, specific obligation to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired. (*Douglas v Woodford* (9th Cir. 2003) 316 F.3d 1079, 1085.) The obligation to investigate possible mental defenses is especially strong where, as with a charge of first-degree murder, an element of the crime may be proven by Defendant's premeditation or deliberation. (*People v Coddington* (2000) 23 Cal.4th 529, 583 [holding that "[a]n expert's opinion that a form of mental illness can

lead to impulse behavior is relevant to the existence vel non of the mental states of premeditation and deliberation..."].)

In the case of *Jennings*, the court found the trial attorney's "unreasonable failure to investigate psychiatric evidence and possible medical defenses fell below the minimal standard of effectiveness that can be reasonably expected of defense counsel." (*Jennings, supra*, at 1019.) In *Jennings*, trial counsel was on notice that there may be a mental defense but instead of investigating the possibility, trial counsel settled on an alibi defense. (See *id.* at 1015.) Had trial counsel conducted a reasonable investigation an effective attorney likely would have presented a mental health defense rather than a weak alibi defense. (See *id.* at 1019.) The court found that failing to conduct a reasonable investigation into the mental health issues was ineffective and that "the probability of a different result [was] 'sufficient to undermine confidence in the outcome . (*Id.* at 1018; citing *Strickland*, 466 U.S. at 694.)

The same situation pertains here to Robert Lewis, Jr. As set forth in more detail below, Robert Lewis Jr. is mentally retarded and suffers from learning disabilities. (See Exhibit 13, Declaration of Natasha Khazonov) This is a capital case involving proof that the defendant had the *mens rea* for murder and that he killed with pre-meditation and deliberation as well as had the mental state for the purpose of the special circumstance and the

specific intent for robbery. To ignore Mr. Lewis's mental condition amounted to a withdrawal of a defense and as such was a violation of his Constitutional rights to Due Process, a fair trial, the Effective Assistance of Counsel, Equal Protection, Privileges and Immunities, the prohibition against Cruel and/or Unusual Punishment and a reliable verdict of guilt and sentence of death as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution and Article I, Sections 1, 7, 15, 16, 17, and 24 of the California Constitution.

CLAIM VIII: PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND THE EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO FULLY PREPARE AND PRESENT HIS DEFENSE OF ALIBI.

In the present case, the prosecution's theory of the crime was that Mr. Lewis deliberately killed the victim in the course of stealing a car, felony-murder predicated on a crime of robbery. Mr. Lewis's principal defense theory was that of alibi: that he was already in rightful possession of the allegedly stolen car prior to the crime and that he was not present when the crime occurred. To the extent that Mr. Slick presented this defense to the jury, his effort was so inadequate as to implicate Petitioner's rights to Due Process, a fair trial, the Effective Assistance of Counsel against Cruel and/or Unusual Punishment guaranteed by the Fifth, Sixth,

Eighth, and Fourteenth Amendments to the Federal Constitution and Article I, Sections 1, 7, 15, 16, 17, and 24 of the California Constitution.

At trial, the first part of this alibi was based almost exclusively upon a hotel registration card dated "10/24/1983." (4RST 674.) Mr. Slick limited his investigator to approximately 30 hours of work. He then took off for a month just before trial. At the last minute Slick asked his investigator, Ms. Kleinbauer, to acquire this registration card, she did so, on the very eve of trial. (Exhibit 12, Declaration of Kristina Kleinbauer, paragraphs 9 and 3, respectively) After tracking the card down, Ms. Kleinbauer interviewed Petitioner's father and wife, both of whom confirmed that they had seen Petitioner with the vehicle prior to the time of the crime. (Id.) At trial, Petitioner's father testified that he filled out a portion of the card, including the make and license number of a vehicle in Petitioner's possession on October 24th, 1983 (4RST 673-675); both the make and license number matched the vehicle allegedly stolen as part of the burglary portion of the charged crime (4RST 632, 674). A manager for the hotel then testified that she filled out additional information on the registration card, including the date that Petitioner arrived and the date that he left, October 24th and 25th, respectively (4RST 682-684).

So ended Mr. Slick's presentation of Petitioner's alibi. Mr. Slick did not lay a foundation with the hotel manager to introduce the registration

card into evidence as a business record. (Evid. Code §1271.) Mr. Slick did not call his investigator to testify as to the chain of custody. Mr. Slick did not do anything to authenticate the document to the jury or the court. (Evid. Code § 1401.) Mr. Slick did not even call Petitioner's wife for the simple purpose of verifying Mr. Lewis's prior use of the vehicle. So far as the jury was concerned, then, Petitioner claimed that he owned the car before the crime - and so had no cause to be present at the scene - because his father said so on a piece of cardstock that could have been filled out in the hallway a few moments earlier.

If Ron Slick had not been so abjectly incompetent, he would have called his investigator to verify that she had gone to the hotel and observed the clerk render the card from her records. He would have had the clerk testify that she had retrieved the record from the files kept in the ordinary course of business. He would have had Petitioner's wife testify to his prior use of the vehicle.

Slick did none of these things because he was an incompetent lawyer.

CLAIM IX: PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL CONCEDED HIS ALIBI DEFENSE DURING CLOSING ARGUMENT.

Even if the failure to competently present available evidence was not, on its own, sufficiently incompetent to implicate Petitioner's constitutional rights, Ron Slick then *conceded* Mr. Lewis's alibi during his closing argument by suggesting that Mr. Lewis might not have acted alone:

> "But there is something else I think you have to consider. One little nagging thing that bothers me is the police investigated this crime. *I think there is someone else involved. Do you think someone else could have been involved with Mr. Lewis?* Has this been ruled out? Well not really." (4RST 777 [emphasis added].)

The importance of the closing argument by counsel for the defense cannot be overstated:

> "It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. [Citation.] [¶] The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a fact finding process, no aspect of such advocacy could be more important than the opportunity finally to

> marshal the evidence for each side before submission of the case to judgment." (*Herring v New York* (1975) 422 U.S. 853, 862.)

No matter what tactic or strategy that defense counsel employs, he may not surrender any of the defendant's substantial rights, nor impair, compromise or destroy his client's cause of action without the defendant's prior, knowing, and full consent. (*People v Davis* (1957) 48 Cal.2d 241, 256.) There is no indication that this consent was given, or even sought. The decision to change from an alibi defense to an accomplice theory cannot even be justified as a desire to leave the jury with a lingering doubt, since Ron Slick presented no foundational evidence of such a theory before the closing argument. When asked to explain his course of action, Mr. Slick could give no answer or explanation for this "major blunder." (Exhibit 14, Declaration of Michael L. Adelson, paragraph 33)

The fact that Ron Slick failed to adequately investigate or present Petitioner's sole defense theory probably alone constituted inadequate assistance of counsel. Combined with Slick's actual concession of that only defense in the closing argument, however, in favor of an alternate and competing theory for which he had built no evidentiary case, there can be no doubt that Petitioner was essentially undefended at trial. Because Ron Slick failed his client so thoroughly, Petitioner was denied his Constitutional rights to Due Process, a fair trial, the effective assistance of

counsel and a reliable verdict of guilt and sentence of death as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution and Article I, Sections 1, 7, 15, 16, 17, and 24 of the California Constitution.

CLAIM X: THE TRIAL COURT ERRED IN GIVING CERTAIN JURY INSTRUCTIONS DURING THE GUILT PHASE OF THE TRIAL AND IT WAS AND IT WAS INEFFECTIVE ASSISTANCE OF COUNSEL TO FAIL TO OBJECT TO SAID INSTRUCTIONS.

Defense Counsel filed a written "Instructions to the Jury Requested by the Defendant" with regard to the guilt/innocence phase of the trial. (CT 327.) The trial court gave the instructions requested by the defense and others which appear to have been requested by the prosecution. (CT 330-388.)

In the course of giving those instructions, and failure to give others, the Court erred in the instances set forth below as well as those set forth in the first appeal and the first Petition. Petitioner maintains that it is the Court's *sua sponte* duty to instruct properly in these instances and that, to the extent that trial counsel failed to object or to request the proper instructions, trial counsel was incompetent. Therefore, as a result of these errors, Petitioner was denied of his rights under First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; his

state constitutional rights as guaranteed by Article I, Sections 1, 7, 13, 15, 16, 17, 24 and 31 of the California Constitution

A. The trial court erred in instructing the jury that they could consider possession of recently stolen property to permit an inference of guilt of murder.

A trial court gave CALJIC Instruction 2.15 in its entirety and specifically indicated that instruction applied to Count l, murder, as well as Count 2. The instruction permits the jury to consider the recent possession of stolen property as well as a defendant's false or contradictory statements about that property as circumstance that may tend to show guilt of murder.

This instruction is properly given in a prosecution for, "robbery, burglary, theft, and receiving stolen property." (CALJIC 2.15, Use Note; See also *People v. McFarland* (1962) 58 Cal.2nd 748, 754; *People v. Mosher* (1969) 1 Cal.3rd 379, 398.

However, this instruction is not appropriate with regard to the charge of murder. Although this issue has not as yet been squarely addressed by this Court, the Court of Appeal for the Fourth District has concluded that conscious possession of recently stolen property does not permit an inference guilt of murder, even though it is alleged that the murder occurred during the commission of a robbery. (*People v. Barker* (2001) 91Cal.App 4th 1166, 1176.)

The reasoning of the Court of Appeal is persuasive in this regard. The trial court should not have interlineated the designation of Count I (murder) in this instruction and thereby violated its *sua sponte* duty. In addition, it was also ineffective assistance of counsel for Ron Slick to fail to object to the application to this instruction to Count I. There were no reported cases at the time of this trial or since, which permitted the use of this instruction with regard to a murder charge. There was and is no known legal theory to make it applicable to a murder charge. Quite to the contrary, the instruction as written and the law that it was based upon, clearly related to the robbery. (See *People v. Mulqueen* (1970) 9 Cal.App.3rd 532, 542; *People v. McFarland*, supra.)

This erroneous instruction went to the heart of the prosecution's case and unduly prejudiced the defense on the murder count. Allowing the jury to draw an inference of the Petitioner's guilt of murder from the possession of stolen property and from statements he may have made about that property is a violation of the Petitioner's constitutional rights under First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and his state constitutional rights as guaranteed by Article I, Sections 1, 7, 13, 15, 16, 17, 24 and 31 of the California Constitution requiring reversal.

B. CALJIC 2.22 (1975 Revision) was unconstitutional as given in that it lessened the prosecution's burden of proof.

The Trial Court gave CALJIC 2.22 in the 1975 revision. That revision stated at the end that "it means that the final test is not the relative number of witnesses, but relative convincing force of the evidence." The current instruction, set forth in CALJIC 7th Edition (2003), deletes the reference to "relative" when referring to the convincing force of the evidence.

This change highlights the unconstitutionality of the instruction given in this case. In a criminal case, the test is not the "relative convincing force" of the evidence presented by the prosecution as opposed to the evidence presented by the defense. That may or may not be an appropriate instruction in a civil case where the standard of proof is preponderance of the evidence. However in a criminal case, it is contrary to the requirement that the prosecution prove its case beyond a reasonable doubt. (Penal Code Section 1096; See *People v. Freeman* (1994) 8 Cal.4th 450 [cert. Den. 515 U.S. 1149]; *Lisenbee v. Henry* (9th Cir. 1999) 166 F.3d 997, 998-1000.) This erroneous instruction and the failure of defense counsel to object to it, constitutes a violation of Petitioner's rights to a fair trial and protection from cruel and/or unusual punishment as guaranteed by the Fifth, Sixth,

Eighth, and Fourteenth Amendments to the federal Constitution and Article I, Sections 1, 7, 16, 17, and 24 of the California Constitution.

C. The trial court failed to instruct on the defense theory that more than one person was involved in the crime.

Ron Slick placed the possibility of another person being present with Robert Lewis, Jr. at the murder scend. Yet he did not request that the jury be instructed as to the legal significance of that theory. Under a felony murder theory at the time of this trial, the People are required to prove that an aider and abettor had a criminal intent that the offense be committed. *(People v. Beeman* (1984) 35 Cal.3rd 547,560-561; see also *People v. Pulido* (1997) 15 Cal.4th 713.) CALJIC 8.27 (7th Edition 2003) covers the issues as well as the subsidiary proposition that in order to be guilty of murder as an aider and abettor to a felony murder, the accused and the killer must have been jointly engaged in the commission of the robbery at the time the fatal blow was struck. (See *People v. Pulido, supra.*)

It was ineffective assistance of counsel, as argued elsewhere, for Ron Slick to argue that perhaps there was another person with Robert Lewis, Jr. in the premisses at the time of the killing. This argument, standing alone, was tantamount to a concession as to the defendant's alibi defense. Slick made no effort to produce evidence regarding this issue and, as complained of here, made no effort to have the jury instructed on what, if any, legal

significance should be attached to a presence of another person. Without an instruction, the jury was left without guidance. It was ineffective assistance of counsel to make this random argument (which also had the effect of conceding the main defense) without requesting an instruction to his rights to a fair trial and protection from cruel and/or unusual punishment as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and Article I, Sections 1, 7, 16, 17, and 24 of the California Constitution.

D. The court failed to instruct under CALJIC 8.80 regarding the intent to kill.

Since Ron Slick raised the possibility that there another person with Robert Lewis, Jr., on the premises and since the jury was instructed not only on felony murder but malice aforethought, it was improper not to instruct the jury as to the question whether or not the defendant was a co-conspirator or aider and abettor and, if so, what circumstances were required for the jury to find beyond a reasonable doubt that the defendant was either the actual killer or had the intent to kill. (CALJIC 8.80) In this regard CALJIC 3.01 should have also been given, defining aider and abettor. In essence, it was either abject incompetence of counsel for Ron Slick to suggest that the defendant was present with someone else at the time of the homicide (as argued elsewhere) or it was incompetence to fail to

request instructions on this issue, or both. In essence, Mr. Lewis was not only deprived of his defense of alibi, but he was deprived of the right to have the jury consider the legal significance of the hastily proffered defense. In fact, no reasonably competent lawyer under the circumstances would have proceeded as Slick did, which resulted in prejudice to the defendant both from the standpoint of undermining his defense of alibi and from the standpoint of not presenting instructions on the hastily offered alternative to his rights to a fair trial and protection from cruel and/or unusual punishment as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and Article I, Sections 1, 7, 16, 17, and 24 of the California Constitution.

CLAIM XI: TRIAL COUNSEL'S FAILURE TO CONDUCT MEANINGFUL VOIR DIRE WAS INEFFECTIVE ASSISTANCE OF COUNSEL AND DEPRIVED PETITIONER OF A CONSTITUTIONALLY GUARANTEED IMPARTIAL JURY

"The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors. The bias or prejudice of even a single juror would violate [petitioner's] right to a fair trial. [Citations Omitted.] One important mechanism for ensuring impartiality is voir dire, which enables the parties to probe potential jurors for prejudice." (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973; see also U.S. Const. Amends., 6, 14; Cal. Const., Art. I § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722 .)

The facts supporting this claim, among others to be presented after adequate funding, full investigation, discovery, access to this court's subpoena power, and evidentiary hearing, include, but are not limited to, the following.

Ron Slick performed only the most cursory of voir dire examinations. Although he declined to collect or review any outside information about the prospective jurors prior to voir dire (Exhibit , Declaration of Ron Slick, paragraph 7), he accepted a jury within two days of the start of voir dire.

When Juror Patricia Owens disclosed that she knew police officer and potential prosecution witness Michael Woodward personally, and that she was waiting to be hired by the Long Beach Victim-Witness Program, he asked only if she could be fair. (2RST 363-64.) When two friends of the victim informed the court that they knew Ms. Owens, and she acknowledged that relationship, Ron Slick declined the Court's invitation to ask any further questions. (3RST 499-501.)

When Juror Mark Norris explained that the prosecutor in this case had successfully prosecuted a case in which he had been the victim, Ron Slick asked only if he could be fair. (2RST 368.)

When Juror Robert Sciacca informed the court that he had been twice burglarized and robbed by a Black teenager, Ron Slick failed to even seek potential bias. (2RST 378-80.)

When Juror Lillian Cramer indicated that she had been burglarized six times - once in a dramatic fashion that *resembled the facts of this case* - Ron Slick asked only if she could follow the law. (2RST 422-23.)

Ron Slick actively limited the voir dire relating to the penalty phase by forgoing the opportunity to present meaningful, open-ended questions and instead ask only four, closed-ended questions in which the venire person was instructed to answer either "yes" or "no":

1. "Do you have such a conscientious objection against the death penalty that if the People prove beyond a reasonable doubt that the Defendant is guilty of first degree murder, that you would *refuse* to vote for a verdict of guilty of first degree murder in order to avoid having you and your fellow jurors reach the death penalty question?"

2. "Do you have such a conscientious objection against the death penalty that if the People prove beyond a reasonable doubt that the Defendant is guilty of murder in the first degree and prove beyond a reasonable doubt the truthfulness of the alleged special circumstance, you would *refuse* to vote for a verdict that the special circumstance is true in order to avoid having you and your fellow jurors reach the death penalty question?"

3. "Do you have such a conscientious objection to the death penalty that, regardless of whatever evidence might be presented during a penalty phase of the trial, should we get there, that you would *automatically refuse to consider* or vote

for a verdict of death in a case involving these charges and special circumstance?"

4. "Do you have such conscientious opinions in favor of the death penalty that, regardless of whatever evidence might be presented during a penalty phase of a trial, should we get there, you would *automatically vote* for a verdict of death in a case involving these charges and special circumstances?" (1RST 1-4, emphasis added.)

Ron Slick explained that all of the described conduct was part of a strategy to allow anti-death penalty venire persons to remain on the jury. (Ron Slick Declaration filed with first petition, paragraphs 6-9.)

A fair and reliable trial is guaranteed by the Constitution. (*Smith v. Phillips* (1982) 455 U.S. 209, 225 [Marshall, J. with whom Brennan and Stevens, JJ., joined, concurring].) "That purpose simply cannot be achieved if the jury's deliberations are tainted by bias or prejudice. Fairness and reliability are assured only if the verdict is based on calm, reasoned evaluation of the evidence presented at trial." (*Id.*)

The United States Supreme Court "has insisted that defendants be given a fair and meaningful opportunity during *voir dire* to determine whether prospective jurors are biased – even if they have no specific prior knowledge of bias." (*Id.* [emphasis in original].)

"Voir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on voir dire may result in a

juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges." (*McDonough Power Equip, Inc. v. Greenwood* (1984) 464 U.S. 548, 554.)

"A prospective juror must be removed for cause if his views would prevent or substantially impair the performance of his duties as a juror. (*Fields v. Woodford* (2002) 309 F.3d 1095, 1103 [citing *Wainwright v. Witt* (1985) 469 U.S. 412, 424]; *United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 1109, 1112.) In the case of *United States v. Allsup* (9th Cir. 1977) 566 F.2d 68,71, the court stated: "A court must excuse a prospective juror if actual bias is discovered during voir dire. Bias can be revealed by a juror's express admission of that fact, but, more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence." In *Allsup*, two of the prospective jurors worked for the same bank the defendant was charged with robbing. (*See id.*) Both jurors stated they could be fair. The defense challenged both jurors for cause. The court denied the motion and the defense was forced to use peremptory challenges. (*See id.*) The Ninth Circuit found that "[t]he employment relationship coupled with a reasonable apprehension of violence by bank robbers leads us to believe that bias of those who work for the bank robbed should be presumed." (*Id.*) "Bias may be presumed from

the 'potential substantial emotional involvement' inherent in certain relationships." (*United States v. Eubanks* (1979) 591 F.2d 513, 517 [citing *Allsup,* 566 F.2d at, 71-72.])

In *Eubanks*, the defendant was charged with distribution of heroin. (Eubanks, f.2d at 516.) One of the jurors failed to disclose that his two sons were heroin users, in prison for crimes committed so they could obtain more heroin. (*Id.*) The court stated "[r]egardless of the reason for Collins' non-disclosure, we conclude that his sons' tragic involvement with heroin bars the inference that Collins served as an impartial juror." (*Id.* at 517 [citing *Allsup*, 566 F.2d, at 71-72].)

Here, there was no meaningful voir dire of perspective jurors either as to guilt phase or penalty phase issues. Furthermore, when issues clearly arose, there was no effort by Ron Slick to meaningfully explore the issue either regarding a possible challenge for cause or for the intelligent use of peremptories his rights to a fair trial and protection from cruel and/or unusual punishment as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and Article I, Sections 1, 7, 16, 17, and 24 of the California Constitution.

CLAIM XII: TRIAL COUNSEL'S FAILURE TO COMPETENTLY MOVE TO CHALLENGE POTENTIAL JURORS FOR CAUSE OR TO COMPETENTLY EXERCISE PEREMPTORY CHALLENGES WAS INEFFECTIVE ASSISTANCE OF COUNSEL AND DEPRIVED PETITIONER OF A CONSTITUTIONALLY GUARANTEED IMPARTIAL JURY.

Even if the Court finds that Ron Slick competently questioned prospective jurors during voir dire as regarding both guilt and penalty phase issues (see Claim XI above), his failure to competently move to challenge potential jurors for cause or to competently exercise peremptory challenges was unconstitutionally ineffective assistance of counsel, depriving Petitioner of his rights to Due Process, effective assistance of counsel, a fair trial, and protection from cruel and/or unusual punishment as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and Article I, Sections 1, 7, 15, 16, 17, and 24 of the California Constitution.

The facts and law supporting this claim, among others to be presented after adequate funding, full investigation, discovery, access to this Court's subpoena power, and evidentiary hearing, include, but are not limited to, all those noted in the immediately preceding claim and the following.

Of the twelve jurors and four alternates chosen for Petitioner's case, three (Owen, Shively, and Mingo) indicated that they knew or were related

to Long Beach police officers. Four others (Norris, Williams, Cramer, and Lawson) had friends or relatives who were police officers. Six of the twelve jurors had been victims of crime, one of whom had been burglarized six times (Vandyke) and another who had been burglarized twice and robbed once (Sciacca). One juror had been robbed within three months of the trial (Norris).

In a trial where police officers will testify for the People and the defendant is charged with a violent theft, common sense dictates that these characteristics would be unappealing in a juror. Even though each person indicated that they could fairly judge Petitioner's case, Ron Slick failed to move to challenge even a single one for cause. Further, he declined to use any of his peremptory challenges to remove these potentially-biased jurors. Given the absence of any indication that any of these jurors were predisposed in Petitioner's favor, Ron Slick's decision to accept a jury - especially when he still had peremptory challenges available - comprised of a majority of people who gave indicia of bias against his client was Constitutionally Ineffective Assistance of Counsel and constituted his rights to a fair trial and protection from cruel and/or unusual punishment as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and Article I, Sections 1, 7, 16, 17, and 24 of the California Constitution.

CLAIM XIII: THE ROBBERY SPECIAL CIRCUMSTANCE PROVISION PURSUANT TO WHICH PETITIONER WAS DETERMINED TO BE DEATH-ELIGIBLE IS UNCONSTITUTIONAL

The robbery special circumstance provision set forth in former California Penal Code Section 190.2, subdivision (a)(17), which provided the sole statutory basis for petitioner's being found death-eligible, violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15, 16, and 17 of the California Constitution, in that this special circumstance provision, which requires no homicidal *mens rea*, fails to adequately narrow the class of persons eligible for the death penalty. The facts supporting this claim, among others to be presented after adequate funding, full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to, the following:

Petitioner incorporates by reference, as though fully set forth herein, the allegations of Claim XXVII, and the Declaration of Professor Steven F. Shatz, appended hereto as Exhibit 7. Petitioner also argues hereinbelow (Claim XXVII) that the entire statutory scheme is invalid for, among other things, a failure to narrow the class of crimes eligible for death. The present claim deals specifically with the felony/murder special circumstance.

Petitioner's death-eligibility rests upon the finding of a robbery

special circumstance alleged pursuant to former California Penal Code section 190.2, subdivision (a)(17) [Initiative adopted November 7, 1978], which, in pertinent part, reads as follows:

> (17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:
>
> (i) Robbery in violation of Section 211.

That provision, as applied to a defendant charged as the actual killer, does not require proof of any homicidal *mens rea.*[6] (*People v. Anderson* (1987) 43 Cal.3d 1104.)

Under the death penalty scheme in effect in 1983, the year of the capital offense charged against petitioner, 83% of first degree murderers were statutorily death eligible. (Exhibit 7, Declaration of Professor Steven F. Shatz, ¶28.) A major factor contributing to the broad sweep of this death penalty scheme is the broad sweep of its felony-murder special circumstance provision. (Exhibit 7, Declaration of Professor Steven F. Shatz, ¶¶ 18 and 19.) California is among a distinct minority of states to have made felony murder *simpliciter* a narrowing circumstance establishing death-eligibility. (*Id.*)

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Under the predecessor statute a robbery special circumstance required proof of a "willful, deliberate, and premeditated" murder committed during the commission or attempted commission of a robbery. (Former California Penal Code section 190.2, subd.(c)(3)[Stats 1977, ch. 316].)

Of those convicted first-degree murderers who murdered under factual scenarios satisfying the 1983 version of California's robbery special circumstance provision (and who are not subject to any additional special circumstance findings other than an accompanying burglary special circumstance[7]), approximately 7.0% are actually sentenced to death. (Exhibit 7, Declaration of Professor Steven F. Shatz, ¶¶ 30 and 31.) A statutory "narrowing" factor which culls so overbroad a group that only 7.0% of the death-eligible are actually sentenced to die permits an even greater risk of arbitrariness than the statutes considered in *Furman*, and, like those statutes, is unconstitutional. As was true for those sentenced to die in pre-*Furman* Georgia, being sentenced to die in California upon conviction of murder with a robbery special circumstance is "cruel and unusual in the same way that being struck by lightning is cruel and unusual." (*Furman,* 408 U.S. at 309-310 [Stewart, J., concurring].) Accordingly, Petitioner's death sentence, which rests upon a constitutionally inadequate narrowing factor, must be set aside on the ground that it constitutes a notation of his rights to a fair trial and protection from cruel and/or unusual punishment as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the

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Since virtually every indoor robbery or attempted robbery is also a burglary, including cases where both were charged or proved gives a truer picture of the incidence, and death-sentence resulting correlation, of the robbery special circumstance. (Ex. 7 [Professor Steven F. Shatz Dec.], ¶ 30 and footnote 28.)

federal Constitution and Article I, Sections 1, 7, 16, 17, and 24 of the California Constitution.

CLAIM XIV: TRIAL COUNSEL'S FAILURE TO INTRODUCE ANY MEANINGFUL MITIGATING EVIDENCE RESULTED IN AN UNRELIABLE SENTENCE IN VIOLATION OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CRUEL OR UNUSUAL CLAUSE OF ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION.

A defendant in a capital case is entitled to the effective assistance of counsel at the penalty phase of his trial. (*Williams v. Taylor* (2000) 529 U.S. 362) "To perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present [ ] and explain [ ] the significance of all the available [mitigating] evidence.' " (*Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 927 [citing *Williams v. Taylor* (2000) 529 U.S. 362, 393].) Where counsel fails to investigate mitigation evidence as thoroughly as contemporary standards require, his counsel is constitutionally ineffective. (*Wiggins v. Smith* (2003) __ U.S. __, 2003 U.S. LEXIS 5014, at 4-5 [holding that trial counsels' decision "not to expand their investigation [of penalty phase issues] beyond a presentence investigation report and Baltimore City Department of Social Services ... fell short of the professional standards prevailing in Maryland in 1989" violated Petitioner's Sixth Amendment right to effective assistance of counsel].)

Where trial counsel's performance is deficient and there is a reasonable probability that but for counsel's unprofessional errors, the result would have been different, the death sentence must be set aside. *(Strickland v. Washington* (1984) 466 U.S. 668.)

In California and under the federal Constitution, a lawyer has a duty to investigate carefully all defenses of fact and law that may be available to the defendant. (*People v. Pope* (1979) 23 Cal.3d 412, 424-425.)

Had trial counsel Slick investigated Petitioner's life and background, he would have been able to show that Mr. Lewis' offenses were the result of his unique personal history as set forth in more below. Mr. Lewis is the product of a broken home. His family life as he was growing up was one of chaos, dysfunction and neglect. His father abandoned him when he was three years old. His father has a long criminal history and is a sexual predator. He was a perverse and dangerous role model to Mr. Lewis. Mr. Lewis' mother was an alcoholic. She had a series of casual relationships after Robert Lewis, Sr. left. She ran a gambling house. Mr. Lewis was left unsupervised with no consistent discipline. As a child, he functioned well below average at school. He has profoundly impaired judgment, and has the mental age of a child. Mr. Lewis is seriously mentally impaired. His Full Scale IQ is 67 which places him in the 1st percentile which is in the mentally retarded range. He also shows clear signs of significant organic

brain damage. (Exhibit 13, Declaration of Natasha Khazanov, Ph.D.) Mr. Lewis spent most of his formative years in juvenile institutions. These institutions failed to identify and address Mr. Lewis' mental health needs, and therefore failed to appropriately intervene. Theses institutions also failed to prepare him to find employment once released and he had no marketable job skills when he was released from prison. (Exhibit 15, Declaration of Adrienne Davis, Ph.D.)

A. Facts

The facts supporting this claim, among others to be presented after adequate funding, full investigation, discovery, access to this Court's subpoena power, and evidentiary hearing, include, but are not limited to, the following facts:

Petitioner's Father: Robert Lewis, Sr.

Mr. Lewis' father, Robert Lewis, Sr., was born on July 31, 1924, in Marion, Alabama. Robert Lewis, Sr. had 10 or 11 siblings. The family lived on a farm. He dropped out of school at age 13. (Exhibit 16, Probation Officer's Report Filed October 21, 1969, in *People v. Robert Lewis, Sr.*, Case No. A-410539, Los Angeles Superior Court.) From 1944 to 1947, he worked as a seaman in the merchant marine. He was stationed in Mobile, Alabama. On April 26, 1946, he was arrested in Marion, Alabama and charged with assault and battery and abusive language. He

was sentenced to serve 12 months at the State Department of Corrections in Montgomery, Alabama. (Exhibit 16, Probation Officer's Report Filed October 21, 1969, in *People v. Robert Lewis, Sr.*, Case No. A-410539, Los Angeles Superior Court.)

Robert Lewis, Sr. came to Long Beach, California, in 1949. (Exhibit 16, Probation Officer's Report Filed October 21, 1969, in *People v. Robert Lewis, Sr.*, Case No. A-410539, Los Angeles Superior Court.) Maggie McGlothin, Mr. Lewis' mother came along (Exhibit 17, Declaration of Robert Lewis, Sr.)

They never married but lived together from 1950 until 1953. Three children were born from their extramarital relationship: Rosamay Lewis, born on February 2, 1951, Robert Lewis, Jr., born on May 31, 1952, and Gladys Louise Lewis, on October 24, 1953. (Exhibit 16, Probation Officer's Report Filed October 21, 1969, in *People v. Robert Lewis, Sr.*, Case No. A-410539, Los Angeles Superior Court; Exhibit 18, Birth Certificate of Rosamay Lewis; Exhibit 19, Birth Certificate of Robert Lewis, Jr.; Exhibit 20, Birth Certificate of Gladys Louise Lewis.)

Robert Lewis, Sr. was a sexual predator. He was also a dangerous and perverse role model to Mr. Lewis. He would run around and be with various women. Robert Lewis, Sr. describes himself and his own father as follows: "My father was just a ho monger having sex with young girls just

like I did." (Exhibit 17, Declaration of Robert Lewis, Sr.)

He married Lavern Gibbs Barnhill on June 4, 1955, in Yuma, Arizona. Two children were born in Los Angeles County from their union: Ramona Lewis, born on April 5, 1956 and Raymond Lewis born on March 3, 1957. (Exhibit 21, Birth Certificate of Ramona Lewis; Exhibit 22, Birth Certificate of Raymond Lewis.)

Robert Lewis, Sr., remained married to Laverne Gibbs until April 1969, when he was arrested by the Compton Police Department for child molestation. Robert Lewis, Sr., had sexual intercourse with his 13-year old daughter, Ramona, over a five month period beginning in September 1968. Ramona became pregnant with her father's child. She gave birth to their son, Dewayne Deon Lewis, on July 6, 1969. Ramona was just 14 years old. (Exhibit 16, Probation Officer's Report Filed October 21, 1969, in *People v. Robert Lewis, Sr.*, Case No. A-410539, Los Angeles Superior Court; Exhibit 23, Birth Certificate of Dewayne Deon Lewis.)

Robert Lewis, Sr. was prosecuted for child molestation in violation of Penal Code § 288. The probation officer, in a report filed in November 1969, describes Robert Lewis, Sr. as follows: "He does not seem to be particularly effected by the consequences of his acts, has little or no insight at this time, and evidently is not continuing in a pattern of sexual irresponsibility, some of the dynamics of which behavior led to the present

offense." (Exhibit 24, Probation Officer's Report, Supplemental Report, Filed on November 20, 1969.)

Robert Lewis, Sr. was diagnosed as suffering from anti-social personality disorder, depression and obsessive compulsive disorder. Dr. Harold C. Deering, M.D., performed a psychiatric evaluation of Robert Lewis, Sr. in November 1969. He diagnosed him as suffering from obsessive-compulsive neurosis: "Abnormal trends were manifested by concern over orderliness and correctness and difficulty in expressing his feelings in direct ways. He is fearful of women and reluctant to become deeply involved with them. He also is depressed. He was estimated to be of average intelligence and was correctly oriented in all spheres. Memory was intact for remote and recent event. The psychiatric diagnosis is Obsessive-compulsive neurosis." (Exhibit 25, Letter dated November 19, 1969, from Dr. Deering to Judge Dell.)

Dr. Ronald A. Markham also performed a psychiatric evaluation of Robert Lewis, Sr. In November 1969. Dr. Markham diagnosed him as suffering from "an antisocial personality disturbance." (Exhibit 26, Letter dated November 7, 1969, from Dr. Markham to Judge Dell.)

As the probation officer noted in a 1969 report, the California Department of Corrections "evaluated the defendant's [Robert Lewis, Sr.] intellectual classification as 'dull normal' Psychiatric evaluation was

'antisocial personality. (Characterized by defects in judgment, too much impulsiveness, and slowness in profiting from experience." The probation officer further notes that Robert Lewis, Sr. "Has been tried on probation, state prison, and parole and has made less than adequate adjustment to all of these treatment plans. His involvement in the instant case with his daughter appears to be a continuation of a pattern wherein the defendant has been involved with females, sexual pursuit appearing to be his motivation and in this instance, victim being his own daughter did not diminish his drive. He does not appear to be particularly contrite, partially rationalizes his behavior to not being treated properly by his estranged spouse and has displayed no insight at this time." (Exhibit 24, Probation Officer's Report, Supplemental Report, Filed on November 20, 1969.)

The marriage between Lavern Gibbs and Robert Lewis, Sr. was not a good one. Lavern Gibbs stated to the probation department that "throughout the marriage the defendant [Robert Lewis, Sr.] was mean and cruel and jealous, and that she did not consider it a good marriage." She further stated, "he beat me and he ran around and gambled and he was jealous. He wouldn't let me the house. I sent him to prison once on a violation when he jumped on me while he was on parole and beat me up." He was unfaithful to her as well, having an affair with Georgia Helm. In fact, in May of 1969, shortly after separating from Lavern Gibbs, Robert

Lewis, Sr., started to live with Georgia Helms. (Exhibit 16, Probation Officer's Report Filed October 21, 1969, in *People v. Robert Lewis, Sr.*, Case No. A-410539, Los Angeles Superior Court.)

Robert Lewis, Sr. was involved with Georgia Helms then her daughter, Deborah Helms, in 1971. Deborah Helms was 16 at the time. They lived together in 1972 and eventually Robert Lewis, Sr. married Deborah Helms in 1977 in Las Vegas. He fathered two girls, Josephine, born on March 19, 1978 and Taraline, born on April 1, 1987

Robert Lewis, Sr. boasts that he has fathered a total of 18 children he knows of. (Exhibit 17, Declaration of Robert Lewis, Sr.)

Robert Lewis, Sr. has a long criminal history and has been in and out of custody every since he came to California, for offenses such as failure to appear, failure to provide, gambling, driving on suspended licenses, escape from custody, forgery, child abuse and drug offenses. (Exhibit 27, Robert Lewis, Sr.'s Criminal History.)

Maggie McGlothin: Petitioner's Mother

Mr. Lewis was raised by his mother in Long Beach. He is the product of a broken home. (Exhibit 28, 1973 Social Evaluation of RCG Tracy.) Petitioner's mother, Maggie McGlothin, was an alcoholic. She drank Champel, a mixed alcoholic drink. According to Robert Lewis, Sr., she would drink eight or nine bottles a day. He would bring her a six-pack

of Champel when he would visit. A Screening Summary from the Youth authority states that Maggie McGlothin "is said to have a rather severe drinking problem and has been hospitalized with cirrhosis of the liver on at least one occasion.(Exhibit 29, Youth Authority ScreeningSummary, 1969.)

Maggie McGlothin was on welfare. She ran gambling parties at her house. Robert Lewis, Sr. did not support the family. Robert Lewis, Sr. would on occasions bring her money he had earned from working as a contractor or from gambling. On April 6, 1954, Robert Lewis, Sr., was arrested by the Long Beach Police Department for failure to provide and sentenced to one year county jail, road camp and 3 years summary probation. (Exhibit 16, Probation Officer's Report Filed October 21, 1969, in *People v. Robert Lewis, Sr.*, Case No. A-410539, Los Angeles Superior Court.)

In 1969, Robert Lewis, Sr., stated in a probation report that, "at one time he supported them [Rosamay, Robert, Jr., and Gladys] but has discontinued his support payments." (Exhibit 16, Probation Officer's Report Filed October 21, 1969, in *People v. Robert Lewis, Sr.*, Case No. A-410539, Los Angeles Superior Court.)

Petitioner's Childhood

Petitioner's childhood was "chaotic" and "spent most of his formative years in some form of incarceration." (Exhibit 30, Probation

Officer's Report, Case No. A-011683, Los Angeles Superior Court.)

His father was an absent one. Robert Lewis, Sr. did not participate in his son's upbringing. Maggie McGlothin raised the children on her own. Robert Lewis, Sr. was self-centered. He wanted to run around and be with various women and not be stuck raising a family. (Exhibit 17, Declaration of Robert Lewis, Sr.)

Mr. Lewis resented the fact that his father was not around when he was growing up. (Exhibit 17, Declaration of Robert Lewis, Sr.)

Following her separation from Robert Lewis, Sr., Maggie McGlothin had a series of casual relationships from which two children were born. This was hard on Petitioner. Mr. Lewis "merely tolerated his mother's various boyfriends." (Exhibit 28, 1973 Social Evaluation of RCG Tracy.) Mr. Lewis lived with his father and Georgia Helms for a period of time "because Robert Jr. was complaining that his mother was keeping company with various men in the neighborhood and gambling in the house and he could not sleep." (Exhibit 31 , Declaration of Georgia Bondsmanson.)

Maggie McGlothin was " ineffectual in terms of her ability to establish adequate behavioral controls for him and that he is able to operate as he pleased in the home." (Exhibit 32, Youth Authority Case Summary, 1/5/71.)

When Mr. Lewis would misbehave, she would give him a whipping.

(Exhibit 17, Declaration of Robert Lewis, Sr.) Georgia Helms recalls Robert Jr. telling her that sometimes Maggie would discipline Robert by beating him with chairs or anything she could get her hands on. (Exhibit 31, Declaration of Georgia Bondsmanson.)

Petitioner's Educational Background

Petitioner "did not like school, learned very little and was truant a great deal." (Exhibit 28, 1973 Social Evaluation of RCG Tracy.)

Mr. Lewis entered kindergarten at Lincoln Elementary School in 1957, at age 5. He attended 133 days out of 180 school days. He entered first grade in 1958 at age 6. He attended 174 days out of 180 school days. He repeated first grade in 1959, at age 7. He attended 172 days out of 180 school days. He entered second grade in 1960 at age 8. He attended 172 days out of 180 school days. He entered third grade in 1961 at age 9. He attended 172 days out of 180 school days. He entered fourth grade in 1962,at gate 10. He attended 139 days out of 180 school days. He entered fifth grade in 1963 at age 11 but withdrew by October of 1963. He attended only 20 days out of the 180 school days. He then entered into Stevenson school at an unknown grade level. (Exhibit 33, Long Beach Elementary School Permanent Records.)

While in Elementary School, he took classes such as community, community life, dairy farm, airport, wholesale retail market, grocery store.

(Exhibit 33, Long Beach Elementary School Permanent Records.)

Mr. Lewis attended 7th, 8th and 9th grade at the California Youth Authority's Paso Robles School for Boys. He received C's and D's throughout 7th grade and all C's throughout 8th grade at Paso Robles. He failed all of his classes in the 9th grade except for one, Government, in which he received a D-. (Exhibit 34 , Cumulative Guidance Records, Junior and High Schools, Long Beach Unified School District.)

A transcript of Mr. Lewis's high school record from the Department of Youth Authority for Paso Robles School for boys for the years 1967-1968 indicate that he was receiving remedial English, Reading, Spelling, and Math classes. Although the grades in these classes range from "B+ to C", formalized testing administered in 1965 and reported on this transcript indicate that in reality he was performing very poorly. On the Wide Range Achievement Test administered December of 1965, when he was 12-13, he was reading and spelling at a first grade level and his grasp of arithmetic was at the third grade level. Exhibit 35, Transcript of High School Record, 5/10/68.)

A transcript from the Preston School of Industry from 1969-1970 indicates grades ranging from C to D. A Wide Range Achievement test administered in September of 1968 reveals that his spelling was at the second grade level while his arithmetic skills remained at the third grade

level. (Exhibit 36, Transcript of High School Record dated 7/22/70.)

In 1972, at age 20, Mr. Lewis' academic achievement was evaluated (not with standardized neuropsychological measures) to be at the third or fourth grade level. He was deemed to have no "salable skills." (Exhibit 28, Social Evaluation 1973 RGC-Tracy.)

Petitioner's Juvenile Institutionalization

Petitioner spent his teenage years in juvenile institutions. He became involved with the juvenile court system in 1964 when he was 12 years old. He was institutionalized for the first time in 1965 when he was 13 years old. (Exhibit 37, Youth Authority Case Summary, SRCC, 9/11/68.)

Mr. Lewis was first institutionalized in a Forestry Camp. In May 1965, when he had just turned 13. (Exhibit 37, Youth Authority Case Summary, SRCC, 9/11/68.)

He was then moved to the California Youth Authority Southern Reception Center and Clinic (SRCC) in November 1965 at age 13.

Mr. Lewis was transferred to Fred C. Nelles Youth Correctional Facility in Whittier in December 1965, at age 13. (Exhibit 38, Register of Actions - Youth Authority, State of California.)

In October 1966, at age 14, Mr. Lewis was transferred to El Paso de Robles Youth Correctional Facility in Paso Robles from where he was paroled in April 1967. (Exhibit 38, Register of Actions - Youth Authority,

State of California.)

In June 1967, his parole was suspended and he was sent back to El Paso de Robles. He was 15. (Exhibit 38, Register of Actions - Youth Authority, State of California.)

Robert Lewis, Jr. was paroled again in May 1968 after spending one year in custody at El Paso de Robles. (Exhibit 38, Register of Actions - Youth Authority, State of California.)

His parole was suspended in August 1968. He was sent back to the CYA Southern Reception Center and Clinic at age 16. From there, he was sent to CYA Preston Youth Correctional Facility in September 1968 where he stayed one year. He was paroled in September 1969 at age 17. (Exhibit 38, Register of Actions - Youth Authority, State of California.)

His parole was suspended in November 1969. Mr. Lewis was sent again to the Southern Reception Center and Clinic. From there, in January 1970, he was sent to Preston Youth Correctional Facility in Ione. (Exhibit 38, Register of Actions - Youth Authority, State of California.)

From there, Petitioner was sent to Deuel Vocational Institution in Tracy, an adult facility, in July 1970, at age 18. He was placed in the Adjustment Center then in the general population. (Exhibit 38, Register of Actions - Youth Authority, State of California.)

Petitioner was paroled in February 1971. (Exhibit 38, Register of

Actions -Youth Authority, State of California.)

Institutional Evaluations of Petitioner

In a 1969 Screening Summary for Youth Authority programs by L.A. Russell, M.D., Dr. Russell states that Mr. Lewis was noted to "act out in order to gain acceptance". He felt that Mr. Lewis "lacked the positive relationship with adults necessary for healthy personality development. He concluded, " It seems reasonably clear that he is in need of additional rehabilitative experience during the course of which he can receive firm supervision, functional academic instruction geared to his vocational needs, and intensive counseling aimed at arousing some anxiety around his behavior and strengthening his impulse controls." (Exhibit 29, Youth Authority Summary, 1969.)

Petitioner did not receive "the functional academic instruction geared to his vocational needs" and "intensive counseling" referred to by Dr. Russell. A 1971 Youth Authority and Progress Report and Placement Request notes that Mr. Lewis was not involved in any academic or vocational instruction. (Exhibit 32, Youth Authority and Progress Report and Placement Request dated January 1971.) A 1977 Institution Programming Summary determined that Mr. Lewis was not a viable candidate for psychotherapy and that he would not respond to any group counseling techniques. (Exhibit 39, Institution Programming Summary,

RC-C, 12/1/77.)

As a probation officer who knew Petitioner in 1972, at ages 19-20, stated Mr. Lewis was seemingly of dull-average intelligence. The probation officer also notes that Mr. Lewis has exhibited some very bizarre behavior that has carried over from his earlier years consisting of a pattern of denial even when caught in the act. He concluded in regard to Mr. Lewis' apparent poor efforts to change his behavior that "there may be some form of mental deficiency that causes this defendant to act the way he does." (Exhibit 30, Probation Officer's Report submitted in *People v. Robert Lewis, Jr.*, Case No. A-011683, Los Angeles Superior Court, dictated 4/5/72.)

That same year, another probation officer observed that Mr. Lewis "was cooperative, but appears to be out-of-touch with reality." (Exhibit 40, Probation Officer's Report submitted in *People v. Lewis*, Case No. A012661, dictated 10/19/72)

A social evaluation conducted on December 26, 1972, at age 20,notes that his insight was poor. " (Exhibit 28, 1973 Social Evaluation RGC-Tracy.)

An Adult Authority report dated August 1, 1975, notes that "One received the impression that his behavior is an extension of his immaturity and his desire to remain a youngster." The report notes that Mr. Lewis

lacks internal control or desire to change his life, has not developed any coping mechanisms during his incarceration., has no realistic parole plans and no employable skills. (Exhibit 41, Adult Authority Report, dated August 15, 1975.)

When Mr. Lewis was evaluated in December 1977, when he was 25 years old, for institution programming at RC-C, the evaluator described him as lacking internal controls and exhibiting unconcern regarding his behavior. According to the evaluator, Mr. Lewis showed little anxiety or appropriate self-concern, is extremely immature, impulsive, and narcissistic. He is also described him as someone who gives little thought about the consequences of his actions and tends to his most infantile aggressive impulses. (Exhibit 39, Institution Programming Summary, RC-C, 12/1/77.)

Petitioner's Adult Institutionalization

Mr. Lewis has also been institutionalized in county jail and with the Department of Corrections most of life. Almost all his adult life has been in custody.

Mr. Lewis served his first prison sentence for robbery from January 1973 until November 1976. He was first institutionalized in San Quentin State Prison from January 1973 to August 1976. He was transferred to Chino State Prison in August 1976 where he stayed until released on parol in November 1976. (Exhibit 42, Summary of Sentence Data.)

When he first arrived at San Quentin, Petitioner was rather apprehensive about being there. He expressed the fear that some people at the facility did not like him. He explained that he didn't expect to have disciplinary problems but did not know what he would do if confronted. The initial classification report indicates that, but for the lack of space, he would be transferred to Tracy. (Exhibit 43, Chrono Sheet, Classification, 2/8/73, Initial.)

During his stay at San Quentin, Mr. Lewis suffered a series of disciplinary violations. However, classification officers described him as a "nuisance offender more than threat." (Exhibit 44, Classification, 11/7/74 Special.) The Classification Committee noted that Mr. Lewis received numerous disciplinary violations due primarily to his irresponsibility and immaturity. According to the prison authorities, Mr. Lewis was also sexually active. Because he had evidenced repeated difficulties with female role homosexuals, the Committee designated him as Single Cell Status which status would serve to remove some temptation." (Exhibit 45, Classification, 12/24/75.)

In July 1976, Mr. Lewis was placed in administrative segregation in the SHU (Security Housing Unit) out of concern for his safety after he was accused by other inmates to be a cell thief. (Exhibit 46, Classification, 7/21/76, Full.)

Once again in August 1976, the Classification Committee pointed out that even though Mr. Lewis had been a nuisance management problem of the greatest magnitude for the past several years, he did not have any serious management type disciplinaries in the file." (Exhibit 47, Classification, 8/10/76, SHU review.)

Mr. Lewis was released on parole in November 1976. On February 25, 1977, he was arrested for two robberies. He was sentenced to state prison on these robberies on June 17, 1977 and September 21, 1977, respectively.

Mr. Lewis served his second prison sentence from September 1977 to December 1981. He was first institutionalized at RCC-CIM in September 1977. While there the staff noted that Mr. Lewis did not have the ability or desire to obey pertinent rules. (Exhibit 48, Chrono Sheet, General, 16 November 1977.)

From Chino, Mr. Lewis was transferred to San Quentin. There, he was again placed in protective custody in the SHU. The staff was concerned for his safety as inmates accused him of being a cell thief. (Exhibit 49, Order and Hearing for Placement in Segregated Housing.) Even though Mr. Lewis was found not guilty of the cell thefts, the Classification Committee decided to keep him in isolation for fear that he would be attacked if released. (Exhibit 50, Chrono Classification, ICC,

9/12/78.)

Petitioner remained in segregation from July 1978 until February 1979 when he was transferred to Folsom. However, the Classification Committee at Folsom found that Mr. Lewis lacked the sophistication or maturity to cope with Folsom's general population and kept him in segregation. (Exhibit 51, Classification, 3/8/79.)

In May 1979, the Classification Committee recommended placement in the general population noting that Mr. Lewis had been disciplinary free since July 1978. (Exhibit 52, Classification, Reg. SHU Rev., 5/31/79.) He was approved for release in the general population with single cell status because of concerns over his overt homosexual behavior effective June 1979. (Exhibit 53, Classification, 6/12/79.)

Mr. Lewis was placed back in the SHU in segregated housing in February 1980 after being charges with a violation of DR-3005(B): conduct, force & violence. (Exhibit 54, Order and Hearing for Placement in Segregated Housing, 1980.)

A review of the facts behind this violation, however, show that Mr. Lewis was the one attacked by another inmate who suspected him of stealing cigarettes from his cell. (Exhibit 55, Supplemental Report, February 10, 1980, C. Reed.) The staff kept Mr. Lewis in a SHU segregated unit because they feared retaliation against Mr. Lewis by white

and Mexican inmates who assumed that Mr. Lewis was responsible for their recent losses. (Exhibit 56, General Chrono, 2/10/80.)

Mr. Lewis remained in the SHU protective custody from February 1980 to September 1980. (Exhibit 57, Classification ICC, 9/30/80.) He was paroled in December 1981 but arrested again in February 26, 1982 for robbery. He sentenced to state prison on December 7, 1982.

Mr. Lewis served his third prison sentence from December 1982 to June 1983. He was institutionalized at Folsom State Prison again. While at Folson, he worked as janitor and did well. His assignment was to mop, sweep and clean the classroom and shop area. His supervisor noted that "In the short time that he was the shop porter, he maintained an excellent attitude toward fellow inmates, staff and job. His quality and quantity of work was exceptional." (Exhibit 58, Work Supervisor's Report, 6/14/83.)

Petitioner's Good Character

As set forth in the first petition, despite the many difficulties he faced, Mr. Lewis had many positive qualities. His family and friends described him as a loving, generous, considerate, respectful and well-behaved person who deeply affected by his broken-home life and his early prison experiences. (See Declarations of Gladys Spillman, Rose Davison, Shineake Spillman submitted with the first petition.)

Petitioner's Mental Retardation and Brain Damage

As fully set forth below in Claim XV, Mr. Lewis is seriously mentally impaired. His Full Scale IQ is 67 which places him in the 1st percentile which is in the mentally retarded range. He also shows clear signs of significant organic brain damage. As a child, he functioned well below average at school. He has profoundly impaired judgment, and has the mental age of a child. (Exhibit 13, Declaration of Natasha Khazanov, Ph.D.)

Impact of Juvenile Institutionalization

As fully set forth below in Claim XVI, Mr. Lewis spent most of his formative years in juvenile institutions. These institutions failed to identify and address Mr. Lewis' mental health needs, and therefore failed to appropriately intervene. Theses institutions also failed to prepare him to find employment once released and he had no marketable job skills when he was released from prison. (Exhibit 15, Declaration of Adrienne Davis, Ph.D.)

B. Ron Slick Failed in His Duty to Present Mitigating Evidence of a Life Duty Time of Trauma, Mental Retardation and Learning Disabilities

> "The responsibility of the lawyer is to walk a mile in the shoes of the client, to see who he is, to get to know his family and the people who care about him, and then to present that information to the jury in a way that can be taken into account in deciding whether the client is so beyond redemption that he should be eliminated from the human community."

> (*Battenfield v. Gibson* (10th Cir. 2001) 236 F.3d 1215, 1229 citing Stephen B. Bright, Advocate in Residence: The Death Penalty As the Answer to Crime: Costly, Counterproductive and Corrupting, 36 Santa Clara L. Rev. 1069, 1085-86 (1996).)

Counsel in a death penalty case has a duty to adequately investigate the penalty phase, unearth all relevant mitigating evidence and present it to the jury:

> "It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase. 'The Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy.'" *(Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1227 [citations omitted].)

"The failure to present important mitigating evidence in the penalty phase can be devastating as a failure to present proof of innocence in the guilt phase." (*Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1135 [citing *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 619].)

> "Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." (*Karis, supra* at 1135 [quoting *Boyde v. California* (1990) 494 U.S. 370, 380].)

In *Ainsworth v. Woodford* (2001) 268 F.3d 868, the Court found that

counsel was ineffective when he failed to prepare and present mitigating evidence to the jury and failed to argue its relevance. "The available mitigating evidence would have provided the jury with insight into Ainsworth's troubled childhood, his history of substance abuse, and his mental and emotional problems." (*Ainsworth v. Woodford, supra,* 268 F.3d at 875.) The court concluded that had the jury been able to consider the wealth of mitigating evidence available to counsel with reasonable investigation and preparation, there was a reasonable probability that the jury would have rendered a verdict of life imprisonment without possibility of parole:

> "In the instant case, counsel failed to adequately investigate, develop, and present mitigating evidence to the jury even though the issue before the jury was whether Ainsworth would live or die. A reasonable investigation would have uncovered a substantial amount of readily available mitigating evidence that could have been presented to the jury. Instead the jurors as in Wallace, 'saw only glimmers of [the defendant's] history and received no evidence vis-a-vis mitigating circumstances.'." (*Ainsworth v. Woodford, supra,* 268 F.3d at 874.)

Counsel in *Ainsworth* engaged in minimal preparation. He interviewed only one witness for 10 minutes on the morning she was scheduled to testify. Although he had obtained school records, he failed to examine employment records, prison records, past probation reports, and

military records. He abdicated the investigation of Ainsworth's psychological history to a female relative. He failed to present evidence of his positive adjustment to prison life, the fact that he had received favorable reviews from prison staff and had presented no management or custody problems. As the court noted, "[t]he evidence would have aided the jury in determining whether Ainsworth would be a danger to other inmates or prison officers if sentenced to life in prison." (*Id.*)

In *Karis*, *supra*, the court found that trial counsel's failure to investigate family history "was error of constitutional magnitude." (*Karis*, *supra*, 283 F.3d at 1136.) In *Karis*, the defendant was evaluated and substantial family abuse was documented in the doctors report. (*Id.* at 1135-36.) Trial counsel opted not to have the doctor testify due to the fact there was also damaging evidence in his report. However, not only did trial counsel not call the doctor, he also failed to put this information in front of the jury through any witness. (*Id.* at 1136.)

The state argued that trial counsel had no duty to do additional investigation since the defendant and his mother were not giving him full cooperation. The court found that even if trial counsel was not getting a full background from the defendant and his mother that was not an excuse for failing to attempt to find the information from other sources. (*Id.* at 1136.)

> "Counsel's duty to investigate mitigating evidence is neither entirely removed nor

> substantially alleviated by his client's direction not to call particular witnesses to the stand. Furthermore, a lawyer who abandons investigation into mitigating evidence in a capital case at the direction of his client must at least have adequately informed his client of the potential consequences of that decision and must be assured that his client has made 'informed and knowing' judgment." (*Id.* at 1136 [quoting Silva v. Woodford (9th Cir. 2002) 279 F.3d 825, 838].)

In *Karis*, the court found "[c]ounsel's error in failing to investigate and present the highly relevant information of an abusive childhood, was prejudicial. A 'reasonable probability' exists that a jury would find this information important to understanding the root of Karis' criminal behavior and his culpability." (*Id.* at 1140.)

"Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death eligibility case." (*Williams v. Taylor* (2000) 120 S.Ct. 1495, 1516.)

Here there was a lifetime of trauma, mental retardation and learning disabilities which was never presented. The jury did not have an opportunity to hear that Mr. Lewis was the product of a broken home. His family life as he was growing up was one of chaos, dysfunction and neglect. His father abandoned him when he was three years old. His father, who had a long criminal history and was a sexual predator, was a perverse and dangerous role model to Petitioner. Mr. Lewis' mother was an alcoholic.

She had a series of casual relationships after Robert Lewis, Sr. left and ran a gambling house. Mr. Lewis was left unsupervised with no consistent discipline.

The jury did not have an opportunity to hear that Mr. Lewis suffered from mental retardation and learning disabilities. As a child, he functioned well below average at school. He has profoundly impaired judgment, and has the mental age of a child. Mr. Lewis is seriously mentally impaired. His Full Scale IQ is 67 which places him in the 1st percentile which is in the mentally retarded range. He also shows clear signs of significant organic brain damage.

The jury did not have an opportunity to hear that Mr. Lewis spent most of his formative years in juvenile institutions and that these institutions failed to identify and address his mental health needs, and therefore failed to appropriately intervene. Theses institutions also failed to prepare him to find employment once released and he had no marketable job skills when he was released from prison.

At the same time, the jury did not have an opportunity to hear about Mr. Lewis many positive qualities as described by his friends and family

C. Ron Slick Failed in His Duty to Present Good Character Evidence

Mr. Lewis is a complicated person. He is borderline retarded, and suffers from learning disabilities. He has suffered unimaginable trauma

during his life, in his family and in institutional settings. However, despite all of this, he has also shown good character as a loving son to his mother and loving brother to his sisters. This evidence was available to Ron Slick and he did not present it.

Evidence of a defendant's good character has been found to have significant mitigating value. For instance, in *Jackson v. Herring* (11th Cir. 1995) 42 F.3d 1350, 1369, the court found that counsel "could have presented to the jury and the court emotional and substantial testimony of Jackson's good character and devotion to her family despite a life of hardship and abuse." The court in *Jackson v. Dugger* (11th Cir. 1991) 931 F.2d 712 found the trial counsel found ineffective for failing to present evidence of good deeds and nonviolent character in mitigation.

In this case no significant evidence of good character was elicited. In his opening statement, Ron Slick requested that the jury recall the testimony of Robert Lewis, Sr., Petitioner's father, and Gladys Spillman, Petitioner's other sister:

> "I have three witnesses to present, although two have already been presented.
> Robert Lewis, Sr., has been presented to you. He has already testified. Normally he would be called at this phase, but since he has already testified, I am just adopting what he has already said into this phase...
> Gladys Spillman is my second witness. She, too, has already testified. And consider what she has said."
> (4RST 809.)

The testimony that Ron Slick so "adopted" included Robert Lewis, Sr.'s responses to a series of leading questions eliciting a positive response that he was Petitioner's father, that he loved Petitioner, and cared if harm came to him. (4RST 676-77.) It also included Gladys Spillman's responses to nearly identical, closed-ended questions in which Ron Slick established that she was Petitioner's sister, also loved him, and also did not want harm to come to him. (4RST 691-92.) These witnesses had given that testimony five days prior to Ron Slick's "adoption," before the jury deliberated and found Petitioner guilty.

He called a single witness, Rose Davidson, and asked her only to testify as to Mr. Lewis's good character. (4RST 810-12.) After identifying her as Petitioner's sister for the court and jury, he asked her seventeen closed-ended questions, establishing that her mother was deceased, her father and both brothers had been in prison, and that she loved Petitioner and cared whether harm came to him. (*Id.*) Ron Slick offered the jury no other mitigation evidence in the penalty phase.

D. Petitioner Was Prejudiced by Trial Counsel Failure to Present Mitigating Evidence

Petitioner has established prejudice by demonstrating that Ron Slick unreasonably failed to investigate and present substantial, credible mitigating evidence. If the jury had been presented the available mitigating evidence, "it is very likely that the jury 'would have concluded that the

balance of aggravating and mitigating circumstances did not warrant death.'" (*Bean v. Calderon*, supra, 163 F.3d 1073, 1081, quoting *Strickland v. Washington*, supra, 466 U.S: 668, 695-696.)

Here, the jury was presented with the following aggravating circumstances: the fact that Petitioner had four prior robbery convictions in 1972, 1977, and 1982, the age of the defendant and the circumstances of the crime. The prosecutor argued that the evidence in front of the jury showed that Petitioner had chosen the path to criminality in life:

> "The age of the defendant at the time he committed the crime is something you can consider. No formal evidence has been presented as to that, but you are allowed to consider your perceptions here in court as part of that, and you can form a rough approximation of the defendant's age and take that into consideration, along with his life's background, to see what sort of path this defendant has chosen in life. Has he chosen the path of a citizen or has he chose the path towards criminality?
> In this particular case we know for a fact that back in '72 the defendant was convicted of robbery. We have to consider whether or not whatever punishment he received, if any, he learned a lesson after that, whether he decided to set a straight course for his life after that first conviction. An you know now that he did not, that twice more in 1977 the defendant was convicted of robbery, and again, did not learn his lesson, but that he continued on the path of criminality, getting convicted once again in 1982 of the very same offense, of robbery. And you know the ultimate conclusion, the ultimate destination of the defendant on that

> path of criminality is right here in this courtroom, where you found him guilty of murder and robbery, exactly as charged." (4RST 817-818.)

The prosecutor also argued that the four prior robbery convictions set the stage for what he described as the "most important factor" for the jury's consideration: the circumstances of the crime. The prosecutor presented Petitioner as a cold-blooded killer who executed the victim to avoid detection. (4RST 820-821.)

Finally, the prosecutor pointed out that there was no evidence on whether the defendant had the capacity of appreciate the criminality of his conduct or whether his ability to appreciate that criminality was impaired as a result of mental disease or defect. (4RST 818.)

The prosecution's aggravating evidence is not sufficient in itself to negate the reasonable probability that a jury presented with the available mitigating evidence would not have sentenced Petitioner to death. (*Bean v. Calderon, supra,* 163 F.3d 1073 at 1081.)

There was evidence that Mr. Lewis had long history of neglect and abandonment. There was evidence that he had chaotic childhood and upbringing. There was evidence that Mr. Lewis was seriously mentally impaired, that he suffered from brain dysfunction for most, if not all his life, resulting in mental retardation and other cognitive and emotional symptoms. There was evidence that he has profoundly impaired judgment and the

mental age of a child. There was evidence that, as a result of these circumstances , Mr. Lewis' ability to conform his conduct to the requirements of the law, control his behavior and comprehend the consequences of his behavior, remember his behavior, or report his behavior was severely impaired. There was evidence that institutions failed to identify and address Mr. Lewis mental health needs, failed to appropriately intervene and that no serious efforts were made to rehabilitate him.

The mitigating evidence set forth herein and in the first Petition is significant. Not only does it present a sympathetic picture of Petitioner, but it also undermines significant aspects of the prosecution's case against him. (*Brown v. Myers* (9th Cir. 19980 137 F.3d 1154, 1157 ["The missing testimony., would have altered significantly the evidentiary posture of the case."].) Had the jury been presented with this mitigating evidence, "it is very likely that the jury 'would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'"

CLAIM XV: TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE REGARDING PETITIONER'S MENTAL RETARDATION AND LEARNING DISABILITIES WAS INEFFECTIVE ASSISTANCE OF COUNSEL UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS

A. Facts

The facts supporting this claim, among others to be presented after adequate funding, full investigation, discovery, access to this Court's subpoena power, and evidentiary hearing, include, but are not limited to, the following facts.

Petitioner incorporates by reference as if fully set forth herein the facts listed above in Claim XIV.

Dr. Natasha Khazanov is a licensed clinical psychologist specializing in the practice of clinical neuropsychology and neuropsychological assessment. (Exhibit 13, Declaration of Natasha Khazanov, ¶¶ 1-10.) She conducted a neuropsychological evaluation of Petitioner to determine if neuropsychological dysfunction or deficits were present, and, if so, to determine the degree, nature, and effect of any such impairment on Mr. Lewis' psychological, cognitive and behavioral functioning. (Exhibit 13, Declaration of Natasha Khazanov, ¶¶ 11-12.) In addition to administering specific tests and conducting a clinical interview of Petitioner, Dr. Khazanov reviewed Petioner's history and family history, Petitioner's educational records, and Petitioner's institutional records. (Exhibit 13,

Declaration of Natasha Khazanov, ¶¶ 13-14.)

Dr. Khazanov found that Mr. Lewis suffers from serious organic brain damage and mental retardation with a Full Scale IQ of 67. (Exhibit 13, Declaration of Natasha Khazanov, ¶ 138.)

Intelligence and Achievement Testing

Dr. Khazanov tested Mr. Lewis' intelligence (aptitude) and academic achievement by administering the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III) and the Wide Range Achievement Test-Third Edition (WRAT- 3), which are standard IQ and achievement tests and considered highly reliable. On both tests, Mr. Lewis demonstrated sub-average ability, i.e., his scores were consistently extremely low. (Exhibit 13, Declaration of Natasha Khazanov, ¶¶ 90.)

Mr. Lewis WAIS-III scores reflect that he has sub-average intelligence in both Verbal and Performance domains. His Verbal IQ of 66 falls in the 1st percentile for people his age and is in the mentally retarded range. His Performance IQ of 75 falls in the 5th percentile and again is qualified as extremely low. Verbal and Performance IQ scores combined produce a Full Scale IQ of 67, which places him in the 1st percentile, which is in the mentally retarded range. This means that 99 percent of the U.S. population in the age group between 45 and 54 years do better on this standard test. It is noteworthy that there is a significant discrepancy

between Mr. Lewis's Verbal and Performance IQ. Although both measures are in the impaired range, verbal skills appear particularly impaired, indicating greater damage on the left than on the right. (Exhibit 13, Declaration of Natasha Khazanov, ¶ 91.)

Intelligence is a multi factorial concept, and in addition to Verbal and Performance IQ, four factors were identified in factor analysis in the research used to create the WAIS-III. These factors are reflected in four Index Scores: Verbal Comprehension, Perceptual Organization, Working Memory, and Processing Speed. Analyzing the Index Scores allows us to identify strengths and weaknesses in one's performance. Mr. Lewis' performance was extremely low on three out of four measures. For example, his Working Memory Index score - a measure of attention and concentration - was calculated to be 65, falling in the first percentile. Similarly, Verbal Comprehension Index, measuring his grasp of the English language, was 68, or in the 2nd percentile. His Perceptual Organization Index - a measure of visuo-spatial abilities - was also very low, calculated at 70, or in the 2nd percentile. Finally, the Processing Speed Index, a measure of eye-hand coordination and how quickly he can integrate visual information, was somewhat higher (88, falling in the 21st percentile.) For Mr. Lewis, this is a relative strength. (Exhibit 13, Declaration of Natasha Khazanov, ¶92.)

This finding, indicating that Mr. Lewis's IQ is below the cut-off score for mental retardation (established at IQ of 70, or two standard deviations below the mean), is significant and raises a clinical issue of mental retardation.(Exhibit 13, Declaration of Natasha Khazanov, ¶ 93.)

Mr. Lewis performance on the WRAT-3 is consistent with the IQ testing. The WRAT-3 measures achievement (as opposed to aptitude) in Reading, Spelling and Arithmetic. Mr. Lewis knows the English alphabet; however, he was able to read only simple words and demonstrated errors in reading, e.g., reading jar as "jam" and plot as "pole". His reading was assessed at the .04th percentile. His spelling was also quite limited. He was able to write simple words such as "go" or "cat" or even "grown", but had marked difficulty in demonstrating an understanding of the connection between basic sounds and letters, e.g., producing "rur" for run, "knitso" for kitchen, and "recou" for result. Thus, his spelling was also assessed at a low level, or in the .2nd percentile. His achievement in arithmetic was his relative strength, even though, compared to the US population at large, it was extremely low. He was able to do some very simple tasks of addition and subtraction and scored at the third-grade level, or in the .7th percentile for individuals his age. Overall, this testing revealed a lack of age-appropriate academic skills consistent with his extremely low IQ. Lack of appropriate remedial formal education and schooling may account for his

inability to develop these skills during childhood. Mr. Lewis stated that he has been learning how to read and write during his incarceration. However, he cannot sound out words, and given the type of reading errors he made on testing, appears to be relying on his low functioning visual spatial abilities to memorize whole words by sight, without any processing of the letter-sound relationships and without much success. Lack of progress in acquiring at least some level of mastery in such a long time suggests that he is fundamentally unable to grasp the concepts of literacy. This finding is indicative of a profound deficit in one of the areas of adaptive functioning - functional academics - and, along with the WAIS-III findings, should be considered as supportive evidence for the diagnosis of mental retardation. (Exhibit 13, Declaration of Natasha Khazanov, ¶ 94.)

Memory Testing

Dr. Khazanov also assessed Mr. Lewis' memory which is an important part of any neuropsychological evaluation. Memory dysfunction may be an indication of brain damage, as well as a result of emotional trauma. It is a relevant issue in evaluating one's ability to remember and relate important information in legal proceedings, and should be taken into account in understanding the issues of Mr. Lewis's ability to assist in his own defense, as well as issues of suggestibility and vulnerability to manipulation.

Dr. Khazanov administered two standard tests to evaluate Mr. Lewis' memory: the Memory Assessment Scales and the Rey-Osterrith Complex Figure Test, both reliable and widely recognized tests of mnestic functions. As evidenced by his performance on both tests, Mr. Lewis has profound deficits in certain aspects of memory. (Exhibit 13, Declaration of Natasha Khazanov, ¶¶ 95-96.)

Dr. Khazanov administered the Memory Assessment Scales (MAS) in its entirety. It consists of 12 subtests, the scores on which are used to assess the short-term, verbal and visual memory. Mr. Lewis's performance on this test revealed significant memory impairment, with specific deficits in attention and verbal memory. (Exhibit 13, Declaration of Natasha Khazanov, ¶ 97.)

The first two subtests of the MAS - Verbal Span and Visual Span - measure the individual's attention and concentration. Mr. Lewis's verbal (auditory) attention span was in the severely impaired range, or <1st percentile. Similarly, his visual attention span also fell in the severely impaired range, or 2nd percentile. (Exhibit 13, Declaration of Natasha Khazanov, ¶98.)

Similarly, Mr. Lewis's Verbal Memory Index Score, calculated to be 70, fell in the severely impaired range, or 2nd percentile. In contrast, Mr. Lewis's Visual Memory Index Score, measuring 95, and fell in the 37th

percentile, a significant strength. Combined verbal and visual memory scores produced a Global Memory Index Score of 74, which fell in the 4th percentile. (Exhibit 13, Declaration of Natasha Khazanov, ¶ 99.)

Specific subtest scores were also revealing. Mr. Lewis's verbal memory was impaired on all measures taken. On the list learning task he was asked to learn a list of 12 words, falling into four categories (colors, countries, birds, and cities), and over 6 trials still was demonstrating learning impairments, falling in the 9th percentile. After a delay his recall performance dropped even further to the 2nd percentile. Similarly, he had difficulty remembering logically organized material - a short story, consisting of three sentences - where his performance fell in the 2nd percentile in both immediate and delayed recall. Qualitative analysis of his performance revealed a high number of intrusions - i.e., he not only missed words from the original list, but also produced words which had never been a part of the exercise. This is very typical of patients with frontal lobe damage. (Exhibit 13, Declaration of Natasha Khazanov, ¶ 101.)

Mr. Lewis's ability to remember names and faces of people was mildly impaired at immediate recall, 16th percentile, although his memory for this also fell to the severely impaired range after a delay, falling in the 1st percentile. Again, he produced intrusions, in this case – names, that were not part of the exercise. (Exhibit 13, Declaration of Natasha

Khazanov, ¶ 101.)

In contrast, his performance on the tasks measuring his Visual Memory was in the mildly impaired to average range, ranging from 9th percentile to 37th percentile. (Exhibit 13, Declaration of Natasha Khazanov, ¶ 102.)

These findings are significant, as they allow us to lateralize brain damage in Mr. Lewis's case more to the left hemisphere, as overall verbal attention and memory are facilitated by the left hemisphere, whereas visual attention and memory are governed overall by the right hemisphere in right-handed individuals. This finding is also in agreement with his WAIS-III results. (Exhibit 13, Declaration of Natasha Khazanov, ¶ 103.)

The Rey-Osterrith Complex Figure Test is a test of visual memory which also allows for qualitative analysis of organization of drawing, which requires good frontal lobe functioning. Mr. Lewis's performance on the Rey-Osterrith Complex Figure Test was impaired, his immediate recall of a figure fell in the 4th percentile. Qualitative inspection of his drawing revealed piecemeal construction of the figure and failure to appreciate how several internal details fit relative to one another with preservation of the overall gestalt of the figure. This finding is consistent with either frontal impairment or left parietal impairment. (Exhibit 13, Declaration of Natasha Khazanov, ¶ 104.)

Overall, Mr. Lewis's memory testing revealed that visual memory is relative strength, with relative preservation of gestalt, in comparison with sub-average verbal memory, intelligence, and organization of internal visual details and the relative size relationships of these details. In my opinion, his ability to retain visual information allowed him to learn limited reading and trade skills to work in a limited capacity as a bricklayer, in spite of significant cognitive limitations. (Exhibit 13, Declaration of Natasha Khazanov, ¶ 105.)

Overall Organic Brain Dysfunction Testing

Mr. Lewis performed poorly on the two subtests of the Halstead-Reitan Battery that were administered to him.

The Category Test (a test of abstract concept formation, requiring one's ability to make cognitive shifts) is the single most sensitive test of brain damage in the battery. It has been found to be 90 percent effective in discriminating brain-injured from normal individuals. The Category Test is a nonverbal test that measures a person's ability to formulate abstract principles based on feedback after each specific test item. Several different concepts must be identified, and each concept is then applied to new information. It tests new problem solving, judgment, abstract reasoning, concept formation and mental flexibility. Deficits on this test may indicate lesions on the left frontal area, although it is sensitive to brain injury in

general. Mr. Lewis made 107 mistakes, placing him in the impaired range of performance. The Category Test is scored by looking at the number of errors, with a cut-off of 51 mistakes - i.e., more than 51 mistakes indicates the presence of brain damage.

Mr. Lewis's performance on another subtest of the Halstead-Reitan Battery, Trail Making Test, Part B, a sequencing task requiring him to connect numbers and letters consecutively, also fell in the impaired range. His performance was much slower than expected, and he demonstrated difficulty in following the order of letters of the alphabet.

In summary, on the these Halstead-Reitan Battery subtests, Mr. Lewis's performance clearly and consistently indicated brain dysfunction, with two out of two indicators considered to be sensitive general indicators of brain damage being positive, poor performance on the Category Test and deficient performance on the Trail Making Test (B). Both tests are considered to be very sensitive to frontal lob dysfunction. Deficient performance on these tests allows us to localize Mr. Lewis' brain dysfunction more to the frontal lobe area. (Exhibit 13, Declaration of Natasha Khazanov, ¶¶ 106-109.)

Motor Functioning Testing

Mr. Lewis showed mild to moderate difficulties on the task of Hand Position Sequencing. This test is considered to be particularly important in

assessing frontal lobe damage. During the test, Dr. Khazanov showed Mr. Lewis a series of three simple hand movements (fist-palm-edge) and asked him to copy my movements. Mr. Lewis was unable to copy the sequence of movements perfectly, even with repeated practice and demonstrations. This finding is indicative of frontal lobe pathology.

Mr. Lewis also exhibited obvious difficulty on another task assessing his motor functioning - Rapid Alternating Movements, where the individual is required to imitate a series of hand movements involving the open palm and closed fist. This is a simple test used by many neurologists to assess motor (reciprocal) coordination and is considered to be sensitive to frontal lobe dysfunction. Mr. Lewis had extreme difficulty keeping one hand open and the other closed. His tendency was to have both palms open or closed in a fist. Even though he was aware of his mistakes in performing this task, he was unable to maintain reciprocal coordination for more than a few seconds.

Mr. Lewis also had difficulty in copying a sequence of finger movements, despite repeated demonstrations. He had particular difficulty using his fingers separately and demonstrated some concrete thinking in copying movements, e.g., using his left hand to mirror a right hand movement, or using his pinky to mirror a thumb movement.

When asked to identify with his eyes closed which finger was

touched (thumb, index, middle, ring, pinky) and then the position of the finger (up, down), Mr. Lewis was able to do so, but his performance was remarkable for his inability to name any of his fingers except his thumb and pinky and for concrete thinking, i.e., when a finger was raised up he reported "up", but when it was lowered he reported "out" , focusing on the fact that it was sticking "out" while the other fingers were at rest on the table, rather than the fact that it had been moved down from it's up position. Despite repeated reinstruction, Mr. Lewis was unable to grasp the idea of "down" relative to up, continuing to report "out" throughout the entire test. (Exhibit 13, Declaration of Natasha Khazanov, ¶¶ 110-113.)

Significance of Frontal Lobe Dysfunction

The frontal lobes of the brain are primarily responsible for the initiation, organization, planning, execution and regulation of complex motor movements and actions. It is often referred to as the "organ of civilization," because it enables the integration of the highest levels of human behavior and damage to it can result in extreme derangement and disorganization.

Individuals with frontal lobe damage are often unable to adequately or properly perform everyday functions, such as decision making or carrying out all but the simplest plans. Proper functioning of the frontal lobes is fundamental to meeting the daily challenges of motivation, control

and self-regulation. The frontal lobes allow an individual to maintain and shift attention, exert organizational control over all aspects of expression, anticipate consequences, consider alternatives, plan and formulate goals, shape, direct, and modulate personality and emotional functioning, and act to integrate ideas, emotions, and perceptions. Frontal lobe disorders may have the most extreme and far-reaching implications for behavior and functioning, and, along with the temporal lobes, the frontal lobes are at particular risk for damage due to falls, to blunt head trauma and from neurotoxin exposure.

Symptoms of frontal lobe syndrome are many and varied and include behavioral effects such as problems of starting (decreased initiative, productivity, spontaneity), difficulties making mental or behavioral shifts (impaired flexibility, disrupted attention, cognitive rigidity, perseveration, difficulty shifting attention from one activity to another), problems of stopping (difficulty modulating emotions and behavior, impulsivity, overreactivity, disinhibition, impulse control problems, poor emotional control, difficulty inhibiting inappropriate or unwanted responses, diminished frustration tolerance, disinhibition regarding aggression and/or sexual behavior, outbursts of anger over trivial stimuli), deficient judgment and self-awareness (misperception of social expectations, inability to perceive performance errors, inability to appreciate one's impact on others,

inappropriate social comments, poor judgment, lack of insight, inability to adapt to new situations, irritable and labile mood, inability to understand consequences, inability to profit from experience) and deficits in abstract thinking (deficiencies in planning and goal-directed behavior, impaired ability to plan, organize, initiate, regulate, or monitor behavior, difficulty considering alternative solutions, deficits in problem solving abilities).

Mr. Lewis's specific deficits, as revealed by both the quantitative and qualitative results of the testing, fall into most of the areas identified above. He suffers impairments in flexibility, the ability to shift or adapt thinking or behavior to changed circumstances, and in the ability to inhibit unwanted responses. Damage to frontal lobes often results in the inability to process social or environmental cues, and individuals with this type of brain dysfunction often cannot respond appropriately to feedback and lack adequate reality testing skills. They demonstrate marked inflexibility in their behavior and an inability to profit from their mistakes. (Exhibit 13, Declaration of Natasha Khazanov, ¶¶ 114-117.)

Significance of Tests

The tests point to the presence of sub-average intelligence and severe neuropsychological dysfunction (i.e., brain damage). There were clear neuropsychological signs of diffuse brain dysfunction with some focal signs implicating predominantly frontal lobes. Evidence of brain damage was

confirmed in both qualitative and quantitative analyses, including Mr. Lewis's substantially sub-average intelligence, impaired performance on several measures particularly associated with frontal lobe functioning, impairments in attention, concentration and working memory, and impairment on tests assessing executive functioning and motor coordination. (Exhibit 13, Declaration of Natasha Khazanov, ¶ 120.)

Mental Retardation

Mental retardation is universally defined as (1) significant limitations in general intellectual functioning, which (2) exist concurrently with significant limitations in adaptive functioning, (3) the onset of which begins before adulthood. See Editorial Board, Definition of Mental Retardation [hereinafter Definition], in Manual of Diagnosis and Professional Practice in Mental Retardation 13, 13 (John W. Jacobson & James A. Mulick eds., American Psychological Association 1996) [hereinafter APA Manual]; American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992) [hereinafter AAMR Manual]; American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. text revision 2000) [hereinafter DSM-IV-TR].

These three defining criteria - all of which must be present before an individual may be classified as having mental retardation, see Definition, at

14; see also AAMR Manual, at 5; DSM-IV-TR, at 41- are interrelated. People with mental retardation have intellectual limitations that result in real and serious impairments in "how effectively individuals cope with common life demands." DSM-IV-TR, at 42; see also Definition, at 20 (mental retardation is characterized by "poor generalization skills and motivational deficits [as well as] deficits in major problem-solving processes and practical knowledge or skills"). Further, mental retardation is a developmental disability, which means that these serious intellectual and adaptive limitations manifest themselves before the individual achieves the ability to function as an adult. See AAMR Manual, at 16-18; Definition, at 36-37; DSM-IV- TR, at 47.

Of course, people with mental retardation display a range of intellectual and adaptive abilities. Individuals with mental retardation may possess relative strengths in some skill areas, especially compared to their limitations in others (e.g., an adult who cannot learn to read might have some limited math skills). See, e.g., AAMR Manual, at 6-7. Because individuals with mental retardation have varying skills and thus varying needs for support, the American Association on Mental Retardation uses a subclassification system that reflects the level and kind of support needed. See AAMR Manual, at 26, 34. Alternatively, people with mental retardation are sometimes subclassified as having either "mild," "moderate,"

"severe" or "profound" mental retardation, depending on the degree of their intellectual and adaptive functioning. See Definition, at 14-19; DSM-IV-TR, at 43-44.

The term "mild" mental retardation can be misleading, for even the highest functioning individuals with mental retardation must have substantial cognitive and behavioral disabilities before they can be diagnosed with retardation. See Definition, at 13 (mental retardation requires significant limitations in intellectual and adaptive functioning); AAMR Manual, at 5 (same); DSM-IV-TR, at 41 (same). Despite these individual variations, the very definition of mental retardation means that all persons with this disability suffer from very substantial impairments in their intellectual and adaptive abilities compared to non-retarded individuals. Although there is no precise census of the number of people with mental retardation, studies invariably put the number at less than 3% of the general population, usually in the 1% to 3% range. See, e.g., D.D. Smith & Ruth Luckasson, Introduction to Special Education: Teaching in an Age of Challenge 146 (2d ed. 1995).

This small group represents those whose intellectual limitations substantially restrict their development and adaptive functioning. These limitations are reflected in diminished capacities to understand and process facts and information; to learn from mistakes and from experience

generally; to generalize and to engage in logical if-then reasoning; to control impulses; to communicate; to understand the moral implications of actions and to engage in moral reasoning; and to recognize and understand the feelings, thoughts and reactions of other people. Moreover, people with mental retardation are often especially eager to please others, a characteristic that makes them very susceptible to manipulation. . (Exhibit 13, Declaration of Natasha Khazanov, ¶¶ 121-125..)

The first criterion of mental retardation is the existence of significant limitations in general intellectual functioning. See Definition, at 13; AAMR Manual, at 5; DSM-IV-TR, at 41. In this context, "significant limitations" means two or more standard deviations below the mean. See Definition, at 13; AAMR Manual, at 35; DSM-IV-TR, at 41.

Tests that measure cognitive functioning have been used since the beginning of the twentieth century to classify individuals' cognitive abilities and to diagnose mental retardation and similar disabilities. Today, standardized IQ tests are the presumptive instruments of measurement among professionals that diagnose and treat mental retardation. AAMR Manual, at 36. Individually administered IQ tests are widely recognized as valid and reliable means of assessing intellectual functioning for the purpose of diagnosing mental retardation. See id. at 35. IQ tests are the "only way to address the intellectual aspect of mental retardation in a

normative way." Clinicians confirm the results of IQ tests by evaluating the individual's functioning in everyday settings and roles. See id. at 36.

On the scales used by many IQ tests, two standard deviations below the mean corresponds to a true score of 70. See, e.g., Definition, at 14 (table); DSM- IV-TR, at 41. However, "there is a measurement error of approximately 5 points in assessing IQ." DSM-IV-TR, at 41. See id. Accordingly, all authorities agree that an individual with an IQ of 75 may be diagnosed with mental retardation - but only if significant limitations in adaptive functioning also exist. See Definition, at 15; AAMR Manual, at 14-15; DSM-IV-TR, at 41-42. This is one reason why adaptive limitations are an integral part of the definition of mental retardation. . (Exhibit 13, Declaration of Natasha Khazanov, ¶¶ 126-129.)

The second necessary criterion of mental retardation is the existence of significant limitations in adaptive functioning. See Definition, at 13; AAMR Manual, at 5; DSM-IV-TR, at 41. "[A]daptive behavior refers to what people do to take care of themselves and to relate to others in daily living rather than the abstract potential implied by intelligence." AAMR Manual, at 38; see also DSM-IV-TR, at 42 ("Adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community

setting").

Adaptive functioning is composed of a wide array of discrete skills that can be placed into categories or "domains," each of which is amenable to evaluation and testing. These skills determine whether and how effectively an individual can do everything from meeting new people, to dressing, to managing a personal banking account. Professionals have identified ten domains of adaptive skills that are assessed for the purposes of diagnosis. They are communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work. See DSM- IV-TR, at 41; AAMR Manual, at 39-41; Definition, at 30-31. The adaptive functioning criterion for identifying mental retardation is satisfied when the individual has substantial limitations in at least two of these domains. See DSM-IV-TR, at 41; AAMR Manual, at 39-41; Definition, at 30.

Clinicians have at their disposal objective rating scales and assessment methods for the comprehensive evaluation of adaptive functioning skills. Such instruments were largely developed for the express purpose of testing adaptive functioning as it relates to mental retardation, and the tests accordingly have a high degree of validity in connection with this use. See AAMR Manual, at 41 ("there is a relatively close correspondence between the structure of many of the [testing] scales and

the implicit meanings within those definitions [of mental retardation]"). In addition to validity, the reliability of particular adaptive functioning tests has been determined through extensive and intensive analyses. See John W. Jacobson & James A. Mulick, Psychometrics, in APA Manual, at 75, 80-82.

As with intellectual functioning, the threshold for significant limitations in adaptive functioning is a domain score that is two or more standard deviations below the mean, see Definition, at 13, referenced to the subject's chronological age, see AAMR Manual, at 6; Definition, at 28. see also DSM-IV- TR, at 42. To verify the accuracy of results obtained from these instruments, the clinician usually must also interview one or more knowledgeable persons who are well-acquainted with the subject's typical, unprompted adaptive behavior. See Definition, at 35; AAMR Manual, at 45. (Exhibit 13, Declaration of Natasha Khazanov, ¶¶ 129-132.)

The third necessary criterion of mental retardation is onset prior to adulthood. See Definition, at 13; AAMR Manual, at 5, 16; DSM-IV-TR, at 41. This criterion is important because it provides additional certainty concerning a diagnosis of mental retardation. A complete evaluation of an individual for mental retardation requires consideration of materials such as school records and reports from persons who have long familiarity with the client in order to confirm that present limitations in intellectual and adaptive functioning became manifest before adulthood. See Diane Courselle et al.,

Suspects, Defendants, and Offenders with Mental Retardation in Wyoming, 1 Wyo. L. Rev. 1, 20, 27 (2001). Unlike many other disabilities or diseases, mental retardation cannot appear for the first time in adults. Thus, false positive diagnoses of mental retardation due to malingering (i.e., the opportunistic feigning of symptoms) are essentially unknown. See id. at 27. (Exhibit 13, Declaration of Natasha Khazanov, ¶ 133.)

Behavioral Indications of Retardation

Mr. Lewis sporadically attended school, and did not like being there. He had poor attendance in kindergarten, repeated the first grade, and appeared to have relatively stable attendance until the 4th grade. Despite his failure to progress, he was passed each school year. Although some grades indicate he was doing at least "average" the WRAT, administered twice during these same years indicated functioning well below normal.

Mr. Lewis's employment history is limited. His only employment listed is occasional work as a bricklayer for his father, but never a steady job.

During the course of Dr. Khazanov's interview and testing of Mr. Lewis, his thought processes were very concrete; for example, failing to grasp the idea of finger placement as "down" relative to up. Similarly, his understanding and interpretation of proverbs was very literal and concrete. For example when asked to explain what the saying "one swallow does not make a summer" meant, he responded: " One swallow can't make no

summer." His vocabulary was very limited, e.g., when asked what the word "yesterday" means, he replied "something that happened yesterday." On the Arithmetic subtest of the WAIS-III he was unable to calculate how many packages of soft drinks he would buy if he wants 30 cans, and there are 6 cans to a package. Mr. Lewis was unable to spell the word "arm" or to recognize the word "jar".

Mr. Lewis suffers from deficits in several areas of adaptive functioning, including functional academics, daily living skills, and socialization. (Exhibit 13, Declaration of Natasha Khazanov, ¶ 134-137.)

Conclusions

Mr. Lewis suffers from serious organic brain damage and mental retardation. The diagnosis of mental retardation should be made based on his significantly sub-average intelligence, deficits in adaptive functioning, in at least such domains as functional academics, self-care, communication, social skills and possibly other areas. Unfortunately, the diagnosis of mental retardation was not made until now. However, Dr. Khazanov was able to conclude, based on the information about the milieu in which Mr. Lewis was raised, that evidence of retardation may well have been present, but not noticed.

The neuropsychological testing conducted by Dr. Khazanov identified both diffuse brain damage and localized dysfunction,

predominantly in the frontal lobes, with more prevalent left-hemisphere focus, affecting Mr. Lewis's overall cognitive and neurological functioning. As a result of these impairments, his ability to plan or carry out a specific course of action, to make informed decisions, to assess his environment, interpret social cues and act rationally are severely and chronically impaired. He is unable to adequately plan complex actions, learn from his mistakes, or to shift his thinking or behaviors in response to environmental or verbal cues, and he is extremely vulnerable to suggestion. He is, moreover, largely unaware of these problems and, even when they are pointed out to him, he simply lacks the capacity to adapt to changed circumstances. Mr. Lewis's impairments are factors that greatly contributed to his behavior, functioning and personality throughout his life. Any evaluation of Mr. Lewis, whether psychological, social or psychiatric, that does not include consideration of these impairments would be wholly misleading, incomplete and inaccurate.

The mental retardation and damage to Mr. Lewis's brain were present at the time of trial. It is Dr. Khazanov's professional opinion that findings consistent with the foregoing would have been reached at the time of Mr. Lewis's arrest and trial, had he been evaluated by a qualified neuropsychologist.

It is also Dr. Khazanov's opinion that the need for a thorough

psychological assessment was abundantly clear at all points relevant to Mr. Lewis's trial and for many years prior to that time.

Finally it is Dr. Khazanov's opinion that at the time of the offense Mr. Lewis was seriously mentally impaired. He suffered from brain dysfunction for most, if not all, of his life, resulting in mental retardation and other cognitive and emotional symptoms, and shows clear signs of significant organic brain damage. He has profoundly impaired judgment, and has the mental age of a child. He had a long history of neglect and abandonment. As a result, his ability to conform his conduct to the requirements of the law, control his behavior, comprehend the consequences of his behavior, remember his behavior, or report his behavior, was severely impaired. (Exhibit 13, Declaration of Natasha Khazanov, ¶ 138-142.)

B. Trial Counsel's Failure to Investigate and Present Evidence of Serious Brain Dysfunction and Mental Retardation in Mitigation Constitutes Ineffective Assistance of Counsel.

"'Evidence of mental problems may be offered to show mitigating factors in the penalty phase, even though it is insufficient to establish a legal defense to conviction in the guilt phase.'" (*Jackson v. Calderon* (9th Cir. 2000) 211 F.3d 1148, 1162 [citing *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1043]; Penal Code § 190.3(k).)

Had Ron Slick investigated Petitioner's background and obtained

and reviewed all the documents available to him, such as Petitioner's C-File, probation reports, school records, he would noted that Mr. Lewis had long history of academic difficulties, started failing school in kindergarten, and scored in the mentally retarded range in 1968 on SRA – a student intelligence test measuring aptitude for scholastic achievement and career. His IQ score- a measure of intelligence was assessed to be 61, falling squarely in the mentally retarded range. His Linguistic Intelligence score was even lower – at 58. (Exhibit 59, Clinic Education Report.)

However, Ron Slick failed to do so. Consequently, he failed to present any evidence in mitigation that Petitioner was seriously mentally impaired, that he had a Full Scale IQ of 67, and suffered from organic brain damage.

C. Trial Counsel's Counsel Failure to Find Any Necessary Expert and Present Them with the Relevant Information Constitutes Ineffective Assistance of Counsel.

Counsel in a death penalty case also has a duty to find any necessary experts and provide them with the relevant information:

> "Counsel has an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert." (*Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1225.)

"Failure to investigate a defendant's organic brain damage or other

mental impairment may constitute ineffective assistance of counsel." (*Caro, supra*, at 165 F.3d 1226).

Effective assistance of counsel includes the employment of appropriate experts to assist in the defense. (*Ake v. Oklahoma* (1985) 470 U.S. 68, 70,83.). The failure to obtain expert assistance to evaluate and present appropriate defense constitutes ineffective assistance of counsel. (*People v. Frierson* (1979) 25 Cal.3d 142, 164.)

"[P]roviding experts with requested information, performing recommended testing, conducting an adequate investigation, and preparing witnesses for trial testimony" are "an integral thread in the fabric of constitutionally effective representation" *(Bean v. Calderon* (1998) 163 F.3d 1073, 1080.)

In this case, Ron Slick consulted Kaushal Sharma, M.D., a psychiatrist, and Michael Maloney, P.D., a psychologist. Ron Slick provided Dr. Sharma only with the Information, the police report, the preliminary hearing transcript, and the probation reports in Mr. Lewis' three previous cases. (Exhibit 60, Letter from Ron Slick to Kaushal Sharma, M.D., dated May 8, 1984.) He failed to provide Dr. Sharma with available information regarding Mr. Lewis such as his school records, prior testing and other pertinent items. Had Dr. Sharma been provided with Petitioner's school records and institutional records, he would have noted

that Mr. Lewis had a long history of academic difficulties, started failing school in kindergarten, and scored in the mentally retarded range in 1968 on SRA – a student intelligence test measuring aptitude for scholastic achievement and career. His IQ score- a measure of intelligence was assessed to be 61, falling squarely in the mentally retarded range. His Linguistic Intelligence score was even lower – at 58. (Exhibit 59, Clinic Education Report.) These records would have shown the need for a comprehensive neuropsychological assessment.

This information, which was available to the pre-trial experts, was ignored by Dr Kaushal Sharma, who evaluated Mr. Lewis on May 21 and June 6, 1984. He stated in his report "No evidence of psychosis, organic brain disorder, depression, or any other major disorder was noted during the examinations. The defendant in the past has been given a diagnosis of Antisocial Personality Disorder starting at an early age. I agree with that diagnosis. ...In the absence of any significant mental illness or other emotional or mental disturbance, I have nothing to suggest any mitigating circumstances for the defendant. In fact, given the defendant's long prison record, antisocial behavior at an early age, lack of mental illness, lack of duress, and lack of intoxication, may suggest that no such mitigating factors exists in this case."

Ron Slick also retained Dr. Maloney. Dr. Maloney was provided

with the same documents as Dr. Sharma. (Exhibit 61, Letter dated May 8, 1984 from Ron Slick to Michael Maloney.) Dr. Maloney conducted psychological testing on June 16th and July 5th 1984. This testing revealed that Mr. Lewis's intelligence as measured by Wechsler Adult Intelligence Scale – Revised (WAIS –R) was extremely low. His Full Scale IQ was found to be 73. Neither Dr. Maloney nor Ron Slick pursued it. It is a standard of practice in psychology to rule out the possibility of mental retardation in a person who scores so low on this test, as the error of measurement is 5, and the cut-off score for mental retardation is 70 . Dr. Maloney failed to explore this possibility. Dr. Maloney obtained a score that should have triggered further investigation of Mr. Lewis's cognitive functioning to explore the possibility of brain damage in his client. Dr. Maloney, however, chose to administer personality tests, such as the Minnesota Multiphasic Personality Inventory -2 (MMPI-2) and the Rorschach. The MMPI was not finished (Mr. Lewis answered only 130 questions out of 567). The MMPI requires at least the sixth grade level in reading. Mr. Lewis's apparent deficits in verbal comprehension prevented his from understanding and finishing this test, which in itself should have prompted further investigation of his cognitive functioning and academic achievement. (Exhibit 13, Declaration of Dr. Khazanov, ¶¶83-87.)

D. Trial Counsel's Failure to Present Expert Testimony Explaining the Significance of the Serious Brain Dysfunction and Mental Retardation Constitutes Ineffective Assistance of Counsel.

Counsel has an obligation to present expert testimony explaining the significance of the mitigating evidence. (*Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1227.) In *Caro*, the jury was presented with mitigating evidence jury aware he was beaten and suffered head injuries as a child, knew that he was exposed to chemicals. "The jury did not, however, have the benefit of expert testimony to explain the ramifications of these experiences on Caro's behavior. Expert evidence is necessary on such issues when lay people are unable to make a reasoned judgment alone." (*Id.*)

Here, the jury should have had the benefit of expert testimony to explain the effects of Petitioner's serious organic brain damage and mental retardation as Dr. Khazanov has done.

E. Petitioner Was Prejudiced by Trial Counsel Failure to Present Evidence of Serious Brain Dysfunction, Mental Retardation and by its Failure to Present Expert Testimony Explaining its Significance

Petitioner has established prejudice by demonstrating that Ron Slick unreasonably failed to investigate and present substantial, credible mitigating evidence. If the jury had been presented the available mitigating evidence, "it is very likely that the jury 'would have concluded that the

balance of aggravating and mitigating circumstances did not warrant death.'" (*Bean v. Calderon*, supra, 163 F.3d 1073, 1081, quoting *Strickland v. Washington*, supra, 466 U.S: 668, 695-696.)

As set forth above in Claim XIV, the prosecution argued in aggravation that Petitioner had suffered four prior robbery convictions, that he had chosen the path to criminality and committed a cold-blooded, execution murder. The prosecutor also pointed out that there was no evidence on whether the defendant had the capacity of appreciate the criminality of his conduct or whether his ability to appreciate that criminality was impaired as a result of mental disease or defect. (4RST 818.)

Petitioner suffered from brain dysfunction for most, if not all his life, resulting in mental retardation and other cognitive and emotional symptoms. Petitioner had the mental age of a child and had profoundly impaired judgment. Brain dysfunction and mental retardation severely impaired Petitioner's ability to conform his conduct to the requirements of the law, control his behavior and comprehend the consequences of his behavior, remember his behavior, or report his behavior. Had the jury been presented with this mitigating evidence, "it is very likely that the jury 'would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'"

CLAIM XVI: TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE REGARDING THE IMPACT OF PETITIONER'S INSTITUTIONALIZATION WAS INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner's death sentence and confinement are unlawful and were obtained in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights to a fair trial, to a reliable and appropriate penalty determination and to the effective assistance of counsel in that counsel failed to investigate and present mitigating evidence regarding the impact of institutionalization on Petitioner, including his California Youth Authority (CYA) incarceration.

A. Facts

The facts supporting this claim, among others to be presented after adequate funding, full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to the following:

Petitioner incorporates by reference as if fully set forth herein the facts listed above in Claim XIV.

Dr. Davis is a clinical psychologist with a specialty in forensic psychology. Her credentials are fully set forth in the declaration submitted herewith. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶¶ 1-5.)

Dr. Davis examine the records of Mr. Lewis to offer an opinion

about the extent to which his mental health needs were accurately identified and addressed via treatment during the many years he was in juvenile and adult correctional facilities, and to address whether this kind of information would have been useful in explaining Mr. Lewis' criminal behavior and should have been presented to the jury during the penalty phase of his trial. Dr. Davis reviewed various transcripts and reports from Mr. Lewis' trial, probation reports, records from San Quentin Prison, mental health evaluations, Mr. Lewis' C-File, Social evaluation from Tracy Correctional facility. . (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶¶ 1-5.)

A review of these documents revealed that Mr. Lewis entered the criminal justice system at an unusually young age and placed at a correctional facility before less restrictive and punitive measures were attempted. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 9.)

The focus of juvenile rehabilitation includes several targets of intervention including (a) identifying the need for special and remedial education, (b) identifying and providing treatment for underlying emotional disturbances that are contributing to his delinquent attitude and conduct, and (c) completing a thorough assessment of the minor's cognitive, physical and psychological functioning, his strengths and weaknesses, (d) identifying the most appropriate intervention strategy based on that minor's particular needs, (e) preparing the minor to take on adult responsibilities by assessing

the minor's vocational capacities and by providing vocational counseling and job training. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 10..)

A review of Mr. Lewis' records shows several sources of institutional failure since he entered a correctional facility at age 12. Those included failure to accurately identify the contribution of his dysfunctional family environment to his delinquent attitude and behavior; failure to adequately diagnose him; failure to identify the seriousness of his cognitive dysfunction; failure to include the expertise of different health care professionals to evaluate his needs; failure to provide the appropriate initial treatment setting to address his emotional needs; failure to ensure his protection from more sophisticated and dangerous minors; failure to prepare him educationally and vocationally once he re-entered the community. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 11.)

Although there were documented reports of the chaos, dysfunction and neglect in his family - his father had a criminal history and his mother was an alcoholic, he was left unsupervised - the impact of these problems on Mr. Lewis' emotional and behavioral functioning were not addressed or included in the interpretation of what was repeatedly referred to as his angry, hostile attitude and his deliquency. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 12.)

Mr. Lewis' school records indicate excessive absences during elementary school. This information coupled with his father's criminality and absence and his mother's alcoholism strongly suggest that Mr. Lewis suffered from both emotional and physical neglect by both parents. Stealing behavior in children is often associated with emotional deprivation. However, there was no intervention by the Department of Children's services to remove him from this environment or provide services for the family. (Exhibit15, Declaration of Adrienne C. Davis, Ph.D., ¶ 13.)

Because these issues were not addressed, Mr. Lewis' psychological needs were not appropriately identified and therefore the proper treatment was not implemented. Individuals from environments like Mr. Lewis' are often angry, bitter, depressed and feel un-nurtured. Their negative attitude and delinquent conduct reflects the environment in which they were raised. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 14.)

Based on the summaries provided in Mr. Lewis' adult correctional file, no formal diagnoses were provided to explain the attitude and behavior that Mr. Lewis was exhibiting. He was responded to and treated as if he had a "conduct disorder". In other words, comments were made about his bad attitude, his hostility, his impulsivity, his aggressiveness, disrespect, his continuing crimes, and the response was to lock him up, not to give him treatment. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 15.)

The only "diagnoses" that appears in Mr. Lewis' records is "anti-social," a diagnosis that can only be given after the age of 18. However, as a juvenile, other diagnoses could have been considered including depression, post-traumatic stress disorder, attention deficit disorder, adjustment disorder, to name a few. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 16.)

The possibility of a neurological disorder was not considered or evaluated as an explanation for Mr. Lewis' behavior. Aggressive, impulsive and poorly socialized behavior can reflect underlying cerebral dysfunction. There was evidence that Mr. Lewis suffered from a learning disability and that he required remedial education, which also points to underlying cerebral dysfunction. His mother's alcoholism could also have affected him neurologically if she was drinking while pregnant with him. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 17.)

Had these diagnoses been explored and considered appropriate treatment could have been implemented including but not limited to psychotropic medication and/or intensive counseling at a facility like the Dorothy Kirby Center, which provided treatment for emotionally disturbed minors who engaged in delinquent behavior. This kind of facility would have carefully evaluated Mr. Lewis' need for psychotropic medications and could have monitored his effectiveness for Mr. Lewis in a closed, secure

setting. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 18.)

A neurological examination was not completed because, based on statements made by his evaluators, Mr. Lewis' attitude and behavior was assumed to be completely volitional. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 19.)

The records show that Mr. Lewis had numerous contacts with law enforcement before he reached adolescence, his first arrest being at age 12. These offenses involved crimes against property and seemed to reflect that lack of supervision in the home. Given the dysfunction in Mr. Lewis' home life, a suitable placement or group home would have been a more appropriate recommendation for a boy of only 12. A suitable placement or group home would have provided a more positive environment, in a family-like setting, where better supervision, involvement of his family in the treatment process, and counseling would have been an integral part of his rehabilitation. Closer contact with his family of origin would have enable the staff to gather information about how Mr. Lewis was being treated in his home. Most suitable placements and group homes hire licensed mental health professionals to work with these minors. Suitable placements and group homes are less punitive and stigmatizing than a probation camp and they protect very young offenders from criminally sophisticated minors. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 20-21.)

A community probation camp is not oriented toward treatment. Its primary purpose is to remove young offenders from the community, in a way, giving the community a "break" from their misbehavior and demonstrating to the minor that their delinquency will not be tolerated. Trained mental health professionals do not provide the limited counseling that may be offered. More often than not, "treatment" is provided by the same staff – who have little or no training in child development, psychology, psychotherapy - that is responsible for disciplining the minors. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 22.)

The repeated references to Mr. Lewis as angry and hostile reflects teh focus of the correctional institutions on his over behavior as opposed to the underlying causes of his behavior. Therefore, decisions about placement were based on his behavior rather than his treatment needs. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 23.)

Mr. Lewis' records revealed that after five months in camp he was committed to the California Youth Authority because of his inability to adjust to the camp environment. He was deemed inappropriate for camp. At a very young age, 13, Mr. Lewis was placed in a facility that was beyond his level of delinquency at that point and beyond his maturity. . (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 24.)

During the period of time when Mr. Lewis was a ward at CYA, this

institution was reserved for the most serious among the juvenile offenders, particularly those who were involved in violent offenses. This did not characterize Mr. Lewis' delinquency at that time. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 25.)

In addition, at age 13, Mr. Lewis was among the younger and probably smaller ward at CYA, which would have put him in a position where he believed he had to prove himself and defend himself vis-a-vis older wards. In a word, Mr. Lewis was put in a correctional setting that would have encouraged and reinforced his aggressive and delinquent attitudes and behavior. It would also have put him in a position to being victimized by other wards. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 26.)

The stigma of being a "delinquent" and particularly an incorrigible delinquent, was also reinforced by his incarceration at CYA. It is difficult to remove this stigma once it is imposed and once an individual has internalized the stigma. Increased anger and aggression is an expected result. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 27.)

Mr. Lewis' emotional reactions are particularly salient in someone of his limited intelligence because he does not have the ability to understand and interpret what is happening to him, or to make the necessary changes to affect the manner in which he is being treated. The expectation always to

be that Mr. Lewis could change if he really wanted to, an attitude that did not take into consideration his limitations. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 28.)

Long term institutionalization interferes with an individual's social and emotional maturity. Once in the system, an individual becomes arrested at the developmental age at which he entered. For example, Mr. Lewis was committed to a correctional institution at age 12 and spent little time out of custody from that point on. Therefore, his emotional and social maturity did not progress beyond that of a youngster in pre-adolescence in terms of peer interactions, self-care, emotional regulation, problem solving, autonomy, respect for authority. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 29.)

The correctional institutions where Mr. Lewis was housed took care of all his custodial needs. In addition, everything about his daily life was regimented and planned for him, leaving no opportunity for him to learn to plan, make decisions, manage and organize his time, consider options, improve his judgment, not to mention the constant exposure to a negative peer group. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 30.)

Correctional facilities are completed regimented environments where an inmate does not have to take responsibility for himself. Therefore, it is common for someone who has been in custody for most of their life to re-

offend, violate probation or parole because they have no life management skills thus making it easy for them to slip back into behavioral and lifestyle patterns. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 31.)

By the time Mr. Lewis re-entered the correctional system at age 20, he was deemed unable to benefit from psychological counseling. In 1977, one probation officer wrote, "the defendant has been exposed to considerable rehabilitative efforts." During that same year, an institutional programming summary drew similar conclusions writing that because of his "sociopathic features" Mr. Lewis is not capable of being a viable candidate for psychotherapy because of his lack of internal controls and poor judgment further indicate he would not respond." (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 32.)

None of his records indicated that Mr. Lewis has been given a specific treatment regimen and failed. The mere fact that he had been in the California Youth Authority, it was assumed that he had been appropriately evaluated and treated. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 33.)

However, in 1984, when Mr. Lewis was evaluated by a defense psychiatrist, Dr. Sharma, who also recognized the time Mr. Lewis spent in the California Youth Authority, he wrote that while there, "he was not provided any treatment per se." (Exhibit 15, Declaration of Adrienne C.

Davis, Ph.D., 34.)

With respect to Mr. Lewis' ability to find employment once released from prison, he was not adequately prepared to do so. His only option was to work with his father as a brick mason. Records indicated that he only completed 10th grade, did not earn a GED and he had no marketable job skills when he was released from prison. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 35.)

In conclusion, several institutions failed to identify and address Mr. Lewis' mental health needs, and therefore failed to appropriately intervene. At the age of12, it was decided that Mr. Lewis was incorrigible because he was angry and hostile, after which no serious efforts were made to rehabilitate him. (Exhibit 15, Declaration of Adrienne C. Davis, Ph.D., ¶ 36.)

B. Trial Counsel's Failure to Investigate and Present Evidence of the Impact of Juvenile Institutionalization on Petitioner and Explain its Significance Through Expert Testimony Constitutes Ineffective Assistance of Counsel.

Counsel in a death penalty case had a duty to engage in sufficient investigation and preparation to be able to present and explain the significance of all available mitigation evidence. (*Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 927.)

As set forth above in Claim XIV, the prosecution argued in aggravation, among other things, that Petitioner had chosen the path to

criminality. The evidence set forth above would have dispelled that Petitioner could change or have taken another path if he really wanted to.

Had the jury been presented with this mitigating evidence, it is very likely that the jury 'would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

CLAIM XVII: PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, THE EFFECTIVE ASSISTANCE OF COUNSEL, AND PROTECTION FROM CRUEL AND/OR UNUSUAL PUNISHMENT BY THE COURT'S FAILURE TO INSTRUCT THE JURY AS TO THE TRUE NATURE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE AND HIS TRIAL ATTORNEY'S FAILURE TO SO OBJECT.

The Supreme Court has held that, where a jury is confronted with the binary option between sentencing a defendant to death or life imprisonment without the possibility of parole, Due Process requires that the Court inform the jury that a life sentence *does in fact* carry *no* possibility of parole. (*Shafer v South Carolina* (2001) 532 U.S. 36, 51.)

Although this was precisely the juries option in Petitioner's case, the Court failed to issue such an instruction, thereby violating his right to Due Process which, in a capital case, therefore includes his rights to a fair trial and protection from cruel and/or unusual punishment as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and Article I, Sections 1, 7, 16, 17, and 24 of the California Constitution. Further, to the extent that Ron Slick failed to bring to Court's error to its

attention, Petitioner was denied his right to effective assistance of counsel - protected by the Fifth, Sixth, and Fourteenth Amendments to the federal Constitution and Article I, Section 15 of the California Constitution.

It is indisputable that the Court failed to tell the jury that when it considered sentencing Petition to life imprisonment, it would be absolutely without the possibility of parole. (Penal Code § 190.2.) Although Ron Slick noted that a life sentence would not carry the possibility of parole (4RST 834-35, 842), it simply was not adequate that only defense counsel do so. This is legal definition not otherwise present within the jury's instructions on the law, which the Court has a duty to issue *sua sponte*. (See *Ramdass v Angelone* (2000) 530 U.S. 156 ;*Simmons v South Carolina* (1994) 512 U.S. 154.) Coming from defense counsel without either evidence or instruction, the jury is directed to disregard it. Argument of counsel cannot be considered unless it is supported by the evidence or the law.

To the extent that the Court failed to give such an instruction, *sua sponte*, Ron Slick clearly represented Petitioner ineffectively when he failed to request the instruction himself. For each reason, Petitioner's fundamental rights were violated, for which his sentence ought to be vacated.

CLAIM XVIII: THE EXECUTION OF PETITIONER WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN THAT PETITIONER IS MENTALLY RETARDED WITHIN THE MEANING OF THE ATKINS DECISION

Dr. Khazanov, a licensed clinical psychologist specializing in the practice of clinie neuropsychology and neuropsychological assessments, diagnosed Petitioner with mental retardation.

A. The Execution of the Mentally Retarded Constitutes Cruel and Unusual Punishment

The United States Supreme Court held in *Atkins v. Virginia* (2002) 536 U.S. 304, that the execution of the mentally retarded constitutes cruel and unusable punishment. "The practice [of executing mentally retarded individuals] . . . has become truly unusual, and it is fair to say that a national consensus has developed against it." (*Id.* at 347.) The execution of mentally retarded defendants is excessive and "the Constitution 'places a substantive restriction on the State's power to take the life of a mentally retarded offender." (*Id.* at 350 [citing *Ford v. Wainwright* (1986) 477 U.S. 399, 405].) Mentally retarded offenders "by definition [] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." (*Atkins, supra* at 2250.) "Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability."

(*Id.*)

B. Petitioner Is Mentally Retarded

There is substantial evidence that Petitioner is mentally retarded. In *Atkins*, the Court noted two similar definitions of mental retardation. The American Association of Mental Retardation (AAMR) defines mental retardation as:

> "Mental retardation refers to substantial limitations in present functioning. It is characterized by: (1) Significantly sub-average intellectual functioning; existing concurrently with (2) Related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, work; (3) Mental retardation manifests before age 18. " ((*Id.* at 2250 n. 3 [citing Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992}.)

As set forth in the Declaration of Natasha Khazanov, Petitioner meets these criteria and is therefore mentally retarded. (Exhibit 13, Declaration of Natasha Khazanov.)

The American Psychiatric Association defines mental retardation as:

> "significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety

> (Criterion B). The onset must occur before the age of 18 years (Criterion C)." (*Atkins, supra* at 2250 n. 3 [citing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000)].).

In 2002, just before the issuance of the *Atkins* decision the AAMR released the tenth edition of its publication an revised its definition of mental retardation. The AAMR now defines mental retardation as "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." (Mental Retardation, p. 8 (10th ed. 2002).) The California statutory definition of mental retardation adopts the same criteria for a diagnosis, but is much more general.[8]

In this case, Petitioner meets all three criteria for mental retardation. Petitioner's Full Scale IQ is 67. Petitioner scored in the mentally retarded range in 1968 on SRA – a student intelligence test measuring aptitude for scholastic achievement and career. His IQ score- a measure of intelligence was assessed to be 61, falling squarely in the mentally retarded range. His Linguistic Intelligence score was even lower – at 58. Petitioner suffers from deficits in several areas of adaptive functioning, including functional

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[8]"'Mentally retarded' means the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." Ca. Penal Code §1001.20(a).

academics, daily living skills, and socialization. (Exhibit 13, Declaration of Natasha Khazanov.)

CLAIM XIX: THE FAILURE OF THE COURT TO ALLOW PROPORTIONALITY REVIEW VIOLATES THE RIGHTS TO SUBSTANTIVE DUE PROCESS AS WELL AS THE RIGHT AGAINST CRUEL/OR AND UNUSUAL PUNISHMENT UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

The United States Supreme Court has relied on a substantive due process analysis to determine whether punitive damages and monetary forfeitures pass Constitutional muster. (See, *State Farm Mut. Auto. Ins. Co. v Campbell* (2003) U.S. 123 S.Ct. 1513; *Cooper Indus., Inc. v Leatherman Tool Group* (2001) 532 U.S. 424; *BMW of North American., Inc. v Gore* (1996) 517 U.S. 559; *Honda Motor Co. v Oberg* (1994) 512 US 415.) The Court also employed an Eighth Amendment cruel and unusual analysis to evaluate monetary forfeitures. (*United States v. Bajakajian* (1998) 524 U.S. 321.) In essence, these analyses of monetary punishments all involved a form of proportionality review. It is Petitioner's contention that, therefore, substantive due process and the prohibition against cruel and/or unusual punishment under the Fifth, Eighth, and Fourteenth Amendments to the Federal Constitution and Article I, Sections 1, 7, and 17 of the California Constitution would now require proportionality review of the punishment of death.

The initial effort to characterize punitive damages in civil cases as

punishment and bring them within the Eighth Amendment to the Constitution, which prohibits "excessive fines" and "cruel and unusual punishments" did not succeed. However, a majority of the United States Court later concluded, in *BMW of North America Inc., supra,* 517 U.S. 559, that substantive Due Process protects against excessive punitive damages verdicts. The court solidified that holding in April 2003 in *State Farm, supra,* __ U.S. __, 123 S.CT. 1513.

The awards that the Court reviewed were significant. However, there was no showing of jury misconduct or prejudice against the defendants. The civil defendants seemed to have been well-represented at trial. Furthermore, these civil defendants were corporations.

In *Cooper Industries Inc. v. Leatherman Tool Group Inc. supra,* 532 U.S. 424, the Court was faced with the question of what degree of scrutiny appellate courts should give to a damages jury verdict that has been upheld by the trial judge. The majority ruled that the Constitution requires appellate courts to conduct an independent examination of the jury's decision, to see whether it satisfies due process. In doing so, the Court relied in part on, *United States v. Bajakajian, supra,* 524 U.S. 321. There, it set aside a forfeiture of more than $350,000 that an alien had unlawfully failed to declare when he was leaving the country, on the ground that the forfeiture resulted in an "excessive fine" prohibited by the Eighth Amendment.

In other words, the United States Supreme Court has developed a jurisprudence regarding punitive damages awards and forfeiture judgments which allows appellate courts, as well as trial courts, to scrutinize such monetary awards both on the grounds that they might violate the right against cruel and unusual punishment under the Eighth Amendment as well as the grounds of substantive due process under the Fifth and Fourteenth Amendments. As a result, proportionality review is required when a punitive monetary award is made against an individual or a corporation.

As argued in the Petitioner's Opening Brief in the companion appeal and as argued herein above, *Pulley v. Harris* (1984) 465 U.S. 37 should first be distinguished on the grounds that it was based on an analysis of the 1977 death penalty law in California, and not the far more expansive 1978 statute that codified the 1978 Briggs Initiative. (*Pulley v. Harris, supra,* 465 U.S. at 51, n.13 [noting that the special circumstances are greatly expanded in the current statute compared to the 1977 one].) However, the Court's new substantive due process analysis is an additional basis to distinguish *Pulley*, and is a reason why proportionality review is now Constitutionally required in death penalty cases.

The Court has established that civil monetary damages, awarded as punitive damages (holding that punitive damages are akin to criminal penalties), have to be scrutinized under Constitutional standards applicable

to criminal penalties. The Court then established that substantive due process prohibits the imposition of such monetary awards if they are not proportionate.

Therefore, *Pulley* can no longer stand as a basis to shield California death judgments from proportionality review. No matter what other safeguards a system has, proportionality review is Constitutionally mandated under the Fifth and Fourteenth Amendments as a requirement of substantive Due Process, and under the Eighth and Fourteenth Amendments to protect against cruel and/or unusual punishment. Any other conclusion would require, as a matter of jurisprudential principle, that there be two categories of protection: one, the rights of corporations and persons not to be punished disproportionately by having to pay money; and, the other, the right of persons not to be punished disproportionately by being put to death. It would be anomalous for the Constitution to accord protection in the first category and not in the second.

This would have the obscene consequence of interpreting the Constitution to protect money and not life itself. Since that could not be the case, substantive due process requires proportionality review as required by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 15 and 17 of the California Constitutions.

CLAIM XX: IF SUBSTANTIVE DUE PROCESS AND THE RIGHT AGAINST CRUEL AND/OR UNUSUAL PUNISHMENT DID NOT REQUIRE PROPORTIONALITY REVIEW, THE RIGHT TO EQUAL PROTECTION OF THE LAWS AND TO THE PRIVILEGES, AND IMMUNITIES UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS REQUIRE THAT PEOPLE FACING THE PENALTY OF DEATH BE TREATED EQUALLY TO PEOPLE FACING MONETARY FINES.

In light of the foregoing, if the Court were not to accord substantive due process rights to a person facing death in a fashion equal to such rights accorded a person or corporation facing monetary damages, it would also be a violation of the right to equal protection of the laws and to the privileges and immunities rights set forth in the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the California Constitution.

CLAIM XXI: PETITIONER RAISED ISSUES ON DIRECT APPEAL AND, TO THE EXTENT THAT THEY ARE NOT PROPERLY RAISED ON APPEAL, PETITIONER RAISES THOSE ISSUES IN THIS PETITION

Petitioner raised a number of issues on direct appeal in *People v. Lewis*, S020670 to which the Attorney General objected either on the basis that the issues were not raised in the record below or that they were not included in the limited remand. To the extent that the Petitioner is not entitled to relief on these issues on direct appeal, Petitioner raises said issues as set forth in Appellant's Opening Brief in this Petition as if set forth fully at this point.

CLAIM XXII: PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW BY THE TRIAL COURT'S REFUSAL TO CONSIDER OR PERMIT PRESENTATION OF EVIDENCE IN SUPPORT OF A MOTION TO STRIKE THE SPECIAL CIRCUMSTANCE FINDING

A. Introduction

The Information filed against Petitioner alleged the special circumstance that Milton Estell's murder was committed while Petitioner was engaged in a robbery in violation of Penal Code section 211. This special circumstance rendered Petitioner eligible for the death penalty pursuant to Penal Code section 190.2 (a)(17). (1CST 281.) The jury found the special circumstance true on August 24, 1984. (1CT 394-395.)

On remand, Petitioner filed a motion requesting an evidentiary hearing for a motion to strike the special circumstance pursuant to Penal Code section 1385. (1CT 164-166.) Petitioner offered to present evidence concerning possible violations of Petitioner's constitutional rights, the interests of society, guilt or innocence, the length and nature of his pretrial incarceration, his post-conviction good behavior, the continued support of his family and his potential for rehabilitation in prison and for becoming a conforming member of the community if released on parole. (CT 147-149.) Referring to this Court's language in the remand order that the trial court "should rehear the application on the basis of the record certified to this Court," Judge Charvat denied the motion on the ground that granting it

would go beyond the certified record. (1RTA 41:22-42:5.) Judge Charvat also stated that he would not entertain a motion to strike the special circumstances. (1RTA 42:6-11.)

B. A Defendant Who Has Been Sentenced to Death Has the Right to Move the Court to Strike the Special Circumstance Pursuant to Penal Code Section 1385 and *People v. Williams* (1981) 30 Cal.3d 470.

A trial court has the express authority to dismiss an action, or part thereof, "in the interest of justice." (Penal Code section 1385.) In *People v. Williams* (1981) 30 Cal.3d 470[9], this Court held that a trial court had the authority, under Penal Code section 1385, to dismiss a finding of special circumstances under the California death penalty statute in order to permit the possibility of parole. (*Id.* at 484.) The jury in *Williams* imposed a sentence of life without possibility of parole. This Court specifically stated that it expressed no view on "whether the power to dismiss under section 1385 applies to a finding of special circumstances after the jury has returned a verdict of death." (*Id.* at 490, n. 11.)

The present case presents precisely that issue. Judge Charvat,

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Penal Code section 1385.1, adopted by the voters in 1990 in Proposition 115, now prohibits the trial court from striking a special circumstance finding. However, this Court held in *Tapia v. Superior Court* (1991) 53 Cal.3d 282, that this provision does not apply to defendants like Petitioner who committed a crime before the measure's effective date, June 6, 1990. (*Ibid.* at 297-298.)

however, ruled that he had no authority to consider dismissing the special circumstance because to do so would go beyond the certified record.

If the trial court has the power to strike a special circumstance in order to permit the possibility of parole, certainly it must have the power to do so to permit the possibility of life instead of death.

This Court has allowed a defendant to strike enhancements upon remand in other contexts. In *People v. Marsh* (1984) 36 Cal.3d. 134, the defendant was convicted, among other crimes, of kidnaping for ransom with bodily harm. This Court reversed and remanded the case to the trial court for resentencing because of its failure to refer the defendant to the Youth Authority for an evaluation. The Court noted that, upon remand, the defendant would have another opportunity to move to strike the enhancing allegations of the kidnaping count in the furtherance of justice. *(Id.* at 142.)

When a judge incorrectly holds that he does not have the discretion to strike an allegation affecting the sentence, the case must be remanded for the trial court to review the matter and exercise its discretion. (*People v. Romero* (1996) 13 Cal.4th 497.) Therefore, the present case should be remanded to allow Judge Charvat to exercise his discretion to strike the special circumstance.

C. Not Allowing Petitioner to Move the Court to Strike the Special Circumstance on Remand Where Defendants in Non-capital Cases Are Allowed to Do So Is a Denial of Equal Protection of the Law.

Providing greater procedural protection to non-capital defendants than capital defendants would violate the Fourteenth Amendment's guarantee of equal protection of the law. (*Myers v. Ylst* (9th Circ. 1990) 897 F.2d 417, 421.) If trial courts in non-capital cases on remand can strike special circumstances and enhancements, equal protection affords the same right to a capital defendant. Allowing a defendant in a non-capital case but not in a capital case to move to strike a sentencing allegation under section 1385 would violate the equal protection clauses of the California and United States Constitutions. (U.S. Const. Amend. 14; CA Const., Art. I, § 7.)

More procedural protection should be afforded defendants in a capital case. Capital defendants are more entitled to remedial safeguards than non-capital defendants. This is also because the United States Supreme Court and this Court have long recognized that the Constitution imposes a requirement of heightened reliability for a verdict of death. (*Simmons v. South Carolina* (1994) 512 U.S. 154, 172; *People v. Cudjo* (1993) 6 Cal.4th 585, 623.) This special need to ensure the reliability of any determination that the death penalty is appropriate in a specific case makes it critical to allow the trial court to entertain a motion to dismiss in

the interest of justice the very special circumstance rendering the defendant death eligible.

D. The Trial Court's Refusal to Hold a Williams Hearing Deprived Petitioner of His Constitutional Right to Due Process of Law and to a Fair, Reliable and Individualized Capital Sentencing under the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 7 and 17 of the California Constitution.

Petitioner proffered evidence to the court to consider in making a determination pursuant to Penal Code section 1385 to strike the special circumstance. Petitioner offered to present evidence concerning possible violations of Petitioner's constitutional rights, the interests of society, the evidence of guilt or innocence, and the length of Petitioner's incarceration. (1CT 147:6-9.) Petitioner offered to present testimony of his good behavior in custody since he was incarcerated in San Quentin in 1985. (1CT 148:24-28.) He offered also to present evidence of his continued contact with his family members during incarceration and their ability to provide emotional and financial support in the future. (1CT 149:1-6.) Finally, he offered to present evidence from a psychiatrist or a psychologist that he was amenable to rehabilitation while in prison and could be a conforming member of the community if released on parole. (1CT 149:6-10.)[10]

As this Court noted, "[t]he wise use of this power [to dismiss a special circumstance] will promote the administration of justice by ensuring that persons are sentenced based on the particular facts of the

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Petitioner gave a more detailed description of the offered evidence in his Motion to Present Additional Mitigating Evidence which was heard contemporaneously and is discussed in Argument VI, *infra*.

offense and all the circumstances. It enables the punishment to fit the crime as well as the perpetrator." (*People v. Williams, supra,* 30 Cal.3d at 489.) In exercising this power, the court may properly consider factors such as the defendant's background, the nature of the offense and other individualized considerations. (*People v. Romero, supra,* 13 Cal.4th at 531.)

Evidence of post-conviction behavior is relevant to the defendant's background. The United States Supreme Court also held that evidence of good in-custody behavior and adaptability to prison life are relevant mitigating factors in a death penalty case. (*Skipper v. South Carolina* (1985) 476 U.S. 1.) It is evidence which enables the court to ensure that the punishment fits the crime as well as the perpetrator.

The Court of Appeal has discussed why post-conviction behavior is a relevant factor in ruling on a motion to strike the special circumstances of murder in the commission of a robbery and burglary:

> "The fact that exercise of section 1385 discretion may occur long after the sentence was originally imposed, and may precede rather than follow vacating the original sentence for purposes of resentencing, in no way alters the fact that sentencing considerations govern the trial court's section 1385 choices. . . . Consideration of postconviction behavior is not an act of mercy, grace or forgiveness as respondent implies. Rather consideration of such evidence merely strengthens the court's ability to fit the punishment to the crime <u>and</u> the particular defendant." (*People v. Warren* (1986) 179 Cal.App.3d 676, 692 [emphasis in original].)

Assuring that the punishment fits the crime is nowhere more important than in a capital case where the Constitution imposes a requirement of heightened reliability for a verdict of death. (*Simmons v. South Carolina* (1994) 512 U.S. 154, 172, [Conc. Opn. of Souter, J. and Stevens, J.].) The evidence offered by Petitioner would have assisted the

trial court in making this important determination.

E. A Williams Hearing Would Be of Particular Significance in this Case Where the Trial Counsel Did Little Preparation and Presented So Little Evidence.

There is no assurance that the penalty fits the crime and the defendant in this case. Petitioner's case was tried in four days[11]. The penalty phase lasted only 1 hour and 36 minutes. Attorney Ron Slick did almost nothing to represent Petitioner. He did not make a *Williams* motion. He did not make any discovery motion. He presented the testimony of only one witness at the penalty phase. (4RST 810-812.) It was a shameful mockery of the trial process. As such, Ron Slick's conduct amounted to ineffective assistance of counsel as agreed elsewhere in this petition.

Here, on remand, the trial court had an opportunity to at least partially restore the right of Petitioner to adequate representation. A trial court should take every procedural opportunity to do justice, particularly, in a capital case. *(Simmons v. South Carolina* (1994) 512 U.S. 154, 172.) The trial court was presented with such an opportunity but rejected it on narrow procedural grounds.

Petitioner on remand attempted to bring relevant and critical evidence to the court's attention. The court should have taken the opportunity to hear that evidence. There can be no reliability of a death sentence if a trial court decides it will not hear what a death sentencer ought to hear before pronouncing the sentence.

Accordingly, this Court should hold that Judge Charvat erred in refusing to consider and to permit presentation of evidence in support of a

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The trial occupied less that one-half of August 15th, one hour of August 16th, all of August 21st and 22nd, less and than one-half of August 23rd and 28th, or a total of approximately four days.

motion pursuant to Penal Code section 1385 to set aside the special circumstance finding. Petitioner's death sentence must be reversed and the matter remanded to the trial court to permit consideration of such a motion.

CLAIM XXIII: PETITIONER WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR, RELIABLE, AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION WHEN THE TRIAL COURT DENIED HIM THE OPPORTUNITY TO PRESENT RELEVANT MITIGATING EVIDENCE IN SUPPORT OF A SENTENCE LESS THAN DEATH.

A. Introduction

On remand, Petitioner filed a motion for an order allowing him to present additional mitigating evidence before being sentenced. (1CT 167-168.) In his motion, Petitioner proffered that he was prepared to present mitigating evidence from family members and friends as well as psychiatric and correctional experts. (1CT 160:8-11.)[12]

B. Petitioner Offered to Present Relevant Additional Mitigating Evidence

Petitioner offered to present the testimony of family members and friends about his childhood:

> "His family members would testify about Mr. Lewis' life at home and his childhood. This testimony would demonstrate that Robert was the second oldest of four children. His father was absent from the house most of the time when he was growing up.
> "His mother raised all the children by herself. She was very depressed much of the time. She was very dependent on Robert and suffocated him with attention. Robert would leave the house whenever possible to escape from her. At the same time, she lacked the ability to maintain effective parental control. His father's absence

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This offer of proof was based on the limited investigation concluded by Petitioner on remand. (1CT 160.) Petitioner's request for funds was denied by the trial court. (1RTA In Camera Hearing, 35-38.)

aggravated the problem because he could not provide effective discipline or be a positive role model. By the time Robert started school he did not have the proper discipline to function effectively. He also was hampered by his low intelligence; his IQ is 80.

"The family was very poor and dependent on welfare. Robert began to steal at an early age to relieve the burden on his sick mother who died of leukemia while still relatively young. Her illness caused him to feel much grief, sadness and also guilt at her condition. This guilt was compounded by the guilt he felt causing her displeasure when he misbehaved. The result was frustration and anger that led to further disruptive behavior which became more serious as he got older." (1CT 160:11-161:10.)

Petitioner offered to present testimony from family members and friends about the positive things Petitioner had done in life:

"Despite the hardships of his past, Robert has accomplished many positive things. His family and friends would testify to Robert's many acts of kindness to his family and friends. They would testify to many examples where Robert has gone out of his way to help children or older people. For example, one friend would testify about how he would spend a lot of time running errands for her invalid father and taking her children for haircuts. Robert would often wash and comb his mother's hair at night. He has made a lasting impression on his young niece during his incarceration through correspondence and telephone call by urging her to do what he did not-listen to and obey your parents. (1CT 162:1-12.)

Petitioner offered to present the testimony of psychiatric experts on the impact of his family upbringing and lengthy incarcerations:

"Psychiatric experts would testify that Robert's lengthy periods of incarceration were counter-productive and destructive. They would testify that to some extent the conditions in these institutions were responsible for increasing the seriousness of his misbehavior. For example, because of his yearning for a strong father figure Robert was particularly susceptible when he was young to the negative of older inmates. They taught and encouraged him to commit

> more serious crimes.
> "At the same time the institutions did not provide any meaningful educational or rehabilitative opportunities. For example, his third grade literacy level is as bad today as it was when he first went to prison. While in these institutions at an impressionable age, Robert witnesses first hand all the horrors of prison life–violence, rape, assaultive behavior, extreme deprivation, etc. When combined with the deprivation of a stable home life and parental control it probably contributed to his future misconduct. (1CT 161:11-27.)

Finally, Petitioner offered to present evidence of post-conviction good adjustment in custody through the testimony of psychiatric and correctional experts:

> "A psychiatric expert would testify that in the middle age Robert has matured considerably. With some effort directed toward providing Robert some acceptance, trust, a controlled environment and job training, he would probably lead a constructive life in prison. A correctional expert would testify that his past conduct in prison since his commitment in 1984 indicates that Robert would not present a threat to the safety of other inmates or guards." (1CT 13-20.)

C. The Trial Court Violated Petitioner's Eighth and Fourteenth Amendment Rights When it Precluded Him from Presenting the Additional Mitigating Evidence.

The Eighth and Fourteenth Amendments require that a defendant be allowed to present all relevant mitigating evidence. Once again, Ron Slick's stark incompetence denied Petitioner the right to present mitigating evidence at the trial. The court on remand, once again, had the opportunity to partially alleviate this denial by allowing additional mitigating evidence. Due to budgetary constraints, counsel on remand had uncovered only a

portion of the available mitigating evidence. Nevertheless, that portion should have been available to the sentencing judge.

The sentencer may "not be precluded from considering *as a mitigating factor*, any aspect of the defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [emphasis in original].) As the high court has explained, any barrier to the consideration of such evidence

> "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Id.* at 605.)

Since *Lockett*, the Supreme Court has repeatedly reaffirmed that the constitutional mandate of individualized capital sentencing requires that the sentencer hear, listen and give full consideration to all relevant mitigating evidence. (*Mills v. Maryland* (1988) 486 U.S. 367, 387; *Hitchock v. Dugger* (1987) 481 U.S. 393, 398-99.) Among others, relevant mitigating evidence includes evidence of child abuse and emotional disturbance. (*Eddings v. Oaklahoma* (1983) 455 U.S. 104, 115 [Plur. Opn.].) It includes evidence of mental retardation. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328) It also includes evidence of good behavior and adjustability to life in prison. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 7, n.2.) In *Skipper v. South Carolina*, the Supreme Court Court reversed the death sentence

because evidence concerning the defendant's good adjustment and behavior in jail while awaiting trial was excluded. The Supreme Court explained that "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is an aspect of his character that is by its nature relevant to the sentencing determination. (*Id.* at 7.)

Finally, it is irrelevant whether the "barrier " to consideration of all mitigation evidence is the statutory language, an evidentiary ruling, an instructional error or ambiguity, or the sentencer's misunderstanding. Any such barrier is constitutionally impermissible. (*Mills v. Maryland* (1988) 486 U.S. 367, 375.) This is so because the Eighth and Fourteenth Amendments impose a requirement of heightened reliability for a verdict of death. (*Simmons v. South Carolina* (1994) 512 U.S. 154, 172.) The Eighth and Fourteenth Amendments require the same reliability of sentence after conviction. (*Johnson v. Mississippi* (1988) 486 U.S. 578.)

The Eighth and Fourteenth Amendments' requirement for reliability was never met in Petitioner's case. Petitioner's trial was a shameful mockery. His trial counsel, Ron Slick, presented none of the available mitigating evidence during the trial. In fact, the entire penalty phase lasted only 1 hour 36 minutes including argument and instructions. No evidence of Petitioner's childhood and good deeds was presented. No mental health evidence explaining the effect of his upbringing and lengthy periods of

incarceration was presented. Since that time, as set forth elsewhere in this petition, evidence of mental retardation, life long trauma and other mitigation evidence has been discovered.

Here, counsel on remand marshaled important evidence that should have been presented at the penalty phase on those crucial issues. In addition, he was ready to present the mitigating evidence of more than six years of good post-conviction behavior, which could not have been presented at trial.[13] Petitioner was denied this opportunity and, as a result, his constitutional rights were violated.

D. Evidence of Good Post Judgment Maturation in Prison Is a Category of Evidence Relevant to the Choice Between Life and Death Which Was Not Available at Trial and Could Not Have Been Presented.

It is federal constitutional error for a capital sentencing court to refuse to take into account the defendant's good behavior and personal growth in custody. (*Skipper v. South Carolina* (1986) 476 U.S. 1.) This is so whether the in-custody good behavior occurs pretrial or post-conviction while in prison between the time of the original sentence and remand for re-imposition of sentence. (*Creech v. Arave* (9th Cir. 1991) 947 F.2d 873, [rev'd in part on other grounds sub.nom, *Arave v. Creech* (1993) 507 U.S.

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As argued *supra*, this evidence should also have been admitted in support of a motion to strike the special circumstances pursuant to *People v. Williams* (1981) 30 Cal.3d 470.

463].)

In this case, Judge Charvat's refusal to allow Petitioner to present additional mitigation evidence, including evidence of post conviction good behavior, violates the principles of *Lockett v. Ohio* (1978) 438 U.S. 586 and its progeny. In *Creech, supra*, the Idaho Supreme Court set aside the original death sentence because the trial judge failed to pronounce it in the defendant's presence as required by Idaho law. On remand, the judge pronounced the death sentence in the defendant's presence. However, he refused to let the defendant introduce evidence of his good behavior and personal growth during the 14 months between his original sentence and the resentencing hearing following remand. Relying on *Lockett v. Ohio* (1978) 438 U.S. 586, 694, *Eddings v. Oklahoma* (1982) 455 U.S. 104 and *Skipper v. South Carolina* (1986) 476 U.S. 1, the Ninth Circuit reversed stating that "we see no rational basis for distinguishing the evidence of a defendant's conduct while awaiting trial and sentencing, and evidence of a defendant's good conduct pending review of a death sentence which is vacated on appeal." (*Creech v. Arave, supra,* 947 F.2d at 881-882.)[14]

As in *Creech*, *supra*, Petitioner's death sentence was vacated on

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The United States Supreme Court, while reversing the Ninth Circuit's holding as to the validity of a statutory aggravating circumstance, agreed that the trial judge's refusal to consider the proffered post-conviction good behavior evidence entitled Mr. Creech to a new sentencing hearing. (*Arave v. Creech*, *supra*, 507 U.S. at 478-479.)

appeal. As in *Creech*, Petitioner offered to present testimony of his post-conviction behavior. He also offered to present expert testimony that he had matured considerably, that he would probably lead a constructive life in prison, that his past conduct since his 1984 incarceration indicated that he would not be a threat to the safety of other inmates or the guards. (1CT 160-161.) As in *Creech,* the judge refused to let Petitioner introduce that evidence.

This error is particularly significant in this case because Judge Charvat did not allow Petitioner to present the other mitigating evidence pertaining to his childhood, good deeds and mental health issues. It is even more significant in light of the fact that this was a Ron Slick case in which virtually no mitigation was presented at trial. In that context, the exclusion of evidence of Petitioner's good behavior and personal growth in prison was all the more prejudicial.

As in *Creech*, this Court must reverse and set aside the verdict of death.

E. The Trial Court's Refusal to Allow Petitioner to Present Additional Mitigating Evidence Violates His Constitutional Right to Equal Protection of the Laws.

A defendant may present additional evidence at sentencing on remand in non-capital cases. On remand, a defendant in a non-capital case is entitled to an updated probation report to be considered at the

resentencing hearing. (*People v. Rojas* (1962) 57 Cal.2d 676.) The probation report may properly include information regarding the defendant's care and treatment in prison since the date of the original, vacated sentence. (*Van Velzer v. Superior Court* (1984) 152 Cal.App. 3d 742.)

A rule prohibiting a defendant from presenting additional mitigating evidence upon remand for sentencing simply because it is a capital case would violate his constitutional right of equal protection of the law. (*Myers v. Ylst*, 897 F.2d 417; U.S. Const., Amend. 14; CA Const., Art. 1, § 7.) Indeed, as argued above, a capital defendant is entitled to more, not fewer, safeguards than a non-capital defendant. See Claim No. XIX *supra* and Claim No. XX, *supra*.

F. Failure to Allow the Presentation of Additional Mitigating Evidence Is Reversible

The trial court in this case committed error in violation of the principle established by *Lockett* and its progeny, and such error is reversible per se because it creates a constitutionally unacceptable "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) Therefore, prejudice need not be shown.

However, even if the error were subject to the harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, this error would

have to be deemed prejudicial. Under *Chapman*, reversal is required unless the state can show beyond a reasonable doubt that the constitutional violation had no effect on the judgment. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 286.) This was a Ron Slick case. The original trial was a mockery. Little useful evidence was presented to the original trial court. Valuable evidence was offered to Judge Charvat on remand, the judge making the death sentence determination. He wrongfully concluded that he could not consider it. As a result, he imposed death without having heard all the mitigating evidence. That is prejudicial. Certainly there is no basis for concluding that the error had no effect on the judgment. Therefore, Petitioner's sentence of death must be reversed.

CLAIM XXIV: PETITIONER'S RIGHTS TO DUE PROCESS, EQUAL PROTECTION, A FAIR TRIAL, AND PROTECTION FROM CRUEL AND/OR UNUSUAL PUNISHMENT - AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND ARTICLE I, SECTIONS 1, 7, 15, 16, 17, 24, AND 31 - WERE VIOLATED BECAUSE THE DEATH PENALTY JURY INSTRUCTIONS ARE UNCONSTITUTIONALLY VAGUE AND INCAPABLE OF BEING UNDERSTOOD BY JURORS

Petitioner's confinement is unlawful in that his conviction and sentence were illegally and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 15, 16, 17, 24, and 31, as well as petitioner's statutory rights, because Penal Code section 190.3

and the jury instructions given in this case that were based on that section, failed to guide the jury's discretion, are vague and incomprehensible, and resulted in arbitrary, capricious, and unreliable sentencing.

Petitioner alleges the following facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and hearing on the merits of the claim.

To the extent that any error or deficiency alleged was due to trial counsel's failure to investigate and/or litigate in a reasonably competent manner on petitioner's behalf, including but not limited to the errors and omissions alleged above, petitioner was deprived of the effective assistance of counsel and his death sentence is unreliable, requiring reversal.

To the extent that any of the errors alleged in the present claim deprived petitioner of the benefits of state law in which he had a liberty interest, he was deprived of equal protection and due process of law under the state and federal constitutions. (*Hicks v. Oklahoma,* (1980) 447 U.S. 343, 346).

Prior to penalty phase deliberations in this case, the trial court issued pattern instructions to the jury which tracked the language of Penal Code section 190.3 concerning the factors that the jury was to take into consideration in determining whether petitioner deserved the death penalty and included factors (a) through (k).

Even when correctly instructed according to the law, jurors can and frequently do misapprehend the rules set forth to guide their discretion in

determining whether the death penalty is an appropriate sentence. A study of actual California jurors who have served in capital cases found:

> "Many of the jurors who were interviewed simply dismissed mitigating evidence that had been presented during the penalty phase because they did not believe it 'fit in' with the sentencing formula that they had been given by the judge, or because they did not understand that it was supposed to be considered mitigating....Other jurors recognized mitigating evidence as such but then rejected or limited its significance by imposing additional conditions on the concept that would make it difficult to ever influence a capital verdict. Thus, fully 8 out of the 10 California juries included persons who dismissed mitigating evidence because it did not directly lessen the defendant's responsibility for the crime itself...In addition, 6 of the California juries in the study rejected mitigating evidence because it did not *completely* account for the defendant's actions." (Haney et al., *Deciding to Take a Life:* Capital *Juries, Sentencing Instructions, and the Jurisprudence of Death,* 50 (No. 2) J. Of Social Issues 149, 167-168 (1994) [emphasis in original]; *see also McDowell v. Calderon,* (9th Cir. 1997) 130 F.3d 833 [en banc] [although jurors "properly" instructed, the plain language of the jury's request for guidance demonstrated that eleven jurors were confused about the law and erroneously believed that they could not consider eight aspects of the defendant's background as ,mitigating evidence]; *State v. Bey,* (1986) 112 N.J. 123, 168-170, 548 A.2d 887,910-911 [instructions on mitigating factors that merely restate the statutory text of the mitigating factors are inadequate because they do not explain the nature of the mitigating inference sought to be drawn].)

The systematic study of actual capital-case jurors in many states by the Capital Jury Project demonstrates virtually without exception a serious lack of understanding on the part of these jurors of many of the concepts which are at the core of the Eighth Amendment restrictions on the death penalty. The nature of these misunderstandings is such that they virtually always skew the process in favor of death. One study summed it up, "if the final penalty decision is death, there is a high probability [i.e., more than a

"reasonable likelihood"] that this final penalty verdict is partially a product of the faulty interpretation of the law." (Luginbuhl & Howe, 70 Ind. L.J. at 1180.)

The empirical data demonstrates that common understanding of these principles is likely to be wrong that petitioner's jury's understanding cannot be relied upon consistent with the Eighth Amendment's requirement of heightened reliability in capital sentencing. (*Beck v. Alabama*, 447 U.S. at 625.)

The Capital Jury Project relied on the experience of actual jurors in death penalty trials, not mock juries or hypothetical cases. But even research of the latter type supports this claim:

> "Because we studied individual rather than collective interpretations of these instructions, we could not address the issue of whether the lack of juror comprehension would likely be corrected in the course of penalty phase deliberation. However, several things seem to us to minimize this possibility. Nothing in the California instruction requires capital juries to reach consensus about the meaning of the instructions themselves, and there are no verdict forms that require them to agree on the factors that led them t their verdict. Moreover, the prevalence of misunderstanding that characterized both the overall definitions [of "aggravation" and "mitigation"] and the template of factors [(a) through (k)] in the California instructions suggests that even the collective intelligence of most capital juries is likely to be highly compromised on these issues. Indeed, based on our data, the likelihood of a capital defendant's life or death verdict being decided by a jury in which at least one member is completely inaccurate in his or her definition of aggravation or mitigation, and incorrect as to tat least two specific factors that form the capital sentencing template in California (19% of our sample) is greater that 2 to 1. This compares to less than a 1 in 2 likelihood of such a jury containing a juror who is legally correct on both terms and completely accurate as to the sentencing template (.04% of our sample). In addition, Ellsworth's (1989) research on the general issue of whether 'twelve heads are

> better that one' in improving jury comprehension of instructions indicated that while some errors of instructional interpretation are corrected in deliberation, about an equal number of correct interpretations are relinquished in favor of incorrect ones. Finally, interview data collected by Haney, Sontag, and Costanzo (1994) indicated that a number of basic instructional misconceptions were still held by actual capital jurors in California, long after they had deliberated and rendered their verdicts. "(Haney & Lynch, 18 Law & Human Behavior at 425, n.14.)

There is now "converging proof that the same kinds of misunderstandings occur in both experimental and real capital jury decision-making. Whether they are given these instructions in the quiet of the laboratory or the intense experience of the capital trial, whether they hear them from a researcher or a judge, and whether they report their understandings immediately or much later, people show serious comprehension problems." (Hans, *How Juries Decide Death: The Contribution of the Capital Jury Project,* 70 Ind. L.J. 1233, 1239 (1995).)

Allowing the decision for life or death to turn on a concept misunderstood, to the defendant's detriment, by a majority of actual and prospective jurors, is inconsistent with the extraordinary degree of reliability required by the Eight Amendment in a capital case. There is nothing in the record of petitioner's trial or sentencing proceedings to suggest that the jurors had any extraordinary ability to understand these commonly misunderstood factors.

Factor (a), which directs the jury to consider the "circumstances of the crime," is unconstitutionally vague not in an abstract sense, *see Tuilaepa v. California*, (1994) 512 U.S. 967, but because it fails to identify any circumstances or types of circumstances that the jury may consider *in order to distinguish the offense from other offenses not subject to the death penalty or to make clear that there may be mitigating aspects to the*

circumstances of the crime. Furthermore, factor (a) allows the sentencer to consider the presence of any special circumstance findings. The sentencer's discretion is therefor not properly channeled because all capital cases have at least one special circumstance; using factor (a), a jury cannot know how to distinguish a death-worthy case from one that is not death-worthy. For these reasons, factor (a) did not constitutionally guide Petitioner's jury in determining whether death was the appropriated punishment. (*Furman v. Georgia* (1972) 408 U.S. 238, 247.)

Factor (b) directs the jury to consider evidence of prior violent criminal conduct:

> "The presence or absence of criminal activity by the defendant, other than the crime(s) for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

Factor (b) improperly allows the jury to consider the defendant's alleged criminal conduct without requiring that the jury unanimously agree that he is guilty of each - or any - of the alleged crimes beyond a reasonable doubt. The only evidence that the People presented in their opening statement at the penalty phase was Petitioner's prior criminal record. (4RST 809-10.)

The jury's improper consideration of factor (a) and (b) evidence violated petitioner's rights to due process under the Fourteenth Amendment to the United States constitution, and to a fair, accurate and non-arbitrary sentencing determination under the Eighth Amendment to the United States Constitution.

The consideration of aggravating acts under factor (b) in violation of state law deprived petitioner of his state-created liberty interest in violation

of due process and equal protection. (*Hicks v. Oklahoma*, *supra,* 447 U.S. at 346.)

The instructions also failed to explain the nature and scope of mitigating evidence. The Court did not clarify to the jury which factors might be considered mitigating and which might be considered aggravating. The Court did not clarify Ron Slick's assertion that this was entirely for the jury to determine. (4RST 837.) The instructions and argument were reasonably likely to mislead the jury into misconstruing the nature and scope of mitigating and aggravating evidence.

Particularly in the absence of written findings, there is grave danger that petitioner's jury had the same sort of misunderstandings that most jurors have been shown to have concerning the meaning of the sentencing factors and that it sentenced petitioner to die because of those misconceptions, in violation of his right to equal protection and to his right to a fair trial and reliable, non-arbitrary and individualized penalty verdict reached through due process of law and protected by the Eight Amendment. Because it is reasonable likely that the jury applied instructions give in an unconstitutional manner, vacation of petitioner's death sentence is mandated under the Eighth and Fourteenth Amendments.

CLAIM XXV: PETITIONER WAS DENIED FUNDAMENTAL DUE PROCESS OF LAW WHEN THE TRIAL COURT DENIED HIS REQUEST FOR PRE-SENTENCING DISCOVERY

A. Introduction

On remand, Petitioner filed a motion requesting pre-sentence discovery. (1CT 11-116.) In his motion, Petitioner requested 18 categories of discovery relating to evidence that might generate a lingering doubt as to Petitioner's guilt or role in the capital offense, undermine or generate a doubt as to the validity of the prior convictions offered as circumstance in aggravation and shed light on his post-conviction custody behavior or

otherwise provide a basis for mitigation of the sentence. Petitioner's motion for discovery requested witnesses, evidence, reports, photographs and other items related to the basis for the case against Petitioner. It also requested:

> "15) Any information or evidence the People possess or are aware of which establishes or might lead to evidence that would establish that any prosecution witness who testified during the guilt phase was untruthful, or received ay monetary or non-monetary rewards, promises, or inducements.
>
> 16) Any newly discovered information or evidence the People possess or are aware of that is relevant or is in any way related to defendant's innocence or to mitigation of the degree of or punishment for any crime or crimes for which he was convicted.
>
> 17) Any information in possession of the District Attorney's office, the Long Beach Police Department or the Los Angeles County Sheriff's office concerning or relating to defendant's post-conviction behavior in the county or city jail.
>
> 18) Any other information or evidence that the People have or may obtain in the future that has not already been disclosed to defendant's counsel that is otherwise relevant to the guilt or innocense of the defendant, the appropriateness or inappropriateness of the death penalty in this case, or any possible violation of defendant's constitutional rights." (1CT 114-115.)

Petitioner noted that this was the first time that a discovery request was made in his case.[15] Petitioner argued that pre-sentence discovery was necessary for a fair and reliable hearing and to ensure that any sentence imposed by the trial court was based on complete and reliable facts. Furthermore, the discovery requested was necessary to prepare for a hearing on the motion to strike the special circumstance and the modification

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Trial counsel, Ron Slick, never filed a motion for discovery. (1CST 1-455.)

hearing. (1CT 117-126.)

The prosecution opposed the motion on the ground that Petitioner was not entitled to pre-sentence discovery because of the limited nature of the proceedings on remand. (1CT 127-130.)

Judge Charvat denied Petitioner' s motion on the ground that his duty was to consider only the evidence that was presented to the jury. (1RTA 29:8-9.)

B. Discovery Was Relevant to the Williams Motion and the Automatic Motion to Modify the Death Verdict.

Judge Charvat mistakenly believed that Petitioner was not entitled to a hearing on a motion to strike the special circumstances pursuant to *People v. Williams* (1981) 30 Cal.3d 470. (See Claim XXII, *supra*.) However, Petitioner was entitled to such a hearing.

The discovery requested was relevant to the issues which could have been properly presented at a *Williams* hearing. A motion to strike the special circumstance pursuant to *People v. Williams, supra,* is predicated upon Penal Code section 1385. Penal Code section 1385 allows dismissal of a special circumstance "in the interest of justice." The interest of justice requires that the court consider all available evidence including evidence of potential violations of constitutional rights, evidence of guilt or innocence, the defendant's background and other individualized considerations including the defendant's post conviction behavior. (See Claim ___, *supra*.) For instance, items 1 through 16 are relevant to the discovery of possible violations of constitutional rights such as the withholding of exculpatory evidence in violation of *Brady v. Maryland* (1963) 373. U.S. 83, 87 and *In re Ferguson* (1971) 5 Cal.3d 525, 531, or jury misconduct. Items 1 through 16 and Item 18 are relevant to the issue of Petitioner's guilt or innocence. Items 17 and 18 pertain to Petitioner's post-conviction behavior.

The discovery motion was also relevant to the hearing on the modification of the death verdict. Items 1 through 18 could have led to the discovery of additional mitigating evidence. As argued above, Petitioner should have been allowed to present this additional evidence in order to have a modification hearing comporting with the constitutional requirements of the Eight and Fourteenth Amendments to the United States Constitution. (See Claim XXIII, *supra*.)

C. The Trial Court Had the Authority to Order Presentence Discovery.

A trial court has the authority to entertain a discovery motion when the court has jurisdiction over the action before it. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1257 [citing *People v. Ainsworth* (1990) 217 Cal.App.3d 247, 254].)

Discovery in this case was necessary to determine the appropriate sentence and to provide meaningful hearings under *Williams*, Penal Code section 1385 and Penal Code section 190.4(e). Judge Charvat should have ordered pre-sentence discovery.

D. Denial of Discovery Violates the Eighth and Fourteenth Amendments Mandate That Procedures Be Followed to Ensure Reliability of Any Determination That Death Is the Appropriate Sentence.

A defendant in a capital case is entitled to a fair and reliable sentence under the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280.) The Eighth and Fourteenth Amendments impose heightened reliability standards for both the guilt and penalty phase of a capital trial. (*People v. Cudjo* (1993) 6 Cal.4th 585, 623.) Judge Charvat's denial of Petitioner's discovery request amounts to a violation of the Eighth and Fourteenth Amendments.

CLAIM XXVI: THE DEATH PENALTY IS WRONG AND THE COURT SHOULD SAY SO NOW

A. Introduction

Petitioner wishes to persuade this Court to have the insight and moral courage to declare an end to the death penalty. This Court has stated that the imposition of the death penalty is a "normative" determination (*People v. Hayes* (1990) 52 Cal.3d 977, 643) or "moral" determination (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) Since it is a normative or a moral determination from case to case, the normative or moral determination of the validity of the death penalty itself must be periodically reviewed. Under the evolving standards of decency incorporated in both the United States and California Constitutions, this Court should conclude that the death penalty is normatively and morally wrong in general or, at least, normatively and morally wrong as conceived and applied under existing statutory schemes, including that of California.

Many arguments have been presented to this Court to address the particulars of this state's statutory scheme. Most of these challenges have been rejected case by case. Nevertheless, Petitioner renews these arguments both individually and collectively with the sincere desire that they be considered or reconsidered by this Court and that this Court declare the California statutory scheme unconstitutional for the reasons set forth below. (See Claim XXVII, *infra.*)

However, first, before addressing those specific issues, we urge this Court to confront the fundamental moral issue: Is the death penalty wrong? Can this Court continue to condone the killing of prisoners? We simply submit that it is time for the intellectual leaders of this state to step forward and acknowledge that the death penalty is wrong.

B. The Death Penalty Is Wrong

It is simply wrong to deliberately kill a prisoner.

The fact that we call it the "death penalty" or "capital punishment" does not make it any less cold-blooded, calculated, premeditated and deliberate. We keep a human being as a prisoner on death row for years. We premeditate and deliberate. Then we kill that prisoner. That is wrong.

The death penalty is not a killing of a human being in self defense. It is not a killing in a justified act of war. It is a premeditated and deliberate killing of a caged human being who, however heinous his or her crimes, is rendered defenseless. It is cold-blooded, calculated and it is wrong.

The fact that we in America have generally told ourselves that it is acceptable to kill people this way does not make it right. The rest of the world looks upon America as almost a cartoon caricature: gun slinging, arrogant and totally oblivious to the fact that the rest of the world thinks killing prisoners is anachronistic and wrong.

Someday we, or historians of a future generation, will look back and ask how a society could retain such an anachronistic and barbaric practice. It does not matter that we as a country have always rejected drawing and quartering or that, recently, we have begun to reject choking people to death with gas, or hanging them by their necks until they snap, or firing lead bullets into their bodies until they hemorrhage to death, or sending massive currents of electricity through them until they sometimes catch on fire. Strapping that caged person onto a gurney and poisoning him or her to death is just as wrong. The fact is killing a prisoner is wrong.

We ask this Court to take on that very question, now, in this case: Is it wrong to kill a prisoner?

Today, this minute, there is a consensus among Western nations that the killing of prisoners is wrong. In this country right now, this minute,

there is a strong consensus that we should stop and evaluate what we are doing. Standards of decency are evolving in this country. Are the courts going to be the last to acknowledge that our societal standards are evolving? Justices of this Court should be and are among the most educated and reflective of the citizens of this state. Is it not up to the educated and reflective among us to lead the intellectual and moral process in which those standards of decency evolve? Of course it is. So we ask this Court, and each Justice of this Court, to confront this question head on; not in legalistic terms; not in the backward looking citations to the fact that courts have been condoning capital punishment. We ask this Court, and each Justice, to have the courage to take the question head on: Is it wrong to kill a prisoner?

Of course it is.

There has been a long "debate" in this country about the morality of capital punishment -- is it consistent with religious beliefs, is it justified as revenge? There has been extensive sociological research into its utility -- does it deter, is it cost effective? And, recently in particular, there has been much documentation of how flawed the decision making process is in choosing who to kill -- why are we killing the poor, the victims of abuse, people of color, people with bad lawyers, and sometimes the innocent? But we ask the Court to put this debate and these studies aside for a moment. Instead, first, take the plain question head on, "Is it wrong to kill a prisoner."

Petition submits that the unadorned question leads the reflective and educated observer to only one answer, "Of course it is."

C. This Court Would Not Be Alone in Coming to the Conclusion That Killing of Prisoners Wrong

The death penalty is an anachronism. As argued in more detail

below, the United States is one of only a handful of nations in the world which regularly employs the death penalty. We stand with China, Iran, Nigeria and Saudi Arabia in still executing large numbers of people. All of the nations of Western Europe have abolished the death penalty. It is an anachronism and it is wrong. (See Claim XXIX, *infra.*)

Even in this country, there have been periods of enlightenment when the people and the governing bodies of various states have concluded that the death penalty is an anachronism. As early as 1847 the state of Michigan, followed by Rhode Island in 1852 and Wisconsin in 1853 decided that state killing was wrong. During the early 1900's, 10 additional states came to the conclusion that killing by the state was wrong. Those of us in other states that did not come to that conclusion have held on to the death penalty not so much because we examined its morality but because it was the status quo. Clearly the death penalty has appeal to people who want to clamor for vengeance but it is still an anachronism, the rightness or wrongness of which has not been examined head on by this Court.

Nevertheless, in the last few years, notable jurists and others have come forward to question whether or not we should accept the status quo or whether we should question the death penalty as an anachronism. As with all serious questions in society, there is a debate. The debate may focus on the fairness of the manner in which the death penalty is imposed, its efficacy or even its cost. However, lurking just below the surface is the ultimate question of whether or not we ought to execute prisoners. And, now that the pragmatic questions are clearly on the table for national discussion, it is an ideal time for the intellectual leaders, including justices of this Court, to simply, once and for all, confront that underlying moral question: Is it wrong to kill a prisoner?

At the time of the decision of the United States Supreme Court in

Furman v. Georgia (1972) 408 U.S. 238, both Justice Brennan and Justice Marshall in concurring opinions took the position that the death penalty itself was unconstitutional for all purposes. (*Id.* at 305-306, 358-360 [(separate Conc. Opns. by Brennan, J. and, Marshall, J.)].) To the point of their respective retirements in 1990 and 1991, Justices Brennan and Marshall continued to maintain that the death penalty itself was unconstitutional and dissented in every subsequent case in which the court upheld the death sentence. They routinely went so far as to dissent from the denial of certiorari in death cases. (*See, e.g.*, *Smith v. Hopper* (1978) 436 U.S. 950.)

The dissents of Justices Brennan and Marshall provided a backdrop to the ongoing debate about the death penalty. Although, one would hope, standards of decency have continued to evolve in this country, it was not until 1994 that a significant judicial opinion from another, more conservative, member of the United States Supreme Court started to fuel the public's awareness of just how these standards are and should be changing. (*Callins v. Collins* (1994) 510 U.S. 1141, 1145 [(Dis. Opn. of Blackmun, J.)].)

Justice Blackmun had the courage to state in a dissent from a denial of a petition for writ of certiorari: "From this day forward, I no longer shall tinker with the machinery of death." (*Callins v. Collins*, *supra*, 510 U.S. 1141, 1145 [(Dis. Opn. of Blackmun, J.)].) Justice Blackmun's concerns pertain in part to the efficacy and fairness of the death penalty system. He believed that it could not be reconciled with the requirement of *Lockett v. Ohio* (1978) 438 U.S. 586, 608-609, that each person facing the death penalty be considered, as a matter of constitutional law, as an individual.

While Justice Blackmun's judicial writings did not squarely address the underlying moral question of whether or not it is right to kill a prisoner,

his courage in coming forward and his resolve in consistently maintaining his position suggest that it may have been informed by a deeper moral epiphany. In *Callins*, he did predict that one day the death penalty will be abolished. He concluded by stating that "The path that the court has chosen lessens us all." (*Callins v. Collins*, *supra*, 510 U.S. 1141, 1156 [(Dis. Opn. of Blackmun, J.)].) The same year that Justice Blackmun wrote in *Callins*, retired U.S. Supreme Court Justice Lewis Powell was interviewed at length for his biography. The author of his biography wrote that "Experience taught him that the death penalty cannot be decently administered." (Jeffries, Justice Lewis F. Powell, Jr., (1994) p. 451.)

Popular awareness, which represents the evolving standards of decency under the Eighth Amendment, has been led by as well as reflected in literature, movies, and popular culture. Sister Prejean's book *Dead Man Walking* struck a chord of resonance in this country before and after it was made into a popular movie. (Prejean, Dead Man Walking: An Eyewitness Account of the Death Penalty (1993); See also Sanger, Book Review *"Dead Man Walking," by Helen Prejean, C.S.J.* (1994) 41 Fed. Bar News & J., at pp. 72-73.) Other books and movies such as Stephen King's *The Green Mile* have continued to reflect the fact that the moral issues associated with the anachronism of capital punishment are increasingly on the public mind.

Other non-judicial events also reflect an evolution of a broad based "moratorium movement." This movement is now of national significance and has been surveyed by Jeffrey Kirchmeier in the current volume of the University of Colorado Law Review. (Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, (2002) 73 U. Colo. L. R. 1 [(hereafter *Death Penalty Moratorium Movement*].) As Professor Kirchmeier documents, the call for a moratorium is informed by many recent events including the 1997

American Bar Association Recommendation, the increasing number of exonerations of death row inmates by DNA testing and other means, Illinois Governor Ryan's imposition of a moratorium and international pressures.

As a further indication of this evolution of standards, a number of other state and federal court judges and justices have begun to speak out. Many of them are former prosecutors and, otherwise, proponents of the death penalty. However they, too, like Justice Blackmun and Justice Powell, have had the courage to come forward with their reservations. In 1998, Chief Justice Kogan of the Florida Supreme Court began to publicly criticize the death penalty. (*Death Penalty Moratorium Movement, supra,* at 31.) This honorable court and each of the justices thereon, is in the same position as Justice Kogan who had to conclude after years as a prosecutor, a judge, and chief justice of a state supreme court, "Knowing as I do the imperfections in our system, I know that we have, on occasion, in the past, executed those people who are in fact innocent." (*Id.* at 31-32.)

Former chief judge of the North Carolina Supreme Court, James Exum, Jr., stated that the death penalty "cheapens the rest of us; it brutalizes the rest of us; and we become a more violent society." (*Id.* at 32)

Justice Virginia Long of the New Jersey Supreme Court in *State v. Timmendequas* (N.J. 2001) 168 N.J. 20, dissented in a death case and said:

> "It is time for the members of this Court to accept that there is simply no meaningful way to distinguish between one grotesque murder and another for the purpose of determining why one defendant has been granted a life sentence and another is awaiting execution. The very exercise of individual proportionality review stands on a fundamentally unstable pediment. It should be scrapped and a moratorium declared on the death penalty until a meaningful process is developed."

Numerous other jurists have, in the space of just the last few years,

started to grapple with the fact that simply processing case after case will never be adequate when dealing with the imposition of death. Some of those who have come to question the wisdom of continuing this anachronistic punishment include judges and justices who had been capital case prosecutors and others who previously had a role in drafting death penalty legislation. (*Death Penalty Moratorium Movement*, *supra*, at 31-36.)

Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit recently said,

> "We have constructed a machine that is extremely expensive, chokes our legal institutions, visits repeated trauma on victims' families and ultimately produces nothing like the benefits we would expect from an effective system of capital punishment. This is surely the worst of all worlds." (*Death Penalty Moratorium Movement*, *supra*, at 34-35.)

In April, 2001 United States Supreme Court Justice Ruth Bader-Ginsburg said she would be "glad to see" Maryland pass a moratorium bill, adding, "People who are well represented at trial do not get the death penalty." Justice Sandra Day O'Connor, as late as July 2001, stated that there are "serious questions" about whether the death penalty is administered fairly. (*Death Penalty Moratorium Movement*, *supra*, at 30).

It will still take courage and vision for the intellectual leaders of California to step forward and declare, what is becoming more and more obvious throughout the country and the world, that the death penalty should be discontinued. It is a propitious time for this Court, and each Justice thereof, to step forward and say that the killing of prisoners is wrong.

CLAIM XXVII: CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT PETITIONERS TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution and the California Constitution. Because challenges to most of these features have been rejected by this Court, Petitioner, rather than unduly lengthening this Petition, presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal Constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various Constitutional defects require that Petitioner's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have expanded the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances"

section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the state will kill dominates the entire process of applying the penalty of death.

A. Petitioner's Death Penalty Is Invalid Because § 190.2 Is Impermissibly Broad.

In Claim XIII, Petitioner addresses the "narrowing" issue with regard to the felony murder special circumstance under Federal Code §190.2. In addition, the death penalty statute, as a whole, fails Constitutional muster.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is actually imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the United States Constitution. As this Court has recognized:

> "To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.' (*Furman v. Georgia* (1972) 408 U.S. 238 [(Conc. Opn. of White, J.]); *accord, Godfrey v. Georgia* (1980) 446 U.S. 420, 427, [(Plur. Opn.].) (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> "Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." *(Zant v. Stephens* (1983) 462 U.S. 862, 878

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in Penal Code section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against Petitioner the statute contained twenty-six special circumstances[16] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the

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This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow,. and is now thirty-two.

thrill, the criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would." (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic, or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal. 4th 469; *People v. Morales* (1989) 48 Cal.3d 527, 557-58, 575.) By establishing so many categories of special circumstance murder, the statute comes very close to achieving its goal of making every murderer eligible for death. Section 190.2 does not genuinely narrow the class of persons eligible for the death penalty.

Comprehensive and meticulous research has been done to see just what proportion of murderers are made eligible for death by these special circumstances, and how many of these are actually sentenced to death. (See Schatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283, 1331-1334 (1997).) See also, Professor Shatz's declaration with respect to felony murder attached as Exhibit 7. This work has shown that California's special circumstances are so broad in definition as to encompass the facts established in

approximately 87% of the cases ending in a conviction of first-degree murder. Excluding those convicted first degree murderers who are 16 and 17 years old, and are therefore statutorily ineligible for death, approximately 84% of convicted first degree murders are death-eligible. Of these, only 9.6% of all those convicted of first degree murder are sentenced to death. California thus has a death sentence ratio of approximately 11.4%. (Schatz and Rivkind, at 1332.)

As in pre-*Furman* Georgia, being sentenced to death in California is cruel and unusual, in the same sense that being struck by lightning is cruel and unusual. A statutory scheme under which 84% of first-degree murderers are death-eligible does not "genuinely narrow." (See *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1319 *Cert. Den.* 130 L.Ed.2d 802 (1995].) Since only 11.4% of those statutorily death-eligible are sentenced to death, California's death penalty scheme permits an even greater risk of arbitrariness than the schemes considered in *Furman,* [17] and, like those schemes, is unconstitutional.

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At the time of the decision in *Furman*, the evidence before the high court established, and the justices understood, that approximately 15-20% of those convicted of capital murder were actually sentenced to death. Chief Justice Burger so stated for the four dissenters (402 U.S. at 386 n. 11), and Justice Stewart relied on Chief Justice Burger's statistics when he said: "[I]t is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder . . ." (402 U.S. at 309, n. 10) Thus, while Justices Stewart and White did not address precisely what percentage of statutorily death-eligible defendants would have to receive death sentences in order to eliminate the constitutionally unacceptable risk of arbitrary capital sentencing, *Furman*, at a minimum, must be understood to have held that any death penalty scheme under which less than 15-20% of statutorily death-eligible defendants are sentenced to death permits too great a risk of arbitrariness to satisfy the Eighth Amendment. See also, *The California Death Penalty Scheme*, *supra*, 72 N.Y.U. L.Rev. at 1288-1290.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing, and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53. Not so. In *Harris*, the issue before the Court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. The United States Supreme Court's assumption that the 1977 law limited death-eligibility to a "small sub-class" was no more than an assumption, and the court contrasted that law with the 1978 law under which Petitioner was convicted, which had "greatly expanded" the list of special circumstances. (*Pulley v. Harris*, *supra*, at 52, fn. 14.)

The United States Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, and prevailing international law. (See section E. of this Argument; Argument IX, *infra.*)

B. Petitioner's Death Penalty Is Invalid Because § 190.3(a) as Applied Allows Arbitrary And Capricious Imposition of Death, in Violation of The Fifth, Sixth, Eighth And Fourteenth Amendments to The United States Constitution.

Section 190.3(a) violates the Fifth, Sixth, Eighth and Fourteenth

Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been found to be "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor. Instead, the Court has allowed extraordinary expansions of this factor, approving reliance on the "circumstance of the crime" aggravating factor because defendant had a "hatred of religion,"[18] or because three weeks after the crime defendant sought to conceal evidence,[19] or threatened witnesses after his arrest,[20] or disposed of the victim's body in a manner that precluded its recovery.[21]

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial

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People v. Nicolaus (1991) 54 Cal.3d 551, 581-82, [*Cert. Den.*, 112 S. Ct. 3040 (1992)]

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People v. Walker (1988) 47 Cal.3d 605, 639 n.10, [*Cert. Den.*, 494 U.S. 1038 (1990)].

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People v. Hardy (1992) 2 Cal.4th 86, 204, [*Cert. Den.*, 113 S. Ct. 498].

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People v. Bittaker (1989) 48 Cal.3d 1046, 1110 n.35 [*Cert. Den.* 496 U.S. 931 (1990)].

Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988, it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. The California Appellate Project collected and finalized the materials referred to in this section of this claim. The original research for this claim was filed in an Amicus Curiae brief with the United States Supreme Court in Tuilaipa v. California, case numbers 93-5131 and 93-5161 filed January 24, 1994. Petitioner request that this Court take judicial notice of the records and briefs in each of the cases cited. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

a. Because the defendant struck many blows and inflicted multiple wounds,[22] or because the defendant killed with a single execution-style wound.[23]

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination,

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See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

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See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

avoiding arrest, sexual gratification)[24] or because the defendant killed the victim without any motive at all.[25]

c. Because the defendant killed the victim in cold blood[26] or because the defendant killed the victim during a savage frenzy.[27]

d. Because the defendant engaged in a cover-up to conceal his crime,[28] or because the defendant did not engage in a cover-up and so must have been proud of it.[29]

e. Because the defendant made the victim endure the terror of

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See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

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See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

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See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

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See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

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See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

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See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

anticipating a violent death[30] or because the defendant killed instantly without any warning.[31]

f. Because the victim had children,[32] or because the victim had not yet had a chance to have children.[33]

g. Because the victim struggled prior to death,[34] or because the victim did not struggle.[35]

h. Because the defendant had a prior relationship with the victim,[36] or because the victim was a complete stranger to the defendant.[37]

These examples show that absent any limitation on the

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See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

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See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

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See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

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See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

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See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

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See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

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See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d at 717, 802 P.2d at 316 (same).

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See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

"circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[38]

b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[39]

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See, e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

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See, e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No.

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[40]

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[41]

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[42]

S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

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See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

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See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

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See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [100 L.Ed.2d 372, 1085 S.Ct. 1853].)

C. California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary And Capricious Sentencing, And Therefore Violates The Eighth And Fourteenth Amendments to The United States Constitution.

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (*Penal Code* section 190.2) or in its sentencing guidelines (*Penal Code* section 190.3). A defendant, like Petitioner, convicted of felony-murder is eligible for death, and freighted with an aggravating circumstance to be weighed on death's side of the scale. Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of

death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral," and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the process of making the most consequential decision a juror can make – whether or not to impose death.

1. The Trial Court's Failure To Instruct The Jury on Any Penalty Phase Burden of Proof Violated Petitioner's Constitutional Rights To Due Process And Equal Protection Of The Laws, And To Not Be Subjected to Cruel And Unusual Punishment.

Petitioner's death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution because it was imposed pursuant to a statutory scheme that does not require (except as to prior criminality) that aggravating circumstances exist beyond a reasonable doubt, or that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt, or that death is the appropriate sentence beyond a reasonable doubt, or that the jury be instructed on any burden of proof at all when deciding the appropriate penalty. (See *Santosky v. Kramer* (1982) 455 U.S. 745, 754-767; *In re Winship* (1970) 397 U.S. 358

Some burden of proof must be articulated to ensure that juries faced with similar evidence will return similar verdicts and that the death penalty is evenhandedly applied, and capital defendants treated equally from case to case. "Capital punishment [must] be imposed fairly, <u>and with reasonable</u>

consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112 [emphasis added].) The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275) The reason is obvious: Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist.[43] This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty.

The error in failing to instruct the jury on what the proper burden of proof is or is not, is reversible *per se*. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.) In cases in which the aggravating and mitigating evidence is balanced, or the evidence as to the existence of a particular aggravating factor is in equipoise, it is unacceptable under the Eighth and Fourteenth Amendments that one man should live and another die simply because one jury assigns the burden of persuasion to the state, and another assigns it to the defendant.

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See, e.g., *People v. Dunkle*, No S014200, RT 1005, cited in Appellant's Opening Brief in that case at p. 725.

2. Beyond a Reasonable Doubt Is the Appropriate Burden of Proof for Factors Relied on to Impose a Death Sentence, for Finding that Aggravating Factors Outweigh Mitigating Factors, and for Finding that Death Is the Appropriate Sentence.

Twenty-five states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[44] Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

Three states require that the jury must base any death sentence on a finding beyond a reasonable doubt that death is the appropriate

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(See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. § 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, § 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-890; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (C) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4(C) (Michie 1990); Wyo. Stat. § 6-2-102(d)(i)(A), (e)(i) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703(c) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

punishment.[45] A fourth state, Utah, has reversed a death judgment because that judgment was based on a standard of proof that was less than proof beyond a reasonable doubt. (*State v. Wood* (Utah 1982) 648 P.2d 71, 83-84.) California does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context, the required finding need not be unanimous.

This Court has reasoned that, because the penalty phase determinations are "moral and . . . not factual" functions, they are not "susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) The moral basis of a decision to impose death, however, does not mean that the decision of such magnitude should be made without rationality or conviction. No greater interest is at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the U.S. Supreme Court expressly found the *Santosky* statement of the rationale for the burden to proof beyond a reasonable doubt requirement[46] applicable to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant are of such magnitude that . . . they have been protected by standards of

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See Ark. Code Ann. § 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. § 10.95.060 (West 1990); and *State v. Goodman* (1979) 257 S.E.2d 569, 577.

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"When the State brings a criminal action to deny a defendant liberty or life, . . . the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755 [internal citations omitted].)

proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. (*Bullington v. Missouri* (1981) 451 U.S. 430, at 441, [(quoting *Addington v. Texas* (1979), 441 U.S. 418, 423-424; *Monge v. California*, *supra*, 524 U.S. at 732 [emphasis added].)

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court confirmed that as a matter of due process under the Fourteenth Amendment the proof beyond a reasonable doubt standard must apply to all of the findings the sentencing jury must make as a prerequisite to returning a verdict of death. In *Apprendi* the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt, unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. Under California's capital sentencing scheme, the jury may not impose a death sentence unless it finds (1) that one or more aggravating factors exist and (2) the aggravating factor or factors outweigh any mitigating factors. (Penal Code section 190.3.) Accordingly, under *Apprendi*, both the existence of any aggravating factors relied upon to impose a death sentence and the determination that such factors outweigh any mitigating factors must be made beyond a reasonable doubt.

This Court has rejected the application of *Apprendi* to the penalty phase of a capital trial, relying in large part on *Walton v. Arizona* (1990) 497 U.S. 639, and its conclusion that there is no constitutional right to a jury determination of facts that would subject defendants to a penalty of death. (*People v. Ochoa* (2001) 26 Cal.4th 398, 453.) *Ring v. Arizona* (2002) 538 U.S. 584 has overruled *Walton*'s holding that judges could make factual determinations that increase the prescribed range of penalties despite the Sixth Amendment's guarantee of a jury trial. As a result, California's scheme is unconditional.

3. Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden of Persuasion For Finding (1) that an Aggravating Factor Exists, (2) that the Aggravating Factors Outweigh the Mitigating Factors, and (3) that Death is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would be Constitutionally Compelled as to Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in <u>any</u> sentencing proceeding. Judges have never had the power to impose sentence without the firm belief that whatever considerations underlie their sentencing decisions have been at least proved to be more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to base "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of <u>any</u> historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign a burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. 272, 276-277 [due process determination informed by historical settled usages].)

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes* (1990) 52 Cal.3d 577, 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on

which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra,* 455 U.S. at 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida* (1976) 428 U.S. 242, 260) – the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. It does so, however, only in non-capital cases. (Cal. R. Ct. 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence].) To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (*See, e.g., Mills v. Maryland*, 486 U.S. at 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.)

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In any capital case, any aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication, and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S.343, 346.)

Accordingly, Petitioner respectfully suggests that *People v.*

Hayes--in which this Court did not consider the applicability of section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, Petitioner's jury should have been instructed that the state had the burden of persuasion regarding the existence of any factor in aggravation, and the appropriateness of the death penalty. Sentencing Petitioner to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma*, 447 U.S. at 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth and Fourteenth Amendments, and is reversible *per se*. (*Sullivan v. Louisiana,* 508 U.S. 275.) That should be the result here, too.

4. California Law Violates The Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require Unanimous Jury Agreement On Aggravating Factors.

a. Jury Agreement

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *accord, People v. Bolin (*1998) 18 Cal.4th 297, 335-336; *People v. Miranda* (1988) 44 Cal.3d 57, 99.) Consistent with this construction of California's capital sentencing scheme, no instruction are given requiring jury agreement on any particular aggravating factor. Historically, no sentencing authority (almost inevitably, a single judge) had the power to impose sentence without some coherent understanding of why a particular sentence was being imposed. That should have been required here too.

Here, there was not even a requirement that a majority of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warrants the sentence of death. Indeed, on the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty which would have lost by a 1-11 vote, had it been put to the jury as a reason for the death penalty.

It is inconceivable that a death verdict would satisfy the Eighth and Fourteenth Amendments if it were based on (i) each juror finding a different set of aggravating circumstances, (ii) the jury voting separately on whether each juror's individual set of aggravating circumstances warrants death, and (iii) each such vote coming out 1-11– against that being an appropriate basis for death (for example, because other jurors were not convinced that all of those circumstances actually existed, and were not convinced that the subset of those circumstances which they found to exist actually warranted death). Nothing in this record precludes such a possibility. The result here is thus akin to the chaotic and unconstitutional result suggested by the plurality opinion in *Schad v. Arizona* (1991) 501 U.S. 624, 633 [Plur. Opn. of Souter, J.].)

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth and Fourteenth Amendments. (*E.g., Murray's Lessee v. Hoboken Land Improvement Co., supra*; 59 U.S. 272; *Griffin v. United States, supra,* 502 U.S. 46.) And it violates the Sixth, Eighth and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of

aggravating circumstances which warranted the death penalty. A death sentence under those circumstances would be so arbitrary and capricious as to fail Eighth and Fourteenth Amendment scrutiny. (*See, e.g., Gregg v. Georgia, supra,* 428 U.S. at 188-189.)

For all of these reasons, the sentence of death violates the Sixth, Eighth and Fourteenth Amendments.

b. Jury Unanimity

Of the twenty-two states like California that vest the responsibility for death penalty sentencing on the jury, fourteen require that the jury unanimously agree on the aggravating factors proven.[47] California does not have such a requirement.

Thus, Petitioner's jurors were never told that they were required to agree as to which factors in aggravation had been proven. Moreover, each juror could have relied on a factor which could potentially constitute proper aggravation, but was different from such factors relied on by the other jurors, i.e., there was no actual agreement on why Petitioner should be condemned.

The United States Supreme Court decision in *Apprendi*, confirms that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantees of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. In *Apprendi* the high court held

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See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Colo. Rev. Stat. Ann. § 16-11-103(2) (West 1992); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code Art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).

that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt, unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved to the jury's satisfaction beyond a reasonable doubt. Under California's capital sentencing scheme, a death sentence may not be imposed absent findings (1) that one or more aggravating factors exist and (2) the aggravating factor or factors outweigh any mitigating factors. (Penal Code section 190.3.) Accordingly, under *Apprendi*, the existence of any aggravating factors relied upon to impose a death sentence had to be found beyond a reasonable doubt by a unanimous jury.

The failure to require unanimity before evidence could be weighed as aggravating violated the Sixth, Eighth and Fourteenth Amendments. This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor*, *supra*, 52 Cal.3d at 749.) Petitioner respectfully asks the Court to reconsider. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at 732;[48] *accord Johnson v. Mississippi* (1998)

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The *Monge* court developed this point at some length: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. `It is of vital importance' that the decisions made in that context `be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida (1977)* 430 U.S. 349, 358. Because the death penalty is unique `in both its severity and its finality,' *(id.*, at 357), we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [opinion of Burger, C.J.] [stating that the

486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

The finding that a circumstance is aggravating is such a finding. An enhancing allegation in a non-capital case is a finding that must, by law, be unanimous. (See, e.g., Penal Code sections 1158, 1158a.) Since capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California, supra,* 524 U.S. at 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (*see generally Myers v. Ylst*, 897 F.2d at 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required.[49]

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[50] To apply the

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`qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed']; *see also Strickland v. Washington* (1984) 466 U.S. 668, 704 [Brennan, J., concurring in part and dissenting in part] [`[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding']. (*Monge v. California,* 524 U.S. at 731-732.)

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Under the federal death penalty statute, it should be pointed out, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C., § 848, subd. (k).)

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The first sentence of Article 1, Section 16 of the California Constitution

requirement to findings carrying a maximum punishment of one year in the county jail – but not to findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-64) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions.

This Court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that [previously unadjudicated] misconduct." (*People v. Raley* (1992) 2 Cal.4th 870, 910.) The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial" on guilt or innocence." (*Monge v. California, supra,* 524 U.S. at 726; *Strickland v. Washington, supra,* 466 U.S. at 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 439.) While the unadjudicated offenses are not the only offenses the defendant is being "tried for," obviously, that trial-within-a-trial often plays a dispositive role in determining whether death, the "penalty . . . unique 'in both its severity and its finality,'" is imposed. (*Monge v. California, supra,* 524 U.S. at 732 [quoting *Gardner v. Florida, supra,* 430 U.S. at 357].)

This Court has also rejected the need for unanimity on the ground that "generally, unanimous agreement is not required on a foundational

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provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

matter. Instead, jury unanimity is mandated only on a final verdict or special finding." (*People v. Miranda, supra*, 44 Cal.3d at p. 99.) But unanimity is not limited to final verdicts. For example, it is not enough that jurors unanimously find that the defendant violated a particular criminal statute; where the evidence shows several possible acts which could underlie the conviction, the jurors must be told that to convict, they must unanimously agree on at least one such act. (*People v. Diedrich* (1982) 31 Cal.3d 263, 281-282.) It is only fair and rational that, where jurors are charged with the most serious task with which any jury is ever confronted – determining whether the aggravating circumstances are so substantial in comparison to the mitigating as to warrant death – unanimity as to the aggravation supporting that decision likewise be required.

The error is reversible *per se*, because it permitted the jury to return a death judgment without making the findings required by law. (See *Sullivan v. Louisiana*, 508 U.S. at 278-281; *United States v. Gaudin* (1995) 515 U.S. 506, 522-523; *Suniga v. Bunnell* (1993) 998 F.2d 664, 668-670.) In any event, given the difficulty of the penalty determination, the State cannot show there is no reasonable possibility (*Chapman v. California* (1967) 386 U.S. 18, 24; *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87; *Satterwhite v. Texas* (1987) 486 U.S. 393, 258-259; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399) that the failure to instruct on the need for unanimity regarding aggravating circumstances contributed to the verdict of death. It certainly cannot be found that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi* (1985)472 U.S. 320, 341.) Here, there was a limited remand, the penalty judgment must be set aside. This, of all cases, was a Ron Slick where a mockery of the California law occurred in practice. However, if that law itself is infirm, the penalty must be reversed.

5. California Law Violates The Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require That The Jury Base Any Death Sentence On Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived Petitioner of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia,* supra, 428 U.S. at 195.) And especially given that California juries have total discretion without any guidance on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California, supra,* 512 U.S. at 979-980), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (*See Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of such a provision does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.)[51] Ironically, such findings are elsewhere considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus, and is required to allege with particularity the circumstances constituting the state's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that

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However, as argued above, the present case lacked a meaningful review pursuant to section 190.4(e) because the successor judge simply read the cold record. (See Arguments I and II, *supra.*) That lack of meaningful review must be considered in conjunction with these other statutory defects.

his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.* at 267.)[52] The same reasoning applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449.)

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Id.;Penal Code section 1170, subd. (c).) Under the Fifth, Sixth, Eighth and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than those afforded non-capital defendants (*see Harmelin v. Michigan, supra,* 501 U.S. at 994). Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (*see generally Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland, supra*, 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (*See, e.g.*, id. at 383, fn. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes, supra*, 52 Cal.3d

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A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. See Title 15, California Code of Regulations, section 2280 et seq.

at 643) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[53]

6. California's Death Penalty Statute As Interpreted By The California Supreme Court Forbids Inter-Case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, Or Disproportionate Impositions Of The Death Penalty.

Petitioner address other issues regarding a lack of proportionality review in Claim XIX and XX, including the violation of substantiative Due Process, Equal Protection and Privileges and Immunities, clauses of the state and federal Constitution.

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See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(i) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(c)) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c)) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate, and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "`that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 [plurality opinion, alterations in original, quoting *Proffitt v. Florida*, 1976, 428 U.S. 242, 251 [opinion of Stewart, Powell, and Stevens, JJ.].)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in *Pulley*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Pulley*, *supra*, at 52, fn. 14.)

As we have seen, that greatly expanded list fails to meaningly narrow the pool of death-eligible defendants and leaves more room for arbitrary

sentencing than the death penalty schemes struck down in *Furman v. Georgia, supra,* 408 U.S. 238. (See Section A of this Argument, *supra.*) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (*See Gregg v. Georgia, supra*, 428 U.S. at 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-3; *Enmund v. Florida* (1982) 458 U.S. 782, 796 n. 22; *Coker v. Georgia* (1977) 433 U.S.584, 596.)

Thirty-one of the thirty-four states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute, Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(a).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman v.*

Georgia (1972) 408 U.S. 238, . . ." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida* (1976) 428 U.S. 242, 259.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[54]

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this

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See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)©) (1992); N.M. Stat. Ann. § 31-20A-4©)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25©)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).
Also see *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

Court. (*See, e.g.*, *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris, supra*, 465 U.S. 37 – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment. Categories of crimes that warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. (See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes"[55].) Categories of criminals that warrant such a comparison include persons suffering from insanity (*Ford v. Wainwright* (1986) 477 U.S. 399) or mental retardation; see *Atkins v. Virginia*, No. 00-8452, 2001 U.S. LEXIS 5463 (argued before the U.S. Supreme Court on February 21, 2002).

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Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more that we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res.L.Rev.1, 30 (1995).)

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman*, in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

7. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible For the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve As Factor In Aggravation Unless Found to Be True Beyond a Reasonable Doubt By A Unanimous Jury.

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in Penal Code section 190.3(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [100 L.Ed.2d 575, 108 S.Ct.1981]; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

Further, as noted above, the United State Supreme Court's recent decision in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466 confirms that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Under *Apprendi*, as applied to California's capital

sentencing scheme, the existence of any aggravating factors relied upon to impose a death sentence had to be found beyond a reasonable doubt by a unanimous jury. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. No such instruction is provided for under California's sentencing scheme. Although that issue did not arise specifically here, it is an inherent flaw in the state's death penalty system.

8. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Petitioner's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)), and "substantial" (see factor (g)), acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

9. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031 n.15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). The jury,

however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85.)

It is thus likely that Petitioner's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the state – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated Petitioner "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "arbitrary and capricious action," *Tuilaepa v. California* (1994) 512 U.S. 967, quoting *Gregg v. Georgia, supra*, 428 U. S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma, supra*, 455 U.S. at 112.)

D. Even If The Absence of The Previously Addressed Procedural Safeguards Did Not Render California's Death Penalty Scheme Constitutionally Inadequate to Ensure Reliability And Guard Against Arbitrary Capital Sentencing, The Denial of Those Safeguards to Capital Defendants Violates The Constitutional Guarantee of Equal Protection of The Laws.

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed, and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California, supra*, 524 U.S. at 731-732.) Despite this directive, California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, <u>second only to life itself</u>, as an interest protected under both the California and the United States

Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 [emphasis added].) "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, `the right to have rights.' (*Trop v. Dulles* (1958) 356 U.S. 86, 102." (*Commonwealth v. O'Neal* (Mass. 1975) 327 N.E. 2d 662, 668.

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra,* 17 Cal.3d 236; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The state cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the People of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (*See People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) Its reasons were a more detailed presentation of the rationale that has also

justified the refusal to require any burden of proof in the penalty phase of a capital trial, or unanimity as to the aggravating factors that justify a sentence of death, or written findings by the jury as to the factors supporting a sentence of death: death sentences are moral and normative expressions of community standards. (See Section C of this Argument, *supra.*) Petitioner will therefore examine the justifications proffered by the *Allen* court, and show that they do not suffice to support denying persons sentenced to death procedural protections afforded other convicted felons.

At the time of Petitioner's sentence on March 20, 1991, California required inter-case proportionality review for non-capital cases. (Former Penal Code Section 1170, subd. (f).)[56] The Legislature thus provided a

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At the time of Petitioner's sentence in this case, Penal Code section 1170, subdivision (f) provided as follows:
"(f)(1) Within one year after the commencement of the term of imprisonment, the Board of Prison Terms shall review the sentence to determine whether the sentence is disparate in comparison with the sentences imposed in similar cases. If the Board of Prison Terms determines that the sentence is disparate, the board shall notify the judge, the district attorney, the defense attorney, the defendant, and the Judicial Council. The notification shall include a statement of the reasons for finding the sentence disparate.

Within 120 days of receipt of this information, the sentencing court shall schedule a hearing and may recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if the defendant had not been sentenced previously, provided the new sentence is no greater than the initial sentence. In resentencing under this subdivision the court shall apply the sentencing rules of the Judicial Council and shall consider the information provided by the Board of Prison Terms.
"(2) The review under this section shall concern the decision to deny probation and the sentencing decisions enumerated in paragraphs (2), (3), and (4) of subdivision (a) of Section 1170.3 and apply the sentencing rules of the Judicial Council and the information regarding the sentences in this state of other persons convicted of similar crimes so as to eliminate disparity of sentences and to promote uniformity of sentencing.
"(g) Prior to sentencing pursuant to this chapter, the court may request

substantial benefit for all prisoners sentenced under the Determinate Sentencing Law (DSL): a comprehensive and detailed disparate sentence review. (*See In re Martin* (1986) 42 Cal.3d 437, 442-444, for details of how the system worked while in practice). In the case of Petitioner, such a review might well be the difference between life and death. Persons sentenced to death, however, are unique among convicted felons in that they are not provided this review, despite the extreme and irrevocable nature of their sentence. Such a distinction is irrational.

In *Allen*, this Court rejected a contention that the failure to provide disparate sentence review for persons sentenced to death violated the constitutional guarantee of equal protection of the laws.

The *Allen* court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*Allen*, *supra*, 42 Cal.3d at 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses (*Coker v. Georgia, supra*, 433

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information from the Board of Prison Terms concerning the sentences in this state of other persons convicted of similar crimes under similar circumstances."
This language was removed by an amendment (Stats 1992 ch 695 §§ 10 (SB 97)), which took effect on September 14, 1992.

U.S. 584) or offenders (*Enmund v. Florida, supra*, 458 U.S. 782; *Ford v. Wainwright, supra,* 477 U.S. 399). Juries, like trial courts and counsel, are not immune from error. They may stray from the larger community consensus as expressed by statewide sentencing practices. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

While the state cannot limit a sentencer's consideration of any factor that could cause it to reject the death penalty, it can and must provide rational criteria that narrow the decision maker's discretion to impose death. (*McCleskey v. Kemp*, *supra*, 481 U.S. at 305-306.) No jury can violate the societal consensus embodied in the channeled statutory criteria that narrow death eligibility, or the flat judicial prohibitions against imposition of the death penalty on certain offenders or for certain crimes.

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See Penal Code section 190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.)[57] The absence of a disparate sentence review cannot be justified on the ground that a reduction of a jury's verdict by a trial court would interfere with the jury's sentencing function.

The second reason offered by *Allen* for rejecting the equal protection claims was that the range available to a trial court is broader under the DSL than for persons convicted of first-degree murder with one or more special circumstances: "The range of possible punishments <u>narrows</u> to death or

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[57] Although, in this case, the 190(e) review was perfunctory.

life without parole." (*Allen*, 42 Cal. 3d at 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at 411.) "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (Opn. of Stewart, Powell, and Stephens, J.J.] (*see also Reid v. Covert* (1957) 354 U.S. 1, 77[Conc. Opn. of Harlan, J.J.]; *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 [Conc. and Dis. Opn. of Harlan, J., joined by Frankfurter, J.]; *Gregg v. Georgia*, *supra*, 428 U.S. at 187 [opn. of Stewart, Powell, and Stevens, J.J.]; *Gardner v. Florida* (1977) 430 U.S. 340, 357-358; *Lockett v. Ohio*, *supra*, 438 U.S. at 605 [Plur. Opn]; *Beck v. Alabama* (1980) 447 U.S. 625, 637; *Zant v. Stephens*, *supra*, 462 U.S. at 884-885; *Turner v. Murray* (1986) 476 U.S. 28 [Plur. Opn., quoting *California v. Ramos* (1983) 463 U.S. 992, 998-999]; *Harmelin v. Michigan*, *supra*, 501 U.S. at 994; *Monge v. California*, supra, 524 U.S. at 732.)[58] The

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The *Monge* court developed this point at some length: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977).

qualitative difference between a prison sentence and a death sentence thus militates for, rather against, requiring the state to apply its disparate review procedures to capital sentencing.

Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to noncapital sentencing as supporting the different treatment of felons sentenced to death. (*People v. Allen, supra*, 42 Cal.3d at 1287.) This perceived distinction between the two sentencing contexts is insufficient to support the challenged classification. The distinction drawn by the *Allen* majority between capital and noncapital sentencing regarding "nonquantifiable" aspects is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California rules of Court, rules 421 and 423.) One may reasonably presume that it is because "nonquantifiable factors" permeate <u>all</u> sentencing choices that the legislature created the disparate review mechanism discussed above.

In sum, the Equal Protection Clause of the Fourteenth Amendment to

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Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington*, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California, supra*, 524 U.S. at 731-732.)

the United States Constitution guarantees each and every person that they will not be denied their fundamental rights, and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir., 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws, and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case.

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases (*People v. Allen*, *supra*, 42 Cal.3d at 186]), or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. These procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California, supra*, 542 U.S. 721.) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented, and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

E. California's Use of The Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity And Decency, And Violates The Eighth And Fourteenth Amendments.

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366.; *see also People v. Bull* Ill.(1998) 185 Ill.2d 179, 225 [dis. Opn. of Harrison, J.].)[59]

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (*See, e.g., Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [Dis. Opn. of Brennan, J.]; *Thompson v. Oklahoma,* 487 U.S. at 830 [Plur. Opn. of Stevens, J.].) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Dec. 18, 1999), on Amnesty International website [www.amnesty.org].)[60]

This is especially important since our Founding Fathers looked to the nations of Western Europe for the "law of nations," as models on which the

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Since that article, in 1995, South Africa abandoned the death penalty.

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These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

laws of civilized nations were founded, and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [Dis. Opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409.) Thus, for example, Congress's power to prosecute war, as a matter of constitutional law, was limited by the power recognized by the law of nations; and what civilized nations of Europe forbade, such as poison weapons or the selling into slavery of wartime prisoners, was constitutionally forbidden here. (*Miller v. United States* (1870) 78 U.S. 268, 315-316, fn. 57 [Dis. Opn. of Field, J.].)

However, due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia, supra,* 408 U.S. at p. 420 [Dis. Opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100.)

In short, "cruel and unusual punishment," as defined in the Constitution, is not limited solely to whatever violated the standards of decency which existed within the civilized nations of Europe in the 18th century. As defined in the Constitution, it encompasses whatever violates evolving standards of decency. And if the standards of decency, as

perceived by the civilized nations of Europe which our Framers looked to as models, have themselves evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own.

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot, supra,* 159 U.S. 113; *see also Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S.110, 112; see Argument IX, post.)

Thus, the very broad death scheme in California, and death's use as regular punishment randomly imposed, violate the Eighth and Fourteenth Amendments. Petitioner's death sentence should be set aside.

CLAIM XXVIII: THE PENALTY OF DEATH AND EXECUTION IN CALIFORNIA ARE ARBITRARILY AND CAPRICIOUSLY IMPOSED DEPENDING ON THE COUNTY IN WHICH THE DEFENDANT IS CHARGED, IN VIOLATION OF THE RIGHT TO EQUAL PROTECTION OF THE LAW

Petitioner's death sentence and confinement are unlawful and unconstitutional. They were obtained in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 7(b) and article IV, section 16(a) of the California Constitution, because the death penalty in California is imposed arbitrarily and

capriciously depending on the county in which the case is prosecuted.

The facts supporting this claim, among others to be developed after full investigation, discovery, adequate funding, and access to this Court's subpoena power and other available court processes, including an evidentiary hearing to further develop and support the merits of this claim, are:

It is axiomatic that every person in the United States is entitled to equal protection of the law. (U.S. Const., 14th Amend.) It is also true that since 1976 the Supreme Court of the United States has upheld the death penalty in general against Eighth Amendment challenges and allowed the states to vary in their statutory schemes for putting people to death. (*See Jurek v. Texas* (1976) 428 U.S. 262; *Proffitt v. Florida* (1976) 428 U.S. 242; *Gregg v. Georgia* (1976) 428 U.S. 153. *Cf. McCleskey v. Kemp* (1987) 481 U.S. 279.)

Nonetheless, on December 12, 2000, the Supreme Court of the United States recognized that when fundamental rights are at stake, uniformity among the counties within a state, in the application of processes that deprive a person of a fundamental right, are essential. (*Bush v. Gore* (2000) 531 U.S. 98.) When a statewide scheme is in effect, there must be sufficient assurance "that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." (Id., at p. 532.) This principle must apply to the right to life as well as the right to vote.

In California, the 58 counties, through the respective prosecutors' offices, make their own rules, within the broad parameters of Penal Code sections 190.2 and 190.25, as to who is charged with capital murder and who is not. There are no effective restraints or controls on prosecutorial discretion in California. So long as an alleged crime falls within the statutory criteria of Penal Code sections 190.2 or 190.25, the prosecutor is

free to pick and choose which defendants will face potential death and which will face a potential lesser punishment.[61]

This is not uniform treatment within the state. In some California counties a life is worth more than in others, because county prosecutors use different, or no standards, in choosing whether to charge a defendant with capital murder. If different and standardless procedures for counting votes among counties violates equal protection, as in the Bush case, then certainly different and standardless procedures for charging and prosecuting capital murder must violate the right to equal protection of the law, as well. Such different and standardless procedures for charging and prosecuting capital murder also violate the Eighth Amendment mandate "that capital punishment be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.)

To further demonstrate the differing standards or lack of standards among the 58 California counties, petitioner requests that funds be made available for further investigation, that discovery be permitted, that the court issue subpoenas and process as necessary, and that a full evidentiary hearing be held further to develop the facts supporting this claim.

This Court must therefore reexamine its prior precedents which hold that prosecutorial discretion as to which defendants will be charged with capital murder does not offend principles of due process, equal protection

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The disparity with which county prosecutors contribute to the death row census is easily seen in the Condemned Inmate Summary List, prepared in March of 2002 by the California Department of Corrections, attached as Exhibit 63. With sixteen counties having never sent someone to death row and some of the largest counties contributing significantly fewer inmates than much smaller counties (e.g. San Francisco County at three versus Kings County at four), it is clear that a person is sentenced to death or not based on an accident of geography.

or cruel and unusual punishment. (*See e.g. People v. Anderson* (2001) 25 Cal.4th 543, 622-623; *People v. Williams* (1997) 16 Cal.4th 153, 278; *People v. Keenan* (1988) 46 Cal.3d 478, 505.)

Unequal treatment among the California counties violates the Fourteenth Amendment Equal Protection Claus, *Bush v. Gore*, supra, and Article 1, Section 7(b) and Article IV, Section 16(a) of the California Constitution. It also violates the Eighth and Fourteenth Amendments and Article 1, Section 17 of the California Constitution.

CLAIM XXIX: PETITIONER'S CONVICTION AND DEATH SENTENCE VIOLATE INTERNATIONAL LAW

Petitioner's convictions, death sentence and confinement are unlawful and violate petitioner's rights under state, federal a and international law. Petitioner incorporates by this reference all of the arguments set forth in Section X of the Appellant's's Opening Brief as if set forth fully at the point. All of the errors throughout the course of petitioner's trial and penalty phase identified in Appellant's Opening Brief, Appellant's Reply Brief and this Petition operated to deprive petitioner of a fair trial and penalty phase by a competent court, and therefore operate now to arbitrarily deprive petitioner of his life in violation of customary international law and international instruments including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Declaration of the Rights and Duties of Man. Moreover, the death penalty, as applied in the United States and the State of California, violates customary international law as evidenced by the equal protection provisions of the above-mentioned instruments as well as the International Convention Against All Forms of Racial Discrimination.

The facts which support this claim, among others to be developed after full investigation, discovery, adequate funding, and access to this

Court's subpoena power and other court processes, including an evidentiary hearing in support of the merits of this claim are:

Petitioner's conviction and sentence of death were imposed without regard to international treaties and laws to which the United States is a signatory, and which obligate the United States to comply with human rights principles.

The State of California is bound by international law and treaties to which the United States is a signatory: "[A]ll treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding." (U.S. Const., art. VI, cl. 2.)

United States courts have recognized that "international law affords substantive rights to individuals and places limits on a State's treatment of its citizens." (*Abebe-Jira* v. *Negeno* (11th Cir. 1996) 72 F.3d 844; *Filartiga v. Pena-Irala* (2d Cir. 1980) 630 F.2d 876.)

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." (*The Paquete Habana* (1900) 175 U.S. 677, 700; see also Rest.3d Foreign Relations Law of the United States, § 111(1) ["International law and international agreements of the United States are law of the United States and supreme over the law of the several States"]; Id., at § 702, comment c ["[T]he customary law of human rights is part of the law of the United States to be applied as such by state as well as federal courts"]; and 22 U.S.C. § 2304(a)(1) ["the United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with constitutional heritage and

traditions of the United States, promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language or religion"].) This includes customary international law as well as international instruments. (*The Paquete Habana*, 175 U.S. at 700; *Filartiga*, 630 F.2d at 881.)

The body of international law that governs the administration of capital punishment in the State of California and the United States includes, but is not limited to, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention Against All Forms of Racial Discrimination, and the Vienna Convention on the Law of Treaties. The purpose of these and other treaties is to bind signatory nations, including the United States, to the protection of the rights of all humans, including petitioner and others who have been accused of capital crimes.

Human rights treaties are different from other treaties in that parties to human rights treaties agree to protect individuals within their jurisdictions, while parties to other treaties agree how to act with respect to each other. The "object and purpose" rule keeps state parties from eliminating important aspects of human rights treaties by making reservations to them, leaving its own citizens as well as other state parties with no recourse. "[T]he true beneficiaries of the agreements are individual human beings, the inhabitants of the contracting states." (Rest.3d Foreign Relations Law of the United States, § 313, reporter's notes p. 184.)

The United States Senate has ratified the International Covenant on Civil and Political Rights (hereinafter "International Covenant"). (International Covenant on Civil and Political Rights, June 8, 1992, 999

U.N.T.S. 171). The United States is therefore bound by its provisions and the provisions of the Second Optional Protocol to the International Covenant, adopted by the United Nations General Assembly in 1989. (*See Ma v. Ashcroft* (9th Cir. 2001) 257 F.3d 1095, 1114 [recognizing the force and effect of the International Covenant in Courts in the United States].)

The Second Optional Protocol provides for the total abolition of the death penalty, but allows state parties to retain the death penalty only in wartime, if a reservation to that effect was made at the time of ratifying or acceding to the Protocol. The United States was not at war at the time petitioner was sentenced to death, and his sentence does not arise from convictions for crimes committed during a war.

The process by which the President of the United States and the United States Senate ratified the International Covenant, and the substance of the purported reservations and declarations placed upon its ratification, present important federal questions under the separation of powers doctrine as well as the Treaty Clause. The United States ratified the International Covenant on September 8, 1992 with five reservations, five understandings, four declarations, and one proviso. (S. Res. 4783-84, 102d. Cong. (1992).) One of the purported reservations was made to avoid the provisions of article 6 to the International Covenant, which guarantees the right to life and specifically prohibits the execution of juveniles. The United States' ratification of the International Covenant on Civil and Political Rights included a vague declaration that the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein and otherwise by the state and local governments. The Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may

take appropriate measures for the fulfillment of the Covenant.
(S. Treaty Doc. No. 95-2 (Dec. 16, 1966), International Covenant on Civil and Political Rights.)

However, the federal Treaty Clause does not contain any language suggesting that the Senate can partially consent to a treaty or create a new one by placing conditions on it that materially alter the treaty which is proffered by other nations. Nor does the alleged "reservation power" survive analysis under the federal Supreme Court's recent decisions regarding the separation of powers, culminating in *Clinton v. City of New York* (1998) 524 U.S. 417 (line-item veto held invalid because the Constitution does not authorize the president "to enact, to amend or to repeal statutes"). (See also *Bowsher v. Synar* (1986) 478 U.S. 714; *INS v. Chadha* (1983) 462 U.S. 919.

President Clinton subsequently issued an executive order adopting a "policy and practice of the Government of the United States" to implement international human rights treaties. (United States Executive Order No. 13107, "Implementation of Human Rights Treaties.") President Clinton specifically referred to the International Covenant when ordering that the United States fully "respect and implement its obligations under the international human rights treaties[.]"[62]

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Exec. Order No 13107 states, in part:

IMPLEMENTATION OF HUMAN RIGHTS TREATIES

By the authority vested in me as President by the Constitution and the laws of the United States of America, and bearing in mind the obligations of the United States pursuant to the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination of All Forms of Racial Discrimination

In addition to violating federal constitutional and separation-of-powers principles, the United States' attempt to condition its consent to the treaty with a "reservation" to the prohibition against executions violates international law because the "reservation" is inconsistent with the "object and purpose" of the treaty.

The Vienna Convention on the Law of Treaties states that a "reservation" is not valid if it "is incompatible with the object and purpose of the treaty." (Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331, pp. 336-37; see also Rest.3d Foreign Relations Law of the United States, § 313(1)(c) ["A state may enter a reservation to a multilateral international agreement unless the reservation is incompatible with the object and purpose of the agreement"].) This rule of international law has been adopted by the International Court of Justice and the United Nations General Assembly. (See Reservations to the Convention of the Prevention and Punishment of the Crime of Genocide, U.N. GAOR, 6th Sess., 360th plenary meeting, at p. 84, U.N. Doc. A/L.37 (1952).)

The "object and purpose" of the International Covenant is to bestow and protect inalienable human rights to citizens: "[e]very human being has

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(CERD), and other relevant treaties concerned with the protection and promotion of human rights to which the United States is now or may become a party in the future, it is hereby ordered as follows:

> "Section 1. Implementation of Human Rights Obligations.
>
> "(a) It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD."

(Exec. Order No. 13107, 63 Fed.Reg. 68991, appended as Exhibit PPP.)

the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life." (Article 6, para. 1, International Covenant on Civil and Political Rights, June 8, 1992, 999 U.N.T.S. 171.) The right to life is a fundamental human right which is expressed throughout the International Covenant. There is nothing more contravening to the "right to life" than the death penalty.

In 1995, the United Nations Human Rights Committee concluded that the United States' reservation to Article 6, paragraph 5 was incompatible with the object and purpose of the International Covenant, and recommended that it be withdrawn. (See Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant, U.N. Hum. Rts. Comm., 53rd Sess., 1413th meeting., at para. 14, U.N. Doc. ICCPR/C/79/Add.50 (1995).) "The Committee [was] particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purposes of the Covenant." (Ibid.)

Because the United States' "reservation" to Article 6, paragraph 5, violates the object and purpose of the International Covenant and its Second Optional Protocol, it is void. Since the "reservation" is void, the United States is bound by this treaty, and, pursuant to the Supremacy and Treaty Clauses to the United States Constitution and long established rules of international law, the State of California is prohibited from executing petitioner. (U.S. Const. Art. VI., Cl. 2; U.S. Const. Art. II, Cl. 2; International Covenant on Civil and Political Rights, June 8, 1992, 999 U.N.T.S. 171; *The Paquete Habana*, 175 U.S. at 700 (1900); *Clinton v. City of New York*, 524 U.S. 417; *Bowsher v. Synar*, 478 U.S. 714; *INS v. Chadha*, 462 U.S. 919; Exec. Order No. 13107, 63 Fed.Reg. 68991 (December 10, 1998) [App. 137]; S. Treaty Doc. No. 95-2 (Dec. 16, 1966)

International Covenant on Civil and Political Rights.)

The use of capital punishment in the United States also violates the International Covenant, the American Declaration, the Race Convention and customary international law because it is imposed in a manner that racially discriminates against African Americans. Article 26 of the International Covenant, Article 2 of the American Declaration and Article 5 of the Race Convention all contain prohibitions against discriminatory and unequal treatment before the law. The death penalty in the United States continues to be, as Justice Harry A. Blackmun said, "fraught with arbitrariness, discrimination, caprice, and mistake." (*Callins v. Collins* (1994) 114 S.Ct. 1127, 1129 [Blackmun, J. dissenting from Supreme Court denial of review].) Statistical information from various studies shows that the death penalty is imposed in a racially discriminatory manner.[63] Because petitioner is part African American, international law prohibits his state-sanctioned execution.

The United States' continued use of the death penalty sharply conflicts with evolving international standards of decency and respect for human life. This nation remains one of the only Western countries which continues to execute criminals. A total of 105 nations -- including all of Western Europe -- no longer use the death penalty as a means of punishing crimes. (Cole, "The Company We Keep: When It Comes to Criminal

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See United States General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing* (1990) GAO/GGD-90-57; David C. Baldus, George Woodworth, and Charles A. Pulanski, Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (unpublished September 1988); *Racial Disparities in Federal Death Penalty Prosecutions 1988-1994*, Staff Report by the Subcomittee on Civil and Constitutional Rights, Committee on the Judiciary, 103 Cong. 2nd Sess., March 1994; Keil & Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991* (1995) 20 Am. J. Crim. Just. 17.

Punishment, We Have More in Common with Yemen than with Europe," *The Recorder*, Jan. 26, 2000, p. 6.) When even Russia commutes the death sentences of all 700 people on death row (*Id.*), it is clear that the "choices of governments elsewhere in the world ... merit our attention as indicators whether a punishment is acceptable in a civilized society." (*Stanford v. Kentucky*, (1989) 492 U.S. 361, 384 [Brennan, J., dissenting].) The United States, however, appears to be proudly bucking the trend by increasing the number of crimes for which the death penalty is authorized. See, e.g., federal Anti-Drug Abuse Act, Anti-Terrorism and Effective Death Penalty Act. Currently, approximately 3,600 inmates sit on death row; since reinstatement of the death penalty in 1976, 600 men and women have been executed. (Levendosky, "Parade of Executions Continues," *San Francisco Daily Journal*, Jan. 26, 2000, p. 4.) Indeed, only five other countries were willing to execute a minor in the 1990s: Iran, Nigeria, Yemen, Saudi Arabia and Pakistan. (Cole, "The Company We Keep: When It Comes to Criminal Punishment, We Have More in Common with Yemen than with Europe," *The Recorder*, Jan. 26, 2000, p. 6.) Persistent application of the death penalty violates international norm and, as such, the death penalty violates the evolving standards of decency in this country under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17, of the California Constitution. Therefore, the penalty of death in this case must be reversed.

Petitioner's convictions and sentence also violate his rights under international law to a fair and impartial trial and to a death sentence rendered by a competent and impartial court. These rights are firmly rooted in international jurisprudence. Several international instruments incorporate these rights including, but not limited to, the Universal Declaration, the International Covenant, and the American Declaration. (*See Martinez v.*

City of Los Angeles (9th Cir. 1998) 141 F.3d 1373, 1384 [finding a "clear international prohibition against arbitrary arrest and detention" as evidenced by the Universal Declaration, the International Covenant, and 119 national constitutions]; *Filartiga*, 630 F.2d 876 [the right to be free from torture "has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights"]; *Kadic v. Karadzic* (2nd Cir. 1995) 70 F.3d 232 [plaintiff stated claims under the Alien Tort Claims Act because defendant's conduct violated well-established norms of customary international law]; *Xuncax v. Gramajo* (D. Mass. 1995) 886 F.Supp. 162, 184-85 [plaintiffs' claims for violations of international law for torture, summary execution, disappearance, and arbitrary detention are "fully recognizable" as claims in United States courts].)

All of the errors throughout the course of petitioner's trial and sentencing proceedings identified in the briefing in petitioner's automatic appeals (No. S004653 and No. S020670), in this petition, and in petitioner's prior petition (S005412) operated to deprive petitioner of a fair trial and penalty phase by a competent court and therefore operate to arbitrarily deprive petitioner of his life in violation of international law.

CLAIM XXX: EXECUTION FOLLOWING LENGTHY CONFINEMENT UNDER SENTENCE OF DEATH WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF PETITIONER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND INTERNATIONAL LAW

Execution of petitioner following his lengthy confinement under sentence of death (almost nineteen years and since the last imposition of sentence on remand, twelve years) would constitute cruel and unusual punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; Article I, Sections 1, 7, 15, 16, and 17 of the California Constitution; and international law, covenants, treaties and norms.

The delay between Petitioner's sentencing and Petitioner's execution violates Article 7 of the Covenant which prohibits "cruel, inhuman or degrading treatment or punishment." It also violates the Eight Amendment to the United States Constitution. (*See Lackey v. Texas* (1995) 514 U.S. 1045 and *Knight v. Florida; Moore v. Nebraska* (1999) 528 U.S. 990 [Dis. Op. of Breyer, J.].)

Petitioner alleges the following facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

Here, Petitioner was originally arrested on November 1, 1983. (3RST 623.) He was convicted and sentenced to death on November 1, 1984 (1CST 439) and this Court reversed Petitioner's death sentence on March 1, 1990. Petitioner re-sentenced until March 20, 1991. He was not appointed counsel on appeal until May 2, 1994. The Los Angeles Superior Court spent 6 years correcting the record until it was certified on November 17, 2000. The delay directly attributable to the courts was 16 years.

Petitioner's excessive confinement on death row has been through no doing of his own. The appeal from a judgment of death is automatic (Pen. Code § 1239, subd. (b)), and there is "no authority to allow [the] defendant to waive the [automatic] appeal." (*People v. Sheldon* (1994) 7 Cal.4th 1136, 1139, relying on *People v. Stanworth* (1969) 71 Cal.2d 820, 833-834.) Of course, full, fair and meaningful review of the trial court proceedings, required under the state and federal constitutions and state law, necessitates a complete record (*Chessman v. Teets* (1957) 354 U.S. 156 ; Pen. Code § 190.7; Cal. Rules of Court, rule 39.5) and effective appellate representation (see *People v. Barton* (1978) 21 Cal.3d 513, 518; *People v. Gaston* (1978) 20 Cal.3d 476; *People v. Silva* (1978) 20 Cal.3d 489; *In re*

Smith (1970) 3 Cal.3d 192; U.S. Const. Amends. VI, VIII, XIV).

The delays in Petitioner's appeal have been caused by factors over which he has exercised no discretion or control whatsoever, and are overwhelmingly attributable to the system that is in place, established by state and federal law, which necessitates extremely time-consuming and exhaustive litigation. The delays have nothing to do with the exercise of any discretion on petitioner's part. *(Cf. McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, 1466-1467 [claim rejected because delay caused by prisoner "avail[ing] himself of procedures" for post-conviction review, implying volitional choice by the prisoner], adopted en banc, 57 F.3d 1493.) The delays here have been caused by "negligence or deliberate action by the State." (*Lackey v. Texas* (1995) 514 U.S. 1045 (mem. of Stevens, J.).) The complaint in this case was filed on September 5, 1990. Petitioner's judgment of death was imposed on April 9, 1993. Appellate counsel was appointed on November 18, 1997, more than four and a half years later. The record on appeal was certified on June 28, 1999.

The condemned prisoner's non-waivable right to prosecute the automatic appeal remedy provided by law in this state does not negate the cruel and degrading character of long-term confinement under judgment of death.

Execution of petitioner following confinement under sentence of death for this lengthy a period of time would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. (*Lackey v. Texas* (1995) 514 U.S. 1045 (Stevens, J., joined by Breyer, J., respecting the denial of certiorari).) (*See Knight v. Florida* (1998) 528 U.S. 990 (Breyer, J., respecting the denial of certiorari)); *Ceja v. Stewart* (9th Cir. 1998) 97 F.3d 1246 (Fletcher, J., dissenting from order denying stay of execution).) If petitioner is executed, his sentence will be more than ten

years of solitary confinement in a tiny cell in the most horrible portion of San Quentin prison – death row– followed by execution.

Carrying out petitioner's death sentence after this extraordinary delay is violative of the Eighth Amendment's Cruel and Unusual Punishments Clause in at least two respects: first, it constitutes cruel and unusual punishment to confine an individual, such as petitioner, on death row for this extremely prolonged period of time. (See, e.g., *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461; Ceja v. Stewart, supra, (Fletcher, J., dissenting from order denying stay of execution).) Second, after the passage of such a period of time since his conviction and judgment of death, the imposition of a sentence of death upon petitioner would violate the Eighth Amendment because the State's ability to exact retribution and to deter other murders by actually carrying out such a sentence is drastically diminished. (*Id.*)

Confinement under a sentence of death subjects a condemned inmate to extraordinary psychological duress, as well as the extreme physical and social restrictions inherent in life on death row. Accordingly, such confinement, in and of itself, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

Over a century ago, the United States Supreme Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." (*In re Medley* (1890) 134 U.S. 160, 172.)

In Medley, the period of uncertainty was just four weeks. As recognized by Justice Stevens, Medley's description should apply with even greater force in a case such as petitioner's, involving a delay that has lasted over thirteen years. (*Lackey v. Texas*, *supra*, (Stevens, J., joined by Breyer, J., respecting the denial of certiorari).)

This Court reached a similar conclusion in *People v. Anderson* (1972) 6 Cal.3d 628, 649: "The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."

The penological justification for carrying out an execution disappears when an extraordinary period of time has elapsed between the conviction and the proposed execution date, and actually executing a defendant under such circumstances is an inherently excessive punishment that no longer serves any legitimate purpose. (*Ceja v. Stewart, supra*, (Fletcher, J., dissenting from order denying stay of execution); *see also Furman v. Georgia* (1972) 408 U.S. 238, 312 [White, J., concurring].)

The imposition of a sentence of death must serve legitimate and substantial penological goals in order to survive Eighth Amendment scrutiny. When the death penalty "ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernable social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." (*Furman v. Georgia*, supra, [(White, J., concurring]; *see also Gregg v. Georgia* (1976) 428 U.S. 153, 183 ["The sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering."].)

In order to survive Eighth Amendment scrutiny, "the imposition of the death penalty must serve some legitimate penological end that could not

otherwise be accomplished. If 'the punishment serves no penal purpose more effectively than a less severe punishment, *Furman v. Georgia, supra*, at. 280, [Brennan, J., concurring], then it is unnecessarily excessive within the meaning of the Punishments Clause."

The penological justifications that can support a legitimate application of the death penalty are twofold: "retribution and deterrence of capital crimes by prospective offenders." (*Gregg v. Georgia, supra*, at 183.) Retribution, as defined by the United States Supreme Court, means the "expression of society's moral outrage at particularly offensive behavior." (*Id*).

The ability of the State of California to further the ends of retribution and deterrence has been drastically diminished here as a result of the extraordinary period of time that has elapsed since the date of petitioner's conviction and judgment of death. "It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death . . . . [A]fter such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. . . . [T]he additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal." (*Lackey v. Texas, supra*, [Stevens, J., joined by Breyer, J., respecting the denial of certiorari]; *see also Coleman v. Balkcom* (1981) 451 U.S. 949, 952, [Stevens, J., respecting denial of certiorari] ["the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself"].)

Because it would serve no legitimate penological interest to execute petitioner after this passage of time and because petitioner's confinement on death row for over ten years, in and of itself, constitutes cruel and unusual

punishment, execution of petitioner is prohibited by the Eighth Amendment's Cruel and Unusual Punishments Clause.

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

In an earlier generation, prior to the adoption and development of international human rights law, this Court rejected a somewhat similar claim. (*People v. Chessman* (1959) 52 Cal.2d 467, 498-500.) But the developing international consensus demonstrates that, in addition to being cruel and degrading, what the Europeans refer to as the "death row phenomenon" in the United States is also "unusual" within the meaning of the Eighth Amendment and the corresponding provision of the California Constitution, entitling petitioner to relief for that reason as well.

While the Ninth Circuit rejected a claim of this type in *Richmond v. Lewis* (9th Cir. 1990) 948 F.2d 1473, 1491-1492, [rev'd. on other grounds, 506 U.S. 40 (1992), vacated 986 F.2d 1583 (1993)], that rejection was deprived of persuasive force when the Arizona Supreme Court subsequently reduced the death sentence of the defendant in that case to a sentence of life imprisonment, in part because he had changed during his excessively long

confinement on death row. (*State v. Richmond* (1994) 180 Ariz. 573 [886 P.2d 1329].)

Further, the process used to implement petitioner's death sentence violates international treaties and laws that prohibit cruel and unusual punishment, including, but not limited to, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention), adopted by the General Assembly of the United Nations on December 10, 1984, and ratified by the United States ten years later. (United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984).) The length of petitioner's confinement on death row, along with the constitutionally inadequate guilt and penalty determinations in his case, have caused him prolonged and extreme mental torture and degradation, and denied him due process, in violation of international treaties and law.

Article 1 of the Torture Convention defines torture, in part, as any act by which severe pain or suffering is intentionally inflicted on a person by a public official. (United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984).) Pain or suffering may only be inflicted upon a person by a public official if the punishment is incidental to a lawful sanction. Id. Petitioner has made a prima facie showing that his convictions and death sentence were obtained in violation of federal and state law.

In addition, petitioner has been, and will continue to be, subjected to unlawful pain and suffering due to his prolonged, uncertain confinement on death row. "The devastating, degrading fear that is imposed on the condemned for months and years is a punishment more terrible than death."

(Camus, Reflections on the Guillotine, in Resistance, Rebellion and Death 173, 200 (1961).) The international community has increasingly recognized that prolonged confinement under a death sentence is cruel and unusual, and in violation of international human rights law. (*Pratt v. Attorney General for Jamaica*, 4 All.E.R. 769 (Privy Council); *Soering v. United Kingdom*, 11 E.H.R.R. 439, ¶ 111 (Euro. Ct. of Human Rights) [United Kingdom refuses to extradite German national under indictment for capital murder in Virginia in the absence of assurances that he would not be sentenced to death].)

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

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

Petitioner's death sentence must be vacated permanently, and/or a stay of execution must be entered permanently.

CLAIM XXXI: PETITIONER CANNOT BE LAWFULLY EXECUTED BECAUSE THE METHOD OF EXECUTION IN CALIFORNIA IS FORBIDDEN BY STATE, FEDERAL AND INTERNATIONAL LAW

Petitioner's sentence of death is illegal and unconstitutional under

the Eighth and Fourteenth Amendments to the United States Constitution, because execution by lethal injection, the method by which the State of California plans to execute him, violates the prohibition of cruel and unusual punishment.

The facts supporting this claim, among others to be developed after full investigation, discovery, adequate funding, and access to this Court's subpoena power and other available court processes, including an evidentiary hearing to further develop and support the merits of this claim, are:

The State of California plans to execute petitioner by means of lethal injection. In 1992, California added as an alternative means of execution "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections." (Pen. Code, § 3604.) As amended in 1992, Penal Code section 3604 provides that "[p]ersons sentenced to death prior to or after the operative date of this subdivision shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection." As amended, section 3604 further provides that "if either manner of execution . . . is held invalid, the punishment of death shall be imposed by the alternate means . . . ."

In 1996, the California Legislature amended Penal Code section 3604 to provide that "if a person under sentence of death does not choose either lethal gas or lethal injection . . . , the penalty of death shall be imposed by lethal injection." (See 15 Cal. Code Regs. § 3349.)

On October 4, 1994, the United States District Court for the Northern District of California ruled in *Fierro v. Gomez* (N.D. Cal. 1994) 865 F.Supp. 1387, that the use of lethal gas is cruel and unusual punishment and thus violates the constitution. In 1996, the Ninth Circuit affirmed the

district court's conclusions in Fierro, concluding that "execution by lethal gas under the California protocol is unconstitutionally cruel and unusual and violates the Eighth and Fourteenth Amendments." (*Fierro v. Gomez* (9th Cir. 1996) 77 F.3d 301, 309, vacated (9th Cir. 1998) 147 F.3d 1138.) The Ninth Circuit also permanently enjoined the State of California from administering lethal gas. (Id.) Accordingly, lethal injection is the only method of execution currently authorized in California. (See California Execution Procedures, appended as Exhibit 64.)

In 1996, the Ninth Circuit concluded in *Bonin v. Calderon* (9th Cir. 1996) 77 F.3d 1155, 1163, that because the use of lethal gas has been held invalid by the Ninth Circuit, a California prisoner sentenced to death has no state-created constitutionally protected liberty interest to choose his method of execution under Penal Code section 3604(d). Under operation of California law, the Ninth Circuit's invalidation of the use of lethal gas as a means of execution leaves lethal injection as the sole means of execution to be implemented by the state. Because Bonin did not argue that execution by lethal injection is unconstitutional, the Ninth Circuit concluded, with no discussion nor analysis, that the method of execution to be implemented in his case was applied constitutionally. (Id.)

The lethal injection method of execution is authorized to be used in thirty-five states in addition to California. From 1976 to November 15, 2001, there were at least 579 executions by lethal injection. Lethal injection executions have been carried out in at least the following states: Arizona, Arkansas, Delaware, Idaho, Illinois, Louisiana, Maryland, Missouri, Montana, Nevada, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Virginia and Wyoming.

Consequently, there is a growing body of evidence, both scientific and anecdotal, concerning this method of execution, the effects of lethal

injection on the inmates who are executed by this procedure, and the many instances in which the procedures fail, causing botched, painful, prolonged and torturous deaths for these condemned men.

Both scientific evidence and eyewitness accounts support the proposition that death by lethal injection can be an extraordinarily painful death, and that it is therefore in violation of the prohibition against cruel and unusual punishment set forth in the Eighth Amendment to the United States Constitution. The Eighth Amendment is applicable to the states through the Fourteenth Amendment. (Robinson v. California (1962) 370 U.S. 660.)

The chemicals authorized to be used in California's lethal injection procedure are extremely volatile and can cause complications even when administered correctly. The procedure exposes the inmate to substantial and grave risks of prolonged and extreme infliction of pain if these drugs are not administered correctly.

Medical doctors are prohibited from participating in executions on ethical grounds. The Code of Medical Ethics was set forth in the Hippocratic Oath in the Fifth Century B.C. and requires the preservation of life and the cessation of pain above all other values.[64] Medical doctors may not help the state kill an inmate.[65] The American Nurses Association also

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The Oath provides: "I will follow the method of treatment which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to anyone if asked, nor suggest any such counsel."

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During the American Medical Association's annual meeting in July 1980, their House of Delegates adopted the following resolution: "A physician, as a member of a profession dedicated to the preservation of life when there is hope of doing so, should not be a participant in a legally authorized execution. [However, a] physician may make a determination or

forbids members from participating in executions.

The first lethal injection execution in the United States took place in 1982 and was plagued by mishaps from the outset. Because of several botched executions, the New Jersey Department of Corrections contacted an expert in execution machinery and asked him to invent a machine to minimize the risk of human error. Fred Leuchter's lethal injection machine, designed to eliminate "execution glitches," was first used on January 6, 1989, for an execution in Missouri.

The dosages to be administered are not specified by California statute, but rather "by standards established under the direction of the Department of Corrections." (Pen. Code, § 3604(a).)

The three drugs commonly used in lethal injections are sodium pentothal, pancuronium bromide and potassium chloride.

As of March 8, 2003, the California Department of Corrections website confirmed that California prisoners are put to death with 5.0 grams of sodium pentothal, 50 cc of pancuronium bromide, and 50 cc of potastium chloride. (See California Execution Procedures, appended as Exhibit 64.)

Sodium pentothal renders the inmate unconscious. Pancuronium bromide then paralyzes the chest wall muscles and diaphragm so that the inmate can no longer breathe. Finally, potassium chloride causes a cardiac arrhythmia which results in ineffective pumping of blood by the heart and, ultimately, cardiac arrest.

The procedures by which the State of California plans to inject chemicals into the body are so flawed that the inmate will not be executed humanely, so as to avoid cruel and unusual punishment.

Death by lethal injection involves the selection of chemical dosages

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certification of death as currently provided by law in any situation."

and combinations of drugs by untrained or improperly skilled persons. Consequently, non-physicians are making medication dosing decisions and prescriptions that must otherwise be made by physicians under the law.

Since medical doctors may not participate or aid in the execution of a human being on ethical grounds, untrained or improperly skilled, non-medical personnel are making what would ordinarily be informed medical decisions concerning dosages and combinations of drugs to achieve the desired result.

The effects of the lethal injection chemicals on the human body at various dosages are medical and scientific matters, and properly the subject of medical decision-making. Moreover, the efficacy of the drugs will vary on different individuals depending on many factors and variables, which would ordinarily be monitored by medical personnel.

There is a risk that the dosages selected by untrained persons may be inadequate for the purposes for which they were selected, may result in unanticipated or inappropriate effects in a particular individual for medical or other reasons, and may inflict unnecessarily extreme pain and suffering.

There is a risk that the order and timing of the administration of the chemicals would greatly increase the risk of unnecessarily severe physical pain and/or mental suffering.

The desired effects of the chemical agents to be used for execution by lethal injection in California may be altered by inappropriate selection, storage and handling.

Improperly selected, stored and/or handled chemicals will lose potency, and thus fail to achieve the intended results or inflict unnecessary, extreme pain and suffering in the process. Improperly selected, stored, and/or handled chemicals will be or become contaminated, altering the desired effects and resulting in the infliction of unnecessary, extreme pain

and suffering. California provides inadequate controls to ensure that the chemical agents selected to achieve execution by lethal injection are properly selected, stored and handled.

Since medical doctors cannot participate in the execution process, non-medical personnel will necessarily be relied upon to carry out the physical procedures required to execute petitioner.

These non-medical death technicians will lack the training, skill and experience needed to effectively, efficiently and properly prepare the apparatus necessary to execute petitioner, prepare him physically for execution, ensure that he is restrained in a manner that will not impede the flow of chemicals and result in a prolonged and painful death, insert the intravenous catheter properly in a healthy vein so that chemicals enter the blood stream and do not infiltrate surrounding tissues, and administer the intravenous drip properly so that unconsciousness and death follow quickly and painlessly.

Moreover, inadequately skilled and trained death technicians are unequipped to deal effectively with any problems that arise during the procedure. They may fail to recognize problems concerning the administration of the lethal injection. Once problems are recognized, these untrained death technicians may not know how to correct the problems or mistakes. Their lack of adequate skill and training may unnecessarily prolong the pain and suffering inherent in an execution that goes awry.

The use of unskilled and improperly trained death technicians to conduct execution by lethal injection and the lack of adequate procedures to ensure that such executions are humanely carried out have resulted in the unwarranted infliction of extreme pain, resulting in a cruel, unusual, and inhumane death for the inmate in numerous cases across the United States in recent years.

In 1982, Charles Brooks of Texas was the first person executed by lethal injection in the United States. The Warden of the Texas prison reportedly mixed all three chemicals into a single syringe. The chemicals had precipitated; thus, the Warden's initial attempt to inject the deadly mixture into Brooks failed. On March 13, 1985, Steven Peter Morin laid on a gurney for forty-five minutes while his Texas executioners repeatedly pricked his arms and legs with a needle in search of a vein suitable for the lethal injection. (Michael Graczyk, "Convicted Killer in Texas Waits 45 Minutes Before Injection is Given," Gainesville Sun, March 14, 1985; "Murderer of Three Women is Executed in Texas," New York Times, March 14, 1985.) Problems with the execution prompted Texas officials to review their lethal injection procedures for inmates with a history of drug abuse. (Id.)

Over a year later, on August 20, 1986, Texas officials experienced such difficulty with the procedure that Randy Wools had to help his executioners find a good vein for the execution. ("Texas Executes Murderer," Las Vegas Sun, August 20, 1986.)

Similarly, on June 24, 1987, in Texas, Elliot Johnson laid awake and fully conscious for thirty-five minutes while Texas executioners searched for a place to insert the needle. On December 13, 1988, in Texas, Raymond Landry was pronounced dead 40 minutes after being strapped to the execution gurney and 24 minutes after the drugs first started flowing into his arms. Two minutes into the execution, the syringe came out of Landry's vein, spraying the deadly chemicals across the room toward witnesses. The execution team had to reinsert the catheter into the vein. The curtain was pulled for 14 minutes so that witnesses could not observe the intermission. (Michael Graczyk, "Landry Executed for '82 Robbery Slaying," Dallas Morning News, December 13, 1988; Michael Graczyk, "Drawn-Out

Execution Dismays Texas Inmates," Dallas Morning News, December 15, 1988.)

On May 24, 1989, in Huntsville, Texas, Stephen McCoy had such a violent physical reaction to the drugs (heaving chest, gasping, choking, etc.) that one of the witnesses fainted, crashing into and knocking over another witness. Karen Zellars, the Houston attorney who represented McCoy and witnessed the execution, thought the fainting would catalyze a chain reaction among the witnesses. The Texas Attorney General admitted that the inmate "seemed to have a somewhat stronger reaction," adding, "The drugs might have been administered in a heavier dose or more rapidly." ("Man Put to Death for Texas Murder," New York Times, May 25, 1989; "Witnesses to an Execution," Houston Chronicle, May 27, 1989.)

On January 24, 1992, in Varner, Arkansas, it took the staff more than 50 minutes to find a suitable vein in Rickey Ray Rector's arm. Witnesses were not permitted to view this scene, but reported hearing Rector's loud moans throughout the process. During the ordeal Rector, who suffered serious brain damage from a lobotomy, tried to help staff find a patent vein. The administrator of the State's Department of Corrections Medical Programs said, as paraphrased by a newspaper reporter, "[T]he moans came as a team of two medical people, increased to five, worked on both sides of Rector's body to find a suitable vein." The administrator said that may have contributed to his occasional outbursts. (Joe Farmer, "Rector, 40, Executed for Officer's Slaying," Arkansas Democrat-Gazette, January 25, 1995; Sonja Clinesmith, "Moans Pierced Silence During Wait," Arkansas Democrat-Gazette, January 26, 1992.)

On March 10, 1992, in McAlester, Oklahoma, Robyn Lee Parks had a violent reaction to the drugs used in the lethal injection. Two minutes after the drugs were administered, the muscles in his jaw, neck and

abdomen began to react spasmodically for approximately 45 seconds. Parks continued to gasp and violently gag. Death came eleven minutes after the drugs were administered. Tulsa World reporter Wayne Greene said, "The death looked scary and ugly." ("Witnesses Comment on Parks' Execution," Durant Democrat, March 10, 1992; "Dying Parks Gasped for Life," The Daily Oklahoman, March 11, 1992; "Another U.S. Execution Amid Criticism Abroad," New York Times, April 24, 1992.)

On April 23, 1992, Billy Wayne White died 47 minutes after his executioners strapped him to a gurney in Huntsville, Texas. White tried to help prison officials as they struggled to find a vein suitable to inject the lethal chemicals. ("Man Executed in '76 Slaying After Last Appeals Rejected," Austin (Tex) American-Statesman, April 23, 1992; "Killer Executed by Lethal Injection," Gainesville Sun, April 24, 1992; Michael Graczyk, "Veins Delay Execution 40 Minutes," Austin American-Statesman, April 24, 1992; Kathy Fair, "White Was Helpful at Execution," Houston Chronicle, April 24, 1992.)

On May 7, 1992, in Texas, Justin Lee May had a violent reaction to the lethal drugs. According to Robert Wernsman, a reporter for the Item in Huntsville, Texas, May "gasped, coughed and reared against his heavy leather restraints, coughing once again before his body froze . . . ." Associated Press reporter Michael Graczyk wrote, "He went into a coughing spasm, groaned and gasped, lifted his head from the death chamber gurney and would have arched his back, if he had not been belted down. After he stopped breathing, his eyes and mouth remained open." (Michael Graczyk, "Convicted Texas Killer Receives Lethal Injection," (Plainview, Texas) Herald, May 7, 1992; "Convicted Killer May Dies," (Huntsville, Texas) Item, May 7, 1992; "Convicted Killer Dies Gasping," San Antonio Light, May 8, 1992; Michael Graczyk, "Convicted Killer Gets

Lethal Injection," (Denison, Texas) Herald, May 8, 1992.)

On May 10, 1994, in Illinois, after the execution had begun, one of the three lethal drugs used to execute John Wayne Gacy clogged the tube, preventing the flow of the drugs. Blinds were drawn to block the scene, thereby obstructing the witnesses' view. The clogged tube was replaced with a new one, the blinds were reopened, and the execution resumed. Anesthesiologists blamed the problem on the inexperience of prison officials who conducted the execution. (Rob Karwath and Susan Kuczka, "Gacy Execution Delay Blamed on Clogged T.B. Tube," Chicago Tribune, p. 1, May 11, 1994.)

On May 3, 1995, Emmitt Foster was executed by the State of Missouri. Foster was not pronounced dead until 29 minutes after the executioners began the flow of lethal chemicals into his arm. Seven minutes after the chemicals began to flow, the blinds were closed to prohibit the witnesses' view. Executioners finally reopened the blinds three minutes after Foster was pronounced dead. According to the coroner who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the execution gurney. The coroner believed that the tightness stopped the flow of chemicals into the veins. Several minutes after the strap was loosened, death was pronounced. The coroner entered the death chamber 20 minutes after the execution began, noticed the problem, and told the officials to loosen the strap so that the execution could proceed. ("Witnesses to a Botched Execution," St. Louis Post-Dispatch, May 8, 1995, at 6B.) In an editorial, the St. Louis Post-Dispatch called the execution "a particularly sordid chapter in Missouri's capital punishment experience." (Id.)

On January 23, 1996, in Virginia, Richard Townes, Jr. was killed by lethal injection. This execution was delayed for 22 minutes while medical

personnel struggled to find a vein large enough for the needle. After unsuccessful attempts to insert the needle through the arms, the needle was finally inserted through the top of Mr. Townes's right foot. "Store Clerk's Killer Executed in Virginia," New York Times, Jan. 25, 1996, at A19.)

On July 18, 1996 in Indiana, Tommie J. Smith, was put to death by lethal injection. Because of unusually small veins, it took one hour and nine minutes for Smith to be pronounced dead after the execution team began sticking needles into his body. For sixteen minutes, the execution team failed to find adequate veins, and then a physician was called. Smith was given a local anesthetic and the physician twice attempted to insert the tube in Smith's neck. When that failed, an angio-catheter was inserted in Smith's foot. Only then were witnesses permitted to view the process. The lethal drugs were finally injected into Smith 49 minutes after the first attempts, and it took another 20 minutes before death was pronounced. (Sherri Edwards & Suzanne McBride, "Doctor's Aid in Injection Violated Ethics Rule: Physician Helped Insert the Lethal Tube in a Breach of AMA's Policy Forbidding Active Role in Execution," Indianapolis Star, July 19, 1996, at A1; Suzanne McBride, "Problem With Vein Delays Execution," Indianapolis News, July 18, 1996, at 1.)

On May 8, 1997 in Oklahoma Scott Dawn Carpenter was pronounced dead some 11 minutes after the lethal injection was administered. As the drugs took effect, Carpenter began to gasp and shake. "This was followed by a guttural sound, multiple spasms and gasping for air" until his body stopped moving, three minutes later. (Michael Overall & Michael Smith, "22-Year-Old Killer Gets Early Execution," Tulsa World, May 8, 1997, at A1.)

On April 23, 1998 in Texas Joseph Cannon died by lethal injection. It took two attempts to complete the execution. After making his final

statement, the execution process began. A vein in Cannon's arm collapsed and the needle popped out. Seeing this, Cannon lay back, closed his eyes, and exclaimed to the witnesses, "It's come undone." Officials then pulled a curtain to block the view of the witnesses, reopening it fifteen minutes later when a weeping Cannon made a second final statement and the execution process resumed. ("1st Try Fails to Execute Texas Death Row Inmate," Orlando Sentinel, Apr. 23, 1998, at A16; Michael Graczyk, "Texas Executes Man Who Killed San Antonio Attorney at Age 17," Austin American-Statesman, April 23, 1998, at B5.)

On June 28, 2000 in Missouri Bert Leroy Hunter had an unusual reaction to the lethal drugs, repeatedly coughing and gasping for air before he lapsed into unconsciousness. (David Scott, "Convicted Killer Who Once Asked to Die is Executed," Associated Press, June 28, 2000.)

On November 7, 2001 in Georgia Jose High was pronounced dead some one hour and nine minutes after the execution began. After attempting to find a useable vein for "15 to 20 minutes," the emergency medical technicians under contract to do the execution abandoned their efforts. Eventually, one needle was stuck in High's hand, and a physician was called in to insert a second needle between his shoulder and neck. (Rhonda Cook, "Gang Leader Executed by Injection Death Comes 25 Years after Boy, 11, Slain" Atlanta Journal Constitution, November 7, 2001, p. B1.)

The Eighth Amendment to the United States Constitution prohibits deliberate indifference to the known risks associated with a particular method of execution. (Cf. Estelle v. Gamble (1976) 429 U.S. 97, 106.) As illustrated in the above accounts and will be demonstrated in detail at an evidentiary hearing, following discovery, investigation, and other opportunities for full development of the factual basis for this claim, there

are known risks associated with the lethal injection method of execution, and the State of California has failed to take adequate measures to ensure against those risks.

The Eighth Amendment safeguards nothing less than the dignity of man, and prohibits methods of execution that involve the unnecessary and wanton infliction of pain. (Trop v. Dulles (1958) 356 U.S. 86, 100.)

To comply with constitutional requirements, the State must minimize the risk of unnecessary pain and suffering by taking all feasible measures to reduce the risk of error associated with the administration of capital punishment. (*Glass v. Louisiana* (1985) 471 U.S. 1080, 1086 [Brennan, J., dissenting]; *Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, 709-11 [Reinhart, J., dissenting]; *see also Zant v. Stephens* (1983) 462 U.S. 862, 884-85 [state must minimize risks of mistakes in administering capital punishment]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 [O'Connor, J., concurring].)

It is impossible to develop a method of execution by lethal injection that will work flawlessly in all persons given the individual factors which have to be accessed in each case. Petitioner should not be subjected to experimentation by the State of California in its attempt to figure out how best to kill a human being.

California's use of lethal injection to execute prisoners sentenced to death unnecessarily risks "unnecessary and wanton infliction of pain." (*Gregg v. Georgia* (1976) 428 U.S. 153, 173.) Such use constitutes cruel and unusual punishment, offends contemporary standards of human decency, and violates the Eighth Amendment to the United States Constitution.

CLAIM XXXII: PETITIONER'S CONVICTIONS AND DEATH SENTENCE MUST BE VACATED BECAUSE OF THE CUMULATIVE EFFECT OF ALL THE ERRORS AND CONSTITUTIONAL VIOLATIONS SHOWN IN THIS PETITION AND IN PETITIONER'S AUTOMATIC APPEALS AND PRIOR PETITION

Petitioner's confinement is illegal and unconstitutional under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 13, 15, 16, 17, 24, and 31 of the California Constitution, because the errors complained of in this petition compounded one another, and also compounded the errors shown in petitioner's automatic appeals and prior petition, resulting in a trial that was fundamentally unfair and in the imposition of cruel and unusual punishment.

Petitioner alleges the following facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim:

Petitioner incorporates by reference, as though fully set forth herein, all other allegations set forth in this petition and all exhibits submitted in support of this petition.

Each of the specific allegations of constitutional error in each claim and sub-claim of this petition requires the issuance of a writ of habeas corpus. Assuming arguendo that the Court finds that the individual allegations are, in and of themselves, insufficient to justify relief, the cumulative effect of the errors demonstrated by this petition, and all the more clearly, the cumulative effect of these errors and the errors set forth in the briefing submitted in petitioner's automatic appeals (No. S004653 and No. S020670) and in petitioner's initial habeas petition (S005412) compels reversal of the judgment and issuance of the writ. (*See, e.g., People v. Holt*

(1984) 37 Cal.3d. 436, 458-459 [discussing cumulative error on direct appeal].) When all of the errors and constitutional violations are considered together, it is clear that petitioner has been convicted and sentenced to death in violation of his constitutional rights to due process and a fair trial, to the effective assistance of counsel, to present a defense, to trial by jury, and to a fair and reliable guilt and penalty determinations, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, 16, and 17 of the California Constitution.

The prejudicial impact of each of the specific allegations of constitutional error presented in this petition and in petitioner's direct appeals and prior petition must be analyzed within the overall context of the evidence introduced against petitioner at trial. No single allegation of constitutional error is severable from any other allegation set forth in this petition and/or in petitioner's automatic appeal. "Where, as here, there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381, [citing United States v. Wallace (9th Cir. 1988) 848 F.2d 1464, 1476]; *see also United States v. Green* (9th Cir. 1981) 648 F.2d 587, 597 [combination of errors and lack of balancing probative value and prejudicial effect of testimony and lack of limiting instruction required reversal].) "In other words, a column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts." (*United States v. Sepulveda* (1st Cir. 1993) 15 F.3d 1161, 1196; *see also Taylor v. Kentucky* (1978) 436 U.S. 478, 486-488 & n. 15; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *Mak v. Blodgett* (9th Cir.

1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *In re Gay* (1998) 19 Cal.4th 771, 826; *People v. Hill* (1998) 17 Cal.4th 800, 844; *In re Jones* (1996) 13 Cal.4th 552, 583, 587; *People v. Ledesma* (1987) 43 Cal.3d 171, 214-227; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1075-1077.)

Petitioner hereby incorporates by reference the record on appeal, and each of the claims and arguments raised in his Opening Brief and Reply Brief in his related automatic appeals (No. S004653 and No. S020670) and initial habeas petition (S005412) and any appendices and exhibits referred to therein, as if fully set forth in this paragraph. Alternatively, petitioner requests that the Court take judicial notice of the same.

Petitioner also incorporates by reference every claim of this petition, and the exhibits incorporated therein, as if fully set forth in this paragraph.

If the state disputes any of the facts alleged herein, petitioner requests an evidentiary hearing to resolve the factual disputes.

Petitioner and his counsel believe that additional facts exist which would support this claim, but have been unable to adduce those facts because this Court has not provided petitioner with adequate funding for investigation, access to discovery or subpoena power, or an evidentiary hearing. Counsel requests an opportunity to supplement or amend this petition after petitioner has been afforded discovery, the disclosure of material evidence by the state, the use of the Court's subpoena power, funding, and an opportunity to investigate fully.

Petitioner's convictions, sentence, and confinement were obtained as the result of numerous errors constituting multiple violations of his fundamental constitutional rights at every phase of his trial, including the selection of a biased jury, the insufficiency of the evidence, the erroneous admission of evidence, the erroneous exclusion of evidence, the denial of

his right to the effective assistance of counsel, prosecutorial misconduct, spectator misconduct, judicial bias and serious instructional error.

Justice demands that petitioner's convictions and sentence of death be reversed because the cumulative effect of all the errors and violations alleged in the present petition and on his automatic appeal "was so prejudicial as to strike at the fundamental fairness of the trial." (*United States v. Parker* (6th Cir. 1993) 997 F.2d 219, 222 [citation omitted]; see also *United States v. Tory* (9th Cir. 1995) 52 F.3d 207, 211 [cumulative effect of errors deprived defendant of fair trial].)

This is also true of state law violations which may not independently rise to the level of a federal constitutional violation, (see, e.g., *Barclay v. Florida* (1983) 463 U.S. 969, 951); the cumulative effect of the state law errors in this case resulted in a denial of fundamental fairness and violate due process and equal protection guarantees under the Fourteenth Amendment. (See *Walker v. Engle* (6th Cir. 1983) 703 F.2d 903, 962.)

In light of the cumulative effect of all the errors and constitutional violations which occurred over the course of the proceedings in petitioner's case, petitioner's convictions and death sentence must be vacated to prevent a fundamental miscarriage of justice.

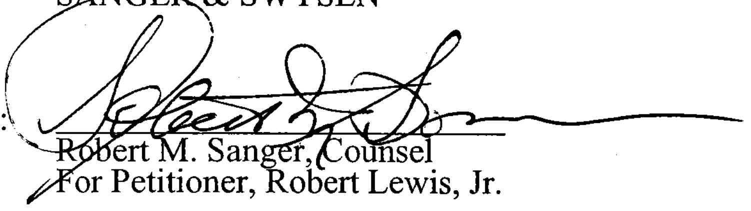
CONCLUSION

For all the reasons set forth in this brief, Petitioner's judgment of conviction and death should be reversed or, in the alternative, the sentence reduced to life without the possibility of parole under Penal Code sections 1260 and 1181 (7) and for such other and further relief as the Court may deem just and proper.

Dated: June 30, 2003

Respectfully Submitted,

SANGER & SWYSEN



By: ______________________
Robert M. Sanger, Counsel
For Petitioner, Robert Lewis, Jr.

PROOF OF SERVICE

I, the undersigned declare:

I am over the age of 18 years and not a party to the within action. I am employed in the County of Santa Barbara. My business address is 233 East Carrillo Street, Suite C, Santa Barbara, California, 93101.

On July 2, 2003, I served the foregoing document entitled: **PETITION FOR WRIT OF HABEAS CORPUS** on the interested parties in this action by depositing a true copy thereof as follows:

See Attached Service List

X **BY U.S. MAIL** - I am readily familiar with the firm's practice for collection of mail and processing of correspondence for mailing with the United States Postal Service. Such correspondence is deposited daily with the United States Postal Service in a sealed envelope with postage thereon fully prepaid and deposited during the ordinary course of business. Service made pursuant to this paragraph, upon motion of a party, shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit.

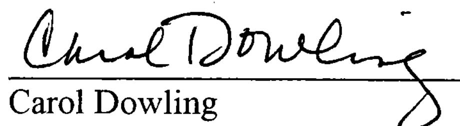
__ **BY FACSIMILE** -I caused the above-referenced document(s) to be transmitted via facsimile to the interested parties at ____________________.

__ **BY HAND** - I caused the document to be hand delivered to the interested parties at the address above.

X **STATE** - I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

____ **FEDERAL** - I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed July 2, 2003 at Santa Barbara, California.



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Robert Lewis, Jr.
(A copy will be served personally by counsel on
Mr. Lewis within 30 days of July 2, 2003)