No. S141210

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

In re

ABELINO MANRIQUEZ,

On Habeas Corpus.

(Related to People v. Manriquez,
Supreme Court No. S038073;

Los Angeles County Superior
Court No. YA004848)

Hon. Robert Armstrong,
Presiding

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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

Petitioner, ABELINO MANRIQUEZ ("Petitioner"), by and through undersigned counsel, petitions this Court for a Writ of Habeas Corpus and by this verified petition alleges as follows:

I. PROCEDURAL HISTORY AND BACKGROUND

1. By information filed April 26, 1991, in the Los Angeles County Superior Court, Petitioner was charged with seven counts of murder under section 187, subdivision (a) (Counts I-VII), three counts of attempted residential robbery under California Penal Code sections 211 and 664 (Counts VIII-X), and one count of residential burglary under section 459 (Count XI).[1] CT 653-66.[2] It was further alleged that each of those counts

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[1] All statutory citations are to the California Penal Code unless otherwise indicated.

[2] The Reporters' Transcript consists of 10 volumes, numbered consecutively from page 1 through page 2350. The Reporters' Transcript will be cited as "RT" followed by the page number. The Clerk's Transcript consists of four volumes, numbered consecutively from page 1 through page 971. The Clerk's Transcript will be cited as "CT" followed by the page number. There are also six sets of Clerk's Transcripts labeled "Supplemental" on the cover: Supplemental I consists of twelve volumes, numbered consecutively from page 1 through page 3269; Supplemental II consists of one volume, numbered from page 3270 through page 3343; Supplemental III consists of two volumes, numbered consecutively from page 3344 through page 3735; Supplemental 4 consists of one volume, numbered from page 3757 through page 3778; Supplemental 4A consists of

(Footnote Continued on Next Page.)

of murder was "a special circumstance within the meaning of California Penal Code section 190.2(a)(3)." CT 661. In addition, as to Counts V-VII, it was alleged that Petitioner committed each charged murder while engaged in the commission of a robbery and a residential burglary, "within the meaning of Penal Code section 190.2(a)(17)." CT 659-61.

2. The information also alleged several enhancements. Thus, it was alleged as to each count that Petitioner personally used a firearm, within the meaning of sections 1203.06(a)(1) and 12022.5, making each count a serious felony pursuant to section 1192.7(c)(8). CT 655-65. Further, it was alleged as to Counts VIII-XI that Petitioner personally inflicted great bodily injury on each of three identified victims, within the meaning of section 12022.7, making each count a serious felony within the meaning of section 1192.7(c)(8). CT 662-65.

3. On or about July 23, 1991, the People announced their intention to seek the death penalty against Petitioner. CT 699.

4. On or about June 8, 1992, Petitioner filed a "Notice of Motion to Sever Counts," which sought to have the matter severed into five

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(Footnote Continued from Previous Page.)

one volume, numbered from page 3787 through page 3789; and Supplemental V consists of one volume, numbered from page 1 through page 117. The Supplemental Clerk's Transcripts are cited herein as "CT Supp." followed by the number of the supplemental transcript and the page number.

separate cases for trial. CT 712-13. The trial court denied that motion without prejudice on June 11, 1992. CT 731; RT 86-87.

5. Also on June 11, 1992, the People moved to consolidate Counts V-XI of the Information with the charges set out in a separate information against Paciano Jacques ("Mingo") Ochoa. CT 731; RT 64-65. The Prosecutor asked the trial court to partially grant Petitioner's severance motion, by severing Counts I-IV of the Information, and to consolidate Counts V-XI with the charges against Ochoa. RT 68. Petitioner's counsel agreed to that proposal. RT 71. The trial court granted the People's motion to consolidate the cases and severed Counts I-IV from the consolidated case. CT 731; RT 72-73. Charges regarding Counts V-XI against Petitioner and Ochoa were then consolidated in Los Angeles County Superior court Case No. 48822. Accordingly, the instant trial involved only four counts charging murder.

6. On July 27, 1993, the prosecution filed a "Notice of Factors in Aggravation," CT 751-52, and then, on August 5, 1993, an "Amended Notice of Factors in Aggravation," CT 755.

7. On August 4, 1993, the trial court denied Petitioner's motion to sever the remaining counts for trial. CT 754; RT 165-66.

8. On August 9, 1993, jury selection commenced in Los Angeles County Superior Court, with the Honorable Robert Armstrong presiding. CT 758.

9. The trial commenced on August 23, 1993, with the opening statement of the prosecution. CT 780. The jury returned verdicts finding Petitioner guilty of first degree murder on each of the four counts, and also finding true the alleged special circumstance of multiple murder, on September 10, 1993. CT 886; RT 1968-71.

10. The penalty phase of the trial began on September 15, 1993. CT 890. On September 22, 1993, the jury returned verdicts of death on each of the four counts. CT 952.

11. On September 15, 1993, prior to the penalty phase Petitioner's motions for a new trial and/or for modification of the judgment were heard and denied. CT 956; RT 1974-82. Sentencing proceedings were held on November 16, 1993 and the court sentenced him to death. CT 956-57, 959-67.

12. On appeal to this Court, Petitioner argued that the joint trial violated his rights to due process and a fair trial because evidence of the four crimes was not cross-admissible; the evidence of some crimes was especially inflammatory; the joint trial involved capital offenses, mandating a higher level of scrutiny of the severance issue; strong charges were joined with weaker ones, creating a "spillover" effect; and the prosecution encouraged jurors to improperly cumulate evidence to determine Petitioner's guilt. Petitioner also argued that the trial court erroneously refused to give a requested limiting instruction regarding joinder of the

counts. This Court affirmed the judgment in its entirety on December 5, 2005. In doing so, it noted that its rejection of each argument "includes a determination that the alleged error does not warrant reversal under the [] federal Constitution." *People v. Manriquez*, 37 Cal. 4th 547, 574 n.14 (2005), *cert. denied*, 126 S.Ct. 2359 (2006) ("*Manriquez*"). Relying on section 954, the Court held that because the charges "are of the same class," the four murder counts were properly joined: "although the prosecution did not make a showing of cross-admissibility in support of joinder, the absence of such a showing did not require severance" and "no abridgment of defendant's right to due process appears." *Id.* The Court also held that the limiting instruction as given "adequately directed the jury to consider each crime separately." *Id.*

13. On February 17, 2006, Petitioner filed a Petition for Writ of Habeas Corpus with this Court and requested leave to amend the February 17, 2006 petition within the presumptive timelines period. On April 25, 2006, Respondent filed a Motion to Strike or Dismiss the petition. Petitioner opposed Respondent's motion. On October 25, 2006, this Court denied Respondent's motion.

14. Petitioner timely filed a petition for certiorari seeking United States Supreme Court review of the refusal to sever the four counts and the refusal to give an adequate limiting instruction. The Petition was denied on June 6, 2006. *Manriquez v. California*, 126 S.Ct. 2359 (2006).

II. STATEMENT OF FACTS

A. Guilt Phase Evidence

1. The Prosecution's Case-in-Chief

15. Petitioner was convicted of four counts of first-degree murder, each arising out of a separate incident.

a. The Las Playas Shooting

16. Count I concerned the shooting death of Miguel Garcia at the Las Playas restaurant in Paramount, California, at approximately 4:00 a.m. on January 22, 1989. Three witnesses, John Guardado, Laura Lozano, and Angelica Contreras, testified at trial. Two of them saw Petitioner at the restaurant that night, but none could identify him as the man who killed Garcia.

17. Guardado saw the shooting, but did not see the shooter's face, RT 843-44; Lozano saw Petitioner shortly before the shooting, but was not present when the shots were fired and did not see who fired them, RT 887-88, 899-00; and Contreras was in the back room during the shooting, but came out afterward and saw Petitioner holding a gun, CT 37.[3]

18. Guardado went to the Las Playas with Garcia, whom he knew

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[3] Trial Counsel and the Prosecutor stipulated to the unavailability of Contreras to testify at trial. Therefore, a videotape of her testimony from the preliminary examination was played for the jury. The record cites concerning her testimony are to the transcript of that testimony in the Clerk's Transcript.

as Miguel or "Kaliman," sometime after 2:00 a.m. the night of the shooting. RT 834-36. Guardado was "dazed out, drunk" that night, and he "ducked" when he saw someone pull out a gun, so he "didn't see much" of what happened. RT 836, 841-43, 850.

19. Guardado said Garcia got up from their booth shortly before the shooting and crossed the room to talk to some men. RT 838, 841-42. Guardado did not pay attention to Garcia, and did not hear any of his conversation with the men; he simply saw Garcia go over and sit down. RT 869-70.

20. A while after Garcia moved to that other table, "two guys" got up from their table and walked toward the exit. RT 842. Garcia rose up as the men passed, and one of them pulled a gun from his waist and shot him. RT 843. The man fired six or seven shots, then ran out. RT 844, 852.

21. Guardado described what the shooter was wearing but he did not see his face, or that of the other man with him before the shooting. RT 843-44. He could only say that the shooter had a medium build and was neither short nor tall; he did not remember anything else. RT 856-57. After the shooting, he checked that Garcia was dead, and then left. RT 853.

22. Sometime later, Guardado talked to some detectives about the shooting. RT 859, 862. He told them that the gun used in the shooting was a "chrome one." RT 862. He did not recognize anyone in the photographs he was later shown by the police, or in the photographs he was shown at

trial. RT 864-66, 978-79.

23. Lozano was a waitress at the Las Playas that night and saw Petitioner about 15 minutes before the shooting. RT 883, 885, 899-00. She never saw him again that night, and had never seen him before. RT 904. Lozano saw Garcia go up to Petitioner and ask something, then heard Petitioner say, "Leave me alone, I have nothing to do with you." RT 905-06, 912-13.

24. At around 4:40 a.m., while in the kitchen, Lozano heard shots and a bullet flying past. RT 887-88. When she looked out into the restaurant, she saw Garcia "falling down on the floor," and saw people leaving, including a man with a gun. RT 889-90.

25. Contreras was also working as a waitress on the night of the shooting. She saw Garcia come in and waited on him. CT 8-10. That evening she saw Garcia standing and arguing with a man she knew as "El Gatito," who she had heard was Petitioner's friend. CT 10-12, 16-17. The men did not strike each other, they were "only arguing . . . ." CT 13. Shortly thereafter, Contreras went into a back room; she later heard shots and came out, at which time she saw Garcia lying on the floor. CT 12.

26. Contreras also saw people running out of the restaurant and a man holding a gun in front of his chest, pointing it back and forth at the "people who were coming after him." CT 13-14, 17, 37. Contreras saw this man with a gun and identified him as Petitioner; she had seen Petitioner

before, both that night and about a week earlier. CT 13-16. She also testified that the gun marked as People's Exhibit 7 looked like the one held by Petitioner. CT 26.

27. Detective Ronald Riordan, a Sheriff's Department homicide investigator, arrived at the scene around 6:30 a.m. on January 22, 1989. RT 941-42. He checked the corpse, and observed several gunshot wounds to the body and head. RT 946. He found five expended shell casings, and observed two bullet holes in the west wall; he also found the bullet that made one of those holes. RT 949-50, 954-56. Two expended .380 caliber bullets were removed from Garcia's body, and he testified that they were consistent in size with the casings and bullets recovered at the crime scene. RT 966-69.

28. At some point, Detective Riordan obtained a .380 caliber pistol that was seized from Petitioner during an unrelated arrest at the La Ruleta Bar on March 2, 1989, and had it checked "against the [evidence from the] Las Playas murder." RT 915-20, 975-76. Exh. 60, Peo. Trial Exhibit 7: Photo of .380 Llama Semi-Automatic Pistol. The ballistics examiner, Dwight Van Horn, testified that the .380 caliber rounds recovered at the Las Playas scene were fired from that gun. RT 1003, 1005, 1020-24.

29. When police found the gun on Petitioner during the March 2, 1989 arrest at the La Ruleta Bar, they also found a one dollar bill folded into a bindle. RT 923-27. A bindle was also found at the Las Playas scene.

RT 960-62. Trial Counsel and the Prosecutor stipulated that both dollar bills contained cocaine residue. RT 990.

30. Detective John Laurie testified that he, Detective Riordan, and Officer Joe Olmedo interviewed Petitioner about the Las Playas shooting around February 24, 1990. RT 1571-72. According to Detective Laurie, Petitioner said that he went to the Las Playas that night with a man named Francisco Manzano; Petitioner also said that the victim (Garcia) tried to pick a fight with him. RT 1574-75. Petitioner said that when he and Manzano tried to leave, Garcia again tried to start a fight, and Manzano shot him with a .380 caliber semi-automatic pistol. Petitioner said he then held the crowd "at bay" with a nine millimeter handgun. RT 1574-75.

31. California Highway Patrol Officer Ronald DeChamplain testified that, during an unrelated traffic stop that he effectuated on January 6, 1990 for suspicion of driving under the influence, Petitioner used the name Francisco Manzano when he was booked. RT 1687-89.

b. The Fort Knots Shooting

32. Count II involved the fatal shooting of George Martinez at the Fort Knots bar in South Gate, California, on February 22, 1989. Martinez was working as a doorman at the bar and was killed by a reportedly Hispanic male who stepped in the front door, fired several shots, and fled. RT 1086, 1099.

33. Deneen Baker, a dancer and waitress, said that at around 8:00

p.m., about an hour and a half before the shooting, a customer touched her while she was on stage. RT 1035-36, 1044-46. She looked at him and then asked the doorman to throw him out. RT 1047. She had served the man two drinks earlier, but did not know if he was intoxicated. RT 1077. Baker identified Petitioner from a photographic lineup approximately thirteen months after the incident and in court as the man who touched her. RT 1048-49, 1052-55.

34. Baker never saw that man again after he was thrown out, but she heard that he was the one who shot Martinez. RT 1066-67. She was there during the shooting, but did not see the shooter. RT 1050.

35. Mario Medel, who was managing the Fort Knots Bar on February 22, 1989, testified that the shooting occurred at around 10 to 10:30 p.m. RT 1085-86. He said that around 5 or 5:30 p.m., a male customer improperly touched Baker, and that he and Martinez threw the man out. RT 1087, 1117.

36. The man "took a swing" at Medel when they threw him out, and Medel hit him back. RT 1089-90. The man refused to leave, even though both Medel and Martinez were bigger and stronger than he was. Medel testified that this man kept trying to get back inside "about every five or ten minutes" over the next several hours. RT 1113, 1120-21, 1123.

37. On one of those occasions, Medel found Martinez and the man wrestling in front of the club, and broke them up. RT 1093. The man

started talking about coming back with a gun, but Medel was unconcerned. RT 1093-95. He said the man had "had too much to drink." RT 1115.

38. The man came back later, and Medel "threw him out" again. RT 1095. Still later, Medel found Martinez and the man struggling yet again, in the same location outside the bar. RT 1095. When Medel hit him, the man fell backward and struck his head on a little wall, which "knocked him out a little bit." RT 1096. Medel testified that the man bled from the head where he hit his head on the wall, and Medel later pointed that blood out to the police. RT 1124-25.

39. At about 10 to 10:30 p.m. that night, Medel and Martinez were at the front door when Martinez said: "Mario, he is back." RT 1091, 1098-99, 1118.[4] Medel saw the guy walking in, then saw him pull out a gun and shoot Martinez. RT 1098-99, 1101.

40. Medel looked at the man they threw out of the bar several times that night, and also saw the face of the man who shot Martinez; he was "sure [that he] was the same guy." RT 1101-02. He identified Petitioner from a photo lineup approximately one year and ten months after the incident and in court as the man who shot Martinez. RT 1102-04.

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[4] The entryway to the Fort Knots has mirrors that provide a view of people entering the door. There are also lights "[s]o you can distinguish who is coming in . . . ." RT 1091-1092. Martinez used a flashlight to check ID's at the door, because it is a "dim spot." RT 1146-1147.

41. Mark Herbert was a patron at the Fort Knots that night and saw a man get thrown out. RT 1149-50. He did not see the man touch Baker, but saw him being escorted out, about two to two and a half hours before Martinez was shot. RT 1153. He also saw the man try to come back in twice after that, RT 1152, and saw Medel and Martinez scuffle with him outside the bar, RT 1154-55. He had no doubt that Petitioner was the man he saw thrown out, but he did not see who shot Martinez. RT 1156-57.

42. Herbert was sitting by the doorway most of that night. RT 1152-53, 1164-65. When the shooting occurred, he was sitting next to a dancer named Barbara Quijada. RT 1157, 1161-62. Herbert knew someone came in just before the shooting, but all he saw was "two flashes from a gun." RT 1157-58. He said Quijada was talking to him at the time of the shooting, and he thought she was looking at him, not the shooter. RT 1173. Hebert identified Petitioner from a photo lineup approximately one year and ten months after the incident and in court as the man whom he saw being escorted out. RT 1175, 1156-57.

43. Barbara Quijada, a waitress at the bar, testified that she was talking to Martinez when the shooter came in, and that she glanced at the mirror when the door opened. RT 1184, 1186-87, 1189, 1223-24. She heard Martinez say: "Hey Mario, there's that guy again," which didn't faze her because she did not know what he was talking about, but she looked at the man coming in. RT 1190, 1224.

44. Looking in the mirror, Quijada saw Martinez approach the man, who reached inside his jacket as if to retrieve his wallet. RT 1191. Suddenly, "there was a real like rapid fire, pop, pop, pop, and a whole bunch of smoke" she thought was firecrackers. RT 1191-93. Everyone started "screaming, 'gun'," and she saw Martinez slide to the floor as the man "fir[ed] in a couple of random shots . . . ." RT 1191-93. When she turned around, the gun was near her head, and she dropped and crawled away. RT 1191-93. That was the last she saw of the shooter. RT 1228, 1231. She did not concentrate on the man when he came in, or observe him more closely than anyone else walking to the door. RT 1247-48. Quijada testified that the shooting happened very quickly and that it "was just all in one movement." RT 1235.

45. Quijada testified that she saw the shooter through a mirror in the entryway and then again in person. RT 1229. Quijada assisted in the preparation of a composite sketch of the shooter several days after the incident. RT 1201-02. She identified Petitioner from a photo lineup approximately a year after the incident and in court. RT 1205-09.

46. Detective Reynold Verdugo investigated the Fort Knots killing with his partner Detective Jansen. RT 1428. Detective Verdugo collected two expended shell casings in the entryway where Martinez was shot, and recovered a "coroner's projectile" at the autopsy; another projectile was discovered later by the bar's "cleanup personnel." RT 1431-32.

47. Detective Verdugo also examined various areas in and around the night club for blood samples. RT 1433-35. There were no bloodstains from anyone except the victim around his body or in most of the other relevant sites at the scene. RT 1433-35. However, there were "relatively fresh" stains in the "aerial (sic) right in front of the" building, where the man who was thrown out of the bar fell and cut his head. RT 1436-42. Those stains, and all the other usable stains found at the scene, were analyzed and tested. The results of those tests came back after trial had begun and none of those samples matched Petitioner's or the victim's blood. RT 1437-39, 1453. Trial Counsel and the Prosecutor stipulated to this effect. RT 1453.

c. The Rita Motel Shooting

48. Count III related to the shooting of Efrem Baldia at the Rita Motel in Compton, California, on November 29, 1989. The only eyewitness to the shooting, Ramiro Gamboa Salazar, said that Petitioner shot Baldia. RT 1308.

49. Nicolas Venegas and Sylvia Tinoco visited Petitioner at the Rita Motel on the morning of November 29, 1989. RT 1257, 1260-61. Venegas testified that three of them spent the morning in Petitioner's room, drinking beer and taking cocaine. RT 1273. During that time, Venegas saw a .45 caliber gun under Petitioner's pillow. RT 1261, 1266. At some point, Venegas went outside, where he saw Baldia and another man drive

into the parking lot and park almost in front of Petitioner's room. RT 1262-63, 1265, 1277-78.

50. Although Tinoco was Petitioner's girlfriend, she and Baldia were also involved in a romantic relationship; Venegas had seen Baldia's car parked at Tinoco's house and had seen them "hugging and all that." RT 1254-55, 1264-65. Salazar also testified that Tinoco "went around" as a girlfriend with both Baldia and Petitioner. RT 1313-14.

51. Venegas saw Baldia arrive with Salazar; he went to speak to Baldia, and they stood beside the car talking. RT 1278. Venegas was afraid there would be problems if Baldia and Petitioner met, because both of them were involved with Tinoco, so he tried to convince Baldia to leave. RT 1263-64, 1266. About five minutes after Baldia arrived, Petitioner came outside. Seeing him, Venegas again told Baldia to leave, and went in another room. RT 1266-67.

52. Before he went back inside, Venegas saw Petitioner and Baldia having an apparent "normal conversation," but he could not hear what they were saying. RT 1277-79. A few seconds later, Venegas heard three or four shots, and then a few minutes later a car leaving. RT 1267, 1269, 1279. About eight minutes later, he looked out and saw Petitioner driving away. RT 1268-69.

53. Salazar went to the motel with Baldia. RT 1304-06. When they drove into the parking lot they saw Tinoco's car, and Salazar thought

Baldia was mad that she was there. RT 1338. Salazar knew that Petitioner and Baldia were mad at each other about Tinoco, and he feared there might be trouble between them. RT 1350. Salazar said that Baldia normally carried a gun, but was not carrying one that day "because [the police] had just taken it away . . . ." RT 1351.

54. When Salazar and Baldia arrived, Baldia got out of his car and walked to Room 23, where he "contacted" Petitioner. RT 1317-18, 1723. An argument ensued, with Petitioner grabbing Baldia's shirt and Baldia pushing Petitioner away. RT 1318-20, 1723-24. During this argument, Petitioner said, "Come over here," to Baldia, who replied, "I haven't done anything." RT 1332, 1347. Baldia backed away, ignoring Petitioner when he said "come back." RT 1319-20. Petitioner then pulled out a pistol and fired about four shots from about 12 to 15 feet away. RT 1308-09. Baldia fell down, and Petitioner left. RT 1311-13. Salazar testified that Baldia's hands were at shoulder level with the palms forward at the time of the shooting. RT 1371-72.

55. Salazar identified Petitioner as the shooter during a photo lineup and in court. RT 1302, 1333-34.

56. Beatriz Escamilla lived at the Rita Motel, and knew both Tinoco and Venegas; she saw them at the motel the day of the shooting. RT 1377-78. At around 2:00 p.m., she heard shots and looked outside; she saw Petitioner, Tinoco, Venegas, and others leaving, and a man lying in the

parking lot. RT 1379. Gerald Burks, a homicide investigator with the Los Angeles County Sheriff's Department, testified that Escamilla said that after hearing shots, she looked out the window and saw Petitioner with a gun in his hand. RT 1422-24.

57. The police recovered several shell casings and expended bullets at the scene. RT 1646-48, 1657-58, 1671. Ballistics testing revealed that all the casings were fired from the same .45 caliber firearm. RT 1648.

58. The police also found a bag in Room 23 containing what looked like three kilo bricks wrapped in brown tape; the bricks were made up of provolone cheese with a light powder of cocaine across the top. RT 1674-75. A latent print examiner for the Los Angeles County Sheriff's Department testified that he recovered prints from the bricks and compared them to Petitioner's prints; he had no doubt that they matched Petitioner's. RT 1537, 1541-43, 1549.

59. Detective Olmedo testified at the preliminary examination that he and another officer interviewed Petitioner at the Charter Suburban Hospital on February 22, 1990. CT 220-22.[5] Speaking in Spanish, Detective Olmedo told Petitioner that he was under arrest for the shooting

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[5] Detective Olmedo's videotaped preliminary examination testimony was played at trial because he was deceased. RT 1533-36.

at the Las Playas. CT 222-24. After initially denying that he committed any murders, Petitioner "indicated" that he killed a man named Arnulfo at the Rita Motel. CT 224-26.

60. Detective Olmedo testified that Petitioner said Tinoco and Venegas came to see him at the Rita Motel at about 9:00 a.m. on November 29, 1989, and that sometime later Baldia and another Latin male pulled into the parking lot. CT 226. Petitioner said he armed himself with a pistol before he went outside, because he knew that Baldia had made "threats against his life." CT 226. Petitioner said that he told Baldia he only wanted to talk, but Baldia kept coming toward him, saying, "I don't want to talk to you," and calling him "stupid." CT 226-27. Petitioner said he drew his pistol and placed the barrel against Baldia's stomach. CT 227. When he pushed Baldia away, the gun fired. Then, remembering what Baldia had said to him, he fired several more times. CT 227.

61. Detective Olmedo testified that Petitioner said the three tape-wrapped packages found at the Rita Motel were not his, and that the shooting had nothing to do with drugs. CT 231-32.

d. The Mazatlan Bar Shooting

62. Count IV involved the fatal shooting of Jose Gutierrez at the Mazatlan Bar in Compton on January 21, 1990. Two witnesses – Beatriz Escamilla and Adela Lopez – identified Petitioner as the perpetrator, but gave different accounts of the incident.

63. Escamilla testified that on the night in question Petitioner was drinking in the bar for two or three hours before the shooting. RT 1382-84, 1413. She talked to him during that time, and she saw him drink two to three beers before the shooting happened at around midnight. RT 1384-86, 1413.

64. Escamilla testified that Gutierrez walked up and "offended" Petitioner when he went to the counter to get beer. RT 1386-87. Gutierrez asked if Petitioner had a gun, then challenged him to use it and insulted his mother. He said, "take [your pistol] out and use it, you mother fuck," three times, while standing three or four feet from Petitioner. RT 1388, 1394, 1401. In response, Petitioner twice said, "Calm down, calm down partner. I don't want any problems." RT 1416. After Gutierrez challenged Petitioner for the third time, Petitioner shot him. RT 1388-89. Escamilla identified Petitioner as the shooter in court. RT 1385.

65. Adela Lopez was working as a waitress on the night of the shooting, and saw Petitioner come into the bar with two or three men about 20 minutes before the shooting. RT 1454, 1456-58. She was familiar with Petitioner because he came to the bar "all the time." RT 1457. After sitting at a table for a while, Petitioner got up and went to the counter; there, he grabbed a man by the back of the neck and shot him. RT 1458-59, 1461-62. She did not hear the victim and Petitioner say anything before the shooting. RT 1461, 1484, 1502. Initially, Lopez testified that the victim

had been asleep on the bar for "at least two hours." RT 1464. Later, she conceded that she "[didn't] know whether he was asleep, but he was leaning against the counter that way." RT 1481.

66. Additionally, Lopez testified that music was playing that night. RT 1478-79. She also testified that she was not watching the victim and his companion the whole time, that she was having a conversation with someone else at the time of the shooting and that she could not hear the conversation between the victim's companion, Alex, and Beatriz Escamilla RT 1481-82.

67. Lopez was not watching when the first shot was fired; she testified that she heard a shot, turned, and saw Petitioner fire several shots at the man on the floor. RT 1463-64, 1484. She testified that she had seen Petitioner walk over and grab the man. RT 1484. Lopez identified Petitioner as the shooter in a photo lineup and in court. RT 1506-07, 1456.

68. The police recovered four .38 caliber shell casings, and three beer bottles and cans, at the scene, and checked them for fingerprints. RT 1525, 1527. A fingerprint from one of the beer cans matched Petitioner's left thumb print. RT 1682-83.

2. The Defense Case

69. Petitioner's only guilt phase witness was Deputy Sheriff Clara Miller, who responded to the Rita Motel shooting. RT 1721-22. She testified that a witness who identified himself as "Antonio Sain" told her

that he drove to the motel with Baldia, and that when they arrived Baldia got out and walked directly to a room Sain believed was Number 23. RT 1723. He said that Baldia "contacted the suspect" at the motel room, that the two men argued, and that when Baldia walked away, the suspect pulled a pistol and shot him. RT 1723-24.

B. Penalty Phase Evidence

1. Evidence in Aggravation

70. The penalty phase aggravating evidence related to the "circumstances of the [capital] crime[s]," and to two other violent crimes Petitioner allegedly committed: a triple homicide (the "Paramount killings") and a forcible rape. Charges in the Paramount killings against Petitioner and co-defendant Paciano Jacques Ochoa were severed from Petitioner's case and were pending in Los Angeles County Superior Court Case No. 48822 at the time evidence regarding them was presented as aggravators in Petitioner's capital trial.

a. The Paramount Killings

71. The triple shooting occurred on February 22, 1990, at 15124 San Jose Avenue in Paramount. RT 2110. The bodies of the three victims, Solticio Martinez, Juan Parra Gomez, and Everardo Cervantes, were found inside a room where there had obviously been a good deal of gunfire, since approximately 16 shell casings were found there. RT 2112-13, 2123.

72. One of the three victims had a pair of handcuffs sticking out of

his back pocket, and a pistol in his waistband. RT 2009, 2113. Another victim had a gun underneath him. RT 2127-28. The third also had a set of handcuffs, along with a set of handcuff keys and an ammunition clip containing seven rounds of .45 caliber ammunition. RT 2113-15.[6]

73. The police found a sack containing four yellow wrapped packages ("bricks") on a dresser just inside the door of the crime scene. RT 2118-19. When the bricks were analyzed, they were found to be primarily made of cheese, along with some cocaine. RT 2126-27.

74. Two handguns were recovered at the crime scene. RT 2030. The first, in the waistband of a victim, was a cocked, loaded nine millimeter semi-automatic. RT 2006-09, 2013. The second, found next to another victim, was a cocked .380 caliber semi-automatic that had been used to fire one round. RT 2014-16, 2042.

75. The police recovered five .45 caliber bullets, three .38 caliber bullets, and one .380 caliber bullet at the scene and from the victims' bodies. RT 2018-20, 2023-25, 2036-37. They also found nine .38 caliber

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[6] Deputy Medical Examiner Christopher Rogers testified about the results of the autopsies of the three victims, Solticio Martinez, Juan Parra Gomez, and Everardo Cervantes. RT 2052-53, 2055, 2059-61, 2064-65. Rogers did not perform any of the autopsies, but supervised the one on Cervantes, and reviewed the records of all three. RT 2055, 2060, 2064. He testified that each of the men died as a result of gunshot wounds; Martinez suffering eleven, Gomez two, and Cervantes one. RT 2055, 2058, 2061, 2065.

cartridge cases, six .45 caliber cartridge cases, and one .380 caliber cartridge case. RT 2027-35, 2037-38.[7] The police tested all the recovered bullets and shell casings, and test-fired the .380 caliber pistol to compare it against other ballistics evidence. No comparison was done of the nine millimeter pistol. RT 2014, 2017-18, 2021-23.

76. The firearms examiner who tested the .45 caliber bullets, Dwight Van Horn, could not say conclusively that they were all fired from the same weapon, but did find that two of them, including one from the body of the victim in autopsy No. 90-1961, were fired from the same gun. RT 2018-21. He also found that all six .45 caliber cartridge cases were fired from the same weapon, which was not found. RT 2026-30.

77. That examiner found that all of the .38 caliber bullets and cartridge cases were fired from the same weapon. RT 2025-26, 2032-35. In addition, he found that three .38 caliber shell casings from the shooting at the Mazatlan Bar (Count IV) were fired from the same weapon as the .38 caliber cartridge cases recovered at the scene of this triple murder. RT 2010-11, 2035.

78. The single .380 caliber shell casing recovered at the crime

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[7] The police determined that at least nine .38 caliber rounds, one .380 caliber round, and six .45 caliber rounds were fired inside the room where the victims were found. RT 2040-41.

scene was fired from the .380 caliber pistol found under the leg of one of the victims, and the .380 caliber bullet found at the scene could have been fired from that pistol. RT 2036-39.

79. The police also collected various other items for examination and analysis. RT 2080-82. A fingerprint examiner compared two identifiable latent prints taken from a beer can found at the scene with Petitioner's prints, and concluded that they were the same.[8] RT 2085-86, 2089-91. It was stipulated that all three victims had gunshot residue on their hands, indicating that they had discharged firearms or that their hands had been in an environment of gunshot residue, and that a gunshot residue test performed on Petitioner at the hospital showed likewise. RT 2128-29.

80. Kathleen Estavillo, an emergency room nurse at Charter Suburban Hospital in Paramount, testified that Petitioner came into the hospital with a gunshot wound in the left side of his chest at approximately 11:00 a.m. on February 22, 1990. RT 2070-71.

b. The Rape of Patricia Marin

81. The prosecution also presented evidence regarding an alleged, unadjudicated rape. Patricia Marin testified that she was raped at gunpoint

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[8] The parties stipulated that the fingerprints found on a second beer can recovered at the crime scene were those of Petitioner's half-brother, Paciano Jacques Ochoa. RT 2092-93.

on January 26, 1988, while babysitting at a friend's house in Paramount. RT 2134-35, 2138-39. She testified that she was awakened during the early morning hours when her friend's husband and another man came in. RT 2136-37. She was awakened again later when a man got on top of her and she felt something "cold on [her] stomach." RT 2138. The man said he would "shoot [her] a few times if [she did] not give him sex," and had intercourse with her against her will. RT 2138.

82. She identified Petitioner as the man who raped her, and said she had known him before that night. RT 2136-37, 2151-53. Marin revealed what happened to a doctor the next day and then reported the rape to the police. RT 2139-40.

C. Evidence in Mitigation

83. In mitigation, five of Petitioner's relatives testified about the deprivation and abuse Petitioner suffered as a child in tiny village in rural Mexico. All said that his childhood was marred by cruelty, physical abuse, poverty, forced labor, and a lack of care, education and affection or encouragement by the adults in his life.

D. Other Evidence

84. Petitioner's trial counsel did not conduct a thorough or adequate investigation, and the State failed to disclose important evidence to the defense. As a result, the jury never heard critical defense evidence that undermined the prosecution case, tended to exculpate Petitioner and

mitigated the basis for punishment, including but not limited to expert testimony on ballistics, eyewitness identification and evidence impeaching prosecution witnesses. Nor did the jury hear the wealth of available evidence regarding Petitioner's serious substance abuse, cognitive deficiencies, posttraumatic stress disorder and background that was directly relevant to issues in both the guilt and penalty phases of the trial. The evidence the jury should have heard is presented in the claims below.

III. BASIS FOR JURISDICTION AND TIMELINESS

85. Petitioner's convictions and sentences are final; no appeal is currently pending before this Court. This Petition is necessary because Petitioner has no other plain, speedy or adequate remedy at law for the substantial violations of his constitutional rights as protected by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, the California constitutional analogues and California Penal Code section 1473, in that the bulk of the factual bases for these claims lies outside the record developed on appeal. Petitioner is illegally and unconstitutionally confined at the California State Prison at San Quentin by Warden Robert L. Ayers, Jr., and Secretary of the California Department of Corrections and Rehabilitation, James E. Tilton, pursuant to a judgment of death imposed upon him by the Los Angeles County Superior Court on November 16, 1993 in *People v. Abelino Manriquez*, No. VA004848.

86. Consistent with this Court's Policies, this Petition is filed

within the presumptively timely period. On February 17, 2006, Petitioner filed a Petition for Writ of Habeas Corpus with this Court to ensure that he both satisfied the presumptive timeliness period for his petition and tolled the limitations period for filing a federal habeas corpus petition. The February 17, 2006 petition requested permission to file this amended petition by January 11, 2008, which is within the presumptively timely period. On April 25, 2006, Respondent filed a Motion to Strike or Dismiss the Petition, which Petitioner opposed. On October 25, 2006, this Court denied Respondent's motion.

IV. JUDICIAL NOTICE AND INCORPORATION

87. Petitioner hereby incorporates by reference each and every paragraph of this Petition in each and every claim presented as if fully set forth therein.

88. Petitioner hereby incorporates by reference all exhibits filed with this Petition as if fully set forth herein. Petitioner requests that this Court take judicial notice of the certified record on appeal and all briefs and pleadings on file in this Court, and all records, documents, exhibits and pleadings in this case filed in the Los Angeles County Superior Court to avoid duplication of those voluminous documents.

V. SCOPE OF CLAIMS AND EVIDENTIARY BASES

89. Petitioner and his habeas corpus counsel have not had a reasonable opportunity for full and factual investigation and development

through access to this Court's subpoena power and other means of discovery, to interview material witnesses without interference from State actors, and an evidentiary hearing. Accordingly, the full evidence in support of the claims that follow still is not presently reasonably obtainable. Nonetheless, the evidentiary bases that are reasonably obtainable are set forth below. That evidence and those allegations adequately support each claim and justify issuance of the order to show cause and the grant of relief requested in this Petition. Allegations not supported by citations to specific evidence are based on information and belief.

VI. CLAIMS FOR RELIEF

CLAIM 1: PETITIONER WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO A FAIR AND RELIABLE DETERMINATION OF GUILT AND PENALTY BY TRIAL COUNSEL'S INCOMPETENCE.

90. Petitioner's convictions and sentences of death were unlawfully and unconstitutionally imposed in violation of Petitioner's rights to due process, to a fair trial, to confront witnesses, to compulsory process, to present a defense, to the effective assistance of counsel, and to accurate and reliable guilt and penalty determinations, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 1, 7, 13, 14, 15, 16, 17, 24 and 28 of the California Constitution, because Petitioner was denied the effective assistance of counsel throughout Petitioner's trial and in pre-trial proceedings.

91. The Sixth Amendment guarantees a criminal defendant the right to the assistance of counsel, and only assistance that is "effective" will pass constitutional muster. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). A defendant's claim that his counsel's assistance was constitutionally defective is evaluated under a two-pronged test. "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Deficient performance" is measured as representation that "fell below an objective standard of reasonableness," which is "reasonableness under prevailing professional norms." *Id.* at 688. Prejudice will only be found if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In the guilt phase, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. In the penalty phase, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.*

92. Petitioner's convictions and sentences are unlawful and unconstitutional because he was denied the effective assistance of counsel.

Petitioner's Trial Counsel was a deputy attorney from the Los Angeles Public Defender's office. This was his first and *only* capital trial.

93. Trial Counsel acknowledged early on that this was an "extremely complicated matter" that "require[d] a great deal of investigation." RT 28-29. There were four guilt phase murder counts, three penalty phase killings, a penalty rape and a long witness list full of transient witnesses moving between the United State and Mexico and witnesses located in rural areas of Mexico. Despite recognizing that the case was complicated and required a great deal of investigation and preparation, Trial Counsel did not conform to the 1989 ABA Guidelines that call for two attorneys to every capital case. *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* ("1989 ABA Guidelines"), No. 2.1. By contrast, the trial counsel for Paciano Jacques Ochoa (the co-defendant in the severed counts regarding the Paramount killings) did seek and obtain the appointment of second counsel for Ochoa. Exh. 34, Motion for Appointment of Second Counsel; Exh. 35, Order for Appointment of Second Counsel. Trial Counsel's failure to seek the appointment of a second attorney was particularly problematic because Trial Counsel had no prior experience trying death penalty cases, thus failing to conform to the ABA requirement that attorneys appointed as lead counsel in capital cases be experienced in that work. *See* 1989 ABA Guidelines, No. 5.1. Left on his own, and without

experience, Trial Counsel had little chance for success.

94. Trial Counsel failed to reasonably or adequately prepare a defense of the case. He conducted an inadequate investigation and failed to follow up on numerous witness leads. He called just one witness during the guilt trial, and that was a police offer who testified regarding statements made to her by prosecution witness Ramiro Gamboa Salazar concerning Count III (Rita Motel). RT 1721-31. At the penalty trial, Trial Counsel called five witnesses who were close at hand and located shortly before trial. He did not interview four of these witnesses before their direct examination. As to the fifth witness, Trial Counsel spoke to him only for a few moments before that witness took the stand. As a result of Trial Counsel's inadequate preparation, the testifying mitigation witnesses were few in number, unprepared, and their testimony was unreasonably limited in scope. Trial Counsel failed to investigate, develop, and present the wealth of evidence available from Petitioner's family members in Mexico.

95. Nor did Trial Counsel properly consult with or present the testimony of expert witnesses. Under ABA standards, a case of this magnitude and complexity called for a number of expert witnesses to explain the significance of the evidence to the jury: guilt experts; mental health/psychological experts, and a cultural expert and/or mitigation expert. *See* 1989 ABA Guidelines, No. 11.4.1. Although Trial Counsel and the director of the Los Angeles Public Defender's special circumstances unit

discussed using mental health experts, a mitigation specialist or cultural experts, and an eyewitness expert, Trial Counsel interviewed and retained just one prospective expert, ignored that expert's advice, and then did not call a single expert to testify at trial.

96. Trial Counsel also failed to uncover important evidence in Petitioner's defense by failing to seek an order to compel the Prosecutor to produce all relevant materials, including but not limited to exculpatory materials. Although Trial Counsel did file a Request for Discovery, CT Supp. III 3638, Trial Counsel informed the Court that the discovery issues had been resolved informally and Trial Counsel failed to pursue an order regarding the prosecution's obligations to produce outstanding discovery materials. RT 155-56. It was unreasonable for Trial Counsel to rely on informal discovery, particularly when Trial Counsel suspected and had reasonable notice that the prosecution had failed to disclose all relevant materials. *See, e.g.*, RT 937.

97. As a result of Trial Counsel's deficient investigation and performance, the jury did not hear critical evidence and testimony from witnesses and experts that would have resulted in a more favorable outcome for Petitioner at trial.

98. Trial Counsel also failed to raise procedural and constitutional violations by the police and Prosecutor. These included a failure to give Petitioner *Miranda* warnings until many hours after he had been in custody

and interrogated, and a failure to raise the violation of Petitioner's rights under the Vienna Convention as a foreign national.

99. Trial Counsel failed to voir dire the venire adequately, missing such obvious and important topics such as attitudes about Mexican immigrants, and accepting jurors whose questionnaires evidenced a strong pro-death penalty stance. He even failed to object to the Prosecutor's discriminatory use of peremptory challenges to exclude minorities, especially Latinos, from the panel. The Prosecutor's strike rate against Latino jurors – *three* times higher than his rate against non-Latino jurors – went unchallenged. As a result, the jury had eleven non-Latino jurors, in a jurisdiction that is nearly 63 percent Latino.

100. Trial Counsel's ineffectiveness continued throughout the trial. ABA Guidelines require vigorous advocacy on behalf of a capital defendant, but Trial Counsel's performance fell far below these standards. Trial Counsel's performance was marked by no pre-trial motions *in limine* to preclude the introduction of highly inflammatory, prejudicial and inadmissible evidence, repeated and unnecessary stipulations to procedural and evidentiary matters to the detriment of Petitioner's interests and constitutional rights, and a failure to object to numerous instances of inflammatory, prejudicial, and inadmissible testimony and prosecutorial misconduct. Trial Counsel's failings went against prevailing standards, which required, among other things, that capital counsel make and preserve

objections in capital proceedings and vigorously defend his client.

101. Petitioner was repeatedly prejudiced by Trial Counsel's deficient performance. The specific instances of ineffective assistance of counsel are set forth below.

A. Petitioner's Trial Counsel Rendered Constitutionally Ineffective Assistance of Counsel During the Jury Selection Process.

1. Trial Counsel Was Prejudicially Ineffective in Failing to Challenge the Prosecutor's Race-Based Use of Peremptory Challenges to Exclude Hispanic and Other Minority Venire Members.

102. Trial Counsel was prejudicially ineffective in failing to challenge the Prosecutor's race-based use of peremptory challenges to exclude Hispanic and other minority venire members.

103. During jury selection, the Prosecutor engaged in a flagrant pattern of discriminatory peremptory strikes. However, Trial Counsel never objected to the Prosecutor's racially motivated use of peremptory challenges even though the Prosecutor's pattern of disproportionately striking Hispanic and other minority jurors would have created a strong *prima facie* case under *Batson v. Kentucky*, 476 U.S. 79 (1986) and *People v. Wheeler*, 22 Cal. 3d 258 (1978). Trial Counsel's failure to raise a *Batson/Wheeler* challenge denied Petitioner his constitutional right to the effective assistance of counsel.

104. The Equal Protection Clause of the Fourteenth Amendment guarantees a defendant "the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Batson,* 476 U.S. at 85-86. When that right is denied because jury selection is infected by discrimination, it denies the accused "the protection that a trial by jury is intended to secure," and that only a venire which is "indifferently chosen" can provide. *Id.* at 86-87 (citation omitted).

105. The jury pool for Petitioner's trial originally consisted of approximately 250 people. RT 171. After each prospective panel had been sworn in, RT 170, jurors were asked to fill out extensive questionnaires, which included a blank for them to note their "race and ethnic origin," RT 180; *see also* CT Supp. I 1-3269 (Pre-Trial Jury Questionnaires). Those who requested a hardship discharge filled out a separate questionnaire, *see, e.g.*, RT 179, and were later either excused by stipulation, *see, e.g.*, RT 195, or asked to remain in the panel and complete the lengthier questionnaire, *see, e.g.*, RT 197. The prospective jurors were then subject to examination by counsel, *see, e.g.*, RT 246. After several prospective jurors had been excused for various reasons, and the parties had exercised challenges for cause, those remaining in the venire were subject to peremptory challenges. Twelve jurors and four alternates were selected by that method.

106. The prosecution engaged in a flagrant pattern of striking individuals who self-identified as Hispanic or who had Spanish surnames, a

pattern that any reasonable defense counsel would have observed and objected to under *Batson*. After prospective jurors had been excused by stipulation and challenged for cause, 84 people remained in the venire, with a racial breakdown as follows: 47 Caucasian, 18 Hispanic, five African-American, eight Asian, three Native American, and three unknown. Six out of the Prosecutor's 13 peremptory strikes were used against Hispanic prospective jurors. The prosecution also struck five other minority members of the venire: two African-Americans, two Native Americans (including one with a Spanish last name, Delgadillo), and one Asian. Of the other two prospective jurors removed by the prosecution's peremptory challenges, one was Caucasian, and the other did not identify his race on the juror questionnaire.

107. Any reasonably competent counsel would have recognized so blatant a pattern of discrimination in peremptory challenges. The Prosecutor used six out of his 13 strikes – 46 percent – to remove Hispanic jurors. When one includes the venire member who had a Spanish surname (Delgadillo) but self-identified as Native American, the number rises to seven out of 13, or 54 percent. By comparison, Hispanic individuals comprised only 21 percent of the final jury pool, or 18 people. Therefore, Hispanics were struck at a rate more than two times what one would have expected had the peremptory challenges been racially blind. In addition, the six Hispanic potential jurors struck by the prosecution represented 33

percent of the 18 members of final jury pool who identified themselves as Hispanic. However, the prosecution's total of 13 peremptory strikes removed only 15 percent of the 84-person panel, again revealing that Hispanic jurors were struck at more than twice the rate to be expected for a racially blind procedure.

108. When one considers the collective number of racial and ethnic minorities struck by the prosecution, the pattern of discriminatory challenges becomes even starker. Eleven of the prosecution's 13 peremptory strikes, or 85 percent, were used against minorities. That number could potentially have been even higher: of the two remaining potential jurors, only one self-identified as Caucasian, and the other did not disclose his race or ethnicity. If the remaining individual was also a minority, 92 percent of the Prosecutor's strikes would have targeted members of racial or ethnic minority groups.

109. That some of these potential jurors were of a different race from Petitioner is irrelevant. *Powers v. Ohio*, 499 U.S. 400 (1991). Likewise, it is of no consequence that two Hispanic individuals ultimately served as jurors. A *prima facie* showing of racial discrimination is not lost even if members of the racial group against whom bias is claimed ultimately serve on a jury. *See, e.g., United States v. Alvarado*, 923 F.2d 253, 255 (2d Cir. 1991); *United States v. Battle*, 836 F.2d 1084, 1085 (8th Cir. 1987).

110. Trial Counsel indisputably could have raised a *prima facie* case of discrimination, shifting the burden to the Prosecutor to explain his pattern of almost exclusively targeting minorities with his peremptory strikes. Trial Counsel's failure to raise a *Batson* objection in the face of the Prosecutor's discriminatory use of peremptory challenges fell far below the performance of reasonably competent counsel and could not be justified by any strategic rationale. A competent trial attorney would have known that striking jurors on the basis of race was unconstitutional, and would have recognized that the Prosecutor's pattern of strikes constituted a *prima facie* case under *Batson* and *Wheeler*.

111. Any reasonably competent attorney would have raised a *Batson* challenge to ensure that the integrity of the trial was not corrupted by racial discrimination in the seating of the jury, particularly given the extreme anti-immigrant sentiment prominent in California at the time of Petitioner's trial. Trial Counsel's timely *Batson* objection would have enabled the trial court to deny the Prosecutor's racially based peremptory challenges and seat a jury uncorrupted by discriminatory strikes. There could have been no strategic justification for failing to inquire why so large a proportion of the minority venire persons had been struck by the prosecution, particularly since racial discrimination in the selection of even a single juror is barred by the State and federal constitutions. Trial Counsel was therefore deficient in failing to object to the prosecution's racially

discriminatory pattern of strikes.

112. After Trial Counsel made a *prima facie* case of discrimination, the burden would have shifted to the Prosecutor to give race-neutral explanations for each of his peremptory strikes. In light of the numbers of Hispanic and minority jurors struck by the Prosecutor, the Prosecutor would have been unable to provide a race-neutral explanation for all of these strikes.

113. Indeed, the Prosecutor's use of strikes was just another example of race-based action. The Prosecutor was reprimanded by the Los Angeles County District Attorney's Office for using a racial epithet in 1989 to describe an African-American colleague. During an investigation into the use of jailhouse informants in prosecutions, Deputy District Attorney Larry Walls was called to discuss his role in one such prosecution. Exh. 33, L.A. County Civil Service Commission, *Walls v. Office of the District Attorney*, Case Nos. 90-371, 90-386, Findings of Fact and Decision, PE 0292 ¶ 4. After overhearing another deputy's play on words that Walls was going to be "lynched," Prosecutor Joseph Markus stated that "'there is going to be a lynching, they had a rope and all they needed was a nigger,' referring to [Walls]." *Id.* at PE 0292 ¶ 5. Walls is African-American. Prosecutor Markus was subsequently reprimanded by the District Attorney's Office for his role in the incident, *Id.* at PE 0292 ¶ 6, and Walls filed a complaint alleging that a subsequent transfer to a different

unit was discriminatory. *Id.* The Prosecutor's reprimand for his use of racially inflammatory language only bolsters the likelihood that his disproportionate rate of peremptory strikes against minority jurors was deliberate and discriminatory.

114. *Batson* requires the trial court to determine the persuasiveness of the prosecution's justifications after a challenge has been raised. Again, it would have been difficult for the Prosecutor to have come up with race-neutral rationales for each of his eleven strikes of minority members of the venire. For example, the Prosecutor struck prospective juror Conley, who self-identified as African American on his juror questionnaire, even after he admitted that the murder of his brother, if anything, might make him lean toward the prosecution. RT 514. In addition, the Prosecutor challenged prospective juror Delgadillo despite having earlier noted that "[s]he's a good juror for me" when discussing whether to give her a hardship discharge. RT 447. Delgadillo identified herself as Native American. Had Trial Counsel raised a *Batson* challenge and made out a *prima facie* case, the court would likely have concluded that the prosecution's justifications were unpersuasive. As a result, the court would have reversed the strikes at issue and allowed the challenged jurors to serve, changing the composition of the jury that assessed Petitioner's guilt and the penalty.

115. The jury's verdict on at least one the four counts charged, and the jury's imposition of a death sentence, would likely have been different

had Trial Counsel raised a *prima facie* case in response to the Prosecutor's discriminatory peremptory challenges. Jury selection is of critical importance in a capital case, because the jury's weighing of aggravating versus mitigating circumstances during the penalty phase, in particular, necessarily involves subjective value judgment. That assessment, however, was done by a jury that was systematically stripped of Hispanic and other minority members, whose insights could have balanced the perspective of the jury.

116. Petitioner was a Mexican immigrant who was unable to understand English, *see, e.g.*, RT 214. A diverse jury would have been less likely to allow Petitioner's race or his national origin to sway their consideration of his case.

117. At the time of trial, California was swept up by heated debate over illegal immigration. In fact, as jury selection began on August 9, 1993, former Gov. Pete Wilson was announcing his proposal for a sweeping program to deny benefits to illegal immigrants and even strip their U.S.-born children of citizenship. The story was featured on the cover of the L.A. Times on August 10, the second day of jury selection. Exh. 43, Bill Stall & Patrick J. McDonnell, *Wilson Urges Stiff Penalties to Deter Illegal Immigrants*, L.A. Times, Aug. 10, 1993, at A1, PE 0328. A series of surveys by the L.A. Times conducted in the same year as Petitioner's trial gauged the public's perceptions of immigrants and revealed that many

in Los Angeles harbored very strong anti-immigrant viewpoints. *See, e.g.*, Exh. 38, Jack Cheevers, *The Times Poll: Valley Votes Rate Crime as Top Issue In L.A. Mayoral Race*, L.A. Times, Feb. 10, 1993, at B4 (58% of respondents stated that illegal immigrants are responsible for a "good amount" of the crime and street violence in Los Angeles) PE 0310; Exh. 41, Dianne Klein, *The Times Poll: Majority In State are Fed Up with Illegal Immigration*, L.A. Times, Sept. 19, 1993, at A1 (86% of Californians described illegal immigration as a major or moderate problem) PE 0319; Exh. 37, Eric Bailey & Dan Morian, *Anti-Immigration Bills Flood Legislature*, L.A. Times, May 3, 1993, at A3, PE 0303. The prosecution's systematic removal of Hispanic and other minority jurors through peremptory challenges only made it more likely that the intense anti-immigrant sentiment affecting California would make its way into the jury room. Indeed, Jury Foreperson Constance Bennett has even acknowledged that "the fact that Manriquez was Mexican . . . came up in the discussions," and one or more jurors voiced comments like, "[h]e's not even a citizen and he comes over here and kills people." Exh. 123, Declaration of Constance Bennett, PE 1142-43 ¶ 11. The jury would have been far less likely to consider such impermissible factors such as Petitioner's race and immigration status had a more diverse panel been seated as a result of Trial Counsel's *Batson* challenge.

118. Trial Counsel's failure to make a *Batson* objection, for which

he had no valid tactical reason, fell well below the minimum standard of competency expected for the representation of a defendant in a capital case. Had Trial Counsel reasonably objected to the Prosecutor's discriminatory peremptory strikes, it is at least reasonably probable that Petitioner would have achieved a more favorable outcome at trial.

2. Trial Counsel Was Prejudicially Ineffective in Failing to Conduct Adequate Voir Dire During Jury Selection.

119. Trial Counsel prejudicially failed to conduct adequate voir dire during jury selection by failing to inquire whether prospective jurors harbored commonly held biases that would have severely impeded their ability to fairly and impartially review the guilt and penalty phases evidence. In particular, Trial Counsel unreasonably failed to ask the prospective jurors about their attitudes regarding illegal Mexican immigrants, non-English speakers, and defendants who exercise their Fifth Amendment right not to testify. Trial Counsel's incompetent voir dire questioning denied Petitioner of his Sixth Amendment right to an unbiased jury.

a. Attitudes Regarding Mexican Immigrants and Non-English Speakers

120. Trial Counsel prejudicially and unreasonably failed to ask the prospective jurors about their attitudes regarding Mexican immigrants and

non-English speakers. Given the widespread and strong anti-immigrant backlash sweeping California at the time in connection with the campaigns on Proposition 187, any reasonably competent trial counsel would have questioned jurors regarding their opinions of Mexican immigrants and non-English speakers to gauge whether they could stand in objective judgment of such a defendant. Because prospective jurors never had the opportunity to acknowledge such prejudices, biased jurors were not excused and ultimately served on the jury.

121. Jury Foreperson Constance Bennett acknowledged that Petitioner's status as an illegal Mexican immigrant came up during juror deliberations and discussions. Bennett declared:

> As to the fact that Manriquez was Mexican, there was an occasional comment like, "He's not even a citizen and he comes over here and kills people." I do not think it was an issue, but it came up in the discussions.

Exh. 123, Declaration of Constance Bennett, PE 1142-43 ¶ 11. Despite Bennett's claim that it was not "an issue," the jurors' discussion of Petitioner's race and immigration status reveals that the subject did, in fact, affect their deliberations. Bennett's declaration demonstrates that at least some of the jurors were biased against non-citizens and Mexican immigrants, predisposing them to convict Petitioner and subsequently sentence him to death. Such sentiments would not have tainted juror deliberations had Trial Counsel properly conducted voir dire to identify and

remove jurors who harbored such biases. Trial Counsel's omissions resulted in the seating of jurors who were predisposed to convict Petitioner and sentence him to death.

122. Trial Counsel had no strategic reason to forgo an adequate voir dire to uncover biases against Mexican immigrants and non-English speaking defendants. But for Trial Counsel's deficient performance, Petitioner's Sixth Amendment right to an unbiased jury would not have been violated, and it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at trial.

b. Attitudes About Defendants Exercising a Fifth Amendment Right Not to Testify

123. Trial Counsel prejudicially and unreasonably failed to question potential jurors about their perceptions of defendants who exercise their Fifth Amendment right not to testify. Petitioner did not testify during his trial. None of the pre-trial juror questionnaires contained any questions probing prospective jurors' attitudes about defendants who elected not to testify (*see, e.g.*, CT Supp. I 3203-36, Jury questionnaire of Helen Burdine) nor did Trial Counsel question potential jurors on the subject during voir dire.

124. Had Trial Counsel solicited responses regarding the right not to testify, he would have identified prospective jurors who would have drawn negative inferences from Petitioner's decision not to testify in his own

defense, which would have been regarded by some as tantamount to an admission of guilt. Because of Trial Counsel's omission, it is likely that Petitioner's convictions and sentences were tainted by jurors who were biased against defendants who exercise their Fifth Amendment right not to testify.

125. Trial Counsel had no strategic reason not to uncover biases against defendants exercising their right not to testify. But for Trial Counsel's deficient performance, Petitioner's Sixth Amendment right to an unbiased jury would not have been violated, and it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at trial.

3. Trial Counsel Was Prejudicially Ineffective in Failing to Seek to Remove Jurors Who Strongly Favored the Death Penalty.

126. Trial Counsel prejudicially and unreasonably failed to exercise peremptory challenges against prospective jurors who strongly favored the death penalty, resulting in the seating of jurors who did not fairly consider Petitioner's mitigating circumstances before imposing a death sentence. In particular, any reasonably competent lawyer would have sought to remove jurors Helen Burdine and William Chang because both were predisposed to impose a death sentence for anyone convicted of multiple murders.

127. Juror Burdine stated during voir dire that she considered the

justice system to be unfair because sentences were too lenient. Burdine felt "strongly" that it was "unjust" for defendants to "get a lighter charge or lighter sentence." RT 497. She stated that she did not believe life in prison was an adequate penalty for multiple killings. On the juror questionnaire, Burdine "strongly agree[d]" with the proposition, "Anyone who intentionally kills two people without legal justification and not in self defense, should receive the death penalty." CT Supp. I 3226. She elaborated on her response by writing, "Person should know it in their hearts taking two lifes [sic] isn't right . . . They don't deserve to live." CT Supp. I 3227. Burdine also noted her agreement with identically phrased propositions relating to the killing of one, three, and four persons: in every instance, she strongly agreed that the killer "should receive the death penalty." CT Supp. I 3226-27. When questioned during voir dire regarding these statements, Burdine said, "If they done it once or twice, you know, why give them another chance?" RT 498. Only upon further questioning by Trial Counsel did Burdine state that she would "maybe" give such a defendant "a second chance, maybe," with "second chance" referring to "life without the possibility of parole." RT 499. These strong opinions indicated that Burdine had a strong propensity to impose higher sentences in criminal cases, and particularly to opt for a death sentence for anyone convicted of multiple murders. Any reasonably competent counsel would have moved to excuse Burdine for cause or would have excused

Burdine with a peremptory challenge.

128. Juror Chang, likewise, "strongly agree[d]" that anyone convicted of killing two or more people should be put to death if the killing was not in self defense or otherwise legally justified. CT Supp. I 2466-67. The reason, he noted on his questionnaire, was "justice." CT Supp. I 2466-67. When questioned during voir dire by Trial Counsel, Chang stated that he would "keep an open mind" but then immediately voiced his belief that "murder was murder" and "eye for an eye, so to speak." RT 509. Chang's belief that multiple murders should inevitably result in the death penalty would have prompted any reasonably competent counsel to move to excuse Chang for cause or to exercise a peremptory challenge to remove him from the jury.

129. No strategic considerations could justify Trial Counsel's decision to permit these two jurors to serve despite their acknowledged bias in favor of imposing a death sentence for an individual convicted of multiple murders. Trial Counsel's omissions prejudiced Petitioner because both jurors were predisposed to discount mitigating circumstances and sentence Petitioner to death exclusively on the basis of his convictions.

130. But for Trial Counsel's deficient performance, Petitioner's Sixth Amendment right to an unbiased jury would not have been violated, and it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at trial.

4. Trial Counsel Was Prejudicially Ineffective in Suggesting to the Venire Panel that a Sentence of Life Imprisonment Without the Possibility of Parole Could Be Reduced.

131. Petitioner was deprived of the effective assistance of counsel during voir dire because Trial Counsel prejudicially and unreasonably misled prospective jurors by suggesting that a sentence of life without the possibility of parole ("LWOP") could lead to Petitioner's eventual release from prison. No reasonably competent counsel would have made such a statement to prospective jurors. Trial Counsel's misstatement prejudiced Petitioner by encouraging jurors to vote for death, even if they otherwise would have considered LWOP absent Trial Counsel's misleading statement.

132. During voir dire, Trial Counsel questioned prospective juror Janet Ignasiak about her response on the juror questionnaire that the death penalty is used "too seldom" because "[t]oo many criminals are let out early only to repeat the same crimes." Exh. 23, Pre-Trial Jury Questionnaire of Janet Ignasiak, PE 0215. Trial Counsel explained to Ignasiak and other prospective jurors that the jury would be presented with only two choices in the penalty phase: "death or life without possibility of parole." RT 419. However, Trial Counsel then suggested that Petitioner, if convicted and sentenced to LWOP, could still potentially be released from prison:

> And as the court told you, though there is perhaps some possibility in the future – because we don't know what's going to happen in the future, we have to assume that those sentences are going to be carried out.

RT 419. Trial Counsel reinforced his mischaracterization of LWOP by suggesting that a defendant sentenced to LWOP could be released decades in the future:

> If you vote for death you should assume it's going to happen. Likewise, if you vote for life without possibility of parole you've got to assume that that's what it means. And, in any event, there isn't going to be anybody that's going to tell you that somebody like that is going to get out in a few years. It's going to be decades if anything ever happens.

RT 419. Thus Trial Counsel twice told jurors that they could not rely on a sentence of LWOP to ensure that Petitioner, if convicted, would remain incarcerated until death. Instead, potential jurors were left to believe that Petitioner could be released if, upon his conviction, jurors voted for any penalty less than death.

133. Trial Counsel's description of the meaning of LWOP during voir dire was a prejudicial mischaracterization of law. Nor did the trial court's admonition to the panel the next day during voir dire ameliorate the prejudicial impact of Trial Counsel's error. RT 454.

134. The Eighth Amendment imposes a heightened need for reliability in determining that death is an appropriate punishment in a

specific case. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *see also Caldwell v. Mississippi*, 472 U.S. 320, 340-41 (1985). If a jury were to vote for death simply because jurors feared a sentence of LWOP would permit Petitioner to be released from prison at some point in the future, it would violate the fundamental fairness of the sentencing proceeding. No reasonably competent attorney would misstate to jurors the possibility that a defendant facing the death penalty could eventually be released on parole if sentenced to LWOP.

135. Trial Counsel had no valid tactical reason for describing LWOP in this manner which prejudicially contributed to the decision of one or more penalty phase jurors to return a verdict of death. In fact, jurors were concerned with the possibility that Petitioner would be released, and this concern played into their decision-making process. For example, Jury Foreperson Constance Bennett responded to the question, "Why did you vote for death?" in the post-verdict questionnaire as follows: "I cannot allow a man like that the remotest possibility of ever being on the street again." Exh. 24, Post-Verdict Juror Questionnaire of Constance Bennett, PE 0232. Bennett further declared, "I understood that life without parole meant he would never be paroled, but I also felt that there was always an outside chance that a prisoner would somehow be released or go free." Exh. 123, Declaration of Constance Bennett, PE 1141 ¶ 6. Given the concerns acknowledged by Bennett, Trial Counsel's mischaracterization of

LWOP to the jury pool likely contributed to the decision of one or more jurors to return a verdict of death.

136. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at trial.

B. Petitioner's Trial Counsel Rendered Constitutionally Ineffective Assistance of Counsel by Failing to Investigate, Present Evidence, and Defend Against the State's Case in the Guilt Phase.

137. Trial Counsel unreasonably and prejudicially failed to conduct a timely or adequate investigation of the potential guilt issues, did not make informed and reasoned decisions regarding the presentation of the defense case, and did not adequately defend against the State's case. Reasonably competent counsel handling a capital case at the time of Petitioner's trial would have known that a thorough investigation of the prosecution's theories of guilt, an independent analysis of the evidence supporting those theories, a review and examination of law enforcement's investigation, an investigation of potential defenses, and a defense against the State's case were essential for preparation for trial. Minimally competent counsel also would have recognized that a thorough investigation of Petitioner's background and family history, including psychological and cognitive deficits and substance abuse as well the impact of such deficits and abuse on his functioning and behavior, was essential to the adequate preparation

of the case for the guilt phase of trial.

1. Count I (Las Playas)

a. Trial Counsel Unreasonably Stipulated to the Admissibility of Witness Angelica Contreras' Prior Testimony.

138. Trial Counsel unreasonably and prejudicially failed to protect Petitioner's constitutionally guaranteed right to confront witnesses when he stipulated to the admissibility of the prior testimony of prosecution witness, Angelica Contreras. RT 815. *Pointer v. Texas*, 380 U.S. 400, 403-05 (1965).

139. On December 13, 1990, the prosecution moved to videotape the preliminary hearing testimony of Angelica Contreras. CT 5-6. The prosecution based this request on the fact that many of the witnesses were Mexican nationals, some of whom were undocumented, which the prosecution claimed increased the potential for these witnesses to be unavailable at the time of trial. CT 5-6. The trial court granted the prosecution's request only after cautioning that "the People do have a continuing obligation to keep track of the witnesses." CT 6. One of the witnesses whose preliminary hearing testimony was videotaped was Angelica Contreras. CT 817, RT 819, 822-23.

140. At trial, the Prosecutor moved to admit Contreras' prior testimony at the preliminary hearing. RT 807-08. To do so, the Prosecutor

was required to establish that Contreras was unavailable as a witnesses. Evid. Code § 240(a). Moreover, the prosecution had the burden of proving that it exercised "reasonable diligence" to try to procure the attendance of a witness. Evid. Code § 240(a)(5). In addition, the prosecution was required to demonstrate that it acted in "good faith" to try to secure Contreras' attendance. *People v. Jackson*, 28 Cal. 3d 264, 312 (1980), *overruled on other grounds by People v. Cromer*, 24 Cal. 4th 889 (2001). Moreover, "the requirement of due diligence is a stringent one for the prosecution," *Jackson*, 28 Cal. 3d at 312 (citation omitted), and it is greater still when, as here, "the absent witness is vital to the prosecution's case and [her] credibility is suspect." *People v. Louis*, 42 Cal. 3d 969, 991 (1986) (citation omitted).

141. In this case, Contreras was a vital prosecution witness. No witness testified to having seen Petitioner shoot the victim, Miguel Garcia. *See* RT 887-90 (Laura Lozano); RT 843-45 (John Arnold Guardado); CT 12 (Angelica Contreras). Contreras was the only testifying witness who identified Petitioner as even having held a gun at the scene of the crime after the shooting. CT 13-18, 33.

142. The requirement of due diligence includes both reasonable efforts to find an absent witness and as well as reasonable efforts to prevent the witness from becoming absent in the first instance. *Louis*, 42 Cal. 3d at 991. Thus, when the witness' testimony is "deemed 'critical' or 'vital' to

the prosecution's case," the prosecution "must take reasonable precautions to prevent the witness from disappearing." *People v. Hovey*, 44 Cal. 3d 543, 564 (1988) (citing *Louis*, 42 Cal. 3d at 989-91). Failing to use reasonable diligence to prevent a witness' absence "does not satisfy the requirement of due diligence" to support a finding of unavailability. *Louis*, 42 Cal. 3d at 991.

143. During the evidentiary hearing on the State's motion to admit the prior testimony of Contreras, the Prosecutor called Kevin Sleeth, an investigator with the District Attorney's Office. RT 808-09. Investigator Sleeth testified that he was directed to find Angelica Contreras on July 22, 1993, which was only one month before the Prosecution's case-in-chief began. RT 810.

144. According to Investigator Sleeth, beginning on July 22, 1993, he checked Angelica Contreras' last known address, and was told by neighbors that she had moved to Mexico approximately five months prior. RT 810-11. Sleeth also claimed to have spoken with Angelica Contreras' former co-workers at Las Playas (who did not know her present whereabouts) and to have performed various record searches in an unsuccessful effort to locate Angelica Contreras. RT 811-13. Further, Sleeth testified that on the morning of August 23, 1993 – the day he offered his testimony – that he called the police station in Colima, Mexico, to try to locate Angelica Contreras' parents, who apparently lived there. By the time

of the hearing, Sleeth had not heard back from the Mexican police. RT 813. Thus, despite the trial court's express warning, the prosecution made no effort to keep track of Angelica Contreras' whereabouts in the intervening years after the preliminary hearing. The District Attorney's Office did not direct Kevin Sleeth to locate Angelica Contreras until July 22, 1993, only approximately one month before trial. Such conduct fell short of the prosecution's burden of proving due diligence in keeping track of its witnesses, particularly someone as critical to the prosecution's case as Angelica Contreras and particularly where there was reason to suspect that she might make herself unavailable at the time of trial.

145. Moreover, even if Angelica Contreras had indeed moved to Mexico, the prosecution still had not met its burden of showing she was in fact unavailable because it did not avail itself of the Treaty on Cooperation Between the United States and the United Mexican States for Mutual Legal Assistance. Mexico-United States: Mutual Legal Assistance Cooperation Treaty, Dec. 9, 1987, U.S.-Mex., S. Treaty Doc. No. 100-13.

146. Kevin Sleeth called Mexican authorities only in one town, Colima, and only did so hours before he testified at trial. RT 813. Not surprisingly, he had not heard back from the Colima police department at the time he offered his testimony. RT 813.

147. Following examination of Sleeth at the hearing, Trial Counsel expressed concern that the prosecution had not proven that Angelica

Contreras was in Mexico and beyond the court's jurisdiction. RT 814. Moreover, he voiced doubts as to whether the prosecution had fulfilled its obligation to keep track of Angelica Contreras in the two-and-one-half years between the preliminary hearing and the trial. RT 814-15. Nonetheless, Trial Counsel inexplicably stated that he was conceding this issue in order to "take care of the problem." RT 815. The Court accepted the stipulation. RT 815-16.

148. Under these circumstances, Angelica Contreras' preliminary hearing testimony was inadmissible against Petitioner in this capital trial, particularly where Contreras was a critical prosecution witness. Reasonably competent trial counsel would have recognized the importance to opposing thc admission of this testimony and the risk it presented in depriving Petitioner's constitutional right to confront Contreras as a witness.

149. Trial Counsel had no strategic reason to stipulate to the admission of Contreras' prior testimony and to forgo reasonably opposing the Prosecutor's motion for the admission of this testimony. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result for Petitioner would have been obtained at trial.

b. Trial Counsel Failed to Investigate, Develop, and Present Evidence of an Alternate Suspect.

150. Trial Counsel unreasonably and prejudicially failed to conduct

a timely and independent investigation to develop and present evidence that would have created reasonable doubt that the Petitioner was the shooter.

151. Had Trial Counsel conducted an adequate investigation of the State's case, Trial Counsel would have learned that the police had identified an individual by the name of Jesus Manzo Andrade as a potential suspect in the Las Playas shooting. Exh. 4, Sheriff's Complaint Report by Dep. Pando and Dep. Nadeau, Jan. 26, 1989. After Detectives Pando and Nadeau made contact with this suspect, this individual identified himself to the detectives as "Jesus Manzo." Additionally, Jesus Manzo was known to use several aliases, and had an outstanding warrant for his arrest. *Id.*

152. During trial, Detective John Laurie testified that he, Detective Ronald Riordan, and Officer Joe Olmedo had interviewed Petitioner about the Las Playas shooting. RT 1571-72. According to Detective Laurie, Petitioner said that he went to the Las Playas that night with a man named Francisco Manzano, whom Petitioner had identified as the shooter. RT 1574-75. Petitioner stated that he had only held patrons "at bay" with a 9 mm gun after the shooting occurred. RT 1575. Officer Ronald DeChamplain further testified that Petitioner gave the name "Francisco Manzano" as his name when he was arrested during an unrelated traffic stop on January 6, 1990. RT 1687-88. The Prosecutor seized on this in closing arguments by arguing that Francisco Manzano and Petitioner were the same person and that Petitioner had shot the victim, Miguel Garcia.

RT 1756, 1761-64, 1782, 1909-10.

153. Had Trial Counsel conducted an adequate investigation of the State's case, he would have learned that the police had identified Jesus Manzo early on as a potential suspect in the shooting incident. This information would have shown that the police had independently focused on another individual with a similar last name to the name of the shooter known by Petitioner, and that they had contacted Jesus Manzo on January 26, 1989 – just four days after the shooting at Las Playas.

154. Additionally, this information would have ameliorated the detrimental effect of Officer DeChamplain's testimony and the Prosecutor's argument that Petitioner and Manzano were the same person, because it would have shown that the police were independently investigating a person with last name similar to Manzano – i.e., Manzo.

155. Trial Counsel unreasonably failed to investigate this alternate suspect and present evidence regarding him during trial. Trial Counsel's unreasonable omissions regarding this defense include but are not limited to his failure to seek a court order compelling the prosecution to produce all relevant records, and his failure to investigate and present evidence regarding this alternate suspect. Counsel have been found ineffective for failing to file formal discovery motions and simply relying on the prosecution to turn over information, or on the prosecution's "open file" policy. *Crandell v. Bunnell*, 144 F.3d 1213 (9th Cir. 1998), *overruled on*

other grounds by Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000); *see also Fisher v. Gibson*, 282 F.3d 1283 (10th Cir. 2002). This was particularly unreasonable because Trial Counsel suspected and had reasonable notice that the prosecution had failed to disclose all relevant materials. *See, e.g.*, RT 937.

156. Trial Counsel had no reasonable strategic reason to fail to investigate, develop, prepare and present information regarding this alternate suspect. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result for Petitioner would have been obtained at trial.

157. Trial Counsel also unreasonably and prejudicially failed to conduct a timely and independent investigation to develop and present evidence showing the victim, Miguel Garcia, was shot by an individual known as "Rancher" who had fought with Garcia at the Las Playas restaurant just weeks before the shooting.

158. Tiffany Valber reported to the police that Garcia was involved in a fight in the Las Playas parking lot approximately two to three weeks before the shooting. Exh. 1, Excerpts from Notebook of Dep. Ronald Riordan, PE 0014. Valber said that she was with Garcia when he got into a fight with some "dope dealers" in the parking lot, who were driving a black pickup truck with a white camper. Exh. 3, Sheriff's Report by Dep. French, Jan. 22, 1989, PE 0045-48; Exh. 1, Excerpts from Notebook of Dep.

Riordan, PE 0014.

159. Fernando Bravo, aka "Negro," who knew Garcia, also reported to the police that a few weeks before the shooting, Garcia fought with someone known as "Rancher" in the parking lot at Las Playas. Exh. 2, Excerpts from Notebook of Sgt. Laurie, PE 0041. Bravo further reported that it was "Rancher" who shot Garcia. *Id.* Additionally, a black pickup truck was seen fleeing the Las Playas restaurant on the night of the shooting. Exh. 3, Sheriff's Report, Jan. 22, 1989, PE 0047.

160. Trial Counsel had no strategic reason to forego a timely and adequate investigation regarding an alternate suspect. No witness was able to testify to having seen Petitioner do the shooting, despite the fact that the incident took place within a well-populated restaurant. Had Trial Counsel developed and presented this evidence, it would have raised reasonable doubt that Petitioner shot Garcia.

161. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result for Petitioner would have been obtained at trial.

c. Trial Counsel Failed to Investigate, Develop, and Present Evidence Demonstrating That the Shooter Was Threatened or Provoked.

162. Trial Counsel unreasonably and prejudicially failed to conduct a timely and independent investigation to develop and present evidence

showing that Garcia threatened or provoked the shooter.

163. Before going to the Las Playas Restaurant on January 22, 1989, Miguel Garcia had spent the night drinking with friends. Exh. 1, Excerpts from Notebook of Dep. Riordan, PE 0005-06. Garcia had been staying with the Vasquez family in Paramount at this time. George Dorame, a friend of Garcia, told the police on January 22, 1989, that he met with Garcia, who was with "Negro," on Wilbarn. *Id.* At around 10:00 p.m. or so, Garcia and Dorame went to pick up beer. *Id.* On their way home, they stopped at the residence of Tiffany and Ramona Valber, and their sister Natalie Hernandez (the "Valber sisters") at 8333 Wilbarn Street. *Id.* at PE 0005, 0011. Garcia, along with the Valber sisters, George Dorame, and others, sat in the yard, drinking beers and listening to music. *Id.* at PE 0002, 0005, 0012; Exh. 2, PE 0030. Around 2:00 a.m., more beer was purchased. *Id.*

164. At approximately 2:45 a.m. or 3:00 a.m., John Guardado, another friend of Garcia, also arrived at the Valber home. RT 834; Exh. 1, PE 0006. Guardado testified at trial that he had been out drinking at a club before arriving at the Valber house. In particular, he had had a "lot of mixed drinks, beers" and was "pretty drunk" that night. RT 836, 867.

165. According to Dorame's account, everyone continued to drink beer until the early hours of Sunday, January 22, 1989, when the beer finally ran out. Exh. 1, PE 0006. Garcia suggested that they go to the

nearby Las Playas Restaurant to get some food. Exh. 2, PE 0030. Dorame and Guardado went with Garcia. Exh. 1, PE 0006.

166. Dorame told the police when he was questioned on January 22, 1989, that Garcia was refusing to sit down at the booth at Las Playas and was calling out to people in other booths, including his "homeboy" in the booth directly across from where Dorame and Guardado were seated. Exh. 1, PE 0008; Exh. 2, PE 0032. Dorame and Guardado tried unsuccessfully to get Garcia to sit at the booth. Exh. 1, PE 0008. Additionally, there was evidence of cocaine and a cocaine-related substance in Garcia's bloodstream along with alcohol. RT 1612.

167. Maria Estrada Contreras, a cashier at the restaurant (and unrelated to witness Anglica Contreras), stated that Garcia said that "if you have balls, pull your gun and shoot" before being shot. Exh. 1, PE 0026-27. Maria Estrada Contreras did not witness the shooting or see the shooter. Exh. 5, L.A. County Sherriff's Report by Sgt. Laurie and Dep. Riordan, Jan. 31, 1989, PE 0059.

168. Garcia was no stranger to violence. He had gotten into a fight at Las Playas just a few weeks before the shooting. Tiffany Valber reported to the police that Garcia was involved in a fight with someone in the Las Playas parking lot approximately two to three weeks before his death. Exh. 1, PE 0019. Valber said that she was with Garcia when he got into a fight with some "dope dealers" in the parking lot, who were driving a black

pickup truck with a white camper. Exh. 3, Sheriff's Report, Jan. 22, 1989, PE 0045-48; Exh. 1, PE 0014.

169. Fernando Bravo, aka "Negro," who knew Garcia, also reported to the police on February 1, 1989, that a few weeks before the shooting, Garcia had gotten into a fist fight with someone known as "Rancher" in the parking lot at Las Playas. Exh. 2, PE 0041.

170. Trial Counsel failed to perform a timely and adequate investigation into Garcia's threatening and provoking statements and behavior surrounding the shooting at Las Playas. Trial Counsel's errors and omissions include, but are not limited to, his failure to investigate and present evidence that Garcia had recently been involved in a fight with a different person at the Las Playas restaurant; his failure to seek a court order compelling the production of all relevant information relating to the shooting; and his failure to investigate and present evidence of Garcia's provoking and threatening statements and actions.

171. Trial Counsel had no strategic reason to forego an adequate and timely investigation to develop and present this evidence. Such evidence would have raised doubt in the mind of the jury that Petitioner was the shooter or that Petitioner was guilty of first degree murder. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result for Petitioner would have been obtained at trial.

d. Trial Counsel Failed to

Reasonably Investigate and
Present Evidence of Petitioner's
Mental Impairments and Illness.

172. Trial Counsel unreasonably and prejudicially failed to investigate, develop, and present evidence concerning Petitioner's mental impairments and illnesses. This evidence would have raised a reasonable doubt that Petitioner had the mental state required for first degree murder. *See People v. Saille*, 54 Cal. 3d 1103, 1114-17 (1991) (in a murder prosecution, defendant is free to show that because of mental illness, he or she did not in fact form the intent to kill lawfully); *People v. Flannel*, 25 Cal. 3d 668, 679-80 (1979) (honest belief, even if unreasonably held, that defendant is in imminent peril or loss of life or serious injury negates malice required for first degree murder).

173. As discussed in Claim 1.D.6-7, below, Trial Counsel wholly failed to reasonably investigate, prepare and present readily accessible evidence demonstrating that Petitioner suffered from alcohol and drug abuse and serious mental impairments and illnesses, including Posttraumatic Stress Disorder ("PTSD"), and Executive Dysfunction Disorder. *See* Exh. 129, Declaration of Dr. Pablo Stewart ("P. Stewart Decl.") PE 1228; Exh. 126, Expert Report of Antolin Llorente, Ph.D. ("A. Llorente Decl.") PE 1152.

174. As a result of these illnesses and impairments, Petitioner suffered from, among other things, "poor planning, impaired judgment,

diminished self monitoring, modulation and inhibition leading to a reduction in the control of emotions, behaviors and actions, and when coupled with his history of PTSD and alcohol-drug abuse, such defects in executive control, particularly disinhibition, are exacerbated, leading to responses and behaviors that may be less controlled by cortical outputs and instead dominated by instincts." Exh. 126, A. Llorente Decl., PE 1165 ¶ 40. Likewise, this evidence would have shown that "[a]t the time of the offense[] [Petitioner] was likely in a dissociative state. Even if he were not in a completely dissociative state, the totality of his chronic mental impairments prevented him from appreciating the wrongfulness of his actions, impaired his judgment and insight, and obliterated his ability to plan out alternative actions." Exh. 129, P. Stewart Decl., PE 1263 ¶ 87.

175. Trial Counsel had no reasonable tactical basis to forego investigating, developing and presenting this evidence. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at trial.

e. Trial Counsel Failed to Reasonably Investigate, Develop, and Present Evidence of Petitioner's Drug and Alcohol Dependence.

176. Trial Counsel unreasonably and prejudicially failed to adequately investigate, develop and present evidence showing that Petitioner's alcohol and cocaine dependence resulted in his failure to

possess the mental state necessary to commit first degree murder. *See* Cal. Pen. Code § 22(b); *People v. Mosher*, 1 Cal. 3d 379, 391 (1969).

177. As discussed in Claim 1.D.6-7, below, Trial Counsel wholly failed to reasonably investigate, prepare and present readily accessible evidence demonstrating that Petitioner suffered from serious and chronic alcohol and cocaine dependence. For example, Petitioner drank every day, and every three months he would drink "locked in" his garage for three days straight. Exh. 129, P. Stewart Decl., PE 1258-59 ¶¶ 76-77. Petitioner abused alcohol and cocaine to medicate the impact of the symptoms of his mental illness. *Id.* at PE 1262 ¶ 85. Had Trial Counsel presented this evidence, the jury would have been persuaded that, even if it believed Petitioner was the shooter, Petitioner was in a state of intoxication such that he did not commit first degree murder. *See* Exh. 129, P. Stewart Decl., PE 1228; Exh. 126, A. Llorente Decl., PE 1152.

178. Trial Counsel had no reasonable tactical basis to forego investigating, developing and presenting this evidence. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at trial.

f. Trial Counsel Failed to Object to the Admission of Unreliable and Prejudicial Hearsay Statements During Detective Laurie's Testimony.

179. Trial Counsel unreasonably and prejudicially failed to object to

unreliable hearsay statements made during Detective John Laurie's testimony.

180. When he testified about his February 24, 1990 interview of Petitioner at the Los Angeles County Jail, Detective Laurie discussed Petitioner's alleged prior use of the alias "Francisco Manzano," whom Petitioner had also identified as the companion that committed the shooting at the Las Playas restaurant. RT 1574-76. On cross-examination, Trial Counsel questioned Detective Laurie about his failure to ask Petitioner to clarify his account that "his friend shot" the Las Playas decedent. RT 1584. Detective Laurie responded, "[W]e were hearing something we knew not really to be true – or we felt that was not true, and it seemed senseless to continue on things that were – we knew not to be true." RT 1584-85. Trial Counsel replied by asking Detective Laurie to identify what evidence, aside from witness statements and physical evidence, supported his belief that Petitioner's account was untruthful. RT 1585. Detective Laurie's answer contained inadmissible hearsay: "Well, we had the fact that – or at least an understanding that Mr. Manriquez had used the alias Francisco Manzano on at least four other arrests. So when he identified his companion as Francisco Manzano, I immediately suspected that information, knowing that he had used that in three or four other arrests. So it was, basically, well, let's see what he says from here." RT 1585.

181. Reasonably competent trial counsel would have objected to the

admissibility of this unreliable hearsay statement, and would have moved to strike it from the record. Detective Laurie had no firsthand knowledge that Petitioner had ever used the name Francisco Manzano in any previous arrests. Rather, Detective Laurie was simply repeating an out-of-court statement – that Petitioner had previously used such an alias – which was admitted to prove the truth of the matter asserted. Detective Laurie also did not identify any source of information for his belief that Petitioner had ever used such an alias. The testimony was highly prejudicial. Detective Laurie's statement alluded to "at least four other arrests" of Petitioner, leading jurors to conclude that Petitioner was more likely guilty of the charged offense. Had Trial Counsel objected, the statements would likely have been excluded and Trial Counsel would have raised reasonable doubt regarding the guilt of Petitioner. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result for Petitioner would have been obtained at trial.

g. Trial Counsel Failed to Challenge the Testimony of Firearms Expert Dwight Van Horn.

182. Trial Counsel unreasonably and prejudicially failed to rebut the prosecution's ballistics evidence.

183. Prosecution witness Dwight Van Horn, a firearms examiner for the Los Angeles County Sheriff's Department, testified that the bullets and casings recovered from the Las Playas shooting had been fired from a gun

police later found on Petitioner when he was arrested at the La Ruleta Bar in Long Beach, California on March 2, 1989. RT 920-21 (testimony by officer that he retrieved gun from Petitioner); RT 962-67 (testimony by detective that he recovered bullets and shell casings from the Las Playas); RT 1021, 1023-24 (testimony by Van Horn linking gun with bullets and casings).

184. Van Horn testified that he linked the gun with the firearms evidence recovered after the shooting at Las Playas. Van Horn concluded that bullets and shell casings recovered from Las Playas were forensically linked to Petitioner's gun. RT 1021-24.

185. Van Horn was incapable of recounting critical details of his ballistics examination beyond conclusory statements that the ammunition had been fired from Petitioner's gun. For example, Van Horn could not recall whether "the lands and the grooves" on the bullets might have been partially obscured, and he only remembered that "the criteria [was] there to call it a positive." RT 1028-30.

186. Reasonably competent trial counsel would have consulted independently with an expert regarding the prosecution's ballistics evidence. Trial Counsel failed to do so. Had he done so, he would have learned that Van Horn's testimony was unreliable because there was no evidence that Van Horn even prepared or maintained such normal and routine supporting documentation which a competent firearms examiner

should utilize in formulating scientific opinions. Exh. 128, Declaration of Kenton Wong ("K. Wong Decl."), PE 1221 ¶ 6. Reasonable trial counsel would also have challenged Van Horn on his failure to follow proper forensic procedures in failing to prepare this documentation.

187. Trial Counsel's errors and omission include but are not limited to his failure to consult with an independent expert to investigate the weaknesses of Van Horn's procedures and conclusions; his failure to cross-examine Van Horn as to the absence of proper supporting documentation underlying his conclusions; and his failure to present testimony of an independent expert to challenge Van Horn's conclusions. Such a challenge would have severely undermined Van Horn's credibility in the eyes of the jury.

188. When forensic evidence is critical in the State's case, defense counsel who fails to adequately investigate and challenge it is ineffective. *See Coleman v. Calderon*, 150 F.3d 1105, 1115-16, *rev'd on other grounds*, 525 U.S. 141 (9th Cir. 1998) (finding trial counsel's failure to challenge hair evidence to be deficient and that counsel "clearly breached his duty to investigate").

189. Trial Counsel had no strategic reason to forego an investigation of and develop and present evidence challenging the bases and conclusions of Dwight Van Horn's analysis. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result

for Petitioner would have been obtained at trial.

h. Trial Counsel Failed to Object to and Move to Strike Irrelevant and Prejudicial Evidence Regarding the Circumstances of Petitioner's Arrest at the La Ruleta Bar.

190. Trial Counsel unreasonably and prejudicially failed to move to strike irrelevant and prejudicial testimony regarding how Petitioner resisted arrest at the La Ruleta Bar.

191. Officer Donald Messer testified that when Petitioner was arrested at the La Ruleta on March 2, 1989, there was a struggle to arrest him. RT 918-20. The Prosecutor asked Officer Messer to describe "what was going on in the struggle between Officer Knutson, yourself and the defendant." RT 920. Officer Messer testified that Petitioner "was not cooperating in letting us get his hands behind his back" and that "[i]t took three of us that I recall was right there to get his hands behind his back to where we were able to handcuff him." RT 920.

192. Trial Counsel unreasonably failed to object to and strike this irrelevant and prejudicial testimony. This testimony was completely unnecessary to the question of Petitioner's guilt on the charges on Count I (Las Playas). It portrayed Petitioner as extremely violent and injected improper considerations during guilt phase issues. Thus, the testimony was more prejudicial than probative under Evidence Code section 352.

193. Trial Counsel had no strategic reason not to, at the very least,

object to and move to strike this testimony. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result for Petitioner would have been obtained at trial.

2. Count II (Fort Knots)

a. Trial Counsel Failed to Investigate, Develop, and Present Evidence to Challenge the Reliability of the Witness Identifications.

194. The State's evidence on Count II was the weakest of the four counts because blood evidence collected at the crime scene did not match Petitioner's. RT 1453. The State's evidence against Petitioner hinged on the witness identifications. Trial Counsel unreasonably and prejudicially failed to investigate, develop, and present evidence challenging the reliability of the identifications made by witnesses Deneen Baker, Mario Medel, Mark Herbert and Barbara Quijada.

195. Of these four witnesses, only two – Medel and Quijada – claimed to have seen the shooting. RT 1098-00, 1190-95. A few days after the shooting, Quijada provided a description of the shooter for a composite sketch. All of the witnesses identified Petitioner from a photo lineup nearly a year after the shooting occurred. RT 1052-55, 1102-03, 1159-60, 1215-18.

196. Despite being aware of the importance of the eyewitness identifications in the State's case, Trial Counsel unreasonably failed to

consult with or present testimony of an expert witness in the field of witness identifications to evaluate the reliability of the identifications even though his supervisor specifically recommended that he consult with such an expert.

197. Had Trial Counsel consulted with an expert witness, that witness would have identified numerous factors relevant to Count II that undermine the reliability of eyewitness identifications. These factors include:

- The duration of time in which a witness observes the face of a suspect. Exh. 127, Declaration of Dr. Kathy Pezdek ("K. Pezdek Decl."), PE 1200-01 ¶¶ 14-16.
- When a weapon is used, witnesses focus on the weapon instead of the weapon's brandisher. This impairs the accuracy of identifications. *Id.* at PE 1202 ¶¶ 17-19.
- Witnesses tend to identify assailants with less accuracy when the latter is a different race. *Id.* at PE 1202-03 ¶¶ 20-22.
- Eyewitness memory fades with time, particularly beyond one week. A time delay between the event and the identification decreases the reliability of the identification. *Id.* at PE 1203-04 ¶¶ 23-25.
- In-court identifications are inherently biased because

witnesses expect to see the perpetrator in court. *Id.* at PE 1205 ¶ 26.

- The correlation between the reported confidence of the eyewitness identification and the accuracy of the identification is low. *Id.* at PE 1205 ¶ 27.
- The use of composite sketches for identification has been shown in studies to not be very accurate. Composite sketches are premised on an assumption that people remember faces by storing independent facial features, contrary to how information about faces is encoded. *Id.* at PE 1205 ¶ 28.

198. A witness identification expert would have advised Trial Counsel that there were serious problems with the identifications made by the witnesses in Count II and that these problems, alone and in combination, reduced the reliability of the witness identifications. *Id.* at PE 1206-07 ¶ 30. A witness identification expert would have offered important testimony to assist Trial Counsel in the preparation of a reasonable defense against the State's case. This testimony would have included, but would not have been limited to, a discussion of the following factors:

- The delay between the time of the shooting and the identifications made during the photo lineup would have

cast significant doubt on the ability of each eyewitness to correctly identify the shooter. Medel and Quijada, who testified that they witnessed the shooting, identified the Petitioner approximately 10 months and 12 months, respectively, after the shooting occurred. The identifications made by Deneen Baker and Mark Herbert took place approximately 13 months and 10 months, respectively, after the shooting occurred. *Id.* at PE 1204 ¶ 24

- The composite sketch of the shooter is only superficially close in resemblance to a photo of Petitioner around the time of the shooting. The similarity is largely accounted for by the hair style. The faces do not appear similar otherwise and few of the other facial features resemble each other. *Id.* at PE 1206 ¶ 29.
- The identifications of Mario Medel and Barbara Quijada are rendered less reliable by the fact that they claimed to have observed the weapon, and well enough to describe it. *Id.* at PE 1202 ¶ 19.
- All of the witnesses were relatively confident in their identifications of the Petitioner. This high degree of confidence cannot be used as an indication of the

probability of the accuracy of their identifications. Moreover, the in-court identifications made by the witnesses are subject to inherent bias. *Id.* at PE 1205 ¶ 27.

- Mark Herbert's and Deneen Baker's identifications were rendered less reliable because they involved a cross-racial identification. *Id.* at PE 1203 ¶ 22.
- Quijada claimed to have witnessed only the shooting, and not any of the prior altercations involving the shooter. She testified that this took place very quickly. This relatively brief exposure time decreased the reliability of her identification. *Id.* at PE 1201, 1204 ¶¶ 16, 25.
- Moreover, it was unclear whether Quijada even saw the shooter's entire face at all. *Id.* at PE 1201 ¶ 16. Quijada testified that she had been talking to Martinez right before the shooting. RT 1186-93. However, Mark Herbert testified that Quijada had been standing alongside him right before the shooting. RT 1161-62. Moreover, Quijada testified that she saw the shooter in person but that she saw him primarily through his reflection in the mirrors. RT 1190, 1192. These mirrors were not clear, but had a gold mottled pattern, which would have made

her view of the shooter even less reliable. Exh. 127, K. Pezdek Decl., PE 1201 ¶ 16.

199. A witness identification expert would have testified that all of these factors, alone and in combination, reduced the reliability of all of the witness identifications in Count II. *Id.* at PE 1206-07 ¶ 30.

200. There was no tactical reason why Trial Counsel did not consult with and present testimony of an eyewitness expert, particularly given the strong reliance on eyewitness evidence in the State's case. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result for Petitioner would have been obtained at trial.

b. Trial Counsel Failed to Investigate, Develop, and Present Evidence Concerning Witnesses Who Were Unable to Make Identifications.

201. Trial Counsel prejudicially and unreasonably failed to investigate and present evidence demonstrating that additional witnesses failed to identify Petitioner in the photographic lineup.

202. During her testimony, Barbara Quijada indicated that approximately ten witnesses were shown the photographic lineup from which she identified Petitioner. RT 1205-07. A total of only four witnesses, however, positively identified Petitioner from the photographic lineup.

203. Therefore, there were several other witnesses who failed to

identify Petitioner as the shooter. Trial Counsel unreasonably failed to conduct a timely and adequate investigation into these facts. Trial Counsel's errors and omissions include but are not limited to his failure to seek a court order compelling the prosecution to produce all relevant records, as well as his failure to investigate and present evidence regarding an alternate suspect. For example, the police conducted a field show-up involving one or more alternate suspects shortly after the shooting. *See* CT 53-54. Trial Counsel failed to conduct an adequate investigation into this field show-up. Counsel have been found ineffective for failing to file formal discovery motions and simply relying on the prosecution to turn over information, or for relying on the prosecution's "open file" policy. *Crandell v. Bunnell*, 144 F.3d 1213 (9th Cir. 1998), *overruled on other grounds by Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000); *see also Fisher v. Gibson*, 282 F.3d 1283 (10th Cir. 2002). This is all the more the case when Trial Counsel suspected and had reasonable notice that the prosecution had failed to disclose all relevant materials, but where he still failed to pursue all relevant discovery. *See, e.g.*, RT 937.

204. Trial Counsel had no reasonable strategic reason to forego an adequate investigation regarding these facts and an adequate presentation of evidence at trial regarding them. Had Trial Counsel investigated and developed these facts, he would have been able to present evidence showing that there were several witnesses who could not identify the

Petitioner, further undermining the weight given to identifications made by witnesses Quijada, Medel, Baker, and Herbert. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result for Petitioner would have been obtained at trial.

c. Trial Counsel Failed to Impeach Witness Barbara Quijada with Her Prior Felony Convictions.

205. Trial Counsel prejudicially and unreasonably failed to investigate the background of Barbara Quijada and impeach her credibility with one or more prior felony convictions.

206. Barbara Quijada was only one of two prosecution witnesses who identified Petitioner as the alleged shooter. Her identification was made at least one year after the incident occurred. RT 1140, 1215.

207. Quijada was a critical witness for the prosecution because she assisted in the preparation of a composite sketch of the shooter several days after the shooting occurred. RT 1200-05. Based on that sketch, the Lynwood Police Department reportedly prepared a photo lineup, which was shown to the witnesses nearly a year later. RT 1205-08.

208. Reasonably competent counsel would have investigated Quijada's criminal background to evaluate her credibility for impeachment purposes.

209. A reasonable investigation would have revealed that Quijada had at least one felony conviction for driving under the influence (DUI) in

1990, and that she had amassed three DUI convictions before that.

210. On August 17, 1990, Quijada was convicted of felony DUI under Cal. Vehicle Code section 23152(a). Exh. 29, *People v. Quijada*, Case No. CR26313, Probation Grant, Aug. 17, 1990, PE 0262; Exh. 30, *People v. Quijada*, Case No. CR26313, Minute Order, Nov. 21, 1997, PE 0266. In that conviction, Quijada admitted to three prior DUI convictions under Cal. Vehicle Code section 23152(a). Exh. 29, *Quijada* Probation Grant; *see also* Exh. 28, *People v. Quijada*, Case No. 905002019, Felony Complaint, May 8, 1990, PE 0259.

211. Trial Counsel failed to perform a reasonable and adequate investigation into Quijada's criminal background. Had Trial Counsel done so, he would have discovered Quijada's prior convictions and would have been able to impeach her testimony and cast significant doubt on her credibility. Cal. Const., art. I, § 28, subdivision (f) ("Any prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used without limitation for purposes of impeachment. . . ."); *see also People v. Forster*, 29 Cal. App. 4th 1746, 1757 (1994) (multiple convictions of driving under the influence involved moral turpitude because it was a "recidivist type crime involving an extremely dangerous activity").

212. These prior convictions would have cast doubt on the veracity of Quijada's testimony, including her statement that she was not drinking at the time of the shooting, RT 1185, 1193, as well as her identification and

description of the shooter.

213. Trial Counsel's errors and omissions include, but are not limited to, failing to seek a court order compelling the production of all relevant, discoverable material, including witnesses' felony convictions, and failing to conduct an independent investigation of Quijada's criminal background. Counsel have been found ineffective for failing to file formal discovery motions and simply relying on the prosecution to turn over information, or on the prosecution's "open file" policy. *Crandell v. Bunnell*, 144 F.3d 1213 (9th Cir. 1998), *overruled on other grounds* by *Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000); *see also Fisher v. Gibson*, 282 F.3d 1283 (10th Cir. 2002). This is particularly so when Trial Counsel suspected and had reasonable notice that the prosecution had failed to disclose all relevant materials, but where he still failed to pursue all relevant discovery. *See, e.g.*, RT 937.

214. Trial Counsel's unprofessional failures and omissions prejudicially impacted Petitioner. Quijada's testimony was critical to the prosecution's case. Quijada was one of only two witnesses who reportedly saw the shooter at the time of the shooting. Moreover, Quijada met with the police shortly after the shooting and worked with a sketch artist to prepare a composite sketch of the shooter.

215. Impeaching her testimony with her prior convictions for felony DUI would have significantly undermined her credibility as well as the

accuracy of her description to the police and of her identifications of Petitioner. Counsel performs ineffectively when he or she fails to fully investigate and present evidence to impeach the prosecution's witnesses. *Alcala v. Woodford*, 334 F.3d 862, 878-88 (9th Cir. 2003).

216. Trial Counsel had no strategic reason to forego an investigation of Quijada's criminal record and an impeachment of her testimony. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result for Petitioner would have been obtained at trial.

d. Trial Counsel Failed to Impeach Witness Deneen Baker with Her Conviction for Theft.

217. Trial Counsel prejudicially and unreasonably failed to investigate the background of Deneen Baker and impeach her credibility with her prior misdemeanor conviction under Penal Code section 484(a) for the theft of property in 1990. Exh. 31, *People v. Deneen Yvonne Baker*, Case No. 90700422, Conviction Record, Jan. 17, 1990, PE 0274.

218. Reasonably competent counsel would have investigated Baker's criminal background to evaluate her credibility for impeachment purposes.

219. Trial Counsel failed to perform a reasonable and adequate investigation into Baker's criminal background. Had Trial Counsel done so, he would have discovered Baker's prior conviction and would have been able to impeach her testimony and cast significant doubt on her

credibility. *See In re Dedman*, 17 Cal. 3d 229, 231 (1976) (conviction under Penal Code section 484(a) was a crime of moral turpitude).

220. This prior conviction would have cast doubt on the veracity of Deneen Baker's testimony and her identification of Petitioner as the individual who touched her inappropriately on the night of the shooting.

221. Trial Counsel's errors and omissions include, but are not limited to, failing to seek a court order compelling the production of, among other things, discoverable material regarding Baker's criminal background and failing to conduct an adequate, independent investigation of Baker's criminal background. Counsel have been found ineffective for failing to file formal discovery motions and simply relying on the prosecution to turn over information, or for relying only on the prosecution's "open file" policy. *Crandell v. Bunnell*, 144 F.3d 1213 (9th Cir. 1998), *overruled on other grounds* by *Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000); *see also Fisher v. Gibson*, 282 F.3d 1283 (10th Cir. 2002). This is particularly so when Trial Counsel suspected and had reasonable notice that the prosecution had failed to disclose all relevant materials, but where he still failed to pursue all relevant discovery.

222. Trial Counsel had no strategic reason to fail to uncover Baker's criminal record and an impeachment of her testimony. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result for Petitioner would have been obtained at trial.

e. Trial Counsel Failed to Object to and Move to Strike Inflammatory and Prejudicial Testimony of Barbara Quijada.

223. Trial Counsel prejudicially and unreasonably failed to move to strike inflammatory and prejudicial testimony by witness Barbara Quijada.

224. There were several instances in which Quijada's testimony was inflammatory and more prejudicial than probative under Evidence Code section 352. Moreover, Quijada's testimony was improper victim impact testimony during the guilt phase of trial. Trial Counsel unreasonably failed to protect his client's rights and failed to object to and move to strike the testimony summarized below.

225. Quijada testified in detail regarding her attempt to save Martinez's life after he was shot. Not only was Quijada not qualified to render a specialized opinion as to Martinez's medical condition (RT 1197-99) her testimony was wholly irrelevant to the question of Petitioner's guilt. At the very least, her testimony was more prejudicial than probative under Evidence Code section 352. Quijada testified in detail about her attempts to perform CPR on Martinez and check his vital signs. She also testified that she tried to talk to him about his wife to keep his mind off his injuries and that she "knew [Martinez] could hear me because his eyes were responding to every word I said." RT 1198. She also testified that the police told her "that there was nothing that they could have done any better

than what I had because he left with nice thoughts. I tried – I tried to alleviate as much fear as I possibly could, which is – I tried – I tried to get his mind off this." RT 1199.

226. In response to the Prosecutor's question "did you talk to the police about what had occurred," Quijada gave a long, emotional narrative response in which she stated that she had been "speechless and couldn't talk, and all they [police] did was tell me that I had done a wonderful job, better than any of them – anything that they could have done for someone that they didn't know." RT 1200. In fact, after this lengthy testimony, the judge interrupted Quijada to remind her that she should confine herself to answering the question asked. RT 1201.

227. When asked about the confidence level of her identification of Petitioner as the shooter, Quijada stated that "[i]t only brutally confirmed, seeing him in person, seeing – that's why my reaction with the larger picture was a shock. And seeing the person – the person is worse." RT 1218. She went on to say that seeing Petitioner in court "only confirms a nightmare that I have been living with for a long time. I guess I can tell you to your face, I will never forget what you did. I will never forgive what you did." RT 1218-19.

228. Reasonably competent trial counsel would have recognized that Quijada's testimony was highly inflammatory and prejudicial and would have sought to protect his client's rights by, at a minimum, objecting

to and moving to strike this testimony.

229. Trial Counsel had no reasonable tactical reason for failing to object to and move to strike this inflammatory, prejudicial testimony. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result for Petitioner would have been obtained at trial.

f. Trial Counsel Failed to Object to and Move to Strike Improper and Prejudicial Testimony regarding Similar Modus Operandi in Counts I and II.

230. Trial Counsel prejudicially and unreasonably failed to object to inflammatory and prejudicial testimony from Detective Verdugo that Fort Knots (Count II) had a similar modus operandi to the Las Playas incident (Count I):

> During the course of our investigation, which is quite often, detective type of follow-up cases are discussed in the office. And at one point I was speaking with Detective Riordan and Sergeant Laurie who had linked the case with another case. And as we began to talk, it's a thing where I might call it an M.O., a modus operandi we may have heard of.

RT 1441. This testimony was highly improper. Not only were Counts I and II concededly not cross-admissible, the testimony prejudiced Petitioner because it led the jury to cross-consider the evidence in finding guilt on Count II. By the time that Detective Verdugo gave his testimony, Detectives Laurie and Riordan – whom he referenced – had already

testified regarding Count I. Thus, the jury was aware that Detective Verdugo was drawing a link between Counts I and II.

231. Trial Counsel had no strategic reason not to, at the very least, object to and move to strike this testimony. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result for Petitioner would have been obtained at trial.

g. Trial Counsel Unreasonably and Prejudicially Elicited Hearsay Testimony from Deneen Baker.

232. Trial Counsel unreasonably and prejudicially elicited hearsay during his cross examination of witness Deneen Baker that unreliably bolstered the prosecution's case against Petitioner.

233. As discussed above, Deneen Baker identified Petitioner as the individual who was ejected from the bar after inappropriately touching her. Baker did not witness the shooting. During his cross examination, Trial Counsel damaged his client's case by eliciting hearsay statements from Baker:

Q: You got some information from talking to other people –

A: Uh-huh.

Q: – That you thought – so that you understood that the person that you threw out or had thrown out was the person that shot Mario; right?

A: Shot George.

Q: Shot George. I confused myself.

A: Right.

RT 1067. Trial Counsel had no tactical reason to elicit this unreliable hearsay testimony. It did nothing to help him defend against the count. On the contrary, this testimony bolstered the prosecution's case because the jury heard Baker draw a link – not based on information available to her through first-hand knowledge – between the person who was thrown out of the bar and the person who shot Martinez. However, Baker never saw the shooting, let alone the person who shot Martinez.

234. In light of the weakness of the prosecution's case on Count II, Trial Counsel's error prejudiced Petitioner by improperly bolstering the prosecution's case. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result for Petitioner would have been obtained at trial.

h. Trial Counsel Unreasonably and Prejudicially Failed To Object to Testimony of Detective Verdugo.

235. Trial Counsel unreasonably and prejudicially failed to object to and move to strike unreliable testimony of Detective Verdugo as lacking in any foundation.

236. Detective Verdugo testified at trial that he directed David Hong, a serologist with the Los Angeles County Sheriff's Department, to collect bloodstains that Detective Verdugo found at the scene. RT 1436-37.

After testing the samples, the Serology Section of the Los Angeles County Sheriff's Department determined that the samples did not match Petitioner's blood. RT 1439; Exh. 12, Sheriff's Scientific Services Bureau Serology Report by David B. Hong, Aug. 25, 1993, PE 0118. The results also excluded the victim, George Martinez, as a source of the blood collected at the scene by the serologist. *Id.*

237. These test results were made available to the Prosecutor and Trial Counsel after the trial began. Upon learning of the results, the Prosecutor and Trial Counsel stipulated that the blood evidence collected at the scene by the Serology Section was not Petitioner's or the victim's. RT 1453.

238. During his direct examination of Detective Verdugo, the Prosecutor asked Verdugo a series of improperly leading questions:

> Q: Now, did you direct [serologist David Hong] to pick up some of the bloodstains?
>
> A: Yes, sir. I pointed out what I wished to have gathered and he did.
>
> . . .
>
> Q: Did Mr. Hong collect every blood –
>
> A: He selected a sample from every position.
>
> Q: Not every bloodstain?
>
> A: Not every bloodstain.
>
> Q: Some were smaller than others and incapable of being collected?

A: That is correct, Sir.

RT 1437. Further:

Q: And were two of the bloodstains that were collected submitted [to the crime lab for analysis]?

A: Yes, sir.

Q: And tested?

A: Yes, sir.

Q: And there were more than two collected?

A: That's correct, sir.

Q: But only two were tested?

A: That's correct, sir.

Q: Based upon their quantity and amount?

A: That is correct, sir.

Q: The ability to test?

A: That's correct, sir.

RT 1438.

239. Detective Verdugo's testimony lacked any foundation. Detective Verdugo did not perform the collection or the testing of the blood. Instead, David Hong had collected the blood and the Serology Section had performed the testing. Moreover, Detective Verdugo was not qualified to give scientific opinions as to why certain bloodstains could not be sampled and why certain samples could not be tested. Furthermore, his testimony on these topics was the product of leading questioning by the

Prosecutor.

240. Detective Verdugo's testimony was unreliable and improper. Competent trial counsel would have recognized this and would have objected to and moved to strike this testimony. Verdugo's testimony led the jury to believe – without any reliable foundation – that the police had followed the correct procedures in collecting and testing the blood samples. Moreover, as discussed in Claim 4, the Prosecutor improperly urged the jury in guilt phase closing argument to believe that blood samples that could not be collected or tested implicated Petitioner:

> *. . . to tell you that the blood is not the defendant's is not true.* There was still blood there they [the officers] couldn't pick up. There were samples they picked up but weren't big enough to test, weren't big enough to test. They only tested two, and it excluded his grouping. The answer is someone else bled out there on those two spots. It doesn't mean he didn't.

RT 1901 (emphasis added). This improper argument would not have been possible had Trial Counsel objected to the testimony of Detective Verdugo regarding the blood stains that were not collected and the blood samples that could not be tested. Trial Counsel had no reasonable tactical reason to forgo objecting to this testimony.

241. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result for Petitioner would have been obtained at trial.

3. Count III (Rita Motel)

a. Trial Counsel Failed to Investigate, Develop, and Present Evidence that Petitioner Acted in Self Defense and/or Under Provocation.

242. Trial Counsel unreasonably and prejudicially failed to investigate, develop, and present evidence showing that Petitioner did not commit first degree murder.

243. Efrem Baldia, the victim of the Rita Motel shooting, and Petitioner were both involved with the same woman, Sylvia Tinoco, at the same time. Baldia, though married to someone else, had been seen at the bar where Tinoco worked, socializing with her and "hugging and all that," and his car would be seen parked at her house. RT 1264-65, 1313-14. Baldia was known to carry a gun. RT 1351. He knew that Petitioner was involved with Sylvia Tinoco, and he had previously threatened Petitioner. CT 226, 239.

244. In addition, Officer Clara Miller testified that she interviewed Salazar the day of the shooting and that he told her that it was Baldia who "walked directly to room . . . 23" and that he "contacted the suspect." RT 1723. Petitioner and Baldia began to argue, with Petitioner grabbing Baldia by the shirt collar and Baldia pushing Petitioner away and walking away from him. RT 1725. Additionally, Tinoco told the police that Petitioner thought that Baldia was going to pull something out of his

waistband and shoot Petitioner. Exh. 11, Sheriff's Report by Sgt. Sears, Jan. 9, 1991, PE 0113-17.

245. Trial Counsel failed to adequately investigate or present evidence to support the fact that Baldia provoked the shooting and that Petitioner acted in self-defense.

b. Trial Counsel Failed to Reasonably Investigate and Present Evidence of Petitioner's Mental Impairments and Illness.

246. Trial Counsel unreasonably and prejudicially failed to investigate, develop, and present evidence concerning Petitioner's mental impairments and illnesses. This evidence would have raised a reasonable doubt that Petitioner had the mental state required for first degree murder. *See People v. Saille*, 54 Cal. 3d 1103, 1114-17 (1991) (in a murder prosecution, defendant is free to show that because of mental illness, he or she did not in fact form the intent to kill lawfully); *People v. Flannel*, 25 Cal. 3d 668, 679-80 (1979) (honest belief, even if unreasonably held, that defendant is in imminent peril or loss of life or serious injury negates malice required for first degree murder).

247. As discussed in Claim 1.D.6-7, below, Trial Counsel wholly failed to reasonably investigate, prepare and present readily accessible evidence demonstrating that Petitioner suffered from alcohol and drug abuse and serious mental impairments and illnesses, including

Posttraumatic Stress Disorder ("PTSD"), and Executive Dysfunction Disorder. *See* Exh. 129, P. Stewart Decl., PE 1228; Exh. 126, A. Llorente Decl., PE 1152.

248. As a result of these illnesses and impairments, Petitioner suffered from, among other things, "poor planning, impaired judgment, diminished self monitoring, modulation and inhibition leading to a reduction in the control of emotions, behaviors and actions, and when coupled with his history of PTSD and alcohol-drug abuse, such defects in executive control, particularly disinhibition, are exacerbated, leading to responses and behaviors that may be less controlled by cortical outputs and instead dominated by instincts." Exh. 126, A. Llorente Decl., PE 1165 ¶ 40. Likewise, this evidence would have shown that "[a]t the time of the offense[] [Petitioner] was likely in a dissociative state. Even if he were not in a completely dissociative state, the totality of his chronic mental impairments prevented him from appreciating the wrongfulness of his actions, impaired his judgment and insight, and obliterated his ability to plan out alternative actions." Exh. 129, P. Stewart Decl., PE 1263 ¶ 87.

249. Trial Counsel had no reasonable tactical basis to forego investigating, developing and presenting this evidence. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at trial.

c. Trial Counsel Failed to

Reasonably Investigate, Develop, and Present Evidence of Petitioner's Drug and Alcohol Dependence.

250. Trial Counsel unreasonably and prejudicially failed to adequately investigate, develop and present evidence showing that Petitioner's alcohol and cocaine dependence resulted in his failure to possess the mental state necessary to commit first degree murder. *See* Cal. Pen. Code § 22(b); *People v. Mosher*, 1 Cal. 3d 379, 391 (1969).

251. As discussed in Claim 1.D.6-7, below, Trial Counsel wholly failed to reasonably investigate, prepare and present readily accessible evidence demonstrating that Petitioner suffered from serious and chronic alcohol and cocaine dependence. For example, Petitioner drank every day, and every three months he would drink "locked in" his garage for three days straight. Exh. 129, P. Stewart Decl., PE 1258-59 ¶¶ 76-77. Petitioner abused alcohol and cocaine to medicate the impact of the symptoms of his mental illness. *Id.* at PE 1262 ¶ 85. Had Trial Counsel presented this evidence, the jury would have been persuaded that, even if it believed Petitioner was the shooter, Petitioner was in a state of intoxication such that he did not commit first degree murder. *See* Exh. 129, P. Stewart Decl., PE 1228; Exh. 126, A. Llorente Decl., PE 1152.

252. Trial Counsel had no reasonable tactical basis to forego investigating, developing and presenting this evidence. But for Trial

Counsel's deficient performance, it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at trial.

d. Trial Counsel Failed to Object to Prejudicial Testimony Characterizing Petitioner as a Cocaine Dealer.

253. Trial Counsel unreasonably and prejudicially failed to move *in limine* to preclude or to object to and move to strike testimony under California Evidence Code section 352 that characterized Petitioner as a cocaine dealer in the guilt phase of trial. During redirect examination of prosecution witness Nicolas Venegas, the Prosecutor asked "[d]id you ever talk to the Defendant about what he was going to do with [the cocaine]?", to which Venegas responded "[Petitioner] asked if I knew somebody that wanted to buy the coke." RT 1284.

254. This testimony was more prejudicial than probative and should not have been admitted into evidence. Venegas' testimony implied that Petitioner was a cocaine dealer. This testimony was irrelevant to the prosecution's case and only served to lead the jury to believe that Petitioner had a criminal propensity to commit crimes of a serious nature. The prejudice was exacerbated by the Prosecutor's opening statements that Petitioner committed the crimes because of his "personality" and "background." *See* RT 792. Trial Counsel had no reasonable tactical basis to forego moving to preclude or objecting to or moving to strike this

testimony.

255. This inflammatory testimony prejudiced Petitioner at trial. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at trial.

4. Count IV (Mazatlan)

a. Trial Counsel Failed to Investigate, Develop, and Present Evidence that Petitioner Acted in Self Defense and/or Under Provocation.

256. Trial Counsel unreasonably and prejudicially failed to investigate, develop, and present evidence showing that Petitioner did not commit first degree murder.

257. Two witnesses identified Petitioner as the shooter, but gave different accounts of the incident.

258. Beatriz Escamilla testified that Gutierrez taunted and provoked Petitioner. RT 1387-89. Escamilla testified that, on the night in question, Petitioner was drinking in the bar for two or three hours before the shooting. RT 1382-84, 1413. She spoke with him during that time, and saw him drink two to three beers before the shooting happened at around midnight. RT 1384-86, 1413.

259. Escamilla testified that Gutierrez walked up to the Petitioner when Petitioner went to the counter to get beer. RT 1386-87. Gutierrez asked if Petitioner had a gun, then challenged him to use it and insulted his

mother. He said, "take [your pistol] out and use it, you mother fuck," three times, while standing three or four feet from Petitioner. RT 1388, 1394, 1401. In response, Petitioner twice said, "Calm down, calm down partner. I don't want any problems." RT 1416. After Gutierrez challenged Petitioner for the third time, Petitioner shot him. RT 1388-89.

260. Adela Lopez was working as a waitress on the night of the shooting, and testified that she saw Petitioner come into the bar with two or three men about 20 minutes before the shooting. RT 1454, 1456-58. After sitting at a table for a while, Petitioner got up and went to the counter; there, he grabbed a man by the back of the neck and shot him. RT 1458-59, 1461-62. Lopez testified that the Petitioner was asleep on the bar for "at least two hours." RT 1464, 1480-82.

261. Lopez was not watching when the first shot was fired; she testified that she heard a shot, turned, and saw Petitioner fire several shots at the man on the floor. RT 1463-64, 1484. But she did see Petitioner walk over and grab the man. RT 1484.

262. Trial Counsel was aware that Jose Campista had informed Silvia Tinoco that the victim, who was intoxicated, had told Abelino to "go fuck his mother." However, Trial Counsel failed to contact Jose Campista before he returned to Sinaloa. RT 1403. Had Trial Counsel conducted a timely and adequate investigation, he would have learned of additional facts to corroborate the testimony provided by Beatriz Escamilla and to

further support a defense of provocation and/or self defense.

b. Trial Counsel Failed to Reasonably Investigate and Present Evidence of Petitioner's Mental Impairments and Illness.

263. Trial Counsel unreasonably and prejudicially failed to investigate, develop, and present evidence concerning Petitioner's mental impairments and illnesses. This evidence would have raised a reasonable doubt that Petitioner had the mental state required for first degree murder. *See People v. Saille*, 54 Cal. 3d 1103, 1114-17 (1991) (in a murder prosecution, defendant is free to show that because of mental illness, he or she did not in fact form the intent to kill lawfully); *People v. Flannel*, 25 Cal. 3d 668, 679-80 (1979) (honest belief, even if unreasonably held, that defendant is in imminent peril or loss of life or serious injury negates malice required for first degree murder).

264. As discussed in Claim 1, section D, below, Trial Counsel wholly failed to reasonably investigate, prepare and present readily accessible evidence demonstrating that Petitioner suffered from alcohol and drug abuse and serious mental impairments and illnesses, including Posttraumatic Stress Disorder ("PTSD") and Executive Dysfunction Disorder. *See* Exh. 129, P. Stewart Decl., PE 1228; Exh. 126, A. Llorente Decl., PE 1152.

265. As a result of these illnesses and impairments, Petitioner

suffered from, among other things, "poor planning, impaired judgment, diminished self monitoring, modulation and inhibition leading to a reduction in the control of emotions, behaviors and actions, and when coupled with his history of PTSD and alcohol-drug abuse, such defects in executive control, particularly disinhibition, are exacerbated, leading to responses and behaviors that may be less controlled by cortical outputs and instead dominated by instincts." Exh. 126, A. Llorente Decl., PE 1165 ¶ 40. Likewise, this evidence would have shown that "[a]t the time of the offense[] [Petitioner] was likely in a dissociative state. Even if he were not in a completely dissociative state, the totality of his chronic mental impairments prevented him from appreciating the wrongfulness of his actions, impaired his judgment and insight, and obliterated his ability to plan out alternative actions." Exh. 129, P. Stewart Decl., PE 1263 ¶ 87.

266. Trial Counsel had no reasonable tactical basis to forego investigating, developing and presenting this evidence. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at trial.

c. Trial Counsel Failed to Reasonably Investigate, Develop, and Present Evidence of Petitioner's Drug and Alcohol Dependence.

267. Trial Counsel unreasonably and prejudicially failed to adequately investigate, develop and present evidence showing that

Petitioner's alcohol and cocaine dependence resulted in his failure to possess the mental state necessary to commit first degree murder. *See* Cal. Pen. Code § 22(b); *People v. Mosher*, 1 Cal. 3d 379, 391 (1969).

268. As discussed in Claim 1.D.7, below, Trial Counsel wholly failed to reasonably investigate, prepare and present readily accessible evidence demonstrating that Petitioner suffered from serious and chronic alcohol and cocaine dependence. For example, Petitioner drank every day, and every three months he would drink "locked in" his garage for three days straight. Exh. 129, P. Stewart Decl., PE 1258-59 ¶¶ 76-77. Petitioner abused alcohol and cocaine to medicate the impact of the symptoms of his mental illness. *Id.* at PE 1262 ¶ 85. Had Trial Counsel presented this evidence, the jury would have been persuaded that, even if it believed Petitioner was the shooter, Petitioner was in a state of intoxication such that he did not commit first degree murder. *See* Exh. 129, P. Stewart Decl., PE 1228; Exh. 126, A. Llorente Decl., PE 1152.

269. Trial Counsel had no reasonable tactical basis to forego investigating, developing and presenting this evidence. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at trial.

d. Trial Counsel Unreasonably Failed to Impeach the Testimony of Detective Arellanes Concerning His History of Violent Threats.

270. On February 7, 1991, Detective David Arellanes testified regarding his interview with Adela Lopez, a witness to the January 21, 1990 homicide at the Mazatlan Bar. RT 1503-11. Detective Arellanes was familiar with Lopez after having spoken "to her on prior occasions at the bar, different bars, different occasions, regarding different types of crimes, or just bar checks." RT 1504. During his February 7, 1991 interview with Lopez, Arellanes showed Lopez a group of six photographs and requested that Lopez pick out the picture of the shooter, if the shooter's photograph was one of the six. RT 1506-07. Specifically, Arellanes testified that he advised Lopez that he was going to show her a "photo showup folder with six individuals . . . The subject who did the shooting in the bar may or may not be in the photo lineup, to be very sure if she did pick someone out, because [Arellanes] didn't want her to pick someone that was innocent." RT 1506. Lopez said that she understood the directions, and she selected the sixth photograph, which depicted Petitioner. RT 1506-07.

271. Trial Counsel cross-examined Arellanes about which came first: Lopez's statement about what she witnessed on January 21, 1990, or her identification of the individual in the photo lineup. RT 1510. Arellanes could not recall the sequence. RT 1510. Trial Counsel asked Arellanes about whether he had spoken with Lopez earlier in the evening, and Arellanes said that he had spoken to Lopez over the phone in order to tell her that he was bringing over the photo lineup. RT 1510. Trial Counsel

then asked Arellanes if Lopez had said that she had seen the person in the photograph before the January 21, 1990 shooting. RT 1510-11. Lopez had seen him six or seven times. RT 1511. Trial Counsel then ended his cross-examination of Arellanes. RT 1511.

272. Competent Trial Counsel would have probed more deeply into Arellanes' unclear prior history with Lopez, the long lapse in time between the shooting and Lopez's photo identification of the shooter, and Arellanes' vague testimony about the direction and scope of his conversation with Lopez. On both direct and cross-examination, Arellanes was vague regarding the procedures he used to question Lopez, and could not recall the sequence of his questions to her. Reasonably competent trial counsel would have explored the possibility that Arellanes failed to follow standard and required procedures.

273. Moreover, had Trial Counsel reasonably investigated Arellanes' background, which he did not do, he would have discovered that Arellanes' wife had obtained a temporary restraining order against him, in part, because he had said to her: "I will fuck you over if you fuck me with my daughter. You will regret it the rest of your life. I have dirty cop friends who will take care of you and no one will ever know its [sic] me." Exh. 32, Declaration of Lucila N. Arellanes, May 16, 1990, PE 0276 ¶ 4. Arellanes made threats against his wife on a continual basis and exhibited bizarre behavior. *Id.*

274. Competent trial counsel would have investigated and used these statements to impeach Arellanes' credibility and raise doubt about the integrity of his investigation into the Mazatlan shooting and the propriety of his dealings with witnesses to the shooting – in particular, Adela Lopez. Trial Counsel's investigative errors and omissions include but are not limited to his failure to seek a court order to compel the production of all impeachment evidence concerning witnesses and any material regarding law enforcement witnesses in their personnel files. Counsel have been found ineffective for failing to file formal discovery motions and simply relying on the prosecution to turn over information, or on the prosecution's "open file" policy. *Crandell v. Bunnell*, 144 F.3d 1213 (9th Cir. 1998), *overruled on other grounds* by *Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000); *see also Fisher v. Gibson*, 282 F.3d 1283 (10th Cir. 2002). This is particularly the case when Trial Counsel suspected and had reasonable notice that the prosecution had failed to disclose all relevant materials, but where he still failed to pursue all relevant discovery.

275. These acts demonstrated Arellanes' lack of trustworthiness. Additionally, these statements would have undermined Arellanes' testimony in which he indicated he followed regular police procedures, including the identification procedures he followed with Lopez and the statements he procured from her.

276. But for Trial Counsel's deficient performance, it is at least

reasonably probable that a more favorable result for Petitioner would have been obtained at trial.

5. Trial Counsel's Errors Prejudiced Petitioner.

277. Petitioner was substantially prejudiced by Trial Counsel's inadequate preparation, lack of investigation, deficient performance. By virtue of Trial Counsel's failures, Petitioner was denied the effective assistance of counsel, and a fair and reliable determination of guilt to which he was on entitled on each of the four charged counts. Trial Counsel's failings, individually and cumulatively, had a substantial and injurious effect on the determination of the jury's verdicts at the guilt phase of Petitioner's trial, and unfairly deprived him of a rational and reliable determination of guilt. But for any or all of Trial Counsel's failings, the jury would have reached a more favorable result at the guilt and penalty phases of Petitioner's trial.

C. Trial Counsel Rendered Constitutionally Ineffective Assistance of Counsel in Defending Against the State's Case in Aggravation in the Penalty Phase.

1. Paramount Killings

278. Trial Counsel unreasonably and prejudicially failed to defend against the Paramount killings during the penalty phase.

279. The prosecution presented evidence to show Petitioner's involvement in the Paramount killings on February 22, 1990, the same day

that Petitioner arrived at the hospital with a gunshot wound and was placed under arrest. The prosecution argued that Petitioner and his half brother, Paciano Jacques ("Mingo") Ochoa, armed themselves with a .38 caliber handgun and a .45 caliber handgun and took four kilos of cheese wrapped in tape to a residence located in Paramount. RT 1990-91, 2251-53. According to the prosecution's theory of the case, defendant and his half brother intended to effect a "drug rip-off," whereby they would obtain the cash from their buyers, who presumably believed they were purchasing four kilos of cocaine. RT 1990.

280. To support its theory, the Prosecutor presented testimony from Dwight Van Horn, a deputy sheriff and firearms examiner employed by the Los Angeles County Sheriff's Department. Van Horn testified that two guns were found at the scene. RT 2016. One was a nine millimeter handgun that was in the waist of one of the decedents, Juan Parra Gomez, and had a magazine containing live rounds but no bullets in the chamber. RT 2006-09. The other was a .380 caliber firearm found next to another decedent, Solticio Martinez. RT 2012-15. No other guns were found at the scene but a gun clip containing seven .45 caliber bullets was found in the pocket of the third decedent, Everado Cervantes. RT 2114-17. Expended bullets and cartridge casings of three different calibers were recovered at the scene, including two bullets and six casings of .45 caliber; three bullets and nine casings of .38 caliber; and one bullet and one casing of

.380 caliber (found under one of the decedents, Solticio Martinez). RT 2027-36. Van Horn also testified that the .380 caliber firearm was a different weapon than the .38 caliber firearm used during the Paramount killings. RT 2014-15. Van Horn further testified that .38 caliber bullets and .38 caliber casings were fired from the same gun and that they were from the same gun used during the Mazatlan (Count IV) shooting. RT 2010-11, 2023-26. Van Horn additionally testified that one of the crime scene .45 caliber bullets and one of the bullets recovered from Martinez's body were fired from the same gun. RT 2030, 2039.

a. Trial Counsel Prejudicially Failed to Rebut the Testimony of the Prosecution's Expert, Dwight Van Horn.

281. Trial Counsel unreasonably and prejudicially failed to challenge the prosecution's ballistics evidence. The prosecution's ballistics evidence was presented to implicate Petitioner in the shootings and to downplay the extent to which the decedents fired shots during the incident. However, Trial Counsel did not contest the prosecution's theory by engaging a forensic expert, who would have testified that the prosecution's failure to produce documentary support of Van Horn's testimony rendered it unreliable. Such evidence would have severely diminished Van Horn's credibility.

282. Van Horn testified that the nine .38 bullet cases recovered at

the Paramount scene were fired from the same gun used at the Mazatlan shooting (Count IV). RT 2035. His testimony likely caused jurors to find that Petitioner had shot one or more of the decedents in the Paramount killings. The jury had already convicted Petitioner of first-degree murder for Mazatlan, and evidence that the same gun had been used in both crimes likely convinced jurors to extend their finding of guilt in Mazatlan to the Paramount shootings.

283. Van Horn also testified that Gomez's handgun was not used in the shooting and that only one casing from the .380 handgun (found near Martinez) was recovered at the scene.

284. Trial Counsel unreasonably failed to conduct a proper cross-examination of Van Horn. A reasonable cross-examination would have examined the bases for Van Horn's conclusions, forcing Van Horn to admit that he lacked supporting documentation for his conclusions. Such an admission would have severely undermined Van Horn's credibility in the eyes of the jury. However, Trial Counsel never questioned Van Horn's failure to document the steps that led to his conclusions. RT 1025-33. Trial Counsel never even requested that the prosecution provide the defense with any underlying documentation to support Van Horn's conclusions. Such omissions fall below what a reasonable defense attorney would have done to challenge the ballistics evidence put forth by the prosecution.

285. Furthermore, Trial Counsel unreasonably failed to consult with

a forensic expert to investigate Van Horn's analysis. A forensic expert would also have testified that Van Horn's testimony lacked credibility because Van Horn lacked the investigative documentation to support his conclusions. *See* Exh. 128, K. Wong Decl., PE 1221 ¶¶ 5-6. Such expert testimony would have found Van Horn's testimony unreliable because there was no evidence that Van Horn even prepared or maintained such "normal and routine . . . supporting documentation . . . which all competent firearms examiners utilize in formulating [] scientific opinion(s)." *Id.*

286. Had Trial Counsel reasonably undertaken the actions stated above, the jury would have been made aware that Van Horn's testimony was conclusory and lacked scientific reliability. Petitioner suffered prejudice due to Trial Counsel's omissions because the jury would have likely discounted Van Horn's testimony and found that there was no reliable evidence to link the gun used at the Mazatlan (Count IV) shooting and the Paramount killings. The jury would also have had serious doubt regarding the forensic evidence as presented by Van Horn that tended to downplay the role of the decedents in the shootout.

287. Trial Counsel had no valid tactical reason to forego investigating, developing and presenting evidence to challenge the prosecution's ballistics evidence. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at trial.

b. Trial Counsel Prejudicially Failed to Investigate, Obtain, and Present Evidence Showing That Petitioner Did Not Commit Robbery Under Force and Fear.

288. The prosecution argued that Petitioner could not claim self-defense because the Paramount shootings allegedly occurred as part of a robbery, and the felony-murder doctrine disallows a self-defense claim where the defendant commits a homicide during an applicable felony. In order for the felony murder rule to apply, however, the prosecution must prove that the defendant possessed the specific intent to commit the underlying felony. To commit a robbery or attempted robbery, one must have the intent to use force or fear to deprive another person of their property. Trial Counsel failed to conduct an adequate investigation and present evidence that Petitioner did not intend to rob the decedents with force or fear, which would have allowed him to claim self-defense. This omission precluded the jury from considering Petitioner's self-defense claim, which likely caused Petitioner's alleged role in the triple homicide to encourage jurors to vote for death.

289. During his closing argument of the penalty phase, the Prosecutor claimed that Petitioner had the requisite intent for felony-murder because he and Ochoa went into the room carrying guns: "You go into a small room with guns and cheese to do a drug deal, you are seeking a great deal of problems." RT 2251. The Prosecutor later continued, "They take

the cheese to get in the door. They take the guns to complete the act. There is your force, the act of taking the property. That's why they take the guns." RT 2253.

290. Trial Counsel unreasonably failed to challenge the prosecution's theory as lacking in any reliable supporting evidence. As discussed above, there was no reliable evidence to demonstrate that Petitioner had fired a handgun at the scene. Moreover, no .45 caliber handgun was ever recovered. Although the prosecution argued that Ochoa brought the .45 caliber handgun to the scene, RT 1990, there was no evidence to support that. Instead, the evidence showed that a gun clip containing seven .45 caliber bullets was found in the pocket of the third decedent, Everado Cervantes.

291. Furthermore, Trial Counsel unreasonably and prejudicially failed to present evidence showing that it was the decedents – not Petitioner – who had intended to commit robbery. Trial Counsel knew that one of the decedents, Solticio Martinez, was a suspect in a catering truck robbery and murder that was committed on January 25, 1900 – not even one month before the Paramount killings. According to Rosalinda Vasquez, a witness to the catering truck homicide, Victor Romero, the brother-in-law of decedent Martinez, informed her that Martinez was the getaway driver during the catering truck robbery/murder. Exh. 9, L.A. County Sherriff's Report by Sgt. Dillon, Mar. 5, 1990, PE 0093-94. Rosalinda Vasquez also

informed Trial Counsel's investigator that decedent Martinez was dealing in drugs. Trial Counsel, however, failed to develop and present any of this evidence during the penalty phase.

292. Moreover, according to Victor Romero, the decedents in the Paramount killings had discussed how they were going to steal kilos of cocaine at the scene of the Paramount killings. *Id.* Likewise, Trial Counsel failed to develop and present any of this evidence during the penalty phase.

293. Trial Counsel had no strategic reason to forego an investigation and presentation of evidence of Martinez's criminal activities, which would have shown the jury that Martinez had a recent history of violent robbery and drug dealing. Nor did Trial Counsel have any strategic reason to forego an investigation and presentation of evidence regarding the decedents' plan to rob Petitioner at the site of the Paramount killings.

294. Trial Counsel had no strategic reason to forego investigating, developing and presenting this evidence, which would have raised reasonable doubt as to Petitioner's guilt of felony-murder in the Paramount killings. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at the penalty phase of his trial.

2. Rape Aggravator

295. The prosecution presented evidence of a rape as a penalty phase aggravator during the penalty phase of trial. Patricia Morales Marin

testified that Petitioner allegedly raped her on the night of January 26, 1988 at 14516 Texaco Street, Paramount, CA, while she was babysitting. RT 2133-59. Trial Counsel unreasonably failed to investigate the rape allegation or to interview potential witnesses who would have refuted Marin's claims. Had such evidence been offered, jurors would have discounted the rape allegation as they weighed aggravating and mitigating circumstances.

296. Trial Counsel prejudicially and unreasonably failed to investigate and defend against this aggravator. Had Trial Counsel conducted a reasonable, he would have discovered that the residents of the house in which the rape allegedly took place – Eufrasio Astorga and Maria del Refujio Ortiz Nevarez – did not even know her, and that no one by her name had ever been a babysitter for them. *See* Exh. 84, Declaration of Eufrasio Astorga, PE 0484 ¶ 6; Exh. 100, Declaration of Maria del Refujio Ortiz Nevarez, PE 0881 ¶ 5. In fact, Astorga and Nevarez only recently learned about the allegation that a rape occurred in their house during that period. *Id.* This evidence would have directly contradicted Marin's testimony that she was friends with Nevarez, that she was entrusted by Nevarez to take care of her children, and that she had told Nevarez about the rape. RT 2135, 2140.

297. A reasonable investigation into the rape allegation would have enabled Trial Counsel to identify Astorga and Nevarez and interview them

regarding the alleged rape. However, Petitioner was prejudicially deprived of two critical witnesses who not only would have testified regarding Petitioner's character, but would have directly refuted Marin's testimony. Exh. 84, E. Astorga Decl., PE 0484 ¶¶ 6-7; Exh. 100, M. Nevarez Decl., PE 0881 ¶¶ 5-6. This critical evidence would have seriously undermined the credibility of Marin's testimony, and the jury would have had reasonable doubt as to Petitioner's guilt regarding this alleged aggravator.

298. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at trial.

D. Petitioner's Trial Counsel Rendered Constitutionally Ineffective Assistance of Counsel in the Penalty Phase by Failing to Investigate, Obtain and Present Evidence in Mitigation for the Penalty Phase.

1. Overview

299. Defense counsel's "duty to investigate all potentially mitigating evidence related to a defendant's mental health, family background, and prior drug use and to provide the sentencing court with a full presentation of the evidence that might lead the sentencer to spare his client's life is not discharged merely by conducting a limited investigation of these issues or by providing the sentencing court with a cursory or 'abbreviated' presentation of potentially mitigating factors. . . . To the contrary, when it comes to the penalty phase of a capital trial, it is

imperative that *all* relevant mitigation evidence be unearthed for consideration." *Lambright v. Schriro*, 490 F.3d 1103, 1121 (9th Cir. 2007) (emphasis added, citations and internal quotations omitted).

300. Trial Counsel delegated the investigation of mitigation witnesses almost entirely to his staff. The principal investigative effort was a hurried and inadequate trip by that staff to interview family members in and around San Antonio, the small, impoverished rancho in northwestern Mexico where Petitioner spent many years of his childhood. Remarkably, none of the family members who were interviewed during that trip were asked to appear at trial. None were even contacted again by Trial Counsel's staff, despite the staff's assurance that members would be contacting them again.

301. Instead, Trial Counsel called five different witnesses for no other reason than that they were easier to reach (four of the five resided in Southern California; one in Mexicali, the capital of the Mexican state of Baja California). Despite this easy access, particularly with those who lived in Southern California, Trial Counsel even failed to speak to – much less interview and prepare for testimony – four of these five witnesses prior to direct examination. As to the fifth witness, Trial Counsel merely exchanged just a few words with him shortly before he walked into the courtroom to testify.

302. The results of Trial Counsel's inadequate preparation were

predictable. The testifying mitigation witnesses were few in number, unprepared, and their testimony was unreasonably limited in scope, and the mitigation evidence they offered was not explained, contextualized or supported by any mitigation expert.

303. Trial Counsel's investigation and preparation of expert testimony was even more inadequate. Trial Counsel called no experts to testify because he had failed to follow up on readily available leads. The one expert who was retained, Jose Moral, M.D., found, upon his own cursory interviews with Petitioner's family members, that Petitioner tended to downplay his mental disorders and impairments, and that further consultation and investigation of Petitioner's mental conditions were in order. Trial Counsel ignored this recommendation and failed to follow up with Dr. Moral and, indeed, Trial Counsel failed to hire or consult with anyone else.

304. In sum, as set forth more fully below, Trial Counsel unreasonably failed to uncover a whole host of mitigating evidence, unreasonably failed to follow through with obvious investigative leads, and abandoned what little investigative work his staff had done by ignoring the compelling potential testimony of the family members his staff had interviewed in favor of uninterviewed, unprepared and unrepresentative witnesses who happened to live relatively close to the Los Angeles County Superior Court. The result was that after deliberating for only four and a

half hours, the jury returned a verdict of death for each of the four convictions.

305. Trial Counsel's failure to investigate and present this evidence was not based on any reasonable or valid strategic or tactical decision. Nor could it have been. *See Lambright v. Schriro*, 490 F.3d 1103, 1120 (9th Cir. 2007) ("Only after a thorough investigation can a less than complete presentation of mitigating evidence ever be deemed reasonable, and only to the extent that a reasonable strategy supports such a presentation.").

2. Trial Counsel Unreasonably Failed to Discover, Interview, and Present the Compelling Testimony of Witnesses Who Knew Petitioner.

306. Petitioner has an extended family, lived in various domestic settings, and spent long periods of his childhood in settings in which families were familiar with one another. As a result, Trial Counsel had a large pool of people from which he could seek and develop mitigation evidence. Petitioner files herewith thirty-nine declarations of friends, family members, and acquaintances who knew Petitioner and provided mitigation evidence for this Petition.[9]

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[9] Exhs. 83-122, Declarations of: Ignacia Alarcon, Eufrasio Astorga, Herminia Manriquez Ayon, Juan Manriquez Ayon, Ponciano Manriquez Ayon, Esperanza Manriquez Banuelos, Gaudencio Manriquez Banuelos, Gregorio Tamayo Banuelos, Jesus Manriquez Banuelos, Gabriel Pena Gallardo, Maria Lourdes Cardenas Hernandez, Alejandro Pompa Jacquez,

(Footnote Continued on Next Page.)

307. Despite the abundance of available and willing witnesses, Trial Counsel's investigation of mitigation was shallow and perfunctory. He delegated crucial investigative duties to unprepared staff members, sent them to Petitioner's home state and country in his stead, and ignored the leads they developed.

308. Of the thirty-nine declarants providing mitigation evidence in support of this Petition, Trial Counsel's staff spoke with only four during this trip to Sinaloa, and each declarant uniformly attests to the inadequacy of the investigation on Petitioner's behalf. For example, Petitioner's aunt, Esperanza Manriquez Banuelos, declares:

> I remember two or three people came to Cosalá to meet our family before Abelino's trial. They were only with the family about two or three hours and then they left. . . . They were here for such a short time, so they didn't find out as much about our family. . . . They came during the rainy season and this may have hindered their access to the ranchos. They said they would return for another visit, but they didn't. They also did not take the time to build a

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(Footnote Continued from Previous Page.)

Feliciana Manriquez Jacquez, Julian Gonzalez Jacquez, Cecilia Solis Manriquez, Julia Martinez, Antonia Jacquez Nunez, Gumercindo Jacquez Nunez, Monica Jacquez Nunez, Erasmo Pena Ochoa, Merita Pena, Rodolfo Manriquez Pena, Teresa Manriquez Pena, Ubaldina Manriquez Pena, Jose Manuel Duran Pompa, Maria Raquel Pompa, Socorro Pompa, Augustina Medina Quintero, Esteban Pompa Robles, Canuto Pompa Robles, José Ángel Pompa Robles, José Quintero Sarabia, Julia Manriquez Sepulveda, Crecencia Tamayo, Lorenzo Pompa Tamayo, Manuel Sánchez Tamayo, Ramón Meza Urea, Faustina Urea Manriquez de Vidal, and Joaquina Ward.

> relationship of trust which is important to people here. I would have been available to give them the same information I am giving now if the other people had taken more time. I would have testified to this if they had asked me to.

Exh. 88, E.M. Banuelos Decl., PE 0639 ¶ 225.

309. Similarly, Petitioner's uncle, Jesus Manriquez Banuelos states:

> I remember when Abelino's first attorneys came to visit his family in Mexico. They only came one time. They only spoke with me for a few minutes. . . . I took them to where Abelino's maternal family was in Rancho La Lomita. They met Abelino's uncles Tereso and Cruz and his sister Feliciana. They stayed there about a half hour. They didn't spend the night when they came here. They asked me only about how Abelino behaved. I answered that he behaved well, because I think of him as a good boy. There was so much more I could have told them about Abelino and his life but they did not ask me about anything else. If the first attorneys would have spent more time, spoken to us more, carried out the investigation with more determination, I would have been able to tell them much more. . . . I could have helped explain how brutal his upbringing truly was and how Abelino deserves mercy.

Exh. 91, J.M. Banuelos Decl., PE 0769-70 ¶¶ 173-74.

310. Petitioner's cousin and sister, like his aunt and uncle, attest to the inadequacy of Trial Counsel staff's trip to Sinaloa. *See* Exh. 95, F.M. Jacquez Decl., PE 0843 ¶ 106 ("I remember some people working on Lino's trial came to see me sometime around 1993. We only talked for a short while. They told me they were going to come back but they never

did."); Exh. 107, T.M. Pena Decl., PE 1017 ¶ 141 ("Sometime around 1993, about three people came to Cosalá, saying they were investigating for the defense of Lino. . . . I don't think they spoke Spanish that well. I only saw them for a few minutes. They did not want to talk to me. I think they mostly spoke with Emilio, Tomasa, Esperanza, and Feliciana. The three people said they wanted to go to La Parrita but the rivers were too high to let them cross. In total, the group stayed with our family for about three hours. . . . When they left, they told us they were going to return, but they never returned.").

311. Thus, Trial Counsel's staff not only failed to locate and interview multiple witnesses who had compelling testimony to offer, but also failed to convey to the witnesses they did interview the importance and significance of the information regarding Petitioner that those witnesses possessed in their knowledge. As a result of Trial Counsel's inadequate investigation, Trial Counsel never learned nor presented to the jury the extensive and compelling mitigation evidence submitted with this Petition, which the witnesses would have readily shared and testified to had they been asked. Exh. 83, I. Alarcon Decl., PE 0480 ¶ 13; Exh. 84, E. Astorga Decl., PE 0484¶ 7; Exh. 85, H.M. Ayon Decl., PE 0506 ¶ 62; Exh. 87, P.M. Ayon Decl., PE 0542 ¶ 17; Exh. 89, G.M. Banuelos Decl., PE 0645 ¶ 14; Exh. 90, G.T. Banuelos Decl., PE 0658 ¶ 48; Exh. 92, G.P. Gallardo Decl., PE 0779 ¶ 18; Exh. 93, M.L.C. Hernandez Decl., PE 0800 ¶ 67; Exh. 94,

A.P. Jacquez Decl., PE 0805 ¶ 9; Exh. 96, J.G. Jacquez Decl., PE 0846 ¶ 6; Exh. 99, J. Martinez Decl., PE 0876 ¶ 12; Exh. 100, M.R.O. Nevarez Decl., PE 0881 ¶ 6; Exh. 101, A.J. Nunez Decl., PE 0897 ¶ 47; Exh. 102, G.J. Nunez Decl., PE 0906 ¶ 22; Exh. 103, M.J. Nunez Decl., PE 0923 ¶ 66; Exh. 104, E.P. Ochoa Decl., PE 0947 ¶ 84; Exh. 105, M. Pena Decl., PE 0965 ¶ 52; Exh. 106, R.M. Pena Decl., PE 0979 ¶ 40; Exh. 108, U.M. Pena Decl., PE 1030 ¶ 32; Exh. 109, J.M.D. Pompa Decl., PE 1039 ¶ 27; Exh. 110, M.R. Pompa Decl., PE 1042 ¶ 5; Exh. 111, S. Pompa Decl., PE 1047 ¶ 12; Exh. 112, A.M. Quintero Decl., PE 1055 ¶ 21; Exh. 114, E.P. Robles Decl., PE 1070 ¶ 16; Exh. 113, C.P. Robles Decl., PE 1063 ¶ 16; Exh. 115, J.A.P. Robles Decl., PE 1076¶ 17; Exh. 116, J.Q. Sarabia Decl., PE 1084¶ 18; Exh. 117, J.M. Sepulveda Decl., PE 1093 ¶ 23; Exh. 119, L.P. Tamayo Decl., PE 1105 ¶ 20; Exh. 120, M.S. Tamayo Decl., PE 1110 ¶ 14; Exh. 121, R.M. Urea Decl., PE 1129¶ 64; Exh. 98, F.U. Manriquez de Vidal Decl., PE 0870 ¶ 53.

3. Trial Counsel Unreasonably and Prejudicially Abandoned Investigative Leads in Sinaloa, Mexico.

312. Although Trial Counsel's staff members stated an intention to follow up with Petitioner's family members in Sinaloa, Trial Counsel failed to pursue those readily available investigative leads. Trial Counsel entirely abandoned all efforts to obtain valuable mitigation testimony from friends, family members, and acquaintances in and around Sinaloa. On this ground

alone, Trial Counsel breached his "duty to investigate *all* potentially mitigating evidence" and "provide the sentencing court with a *full presentation* of the evidence that might lead the sentencer to spare his client's life. . . ." *Lambright v. Schriro*, 490 F.3d 1103, 1120 (9th Cir. 2007) (emphasis added). "When it comes to the penalty phase of a capital trial, it is imperative that all relevant mitigation evidence be unearthed for consideration." *Id.*

a. Esperanza Manriquez Banuelos, with Whom Trial Counsel Never Followed Up, Could Have Presented Compelling Mitigation Evidence at Trial.

313. Esperanza Manriquez Banuelos[10] was inadequately interviewed by Trial Counsel's staff and inexplicably ignored afterwards. Exh. 88, E.M. Banuelos Decl., PE 0639 ¶ 225.

314. Had Trial Counsel performed reasonably, Esperanza could have testified to the following facts, none of which was presented to the jury prior to the imposition of death:

315. Evidence of chronic, extreme physical and emotional abuse and neglect. Esperanza could have supported the testimony of those at trial regarding Petitioner's childhood abuse. This includes the following

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[10] For ease of identification, some of Petitioner's family members are referred to by their first names.

declaration testimony:

316. "No other father in San Antonio was as harsh with his son as Emilio was with Abelino. Emilio used to yell at Abelino, 'I want you to guess what work I want you to do!' When Abelino failed to guess correctly Emilio would beat him." Exh. 88, E.M. Banuelos Decl., PE 0607 ¶ 80.

317. "I saw Emilio slap and hit Abelino in the face so many times I can't count. When Emilio raised his open hand or his fist to Abelino he did it with so much force that Abelino usually stumbled or fell over onto the ground. Emilio slapped and hit Abelino's face forward and backward and head on. Other times, when Emilio was angry he took his belt off or grabbed a stick or a pole to hit Abelino. It was obvious how painful the beatings were for Abelino. Sometimes Abelino would just be walking by Emilio and he would do this. Emilio did this to Abelino at least once a day." *Id.* at PE 0620 ¶ 139.

318. "I remember hearing Abelino countless times as a young boy whimpering through the walls or outside the house, 'Ow! Oh, daddy! Please stop daddy!' . . . As the years of beatings passed by, Abelino made less noise. I remember the older Abelino got, the more he remained quiet when he was getting beat. He knew that if he said anything he would get beat more." *Id.* at PE 0620 ¶ 140.

319. "When Emilio came around Abelino, Abelino hunched over and cowered the way dogs do that get kicked all the time. Abelino was

obviously scared of his father." *Id.* at PE 0612 ¶ 102.

320. "Besides beating Abelino, Emilio constantly swore at Abelino and terrorized him with ugly threats. Some of the horrible things Emilio repeatedly told Abelino included: I'm going to kill you! You'll see. I'll hit you so hard! I will fuck you up! I'll hit you with a pole! I'm going to whip you! Son of a whore! Fucking son of a bitch! Son of your fucking mother!" *Id.* at PE 0621 ¶ 143.

321. "Out of ignorance or because it was the only way we knew, my half-sister Crecencia and I were also strict with Abelino and often hit him. Crecencia was meaner than I was. I did not see one adult in Abelino's house who made him feel he was loved." *Id.* at PE 0608 ¶ 83. "Abelino never felt the love of a mother or a father. His mother abandoned him and his father despised him." *Id.* at PE 0611 ¶ 99.

322. "Tomasa [Petitioner's grandmother] did not like Abelino. She was a tough woman. She was never affectionate with Abelino or did anything to show Abelino she loved him. . . . It was clear Tomasa did not love Abelino." *Id.* at PE 0608 ¶ 81.

323. "The only thing that Abelino did after his father hit him was refuse to eat. This was his way of showing he was angry or upset, though he never said anything. When Abelino was served food and he had just been hit, he sat at the table and ignored the food or he would go outside and wait for everyone to finish eating. This happened at least once or twice a

week. Abelino did this even though he was hungry and hadn't eaten all day. . . . And Emilio used to whip Abelino for not eating." *Id.* at PE 0612 ¶ 103.

324. "Although Tomasa and Emilio were strict with all the children (Feliciana, Ramón, and Gaudencio), they were abusive with Abelino. Abelino received the worst treatment out of all the children in the house. Abelino did not have anybody special to look after him or protect him from Emilio's and Tomasa's abuse." *Id.* at 0608 ¶ 82. "Abelino could not help but see Emilio treat the other children in the house better." *Id.* at PE 0608 ¶ 84.

325. "Abelino did not feel loved by his father. Emilio and Tomasa simply refused to show Abelino one ounce of compassion. Not once did Emilio embrace or affectionately touch his son. He never spoke with tenderness or hugged Abelino. My nephew Abelino must have felt his father despised him." *Id.* at PE 0621 ¶ 144.

326. Because Trial Counsel failed to fully investigate and present Esperanza as a witness, the jury did not have the benefit of any of this testimony.

327. Petitioner's abandonment by his mother and his mother's instability. Petitioner's mother, Benita, "was a drifter" who "followed the different men her life, leaving her children behind." *Id.* at PE 0598 ¶ 32. While Petitioner's father was working for three months in another village,

Petitioner's mother "abandoned [Petitioner] to be with her new man," leaving Petitioner and his two-year old brother, Cristobal, with Petitioner's elderly great aunt and great uncle (Ciriaco and Maria). *Id.* at PE 0595-96 ¶¶ 16-19, 23-24.

328. Petitioner and Cristobal were then taken by the elderly aunt, Maria, to live with her and Petitioner's uncle, Tereso. *Id.* at PE 0597 ¶ 25. Tereso was a "strict, bossy, rude man and not very loving with the children." *Id.* at PE 0597 ¶ 26. He was also a "drunk." *Id.* at PE 0597 ¶ 25. Maria "was an elderly woman and didn't have the energy required to attend to small children." *Id.* at PE 0597 ¶ 26.

329. After the death of Petitioner's brother, Tereso "no longer wanted Abelino." *Id.* at PE 0598 ¶ 31. So, at about seven or eight years old, Petitioner was uprooted and shuffled to yet another household. *Id.* Petitioner ended up in San Antonio with his abusive father and grandmother where, beginning in his late adolescence, "he would try to find his mother wherever she was. He would leave San Antonio unexpectedly and without permission." *Id.* at PE 0610 ¶ 94.

330. Esperanza can recall four boyfriends Petitioner's mother, Benita, had during Petitioner's childhood (*id.* at PE 0598 ¶¶ 32-34) and that Benita lived in at least three different ranchos because she "was always moving around from place to place" to follow "the different men in her life." *Id.* These were not a series of monogamous relationships; they often

overlapped. *See id.*

331. None of these facts were presented to the jury.

332. The early, unnecessary death of Petitioner's younger brother. Cristobal died as a child because Maria and Tereso failed to obtain proper treatment for his stomach problems. *Id.* at PE 0597 ¶ 29. Maria and Tereso, too poor to afford a doctor, treated Cristobal with "a purging oil" and "pork meat with red chili" because Maria "had poor judgment on account of her old age" and "was too old to be caring for little Cristobal and Abelino [Petitioner]." *Id.* Petitioner's mother, Benita, did not attend the service for her dead son, Cristobal. *Id.* at PE 0598 ¶ 30. In fact, Benita demonstrated a "failure to acknowledge Cristobal's death" which Esperanza can only explain by saying that "Benita did not show signs of caring for her children." *Id.*

333. None of these facts were presented to the jury.

334. Poverty. Trial Counsel virtually ignored Petitioner's poverty, and essentially advised the jury, during his opening statement, to disregard Petitioner's poverty: "The poverty part of [the evidence] is not really the mitigating factor." RT 2162. Trial Counsel only touched on Petitioner's poverty when Cecila Solis explained that the San Antonio rancho was not "a big ranch house where somebody owned the land" and that San Antonio did not have a store, a church, or a school and was "sort of up in the hills." RT 2165.

335. Had Trial Counsel performed reasonably, he could have presented evidence as follows:

> The house did not have a door, only an opening in the wall. Animals roamed freely about in and near the houses. Bats occasionally infested San Antonio. We could not control bats from flying into the porch or inside the house, the two places where we all slept. They would pee on us while we slept. Their pee caused blisters to form on our skin that lasted some four days. Mice and rats lived around the house. We hung net-like bags by wires from the rafters in the ceiling and this is where we stored tortillas and the occasional meat and cheese we might have had. This prevented the cats from getting into the food. We covered the bags with pieces of tin so the mice couldn't get into the food.

Exh. 88, E.M. Banuelos Decl., PE 0602 ¶¶ 54-55.

336. Esperanza also could have explained how Petitioner's family was so poor that they often ran out of food. "One of the difficulties of living in the rancho was not knowing if we would have enough food to last through the year." *Id.* at PE 0603 ¶ 59. "Scarcity of food was a common problem for Emilio [Petitioner's father] and every other person in San Antonio. This was one of the many hardships of life on the rancho in every generation of my family, including the years Abelino lived in San Antonio." *Id.* at PE 0604 ¶ 62. "[T]here were always a number of reasons why food was scarce. . . . Sometimes the harvest was damaged by drought and lack of rain or by infestations of insects. Other times the harvest yielded only small quantities of foods so food ran out more quickly.

Sometimes the fields would be harvested too late and the crops would not survive. Other times men were sick or were away working somewhere else during planting season." *Id.* at PE 0604 ¶ 61.

337. Esperanza also could have explained that when Petitioner's family ran short of food, they had only themselves (*i.e.*, no church, no community groups, no government, etc.) to fall back on: "When food supplies were low, we rationed already small quantities of food into smaller quantities. Alternatively, we had to find other means of obtaining food. As we certainly did not have the means to buy food, we would go out into the countryside and look for things to eat that grew in the wild. We would look for fruit, maybe guavas or 'bayusas' from the agave cactus, and 'bledo' (a kind of cactus) or prickly pear cactus. During food shortages, this wild food was sometimes the only food available." *Id.* at PE 0604 ¶ 63.

338. Even obtaining safe drinking water was difficult and at times impossible:

> For most of the year, finding water for the household was one of the principal chores in San Antonio. . . . We collected water from puddles in the streams around San Antonio and we also collected water from springs outside of San Antonio. For the most part, young girls and women were in charge of collecting water and it was something that had to be done daily, sometimes more than once a day. We had to walk about a half hour outside of San Antonio to look for the springs. Eventually a spring would dry up and then we would have to look for another spring. We dug holes in the ground

> to access the water from the springs. We collected the water we needed and carried it back to San Antonio in buckets on our heads and sometimes with the help of donkeys carrying the aluminum containers we used. The animals dirtied the water because they roamed freely in San Antonio. People did not fence their animals. Animals drank from and walked through the streams. They went to the bathroom in or next to the streams.

Id. at PE 0605 ¶¶ 67-69.

339. None of these facts were presented to the jury.

340. Exposure to arceniato and the use of dangerous medical practices. Esperanza could also have testified about Petitioner's early and frequent exposure to arceniato, a dangerous toxin, which would have supported the argument that Petitioner suffered childhood neurocognitive disorder:

> My mother always used a poisonous, foul-smelling grayish-white powder called Arceniato in her vegetable and flower garden. She used this poison to kill the red ants and for many other purposes. We would sprinkle Arceniato in the beds to kill the bed bugs, on the floor to kill the fleas, and even in our hair to kill lice. . . . We used to put Arceniato in the chickens' nest-eggs to try to kill the [insects]. We did not wash the eggs before eating them, but we didn't know any better. Arceniato was a dangerous poison. I remember hearing that somebody in another rancho near San Antonio died after using Arceniato. Some people had stronger reactions to Arceniato, but everyone was affected somewhat by it. The effects were worse for whoever applied the Arceniato and they included headaches and nausea. It smelled

> horrible and the mere smell of it made one feel dizzy or stunned. People who passed by a place where Arceniato had been sprinkled could also feel the effects. . . . Abelino was near places where Arceniato was sprinkled and would have inhaled it. Not only in San Antonio, but in all the other ranchos where Abelino visited and lived, most households commonly used Arceniato

Id. at PE 0606 ¶¶ 71-73.

341. Poverty and ignorance also led to medical treatments that were at best ineffective and at worst harmful. These treatments included: drinking water boiled with human excrement to treat scorpion bites; drinking urine for stomach ailments; and wrapping pieces of bark around the waist to treat urinary problems. *Id.* at PE 0607 ¶¶ 76-79; *see also* Paragraph 332 above regarding the death of Petitioner's brother.

342. None of these facts were presented to the jury.

b. Like Esperanza Manriquez Banuelos, the Other Witnesses Whom Trial Counsel Failed to Pursue Could Have Presented Compelling Mitigation Evidence at Trial.

343. Like Esperanza and three other Sinaloa-area witnesses attest that Trial Counsel paid one short visit to them – each explaining the visit was inadequate – after which Trial Counsel never contacted them again despite assurances that they would be in touch. Those witnesses are Jesus Manriquez Banuelos (Petitioner's uncle, the brother of Esperanza), Teresa

Manriquez Pena (Petitioner's cousin), and Feliciana Manriquez Jacquez (Petitioner's sister).

344. Like Esperanza, each of these witnesses was willing and able to testify to the abuse Petitioner suffered at the hands of his father, grandmother, and others, which would have effectively corroborated the testimony of those witnesses that Trial Counsel did present.[11]

345. These witnesses also could have provided testimony of other incidents and methods of abuse the jury never heard about. For example, Jesus attests to a "grotesque and excessive" incident of abuse that was not presented at trial, in which Petitioner's father "locked him up inside my house for about three days. No one was at my house because we were temporarily living in a little shed near my cornfield while we harvested corn. Emilio did not give Abelino any food or water." Exh. 91, J.M. Banuelos Decl., PE 0747 ¶ 105. Jesus also explains that Petitioner's father was actually inspired to devise new methods of abuse. "As another form of punishment, Emilio used to beat Abelino while he was tied up or leave him tied up after beating him. These punishments of locking up and tying up Abelino were something Emilio came up with on his own. Our mother

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[11] *See* Exh. 91, J.M. Banuelos Decl., PE 0734, 0736, 0742, 0747-49, 0750 ¶¶ 60-63, 69-70, 91, 105-109, 113; Exh. 95, F.M. Jacquez Decl., PE 0830-33 ¶¶ 28-30, 34, 36-39, 44-45; Exh. 107, T.M. Pena Decl., PE 1007, 1009, 1010-11 ¶¶ 55-59, 70-72, 81-94.

Tomasa did beat us when we were little but she did not lock us up or tie us up." *Id.* at PE 0748 ¶ 107.

346. Feliciana, Petitioner's sister, recalls: "[One] time, when Lino was a little older and already had the body of a young man, my father kept Lino tied up naked outside. This was after my father had beaten him. Lino was so ashamed that everybody could see him like this. I really don't understand why my father had such hatred for my brother." Exh. 95, F.M. Jacquez Decl., PE 0832 ¶ 38. She also recalls being neglected by her father and that she "barely ever saw him." She states that, "In San Antonio, he [Emilio Manriquez] worked all the time and was barely ever around. *Id.* at PE 0829 ¶ 21. Emilio neglected Lino, too. Sometimes, Lino would wander away from the ranch and Emilio, his father, had no idea of his whereabouts, but would not bother to go looking for him. *Id.* at PE 0831 ¶ 32.

347. Teresa recalls:

> . . . I witnessed Emilio tie Lino to a mango tree and hit him really hard. I can't remember how Lino was tied up or how many times his father whipped him, but I remember the whippings were strong. Lino was defenseless. As Emilio repeatedly beat Lino with a whip, Lino tried to appear strong and he did not cry out. But I could tell Lino was just holding in his cries and was in a lot of pain. Emilio beat Lino while he was tied to the mango tree at around 3:00 in the afternoon. Then he left Lino tied up for the rest of the afternoon into the evening and maybe even the whole night.

Exh. 107, T.M. Pena Decl., PE 1010-11 ¶¶ 86-87.

348. Jesus, Teresa, and Feliciana also would have and could have testified to subjects of mitigation that Trial Counsel ignored, including poverty,[12] the abandonment of Petitioner by his mother which left Petitioner with an elderly great aunt and an alcoholic uncle,[13] the resulting death of Petitioner's brother that Petitioner's mother never acknowledged,[14] Petitioner's mother's drifting and instability,[15] extreme neglect of Petitioner,[16] and Petitioner's exposure to toxins and harmful medical practices.[17]

349. None of these subjects, which Esperanza would have discussed had she been asked, were presented as mitigation at trial. In addition, Jesus, Teresa, and Feliciana – who were also never asked to testify – could have expanded on these subjects beyond Esperanza's declaration testimony.

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[12] *See* Exh. 91, J.M. Banuelos Decl., PE 0722-26, 0728-29, 0763 ¶¶ 26-37, 45-48, 152; Exh. 95, F.M. Jacquez Decl., PE 0826, 0839-40 ¶¶ 1-6, 81-82, 85-87; Exh. 107, T.M. Pena Decl., PE 1001-06 ¶¶ 6-7, 12-15, 22, 26-42, 46-52.

[13] *See* Exh. 91, J.M. Banuelos Decl., PE 0718-19 ¶¶ 11-13; Exh. 95, F.M. Jacquez Decl., PE 0828-31 ¶¶ 15-19, 27, 35; Exh. 107, T.M. Pena Decl., PE 1008 ¶ 67.

[14] *See* Exh. 91, J.M. Banuelos Decl., PE 0719 ¶ 15; Exh. 95, F.M. Jacquez Decl., PE 0829 ¶¶ 24-25; Exh. 107, T.M. Pena Decl., PE 1001 ¶ 5.

[15] *See* Exh. 91, J.M. Banuelos Decl., PE 0720 ¶¶ 18-19; Exh. 95, F.M. Jacquez Decl., PE 0836 ¶¶ 60-61.

[16] Exh. 95, F.M. Jacquez Decl., PE 0829, 0831 ¶21, 32; Exh. 91, J.M. Banuelos Decl., PE 0719 ¶ 14.

[17] *See* Exh. 91, J.M. Banuelos Decl., PE 0731-33, PE 0762 ¶¶ 52-59, 150; Exh. 95, F.M. Jacquez Decl., PE 0827 ¶ 7; Exh. 107, T.M. Pena Decl., PE 1005¶¶ 43-45.

Jesus reports Petitioner was not only exposed to Arseniato, but also Asuntol, a chemical that reportedly killed a man from a neighboring rancho, as well as chemicals used to wash metals from nearby mining operations, which were discharged into a neighboring river, killing fish downstream. Exh. 91, J.M. Banuelos Decl., PE 0733 ¶¶ 58-59. Jesus could also have testified to the abandonment and neglect Petitioner suffered. He comments that "the time Abelino spent with Tereso and Maria was very good for the kids. Abelino was an energetic, active child, and I suspect Tereso was abusive toward him. Maria was too elderly to look after the children adequately. Abelino and Cristobal, who had already been abandoned by their mother, were basically abandoned and left to their own luck in the care of Benita's family. Adults did not take care of or supervise Abelino. . . ." *Id.* at PE 0719 ¶14.

350. Teresa could have discussed how everyone in San Antonio repeatedly and routinely suffered from serious illness as a result of the poor hygiene and unsafe drinking water. Exh. 107, T.M. Pena Decl., PE 1005-06 ¶¶ 46-49. She states, "Everybody got sick, but babies and young children were especially prone to sickness in the ranchos. It was common for young children to have worms at least once a year. Children came down with diarrhea, fevers, and vomiting which lasted for many days, at least two, three, four, and five times a year." *Id.* at PE 1006 ¶ 48.

351. Feliciana, Petitioner's sister, could have testified regarding

Petitioner's struggles as a child with his abandonment by his mother and the ensuing death of his younger brother, Cristobal. *See* Exh. 95, F.M. Jacquez Decl., PE 0829 ¶ 25 ("Lino and Cristobal loved each other very much. They used to play together and bathe together and talk to each other all the time. . . . After Cristobol's death, Lino was always saying he missed his little brother."); *Id.* at PE 0831 ¶ 35 ("When my mom left us and went with the other man, Angel Sanchez, I think it really did a lot of damage to Lino. . . . He used to ask why our mom never came to get him."); *see also* Exh. 107, T.M. Pena Decl., PE 1000-01 ¶¶ 5, 9.

352. Jesus also would have testified that Petitioner suffered severe head trauma at the hands of those whom he considered his friends, supporting a theory that Petitioner suffered from brain damage, another theory Trial Counsel never pursued. In particular, Jesus attests that twice Petitioner was pistol-whipped to the skull, and during at least one of the incidents the "men continued to beat on Abelino when he fell to the ground, bleeding and unable to defend himself." Exh. 91, J.M. Banuelos Decl., PE 0757 ¶ 133; *see also* Exh. 95, F.M. Jacquez Decl., PE 0836 ¶ 64.

353. Exposure to guns and violence. Witnesses could have testified on yet another mitigation subject not even hinted at by Trial Counsel to the jury: that these Sinaloa ranchos in general and rancho San Antonio in particular were rife with gun violence, rape, and vigilante justice. *See* Exh. 91, J.M. Banuelos Decl., PE 0764-68 ¶¶ 154-67. "Shoot-outs, death,

and murder were, and still are, a part of rancho life. . . . I have countless stories of witnessing or hearing about people getting killed or shot." *Id.* at PE 0764 ¶ 154. The following is just one of the examples Jesus provides:

> . . . I was in Rancho Rio de Barraganes selling alcohol at a party. Somebody paid a corrupt federal police official in Culiacan to come to Rio de Barraganes and assassinate his enemies. The men who were supposed to be killed were "gavilleros," [gang members] associates of someone named Florentino. When the federal police boss arrived with about 20 men, some of whom were also police officers, Florentino and the other "gavilleros" weren't there. These men had come to kill people. They were drunk and they had already been paid. They didn't try to figure out if Florentino and his men were there, they just started shooting at innocent people. I was lucky and I was able to hide. In the end, eight innocent people died and about six or seven people were wounded. Those men then tied up a group of other people with wire used for hanging clothes and carried them off. . . . My brother Emilio [Petitioner's father] and my nephew Isabel were among the group of people brutally carried off. I had to follow them and prove that Emilio and Isabel weren't Florentino's "gavilleros." The police finally returned the innocent men to the town of Nuestra Señora.

Id. at PE 0766 ¶ 162.

354. Feliciana reports that her half-brother was shot in a nearby rancho, and died on the way to the hospital. Exh. 95, F.M. Jacquez Decl., PE 0841¶ 99. "Hearing about my brother's murder was sad, but unfortunately such violence is commonplace here." *Id.* She also states that

at age seventeen her uncle tried to rape her. *Id.* at PE 0842 ¶ 104. Twenty years ago, when she was three-months pregnant and living in a rancho near to San Antonio:

> I was attacked by some soldiers. I lived in La Huerta. My husband Gabriel was in Cosalá doing some errands. Very late at night, the soldiers knocked on the door and when I opened the door they pointed rifles in my face. They said they were the Mexican Army. They made my mother-in-law sit in a chair and dragged me out of the house. Thank God, my children were asleep and didn't realize what was happening. They tore my dress with a knife and dragged me along the ground. They told me they would take me to the stream and I was afraid they were going to rape me, something I knew soldiers did to women who lived in the ranchos. I was crying. They held me for one or two hours. They tortured me by pouring water into my nose, about six times. That hurt a lot. Finally, they let me go. The soldiers' pretext was that they were searching for and confiscating pistols, but I had no pistols.

Id. at PE 0842 ¶ 103; *see also id.* at PE 0841-42 ¶¶ 99-102.

355. Teresa could have told the jury about how her aunt's husband was murdered. "I was about 13 or 14 when he died. His murdered body was found outside of San Antonio about nine days after he died. My cousin Lino was still living on and off in San Antonio at this point. Many people, including me, saw his murdered body. . . . He was riddled with bullets in his arms, his legs, his stomach, and his forehead. His body was swollen and it reeked." Exh. 107, T.M. Pena Decl., PE 1016 ¶¶ 129-30; *see also id.*

at PE 1015-16 ¶¶ 123-28, 131-32.

356. Life on the ranchos where Petitioner was raised was extremely violent. "Part of the reason for the widespread violence was the fact that there was really no functioning, structured government in these remote, rural areas. There was certainly no formal, reliable law enforcement presence, and only the sporadic intervention of the military." Exh. 130, Declaration of Dr. Craig Haney ("C. Haney Decl."), PE 1323 ¶ 90. "As a result, just as in Rancho San Antonio where [Petitioner] had lived earlier, people in La Huerta did not depend on the police to enforce the law; they often applied their own brand of rural justice instead." Exh. 130, C. Haney Decl., PE 1323 ¶ 92.

357. "Moreover, because these were dangerous jungle-like areas where farm workers needed protection from wild animals, it was very common for people to carry weapons, especially guns. Often, with the added influence of alcohol, interpersonal conflicts were settled violently." Exh. 130, C. Haney Decl., PE 1323-24 ¶ 93.

358. None of these facts were presented to the jury.

359. Petitioner's transience and exposure to criminality and negative role models. Witnesses could have testified regarding Petitioner's early exposure to criminality and negative role models. This evidence was not adequately investigated or presented to the jury.

360. "Abelino grew up surrounded by drunks. Abelino always saw

father, uncles, stepfather, and friends getting drunk. While Abelino was a child and a teenager, most of the adult men in Abelino's life, except for me, were alcoholics." Exh. 91, J.M. Banuelos Decl., PE 0755 ¶ 128. Petitioner began to drink at a very young age – first at age six, then more regularly when he was 12 – and then continued drinking throughout his life. *Id.* at PE 0755-56 ¶ 129. Petitioner's drug and alcohol use was also a means to self-medicate symptoms of depression and anxiety that were predictable consequences of the treatment he survived. Exh. 129, P. Stewart Decl., PE 1250 ¶ 52.

361. Petitioner's childhood was pervaded by extreme abuse at the hands of his father and grandmother. Petitioner longed to be reunited with his mother. Exh. 103, M.J. Nunez Decl., PE 0921 ¶ 44. He walked for days without food, going from rancho to rancho until he found her. *Id.* at PE 0921 ¶ 45.

362. Petitioner finally found his mother, but he was eventually driven away by the conflicts between his mother and his mother's new live-in boyfriend, Erasmo Pena, and the conflicts between Petitioner and Erasmo Pena.

363. As Monica Jacquez Nunez recalled:

> This could have been a happy time for Lino to be living with his mother again, but Benita's new man, Erasmo Pena, was a violent machista who like to fight. Erasmo fought constantly with Benita. He drank a lot of alcohol and

> smoked a lot of cigarettes. After a while of Lino living with them, Erasmo began fighting with Lino. . . . One time while he was fighting with and yelling at Lino, Erasmo took his pistol out as if he was going to kill Lino. Lino didn't have anything with which to defend himself. Lino screamed at Erasmo, "Shoot me! Kill me!" . . . Lino stopped living with his mother after that.

Id. at PE 0922 ¶ 50.

364. Moreover, Petitioner's mother was sexually promiscuous and had many encounters with different men, even when she was married. *See, e.g.*, Exh. 104, E.P. Ochoa Decl., PE 0939 ¶ 20.

365. Additionally, Petitioner never received guidance or discipline from his mother, and his mother even encouraged criminal behavior: "Benita [Petitioner's mother] would give her son Lino bad ideas. Benita pushed Lino to be more violent. Several times I heard Benita tell Lino to throw me into a gorge or kill me." *Id.* at PE 0943 ¶ 55.

366. Without adequate parental guidance or care, Petitioner began to socialize with marginal men who came in from other parts of the country and were involved with questionable activities, including crime and violence and who accepted Petitioner. Exh. 104, E.P. Ochoa Decl., PE 0946-47 ¶ 83; Exh. 130, C. Haney Decl., PE 1328 ¶ 104.

367. As Dr. Haney notes:

> . . . the transience that led Abelino into contact with this group of older men was a continuation of a pattern of adapting to abuse that he had undertaken much earlier in life. It was a pattern

that would lead to long-term consequences.

. . .

> However, the adaptation that Abelino used to escape the abuse and conflict that haunted him earlier in his life brought chaos, instability, and transience later on. The pattern appeared to become deeply internalized, so that Abelino could not create or maintain stability when he got older.

Exh. 130, C. Haney Decl., PE 1328-29 ¶¶ 105, 107.

368. Petitioner also drifted into working in the marijuana and poppy fields in Mexico. Exh. 104, E.P. Ochoa Decl., PE 0946 ¶¶ 78-80. As Jesus explained, "[t]here weren't a lot of options for other work, it paid better than other places, and Abelino was surrounded by people who worked in the industry." Exh. 91, J.M. Banuelos Decl., PE 0761 ¶ 147.

369. The jury never heard about the how these forces beyond Petitioner's control helped to shape the direction his life took and the adaptive nature of many of the actions in which he may have engaged. Exh. C. Haney Decl., PE 1398-99 ¶ 237.

c. Trial Counsel Had No Valid Tactical Reason to Forego Investigating, Developing and Presenting Mitigating Evidence from Multiple Witnesses in Mexico.

370. There is simply no explanation or any valid strategic or tactical basis for Trial Counsel's failure to present the testimony of witnesses such as Esperanza, Jesus, Feliciana and Teresa. Each of these family members

had already met with Trial Counsel and was willing and able to testify on Petitioner's behalf. Each possessed valuable testimony that Trial Counsel never bothered to present in mitigation.

371. Nor is there any excuse for Trial Counsel's failure to properly investigate and present testimony from the various other witnesses in Mexico whom Trial Counsel never even contacted. *See generally* Exh. 124, Affidavit of Augustin Rodriguez de la Gala, PE 1148-49 ¶¶ 23-28. Had Trial Counsel appropriately contacted the Mexican government for assistance in a timely fashion, consular officials would have: "worked closely with Mr. Manriquez, his family and the defense team"; "provided advice and logistical assistance in accessing the remote areas of rural Mexico in which Mr. Manriquez was raised"; "facilitated the provision of guides and interpreters"; and "ensured that local officials were instructed to provide the investigators with full assistance in locating documents and witnesses." *Id.* at PE 1148-49 ¶¶ 23-24. Trial Counsel requested no such assistance. Instead, according to the Director of International Litigation in the Mexican Ministry of Foreign Affairs, "the consular assistance that could be provided was confined to facilitating visas for a list of witnesses in Mexico that was provided to the consulate by the defense team *approximately one week before commencement of the penalty phase*." *Id.* at PE 1149 ¶ 25 (emphasis added).

4. The Witnesses Trial Counsel Presented

Were Few in Number, Unprepared, and
Their Testimony Was Unreasonably
Limited in Scope.

372. Despite his client facing the possibility of four death sentences, Trial Counsel presented only five mitigation witnesses, whose testimony in total took less than one day to present. *See* RT 2163-32.

373. Trial Counsel's opening statement is less than one page of the transcript. RT 2162-63. He did not even explain the concept of mitigation to the jury, and downplayed the significance of the mitigation evidence that he did present:

> I intend to put on *some evidence* in mitigation about my client's background. I think that it's going to show you that he came from a very, very poor area of Mexico. *The poverty part of it is not really the mitigating factor.* However, I think that you will see that his life as a young child and as an adolescent was very, very difficult. I think that you will find that he was mistreated quite badly, and I think that that evidence will show *some mitigation* in this case.

RT 2162. (emphasis added).

374. As forecasted, the testimony presented was limited, in general terms, to: (a) Petitioner's life during his childhood and early teens; (b) evidence that Petitioner was abused, *see, e.g.,* RT 2191-92; (c) evidence that Petitioner was not allowed to play, *see, e.g.*, RT 2192; and evidence that Petitioner was shown little or no affection, *see, e.g.*, RT 2193.

375. Dr. Haney notes:

> Indeed, trial counsel's examination of the few defense penalty phase witnesses was superficial and incomplete. Potential witnesses were never contacted, those who were contacted were not interviewed about the full range of information that they had about Abelino's social history, and those who were called to testify were not property prepared (indeed, they appear not to have been prepared at all). Trial counsel not only failed to call badly needed expert witnesses to provide some coherence to aspects of Abelino's life that were discussed, and connect Abelino's early experiences to his adult behavior, but he also failed himself to attempt to a coherent case in mitigation.

Exh. 130, C. Haney Decl., PE 1392 ¶ 227.

376. Moreover, Dr. Haney points out that Trial Counsel exacerbated his poor work with his mitigation witness and mitigation case by "inexplicably undermin[ing] the nature of the scant mitigation that had been presented." *Id.*

377. As a result of this inadequate mitigation case, the jury found that Petitioner should be given the death penalty on each of the four counts after just four and a half hours of deliberation.

a. The Mitigating Evidence Presented by Trial Counsel Was Unreasonably Limited.

378. As discussed above, despite the abundant, readily available mitigation evidence, Trial Counsel presented only five witnesses, and unreasonably limited the scope of their testimony, failing to question them about compelling information.

b. The Witnesses That Trial Counsel Presented Were Unprepared.

379. The few mitigation witnesses who testified were wholly unprepared. The first defense witness, Cecilia Solis Manriquez, resided in Van Nuys, California at the time of the trial. RT 2175. Despite this proximity, Trial Counsel never met with Cecilia and instead delegated that task to a member of his staff, who "met with her once or twice, each time for less than an hour, to discuss Abelino's background and family life." Exh. 97, C.S. Manriquez Decl., PE 0848 ¶ 2. Cecilia did not speak with Trial Counsel "until he asked me questions at trial." *Id.* at 0848 ¶ 3.

380. Cecilia "felt nervous, ill-prepared and scared when testifying." *Id.* at PE 0849 ¶ 7. She states, "I never practiced my direct testimony with him or anyone. Neither Abelino's trial attorney nor Rosanna, the woman I met with once or twice, ever discussed my role as a witness with me or prepared me for direct or cross examination." *Id.* at PE 0848 ¶ 3. Trial Counsel neither "discussed the purpose of cross examination with me" nor "helped me think about questions I might be asked during cross examination. . . . " *Id.* at PE 0849 ¶ 6.

381. Crecencia Tamayo, also from the Los Angeles area, had the same experience as Cecilia. She states, "I did not meet him [Trial Counsel] until I was on the witness stand at court. I don't recall meeting with anyone connected with Abelino's defense more than a few times.

Each time we discussed Abelino's background and family life. . . . I never practiced my direct testimony with him or anyone. No one from Abelino's trial team ever discussed my role as a witness with me or prepared me for direct examination and cross examination. . . . I was nervous and felt unprepared to testify at trial." Exh. 118, C. Tamayo Decl., PE 1095 ¶¶ 2-4.

382. Joaquina Ward also lived in Van Nuys at the time of the trial. RT 2205. She states:

> No one interviewed me prior to my testimony. The only thing Lino's defense team did was to talk to me and the other witnesses for a few minutes just before we had to testify, telling us that all we had to do was tell the truth. All the information I gave came out for the first time when I testified. I speak a little bit of English. I understood what the prosecutor was saying about Lino. He was saying Lino was a mean man. I wanted to tell them that wasn't true. I wanted to say so much more than I said in my testimony but I wasn't given the opportunity to say anything more.

Exh. 122, J. Ward Decl., PE 1138 ¶ 23.

383. Juan Manriquez Ayon was the only testifying witness who was a Mexican resident at the time of the trial. He states of his experience:

> I found out about Lino's trial when I received a telegram from a woman working for Lino's defense. I was Lino's only relative from Mexicali who went to Los Angeles. I am not aware of anyone contacting others in Mexicali. . . . I met the woman who had sent me the telegram as well as a man who the woman told me was Lino's attorney. The only time I spent with these two people was about a

> half hour immediately before I was a witness in court. The lawyer said only a few words to me. Mostly the woman talked. . . . When the half hour or so ended, I felt that I still had many things I wanted to tell the woman that I had not gotten a chance to say. Another reason I did not tell the woman more things was because I felt so scared. After our short conversation, I went into the court to testify. This was especially difficult for me because I was not clear about the process and the purpose of my presence in court and I still felt scared and upset. Nobody practiced with me or prepared me for testifying in court. Nobody gave me any advice for how to stay calm or how not to feel nervous during my testimony in court. When I was in the court testifying, the woman from Lino's defense was no longer present. While I was testifying somebody was interpreting for me but I barely understood what was going on. During my testimony, I felt scared to talk because I didn't know if something bad was going to happen because of what I said and I did not understand the purpose of my testimony.

Exh. 86, J.M. Ayon Decl., PE 0534 ¶¶ 75-81.

c. The Witnesses' Testimony Was Unreasonably Limited in Scope.

384. Trial Counsel failed to elicit important testimony regarding a number of crucial mitigation subjects, including the poverty of San Antonio, the abandonment of Petitioner by his mother which left Petitioner with an elderly great aunt and an alcoholic uncle, the resulting death of Petitioner's brother that Petitioner's mother never acknowledged, Petitioner's mother's drifting and instability, Petitioner's exposure to toxins and potentially dangerous medical practices, and the culture of violence,

rape, and vigilante justice that plagued San Antonio and the neighboring ranchos.

385. These omissions resulted from a double failure by Trial Counsel: the failure to follow up with the Sinaloa-area witnesses, and the failure to elicit testimony on these subjects from the very witnesses who did testify. There can be no doubt that the testifying witnesses would have and could have covered these subjects but for Trial Counsel's failures. *See*, Exh. 122, J. Ward Decl., PE 1131-38 ¶¶ 1-23; Exh. 86, J.M. Ayon Decl., PE 0522-34 ¶¶ 1-74.

386. The one subject Trial Counsel did elicit testimony about was the physical abuse suffered by Petitioner. That testimony, as shown above, was woefully under-developed due to Trial Counsel's abandonment of the Sinaloa-area witnesses. Moreover, Trial Counsel failed to elicit key testimony about abuse that even the *testifying* witnesses would have presented but for Trial Counsel's inadequacy.

387. For example, Juan Manriquez Ayon could have testified to the following, but did not due to Trial Counsel's deficient performance:

> Emilio beat Lino when he was naked and when he was tied up. Emilio sometimes beat Lino day after day or all day long. Emilio sometimes used the same whip made of crude leather that he used to hit the horses to hit Lino. It was as if Emilio was trying to kill Lino.
>
> . . .

I frequently heard Lino's cries from his house. Lino would cry and scream from the pain of being hit. He would say, "Ay daddy, no more." Emilio didn't pay any attention to Lino's cries for mercy. I knew whenever Emilio was beating Lino because I heard it happening. My house was right next door to Lino's house. . . . As Lino got older, he learned to not cry and scream when his father beat him. He just stayed quiet, but I could still hear the lashes and whippings Emilio gave him.

. . .

On one occasion, Lino and I were approaching San Antonio with a donkey that was carrying firewood. Emilio was furious because we were together. When we saw Emilio, I ran away but Emilio grabbed Lino and tied him to the donkey. He hit Lino over and over again and brought him back to San Antonio tied to the donkey.

. . .

Another time, Emilio came and got Lino at the river where he was bathing and took him back to the house. Emilio tied up Lino, who was still naked, in front of the house for about six hours. Lino was a teenager at the time and this was utterly humiliating for him because cousins who lived in a different rancho were visiting and everybody who walked by saw Lino.

. . .

I remember another time Lino was cutting a thorny plant. Emilio wanted Lino to cut the plant in a way that the branches would fall on a ground in a different place than where Lino was letting them fall. Lino accidentally bumped into a thorny branch or rubbed against it and he flinched in pain. Emilio then hit Lino and pushed his whole body into the thorny plant.

Exh. 86, J.M. Ayon Decl., PE 0526-27 ¶¶ 28-33.

388. Trial Counsel further failed to present additional compelling evidence from a number of witnesses who, as a result of his inadequate investigation, Trial Counsel failed to discover although they were available and willing to testify. As just one example, Julia Martinez, a neighbor from San Antonio states:

> Emilio Manriquez, Lino's father, was exceedingly hard on his son. Once, I saw Emilio make Lino drag the yoke used by the oxen for plowing. Emilio was making Lino walk from San Antonio to La Mesa, a steep walk with paths that only go uphill for about an hour, and drag the yoke with his neck and shoulders. Lino was quite young, just a small boy. The yoke must have weighed a minimum of 20 kilograms. Lino could not have weighed much more than the yoke. The yoke was bigger than Lino's skinny body. Yokes are usually made of a hard wood called "amapa" and the edges of the yoke are sharp and can cut skin. I remember it was a hot day and little Lino was sweating. The time of year yokes are used is always the hottest time of the year, during the rainy season. As some kind of punishment, Emilio was making his son do a job the animals normally did. Emilio was treating Lino like an animal.

Exh. 99, J. Martinez Decl., PE 0873 ¶¶ 10.

389. Trial Counsel had no valid strategic or tactical basis for presenting such a scant and inadequate mitigation case, and for failing to interview or prepare the few witnesses he did call before they testified. *See Lambright v. Schriro*, 490 F.3d 1103, 1120 (9th Cir. 2007) ("Only after a

thorough investigation can a less than complete presentation of mitigating evidence ever be deemed reasonable, and only to the extent that a reasonable strategy supports such a presentation.").

5. A Reasonable Investigation and Preparation of Witnesses Who Knew Petitioner Would Have Made a Difference.

a. Trial Counsel Unreasonably Failed to Investigate, Develop, and Present a Compelling Mitigation Case.

390. Had Trial Counsel conducted a reasonable investigation and preparation of Petitioner's mitigation case, he would have been able to submit to the jury, among other things, the following evidence: (a) numerous incidents of horrendous physical and psychological abuse at the hands of Petitioner's father, grandmother, and others; (b) extreme poverty including, among other things, food shortages, malnutrition, rodent and insect infestation, and chronic illness from poor hygiene and unsafe drinking water; (c) Petitioner's abandonment by his mother in favor of a "new man" and Petitioner's inadequate care by an elderly great aunt and an uncle who was a "drunk"; (d) the trauma resulting from the subsequent, unnecessary death of Petitioner's younger brother, whose death Petitioner's mother did not acknowledge and whose wake Petitioner's mother did not attend; (e) the neglect suffered by Petitioner as a child; (f) Petitioner's exposure to toxic chemicals and unsafe medical treatments; (g) head trauma

from Petitioner's being pistol-whipped by those whom Petitioner considered friends; (h) evidence that the community Petitioner lived in was rife with violence, rapes, and vigilante justice; (i) Petitioner's transience and exposure to violence and negative role models; (j) and Petitioner's (and family members') neurocognitive impairments, mental illnesses, and extreme alcohol and drug use. This evidence was never presented to the jury.

391. As Dr. Craig Haney notes:

> Abelino Manriquez's social history does contain many of precisely the mitigating themes that capital jurors find meaningful and persuasive in choosing life over death. Indeed, the social history mitigation in this case is both powerful and persuasive. Of course, such evidence must be carefully and diligently collected, it must be thoughtfully analyzed, and the testimony trough which it is conveyed to the jury must be properly prepared and effectively presented. Undertaking these basic essential steps is exactly what influences the outcome of a capital penalty trial.
>
> Unfortunately, Abelino's trial counsel failed to undertake any of these basic, essential steps. As a result, Abelino's mitigating social history was never effectively presented. The crucial connections – from childhood and adolescent deprivation, abuse, and trauma to adult criminality – were never made for the jurors who decided Abelino's fate.
>
> More specifically, many crucial mitigating themes were never identified in Abelino's case and many potentially important witnesses were never located or interviewed. In other

> instances, themes were identified but not properly developed, and potential witnesses were found but never called. The very few witnesses who were called appeared to have been poorly prepared and ineffectively presented.
>
> In addition to the important mitigating themes from Abelino Manriquez's social history that were completely overlooked by trial counsel, the very few potentially mitigating themes that surfaced at his penalty trial were presented with little or no convincing corroboration – corroboration that, in reality, was substantial. The fragmented and incomplete social history testimony that trial counsel did assemble and present was so poorly organized and incoherently presented that it likely left the Manriquez jurors skeptical and confused about its mitigating significance.

Exh. 130, C. Haney Decl., PE 1297 ¶¶ 21-24.

392. An effective presentation of social history information is important to jurors because it "provides crucial insight into Abelino's psychological make-up, and it helps to explain how and why his life took the course that it did." *Id.* at PE 1296-97 ¶ 20.

393. An effective presentation of the mitigating evidence would have shown that Petitioner's background and childhood presented numerous risk factors that had a profound impact on his well-being as adult. *Id.* at PE 1333 ¶ 115. These factors include, but are not limited to, Petitioner's poverty, abandonment, neglect, physical and psychological abuse, exposure to violence, negative role models, a lack of institutional

intervention, protection, or treatment, and longstanding alcohol and drug use. *Id.* at PE 1336-62 ¶¶ 121-167.

394. A coherent discussion of these issues as risk factors would have helped the jury to understand the negative influences in Petitioner's life – which were largely outside of his control – that explained the course that Petitioner's life eventually took:

> Abelino continued to live in impoverished communities and to manage only a marginal lifestyle as a young adult. He was significantly disadvantaged by his lack of education, his limited work skills and experience, and by the long-lasting psychological problems and issues that years of exposure to severe, multiple risk factors had produced. The fact that he was not able to escape from these criminogenic environments as an adult represented another set of significant negative influences in his life that helped to explain the course that it eventually took.

Id. at PE 1362 ¶ 167.

395. "When [a social history] is carefully assembled and properly presented in a capital penalty phase trial, it can lead jurors to vote for life instead of death. Indeed, in many cases this kind of explanatory evidence is the only thing that stands between a capital defendant and a death verdict." *Id.* at PE 1296-97 ¶ 20. Thus, it was critical that Trial Counsel present an adequate social history of Petitioner's life. However, he failed to do so.

396. As Dr. Haney points out:

> Abelino's formative years – from early

> childhood until early adulthood – were filled with precisely the kinds of risk factors and harmful events that unfortunately characterize the lives of many capital defendants. Exposure to these kinds of deprived and degrading conditions, extreme forms of mistreatment, and numerous traumatic events is known to have long-term "criminogenic" – crime-producing – consequences.
>
> . . .
>
> In Abelino's case, exposure to these criminogenic risk factors and life circumstances continued into young adulthood. The physical abuse that he suffered at the hands of his parents turned to neglect, as Abelino struggled to overcome the negative effects of his earlier mistreatment. However, he was still surrounded by poverty and violence, and increasingly by numerous negative role models who were engaged in crime and drug manufacture and use. There was little or no governmental or institutional intervention to assist him in addressing his problems, and he fell increasingly under the influence of older peers who were engages in nefarious activities.

Id. at PE 1296 ¶¶ 18-19. This social history information was never explained to the jury. Moreover:

> [T]rial counsel made no meaningful attempt to provide the jury with an understanding of the arc or direction of [Petitioner's] life. Indeed, although trial counsel did call a few witnesses who provided some social historical information, there was no genuine social history presented. That is, trial counsel made no effort to address or link the developmental stages of Abelino's life or explain how his development might have been impacted by the things that had happened to him. Knowledgeable lay witnesses

> could have provided some of this kind of testimony, but trial counsel failed to call them or, once having called them, failed to ask them to address these issues. Of course, qualified experts could have effectively addressed these key social historical issues but . . . trial counsel failed to call any.

Id. at PE 1376-77 ¶ 195.

397. Moreover, in making an effective mitigation case, it was critical for Trial Counsel to have presented testimony from expert witnesses: "Among other things, these experts could have established key connections between the deprivation and abuse that characterized Abelino Manriquez's social history and the subsequent troubled path of his life. Such experts could have and should have been called to develop the scientific underpinnings for the well-founded proposition that Abelino Manriquez's deprived and traumatic social history affected his life course in profound and problematic ways." *Id.* at PE 1299-1300 ¶ 27. Trial Counsel failed to adequately investigate and develop this expert testimony. Not a single expert witness was called by the defense.

398. The incomplete and ineffective mitigation case presented by Trial Counsel was only exacerbated by the fact that Trial Counsel failed to "make clear to the jurors why [the mitigation evidence] did or should matter to them." *Id.* at PE 1298-99 ¶ 25. "Indeed, it was likely unclear to the Manriquez jury how and why trial counsel thought any of this evidence was 'mitigating' at all. Because trial counsel failed to articulate any theory

of mitigation – not in an opening statement (which counsel used instead to minimize the significance of the evidence he was about to present), nor in the course of the actual testimony (where counsel could have, but did not, call experts who could have developed and connected important mitigating themes), nor in closing argument – none was ever coherently presented at the trial itself. For these reasons, the true mitigating significance of even the very sketchy social historical information that was presented remained unclear." *Id.*

399. Trial Counsel had no reasonable tactical reason for his failure to uncover, analyze, and present the mitigating themes and testimony available to him. *Id.* at PE 1300 ¶ 28.

b. A Reasonable Investigation and Presentation of Mitigating Evidence Would Have Defeated the Prosecutor's Claim That Petitioner's Upbringing Was "No Different Than a Lot of Our Lives, But in a Different Place at a Different Time."

400. Having presented only five unprepared witnesses regarding Petitioner's upbringing, Trial Counsel left Petitioner vulnerable to the argument that that Petitioner's upbringing was "no different than a lot of our lives, but in a different place at a different time." RT 2264. The jury would not have found this argument compelling had Trial Counsel adequately investigated and presented Petitioner's mitigation case.

c. A Reasonable Investigation and Presentation of Mitigating Evidence Would Have Defeated the Prosecutor's Claim That Defense Witnesses Were "Exaggerating."

401. The Prosecutor repeatedly referred to the mitigation testimony as an "exaggeration." *See, e.g.*, RT 2263. Trial Counsel left Petitioner susceptible to this argument because he failed to adequately investigate or prepare Petitioner's case. The testimony presented appeared to be an exaggeration because the actual conditions of Petitioner's upbringing were so unbelievably harsh, *e.g.*, that the family only stopped working once a year for Good Friday, that Petitioner was beaten every day or even three times a day, that the children were not allowed to play with each other. Had Petitioner presented prepared witnesses who were confident instead of frightened and confused, the testimony would not have appeared to be an exaggeration. Further, had Trial Counsel presented more witnesses able to testify to and thereby corroborate these facts, the purported "exaggerations" would have been revealed to be the truth.

d. A Reasonable Investigation and Presentation of Mitigating Evidence Would Have Defeated the Prosecutor's Claim That the Witnesses Were Unreliable Because They Were All Family Members.

402. Because of the unreasonably inadequate investigation and

presentation by Trial Counsel, only family members testified about Petitioner's upbringing. Consequently, Trial Counsel left Petitioner vulnerable to the argument that "the witnesses that testified were all relatives of the Defendant. They knew their purpose being here. . . . There was a great deal or a certain degree of exaggeration . . . on particular points." RT 2240. Despite their importance, Trial Counsel would not have left Petitioner vulnerable had he presented testimony from non-family witnesses. Many such witnesses were willing and able to testify and some of these witnesses, like Julia Martinez, could have offered evidence of particularly horrific instances of abuse that Petitioner suffered. Unfortunately, Trial Counsel never bothered to contact them. *See, e.g.*, Exh. 99, J. Martinez Decl., PE 0875; Exh. 111 , S. Pompa Decl., PE 1046; Exh. 113 , C.P. Robles Decl., PE 1061 ; Exh. 114, E.P. Robles Decl., PE 1068; Exh. 115, J.A.P. Robles Decl., PE 1075; Exh. 116, J.Q. Sarabia Decl., PE 1082; Exh. 93, M.L.C. Hernandez Decl., PE 0791.

e. A Reasonable Investigation and Presentation of Mitigating Evidence Would Have Defeated the Prosecutor's Claim That Crecencia Tamayo's Testimony Proved Petitioner's Upbringing Was Not So Bad.

403. A key question repeatedly asked by Trial Counsel was whether the testifying witnesses had seen Petitioner ever being given affection as a child. Yet due to inadequate preparation, Crecencia Tamayo was not

prepared on cross-examination to answer the Prosecutor's simple question regarding whether Crecencia herself gave Petitioner affection. The result was that Crecencia testified that she gave Petitioner love and affection after Petitioner was beaten, but omitted the fact that she herself repeatedly beat and mistreated Petitioner. RT 2196. The Prosecutor then used Crecencia's testimony on this to cast doubt on the mistreatment suffered by Petitioner:

> It's an exaggeration.
>
> Never, never any love or affection applied to Defendant.
>
> That's really interesting, because the Defendant's Aunt Miss Tamayo, when she took the witness stand, I looked at her and she seemed like somewhat of a nice person. . . . I thought to myself this is the kind of woman who would – if a little boy is hurt or harmed or scared or afraid, working too hard or something would – the aunt of the Defendant would hug him.
>
> The other witnesses said no love or affection.
>
> Did you hug him once in a while?
>
> Yeah.

RT 2263-64.

404. Had Trial Counsel properly investigated and prepared his mitigation case, the Prosecutor would not have been able to make the inaccurate and misleading argument. First, Crecencia was so unprepared she admits she answered the question inaccurately. Exh. 118, C. Tamayo Decl., PE 1097 ¶ 4 ("I recall him asking me whether I ever showed Abelino

affection, and I believe I said that I did. I think this response was not complete. . . . I may have been nicer to Lino than the others (particularly his father and grandmother, who treated him like an animal) but I, too, was harsh on him.").

405. Second, three of the Sinaloa-based witnesses Trial Counsel abandoned could have and would have testified that Crecencia herself beat Petitioner, thus discrediting the Prosecutor's insinuation that Crecencia helped protect Petitioner. Exh. 95, F.M. Jacquez Decl., PE 0830 ¶ 28; Exh. 107, T.M. Pena Decl., PE 1007 ¶ 56; Exh. 88, E.M. Banuelos Decl., PE 0608 ¶ 83.

406. Third, and most egregiously, Joaquina Ward – who testified *after* Crecencia – was not asked by Trial Counsel to describe the abuse Crecencia herself inflicted on Petitioner. Trial Counsel should have, but did not, know that Joaquina was aware of this abuse. Exh. 122, J. Ward Decl., PE 1136 ¶ 9 ("Emilio wasn't the only adult in the house who mistreated Lino. Tomasa [Petitioner's grandmother] and her daughters Crecencia and Esperanza were hard on Lino too, Crecencia more so than Esperanza. They insulted Lino all the time, calling him ugly names like no-good, asshole, lazy, and stupid. . . . They often hit him, and after he was hit, he didn't want to eat his food.").

f. A Reasonable Investigation and Presentation of Mitigating Evidence Would Have Defeated

the Prosecutor's Claim That Petitioner "Chose" to Kill as Evidenced by Other Family Members Who Had Not Been "in Trouble with the Law."

407. The Prosecutor repeatedly asked Petitioner's witnesses whether they or other family members had been in trouble with the law. After they said no, the Prosecutor used this testimony to ague that "there were children raised there [in San Antonio], productive members of the community now, live in Van Nuys, jobs, children, married, family. They didn't kill." RT 2241.

408. First, when asked, Petitioner's witnesses uniformly testified that Petitioner was treated the worst out of anyone who grew up in San Antonio at that time. Yet Trial Counsel failed to emphasize this fact in closing argument.

409. Second, the Prosecutor's claim could have been rebutted had Trial Counsel investigated and prepared reasonably. Many of those raised in San Antonio suffer from nightmares, alcoholism and other conditions as a result of their childhoods there.

410. Third, Trial Counsel had a witness in court who could have, but did not, counter the Prosecutor's argument with evidence that the type of abuse Petitioner particularly suffered could push someone into despair and criminality. Specifically, Juan Manriquez Ayon, who testified for Petitioner, could have but was not given the opportunity to testify to the

following:

> I cannot forget the horrific treatment I received and the even more horrific treatment my cousin Lino received in San Antonio. Some of the adults in San Antonio were savages. I wonder if abusing children somehow brought them relief. What those people did to me has negatively affected my life. I have severe problems to this day because of the treatment I received in San Antonio. I have struggled with drugs, alcohol, the painful memories of my childhood, and my conflicted emotions toward my family throughout my adult life. In San Antonio, Lino suffered even more than I did. I am a drunk, and I have had many problems due to alcohol. I know how terrible Lino must feel.
>
> . . .
>
> Although my given name is Juan Manriquez Peña, I now go by Juan Ayon. This is so I am not associated with the criminal record I have in the United States. When I was about 19 or 20 years old, I was arrested and went to jail in California. Another guy and I were taking people across the border. This was something I was doing to earn money. We were taking people across on foot. Someone in the group fell from an overpass that was over a road, and was killed. A helicopter and a lot of police arrived. The other guy and I ran away and stole a car in San Ysidro, CA, the border town on the other side from Tijuana.
>
> . . .
>
> When I was around 19 or 20 years old, I lived in Van Nuys, CA, and was a member of a gang call 'VVN'. Sometimes we would carry knives and fight with other gangs. We could not go into other gangs' neighborhoods.

Exh. 86, J.M. Ayon Decl., PE 0523, 0533-34 ¶¶ 9, 73-74.

g. A Reasonable Investigation and Presentation of Mitigating Evidence Would Have Defeated the Prosecutor's Claim That "There Was an Effort [by Petitioner] to Bring You Everything They Could, and There Is a Lack of Evidence Because They Didn't Have Any."

411. As stated, Trial Counsel never contacted a vast number of potential witnesses. Four declarants were contacted in Sinaloa and then abandoned. The witnesses who did testify were unprepared, their testimony was not properly developed or was under-developed, and it was not contextualized by any expert witness.

412. Though eminently false in this case, a rational jury would have assumed that Trial Counsel expended every effort and followed every possible lead to save his client from the possibility of four death sentences. The Prosecutor aptly took advantage of this assumption: "There were witnesses brought here from the country of Mexico.[18] They were brought to you by the defense for the purpose of the penalty phase. . . . There is a tremendous lack of evidence. There was an effort to bring you everything they could, and there is a lack of evidence because they didn't have any." RT 2266.

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[18] In fact, there was only one such witness. That witness, Juan Manriquez Ayon, was totally unprepared to testify. *See* ¶ 383 above.

413. Obviously, Trial Counsel wholly failed to present "everything they could." Trial Counsel left Petitioner wide open to the assumption that only five witnesses could or would testify in his favor, and that the only mitigating evidence pertained to a few limited facts about his life from ages five to seventeen.

414. Trial Counsel also left Petitioner open to the assumption that the brutality and poverty of Petitioner's developmental years had no relationship to the crimes for which he was charged. In fact, as evidenced by the declaration of Dr. Haney, a properly prepared defense expert could have explained the connection between Petitioner's deprived childhood and his crimes and shown that the evidence presented on his behalf was truly mitigating.

415. Trial Counsel did not make, and could not have made, a reasonable strategic decision to present mitigating evidence that would have precluded the Prosecutor's argument.

h. Reasonably Competent Counsel Would Have Followed Through on Efforts to Use an Expert to Explain Petitioner's Culture and Upbringing.

416. Trial Counsel had, at one time, considered using an expert to explain Petitioner's upbringing and socio-cultural background to the jury. As demonstrated by Dr. Haney's declaration, such an expert could have explained the effects of Petitioner's horrific experiences during his

childhood, adolescence, and as a young adult on his functioning at the time of the offenses so that the jury would have understood the mitigating nature of that evidence. Evidently understanding the importance of such testimony, the trial team did contact a potential mitigation expert but failed to follow up with this expert or provide her with the evidence necessary to conduct and adequate analysis. Trial Counsel unreasonably failed to present such an expert at trial.

417. This, like all the other evidence Trial Counsel failed to present, played into the Prosecutor's argument that there was a lack of evidence because Petitioner didn't have any.

418. Trial Counsel had no strategy on this issue. Any strategy Trial Counsel may have had was unreasonable, based, as it was, on an incomplete investigation.

i. A Reasonable Investigation and Presentation of Mitigating Evidence Would Have Defeated the Prosecutor's Claim That Petitioner "Carried Guns Because He Liked To Kill."

419. Properly investigated and prepared mitigation testimony could have and would have helped the jury understand why Petitioner carried a gun. Without any such testimony, the jury was left with the Prosecutor's repeated assertion that Petitioner carried a gun because he had a "gun-carrying attitude" and "likes to kill." *See* RT 2258, 2260; *see also*

RT 2241, 2260, 2266.

420. First, Trial Counsel could have, but did not, demonstrate that Petitioner carried a gun because he himself had been the victim of violence, and in particular gun violence, prior to the charged offenses. Specifically, Trial Counsel failed to unearth and failed to present evidence showing: (a) that Petitioner suffered a gun shot wound when he was approximately twenty years old, Exh. 91, J.M. Banuelos Decl., PE 0756 ¶ 131; (b) that Petitioner had been pistol whipped on at least two separate occasions when he was in his twenties, *id.* at PE 0757 ¶ 133; and (c) that Petitioner had been shot in the neck and hospitalized for 15 days one year before any of the incidents in this case. Exh. 54, Harbor-UCLA Medical Center Operative Report, Sep. 4, 1988, PE 0384.

421. Second, as discussed above, Trial Counsel failed to investigate, develop or present evidence showing that Petitioner grew up in a community that was rife with gun-related murders, rape, and vigilante justice, and in which the police could not be relied on for any protection. *See, e.g.*, Exh. 91, J.M. Banuelos Decl., PE 0723 ¶ 28 ("The police, who lived in faraway towns, didn't patrol and protect the countryside and the ranchos, and they did not solve problems for people. Rancheros had to protect themselves and work out their own problems.").

422. Third, Trial Counsel failed to investigate, develop or present evidence showing that carrying a gun for self-protection was commonplace

in the Sinaloa ranchos, including San Antonio. For example, Petitioner's uncle, Jesus Manriquez Banuelos, could have testified, "San Antonio more closely resembled a wilderness than a town. Because of this, it was common for people in ranchos to carry pistols and guns around. They used pistols for hunting and for self-defense, mostly against wild animals, but also against robbers and attackers in the wilderness and on the paths connecting different ranchos. It was normal for people to visibly tote their pistols." Exh. 91, J.M. Banuelos Decl., PE 0724 ¶ 33. Teresa Manriquez Pena states, "Men, women, and children commonly carried guns. A child was considered old enough to use a gun by age 12. People didn't walk around their houses armed with guns, but they might have walked in the countryside armed or gone to a party armed." Exh. 107, TM. Pena, Decl., PE 1017 ¶ 138.

423. Finally, Jesus Manriquez Banuelos, who stayed in touch with Petitioner during Petitioner's twenties, could have explained how Petitioner's first gun was given to him for self-protection, and carrying a gun made sense:

> Because of the danger involved, it was typical for the bosses of marijuana and poppy fields to give their workers guns. Bosses almost always went around armed. The bosses who hired Abelino as an adult to work in the poppy and marijuana fields gave him a gun to carry. Abelino didn't use his gun. He didn't shoot it off into the air at parties. He didn't pick fights or use his gun in fights. He didn't show off his

> gun or try to act tough because he had a gun. Abelino took the gun because the bosses in the fields gave it to him. It was normal for people in that area to carry a gun as a way to avoid being a victim of an attack or an assault. Just like everyone else, Abelino learned to be on the alert. Abelino felt even more than most men that he needed to be safe and protected. Abelino never experienced living in a safe, protective, calm environment. He had been the victim to his father's violence and the violence of other men. He traveled through, lived, and worked in the many dangerous, violent places of the Durango/Sinaloa countryside.

Exh. 91, J.M. Banuelos Decl., PE 0768-69 ¶¶ 170-71.

424. Finally, an expert could have further explained that carrying a gun was reasonable adaptive behavior given Petitioner's background and upbringing. Exh. 130, C. Haney Decl., PE 1323-24 ¶¶ 90-93. No such expert testimony was presented.

425. Thus, Trial Counsel unreasonably and unnecessarily left Petitioner vulnerable to being portrayed as a person who carries a gun to kill, rather than protect himself from real and perceived threats. Trial Counsel had no reasonable strategic or tactical basis for failing to present evidence to address the prosecution argument. Any strategy Trial Counsel may have had was unreasonable, based, as it was, on an incomplete investigation.

6. Trial Counsel Unreasonably Failed to Perform an Adequate Investigation of Mitigation Evidence from Expert Witnesses.

426. Trial Counsel unreasonably and prejudicially failed to investigate, develop, and present evidence of Petitioner's neurocognitive impairments, mental illness, and drug and alcohol abuse.

427. The failure to present such evidence whenever possible renders counsel's assistance prejudicially deficient. *Lambright v. Schriro*, 490 F.3d 1103, 1121 (9th Cir. 2007) ("[B]oth this court and the Supreme Court have consistently held that counsel's failure to present readily available evidence of childhood abuse, *mental illness*, and *drug addiction* is sufficient to undermine confidence in the result of a sentencing proceeding, and thereby to render counsel's performance prejudicial." (emphasis added, citations and internal quotations omitted)).

428. Remarkably, Trial Counsel did not present a single witness – expert or otherwise – to testify regarding Petitioner's mental illnesses, drug addiction or neurocognitive impairments. This fact is astonishing considering that Trial Counsel *knew* of Petitioner's childhood abuse and chemical dependence throughout his life. Since evidence of mental illness and drug addiction exists, see Claim 1.D.6.a., below, and since such evidence was readily available and never presented, Trial Counsel's assistance was prejudicially ineffective.

a. Petitioner's Mental Illness and Neurocognitive Impairment

429. Trial Counsel failed to adequately investigate, develop, and

present evidence of petitioner's mental illness and neurocognitive impairment. As evidenced by the declaration of Pablo Stewart, such evidence was available to Trial Counsel and could have been presented after an adequate investigation and consultation with appropriate experts.

430. Pablo Stewart is a medical doctor specializing in clinical and forensic psychiatry who has extensive experience diagnosing substance abuse and related disorders. Exh. 129, P. Stewart Decl., PE 1228-29 ¶ 2-4. Dr. Stewart met with Petitioner in connection with this habeas proceeding.

431. Dr. Stewart's opinions are supported at length by his declaration, which documents, among other things: (a) the "significant history of mental illness and cognitive impairment" in Petitioner's family; (b) the likelihood of developmental deficiencies due to Petitioner's "chronic malnutrition, exposure to neurotoxins, and traumatic brain injury," *id.* at PE 1239-40 ¶¶ 27-30; (c) the "maltreatment inflicted on Abelino as a child [that] was so extreme that it amounted to torture," *see id.* at PE 1240-45 ¶¶ 31-40; and (d) the poverty, isolation, absence of affection, and absence of supporting institutions, all of which exacerbated the effects of the abuse suffered by Petitioner, *see id.* at PE 1245-47 ¶¶ 41-43.

432. Dr. Stewart's opinion is that Petitioner "suffers from multiple mental impairments and neurocognitive disorders, each of which was present and acute at the time of the offenses. Abelino suffers from Posttraumatic Stress Disorder (PTSD), chronic, severe; Mood Disorder, not

otherwise specified; Alcohol and Cocaine Dependence; and multiple neurocognitive deficits including problems with executive functioning." *Id.* at PE 1261 ¶ 82; *see also id.* at PE 1261-63 ¶¶ 83-87. Dr. Stewart continues:

> Abelino Manriquez has survived severe multiple traumas, including the threat of annihilation at the hands of his father and grandmother, that should be taken into account in formulating any opinion about his actions and functioning at the time of the offenses and over the course of his life. His symptoms of posttraumatic stress disorder with its resultant problems with executive functioning caused him genuinely to believe in his mind that he had to act in self-defense or be killed by the victims. He was hypervigilant to assault and threats of being killed as a result of a life long pattern of being tortured in near fatal abuse inflicted by his father. His ability to plan alternative action and to carry through with a plan was compromised by overwhelming fear and terror, significant cognitive deficits, and mental disease which distorted his perception of reality. Noting his tendencies to dissociate when confronted with stressful stimuli, he very likely dissociated, entered an altered state of consciousness, and responded without insight or understanding of his present reality. At the time of the offenses, he was likely in a dissociative state. Even if he were not in a completely dissociative state, the totality of his chronic mental impairments prevented him from appreciating the wrongfulness of his actions, impaired his judgment and insight, and obliterated his ability to plan out alternative actions.

Id. at PE 1263 ¶ 87.

433. This testimony would have been important for the jury to consider as mitigation evidence because it would have shown that Petitioner suffered from neurocognitive defects that made him, among other things, less morally culpable for the offenses the jury found him guilty of committing.

434. Dr. Antolin Llorente holds a Ph.D. in clinical psychology, is a licensed clinical psychologist, and is a Clinical Professor at the University of Maryland. Exh. 126, A. Llorente Decl., PE 1152 ¶ 1. Like Dr. Stewart, he also met with Petitioner in connection with this habeas proceeding. Dr. Llorente also administered to Petitioner a number of neuropsychological tests to assess Petitioner's neuropsychological functioning. *Id.* at PE 1152, 1153, 1156-62 ¶¶ 2, 4, 18-33.

435. Had Trial Counsel consulted with an expert such as Dr. Llorente, Trial Counsel would have been able to develop evidence showing that Petitioner suffers from neurocognitive deficiencies.

436. Petitioner's executive skills functioning is impaired. *Id.* at PE 1162 ¶ 32.

437. Petitioner's overall "neuropsychological profile demonstrated scores below the range of expectation or blatant deficits on a number of domains including simple visual attention, rote auditory memory, associative verbal memory, long-term verbal memory, and selected executive functions including interference, inhibition, planning and

organization. Pronounced impairments were observed in complex visual-memory and higher order executive skills, namely inhibition facilitated by frontal systems." *Id.* at PE 1163 ¶ 35.

438. Moreover, Petitioner's family suffers from mental illness and neurocognitive defects, further corroborating Petitioner's mental illness and neurocognitive defects. Indeed, as Dr. Stewart summarizes:

> Family members and friends report in narrative form an array of psychiatric symptoms expressed by various family members, including psychotic episodes, depression, mania, sleep disturbance, and polysubstance abuse.[19] These symptoms interfered with the family's day to day functioning, seriously compromised their parenting abilities, were not ameliorated by any medical or psychiatric treatment, and were exacerbated by extreme poverty, illiteracy, severely limited access to education and religious instruction, and geographic isolation. These symptoms were remarkable and far outside the range of

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[19] Declarations of Ignacia Alarcon, Eufrasio Astorga, Herminia Manriquez Ayon, Juan Manriquez Ayon, Ponciano Manriquez Ayon, Esperanza Manriquez Banuelos, Gaudencio Manriquez Banuelos, Gregorio Tamayo Banuelos, Jesus Manriquez Banuelos, Gabriel Pena Gallardo, Maria Lourdes Cardenas Hernandez, Alejandro Pompa Jacquez, Feliciana Manriquez Jacquez, Julian Gonzalez Jacquez, Cecilia Solis Manriquez, Julia Martinez, Antonia Jacquez Nunez, Gumercindo Jacquez Nunez, Monica Jacquez Nunez, Erasmo Pena Ochoa, Merita Pena, Rodolfo Manriquez Pena, Teresa Manriquez Pena, Ubaldina Manriquez Pena, Jose Manuel Duran Pompa, Maria Raquel Pompa, Socorro Pompa, Augustina Medina Quintero, Esteban Pompa Robles, Canuto Pompa Robles, Jose Angel Pompa Robles, Jose Quintero Sarabia, Julia Manriquez Sepulveda, Crecencia Tamayo, Lorenzo Pompa Tamayo, Manuel Sanchez Tamayo, Ramon Meza Urea, Faustina Urea Manriquez de Vidal, and Joaquina Ward.

normative customs for behavior in Mexico.

Exh. 129, P. Stewart Decl., PE 1234 ¶ 17. *See id.* at PE 1234-38 ¶¶ 18-26. Indeed, Petitioner's own son suffers from mental retardation. *See* Exh. 126, A. Llorente Decl., PE 1155 ¶ 11; Exh. 55, Abelino C. Manriquez, Jr. School Records, at PE 0388. None of this evidence was presented to the jury.

439. Trial Counsel never investigated Petitioner's neurocognitive defects or the family history of such defects. Had he done so, he would have been able to present compelling testimony from an expert, who would have found that Petitioner's neurocognitive deficiencies resulted in "poor planning, impaired judgment, diminished self-monitoring, modulation and inhibition leading to a reduction in the control of emotions, behaviors and actions, and when coupled with his history of PTSD and alcohol-drug abuse, such deficits in executive control, particularly disinhibition, are exacerbated leading to responses and behaviors that may be less controlled by cortical outputs and instead dominated by instincts." Exh. 126, A. Llorente Decl., PE 1165 ¶ 40.

440. This testimony would have been important for the jury to consider as mitigation evidence because it would have shown that Petitioner suffered from neurocognitive defects that made him, among other things, less morally culpable for the offenses the jury found him guilty of committing.

b. Evidence of Mental Illness and Neurocognitive Impairment Was Available to Trial Counsel, Who Unreasonably and Prejudicially Failed to Investigate, Develop, or Present Such Evidence.

441. Trial Counsel was aware of Petitioner's childhood abuse. Trial Counsel was also aware, from his meetings with Petitioner, and discussions with others, that Petitioner chronically used alcohol and cocaine prior to his arrest. Either of these facts alone would lead any reasonable counsel to adequately investigate and prepare a mitigation defense based on psychological and neurocognitive factors.

442. Trial Counsel, however, failed to do so. Instead, Trial Counsel hired a single psychiatrist, Dr. Jose Moral, whose work was limited to the $1,000 that Trial Counsel secured for a preliminary assessment. Dr. Moral, in turn, conducted preliminary interviews of Petitioner and his sisters living in the United States. Due to Trial Counsel's unreasonable delay, those interviews were not conducted until July 1993, just two months before the penalty phase of Petitioner's trial.

443. Unsurprisingly, after conducting those few preliminary interviews, Dr. Moral advised Trial Counsel of Petitioner's history of abuse and recommended that Trial Counsel hire an additional expert.

444. Trial Counsel did not follow Doctor Moral's advice to retain an additional expert, and Dr. Moral himself never testified. Trial Counsel's

entire mitigation case consisted of brief testimony from the five most easily accessible family members.

445. Trial Counsel's inadequate investigation, preparation, and presentation of expert evidence meant the jury did not hear expert evidence of Petitioner's mental illnesses, neurocognitive impairments, and alcohol and cocaine dependence.

446. Trial Counsel's errors and omissions were not based on any valid tactical reason. Instead, Trial Counsel simply failed to follow up on leads, failed to follow Dr. Moral's advice, and failed to develop and present evidence.

7. A Reasonable Investigation and Presentation of Expert Issues Would Have Made a Difference.

447. Trial Counsel's assistance was prejudicially ineffective. As discussed below, the failure to present evidence of mental illness, neurocognitive impairments and drug addiction prejudiced Petitioner.

a. A Reasonable Investigation and Presentation of Mitigation Evidence Would Have Defeated the Prosecutor's Claim That Petitioner "Liked to Kill."

448. A theme of the Prosecutor's closing argument was that Petitioner "likes to kill." *See* RT 2241 ("He likes to kill."); RT 2241 ("He chose that path in life. He chose to be a killer. . . . That's what this individual is all about."); RT 2253 ("But he likes to kill. He likes to.");

RT 2254 ("Who is the best shot in this courtroom? Who likes to kill?"); RT 2257 ("We know he carried a gun. Why? He likes to kill."); RT 2258 ("He thinks he wants to [kill] again. That's why he keeps carrying a gun."); RT 2259 ("I like it, I like to kill, says Mr. Manriquez. I like it."); RT 2260 ("His gun-carrying attitude, the fact that if someone makes him angry, he shoots and kills. That's what he does."); RT 2261 ("Where he goes, Mr. Manriquez, people die; and that's because he likes it that way."); RT 2262 ("You have got the kind of person here sitting in this courtroom, who likes to kill. *There is no other explanation for his acts*. He likes to kill and continue killing.") (emphasis added); RT 2266 ("[Prior to the offenses, Petitioner] committed the acts that led to what he is on trial for now, those acts being dealing drugs, carrying a gun, and liking to kill."); RT 2267 ("He likes it.").

449. Because the Prosecutor met so little opposition from the defense – that is, because the defense did so little to present its own remotely complete or persuasive view of Abelino Manriquez – the Prosecutor had enormous latitude in his closing argument to characterize Abelino any way he chose. *See* Exh. 130, C. Haney Decl., PE 1377 ¶ 196. Not surprisingly, the Prosecutor characterized Abelino in the worst possible terms – as a person who "likes to kill."

450. The Prosecutor made these arguments because Trial Counsel had neglected to present a credible and corroborated account of the terror

and trauma that characterized Abelino's early life. *Id.* at PE 1377 ¶ 197. Furthermore, had Trial Counsel retained and provided adequate information to expert, the jury would have been presented with compelling evidence showing that Petitioner suffers from impaired executive functioning, PTSD, mood disorder, and alcohol and drug dependence. The jury would have had information from which they could infer that Petitioner acted the way he did not because he "liked it," but because the trauma and abuse he suffered, combined with neurocognitive impairments and mental illness, made him hypervigilant and unable to control his actions.

b. A Reasonable Investigation and Presentation of Mitigation Evidence Would Have Defeated the Prosecutor's Claim That "There Simply Is No Evidence Offered" to Show "the Offenses Were Committed While the Defendant Was Under the Influence of Extreme Emotional or Mental Disturbance."

451. Due to Trial Counsel's failures, the Prosecutor reviewed with the jury the list of mitigation factors, and was able to tick off those for which Trial Counsel provided absolutely no mitigation evidence.

452. The Prosecutor argued, "There simply is no evidence offered" to show "the offenses were committed while under the influence of extreme emotional or mental disturbance." RT 2243-44. Had Trial Counsel prepared and presented an expert like Dr. Stewart, the Prosecutor could not

have made this argument.

453. As Dr. Stewart explains, "Abelino Manriquez has survived severe multiple traumas, including the threat of annihilation at the hands of his father and grandmother, that should be taken into account in formulating any opinion about his actions and functioning at the time of the offenses and over the course of his life. His symptoms of posttraumatic stress disorder with its resultant problems with executive functioning *caused him genuinely to believe in his mind that he had to act in self-defense or be killed by the victims*. He was hypervigilant to assault and threats of being killed as a result of a life long pattern of being tortured in near fatal abuse inflicted by his father. . . . *At the time of the offenses, he was likely in a dissociative state*. [Even if he were not in a completely dissociative state,] the totality of his chronic mental impairments prevented him from appreciating the wrongfulness of his actions, impaired his judgment and insight, and obliterated his ability to plan out alternative actions." Exh. 129, P. Stewart Decl., PE 1263 ¶ 87 (emphasis added).

c. A Reasonable Investigation and Presentation of Mitigation Evidence Would Have Defeated the Prosecutor's Claim That Petitioner Has No Evidence That the Offenses Were Committed While Petitioner Suffered from a Mental Disease or Defect.

454. The Prosecutor argued, "There is no evidence in this case

submitted to you in any shape, form whatsoever that the Defendant had any mental difficulties, none." RT 2244-45.

455. Again, this would not have been the case had Trial Counsel conducted a reasonable investigation into Petitioner's background and illnesses and had he developed and presented this evidence.

d. A Reasonable Investigation and Presentation of Mitigation Evidence Would Have Defeated the Prosecutor's Claim That "There Is Insufficient Evidence" to Show "That the Effects of The Intoxication Caused These Acts."

456. The Prosecutor argued that "[t]here is insufficient evidence in regards to the offenses themselves to show that the effects of the intoxication cause these acts." RT 2245.

457. Petitioner's vulnerability to this argument resulted from Trial Counsel's failure to investigate and present evidence of Petitioner's chronic and substantial drug and alcohol abuse through available fact witnesses who could have testified regarding Petitioner's intoxication. Experts such as Dr. Llorente and Dr. Stewart could have, but did not, explain that Petitioner was cocaine and alcohol dependent, that Petitioner had used alcohol and drugs as a way to self-medicate for the impact of the symptoms of his untreated mental illness, and that the effects of those substances exacerbated Petitioner's inability to control his actions. Exh. 129, P. Stewart Decl., PE 1263 ¶¶ 86-87. Witnesses such as Jesus Manriquez

Banuelos could have testified that Petitioner had been using alcohol from a very early age and that he had been surrounded by men in his childhood who routinely abused alcohol. Exh. 91, J.M. Banuelos Decl., PE 0755-56 ¶ 128-29. Therefore, this drug and alcohol abuse largely stemmed from forces outside of Petitioner's control.

8. Conclusion

458. Petitioner was substantially prejudiced by Trial Counsel's unprofessional errors and omissions during the penalty phase.

459. Had mitigating themes and evidence been adequately investigated, developed, and presented to the jury "through the properly prepared testimony of the extensive number of family and other percipient witnesses who were available to testify, and through appropriate and appropriately prepared experts, the *Manriquez* jury would have understood [Petitioner] in fundamentally different and far more favorable light, and would have appreciated and weighted the mitigation in the case as far more substantial, and it is likely that the outcome of their deliberations would have been different." Exh. 130, C. Haney Decl., PE 1400 ¶ 240.

E. Petitioner's Trial Counsel Rendered Constitutionally Ineffective Assistance of Counsel in Failing to Request Several Jury Instructions.

460. Trial Counsel unreasonably and prejudicially failed to request several jury instructions.

1. Trial Counsel Prejudicially Failed to Request an Instruction to the Jurors on the Meaning of Life Without the Possibility of Parole.

461. At the close of the trial, Trial Counsel prejudicially failed to request a special jury instruction regarding the meaning of life without the possibility of parole ("LWOP").

462. Trial Counsel prejudicially mischaracterized LWOP as set out in Claim 1 section A.4, above. Nevertheless, Trial Counsel failed to request a special jury instruction at the end of trial to ameliorate the effect of his statements during voir dire, such as the instruction currently set forth in model California criminal jury instructions.

463. Furthermore, in *People v. Ramos*, 37 Cal. 3d 136 (1984), this Court stated that, although a court has no obligation to give an instruction *sua sponte* about the potential for commutation of both the death penalty and LWOP, it is nonetheless constitutionally *permissible* for the court to give such an instruction at the request of the defendant. *Id.* The *Ramos* Court analogized this decision to a defendant's choice not to testify at trial, stating that "permitting that defendant to assess the relative cost and benefit of a cautionary instruction in a particular case appears appropriate with regard to the commutation issue." *Id.*

464. As it was in Petitioner's best interest to correct the mischaracterization Trial Counsel presented to potential jurors during voir

dire, counsel should have requested an instruction stressing, in accordance with *Ramos*, that "it would be a violation of the juror's duty to consider the possibility of [] commutation in determining the appropriate sentence." *Id.* He made no such request.

465. Trial Counsel had no valid tactical reason to forego requesting such an instruction, and his prejudicial omission deprived Petitioner of his Sixth Amendment right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984).

466. Post-verdict juror questionnaires revealed that jurors were concerned with the possibility that Petitioner would be released, and that this concern ultimately played into their decision. Principally, Jury Foreperson Constance Bennett responded to the question, "Why did you vote for death?" as follows: "I cannot allow a man like that the remotest possibility of ever being on the street again." Exh. 24, Post-Verdict Juror Questionnaire of Constance Bennett, PE 0232. Given the concerns readily admitted to by Foreperson Bennett, Trial Counsel's mischaracterization of LWOP to the jury pool during voir dire likely contributed to the decision of one or more jurors to return a verdict of death. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at trial.

2. Trial Counsel Prejudicially Failed to Request a Jury Instruction That Required the Jurors to Disregard Petitioner's Race,

Nationality, and Immigrant Status.

467. Trial Counsel prejudicially and unreasonably failed to request a jury instruction regarding the Prosecutor's improper statements referring to Petitioner's race, nationality and immigrant status.

468. As discussed in Claim 5, the trial contained many instances of prosecutorial misconduct in which the Prosecutor prejudicially referenced Petitioner's race, nationality, and immigrant status. For example, the Prosecutor stated that a "macho attitude" and the "carrying of a gun" were things that Petitioner had brought with him from Mexico to the United States." RT 792. The Prosecutor's references to Petitioner's immigrant status were made in Los Angeles in the fall of 1993 when anti-immigrant sentiment was prevalent. An economic recession and a growing crime rate were blamed on illegal immigrants. *See* Exh. 38, Jack Cheevers, *The Times Poll: Valley Voters Rate Crime As Top Issue in L.A. Mayoral Race*, L.A. Times, Feb. 10, 1993, at B4, PE 0309; Exh. 41, Dianne Klein, *The Times Poll: Majority in State Are Fed Up With Illegal Immigration*, L.A. Times, Sept. 19, 1993, at A1, PE 0319; Exh. 37, Eric Bailey & Dan Morain, *Anti-Immigration Bills Flood Legislature*, L.A. Times, May 3, 1993, at A3, PE 0303. In light of the anti-immigrant climate in which the trial took place, the Prosecutor's statements were intended to, and likely did, inflame and prejudice the jury.

469. Trial Counsel failed to request any special instruction at the

close of trial to correct for the Prosecutor's inflammatory statements, despite the fact that these statements compromised the jury's impartiality and violated Petitioner's due process rights. *See People v. Cudjo*, 6 Cal. 4th 585, 625 (1993) (stating that "[p]rosecutorial argument that includes racial references appealing to or likely to incite racial prejudice violates the due process and equal protection guarantees of the Fourteenth Amendment to the federal Constitution.").

470. The Prosecutor in this case tied "a macho attitude" and "the carrying of a gun" with Petitioner's Mexican background, with the underlying implication that Petitioner's criminal propensity was a result of his ethnicity. Based on the prevailing social climate in Los Angeles, and the Prosecutor's ethnically-charged argument, Trial Counsel's failure to request a special instruction ordering the jurors to disregard Petitioner's ethnicity, national origin, and immigrant status amounted to ineffective assistance of counsel.

471. Trial Counsel had no valid tactical reason not to request the instruction, and his prejudicial omission deprived Petitioner of his Sixth Amendment right to the effective assistance of counsel. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at trial.

3. Trial Counsel Unreasonably and Prejudicially Failed to Secure an Instruction Regarding the Coroner's

Testimony.

472. After the court allowed the coroner to testify in one sitting about all four separate counts brought against Petitioner, Trial Counsel prejudicially and unreasonably failed to ensure that the court give an instruction to the jury to keep the counts separate.

473. Initially, before the coroner testified, Trial Counsel did express concern to the court (outside the presence of the jury) that the coroner's combined testimony would be overwhelming for the jury:

> I think it's prejudicial to my client . . . that putting at the end of the case the coroner discussing all of the things that you are talking about, all of which may be relevant, is going to cause some difficulty in a case like this where we are really talking about four separate things. And when you have one coroner bunch them all together as the last thing they hear, you might as well have meshed the whole case together.

RT 995-96. In response, the court stated that to "sort of undo to a certain extent the blanket effect of the testimony . . . I will try to give a limiting instruction and tell them that you must separate this testimony and regard the Garcia autopsy as completely separate from the Martinez autopsy, and the Baldia autopsy separate from Gutierrez, and so on." RT 997-98.

474. Coroner Christopher Rogers then took the stand to testify about the autopsies on each of the victims in the four counts brought against Petitioner. *See* RT 1597-1639.

475. The court never gave the instruction, and Trial Counsel failed

to request it again. The problem was exacerbated when the Prosecutor repeatedly argued that the coroner's testimony taken together demonstrated Petitioner's deliberation and premeditation. *See* RT 1746-47, 1760, 1772-74, 1777, 1779-80.

476. The Coroner's testimony, and the Prosecutor's conflation of the counts when describing the coroner's testimony, encouraged the jury to consider the counts as a whole rather than separately. And the jury did so. As shown below in Claim 5, post-verdict jury questionnaires demonstrate that the jury, in fact, aggregated the evidence on the separate counts when deliberating in the guilt phase.

477. Trial Counsel's failure to secure an instruction to the jury from the court contributed to the jury's prejudice against Petitioner and amounted to ineffective assistance of counsel, in violation of Petitioner's constitutional rights.

478. Trial Counsel had no valid tactical reason for not ensuring that the admonition was given, and his prejudicial omission deprived Petitioner of his Sixth Amendment right to the effective assistance of counsel. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at trial.

F. Petitioner's Trial Counsel Rendered Constitutionally Ineffective Assistance of Counsel in Failing to Move to Exclude Evidence.

1. Trial Counsel Failed to Bring a Motion to Exclude Petitioner's Statements That Were Obtained in Violation of His Constitutional Rights.

479. Trial Counsel prejudicially and unreasonably failed to move to exclude statements obtained in violation of Petitioner's constitutional rights. *Miranda v. Arizona*, 384 U.S. 436 (1966).

480. On February 22, 1990, the Los Angeles County Sheriff's Department and other police agencies engaged in a "question first, warn later" tactic to improperly elicit information from Petitioner regarding the various crimes he was suspected of committing. Without first giving the *Miranda* warnings required by the Fifth Amendment of the U.S. Constitution, officers interrogated Petitioner for several hours while he was handcuffed to his hospital bed and injured with a gunshot wound. By the time Petitioner received the *Miranda* warnings, they were ineffective and inadequate at apprising him of his rights, particularly because the officers failed to advise Petitioner that his previous statements would be inadmissible against him. In addition, Petitioner's waiver of his *Miranda* rights was ineffective because he did not give a knowing and voluntary waiver. Two days later, on February 24, 1990, officers resumed Petitioner's interrogation at the central jail without curing the previous

Miranda violations.

481. The prosecution used Petitioner's statements against him at trial, most notably for the Rita Motel (Count III) and Las Playas (Count I) shootings. RT 1571-75; CT 220-26. Petitioner confessed to the Rita Motel shooting when he was questioned at the hospital. CT 224-26. Petitioner admitted at the central jail two days later that he was present during the Las Playas shooting and had a gun, but that another person named Francisco Manzano committed the shooting. RT 1574-75. The prosecution used Petitioner's statements at trial to show that Petitioner was the shooter at the Las Playas and Rita Motel incidents.

482. Any reasonably competent counsel would have moved to exclude these statements because they were made in violation of Petitioner's fundamental rights. Had Trial Counsel moved to exclude the evidence, the jury likely would not have convicted Petitioner of first degree murder in Count I (Las Playas) and Count III (Rita Motel).

483. At approximately 10:52 a.m., on February 22, 1990, Petitioner was admitted to Charter Suburban Hospital with a gunshot wound to the shoulder. Exh. 8, Sheriff's Report by Sgt. Sears, Mar. 1, 1990, PE 0075. Kathleen Estavillo was an attending nurse. *Id.* at PE 0076. Estavillo put Petitioner in a bed so that he could lie down and receive treatment. Petitioner was given an IV antibiotic, but he did not receive any pain medication for his gun shot wound. *Id. See also Exh.* 125, Declaration of

Kathleen Estavillo, PE 1150 ¶ 2.

484. When police received word over the radio that a gunshot victim was admitted to Charter Suburban Hospital, Deputy Augie Pando responded to the call. Upon arrival, Deputy Pando "immediately recognized" Petitioner as a suspect in another case with an outstanding warrant. Exh. 6, Sheriff's Report by Det. Carrion, Feb. 22, 1990, PE 0071.

485. At 4:45 p.m., Detective Sears was contacted and advised that Petitioner had been "detained" and was being treated for a gun shot wound at Charter Suburban Hospital. Exh. 8, Sheriff's Report, Mar. 1, 1990, PE 0075. According to his police report, Detective Sears arrived at the hospital at 5:40 p.m. and spoke with Deputy Pando, who informed him that he had been questioning Petitioner and that Petitioner had denied involvement in the Paramount shooting. *Id.* Petitioner was handcuffed to the hospital bed and in custody during this interrogation. Exh. 6, Sheriff's Report, Feb. 22, 1990, PE 0071; Exh. 125, K. Estavillo Decl., PE 1150 ¶ 9; Exh. 73, Peo. Trial Exh. 40 (*see* last ten seconds of video). Petitioner was not advised of his *Miranda* rights prior to this custodial interrogation.

486. According to Deputy Pando, Officers Dillon and Burks arrived about 6:30 p.m., six to seven hours after Petitioner had first been handcuffed. Exh. 7, Sheriff's Report by Dep. Pando, Feb. 22, 1990, PE 0072-74. Deputy Pando advised them that he recognized Petitioner and that he was wanted by "Sheriff Homicide Investigators on at least two other

cases." Exh. 9, Sheriff's Report, Mar. 5, 1990, PE 0087. (Again, without any *Miranda* warnings, Dillon and Burks interrogated Petitioner in the emergency room while Petitioner remained handcuffed and in custody. *Id.* Dillon and Burks "questioned" Petitioner about his "true identity," his arrest history, and the Paramount shooting. *Id.* The officers reported that Petitioner allegedly made a number of "other statements . . . that appeared to be untruthful." *Id.*

487. After the "interview was terminated" by Dillon and Burks, Detective Sears also "interviewed the suspect" at around 8:40 p.m. that day regarding the Rita Motel incident and, based on the interview, directed Detective Pando to book Petitioner for homicide in the Rita Motel incident. Exh. 9, Sheriff's Report, Mar. 5, 1990, PE 0088; Exh. 7, Sheriff's Report, Feb. 22, 1990, PE 0074. Shortly thereafter, at 9:00 p.m., Detective Joe Olmedo formally advised Petitioner that he was under arrest for the murder at Las Playas. CT 221. At this point, Olmedo finally informed Petitioner of his *Miranda* rights for the first time and in Spanish. CT 222. Petitioner waived his *Miranda* rights. Petitioner was in pain at the time he waived his *Miranda* rights. CT 222-25. Olmedo also admitted that he did not perfectly understand Petitioner because their dialects were different. RT 246-47. Petitioner was never advised that his pre-*Miranda* statements would be inadmissible against him.

488. Following the *Miranda* warnings, Sears questioned Petitioner

about the Rita Motel incident. Having already made statements earlier before the *Miranda* warning was given, Petitioner admitted that he shot and killed Efrem Baldia at the Rita Motel (Count III). According to police reports, Petitioner said that the victim had stated, "I don't want to talk to you stupid," as the victim was walking towards him. Exh. 8, Sheriff's Report, Mar. 1, 1990, PE 0077. Petitioner then told police that "he drew the weapon from his waist band with his right hand and placed the barrel into the victim's stomach and pushed him back as the weapon discharged." *Id.* The report then states that Petitioner told the police, "I was angry because of what he said and shot him several more times as he was going down." *Id.*

489. Two days later, on February 24, 1990, officers continued Petitioner's interrogation after he was moved to the central jail. Exh. 10, Sheriff's Report, Dec. 11, 1990, PE 0111. Petitioner was again advised of his *Miranda* rights. RT 1572-73. Again, Petitioner was not advised that any pre-*Miranda* statements would be inadmissible against him. Petitioner then admitted that he was at Las Playas the night of the shooting and had gotten into a confrontation with Miguel Garcia. RT 1574-76. Petitioner also admitted that he had a gun and "he would have shot" the victim, but his companion, Francisco Manzano, committed the shooting. RT 1576.

490. During the trial, the prosecution introduced the statements Petitioner made while detained at the hospital and central jail and relied

heavily on these statements for its case. With respect to Las Playas, the prosecution presented Petitioner's statements to argue that Francisco Manzano was an alias used by Petitioner and that Petitioner, therefore, was the real shooter. RT 1570-97. In regards to Rita Motel, the prosecution presented the preliminary hearing testimony of Detective Olmedo (by then deceased), who recounted Petitioner's hospital bed admission: "He said the victim had stepped backwards as the weapon discharged and at the same time, he remembered what the victim had said to him, and he fired several more times at the victim falling to the ground, as the victim was falling to the ground. CT 227.

491. By intentionally engaging in a "question first, warn later" tactic, the police unconstitutionally interrogated and sought admissions from Petitioner before apprising him of his constitutional rights. The officers at the hospital that day waited hours before giving Petitioner *Miranda* warnings, despite the fact that Petitioner was under custodial interrogation. According to Nurse Estavillo, "numerous" officers arrived at the hospital that day and "many of them took part in interrogating" Petitioner before Nurse Estavillo left work around 8:30 p.m. Exh. 12, K. Estavillo Decl., PE 1150 ¶ 3. Finally, upon giving *Miranda* warnings at 9:00 p.m., the police did not cure their constitutional violations by warning Petitioner that his pre-*Miranda* statements were inadmissible. *See Mission v. Seibert,* 542 U.S. 600, 622 (2004) (curative measures include an

"additional warning that explains the inadmissibility of the pre-warning custodial statement") (Kennedy, J., concurring).

492. The post-*Miranda* statements by Petitioner were inadmissible for another independent reason: The *Miranda* warnings were not effective because Petitioner did not give a knowing and voluntary waiver of his rights. Petitioner was given the warnings when he was in pain from his wounds. Moreover, Olmedo could not communicate with Petitioner sufficiently well in Spanish for Petitioner to give a knowing waiver of his constitutional rights.

493. Petitioner's statements regarding the Rita Motel and Las Playas were elicited in violation of Petitioner's Fifth Amendment protection against self-incrimination, Fourteenth Amendment Due Process right and Eighth Amendment right to a reliable sentencing determination, and were, therefore, inadmissible. Reasonably competent trial counsel would have recognized that Petitioner's statements were incriminating and obtained in violation of his constitutional rights. Without Petitioner's incriminating statements regarding the Rita Motel and Las Playas incidents, a reasonable jury would have found that the evidence presented by the prosecution was insufficient to convict Petitioner of first degree murder for those counts. Trial Counsel had no valid tactical reason not to seek to exclude these statements, and his failure deprived Petitioner of his Sixth Amendment right to the effective assistance of counsel.

494. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at trial.

2. Trial Counsel Prejudicially Failed to Exclude Evidence That Was More Prejudicial Than Probative Under Evidence Code Section 352.

a. Prejudicial and Inflammatory Statements Regarding Witnesses' Fear of Petitioner.

495. Trial Counsel unreasonably and prejudicially failed to move *in limine* to preclude or object to and move to strike irrelevant testimony of witnesses who testified – most often in response to improper questioning by the Prosecutor – that they were afraid of Petitioner. Evidence of the witnesses' subjective fears was highly inflammatory and prejudicial during both the guilt and penalty phases. This testimony suggested that Petitioner was highly dangerous, and injected improper considerations into the jury's guilt and penalty deliberations.

496. California Evidence Code section 352 gives the trial court discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

497. Many witnesses who testified during direct examination

referred to their fear of Petitioner. This testimony was highly prejudicial and should have been precluded or stricken under California Evidence Code section 352. Examples of this testimony are set forth as follows:

498. Laura Lozano. Laura Lozano testified for the prosecution regarding Count I. When the Prosecutor asked on direct examination during the guilt phase why she withheld certain information from the police, she said that she did so "out of fear." RT 892. When later asked by the Prosecutor, "Why were you afraid?", she explained, "I really don't know. I've always been a straightforward person, and I like to say things just as they are. But at that time I was frightened and I was very much afraid." RT 895.

499. During redirect examination, the Prosecutor asked "[w]hy did you not want to pick out Mr. Manriquez in those photographs?" RT 909. Lozano responded, "Out of fear and we were frightened. I was frightened." RT 909. When pressed by the Prosecutor, "[w]hat were you frightened of?", Lozano responded, "Well, I don't know. Maybe – maybe that I might lose my life, too, when you don't know who's who." RT 909. The Prosecutor elicited these improper questions on redirect even though Trial Counsel never cross examined Lozano in a way to open the door to these types of questions.

500. Mario Medel. Mario Medel, the manager at the Fort Knots bar, testified for the prosecution about Count II. During direct examination, the

Prosecutor used a series of questions designed to encourage Medel to discuss the fear he felt in the weeks following the shooting.

> Q: During that time when you were working in the bar, did you think about this incident?
>
> A: Every day. Every day that I worked.
>
> Q: During that time, were you worried about anything happening to you?
>
> A: All the time.
>
> Q: During that time, did you ever look around in the bar at people coming in to see –
>
> A: Well, after that incident happened, we instituted a full search for anybody that came into the bar.
>
> Q: So you were looking at people?
>
> A: We were searching everybody. They weren't allowed in with pocket knives or nothing.
>
> Q: Did you worry about someone coming back to shoot you?
>
> A: Yes. But at the time, I wasn't allowed any time off.

RT 1104-05. By asking whether Medel thought about the incident or whether he worried about his own safety, the Prosecutor deliberately elicited testimony designed to incite the jury.

501. Deneen Baker. Deneen Baker testified for the prosecution regarding Count II. During direct examination, the Prosecutor asked questions designed to elicit testimony regarding Baker's fear.

Q: After this [shooting] incident occurred, did you continue to work there [at Fort Knots]?

A: Yes, I did.

Q: And in working there were you a little bit concerned about your safety?

A: Constantly.

RT 1056.

502. Ramiro Gamboa Salazar. Ramiro Gamboa Salazar testified for the prosecution regarding Count III, the Rita Motel shooting. From the very beginning of his direct examination, the Prosecutor asked questions designed to elicit testimony about Salazar's fear of Petitioner:

Q: Mr. Salazar, you are in custody today?

A: Yes.

Q: And you were put in custody last night; is that correct?

A: Yes.

Q: And you appear to me have been crying; is that correct?

A. No.

Q: Were you crying yesterday when you were picked up in the District Attorney's office, picked up and brought to the District Attorneys' office?

A: No.

RT 1300.

503. Later during direct examination, when the Prosecutor asked

why Salazar gave a false name, Salazar replied, "I don't know why I said it." RT 1322. The Prosecutor then asked, "Were you scared to tell?" and "Were you scared to tell the deputies your true name because you had told them who had committed the murder?" RT 1322. Salazar replied to both questions in the affirmative. RT 1322. Discussing the shooting itself, the Prosecutor asked Salazar, "Were you afraid that Mr. Manriquez was going to shoot you at that point," to which Salazar responded, "Yeah." RT 1325. Later, the Prosecutor read extensively from preliminary hearing testimony that Salazar had given on December 20, 1990, and he questioned Salazar extensively about his earlier statements that he was afraid of Petitioner. RT 1327-31. The Prosecutor specifically asked Salazar about his preliminary hearing statement that he feared Petitioner "because he was going to kill me. . . ." RT 1328-31.

504. Nicolas Venegas. Nicolas Venegas testified for the prosecution regarding Count III, the Rita Motel shooting. When Venegas testified on direct examination that he could not recall certain events, the Prosecutor asked him, "You worried about your family?", "You worried about your mom?" and "Scared for yourself?" RT 1271. Venegas responded in the affirmative to these questions.

505. Adela Lopez. Adela Lopez testified for the prosecution about Count IV. The Prosecutor asked Lopez leading questions to solicit statements about her fear of testifying. Asked, "Are you scared to testify?",

Lopez stated, "I am because actually I have a family." RT 1467. Asked, "Who are you afraid for?", Lopez responded that she was afraid "[f]or my children." RT 1467.

506. The Prosecutor continued with this approach in the penalty phase. As part of the prosecution's presentation of evidence in aggravation, Patricia J. Marin testified that Petitioner allegedly raped her at gunpoint on January 26, 1988. RT 2136-41. The Prosecutor asked Marin, "Are you afraid now?" and Marin testified, "I am still afraid. I am still afraid because he is still alive. He is still there. He can do something to me still, or my family." RT 2141.

507. Not once did Trial Counsel object to or move to strike this inflammatory and prejudicial testimony, let alone seek an order *in limine* to preclude the introduction of this testimony. Trial Counsel had no valid tactic reason to fail to do so.

508. Trial Counsel's error was compounded by the fact that the Prosecutor seized on this testimony in arguing that Petitioner should be sentenced to death. In his closing argument in the penalty phase, the Prosecutor drew further attention to the witnesses' testimony about their fears. "Adela Lopez testified . . . 'I worry about my children,' [and] Patricia Morales testified too, she is worried about her children." RT 2261. The Prosecutor relied on this testimony to encourage the jurors to sentence Petitioner to death by suggesting that Petitioner would continue to pose a

threat while alive: "It's important to add to those factors in aggravation the kind of fear [Petitioner] puts into people. Not only you could be killed by him, but just by the fact that you come to court to testify against him." RT 2261. This argument was highly inflammatory and improper. *United States v. Weatherspoon*, 410 F.3d 1142, 1149 (9th Cir. 2005) (courts have "consistently cautioned against prosecutorial statements designed to appeal to the passions, fears and vulnerabilities of the jury. . . .") (citations omitted).

509. This evidence was more prejudicial than probative. A witness' subjective fear had no probative value for assessing Petitioner's guilt or innocence, and was not a legitimate factor in aggravation that could have been considered by the jury. Furthermore, the testimony and closing argument were highly prejudicial. The witnesses' testimony about their fear was introduced only to incite the senses of the jurors and to bias them against Petitioner.

510. Trial Counsel had no valid tactical reason to forego moving to exclude such evidence or objecting to and moving to strike such testimony at trial. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at trial.

b. Prejudicial and Inflammatory Trial Exhibits

511. Trial Counsel prejudicially and unreasonably failed to move to exclude the introduction of several prosecution exhibits that were more prejudicial than probative pursuant to California Evidence Code section 352. During the guilt phase, Trial Counsel did not oppose the prosecution's introduction of prejudicial color photographs depicting victims of the charged crimes, including but not limited to People's Trial Exhibits 12A, 12B, 19-O, and 21. Exhs. 63, 64, 68, 69. Trial Counsel also unreasonably failed to oppose the admission during the penalty phase of prejudicial photographs, including but not limited to People's Trial Exhibits 50A-C, 51A-B, and 52A-B. Exhs. 75-81. Any reasonably competent counsel would have objected to the introduction of such graphic evidence as cumulative and far more prejudicial than probative.

512. Several of these photographs were exceedingly graphic and disturbing. Some of the images depicted bullet wounds to the forehead, cheek, and jaw line of victims. Many of the photographs depicted the faces of the decedents and disrobed parts of their bodies.

513. These photos were unnecessarily cumulative, prejudicial, and of little probative value. The causes of death were never contested by the defense. The entry points of bullets and gruesome images of the cadavers therefore had minimal probative value. Moreover, the same evidence was presented through the testimony of Christopher Rogers, the deputy medical examiner from the Los Angeles County Coroner's Office. RT 1598, 2051.

While the probative value was minimal at best, the prejudicial effect of these photographs was enormous. Exposing jurors to the graphic details of the victims' bodies and the crime scenes prejudicially impaired the jurors' ability to fairly and neutrally weigh the evidence.

514. Therefore, the prejudicial effect of the graphic photos clearly outweighed their probative value. Trial Counsel had no valid strategic reason for allowing this prejudicial evidence to be presented.

515. Trial Counsel's failure to move to exclude this evidence prejudiced Petitioner in the guilt phase, because the introduction of such inflammatory evidence made the jurors more likely to convict Petitioner of first-degree murder on each count. The admission of such prejudicial photographs during the penalty phase encouraged jurors to find for death sentences based on their reactions to the graphic photographs, rather than based on a rational balancing of the aggravating and mitigating circumstances. Trial Counsel had no valid tactical reason for failing to move to exclude this evidence.

516. But for Trial Counsel's deficient performance, it is at least reasonably probable that a more favorable result would have been obtained for Petitioner at trial.

G. Trial Counsel Failed to Seek Judicial Relief When He Discovered That the Jury Foreperson Was Biased and Had Failed to Provide Truthful Responses During Voir Dire.

517. Trial Counsel unreasonably failed to raise the issue of juror misconduct and bias with the court. As discussed in Claim 2, Jury Foreperson Constance Bennett provided inaccurate responses on material issues on voir dire that further demonstrated her inability to fairly and impartially review the evidence.

518. Minimally competent counsel, upon discovering that the Foreperson Bennett had lied about a material issue in voir dire, would have moved the court for a new trial or mistrial on that ground. Trial Counsel did not.

519. Shortly after the trial concluded, Trial Counsel sent post-verdict questionnaires to all jurors. Constance Bennett, the Jury Foreperson, completed the questionnaire. She signed and dated it, October 21, 1993 and sent it to Trial Counsel on October 22, 1993. Exh. 24, Post-Verdict Juror Questionnaire of Constance Bennett, PE 0227. In her questionnaire, Foreperson Bennett offered information indicating that she had been dishonest on her pre-trial questionnaire with respect to matters directly relevant to issues in Petitioner's case, and that she was specifically biased against Petitioner. *Id.* Claim 2.A., below, describes Foreperson Bennett's untruthful responses in voir dire and bias in detail.

520. On November 16, 1993, several weeks later, Trial Counsel appeared for Petitioner at his sentencing hearing. At the hearing, Trial Counsel raised several arguments with the Court, essentially renewing his request for a new trial. At this time, Trial Counsel was aware of Foreperson Bennett's post-verdict questionnaire. He should have raised the untruthful responses and bias problem with the court, but he did not. RT 2338-40. In fact, Trial Counsel never raised this issue. He failed to give the trial court a chance to rectify this jury misconduct and bias.

521. Trial Counsel's failure significantly harmed Petitioner. The Jury Foreperson's bias and misconduct denied Petitioner of his right to a fair trial, raising an unrebuttable presumption of prejudice. Trial Counsel was aware of this problem and had proper occasion to raise it with the court. He simply failed to do so.

522. Trial Counsel had no strategic reason for failing to raise this issue. But for Trial Counsel's failure, it is at least reasonably probable that a more favorable outcome would have been obtained for Petitioner.

H. It Was Unreasonable for Trial Counsel, Who Had Never Tried a Capital Case to Verdict, to Defend This Complex Case Without Requesting Additional Attorney Staffing.

523. Stephen L. Hobson was the sole attorney assigned to defend Petitioner against seven counts of murder in five separate incidents. This was a special circumstance case with multiple murders in which the

Prosecutor was seeking the death penalty. There were over two thousand pages of police reports and six hundred pages of preliminary hearing transcripts. Dozens of potential police witnesses and dozens of potential civilian witnesses were involved in this case. Moreover, Petitioner, who only spoke Spanish, was a traumatized individual whose childhood was marred by extreme cruelty, vicious beatings, and grinding poverty. Petitioner's case was highly complex and should not have never been handled by a single attorney who was inexperienced in leading a capital defense case for trial.

a. The ABA Guidelines Called for a Capital Defense Team of at Least Two Attorneys.

524. The American Bar Association ("ABA") establishes well-defined norms applicable to counsel in capital cases. At the time of this trial, the 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases were in place. The United States Supreme Court has long referred to the ABA Guidelines as "guidelines to determining what is reasonable." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)); *see also Williams v. Taylor*, 529 U.S. 362, 396 (2000). The 1989 Guidelines "represent a codification of longstanding commonsense principles of representation understood by diligent, competent counsel in death penalty cases." *Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2003). The plain

language of this rule clearly indicates that appointment of a single attorney to Petitioner's case fell below legal norms and was unreasonable, particularly in light of the complexity of the case and Petitioner's status as a foreign national. Guideline 2.1 stated that "[i]n cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant." 1989 ABA Guidelines, No. 2.1.

525. Moreover, the commentary to Guideline 2.1 clarifies that a defendant is constitutionally entitled to legal assistance of sufficient quality so as to prepare an adequate defense at trial and that "[i]n the context of capital litigation, this mandate is difficult to fulfill where the heavy responsibilities of representation are placed in the hands of a single attorney." 1989 ABA Guidelines, No. 2.1.

526. Even before these guidelines were established this Court stressed the importance of second counsel in death penalty cases. In *Keenan v. Superior Court,* this Court held that California Penal Code section 987.9 required the trial court to appoint second counsel "[i]f it appears that a second attorney may lend important assistance in preparing [a capital case] for trial or presenting the case. . . . Indeed, in general, under a showing of genuine need, and certainly in circumstances as pervasive as those offered by the attorney in this case, a presumption arises that a second attorney is required." *Keenan v. Superior Court*, 31 Cal. 3d 424, 434 (1982). The court in *Keenan* also emphasized that "[i]n a murder

prosecution that is factually and legally complex, the task of effectively preparing for trial places a substantial burden on the defense attorney. This is particularly true of a capital case, since the possibility of a death penalty raises additional factual and legal issues." *Id.* at 431-32.

527. The pervasive circumstances in *Keenan*, which led the Court to the presumption that a second attorney was required, included the fact that the case involved one-hundred and twenty witnesses, extensive scientific and psychiatric testimony, five other pending criminal cases, and extensive pretrial motions. Similarly, the present case involved seven counts of murder in five separate incidents. There were over a hundred potential witnesses and multiple pre-trial motions. The appointment of co-counsel was compelled in this case, even if Trial Counsel had been a highly experienced attorney.

528. Hobson, the single attorney in this case, clearly was not equipped to provide the sufficient quality of representation entitled to a defendant facing multiple murder charges.

529. The ABA Guidelines adopted in 2003 simply explain in greater detail the obligations of trial counsel. Under the 2003 ABA Guidelines, "[t]he defense team should consist of no fewer than two attorneys . . . an investigator, and a mitigation specialist." *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, ("2003 ABA Guidelines"), No. 4.1.A.1 (2003). In addition, the "defense

team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments." *Id.*, No. 4.1.A.2. Therefore, the current standard practice calls for a minimum of five members on the defense team of a single capital case.

530. Similarly, the 1989 Guidelines underscore the importance of an adequate support staff and provide that "the legal representation for each jurisdiction should provide counsel appointed pursuant to these guidelines with investigative, expert, and other services necessary to prepare and present an adequate defense. These should include not only those services and facilities needed for an effective defense at trial, but also those that are required for effective defense representation at every stage of the proceedings, including the sentencing phase." 1989 ABA Guidelines, No. 8.1.

531. The wisdom of experience has shown the necessity of having an adequate defense team. The present case was handled by only one attorney and one Spanish speaking paralegal (half way through the case the original paralegal was replaced by another Spanish speaking paralegal). During the guilt phase, Petitioner faced four individual murder charges with special circumstance of multiple murder. During the penalty phase the prosecution introduced three more murder aggravators and a rape aggravator. This was an extraordinary case, yet Petitioner only had the

assistance of one attorney.

532. The ABA standards call for multiple attorneys to defend even a single-count homicide death penalty case. Therefore, the failure to seek and obtain additional staffing based on the circumstances of this case was an egregious case of ineffective assistance. Effective assistance of counsel is essential in all cases where a person is charged with a capital crime. It is at least reasonably probable that a more favorable result would have been obtained had second counsel been appointed to assist Petitioner in the present case.

I. Cumulative Prejudice and Heightened Prejudice Standard

533. When considered cumulatively, the numerous deficiencies in Trial Counsel's performance set forth in this claim, and in other claims filed herein (*see, e.g.,* Claims 5, 6, 13, 14, and 18), are sufficiently significant to undermine confidence in the outcomes of the guilt and penalty phases of trial. The unreasonable failures by Trial Counsel eviscerated Petitioner's rights to a fair trial, due process, compulsory process and to effective assistance of counsel. But for Trial Counsel's incompetent actions and omissions, there is a reasonable probability that at least one juror would not have found Petitioner guilty of the charged counts, would not have found true the special circumstance allegations, and would not have decided on a penalty verdict of death. There is a reasonable

probability that, absent the errors and omissions of Trial Counsel, the outcome of trial would have been different. Confidence in the verdicts has therefore been undermined as a result of Trial Counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984). For these reasons as well, Petitioner's death sentences violate the Eighth Amendment's requirement for heightened reliability in the death eligibility process, and in the determination that death is the appropriate punishment. *Johnson v. Mississippi*, 486 U.S. 578 (1988); *Zant v. Stephans*, 462 U.S. 862, 884-85 (1983); *Gardner v. Florida*, 430 U.S. 349, 358 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

CLAIM 2: PETITIONER WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY.

534. Petitioner's convictions and sentences of death were unlawfully and unconstitutionally imposed in violation of Petitioner's rights to due process, to a fair and impartial jury, to a fair trial, to confront witnesses, to compulsory process, to present a defense, to the effective assistance of counsel, and to accurate and reliable guilt and penalty determinations, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 1, 7, 13, 14, 15, 16, 17, 24, and 28 of the California Constitution, because of juror misconduct.

A. Jury Foreperson Constance Bennett Provided Untruthful Responses on Her Pre-Trial Jury Questionnaire Concerning Critical Matters That Revealed Her Bias Against Petitioner.

535. Jury Foreperson Constance Bennett provided untruthful answers during jury selection on material questions that went to the core of issues presented during Petitioner's trial. Furthermore, Juror Bennett's responses to the pre-trial jury questionnaire demonstrated her bias against Petitioner and her inability to be fair and impartial.

536. The court provided each prospective juror with a questionnaire and emphasized the requirement and importance of answering truthfully: "Because the questionnaire is part of the jury selection process, the questions are to be answered under your oath as a prospective juror to tell the truth." CT Supp. I 2478. The court further instructed the prospective jurors to "accurately and truthfully answer, under penalty of perjury, all questions propounded to [them] concerning [their] qualifications and competency to serve as a trial juror. . . ." RT 170.

537. In relevant part, the pre-trial questionnaire required all prospective jurors to respond truthfully to the following:

> 63. Have you or anyone close to you been the victim of a crime, reported or unreported?
>
> If "yes":
>
> (a) What kind of crime(s)?
>
> (b) How many times?

(c) Who was the victim(s)?

64. Have you or any relative or friend ever experienced or been present during a violent act, not necessarily a crime?

65. Have you ever seen a crime being committed?

66. Have you ever been in a situation where you feared being hurt or being killed as a result of violence of any sort?

CT Supp. I 2494-95.

538. Juror Bennett answered "No" to questions 64 through 66. CT Supp. I 2495. She answered "Yes" in response to Question 63, but referred only to a single instance of home robbery in which the victim was her "roommate before [they] lived together." CT Supp. I 2495. Juror Bennett executed the juror questionnaire, certified "under penalty of perjury, that [her responses] are true and correct," CT Supp. I 2512, and asserted that she knew of no "reason why [she] would not be a completely fair and impartial juror in this case," CT Supp. I 2498. At no time during voir dire did Juror Bennett offer a different account of what she stated in her pre-trial questionnaire on these questions. Ultimately, Juror Bennett was selected as a juror and became the foreperson of the jury. *See* RT 2329.

539. The jury found Petitioner guilty of four counts of first degree murder in the guilt phase of trial, and delivered a verdict of death in the penalty phase. After Petitioner's trial, Trial Counsel sent Juror Bennett and

other jurors a post-verdict questionnaire, which Juror Bennett completed and returned. In this post-verdict questionnaire, Juror Bennett revealed to Trial Counsel – *for the first time* – crucial facts regarding her background that directly contradicted her earlier pre-trial questionnaire responses. Juror Bennett admitted that she had been the victim of several unreported crimes of a significant and highly prejudicial nature:

> The mitigating circumstances offered during the sentencing phase was *[sic]* actually a detriment in most of the jurors *[sic]* minds, especially mine. I grew up on a farm where I was beat *[sic]*, raped, and used for slave labor from the age of 5 thru *[sic]* 17. I am successful in my career and am a very responsible law abiding citizen. It is a matter of choice!

Exh. 24, Post-Verdict Juror Questionnaire of Constance Bennett, PE 0234.

540. Juror Bennett later confirmed under penalty of perjury that she suffered abuse and rape as a child:

> As to the mitigating evidence, I recall that Manriquez grew up on a farm and was abused. I told the other jurors about what I had heard about farms in Mexico. But, I was regularly beaten from age three to age seventeen while I lived with a foster mother on a farm in Pennsylvania. The farm was 160 acres and we worked hard on the farm. At the farm there was also a home for aged people and one of the residents raped me when I was five. Having been through abuse myself, I do not view abuse as an excuse. I told the other jurors about my experience and my belief that childhood abuse was not an excuse.

Exh. 123, C. Bennett Decl., PE 1142 ¶ 9. Additionally, Juror Bennett had

recalled the pre-trial questionnaire, calling some of the questions "intense" and opining that "[s]ome of the questions on the questionnaire seemed to have no purpose" and that "[s]uperficial questions about where you were brought up, or your education, or income should be no one's business." *Id.* at PE 1191 ¶ 4.

541. Juror Bennett's post-trial revelations regarding her violent upbringing directly contradicted the responses she provided during jury selection.

542. Juror Bennett's post-trial admissions exposed a childhood with features significantly similar to that of the Petitioner, whose abuse during childhood was presented as mitigating evidence during the penalty phase of trial. Petitioner's childhood was marred by extreme cruelty, vicious beatings, grinding poverty, forced farm labor, and an absolute lack of care, education, affection or encouragement by the adults in his life. *See generally* RT 2163-2232.

543. In addition, the prosecution introduced evidence regarding an unadjudicated, alleged rape as an aggravator in the penalty phase of trial. RT 2133-41. The post-trial questionnaire asked "How significant was the evidence of the rape on your decision to vote death?" With possible choices of "Very," "Not Very," and "Not At All," Juror Bennett marked "*Very*" in response to that question. *Id.* at PE 0231 (emphasis in original). Moreover, it is reasonably likely that Juror Bennett weighed her own

experiences with rape in reaching her verdict.

544. The U.S. Constitution's intolerance for jury bias is absolute. "Even if 'only one juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury.'" *Tinsley v. Borg*, 895 F.2d 520, 523-24 (9th Cir. 1990) (quoting *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979)). Even so, it is likely that Juror Bennett's bias affected other jurors as well because Bennett discussed her abuse during deliberations in the penalty phase:

> This abuse issue was discussed in the penalty deliberations. A couple of the other jurors also had rough childhoods. I remember that one of the jurors, an older white man, said he had a stepfather who would beat him once in a while.

Exh. 123, C. Bennett Decl., PE 1142-43 ¶ 11. Moreover, as the jury foreperson, she played an instrumental role in getting the jurors to reach a verdict. *Id.* at PE 1140 ¶ 2.

545. Juror Bennett's untruthful responses to the pre-trial questionnaire resulted in a violation of Petitioner's rights to a fair and impartial jury. The Sixth Amendment guarantees criminal defendants a fair trial, and the "touchstone of a fair trial is an impartial trier of fact – 'a jury capable and willing to decide the case solely on the evidence before it.'" *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). Therefore, any taint in the impartiality of the jury, during either the guilt phase or the

penalty phase, denies the defendant's constitutional right to a fair trial. Moreover, a biased juror "introduces a structural defect not subject to harmless error analysis," and the defect can only be remedied by vacating the verdict. *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998).

546. The jury selection process is designed to protect the jury's integrity at the outset by *preventing* the seating of biased jurors, either through excusal for cause or through the exercise of peremptory challenges. *See McDonough*, 464 U.S. at 554 ("*Voir dire* examination serves to protect that right [to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors."). "Demonstrated bias" may prompt a prospective juror to be excused for cause, while "hints of bias" may trigger peremptory challenges. *McDonough*, 464 U.S. at 554. However, such cleansing of the jury pool during voir dire is corrupted when jurors give false responses, thereby masking the potential or actual bias that their truthful answers might reveal. When a potential juror conceals material facts on voir dire, she denies "the right to reasonably exercise a peremptory challenge," causing "the deprivation of an absolute and substantial right historically designed as one of the chief safeguards of a defendant against an unlawful conviction." *People v. Diaz*, 152 Cal. App. 3d 926, 933 (1984). Moreover, concealing bias on voir dire is a "direct violation of the oaths, duties and admonitions imposed on actual or prospective jurors," and it constitutes "juror misconduct." *In re Hamilton*,

20 Cal. 4th 273, 294 (1999).

547. A potential juror may be challenged for cause if her responses reveal any actual or implied bias. Cal. Code Civ. Proc. § 225(b)(1). Juror Bennett's post-trial revelations demonstrate her actual bias against Petitioner, and her inability to consider fairly and impartially the mitigating evidence. She called such evidence "actually a detriment in most of the juror's *[sic]* minds, especially mine." Exh. 24, Post-Verdict Juror Questionnaire of Constance Bennett, PE 0234. Juror Bennett additionally remarked that though she had an upbringing quite similar to Petitioner's, she was unmoved by the mitigating evidence because she, unlike Petitioner, was "successful in [her] career and [ ] a very responsible law abiding citizen." *Id.* (emphasis in original).

548. At the very least, Juror Bennett's untruthful responses revealed a presumptive, implied bias against Petitioner. It is well-established that courts may imply bias based on a juror's personal experiences where those experiences create "the potential for substantial emotional involvement, adversely affecting impartiality." *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977) (presuming bias of jurors against the defendant because they worked for the bank, albeit a different branch, that the defendant was accused of robbing). Courts have presumed bias "where a juror or his close relatives have been personally involved in a situation involving a similar fact pattern" or have personally experienced a fact pattern similar to the

crime. *Tinsley v. Borg*, 895 F.2d at 528; *see also United States v. Eubanks*, 591 F.2d 513, 516-17 (9th Cir. 1979) (ordering new trial because one juror in heroin case failed to disclose that he had two sons serving heroin-related prison terms, which "bar[red] the inference that [he] served as an impartial juror"). In light of the similarities of Juror Bennett's history – which she concealed during jury selection – with evidence presented in the penalty phase, such as the beatings and forced labor Petitioner suffered as a child as well as the evidence regarding the unadjudicated, alleged rape, a court would find Juror Bennett impliedly biased against Petitioner at the very least.

549. Juror Bennett committed serious misconduct in providing untruthful responses during jury selection, and in concealing her bias. The concealment of this information violated Petitioner's unquestioned right to challenge Juror Bennett for cause and also violated Petitioner's right to exercise a peremptory challenge. As a result, Petitioner was denied his Sixth Amendment right to a fair trial and impartial jury.

B. Jury Foreperson Constance Bennett Committed Misconduct When She Discussed Extraneous Facts Regarding Life on Mexican Farms During Penalty Phase Deliberations.

550. Juror Bennett committed misconduct by improperly injecting her own, untested and specialized knowledge into the penalty phase deliberations when she informed jurors of facts she claimed to know

regarding life on Mexican farms:

> As to the mitigating evidence, I recall that Manriquez grew up on a farm and was abused. I told the other jurors about what I had heard about farms in Mexico.
>
> . . .
>
> I had heard that life on farms in Mexico was real tough, with long work hours and very little food. Again, I did not accept this was an excuse and said so.

Exh. 123, C. Bennett Decl., PE 1142-43 ¶¶ 9, 11.

551. Juror Bennett failed to follow the Court's instructions in discussing these extraneous facts with the jurors during deliberations. *See* CT 795. Moreover, the jurors were likely influenced by Juror Bennett's discussion of improper facts, and her conclusions regarding them, particularly since she served as the foreperson of the jury.

552. This consideration of extraneous facts constitutes juror misconduct because a "death sentence [is] imposed, at least in part, on the basis of information which [a defendant] had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977). This misconduct denied Petitioner his Sixth Amendment right to a fair trial and impartial jury.

C. Juror Bennett Was Biased in Favor of Imposing the Death Penalty Because She Was Concerned That Petitioner Would Be Released from Prison Before His Natural Death.

553. Juror Bennett refused to vote for life without possibility of

parole as a sentence because she was concerned that Petitioner would have a chance at parole at a later stage. Her concerns overrode her ability to fairly and impartially consider the penalty phase evidence and to follow instructions.

554. In the post-verdict questionnaire, Juror Bennett responded to the question, "Why did you vote for death?" as follows: "I cannot allow a man like that the remotest possibility of ever being on the street again." Exh. 24, Post-Verdict Juror Questionnaire of Constance Bennett, PE 0232. Juror Bennett later declared under penalty of perjury that "I understood that life without parole meant he would never be paroled, but I also felt that there was always an outside chance that a prisoner would somehow be released or go free." Exh. 123, C. Bennett Decl., PE 1141 ¶ 6.

555. Juror Bennett's post-trial statements indicate that she was actually biased against a sentence of life without the possibility of parole. At the very least, Juror Bennett's statements reveal an implied bias that prevented her from fairly and impartially considering a verdict of life without the possibility of parole in penalty phase deliberations.

556. In addition, Juror Bennett never disclosed her bias during jury selection. In her pre-trial questionnaire, she indicated that she only "agreed somewhat" that a person convicted of "intentionally kill[ing] four people without legal justification [] and not in self defense [] should receive the death penalty." CT Supp. I 2504. Nor did Juror Bennett reveal her bias

during voir dire. RT 281-82. As a result, Petitioner was denied his right to a fair and impartial jury. *See People v. Diaz*, 152 Cal. App. 3d 926, 933 (1984) (When a potential juror conceals material facts on voir dire, she denies "the right to reasonably exercise a peremptory challenge," causing "the deprivation of an absolute and substantial right historically designed as one of the chief safeguards of a defendant against an unlawful conviction."); *see also In re Hamilton*, 20 Cal. 4th at 294 (concealing bias on voir dire is a "direct violation of the oaths, duties and admonitions imposed on actual or prospective jurors," and constitutes "juror misconduct.")

557. To the extent that the trial court adequately instructed the jurors on the meaning of life without the possibility of parole, which it did not, Juror Bennett's post-trial statements demonstrate misconduct in having refused to follow such instruction by allowing her predispositions to factor in the penalty verdict. Her post-trial statements also demonstrate that she concealed an intention not to follow instructions, contrary to her statement in voir dire that she would follow the law. RT 282. This misconduct deprived Petitioner of his Sixth Amendment right to a fair trial and impartial jury.

D. Several Jurors Were Biased Against Hispanic Immigrants.

558. Several of the jurors were biased against Hispanic immigrants.

The prejudices of the jury members affected the impartiality of the jury and negatively affected Petitioner's ability to obtain a more favorable result at trial.

559. Jury Foreperson Constance Bennett acknowledged following the trial that Petitioner's status as a Mexican immigrant came up during juror deliberations and discussions. Juror Bennett declared:

> As to the fact that Manriquez was Mexican, there was an occasional comment like, "He's not even a citizen and he comes over here and kills people." I do not think it was an issue, but it came up in the discussions.

Exh. 123, C. Bennett Decl., PE 1141 ¶ 4.

560. As discussed in Claim 1.E.2, Petitioner's trial took place in an environment that created an unacceptable risk that impermissible and emotional factors would come into play in the jury's deliberative process. At the time of Petitioner's trial, a racially charged campaign for the passage of Proposition 187, a far-reaching initiative designed to deny undocumented immigrants social services, was in full force. Anti-immigrant sentiment in California, which was particularly directed against Hispanic immigrants, was prevalent at the time of Petitioner's trial. On November 8, 1993, Proposition 187 passed by voter initiative.

561. Moreover, as discussed in Claim 5, the Prosecutor improperly made racist and inflammatory statements regarding Petitioner's Mexican nationality and immigrant status. In making these statements, the

Prosecutor also improperly argued that Petitioner committed the crimes because of his "personality" and "background." *See* RT 792. These arguments contributed to the bias against Petitioner.

562. The fact that Petitioner's race and illegal immigrant status was mentioned in juror discussions indicates that it improperly played a role in their deliberations, particularly when viewed against the backdrop of the Proposition 187 campaign. One or more jurors were actually or impliedly biased against Mexican immigrants.

563. Moreover, these biases were concealed during jury selection. *See People v. Diaz*, 152 Cal. App. 3d 933 (1984) (When a potential juror conceals material facts on voir dire, she denies "the right to reasonably exercise a peremptory challenge," causing "the deprivation of an absolute and substantial right historically designed as one of the chief safeguards of a defendant against an unlawful conviction."); *see also In re Hamilton*, 20 Cal. 4th at 294 (concealing bias on voir dire is a "direct violation of the oaths, duties and admonitions imposed on actual or prospective jurors," and it constitutes "juror misconduct.") This concealed bias deprived Petitioner of his Sixth Amendment right to fair trial and impartial jury.

E. Conclusion

564. Each of these facts alone creates a structural defect in the proceedings that is not subject to harmless error analysis. *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998). Even if the constitutional

violations are not per se prejudicial, they so infected the integrity of the proceedings that the error cannot be harmless. Taken together, the violations eviscerated Petitioner's fundamental right to a fair trial, and raise an unrebuttable presumption of prejudice, requiring a grant of relief.

CLAIM 3: PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION BY THE PROSECUTION'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES.

565. Petitioner's convictions and sentences of death were unlawfully and unconstitutionally imposed in violation of Petitioner's rights to due process, to equal protection, to a fair trial, to confront witnesses, to compulsory process, to present a defense, to the effective assistance of counsel, and to accurate and reliable guilt and penalty determinations, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 1, 7, 13, 14, 15, 16, 17, 24, and 28 of the California Constitution, because the Prosecutor used peremptory challenges to strike jurors on the basis of their race.

566. Petitioner specifically incorporates by reference those factual allegations contained in Claim 1 and the accompanying exhibits as if set forth fully herein.

567. During jury selection, the Prosecutor engaged in a flagrant pattern of discriminatory peremptory strikes. The Prosecutor used 11 out of his 13 peremptory challenges to strike minority venire members, six of

whom self-identified as Hispanic.

568. The prosecution struck Hispanic jurors at a rate far greater than would be expected based on the composition of the venire. Six out of the Prosecutor's 13 strikes, 46 percent, were used to remove Hispanic jurors. When one includes the venire member who had a Spanish surname (Delgadillo) but self-identified as Native American, the number rises to seven out of 13, or 54 percent. By comparison, Hispanic individuals comprised only 21 percent of the final jury pool, or 18 people. Therefore, Hispanics were struck at a rate more than two times what one would have expected had the peremptory challenges been racially blind. In addition, the six Hispanic potential jurors struck by the prosecution represented 33 percent of the 18 members of final jury pool who identified themselves as Hispanic. However, the prosecution's total of 13 peremptory strikes removed only 15 percent of the 84-person panel, again revealing that Hispanic jurors were struck at more than twice the rate to be expected for a racially blind procedure.

569. The pattern of discriminatory challenges for minorities as a whole was even starker. Eleven of the prosecution's 13 peremptory strikes, or 85 percent, were used against minorities. That number could potentially have been even higher: of the two remaining potential jurors, only one self-identified as Caucasian, and the other did not disclose his race or ethnicity. If the remaining individual was also a minority, 92 percent of the

Prosecutor's strikes would have targeted members of racial or ethnic minority groups.

570. The Prosecutor did not have and could not have articulated any legitimate nondiscriminatory reason to justify his racially discriminatory use of peremptory strikes.

571. This misconduct rendered the trial proceedings fundamentally unfair and had a substantial and injurious effect on the verdicts, and unconstitutionally deprived Petitioner of a fair and reliable determination of guilt and penalty.

572. To the extent Appellate Counsel was required and/or permitted to challenge the Prosecutor's misconduct, Appellate Counsel was constitutionally ineffective in failing to do so.

CLAIM 4: JOINDER OF COUNTS I THROUGH IV RENDERED THE TRIAL FUNDAMENTALLY UNFAIR IN VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS AND VIOLATED HIS RIGHTS TO DUE PROCESS AND A FAIR AND RELIABLE DETERMINATION OF GUILT AND PENALTY.

573. Petitioner's convictions and sentences of death were unlawfully and unconstitutionally imposed in violation of Petitioner's rights to due process, to equal protection, to a fair trial, to confront witnesses, to the effective assistance of counsel, and to accurate and reliable guilt and penalty determinations as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I,

Sections 1, 7, 13, 14, 15, 16, 17, 24, and 28 of the California Constitution, and California Penal Code section 954, because the trial court erroneously joined Counts I through IV in a single trial.

574. Petitioner was convicted in a single trial, of four geographically, temporally and factually distinct counts of first-degree murder. The trial court's refusal to grant severance of the counts allowed the inflammatory impact of multiple murder counts to overwhelm the jurors' ability to weigh the evidence separately on each count. The trial court's failure to grant severance denied Petitioner the opportunity to present an effective defense, violating the rule that joinder "must never be used to deny a criminal defendant's right to due process and a fair trial." *Williams v. Superior Court*, 36 Cal. 3d 441, 448 (1984). The improper refusal to sever subjected Petitioner to the substantial prejudice of associative guilt through the joinder of multiple, unrelated, non-cross admissible, capital counts of widely varying strength. Petitioner's convictions and death sentences must be overturned because "joinder actually resulted in 'gross unfairness' amounting to a denial of due process." *People v. Mendoza*, 24 Cal. 4th 130, 162 (2002) (citation omitted); *Bean v. Calderon*, 163 F.3d 1073, 1083 (9th Cir. 1998).

575. The confusing and inflammatory joint trial also caused Petitioner substantial prejudice at the penalty phase because the jury was unable to consider and prescribe a sentence individually for each count.

Had each count been tried separately, Petitioner would not have been subject to the death penalty. The prejudicial joinder therefore deprived Petitioner of both his state and federal constitutional rights to a fair, reliable, non-arbitrary, and individualized penalty determination. *See Woodson v. North Carolina*, 428 U.S. 280 (1976)[20].

576. California Penal Code section 954 provides that although "an accusatory pleading may charge . . . two or more different offenses of the same class of crimes" jointly, trial courts have discretion to "order [that they will] be tried separately . . . ." However, a clear showing of potential prejudice may require severance, even though joinder is statutorily permissible under section 954. *Williams*, 36 Cal. 3d at 446-47; *see also People v. Bean*, 46 Cal. 3d. 919, 935 (1990) ("[s]everance may be

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[20] The "Waltreus rule" holds that a claim cannot be relitigated on a state habeas corpus petition if it was already raised and rejected on appeal. *In re Waltreus*, 62 Cal. 2d 218, 225 (1965); *In re Harris*, 5 Cal. 4th 813, 825 (1993). Although raised and rejected on direct review, this claim is not procedurally barred because this Petition offers evidence that was either outside of the record; could not be discovered through the exercise of due diligence; or was not discovered due to the ineffective assistance of counsel that "casts fundamental doubt on the accuracy and reliability of the proceedings," and "undermine[s] the entire prosecution case and point[s] unerringly to innocence or reduced culpability." *In re Clark*, 5 Cal. 4th 750, 766 (1993).

necessary in some cases to satisfy the overriding constitutional guaranty of due process to ensure defendants a fair trial.").

577. Even if the trial court's refusal of severance was correct when made, a showing that "joinder actually resulted in 'gross unfairness' amounting to a denial of due process'" mandates reversal. *People v. Mendoza*, 24 Cal. 4th 130, 162 (2000) (citation omitted). "[E]rror involving misjoinder 'affects substantial rights' and requires reversal . . . [if it] results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict." *United States v. Lane*, 474 U.S. 438, 449 (1986) (citation omitted); *Sandoval v. Calderon*, 241 F.3d 765, 771-72 (9th Cir. 2000). "Misjoinder [] rises to the level of a constitutional violation [] if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *Lane*, 474 U.S. at 446 n.8. If the joinder of offenses actually renders a Petitioner's state trial fundamentally unfair, giving rise to a due process violation, then the court must grant relief. *Featherstone v. Estelle*, 948 F.2d 1497, 1503 (9th Cir. 1991).

578. Although the statutory requirements for joinder are met,

> Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so

> that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.

People v. Kraft, 23 Cal. 4th 978, 1030 (2000) (citation omitted). Petitioner's claim satisfies each of these elements, and the evidence demonstrates prejudice to Petitioner from the denial of severance.

579. This Court acknowledged that "the prosecution did not make a showing of cross-admissibility in support of joinder." *Manriquez*, 37 Cal. 4th 547, 575 (2005) . In fact, the prosecution could not have made such a showing. The crimes charged, and the evidence the jury heard about them, were unrelated in time, place, motive, and circumstance. Nevertheless, the Court affirmed the denial of Petitioner's motions to sever because Petitioner had failed to demonstrate any undue prejudice from the joinder. *Manriquez*, 37 Cal. 4th at 576. The prejudice this Court did not find is now clear.

580. The prejudicial effect of trying the four counts together was apparent as early as the jury's deliberation on guilt, when the jury asked to see testimony that the same gun was used in the Las Playas and Fort Knots murders. CT 791. In fact, such testimony did not exist because the two crimes involved different weapons, yet the request indicates that the jury was actually confused by the joint presentation of evidence of these separate crimes.

581. Post-verdict evidence confirms that the jury did not keep the counts separate. Jurors' responses to post-trial questionnaires demonstrate that the joinder of the four murder counts prejudicially influenced the jury to convict on first-degree murder and vote for the death penalty. In response to several questions as to whether severance would have affected his decision to vote for conviction on each count, Juror Robert Carlson answered as to the Rita Motel count, "I don't know. It's hard not *[sic]* to have all these killings in one trial and not consider any particular pattern." Exh. 25, Post-Verdict Juror Questionnaire of Robert Carlson, PE 0238. And for the same question as to the Mazatlan count, "Possibly. Certainly a pattern has been presented." *Id.* at PE 0239. With respect to Count I (Las Playas) Carlson also stated that he thought that had the counts been severed, "I'm sure we would have had more conversation concerning degree." *Id.* at PE 0236.

582. Another juror, Linda Chambers, stated that had the counts been severed, she "probably" would have chosen life imprisonment rather than death on the Las Playas count. Exh. 26, Post-Verdict Juror Questionnaire of Linda Chambers, PE 0244. Carlson and Constance Bennett both stated that the evidence of multiple killings was "very significant" in their respective decisions to vote for the death penalty. Exh. 24, Post-Verdict Juror Questionnaire of Constance Bennett, PE 0231; Exh. 25, Post-Verdict Juror Questionnaire of Robert Carlson, PE 0239. In the margin near

question 20, juror Steven Savage wrote that the significance of the joinder was "in between 'very' and 'not very' [significant] – the evidence may or may not have been enough for me to convict if tried on these charges; I centered on the four murders." Exh. 27, Post-Verdict Juror Questionnaire of Steven Savage, PE 0255. The statements of these jurors reflect actual prejudice that prevented Petitioner from receiving individualized determinations of guilt and penalty on each count.

583. The joinder of multiple capital charges against Petitioner is subject to a higher degree of scrutiny.

> Since one of the charged crimes is a capital offense, carrying the gravest possible consequences, the court must analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case. Even greater scrutiny is required in the instant matter, for it is the joinder itself which gives rise to the special circumstances allegation of multiple murder under Penal Code section 190.2, subdivision (a)(3).

Williams, 36 Cal. 3d at 454.

584. As this Court noted on direct review, "none of the individual homicides carried a special circumstance that might have converted the matter into a capital case, and joinder did effect such conversion (in view of the multiple-murder special circumstance)." *Manriquez*, 37 Cal. 4th at 575. The Court answered this problem, in part, by noting that "separate trials would have given the prosecution multiple opportunities in which to

convince a jury to impose the death penalty upon defendant." *Id.* at 576. While it is true that severance would have given the Prosecutor multiple opportunities to try for a death verdict, it also would have made it difficult or impossible to obtain four death verdicts. Indeed, the combined weight of the joined charges, leading to a determination of special circumstances, and the cumulative presence of inflammatory, non-cross admissible evidence increased the likelihood of any death verdict and deprived Petitioner of the opportunity to receive individualized penalty determinations. As described above, at least two jurors, Linda Chambers and Robert Carlson, admitted that they might well have or probably would have come to different verdicts had the counts been tried separately.

585. The trial court's prejudicial joinder of offenses, refusal to grant severance, and failure to cure the prejudice through an appropriate instruction rendered the trial proceedings fundamentally unfair and had a substantial and injurious effect on the determination of the jury's verdicts, and unconstitutionally deprived Petitioner of a fair and reliable determination of guilt and penalty.

CLAIM 5: PETITIONER WAS DENIED HIS RIGHT TO A FAIR TRIAL BECAUSE OF PERVASIVE MISCONDUCT BY THE PROSECUTOR DURING OPENING AND CLOSING STATEMENTS AND BY TRIAL COUNSEL'S FAILURE TO OBJECT TO THAT MISCONDUCT.

586. Petitioner's convictions and death sentences were unlawfully

and unconstitutionally imposed in violation of Petitioner's rights to due process, to a fair and impartial jury, to a fair trial, to confront witnesses, to compulsory process, to present a defense, to the effective assistance of counsel and to accurate and reliable guilt and penalty determinations as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 1, 7, 13, 14, 15, 16, 17, 24, and 28 of the California Constitution, because of the Prosecutor's intentionally improper and prejudicial statements during opening and closing statements at trial. The Prosecutor's misconduct violated petitioner's constitutional rights to a fair trial, due process and reliable, non-arbitrary guilt and penalty determinations.

587. Prosecutors have an obligation to avoid "improper suggestions, insinuations and especially assertions of personal knowledge." *Berger v. United States*, 295 U.S. 78, 88 (1935). It is improper for a prosecutor to refer to facts not in evidence. *United States v. Blueford*, 312 F.3d 962, 968 (9th Cir. 2003). Moreover, it is improper for a prosecutor to appeal to racial and other biases that compromise the jury's impartiality. *See People v. Cudjo*, 6 Cal. 4th 585, 626 (1993).

588. During opening and closing statements, the Prosecutor engaged in a pervasive pattern of misconduct that prejudicially violated Petitioner's constitutional rights. This misconduct infected the trial with unfairness and resulted in unreliable convictions and sentences in violation of Petitioner's

right to due process. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *People v. Padilla*, 11 Cal. 4th 891, 940 (1995); *People v. Hill*, 17 Cal. 4th 800, 818 (1998).

589. Although evidence of the four different counts was concededly not cross-admissible, the Prosecutor made improper statements during the guilt phase of the trial intended to lead the jury to cross-consider evidence on each count.

a. In opening statements, the Prosecutor encouraged the jury to cumulate the evidence, arguing that the evidence on each count demonstrated a "common theme":

> [t]he People would submit to you that the evidence is going to indicate the following: that there is a common theme to this set of murders, these four murders; that the common theme relates to the defendant's background; that the defendant is in fact from the country of Mexico. He is here in this country and he has brought to this country, the United States, certain things with him that is part of his own personality, his own personality. These ideas that are part of his personality include the carrying of a gun, the carrying of a handgun, an attitude, for lack of a better term, that's would consider to be or the evidence will indicate to you, a macho attitude. And that he has a tendency to frequent locations, bars, other locations, and he brings with him to the motel, the Rita Motel, to these bars, this attitude and that weapon. And what that adds up to is murder. Four murders in the first degree. With that attitude he proves a point with his gun and that is in terms of killing individuals. That is a theme that goes through each and every one of these murders.

RT 791-92.

b. During rebuttal closing arguments, the Prosecutor argued that the jury should look at the four counts as a whole in deciding for guilt on each count:

> When you have four – when you have circumstantial evidence, you cannot look at it in terms of one particular piece. You cannot look at Las [P]layas, just the one itself. It's like describing an elephant. An elephant has four legs. Well, a lot of things have four legs, okay? It's two tons. Well, if you separate from that, a lot of things are very heavy, trash trucks. . . . The point being when you got an elephant, you got an elephant. You cannot separate and look at each one. You have to look at them in total.

RT 1912-13.

c. The Prosecutor also told the jury that the murders occurred "within an area of Los Angeles that is not too far apart," RT 798. and that there was a "pattern" to the wounds of the victims of Count I (Las Playas) and Count III (Rita Motel), as demonstrated by the coroner's testimony: "The pattern that he had at Las Playas, that he is showing at the Rita Motel, when he sets up the killing. The pattern that he has is he executes an individual in the back." RT 1772.

d. These acts of misconduct substantially prejudiced Petitioner. They confused the jury and led the jury to cross-consider the evidence. For example, the jury asked for "testimony that will indicate that the same gun was used in the first [Las Playas] and second murders [Fort

Knots]," CT 791, when, in fact, no such evidence was presented.

e. Post-verdict questionnaires further evidence this confusion and improper cross-consideration of evidence. In response to the question, "could your decision on this count [Count III] have been any different if it had been the only charge against Manriquez?" Juror Robert Carlson stated that ". . . it's hard not to have all these killings presented in one trial and not consider any particular pattern." Exh. 25, Post-Verdict Juror Questionnaire of Robert Carlson, PE 0238. In response to this question regarding Count IV (Mazatlan), Juror Carlson stated: "Possibly. Certainly a pattern has been presented." *Id.* at PE 0239. In response to the question, "[c]ould your decision on this count [Count I] have been any different if it had been the only charge against Manriquez," another juror, Linda Chambers, responded that "[i]f this was the only count I would've of probably chose life in prison." Exh. 26, Post-Verdict Juror Questionnaire of Linda Chambers, PE 0244.

590. The Prosecutor made racist and inflammatory statements during the guilt phase regarding Petitioner's Mexican nationality and immigrant status. In making these statements, the Prosecutor also improperly argued that Petitioner committed the crimes because of his "personality" and "background."

a. The Prosecutor argued that "there is a common theme to this set of murders, these four murders; that the common theme relates to

the defendant's background; that the defendant is in fact from the country of Mexico. He is here in this country, and he has brought to this country, the United States, certain things with him that is part of his own personality, his own personality. These ideas that are part of his personality include the carrying of a gun, the carrying of a handgun. An attitude, for lack of a better term, that's what I would consider to be or the evidence will indicate to you, a macho attitude." RT 792.

b. The Prosecutor's statements were another example of racially charged language. The Los Angeles County District Attorney's Office previously reprimanded the Prosecutor for use of a racial epithet to describe an African-American colleague, Larry Walls. After overhearing another deputy's play on words that Walls was going to be "Lynched," the Prosecutor joined in, stating that "there is going to be a lynching, they had a rope, and all they needed was a Nigger." Exh. 33, L.A. County Civil Service Commission, *Walls v. Office of the District Attorney*, Case Nos. 90-371, 90-386, Findings of Fact and Decision, PE 0291. Prosecutor Markus was subsequently reprimanded by the District Attorney's Office for his role in the incident. *Id.*

c. Moreover, as discussed in Claim 1.E.2, Petitioner's trial took place in an environment that created an unacceptable risk that impermissible and emotional factors would come into play in the jury's deliberative process. At the time of Petitioner's trial, a racially charged

campaign for the passage of Proposition 187, a far-reaching initiative designed to deny undocumented immigrants social services, was in full force. Anti-immigrant sentiment in California, which was particularly directed against Hispanic immigrants, was prevalent at the time of Petitioner's trial. *See* Claim 1.E.2, above. The Prosecutor's statements improperly played off that sentiment. Indeed, Jury Foreperson Constance Bennett acknowledged following the trial that Petitioner's status as a Hispanic immigrant came up during juror deliberations. Juror Bennett declared:

> As to the fact that Manriquez was Mexican, there was an occasional comment like, "He's not even a citizen, and he comes over here and kills people." I do not think it was an issue, but it came up in the discussions.

Exh. 123, C. Bennett Decl., PE 1191 ¶ 4.

d. It was improper for the Prosecutor to argue that the evidence of guilt related to Petitioner's "background" and "personality." References to a defendant's supposed criminal personality are impermissible. *See McKinney v. Rees*, 993 F.2d 1378, 1386 (9th Cir. 1993).

e. The Prosecutor's appeal to the jury's bias and to Petitioner's supposed criminal propensity compromised jurors' impartiality and violated Petitioner's due process rights. *See People v. Cudjo*, 6 Cal. 4th 585, 625 (1993) ("Prosecutorial argument that includes racial references

appealing to or likely to incite racial prejudice violates the due process and equal protection guarantees of the Fourteenth Amendment to the federal Constitution"); *People v. Simon*, 80 Cal. App. 675, 680 (1927) (The "verdict of the jury should be predicated upon the testimony produced at the trial alone, free from all racial and religious prejudices.")

591. The Prosecutor improperly attacked the credibility of Trial Counsel during rebuttal closing statements in the guilt phase.

a. During closing statements, Trial Counsel argued that there were about ten people who were asked to identify the shooter at Fort Knots on the same day that witness Quijada made an identification. Trial Counsel stated: "Why didn't the people call them [the other witnesses]? Because they didn't identify the defendant from that lineup. Why were they there? They were there because they were people that could possibly identify him. Why weren't they called? Because if they didn't identify him, they must be wrong." RT 1822. In his rebuttal arguments, the Prosecutor argued: "Going on to some other outright, outright flat misstatements, to say the least, a misstatement, there were other witnesses at the Fort Knots bar that identified *someone else* involved in the shooting." RT 1892 (emphasis added). In fact, this is not what Trial Counsel said. He said only that these other witnesses did not identify Petitioner as the shooter. This argument was even more improper because, as discussed in Claim 6, the Prosecutor had failed to turn over evidence regarding the

identity of the other witnesses and who, if anyone, they selected in the course of that photo lineup procedure.

b. The Prosecutor repeatedly accused Trial Counsel of "misstatements" throughout the rebuttal closing arguments and pejoratively called the defense a "buffet defense" of "walk[ing] down the line and [ ] hop[ing] the jury grabs at something. . . ." RT 1894.

c. These comments prejudicially undermined Trial Counsel's credibility. *See People v. Hill*, 17 Cal. 4th 800, 832 (1998) ("An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and in view of the accepted doctrines or legal ethics and decorum, is never excusable.").

592. During closing arguments in the guilt phase, the Prosecutor improperly commented on Petitioner's failure to subpoena witnesses to provide an alibi regarding Count II (Fort Knots).

a. During closing arguments, the Prosecutor commented as follows:

> But, in addition to that – this is not a comment on the defendant. The defendant has the right, the absolute right, not to testify in a criminal case. But I am talking about subpoenas. These subpoenas. Subpoenas are free. Subpoenas are something the defendant would have a right to. Where was he on that day? The lack of evidence is what I am talking about. Where was he? Who was he with? Sylvia Tinoco? If he wasn't there at Fort Knots, why isn't there one witness that comes into court with these

> free subpoenas to testify as to where the defendant is on that day? It's because he committed the murder. The stakes are high. The stakes are high. If there was someone to come in and say, he was with me, it would have happened for you.

RT 1769-70.

b. Although the Prosecutor purported not to make these statements to "comment on the defendant," that is precisely what he did. The Prosecutor made this statement to underscore his real meaning: Petitioner would have testified had he been innocent. This is misconduct. *See Griffin v. California*, 380 US. 609, 615 (1965). This argument, as well as others that the Prosecutor made regarding Petitioner's failure to defend against Count II (*see* RT 1892, 1905) called attention to Petitioner's failure to testify and prejudiced Petitioner. *See People v. Mendoza*, 37 Cal. App. 3d 717, 726 (1974) (holding that the prosecutor's thinly veiled comments on a defendant's failure to testify violated the spirit of *Griffin* and contributed to reversible error).

593. The Prosecutor made misleading and unfounded arguments during the closing arguments of the guilt phase that the blood outside of the Fort Knots Bar was Petitioner's. There was no evidence whatsoever to support this argument. In fact, the Prosecutor had stipulated during trial that the blood evidence did not match Petitioner's.

a. At trial, Mario Medel, the manager of the Fort Knots

bar, testified that the shooter who was thrown out of the bar made repeated attempts to gain reentry to the bar. RT 1114-24. During one of these attempts, Medel struck the shooter, who bled from his injury. RT 1124. Medel pointed out the blood from the shooter to the police. RT 1124-25.

b. Detective Verdugo testified at trial that he directed David Hong, a serologist with the Los Angeles County Sheriff's Department, to collect bloodstains that Detective Verdugo found at the scene. RT 1437. After testing the samples, the Serology Section of the Los Angeles County Sheriff's Department determined that the samples did not match Petitioner's blood. RT 1439; Exh. 12, Serology Report, Aug. 25, 1993, PE 0118. The results also excluded the victim, George Martinez, as a source of the blood collected at the scene by the serologist. *Id.*

c. These test results were made available to the Prosecutor and Trial Counsel after the trial began. They then stipulated that the blood evidence collected at the scene by the Serology Section was not Petitioner's or the victim's. RT 1453.

d. Despite the conclusion of the Los Angeles County Sherriff's Department that the blood collected at the crime scene was not Petitioner's and his own stipulation to that effect, the Prosecutor nonetheless argued that someone else bled outside Fort Knots:

> . . . *to tell you that the blood is not the defendant's is not true*. There was still blood there they [the officers] could not pick up.

> There were samples they picked up that weren't big enough to test, weren't big enough to test. They only tested two, and it excluded his grouping. The answer is someone else bled out there on those two spots. It doesn't mean he didn't.

RT 1901 (emphasis added).

e. The Prosecutor therefore improperly urged the jury to believe that blood samples that could not be collected or tested implicated Petitioner. There was no evidence that the blood evidence at the crime scene matched that of Petitioner, and no evidence that any samples were too small to be tested. Instead, the Prosecutor argued that unknown (and unknowable) facts implicated Petitioner. This was prejudicially improper. *See United States v. Blueford*, 312 F.3d 962, 968 (9th Cir. 2002) (improper to refer to facts not in evidence).

594. The Prosecutor improperly expressed his own views of the credibility of witness Beatriz Escamilla.

a. During closing arguments, the Prosecutor urged that Petitioner and Escamilla had talked about making the shooting at the Mazatlan Bar (Count IV) "look like a voluntary manslaughter" "so the jury buys it." RT 1777. This statement was the Prosecutor's own view of what happened and why he believed Escamilla was not reliable. This was pure conjecture and constituted misconduct. *See People v. Perez*, 58 Cal. 2d 229, 245 (1962) ("It is misconduct for a prosecuting attorney to express his

personal belief as to the reliability of a witness") (citations omitted).

b. Additionally, it was improper for the Prosecutor to denigrate Escamilla by calling her a "speed liar" and by commenting that "it [her testimony] would come out so fast out of her mouth that you couldn't even keep track of what she was saying." RT 1778. *See United States v. Francis*, 170 F.3d 546, 551 (6th Cir.1999) ("[M]isconduct occurs when a jury could reasonably believe that the prosecutor was . . . expressing a personal opinion as to the witness's credibility.").

595. The Prosecutor committed misconduct by making inflammatory statements that prejudiced Petitioner during the penalty phase of trial.

a. The Prosecutor repeatedly argued that Petitioner "likes to kill." For example:

> . . . what you have here sitting in this chair is a person but for no other reason likes to kill. That's what he likes to do. RT 2239-40.
>
> He likes to kill. RT 2241.
>
> But he likes to kill. He likes to. RT 2253.
>
> He is carrying a gun then. We know he carries a gun. Why? He likes to kill. RT 2257.
>
> I like it, I like to kill, *says Mr. Manriquez.* I like it. RT 2259 (emphasis added).
>
> You have got the kind of person here sitting in this courtroom who likes to kill. There is no other explanation for his acts. RT 2262.

He likes it [killing]. RT 2267.

b. The Prosecutor improperly made this argument no less than seven times on separate occasions. Courts "have consistently cautioned against prosecutorial statements designed to appeal to the passions, fears and vulnerabilities of the jury. *United States v. Weatherspoon*, 410 F.3d 1142, 1149 (9th Cir. 2005). In one of these instances, the Prosecutor even claimed that Petitioner said that he likes to kill. RT 2259. This was false. There was no evidence that Petitioner said any such thing. This also amounts to misconduct. *Berger v. United States*, 295 U.S. 78, 88 (1935) (Prosecutors have an obligation to avoid "improper suggestions, insinuations and especially assertions of personal conduct.").

c. The Prosecutor exhorted the jury to consider that they were the "voice of the community." RT 2261, 2262, 2267. This constituted misconduct. Prosecutors may not "urge jurors to convict a criminal defendant in order to protect community values, preserve civil order or deter future lawbreaking." *Weatherspoon*, 410 F.3d at 1149. "The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence." *Id.*

d. The Prosecutor inflamed the jury by arguing that several witnesses were afraid of Petitioner and that they worried about the safety of their children. RT 2261. This argument led the jury to be influenced by fear rather than an impartial and rational consideration of the

evidence. Courts "have consistently cautioned against prosecutorial statements designed to appeal to the passions, fears and vulnerabilities of the jury." *Weatherspoon*, 410 F.3d at 1149.

e. The Prosecutor inflamed the jury when he asked them to consider the "perception and agony that the victims must have went through. . . ." RT 2239. This argument eroded the jury's ability to rationally and impartially consider the penalty phase evidence when deliberating on the penalty. *See Weatherspoon*, 410 F.3d at 1149.

596. These instances of misconduct, standing alone and in combination, so infected the integrity of the proceedings against Petitioner that they cannot be deemed harmless. These acts of misconduct substantially prejudiced Petitioner and rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the verdicts, and unconstitutionally deprived Petitioner of a fair and reliable determination of guilt and penalty.

CLAIM 6: PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE STATE FAILED TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE.

597. Petitioner's convictions and sentences of death were unlawfully and unconstitutionally imposed in violation of Petitioner's rights to due process, to a fair trial, to confront witnesses, to compulsory process, to present a defense, to the effective assistance of counsel and to accurate,

reliable guilt and penalty determinations, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 1, 7, 13, 14, 15, 16, 17, 24, and 28 of the California Constitution, because the State withheld and failed to disclose relevant material evidence and material information that would have led to the discovery of material evidence favorable to Petitioner.

598. The Due Process Clause of the Fourteenth Amendment protects a criminal defendant's right to have materially favorable evidence disclosed by the prosecution. *Brady v. Maryland*, 373 U.S. 83, 86-87 (1963). "A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused." *Youngblood v. West Virginia*, 126 S.Ct. 2188, 2190 (2006). Even if the prosecutor is unaware of the specific evidence, the failure to take steps to learn of and disclose material favorable evidence known to others acting on the prosecution's behalf, including police, is reversible error. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

599. The prosecution suppressed exculpatory and impeachment evidence which, had it been revealed, would have devastated the guilt phase case against Petitioner and made it impossible for the prosecution to obtain capital murder convictions against Petitioner on all counts. Furthermore, even if the prosecution had obtained such a verdict, additional suppressed evidence would have led to a life without the possibility of parole verdicts

for Petitioner at the penalty phase.

A. Suppression of Police Report Regarding Alternate Suspect in Count I (Las Playas)

600. The Prosecutor violated his duty to disclose material exculpatory evidence when he failed to disclose a report by the Los Angeles County Sheriff's Department that demonstrated that the police had identified an alternate suspect in Count I (Las Playas) named Jesus Manzo.

601. The Prosecutor violated his duty to disclose material exculpatory evidence when he failed to disclose a report by the Los Angeles County Sheriff's Department that demonstrated that the police had identified an alternate suspect in Count I (Las Playas) named Jesus Manzo. Exh. 4, Sheriff's Complaint Report, Jan. 26, 1989, PE 0049. The police had contacted Jesus Manzo as a potential suspect on January 26, 1989, just four days after the shooting at Las Playas.

602. During trial, Detective John Laurie testified that he, Detective Ronald Riordan and Officer Joe Olmedo had interviewed Petitioner about the Las Playas shooting. RT 1571-72. According to Detective Laurie, Petitioner said that he went to the Las Playas that night with a man named Francisco Manzano, whom he identified as the shooter. RT 1574-75. Petitioner stated that he had only held patrons "at bay" with a 9 mm gun after the shooting occurred. RT 1574-75. Officer Ronald DeChamplain further testified that Petitioner gave the name "Francisco Manzano" as his

name when he was arrested during an unrelated traffic stop on January 6, 1990. RT 1687-88. The Prosecutor seized on this in closing arguments by arguing that Francisco Manzano and Petitioner were the same person and that Petitioner had shot the victim, Miguel Garcia. RT 1756, 1761-64, 1782, 1910.

603. The undisclosed information would have shown that the police, in fact, had independently focused on another individual early in their investigation and that this person's last name was similar to the name of the shooter known by Petitioner.

604. Additionally, this information would have ameliorated the detrimental effect of Officer DeChamplain's testimony and the Prosecutor's argument that Petitioner and Manzano were the same person, because it would have shown that the police were, in fact, investigating a person with a last name similar to Manzano, i.e., Manzo.

605. Trial Counsel was never provided a copy of the police complaint documenting Manzo's arrest, nor did he receive any documentation from the prosecution concerning the police investigation of Manzo as a possible suspect in the Las Playas shooting. Habeas Corpus Counsel only received the police complaint against Manzo around July 2007, as a result of a *Steele* motion, demanding that the prosecution and law enforcement agencies disclose all materials to which Petitioner would have been entitled at the time of trial. *See In re Steele*, 32 Cal. 4th

682 (2004).

606. Trial testimony supports Petitioner's account of what happened at the Las Playas: two witnesses confirmed that Petitioner was accompanied by at least one unidentified companion, and one witness's description of how Petitioner carried the gun is consistent with holding people "at bay." In preliminary hearing testimony later played on tape at the trial, waitress Angelica Contreras said Petitioner had entered the restaurant that evening with three companions, none of whom she could name, CT 16, and who "left together with him" after the shooting. CT 18. Contreras did not observe the shooting because she was in another room, CT 12, but when she returned to the main seating area moments later, she saw Petitioner holding a gun "with the arms outstretched from the chest and moving from side to side," CT 35, "pointing to the rest of the people who were coming after him." CT 37. She could not see whether any of the other restaurant patrons were also holding a gun. CT 33-34. Laura Lozano, another waitress, saw one person exiting the restaurant while carrying a gun "with the hand up" after the shooting. RT 890. However, Lozano saw neither the shooting itself nor the face of the man holding the gun. RT 890. John Guardado, a friend of the victim's, testified that he "noticed two guys walk out," one of whom "pulled out a gun and shot" the victim. RT 842. Guardado could not identify either of the two men, RT 844, and he did not see anything else because he ducked as soon as the shooting began.

RT 843. Immediately after the shooting, "the guy that had pulled the gun ran out," accompanied by his companion. RT 852. Guardado could not see whether the other man who accompanied the shooter was also holding a gun. RT 880.

607. However, the police complaint documenting officers' initial investigation of Manzo as the Las Playas shooter was a critical piece of exculpatory evidence corroborating Petitioner's claim that a man named Manzano, not Petitioner, committed the Las Playas shooting. The names "Manzo" and "Manzano" are very similar, and Manzano is possibly a nickname or alias for Manzo. In addition, Manzo's physical appearance and car matched the description police then had of the Las Playas shooter. Furthermore, Manzo lived in approximately the same area identified by Petitioner as Manzano's neighborhood. The complaint lists Manzo's address as 15319 Virginia Avenue, Paramount. Exh. 4, Sheriff's Complaint Report, Jan. 26, 1989, PE 0049. Petitioner told police that he believed Manzano "lived in the area of San Luis and Orange Street in Paramount," although "he wasn't sure where he could be found," and "thought perhaps he had returned to Mexico." RT 1575-76. Those two addresses, both only one block off of Somerset Boulevard, are less than a mile-and-a-half apart.

608. The foregoing evidence was favorable to Petitioner as exculpatory evidence, was suppressed by the State and was material to Petitioner's case. It is at least reasonably probable that a more favorable

outcome would have resulted had the evidence been disclosed. The suppression of this evidence substantially prejudiced Petitioner, rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the verdicts.

B. Suppression of Field Show Up Regarding Count II (Fort Knots)

609. The Prosecutor violated his duty to disclose material exculpatory evidence when he failed to disclose that the police had identified at least one alternate suspect in Count II (Fort Knots) and that the police held a field show-up shortly after the Fort Knots shooting regarding such suspect(s).

610. Deneen Baker, the dancer at Fort Knots, testified during a preliminary hearing that detectives from the South Gate Police Department brought several suspects to the bar a few days after the shooting. Specifically, Baker stated, "I know that they [the detectives] brought some men up to the bar" a few days after the shooting. CT 53. Baker told the detectives that she did not recognize any of the suspects as the shooter. CT 54.

611. Baker's testimony clearly indicates that the police investigated several suspects in addition to Petitioner following the Fort Knots shooting. However, the State and the prosecution produced no information to the defense regarding these other suspects. Trial Counsel never received the

names of the other suspects, any of the police documentation or reports regarding the investigations of other suspects or the procedures followed by the police during the field show-up.

612. The suppressed evidence was favorable to Petitioner, because it would have demonstrated that police early on in their investigations had identified one or more alternate suspects. However, jurors never heard any evidence to show that other suspects even existed. In light of the fact that the prosecution's case on Fort Knots relied solely on the strength of eyewitness identifications (which were unreliable, as discussed in Claim 1.B.2.), this additional evidence would additionally have raised reasonable doubt as to Petitioner's guilt on Count II.

613. Moreover, the suppressed evidence would have shown that the police failed to follow the proper procedures in conducting the field show up, thereby casting doubt on the reliability of their investigation as well as the reliability of the identification process.

614. The foregoing evidence was favorable to Petitioner as exculpatory evidence, was suppressed by the State and was material to Petitioner's case. It is at least reasonably probable that a more favorable outcome would have resulted had the evidence been disclosed. The suppression of this evidence substantially prejudiced Petitioner, rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the verdicts.

C. Suppression of Rejected Identifications in Count II (Fort Knots)

615. The prosecution suppressed evidence regarding witnesses who failed to identify Petitioner in the photographic lineup.

616. During her testimony, Barbara Quijada indicated that approximately ten witnesses were shown the photographic lineup from which she identified Petitioner. RT 1206-07. A total of only four witnesses, however, positively identified Petitioner from that photographic lineup. Therefore, there were several other witnesses who failed to identify Petitioner as the shooter.

617. This evidence would have generated the names of witnesses who could have testified that they did not recognize Petitioner from the photographic lineup. This evidence was material particularly because Count II rested entirely on witness identifications. Evidence that other witnesses were unable to identify Petitioner would have undermined the weight given to identifications made by witnesses Quijada, Medel, Baker and Herbert.

618. The foregoing evidence was favorable to Petitioner as exculpatory evidence, was suppressed by the State and was material to Petitioner's case. It is at least reasonably probable that a more favorable outcome would have resulted had the evidence been disclosed. The suppression of this evidence substantially prejudiced Petitioner, rendered

the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the verdicts.

D. Suppression of Impeachment Evidence

619. The prosecution suppressed impeachment evidence concerning witnesses that was available and should have been disclosed to Petitioner. *See People v. Wheeler*, 4 Cal. 4th 284, 295 (1992); *Pitchess v. Superior Court*, 11 Cal. 3d 531 (1974). This impeachment evidences includes, but is not limited to, the following:

1. Barbara Quijada

620. The prosecution suppressed impeachment evidence concerning witness Barbara Quijada based on her prior felony conviction for driving under the influence ("DUI"). The prosecution suppressed this evidence in spite of Trial Counsel's Request for Discovery. CT Supp. III 3638. This request sought, among other things, "[t]he existence of a felony conviction of any material witnesses whose credibility is likely to be critical to the outcome of the trial which has not previously been disclosed to the defense." CT Supp. III 3639.

621. Barbara Quijada was only one of two prosecution witnesses who identified Petitioner as the alleged shooter. All of the identifications were made at least ten months after the incident occurred.

622. Quijada was a critical witness for the prosecution because she assisted in the preparation of a composite sketch of the shooter several days

after the shooting occurred. RT 1200-05. Based on that sketch, the Lynwood Police Department prepared a photo lineup that was shown to the witnesses nearly a year later. RT 1205-08.

623. Quijada had a felony conviction for driving under the influence (DUI) in 1990, and she had amassed three DUI convictions before that. On August 17, 1990, Quijada pled guilty to felony DUI under Cal. Vehicle Code section 23152(a). Exh. 29, *Quijada*, Probation Grant, PE 0262. In that conviction, Quijada admitted to three prior DUI convictions under Cal. Vehicle Code section 23152(a). Exh. 29, PE 0262; *see also* Exh. 28, *Quijada*, Felony Complaint, PE 0259.

624. This information was not disclosed to Trial Counsel. This information was favorable and material to Petitioner because reasonably competent Trial Counsel would have been able to impeach her testimony and cast significant doubt on her credibility. Cal. Const. art. I, § 28(f) ("Any prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used without limitation for purposes of impeachment. . . ."); *see also People v. Forster*, 29 Cal. App. 4th 1746, 1757-58 (1994) (multiple convictions of driving under the influence involved moral turpitude because it was a "recidivist type crime involving an extremely dangerous activity").

625. These prior convictions would have cast doubt on the veracity of Quijada's testimony that she was not drinking at the time of the shooting

as well as on the accuracy of her identification and description of the shooter, and her overall testimony. *See* RT 1185, 1193.

626. The jury placed considerable weight on Barbara Quijada's testimony. Quijada was one of only two witnesses who allegedly saw the shooter at the time of the shooting. Moreover, Quijada met with the police shortly after the shooting and worked with a sketch artist to prepare a composite sketch of the shooter.

627. Impeaching Quijada's testimony with the prior convictions for felony DUI would have significantly undermined her credibility as well as the accuracy of her description to the police and of her identifications of Petitioner.

628. The foregoing evidence was favorable to Petitioner as exculpatory evidence, was suppressed by the State and was material to Petitioner's case. It is at least reasonably probable that a more favorable outcome would have resulted had the evidence been disclosed. The suppression of this evidence substantially prejudiced Petitioner, rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the verdicts.

2. Deneen Baker

629. The prosecution suppressed impeachment evidence concerning witness, Deneen Baker regarding her prior misdemeanor conviction under Penal Code section 484(a) for the theft of property in 1990.

630. This prior conviction would have cast doubt on the credibility of Deneen Baker's testimony and her identification of Petitioner as the individual who touched her inappropriately the night of the shooting.

631. The foregoing evidence was favorable to Petitioner as exculpatory evidence, was suppressed by the State and was material to Petitioner's case. It is at least reasonably probable that a more favorable outcome would have resulted had the evidence been disclosed. The suppression of this evidence substantially prejudiced Petitioner, rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the verdicts.

3. Detective David Arellanes

632. The prosecution suppressed material in Detective David Arellanes' records including, but not limited to, violent threats he made to his then wife, Lucila N. Arellanes. Detective Arellanes was a lead detective in Count IV (Mazatlan) and had also interviewed witnesses to the Mazatlan shooting, including Adela Lopez.

633. Arellanes' wife had obtained a temporary restraining order against him, in part, because he had said to her: "I will fuck you over if you fuck me with my daughter. You will regret it the rest of your life. I have dirty cop friends who will take care of you and no one will ever know its [sic] me." Exh. 32, Declaration of Lucila N. Arellanes, May 16, 1990, PE 0276 ¶ 4. Arellanes made threats against his wife on a continual basis

and exhibited bizarre behavior. *Id.*

634. These statements could have been used by reasonably competent Trial Counsel to impeach Arellanes' credibility and raise doubt about the integrity of his investigation into the Mazatlan shooting and the propriety of his dealings with witnesses to the shooting, in particular, witness Adela Lopez. Courts have held threats to constitute behavior indicating moral turpitude and therefore untrustworthiness. *See People v. Cornelio*, 207 Cal. App. 3d 1580, 1585 (1989). Moreover, these statements would have undermined Arellanes' testimony in which he indicated he followed regular police procedures, including the identification procedures he followed with Lopez and the statements he procured from her.

635. No records regarding Arellanes or any other officers were disclosed to Trial Counsel, despite the fact that it was evidence that could be used to impeach the credibility of Arellanes and the identification procedures he purported to follow. This violated the prosecution's discovery obligations. *Id.*

636. The foregoing evidence was favorable to Petitioner as exculpatory evidence, was suppressed by the State and was material to Petitioner's case. It is at least reasonably probable that a more favorable outcome would have resulted had the evidence been disclosed. The suppression of this evidence substantially prejudiced Petitioner, rendered the trial proceeding fundamentally unfair, eroded the reliability of the

verdicts and had a substantial and injurious effect on the verdicts.

E. Suppression of Videotaped Interview of Petitioner

637. The Prosecutor suppressed a video showing one or more police interviews of Petitioner in the hospital.

638. People's Trial Exhibit No. 40, Exh. 73, contained a video of the crime scene in the Paramount killings. At the end of that a video, there is a cut to a brief, approximately ten second-long video of Petitioner in his hospital bed, apparently after the Paramount killings. The clip shows that the police videotaped Petitioner while he was hospitalized.

639. This video would have shown how the police interrogated Petitioner following the Paramount killings. This video was favorable to Petitioner because it would have shown that Petitioner was being interrogated by the police while he was in custody and before he was read his *Miranda* rights, as discussed in Claim 1.F. The video also shows Petitioner handcuffed to the hospital bed. The evidence was also material because it would have allowed reasonably competent trial counsel to move to exclude incriminating statements made by Petitioner while he was in custody.

640. As discussed in Claim 1.F, Petitioner's statements regarding Count III (Rita Motel) and Count I (Las Playas) were elicited in violation of his *Miranda* rights and were, therefore, inadmissible. Without Petitioner's

incriminating admissions regarding Counts I and III, a reasonable jury would have likely found that the evidence presented by the prosecution on each of those counts was not sufficient to convict Petitioner of first-degree murder for those counts.

641. The foregoing evidence was favorable to Petitioner as exculpatory evidence, was suppressed by the State and was material to Petitioner's case. It is at least reasonably probable that a more favorable outcome would have resulted had the evidence been disclosed. The suppression of this evidence substantially prejudiced Petitioner, rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the verdicts.

F. Suppression of Charter Suburban Hospital Records

642. The Prosecutor suppressed medical records of Petitioner of his treatment at Charter Suburban Hospital following the Paramount killings.

643. As discussed in Claim 1.F, Petitioner was interviewed by police at Charter Suburban Hospital, where he was being treated for his shooting injury after the Paramount killings.

644. The Charter Suburban Hospital records were favorable to Petitioner because they would have shown that Petitioner was in significant pain or duress or under the effects of substances or medication and, therefore, incapable of giving a knowing and voluntary waiver of his

Miranda rights. With this information, reasonably competent Trial Counsel would have been able to exclude Petitioner's pre- and post-*Miranda* warning statements as well as any evidence gathered by police as a result of Petitioner's statements. As discussed in Claim 1.F, this information was material because it would have allowed reasonably competent Trial Counsel to move to exclude, at a minimum, Petitioner's incriminating statements regarding Count III (Rita Motel) and Count I (Las Playas).

645. Without Petitioner's incriminating admissions regarding Counts I and III, a reasonable jury would have likely found that the evidence presented by the prosecution on each of those counts was not sufficient to convict Petitioner of first-degree murder for those counts.

646. The foregoing evidence was favorable to Petitioner as exculpatory evidence, was suppressed by the State and was material to Petitioner's case. It is at least reasonably probable that a more favorable outcome would have resulted had the evidence been disclosed. The suppression of this evidence substantially prejudiced Petitioner, rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the verdicts.

G. Suppression of Forensic Documentation

647. The prosecutor suppressed documentation relating to forensic analyses that could have been used to cross examine forensic experts presented by the prosecution including, but not limited to, Dwight Van

Horn (firearms), to the extent that any such documentation existed. *See* Exh. 128, K. Wong Decl., PE 1221 ¶¶ 5-6.

648. Prosecution witness Dwight Van Horn, a firearms examiner for the Los Angeles County Sheriff's Department, testified that the bullets and casings recovered from the Las Playas shooting (Count I) had been fired from a gun that police later found on Petitioner when he was arrested at the La Ruleta Bar in Long Beach, California on March 2, 1989.

649. Van Horn testified that he linked the gun with the firearms evidence recovered after the shooting at Las Playas (Count I). Van Horn concluded that bullets and shell casings recovered from Las Playas were forensically linked to Petitioner's gun. RT 1021, 1023-24.

650. Van Horn was incapable of recounting critical details of his ballistics examination beyond conclusory statements that the ammunition had been fired from Petitioner's gun. For example, Van Horn could not recall whether "the lands and the grooves" on the bullets might have been partially obscured, and he only remembered that "the criteria [was] there to call it a positive." RT 1030.

651. Van Horn testified that the nine .38 bullet cases recovered at the Paramount scene were fired from the same gun used at the Mazatlan shooting (Count IV). RT 2035. His testimony likely caused jurors to infer that Petitioner had committed the shooting in Paramount. The jury had already convicted Petitioner of first-degree murder for Mazatlan, and

evidence that the same gun had been used in both crimes likely convinced jurors to extend their finding of guilt in Mazatlan to the Paramount shootings.

652. The forensic documentation, to the extent it existed, could have been used by reasonably competent Trial Counsel to develop evidence to show that Van Horn failed to follow procedures and that his conclusions were unsupported by the scientific evidence. Without reliable testimony by Van Horn, the jury would have had reasonable doubt as to Petitioner's guilt in Count I and his guilt of felony murder in the Paramount killings. Thus, this information was both favorable and material to Petitioner.

653. The foregoing evidence was favorable to Petitioner as exculpatory evidence, was suppressed by the State and was material to Petitioner's case. It is at least reasonably probable that a more favorable outcome would have resulted had the evidence been disclosed. The suppression of this evidence substantially prejudiced Petitioner, rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the verdicts.

H. Conclusion

654. To the extent that this Court concludes that Trial Counsel and/or Appellate Counsel failed to seek relief for the suppression of evidence discussed in this claim and/or raise this challenge on appeal, Petitioner has been prejudicially deprived of effective assistance of counsel.

CLAIM 7: PETITIONER'S APPELLATE COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE BY FAILING TO RAISE ON APPEAL THE TRIAL COURT'S PREJUDICIAL ERROR IN ADMITTING A VIDEO OF THE PARAMOUNT CRIME SCENE.

655. Petitioner's convictions and sentences of death were unlawfully and unconstitutionally imposed in violations of petitioner's rights to due process, to a fair trial, to confront witnesses, to compulsory process, to present a defense, to the effective assistance of counsel, and to accurate and reliable guilt and penalty determinations, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 1, 7, 13, 14, 15, 16, 17, 24, and 28 of the California Constitution, because Petitioner's Appellate Counsel failed to raise on appeal that the trial court erred in admitting the Paramount crime scene video. Exh. 73, Peo. Trial Exhibit 40.

656. During the penalty phase of Petitioner's trial, Trial Counsel objected to the introduction of the crime scene of the Paramount killings video on the ground that it was more prejudicial than probative pursuant to California Evidence Code section 352, but the trial court nevertheless allowed the video to be played to the jury without sound. RT 1997-98. Appellate Counsel's failure to raise the trial court's error on appeal violated Petitioner's right to effective assistance of counsel as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution,

and Article I, Sections 1, 7, 14, 15, 16, 17, 24 and 28 of the California Constitution.

657. The Paramount video was graphic and contained bloody images of the victims at the scene of the incident. The video had little probative value and was cumulative because the jury did not need to see the victims at the scene in order to understand how they were killed or the sequence of events. The prosecution had presented testimony from the coroner and firearms expert Dwight Van Horn to convey the necessary information to the jury. Trial Counsel objected to the introduction of this video.

658. Petitioner's Appellate Counsel unreasonably failed to argue on Petitioner's appeal that the trial court erred in admitting the Paramount video over the objection of Trial Counsel. Appellate Counsel had no valid tactical reason for failing to do so and reasonable counsel would have raised this argument under the same circumstances. Therefore, Appellate Counsel's failure constituted ineffective assistance of counsel. Petitioner was prejudiced by Appellate Counsel's ineffective assistance. But for Appellate Counsel's ineffectiveness, it is reasonably probable that Petitioner would have received a more favorable outcome on his appeal.

CLAIM 8: PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY THE ADMISSION OF STATEMENTS OBTAINED IN VIOLATION OF HIS FIFTH AMENDMENT PROTECTION AGAINST SELF INCRIMINATION.

659. Petitioner's convictions and sentences of death were unlawfully and unconstitutionally imposed in violation of Petitioner's rights to due process, to a fair trial, to confront witnesses, to compulsory process, to present a defense, to the effective assistance of counsel, and to accurate, reliable guilt and penalty determinations, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 1, 7, 13, 14, 15, 16, 17, 24 and 28 of the California Constitution, because statements of Petitioner that were introduced at trial were obtained in violation of the Fifth Amendment protection against self incrimination.

660. Petitioner specifically incorporates by reference those factual allegations contained in Claim 1 and the accompanying exhibits as if set forth fully herein.

661. As set forth in Claim 1.F, Petitioner was questioned at length by police officers without being given any *Miranda* warnings while he was being treated for a gunshot wound at Charter Suburban Hospital on February 22, 1990. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). Petitioner was in custody and handcuffed to the hospital bed during questioning.

662. Once he was advised of his *Miranda* rights hours after the questioning had first begun, Petitioner reportedly waived his *Miranda* rights, and he was never told that his pre-*Miranda* statements would be inadmissible against him. Petitioner admitted later that evening that he shot and killed Efrem Baldia at the Rita Motel (Count III), and two days later he gave incriminating statements in which he named Francisco Manzano as the shooter at the Las Playas restaurant (Count I). Both statements were used by the prosecution against Petitioner at trial. RT 1554, CT 227, RT 1570-1597.

663. By the time Petitioner received the *Miranda* warnings, they were ineffective and inadequate at apprising him of his rights, particularly because the officers failed to advise Petitioner that his previous statements would be inadmissible against him. The post-*Miranda* statements by Petitioner were inadmissible for another independent reason: The *Miranda* warnings were not effective because Petitioner did not give a knowing and voluntary waiver of his rights. Petitioner was given the warnings when he was in pain from his wounds. Moreover, Officer Olmedo could not communicate with Petitioner sufficiently well in Spanish for Petitioner to give a knowing waiver of his constitutional rights.

664. Thus, Petitioner's Fifth Amendment protection against self incrimination was violated. As a result of this violation, incriminating and prejudicial statements made by Petitioner were admitted at trial.

665. The introduction of these statements substantially prejudiced Petitioner and rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the verdicts, and unconstitutionally deprived Petitioner of a fair and reliable determination of guilt and penalty.

666. To the extent that this Court concludes that Appellate Counsel failed to raise a challenge regarding the foregoing matters, Petitioner has been prejudicially deprived of his Sixth Amendment right to effective assistance of counsel.

CLAIM 9: PETITIONER WAS DENIED HIS RIGHT TO A FAIR TRIAL BECAUSE OF STATE MISCONDUCT.

667. Petitioner's convictions and sentences of death were unlawfully and unconstitutionally imposed in violation of Petitioner's rights to due process, to a fair trial, to confront witnesses, to compulsory process, to present a defense, to the effective assistance of counsel, and to accurate, reliable guilt and penalty determinations, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 1, 7, 13, 14, 15, 16, 17, 24 and 28 of the California Constitution, because of State misconduct.

1. The Introduction of Prior Testimony of Witness Angelica Contreras

668. The Prosecutor improperly presented videotaped testimony by

witness Angelica Contreras as part of his case for Count I (Las Playas), despite his blatant failure to exercise "reasonable diligence" and demonstrate "good faith" to procure her attendance at trial.

669. Petitioner specifically incorporates by reference those factual allegations contained in Claim 1 and the accompanying exhibits as if set forth fully herein.

670. When Contreras testified for the prosecution during a preliminary hearing on December 13, 1990, the trial court only allowed the testimony to be videotaped after cautioning that "the People do have a continuing obligation to keep track of the witnesses." CT 6. Before the videotaped testimony could be admitted, the Prosecutor had the burden of proving that he had exercised "reasonable diligence" to try to procure Contreras' attendance, Evid. Code § 240(a)(5), which included demonstrating that he had acted in "good faith" to try to secure her attendance, *People v. Jackson*, 28 Cal. 3d 264, 312 (1980), overruled on other grounds by *People v. Cromer*, 24 Cal. 4th 889 (2001). Moreover, when a witness' testimony is "deemed 'critical' or 'vital' to the prosecution's case" – as it was here, given that only Contreras testified to having seen Petitioner holding a gun at the Las Playas crime scene, CT 13-18, 33 – the prosecution "must take reasonable precautions to prevent the witness from disappearing," *People v. Hovey*, 44 Cal. 3d 543, 564 (1988) (citing People v. Louis, 42 Cal. 3d 969, 989-91 (1986)).

671. The Prosecutor failed to exercise diligence that even remotely met the threshold required for him to present Contreras' testimony by videotape. The testimony of District Attorney's Office investigator Kevin Sleeth, whom the Prosecutor questioned to demonstrate his alleged efforts to maintain contact with and procure Contreras for trial, in fact revealed that the prosecution had failed to meet the "stringent" due diligence requirement. *Jackson*, 28 Cal. 3d at 312; RT 808-14. As alleged in Claim 1.B.1.a., Sleeth testified that he had been instructed to find Contreras only one month before the State began presenting evidence in the trial. RT 810. Although Contreras' neighbors told him one month before trial that she might have moved to Mexico, he only called the local Mexican police station to follow up on that lead on the morning of his trial testimony. RT 810-11, 813.

672. Such minimal efforts fell far below the stringent due diligence requirement of the Prosecutor in this context. The preliminary hearing testimony of so critical a prosecution witness was inadmissible against Petitioner in this capital trial. The Prosecutor failed to fulfill his obligation to exercise "reasonable diligence" and show "good faith" in securing the absent witness' attendance at trial. His introduction of Angelica Contreras' videotaped testimony despite that lapse constituted misconduct.

673. To the extent that Appellate Counsel was required and/or permitted to challenge the State's misconduct on any of the foregoing

grounds, Appellate Counsel was unconstitutionally ineffective in failing to do so, such that Petitioner was prejudicially deprived of his Sixth Amendment right to the effective assistance of counsel.

2. Inflammatory and Prejudicial Testimony and Evidence

674. The Prosecutor improperly inflamed the passions of the jury by soliciting testimony and presenting evidence that would cause jurors to convict and sentence Petitioner based on emotion rather than rational deliberation.

675. Petitioner specifically incorporates by reference those factual allegations contained in Claim 1 and the accompanying exhibits as if set forth fully herein.

676. Courts have "consistently cautioned" against prosecutorial conduct "designed to appeal to the passions, fears and vulnerabilities of the jury." *United States v. Weatherspoon*, 410 F.3d 1142, 1149 (9th Cir. 2005).

a. Inflammatory and Prejudicial Testimony regarding Witnesses' Fear of Petitioner

677. The Prosecutor improperly elicited testimony from numerous witnesses about their alleged fear of Petitioner. Evidence of the witnesses' subjective fears was highly inflammatory and prejudicial during both the guilt and penalty phases. This testimony suggested that Petitioner was highly dangerous, and injected improper considerations into the jury's guilt

and penalty deliberations. This testimony was designed only to inflame the passions of jurors, and the Prosecutor's efforts to elicit such testimony constituted misconduct.

678. As alleged in Claim 1.F.2.a., the Prosecutor encouraged at least six guilt phase witnesses to testify about their alleged fear of Petitioner: Laura Lozano, RT 892, 895, 909 (Count I); Mario Medel, RT 1104-05 (Count II); Deneen Baker, RT 1056 (Count II); Ramiro Gamboa Salazar, RT 1300-01, 1322, 1325, 1327-31 (Count III); Nicholas Venegas, RT 1271-72 (Count III); and Adela Lopez , RT 1467. The Prosecutor also solicited similar testimony from penalty phase witness Patricia J. Marin, RT 2136-41.

679. In his examination of these witnesses, the Prosecutor repeatedly used leading questions to target the fear that the witnesses allegedly felt in the aftermath of the shootings, despite the fact that such fear was irrelevant to both guilt and penalty determinations. For instance, the Prosecutor asked Fort Knots manager Medel whether he "worried about anything happening" to him during the weeks he worked after the shooting. RT 1104-05. Similarly, he asked Deneen Baker whether she was "a little bit concerned about [her] safety" when she continued to work at Fort Knots. RT 1056. The Prosecutor inquired of Salazar whether he gave police a false name because he was "scared to tell," RT 1322, and he asked Venegas whether he claimed to not be able to recall certain events because

he was "worried about [his] family" and his mom, and because he was "scared for" himself, RT 1271. Of witness Lopez he asked point-blank, "Are you scared to testify?" RT 1467, and of Marin he inquired, "Are you afraid now?" RT 2141.

680. By drawing out witness testimony about their subjective fears of Petitioner and of participating in the judicial process, the Prosecutor repeatedly suggested to jurors that Petitioner was dangerous – and thus both guilty of the charged crimes and deserving of the death penalty. Such testimony had no probative value but was extremely prejudicial, in that it incited the passions of the jurors and appealed to their emotion, not their reason. The Prosecutor's deliberate efforts to elicit such emotionally inflammatory testimony constituted misconduct.

681. To the extent that Appellate Counsel was required and/or permitted to challenge the State's misconduct on any of the foregoing grounds, Appellate Counsel was unconstitutionally ineffective in failing to do so, such that Petitioner was prejudicially deprived of his Sixth Amendment right to the effective assistance of counsel.

b. Introduction into Evidence of Inflammatory and Prejudicial Photographs

682. The Prosecutor purposefully inflamed the jury's passion by introducing into evidence graphic photographs depicting the victims of the charged crimes. Such actions were designed only to appeal to the jurors'

emotions and as such constituted prosecutorial misconduct.

683. As alleged in Claim 1.F.2.b., several unduly graphic photographs were introduced into evidence during both the guilt and penalty phases of trial. During the guilt phase, the prosecution improperly introduced prejudicial color photographs depicting victims of the charged crimes. The prosecution also introduced prejudicial photographs during the penalty phase. Several of these photographs were exceedingly graphic and disturbing. Some of the images depicted bullet wounds to the forehead, cheek, and jaw line of victims. Many of the photographs depicted the faces of the decedents and disrobed parts of their bodies.

684. The Prosecutor's introduction of these photographs into evidence constituted misconduct because they were designed only to inflame the passions of the jury, and were otherwise unnecessarily cumulative, prejudicial, and of little probative value. The causes of death were never contested by the defense. The entry points of bullets and gruesome images of the cadavers therefore had minimal probative value. Moreover, the same evidence was presented through the testimony of Christopher Rogers, the deputy medical examiner from the Los Angeles County Coroner's Office. RT 1598, 2051. While the probative value was minimal at best, the prejudicial effect of these photographs was enormous. Exposing jurors to the graphic details of the victims' bodies and the crime scenes prejudicially impaired the jurors' ability to fairly and neutrally

weigh the evidence. It was improper for the Prosecutor to introduce such photographs where he realized, and likely intended, that they would appeal to the jurors' emotions.

685. To the extent that Appellate Counsel was required and/or permitted to challenge the State's misconduct on any of the foregoing grounds, Appellate Counsel was unconstitutionally ineffective in failing to do so, such that Petitioner was prejudicially deprived of his Sixth Amendment right to the effective assistance of counsel.

3. State Authorities Engaged in a Pattern of Misconduct That Created Prejudicially Misleading Evidence.

686. The Prosecutor and his agents secured false and/or misleading testimony and evidence against Petitioner by coercing, threatening, intimidating, tampering with, frightening, and/or coaching witnesses.

687. For example, Nurse Kathleen Estavillo testified at the penalty phase regarding statements made by Petitioner and his medical treatment for a gunshot wound after the Paramount killings occurred. RT 2069-2077.

688. Police officers instilled in Estavillo a fear of Petitioner to the point that she believed that she would be killed in retribution. As noted in her declaration:

> After he handcuffed Mr. Manriquez, Deputy Pando went out to his squad car and brought back a photograph he said he kept in his visor for the last three to six years. He said that he had been looking for Manriquez for years.

. . .

> During trial, the police picked me up to bring me to court to testify and dropped me off afterwards. They said they were concerned for my safety. The police told me that the defendant's family might be in the back of the courtroom, and that his family probably all lived around Paramount. They said this to suggest that the presence of his family might be a reason for me to fear my safety. At one point, the police suggested that I videotape my testimony, because I might not be around to testify. I interpreted them to mean that I might be killed in retaliation for my testimony against the defendant. I had no reason not to believe the officers. This made me extremely nervous – even paranoid.

Exh. 125, K. Estavillo Decl., PE 1150 ¶¶ 4, 6-7.

689. As a result of this misconduct, witnesses, among other things, failed to provide crucial information and testimony that was favorable to Petitioner. For example, it was not revealed until recently that Estavillo witnessed Petitioner being handcuffed to the hospital bed when Deputy Pando arrived. *See id.* at PE 1150 ¶ 3.

690. To the extent the Court concludes that the foregoing challenges were not raised before, the failures constitute prejudicial ineffective assistance of counsel and/or ineffective assistance of appellate counsel.

4. Conclusion

691. These acts of misconduct substantially prejudiced Petitioner and rendered the trial proceeding fundamentally unfair, eroded the

reliability of the verdicts and had a substantial and injurious effect on the verdicts, and unconstitutionally deprived Petitioner of a fair and reliable determination of guilt and penalty.

CLAIM 10: PETITIONER'S CONSTITUTIONAL AND STATUTORY RIGHTS WERE VIOLATED BY THE PROCESS USED TO SELECT AND IMPANEL THE JURY.

692. Petitioner's convictions and sentences of death were unlawfully and unconstitutionally imposed in violation of Petitioner's rights to due process, to a fair trial, to confront witnesses, to compulsory process, to present a defense, to the effective assistance of counsel, and to accurate and reliable guilt and penalty determinations, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and Article I, Sections 1, 7, 13, 14, 15, 16, 17, 24, and 28 of the California Constitution, because of the systematic, arbitrary and discriminatory exclusion of Hispanics and African-Americans from jury pools. State statutory mandates were also arbitrarily violated by the jury selection process, in violation of state law and the prohibition by the Due Process Clause of the federal Constitution against arbitrary deprivation of state liberty interests.

693. Petitioner is a Mexican national of Hispanic heritage. He was denied his right to a jury drawn from a fair cross section of the community, as guaranteed by the federal and state constitutions. Petitioner was tried in

1990 in the Southeast Judicial District of Los Angeles County, in Norwalk.

694. African Americans and Hispanics constitute distinctive groups for purposes of constitutional analysis.

695. According to the 1990 census, African Americans constituted approximately 11.2 percent of the population of Los Angeles County. The number of African Americans who were eighteen years old and older comprised approximately 10.8 percent of all individuals eighteen and over in Los Angeles County. The percentage of the population eligible for jury service that is African American is actually greater than this number, because Los Angeles County is home to a number of persons who are not citizens of the United States, but the number of black persons who are non-citizens is negligible. Thus, the absolute and comparative disparity percentage points provided below likely underestimates the true disparities for African Americans.

696. According to the 1990 census, Hispanics or Latinos constituted approximately 37.8 percent of the population of Los Angeles County. The number of Hispanic or Latino individuals who were eighteen years old and older comprised approximately 33.31 percent of all individuals eighteen and over in Los Angeles County. Hispanic or Latino individuals aged eighteen and over who were proficient in English comprised approximately 29.02 percent of the citizens eighteen and over in the County.

697. The group of persons actually eligible for jury service includes

persons who are both citizens of the United States and who are proficient in English. Because the "eighteen and over" population of Los Angeles County includes a number of non-citizen persons of Hispanic origin, the absolute and comparative disparity percentage points provided below likely slightly overestimates these disparities. However, the fact that the true percentages of Hispanic or Latinos in the Los Angeles population are actually higher than the figures provided by the census because the census typically undercounts Hispanic or Latino individuals minimizes the effect of this inflation. For example, in 1980 it undercounted Hispanics by between 2.2 percent to 7.6 percent. *Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal. 1990).

698. African Americans and Hispanics were underrepresented in the jury pools in Los Angeles County at the time of Petitioner's trial, rendering the trial proceedings fundamentally unfair and resulting in a substantial and injurious effect in the verdicts, and depriving Petitioner of a fair and reliable determination of guilt and penalty.

699. To the extent that this Court concludes that Trial Counsel and/or Appellate Counsel failed to challenge the composition of the jury on the foregoing grounds, Petitioner has been prejudicially deprived of the effective assistance of counsel.

CLAIM 11: PETITIONER'S DEATH SENTENCES ARE UNCONSTITUTIONAL BECAUSE THEY WERE SELECTED AND IMPOSED IN A DISCRIMINATORY, ARBITRARY, AND CAPRICIOUS FASHION AND WERE BASED ON IMPERMISSIBLE RACE AND GENDER CONSIDERATIONS.

700. Petitioner's convictions and sentences of death were unlawfully and unconstitutionally imposed in violation of Petitioner's rights to due process, to a fair trial, to confront witnesses, to compulsory process, to present a defense, to the effective assistance of counsel, and to accurate and reliable guilt and penalty determinations, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 1, 7, 13, 14, 15, 16, 17, 24, and 28 of the California Constitution, because the prosecution used race, gender, and other unconstitutional considerations in its charging decision to seek the death penalty.

701. The equal protection guarantee of the federal Constitution prohibits prosecuting officials from purposefully and intentionally singling out individuals for disparate treatment on an invidiously discriminatory basis. This principle has greater importance when the possible sentence is death. The U.S. Supreme Court consistently has recognized that the qualitative difference of death from all other punishments requires a greater degree of scrutiny of the capital sentencing determination. Accordingly, the Constitution demands a high degree of rationality in imposing the death

penalty. A capital sentencing system that permits race, gender, or other impermissible criteria to influence charging decisions or one that permits arbitrary and capricious charging decisions violates the Constitution.

702. Similarly, the Constitution is violated when the death sentencing scheme results in arbitrary and capricious charging and sentencing patterns. A death sentence is unconstitutionally imposed when the circumstances under which it has been imposed create an unacceptable risk that the death penalty may have been meted out arbitrarily or capriciously or through whim or mistake.

703. Under California law, the Los Angeles County District Attorney is responsible for identifying the murder cases in Los Angeles County in which the state will seek the death penalty.

704. During the period 1977-1995, the Los Angeles County District Attorney's Office used race as a criterion in its charging decision regarding the identification of cases in which to seek a penalty of death, including the decision to charge Petitioner. The Los Angeles County District Attorney's Office sought the death penalty in this case against Petitioner, who is Hispanic and an illegal immigrant from Mexico, while not seeking the death penalty in other cases with similar or more egregious facts than Petitioner's case where the defendant was white and non-Hispanic. Petitioner's race was a factor that was used to his detriment by the Los Angeles County District Attorney's Office in its charging decision to seek

the death penalty against him. The ultimate decision-maker in the Los Angeles County District Attorney's Office was white, as were many, if not all, of the intermediate decision-makers in Petitioner's case.

705. In addition to racial discrimination in Petitioner's case, there is a pattern of racial discrimination in the charging decisions of the Los Angeles County District Attorney's Office for the years 1977-1995. This pattern of racial discrimination in the charging decisions of the Los Angeles County District Attorney's Office is consistent with empirical studies indicating the widespread presence of racial bias in charging decisions generally. Such studies show that the death penalty is imposed and executed upon African-Americans with a frequency that is disproportionate to their representation among the number of persons arrested for, charged with, or convicted of death-eligible crimes. *See, e.g., Developments in the Law, Race and Criminal Process*, 101 Harv. L. Rev. 1472, 1525-26 (1988). Furthermore, Prosecutor Joseph Markus, who prosecuted the case against Petitioner, was reprimanded by the Los Angeles County District Attorney's Office for his use of a racial epithet to describe an African-American colleague. Exh. 33, L.A. County Civil Service Commission, *Walls v. Office of the District Attorney*, Case Nos. 90-371, 90-386, Findings of Fact and Decision, PE 0291.

706. During the period 1977-1995, the Los Angeles County District Attorney's Office used gender as a criterion in its charging decision

regarding the identification of cases in which to seek a penalty of death, including the decision to charge Petitioner. Petitioner's gender was a factor that was used to his detriment by the Los Angeles County District Attorney's Office in its charging decision to seek the death penalty against him. The ultimate decision maker in the Los Angeles County District Attorney's Office was male as were many, if not all, of the intermediate decision makers in Petitioner's case.

707. In addition to gender discrimination in Petitioner's case, there is a pattern of gender discrimination in the charging decisions of the Los Angeles County District Attorney's Office for the years 1977-1995. This pattern of gender discrimination in the charging decisions of the Los Angeles County District Attorney's Office is consistent with empirical studies indicating the widespread presence of constitutionally impermissible gender bias in charging decisions generally. The death sentence is imposed and executed upon men with a frequency that is disproportionate to their representation among the general population, as well as among the number of persons arrested for, charged with, or convicted of death-eligible crimes.

708. During the period 1977-1995, the Los Angeles County District Attorney's Office used economic status as a criterion in its charging decision regarding the identification of cases in which to seek a penalty of death, including the decision to charge Petitioner. Petitioner's economic

status was a factor that was used to his detriment by the Los Angeles County District Attorney's Office in its charging decision to seek the death penalty against him.

709. In addition to economic discrimination in Petitioner's case, there is a pattern of economic discrimination in the charging decisions of the Los Angeles County District Attorney's Office for the years 1977-1995. This pattern of economic discrimination in the charging decisions of the Los Angeles County District Attorney's Office is consistent with empirical studies indicating the widespread presence of constitutionally impermissible economic status bias in charging decisions generally.

710. The Los Angeles County District Attorney's utilization of Petitioner's indigence as a factor in charging him constitutes prosecutorial misconduct and violated Petitioner's fundamental due process rights. Los Angeles County is not alone in the prejudice against young indigent, minority men, as California's death row is overwhelmingly comprised of young indigent men.

711. Statistically, the death penalty in the State of California as a whole is disproportionately applied to impoverished defendants who are represented by counsel appointed at public expense. The death sentence is imposed and executed upon poor people with a frequency that is disproportionate to their representation among the general population, as well as among the number of persons arrested for, charged with, or

convicted of death-eligible crimes. The application of the death penalty against individuals based on their poverty level is simply another unjustifiable standard and arbitrary classification that is prohibited by the United States Constitution and the Constitution of the State of California. A prosecutor's utilization of the poverty level of an individual as a factor in deciding whether to charge capitally is also prosecutorial misconduct.

712. During the period from 1977-1995, the Los Angeles County District Attorney's Office applied no consistent permissible criteria in its charging decisions with respect to those cases in which it sought a penalty of death, including the decision to charge Petitioner. During this period, the Los Angeles County District Attorney's Office used impermissible criteria, namely race, gender and indigency of the defendant, in its charging decisions regarding the cases in which it would seek a penalty of death.

713. In Petitioner's case, the Los Angeles County District Attorney's Office decided to seek the death penalty. This charging decision was made on the basis of impermissible factors – race, gender and indigency – and was not based upon any constitutionally permissible factors that were consistently applied across all death penalty-eligible murder cases. The Los Angeles County District Attorney's Office sought the death penalty in this case against Petitioner, while not seeking the death penalty in other cases with similar or more egregious facts than those presented by Petitioner's case. The pattern of the charging decisions for

death-eligible homicides indicates that the Los Angeles County District Attorney's Office has no consistent, constitutionally permissible criteria, on which to base its death penalty decisions.

714. The application of race, gender, and economic status as criteria for imposing the death penalty against Petitioner was constitutionally impermissible. Similarly, arbitrary and capricious charging decisions violate the Constitution. Accordingly, Petitioner's sentences of death must be set aside.

715. Trial Counsel was ineffective in failing to present appropriate challenges to the charging decision. Trial Counsel failed to raise available challenges to the constitutionality of the charging decision in this case. Trial Counsel failed to raise a challenge to the California statutory scheme in general and failed to raise the issue that capital charging decisions and sentences in California, and in Los Angeles County in particular, are disproportionately determined by the race and gender of the victim, the race and gender of the accused, and the class of the accused. Trial Counsel's unreasonable and prejudicial failure to raise such challenges deprived Petitioner of his Sixth Amendment rights. A reasonably competent attorney during the time of Petitioner's trial would have raised such a challenge.

716. The violations of Petitioner's guaranteed constitutional rights in this regard were per se prejudicial and relief is warranted without any

showing that the error was harmless. This error so infected the integrity of the proceeding against Petitioner that the error cannot be deemed harmless and the State will be unable to meet its burden in showing this error harmless. In any event, this violation of Petitioner's rights had a substantial and injurious effect or influence on the verdicts, rendered the verdicts fundamentally unfair and resulted in a miscarriage of law.

CLAIM 12: THE DEATH SELECTION PROCESS USED TO CONDEMN PETITIONER TO DEATH VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS.

717. Petitioner's convictions, judgment of death, and confinement are unlawful and unconstitutional in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and Article I, Sections 1, 7, 13, 14, 15, 16, 17, 24, and 28 of the California Constitution. Petitioner's convictions, judgment of death, and confinement were obtained in violation of his rights to heightened reliability in the sentencing process, protection from double jeopardy, trial by jury, assistance of counsel, presentation of a defense, a fair and impartial jury, a reliable penalty determination, equal protection, and due process because California's death penalty statute fails to narrow the class of defendants eligible for the death penalty and permits the imposition of death in an arbitrary and capricious manner; the death selection factors upon which the jury was instructed were unconstitutionally vague, unreliable, and failed to

channel the jury's discretion; the trial court instructed the jury on the death selection factors without any effort to narrow or define any of the vague and overbroad language; the trial court did not convey that the central determination is whether the death penalty is appropriate, not merely authorized under the law; the trial court did not provide the jury with all the options afforded them; the penalty instructions favored and weighted aggravating evidence, and disfavored and minimized mitigating evidence; certain definitions in the penalty instructions were inaccurate, misleading or unconstitutional; and the weighing process upon which the jury was instructed was confusing and incorrect. The result of these violations was the imposition of a freakish, wanton, arbitrary and capricious judgment of death.

A. California's Death Penalty Statute Fails to Narrow the Class of Death-Eligible Defendants as Required by the Eighth and Fourteenth Amendments.

718. Petitioner was convicted, in a single trial, of four geographically, temporally and factually distinct counts of first degree murder and sentenced to death under California Penal Code sections 187(a) and 190.2(a)(3). The special circumstance rendering Petitioner eligible for imposition of a sentence of death was a finding of multiple murder, alleged and found true under Penal Code section 190.2(a)(3).

719. The Eighth and Fourteenth Amendments require that "death

penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." *California v. Brown*, 479 U.S. 538, 541 (1987) (citations omitted). A death penalty statute must, by rational and objective criteria, narrow the group of murderers upon whom the ultimate penalty can be imposed. *McCleskey v. Kemp*, 481 U.S. 279, 305 (1987).

720. Death penalty statutes must accomplish this narrowing function by defining categories of murderers eligible for death. *Zant v. Stephens*, 462 U.S. 862, 878 (1983). These categories must "genuinely narrow" the class eligible for the death penalty and must "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Id.*. The requirement that the jury find the presence of an objectively defined narrowing factor before considering the death penalty satisfies the constitutional concerns in *Furman* and *Gregg* only when it "serves the purpose of limiting the class of death-eligible defendants . . . ." *Blystone v. Pennsylvania*, 494 U.S. 299, 306-07 (1990); *Lowenfield v. Phelps*, 484 U.S. 231, 244-45 (1988). Further, the statutory narrowing factors must create a principled distinction between "the subset of murders for which the sentence may be imposed and the *majority of murders which are not subject to the death penalty*." *Wade v. Calderon*, 29 F.3d 1312, 1319 (9th Cir. 1994) (emphasis added).

721. First-degree murder in California is defined by Penal Code

section 189. As it read at the time of Petitioner's convictions, section 189 created three categories of first degree murders: murders committed by listed means, killings committed during the perpetration of listed felonies, and willful murders committed with premeditation and deliberation. At the time of Petitioner's convictions, Penal Code section 190.2 contained 29 special circumstances, or 29 different crimes punishable by death.

722. California Penal Code section 190.2's "special circumstances" are supposed to satisfy *Furman*'s narrowing requirement. *Brown v. Sanders*, 546 U.S. 212, 221 (2006); *see also People v. Bacigalupo*, 6 Cal. 4th 457, 467-68 (1993). However, the special circumstances listed in Penal Code section 190.2 do not perform the constitutionally required narrowing function. Instead, the special circumstances cover virtually all first degree murders.

723. At the time of Petitioner's convictions, there was substantial overlap between the murders committed by listed means in section 189 and the special circumstances set forth in section 190.2. Four of the five "means" listed in section 189 (murders by destructive device or explosive, poison, torture, and lying in wait) were also special circumstances. *See* Cal. Penal Code § 190.2(a)(4), (a)(6), (a)(15), (a)(18), and (a)(19). There also was complete overlap between the felony murders listed in section 189 and the special circumstances listed in Penal Code section 190.2(a)(17). As of the date of the crime, all of the felonies listed in section 189 (arson, rape,

robbery, burglary, kidnapping, train wrecking, sodomy, oral copulation, lewd act on a child, and rape by instrument) also were special circumstances. *See* Cal. Penal Code § 190.2(a)(17). The only intentional first-degree murders not expressly qualifying for the death penalty were those where the first-degree murder was established by proof of premeditation and deliberation. Some of these murders would have been capital murders because the defendant committed another murder, Cal. Pen. Code § 190.2(a)(2), (a)(3), the defendant acted with a particular motive, Cal. Pen. Code § 190.2 (a)(1), (a)(5), (a)(16), or the defendant killed a particular victim, Cal. Pen. Code § 190.2.(a)(7)-(a)(13). Virtually all the remaining premeditated murders also would have been capital murders because, by definition, most premeditated murders are committed while the defendant was lying in wait. Cal. Penal Code § 190.2(a)(15); *see People v. Morales*, 48 Cal. 3d 527, 557, 575 (1989); *see also People v. Ceja*, 4 Cal. 4th 1134, 1147 (1993) (Kennard, J., concurring).

724. The real breadth of the special circumstance categories is not in the number of categories alone, or in the number that produce death sentences, but in two factors that, in combination, make California's scheme exceptional. First, California, along with only seven other states (Florida, Georgia, Maryland, Mississippi, Montana, Nevada, and North Carolina), makes felony-murder simpliciter a narrowing circumstance. *See People v. Anderson*, 43 Cal. 3d 1104 (1987). Although the felony-murder

language of Penal Code section 189 is not identical to the special circumstance language, in application, there is no difference. *See People v. Hayes*, 52 Cal. 3d 577 (1990). Second, California, along with only three other states (Colorado, Indiana and Montana), makes "lying-in-wait" a "narrowing" circumstance. Cal. Penal Code § 190.2(a)(15). As interpreted by this Court, this circumstance encompasses a substantial portion of premeditated murders. Only California and Montana have death penalty schemes with both felony-murder simpliciter and lying-in-wait death-eligibility circumstances and, unlike California's numerous and broad felony-murder special circumstances, Montana's felony-murder narrowing circumstances encompass only two felonies: aggravated kidnapping and sexual assault on a minor. *See* Mont. Code Ann. § 46-18-303(7), (9) (1995).

725. The breadth of Penal Code section 190.2 is more than just theoretical. Empirical evidence confirms what is evident from the face of the statute in effect in 1993: a survey of 596 published and unpublished decisions on appeals from first and second degree murder convictions in California, from 1988 through 1992, as well as 78 unappealed murder conviction cases filed during the same period in three counties, Alameda, Kern, and San Francisco, demonstrates that Penal Code section 190.2 fails to perform the narrowing function required under the Eighth and Fourteenth Amendments. *California Death Penalty Scheme: Requiem for Furman,* 72

N.Y.U. L. Rev. at 1327-35. According to this survey, this Court reversed a capital case, in whole or in part, only once because of insufficient evidence to support the finding of special circumstances. *See People v. Morris*, 46 Cal. 3d 1 (1988). The results of this study of published appeals from first degree murder convictions make clear the following point: the overwhelming majority (92 percent) of non-death judgment first-degree cases are also factually special circumstance cases. The results of this study of unpublished appeals from first-degree murder convictions generally confirm the data for the published cases. Again, the overwhelming majority (85 percent) of first-degree murder cases are factually special circumstance cases, with the majority of the special circumstance cases being felony-murder cases. The distribution of special circumstances closely tracks the distribution in the published non-death judgment first-degree murder cases. The published case sample indicates that 92 percent of non-death judgment first-degree murder cases are factually special circumstance cases, while the unpublished case sample puts the number at 85 percent. When the percentages for the three categories of first degree murder cases (death judgment cases, published non-death judgment cases, and unpublished cases) are combined according to their respective proportions of total first degree murder cases, the result is that approximately 87 percent of first degree murder cases are factually special circumstance cases. Thus, approximately seven out of eight first-degree

murder cases are factually special circumstances cases, the majority of first-degree murders are felony murders, and felony murders are virtually all special circumstance murders.

726. The class of first degree murderers is narrowed to a death-eligible class not only by the special circumstances of section 190.2, but also by Penal Code section 190.5, which forbids application of the death penalty to anyone under the age of eighteen at the time of the commission of the crime. When juvenile first-degree murderers are excluded from the calculation, the result is that more than 84 percent of first degree murderers are statutorily death eligible under Penal Code section 190.2. Professor Shatz's study demonstrates that Penal Code section 190.2 fails to narrow genuinely the group of murderers who may be subject to the death penalty and does not address the risk of arbitrariness prohibited by the Eighth and Fourteenth Amendments. According to this study, only 9.6 percent of those statutorily death-eligible under California's death penalty scheme are actually sentenced to death. If 84 percent of first degree murderers are statutorily death-eligible, and only 9.6 percent are sentenced to death, California has a death sentence ratio of 11.4 percent. This ratio is significantly below the assumed percentage of death judgments at the time of *Furman* (15-20 percent), a percentage impliedly found by the United States Supreme Court to create enough risk of arbitrariness to violate the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238 (1972).

727. Because almost all first-degree murders in California fall within the special circumstances enumerated in Penal Code section 190.2, the death penalty statute fails to genuinely narrow the class of death eligible murderers in violation of the Eighth and Fourteenth Amendments. As a consequence, the death-eligible class is so large that fewer than one out of eight statutorily death-eligible convicted first degree murderers is actually sentenced to death. Under California's death penalty scheme, there is no meaningful basis to distinguish the cases in which the death penalty is imposed. California's scheme defines death-eligibility so broadly that it creates a greater risk of arbitrary death sentences than the pre-*Furman* death penalty schemes.

728. The overbroad death-eligible class is no accident. In 1978, the voters enacted Proposition 7, known as the "Briggs Initiative." Petitioner was tried and convicted under this 1978 death penalty law. The Briggs initiative was to give Californians the "toughest" death-penalty law in the country. California Journal Ballot Proposition Analysis, 9 Calif. J. (Special Section, November 1978) p. 5. The intent of the voters, as expressed in the ballot proposition arguments, was to make the death penalty applicable to all murders:

> And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the 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.

1978 Voter's Pamphlet, p. 34.

729. The Briggs Initiative sought to achieve this result by expanding the scope of California Penal Code section 190.2 in a number of respects. The Briggs Initiative more than doubled the number of special circumstances, adding five more "victim" circumstances, Cal. Pen. Code § 190.2(a)(8) (federal law enforcement officer), (9) (fireman), (11) (prosecutor), (12) (judge), (13) (elected or appointed official); four more felony-murder circumstances, Cal. Pen. Code § 190.2(a)(17) (iv) (sodomy), (vi) (oral copulation), (viii) (arson), (ix) (train wrecking); two more "means" circumstances, Penal Code section 190.2(a)(15) (lying in wait), (19) (poison); two more "motive" circumstances, Cal. Pen. Code § 190.2(a)(5) (to avoid arrest or escape), (16) ("hate" motive); and one new catchall circumstance: that the murder was "especially heinous, atrocious, or cruel, manifesting exceptional depravity," Cal. Pen. Code § 190.2(a)(14). The Briggs Initiative substantially broadened the definitions of prior special circumstances, most significantly by eliminating the across-the-board homicide *mens rea* requirement of the 1977 law. Under the Briggs Initiative, the majority of the special circumstances for the actual killer, including the felony-murder circumstances, have no homicide *mens rea* requirement. *See* Cal. Pen. Code § 190.2(a)(17); *see also People v.*

Anderson, 43 Cal. 3d 1104 (1987). The Briggs Initiative expanded death-eligibility for accomplices by eliminating the "personal presence" and "physical aid" requirements generally applicable under the 1977 law.

730. Since the adoption of the Briggs initiative in 1978, the Legislature and this Court have continued to expand the scope of both first-degree murder and the special circumstances. In 1982, the Legislature added a new "means" theory of first-degree murder to Penal Code section 189: knowing use of armor-piercing bullets. 1982 Cal. Stat. 950, § 1 (codified as amended at Cal. Penal Code § 189). In 1990, Proposition 115 added five first-degree felony murders to Penal Code section 189 (felony-murder kidnapping, train wrecking, sodomy, oral copulation and rape by instrument). In 1993, the Legislature added felony-murder carjacking and murder perpetrated by means of discharging a firearm from a motor vehicle to section 189. *See* Stats. 1993, c. 611, §§ 4, 4.5, 6. In 1981, the Legislature, as part of a general rejection of the diminished capacity defense, eliminated two mental state defenses previously available in first-degree murder cases. 1981 Cal. Stat. 404, §§ 2, 7 (codified as amended at Cal. Pen. Code §§ 22, 189). This Court had previously held that proof of intoxication (and, inferentially, any mental defect) could negate malice, even in the case of a premeditated killing, *People v. Conley*, 64 Cal. 2d 310 (1966), but the defense was eliminated by amendments to the definition of "malice," Cal. Penal Code § 188; *see also People v. Saille*, 54 Cal. 3d 1103

(1991) (explaining that changes in section 188 repudiated *Conley*). Similarly, this Court had earlier held that, even in the case of a planned killing, a defendant could negate "premeditation and deliberation" by raising a doubt as to whether the defendant had the capacity to "maturely and meaningfully reflect upon . . . his contemplated act." *People v. Wolff*, 61 Cal. 2d 795 (1964). That defense was eliminated by amendments to the definition of "willful, deliberate, and premeditated killing." Cal. Penal Code § 189; *see also People v. Stress*, 205 Cal. App. 3d 1259 (1988).

731. The list of special circumstances underwent similar statutory expansions. In 1990, Proposition 115 added two more felony-murders to the special circumstances list: mayhem and rape by instrument. It also expanded the witness killing special circumstance to apply to witnesses in juvenile proceedings. It expanded the liability of felony-murder accomplices, eliminating the intent to kill requirement and requiring only that the accomplice meet the constitutional threshold required by the Eighth Amendment and controlling Supreme Court decisions. Despite the far broader sweep of the special circumstances under the Briggs Initiative and later amendments and interpretations, the special circumstances are somehow still allegedly expected to 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*, 6 Cal. 4th 457 (1993). As

shown above, they do not.

732. In the context of felony murders, this Court has not allowed the type of "bootstrapping" that California's death penalty applies to defendants. *See People v. Ireland*, 70 Cal. 2d 522 (1969); *People v. Wilson*, 1 Cal. 3d 431 (1969). In *Ireland*, this Court held that "a second degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged" because that "kind of bootstrapping finds support neither in logic nor in law." *Ireland*, 70 Cal. 2d at 539. Under California's death penalty statute, however, a prosecutor need only show a defendant guilty of first degree murder, and in all those cases, because of the overlap between elements, that defendant will also become death eligible. In *Ireland*, this Court condemned such illogical bootstrapping. It should now condemn the similar bootstrapping that results in automatic death eligibility for defendants convicted of first degree murder.

733. Compounding the problem presented by the overbroad class of death eligible murderers, individual prosecutors in California are afforded complete discretion to determine whether to charge special circumstances and whether to seek death. There are no statewide standards to guide the prosecutors' discretion, thereby creating county-by-county arbitrariness. *See* Penal Code §§ 187-190.5. Some offenders, under the California

statutory scheme, are chosen as candidates for the death penalty by one prosecutor, while others with similar factors in different counties are not. This arbitrary determination can be made at the charging stage, prior to trial, after the guilt phase, and during or even after the penalty phase. This range of opportunity, coupled with the absence of any standards to guide the prosecutor's discretion, permits reliance on constitutionally irrelevant and impermissible considerations, including race, ethnicity, sexual orientation, and/or economic status. Additionally, the prosecutor is free to seek death in virtually every first-degree murder case, and to argue that death should be imposed based on nothing more than the same facts that substantiated a conviction for first-degree murder.

734. Petitioner would not have been charged with the death penalty had he been charged with the same crimes in many other counties in California. The California statutory scheme, by design and in effect, improperly produced arbitrary and capricious prosecutorial discretion throughout the capital case process, in charging, prosecuting, submitting the case to the jury. This violates the Eighth and Fourteenth Amendments.

735. The great majority of states that sanction capital punishment seek to minimize arbitrariness by requiring comparative, or "inter-case," appellate sentence review. *See* Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After "Gregg": Only "The Appearance of Justice"* 87 J. Crim. L. & Criminology 130, 272 (1996). By

statute, Georgia requires that the state Supreme Court determine whether "the sentence is disproportionate compared to those sentences imposed in similar cases." Ga. Stat. Ann. § 27-2537(c). This 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*, 408 U.S. 238 (1972)." *Gregg v. Georgia*, 428 U.S. 153, 198 (1976). Towards the same end, Florida has judicially "adopted the type of proportionality review mandated by the Georgia statute." *Proffitt v. Florida*, 423 U.S. 242 (1976). Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review. 87 J. Crim. L. & Criminology at 272.

736. Penal Code section 190 neither requires nor forbids inter-case proportionality review. This Court has made it clear, however, that inter-case proportionality review is not permitted in California. *See People v. Wharton*, 53 Cal. 3d 522, 603 (1991); *People v. Morris*, 53 Cal. 3d 152, 234 (1991); *People v. Marshall*, 50 Cal. 3d 907, 939 n.8 (1990). This blanket prohibition on the consideration of any evidence showing that similarly situated defendants are treated differently by California prosecutors or imposed by California juries violates the United States Constitution.

737. California's death penalty statute fails to narrow genuinely the class of death eligible murderers in violation of the Eighth and Fourteenth Amendments and permits the imposition of death sentences in an arbitrary

and capricious manner. Since Petitioner was prosecuted under this unconstitutional statute, his death sentences are invalid.

B. The California Statute on Aggravating and Mitigating Factors is Unconstitutionally Vague and Ambiguous.

738. Penal Code section 190.3 sets forth the aggravation and mitigation circumstances that the jury is to weigh in determining whether to impose a sentence of death upon a defendant convicted of special circumstance murder. Penal Code section 190.3 not only fails to serve the constitutionally mandated purpose of narrowing the class of death-eligible defendants but is itself so vague and confusing that it renders the capital sentencing scheme unconstitutional.

739. The jury was instructed concerning factor 190.3 (k): "Any other circumstance which extenuates the gravity of the crime even though it's not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." RT 2299; CALJIC No. 8.85; Cal. Pen. Code § 190.3(k). This instruction is a slight modification of factor (k) as it appears in the statute, a modification based on this Court's "considerable discomfort with factor (k)." *People v. Easley*, 34 Cal. 3d 858 (1983); *see also Ayers v. Belmontes*, 127 S.Ct. 469, 482 (2006) (Stevens, J., dissenting). In *Easley*, this Court effectively amended factor (k) to "avoid potential misunderstanding in the

future" by adding that the jury may also consider "any other aspect of the defendant's character or record that the defendant proffers as a basis for a sentence less than death." *Easley*, 34 Cal. 3d at 878; *Ayers*, 127 S.Ct. at 482 (Stevens, J., dissenting) (discussing *Easley*). However, the amendment has not fulfilled the Court's hope, as juries continue to misunderstand and misinterpret factor (k).

740. Most jurors do not understand the basic constitutional concepts underlying capital sentencing. *See generally* William J. Bowers, *The Capital Jury Project: Rational, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043, 1077-1102 (1995); Craig Haney, *Taking Capital Jury Seriously*, 70 Ind. L.J. 1223 (1995). Worse, these misunderstandings almost always skew the process in favor of death. *See* James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 Ind. L.J. 1161, 1176-77 (1995); Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 Law & Human Behavior 411, 428 (1984). In a study by Professor Craig Haney, an "expanded" factor (k) instruction nearly identical to the one[21] given here, RT 2299, was found to

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[21] The "expanded factor (k)" instruction in Haney's study read: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less

(Footnote Continued on Next Page.)

be the least accurately understood of California's 11 sentencing factors, with 36 percent of his respondents erroneously concluding that it is an aggravating, not a mitigating, factor. Haney & Lynch, 18 Law & Human Behavior at 423-24, 428-29 (1994); *see also United States ex rel. Free v. Peters*, 806 F. Supp. 705, 723 (N.D. Ill. 1992), *rev'd* 12 F.3d 700 (7th Cir. 1993).[22]

741. A study of actual California jurors who 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

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than death."

[22] The Seventh Circuit's rejection of empirical data about jurors' comprehension of instructions (*Free v. Peters,* 12 F.3d 700 (7th Cir. 1993); *Gacy v. Welborn,* 994 F.2d 305 (7th Cir. 1993)) was based on the doctrine of *Teague v. Lane,* 489 U.S. 288 (1989), a ground not relevant to litigation in the state courts. *Williams v. Chrans,* 50 F.3d 1356, 1357 1358 (7th Cir. 1995).

> 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.

Craig 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, 167-68 (1994) (emphasis in original); *see also McDowell v. Calderon*, 116 F.3d 364 (9th Cir. 1997) (Trott, J., dissenting) (11 jurors thought that they could not consider the defendant's background as mitigating evidence under factor (k)).

742. Insofar as these studies indicate that the lack of understanding of factor (k) is attributable to a pervasive lack of understanding of what "mitigation" means, Haney & Lynch, 18 Law & Human Behavior at 420-22, the constitutional harm is even more pronounced. *See also State v. Bey*, 112 N.J. 123, 168-70 (1988) (instructions on mitigating factors which 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); *McDowell v. Calderon,* 116 F.3d 364 (Trott, J., dissenting).

743. The unconstitutional vagueness of factor (k) as judicially amended by this Court is also demonstrated by the inability of the courts themselves to agree on what it means. Since this Court tried to "avoid potential misunderstanding" in its 1983 *Easley* decision, there have been multiple decisions by divided courts unable to agree on an interpretation.

Indeed, the question has proved so vexing it has reached the United States Supreme Court no less than three times since then. *See Ayers v. Belmontes*, 127 S.Ct. 469 (2006) (5 to 4 decision reversing for the second time a divided Ninth Circuit decision); *Brown v. Payton*, 544 U.S. 133 (2005) (5 to 3 decision reversing 6 to 5 Ninth Circuit en banc decision); *Boyde v. California*, 494 U.S. 370 (1990) (5 to 4 decision affirming 4 to 3 decision by this Court). This Court should put an end to this ongoing confusion and controversy by declaring factor (k) unconstitutionally vague.

744. 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 Eighth 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; on the contrary, there is every reason to believe that they affirmatively did not understood their duties.

745. 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 him to die because of those misconceptions, in violation of his right to a reliable penalty verdict reached through due process of law. Because there is more than a reasonable probability that the jury applied the instructions on

factors (a)-(k) in an unconstitutional manner, reversal of Petitioner's death sentence is mandated under the Eighth and Fourteenth Amendments. *Beck v. Alabama,* 447 U.S. 625 (1980); *Estelle v. McGuire*, 502 U.S. 62 (1991). Thus, Petitioner's death sentence is invalid.

C. The Jury Instructions on Aggravation and Mitigation Were Unconstitutionally Inaccurate, Misleading and Biased Toward a Death Verdict.

746. The statutory sentencing factors, as applied here through the instructions on mitigation, were prejudicially inaccurate, incomplete and misleading. The result was to unconstitutionally bias the jury to return a death verdict. First, the trial court instructed the jury on all of the statutory sentencing factors, even though some were clearly inapplicable. The failure to delete inapplicable factors, combined with the failure to specify which factors were mitigating, allowed Petitioner's jury to consider mitigating evidence in aggravation of the penalty. Factor (e), for example, concerns the victim's consent to the homicidal act, and factor (f) concerns a defendant's belief in the moral justification for the act. Cal. Penal Code § 190.3 subd. (e), (f). These factors, which can only be considered in mitigation under state law,[23] had no relevance in this case. The crimes at issue were not rendered more heinous than an ordinary murder by the fact

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[23] *See, e.g., People v. Whitt*, 51 Cal. 3d 620, 654 (1990) (factors (d), (e), (f), (h), and (k) "can only mitigate").

that one of the victims did not consent to the homicidal act, or by the fact that Petitioner had no reasonable belief that his actions were morally justified. Yet, the instructions improperly suggested otherwise. Thus, the jury was permitted to aggravate Petitioner's sentence on the basis of factors that should have played no role in the sentencing process.

747. Moreover, the failure to delete unsupported factors effectively denigrated the mitigation that was presented. In no other area of criminal law are instructions given as to matters unsupported by the evidence. The effect here was to permit individual jurors to decide whether an enumerated factor was relevant. Such ad hoc determinations of relevancy, permitting consideration of factors not anchored in evidence, undermined the reliability of the sentencing process and deprived Petitioner of his right to an individualized sentencing determination based on permissible factors relating to his background and character, and to the crime.

748. Second, factor (h) is "[w]hether or not *at the time of the offense* the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication." Cal. Pen. Code § 190.3(h) (emphasis added). Similarly, factor (d) is "whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." Cal. Penal Code § 190.3(d). There is a substantial and impermissible risk that the jury would understand

the temporal language in factors (d) and (h) – i.e., "at the time of the offense" – to mean that evidence otherwise related to such factors could not be given mitigating weight if it did not influence the commission of the crime. But inferences that do "not relate specifically to [the defendant's] culpability for the crime he committed" may nevertheless be mitigating under the Eighth Amendment. *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986); *Tennard v. Dretke*, 542 U.S. 274 (2004) (rejecting the contention that evidence of low IQ does not constitute constitutionally relevant mitigation unless there is a nexus between the condition and the capital offense). There is a substantial likelihood that Petitioner's jury concluded that factor (d) and (h) evidence must be contemporaneous with the crime to be considered as mitigating, and therefore refused to consider constitutionally relevant defense evidence on that basis.

749. Indeed, one of the primary misconceptions harbored by jurors concerning mitigation is that it relates only to the circumstances of the crime. *See* Haney & Lynch, 18 Law & Human Behavior at 422-24 (1994); Haney, et al., 50 (no.2) J. of Social Issues 149 (1994). Thus, the definition of mitigation given in this case was substantially likely to have been understood as limiting the jury's consideration solely to the circumstances of the crime, in violation of Petitioner's Eighth Amendment right to have the jury consider any and all evidence that "might serve 'as a basis for a sentence less than death'" even if unrelated to the capital crime. *Tennard*,

542 U.S. at 287 (quoting *Skipper*, 476 U.S. at 7 n.2 (1986)). The trial court's failure to provide the jury with an adequate understanding of this critical concept undermined the reliability of the ensuing death judgment, failed to channel the jury's discretion, and resulted in the failure to consider relevant mitigating evidence.

750. The jury was instructed under CALJIC No. 8.88 that "[a] mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." RT 2323. This definition of mitigation did not correct the problem or cure the jury's likely misunderstanding. It did not adequately inform the jury of the full scope of evidence that must be considered in determining whether to impose death or life and was reasonably likely to be understood as limiting the mitigating evidence the jury should consider.

751. Third, the trial court failed to instruct the jury affirmatively to consider all sympathetic mitigating factors and non-statutory mitigation, and thereby violated Petitioner's right to an individualized and reliable sentencing determination.

752. Fourth, the trial court also failed to instruct the jury on the appropriate role that sympathy for Petitioner and his family could play in their deliberations. *See Penry v. Lynaugh*, 492 U.S. 302 (1989);

Hitchcock v. Dugger, 481 U.S. 393 (1987). The trial court's failure to specifically instruct the jury that the "no sympathy" admonition of CALJIC 1.00, which was given at the guilt phase, did not apply to the penalty phase, further undermined Petitioner's right to a reliable and individualized sentencing determination.

753. Because Petitioner's jury was substantially likely to have been misled and to have not considered any and all evidence that "might serve 'as a basis for a sentence less than death,'" *Tennard*, 542 U.S. at 287 (quoting *Skipper*, 476 U.S. at 7 n.2 (1986)), and because the trial court's improper instructions magnified the constitutional error, Petitioner's death sentences are invalid.

754. To the extent the above points were not raised before, the failure(s) constitute prejudicial ineffective assistance of counsel and/or ineffective assistance of Appellate Counsel.

CLAIM 13: PETITIONER'S RIGHT TO CONSULAR NOTIFICATION UNDER THE VIENNA CONVENTION WAS VIOLATED.

755. Petitioner's convictions and sentences of death were unlawfully and unconstitutionally imposed in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and Article I, Sections 1, 7, 13, 14, 15, 16, 17, 24, and 28 of the California Constitution, and the Vienna Convention on Consular Relations ("Vienna Convention"), specifically the right of consular

notification. Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 23 U.S.T.77.

756. The International Court of Justice ("ICJ") found that the United States violated the Vienna Convention rights of Petitioner in *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31). The ICJ's binding decision granted Petitioner judicial "review and reconsideration" of his convictions and sentences. *Avena,* 2004 I.C.J. at 64. The President of the United States affirmed the binding force of this decision on state courts. Exh. 50, Memorandum from President George W. Bush on Compliance with the Decision of the International Court of Justice in *Avena,* PE 0372. Because Petitioner was prejudiced by the violation of his Vienna Convention rights, he is entitled to a new trial and sentencing hearing. At a minimum, *Avena* guarantees Petitioner an evidentiary hearing on the effect of the violation of his Vienna Convention rights.

757. In 1969, the United States ratified the Vienna Convention and the accompanying Optional Protocol Concerning Settlement of Disputes ("Optional Protocol"). The Vienna Convention grants foreign nationals detained in the United States the right to contact their consulate. Vienna Convention, art. 36, Apr. 24, 1963, 23 U.S.T.77. Detaining authorities must "inform the person concerned without delay of his rights under [the Vienna Convention]." Vienna Convention, art. 36, Apr. 24, 1963, 23 U.S.T.77; *see also* Cal. Penal Code § 843 (c) (requiring notification to

occur within two hours of arrest). The Optional Protocol submits the United States and other signatories to the "compulsory jurisdiction" of the ICJ for settling disputes that arise under the Convention. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T 325, 326.

758. On February 22, 1990, Petitioner was arrested for murder. There is no record that detaining authorities ever informed Petitioner of his rights as a Mexican national under the Vienna Convention. The Mexican consulate did not become aware of Petitioner's case until more than a year after his arrest, on June 12, 1991. Exh. 124, Affidavit of Augustin Rodriguez de la Gala, PE 1147 ¶ 18. The Mexican consulate responded on August 6, 1991, and agreed to provide assistance in Petitioner's case. *Id.*

759. On January 9, 2003, the Government of Mexico initiated proceedings against the United States in the ICJ, alleging that the United States had violated the consular notification provisions of the Vienna Convention in the case of Petitioner and 53 other Mexican nationals. *Avena*, 2004 I.C.J. 12. The United States participated fully in each stage of the *Avena* case, and did not contest the jurisdiction of the ICJ to settle disputes under the Vienna Convention.

760. On March 31, 2004, the ICJ ruled that United States had breached each and every obligation under the Vienna Convention in the Petitioner's case. *Avena,* 2004 I.C.J. at 54. Accordingly, the ICJ found that

Petitioner is entitled to full "review and reconsideration" of his convictions and death sentences, and the legal consequences of the breach of his treaty rights. *Avena,* 2004 I.C.J. at 64. The ICJ ruled that the review must be "effective" and take "account of the violation of the rights set forth in [the] Convention." *Avena,* 2004 I.C.J. at 64 (citations omitted).

761. The United States has a binding treaty obligation to abide by the ICJ judgment in *Avena.* The United States voluntarily consented to the compulsory authority of the ICJ when the President ratified and the Senate gave unanimous advice and consent to the terms of the Optional Protocol. 115 Cong. Rec. 30997 (Oct. 22, 1969). "The Optional Protocol serves as a forum selection clause, with the effect that parties that have selected the ICJ as the forum to decide their disputes are bound to carry out its decisions." Brief for International Court of Justice Experts as *Amici Curiae* at 5, *Medellin v. Texas*, No. 06-984 (2007). Under the Optional Protocol, the United States must comply with ICJ judgments to which it is a party.

762. The treaty obligations of the United States are the supreme law of the land. U.S. Const., art. VI. Specifically, the United States must enforce the *Avena* judgment in its domestic courts. "A state court is not free to depart from the . . . application of an international treaty as authoritatively settled by an international tribunal exercising a consent-based jurisdiction accepted by the federal political branches . . . ." Brief for International Court of Justice Experts as *Amici Curiae* at 6, *Medellin v.*

Texas, No. 06-984 (2007). *Avena* applies to all judicial authorities within the United States, which must carry out their judicial duties consistent with the judgment.

763. Thus, U.S. obligations under the Vienna Convention trump conflicting state law: "To the extent that there are conflicts with . . . State laws[,] the Vienna Convention . . . would govern as in the case of bilateral consular conventions." Sen. Exec. Rep. No. 91-9 at 18. Therefore, in judicial proceedings involving *Avena* parties, including this case, the terms of the ICJ judgment preempt any contradictory state procedural default rules and standards of review.[24]

764. In 2005, the President of the United States issued a directive affirming that the *Avena* judgment is binding upon state courts:

> I have determined, pursuant to the authority vested in me as President by the Constitution

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[24] In *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), the Supreme Court ruled that ICJ interpretations of the Vienna Convention are not precedent in U.S. courts. Unlike Petitioner, however, the parties in *Sanchez-Llamas* were not involved in the *Avena* litigation; they did not have rights to specific relief under *Avena*. Therefore, the Supreme Court did not have occasion to rule on the enforceability of ICJ judgments in U.S. courts. Although the ICJ's interpretations of the Vienna Convention are not binding, the ICJ's resolutions of specific disputes arising under the Convention are binding. *Sanchez-Llamas* did not foreclose U.S. enforcement of the *Avena* judgment. This is confirmed by the Supreme Court's grant of *certiorari in Medellin v. Texas*, involving another Avena party who was denied "review and reconsideration" by Texas courts. *Medellin v. Texas*, 127 S. Ct. 2129 (2007).

> and laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having state courts give effect to that decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

Exh. 50, Memorandum from President George W. Bush on Compliance with the Decision of the International Court of Justice in *Avena,* PE 0372.

765. A Presidential directive has the same force of law as an Executive Order. Exh. 49, Memorandum for the Counsel to the President, Jan. 29, 2000, PE 0370. Therefore, the Presidential directive itself establishes an independent basis for asserting Petitioner's rights under *Avena*. "The authority to decide whether this Nation will comply with an ICJ decision, and, if so, how compliance should be achieved, falls on the President." Brief for United States as *Amicus Curiae* supporting Petitioner at 11, *Medellin v. Texas*, No. 06-984 (2007). In this case, the President determined that to protect the interests of United States citizens abroad, promote the effective conduct of foreign relations, and underscore the United States' commitment in the international community to the rule of law, state courts must provide specific relief to *Avena* parties. *Id.* at 9. Indeed, the President has determined "prompt compliance" is in "the paramount interest of the United States." Brief for United States as *Amicus Curiae* supporting Respondent, 2005 WL 504490 at 42, *Medellin v. Dretke*,

544 U.S. 660 (2005) .

766. The President has express authority to represent the United States in cases before the ICJ, 22 U.S.C. § 28 (2006), and is the "sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). The President's determination to implement the *Avena* judgment therefore establishes a "binding federal rule" and hence constitutes the supreme law of the land. Brief for United States as *Amicus Curiae* supporting Respondent, 2005 WL 504490 at 14, *Medellin v. Dretke*, 544 U.S. 660 (2005). The Supreme Court has repeatedly upheld the President's inherent authority to settle claims of particular individuals in connection with disputes with foreign nations. *American Insurance Association v. Garamendi*, 539 U.S. 396, 415 (2003); *Dames & Moore v. Regan*, 453 U.S. 654, 682 (1981). "In light of the President's established authority to resolve disputes with a foreign government . . . the Optional Protocol . . . should be understood to recognize, and to provide the President with . . . [the] implementation authority at stake here." Brief for United States as *Amicus Curiae* supporting Petitioner at 14, *Medellin v. Texas*, No. 06-984 (2007).

767. Specifically, the President's determination gives Petitioner the right to enforce the *Avena* judgment in a proceeding filed in California state courts. The United States explained:

> Under that [Presidential] determination, in order to obtain "review and reconsideration" of their convictions and sentences in light of the decision of the ICJ in Avena, the 51 named individuals may file a petition in state court seeking such review and reconsideration, and the state courts are to recognize the Avena decision. In other words, when such an individual applies for relief to a state court with jurisdiction over his case, the Avena decision should be given effect by the state court . . . .

Brief for United States as *Amicus Curiae* at 42, *Medellin v. Dretke*, 544 U.S. 660 (2005). Therefore, the President's directive independently entitles Petitioner to specific relief under *Avena.*

768. Courts considering Vienna Convention claims have used a three-prong test to determine prejudice: (1) the defendant did not know he had a right to contact his consulate for assistance; (2) he would have availed himself of the right had he known of it; and (3) it was likely that the consulate would have assisted the defendant. *See United States v. Rangel-Gonzales,* 617 F.2d. 529, 532 (9th Cir. 1980); *United States v. Raven*, 103 F. Supp. 2d 38 (D. Mass. 2000); *United States v. Tapia-Mendoza*, 41 F. Supp. 2d 1250, 1254 (D. Utah 1999); *Torres v. State*, 120 P.3d 1184 (Ok. 2005); *People v. Preciado-Flores*, 66 P.3d 155, 161 (Colo. App. 2002), *cert. denied*, 2003 Colo. LEXIS 327 (2003); *Zavala v. State*, 739 N.E.2d 135, 142 (Ind. App. 2000); *see also* Ann K. Wooster, *Annotation, Construction and Application of Vienna Convention on Consular Relations (VCCR), Requiring that Foreign Consulate be Notified When One of its*

Nationals is Arrested, 175 A.L.R. Fed. 243 (2002).

769. Petitioner satisfies all three prongs. Petitioner was arrested on February 22, 1990. As adjudicated in the ICJ, Petitioner was not notified of his rights under the Vienna Convention. *Avena,* 2004 I.C.J. at 54. Petitioner would have availed himself of those rights, as he ultimately did a year later when defense counsel became aware the Mexican consulate could provide assistance. Exh. 124, de la Gala Affidavit, PE 1144. Finally, the Mexican consulate would have assisted Petitioner, as evidenced by their willingness to assist trial counsel in gathering evidence. *Id.*

770. Since the Petitioner has shown that "he did not know he could have contacted his consulate, would have done so, and the consulate would have taken specific actions to assist," he has satisfied the prejudice standard of *Avena*. *Torres,* 120 P.3d at 1186-87. Petitioner is, therefore, entitled to relief. As the Oregon Supreme Court explained, actual prejudice under *Avena* does not turn on whether the assistance of Mexican consulates would have "affect[ed] the outcome of the proceedings." *Id.* The Court must provide relief for the violation of Petitioner's rights "[w]hether or not the aid [he was denied would] have result[ed] in a different case outcome." *Id.*

771. *Avena* directs United States courts to fashion appropriate remedies tailored to the facts of each individual case. These remedies can encompass new trials, new sentencing proceedings, and exclusion of evidence. Therefore, in assessing the prejudice that flowed from the

violation here, this Court should consider the effects of the violation on the fairness of the proceedings. This is the only review and reconsideration process that "guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention," *Avena,* 2004 I.C.J. at 65, takes into account all of "the legal consequences of this breach," *Avena,* 2004 I.C.J. at 65, and "in the causal sequence of events . . . examine[s] the facts, and in particular the prejudice and its causes." *Avena,* 2004 I.C.J. at 60.

772. Violation of Petitioner's Vienna Convention rights prevented the Mexican Consulate from intervening in a timely manner. An early intervention would have significantly affected the outcome of the proceedings.

773. As a foreign national, Petitioner faced obstacles of language and culture, unfamiliarity with the legal system, fears of deportation, and isolation from family, friends, and community. Petitioner lacked an understanding of the U.S. justice system and the role of his defense counsel. There is no comparable system of a decently funded office of experienced counsel in Mexico.

774. Petitioner suffered serious prejudice because he was not timely advised of his Vienna Convention rights. Exhibit 124, the Affidavit of Agustin Rodriguez de la Gala, the Director of International Litigation in the Mexican Foreign Ministry, details the substantial assistance the Mexican Consulate would have provided had it been able to intervene when

Petitioner was arrested instead of a year later. Among other things, the Consulate would have ensured that Petitioner understood his rights in dealing with U.S. law enforcement officers before he was interrogated, including his right to remain silent and the importance of having counsel present. Exh. 124, de la Gala Affidavit, PE 1144. This would have been of enormous value given that Petitioner does not speak English or understand the American legal system, and given that Petitioner's *Miranda* rights were violated in this case. As explained above, Petition was interrogated without any proper *Miranda* warning, and only belatedly was given a *Miranda* warning in Spanish, his only language. *See* Claim 1.F.1, above. Had Petitioner been provided the services of a Consular representative to explain in Spanish his rights and how the American legal system works, Petitioner may well have refused to make statements that were then used against him at trial. *See* Claim 1.F.1, above. Having a police officer (belatedly) read *Miranda* rights through an interpreter is no substitute for the advice and guidance Petitioner would have received from Mexican Consular officials. Exh. 124, de la Gala Affidavit, PE 1144.

775. Furthermore, foreign nationals are frequently subject to discriminatory treatment as a consequence of their race and immigrant status. Studies have shown that race and ethnicity play a significant role in the administration of the death penalty in the United States. *See, e.g.*, Department of Justice, *Survey of the Federal Death Penalty System* (2000)

(concluding that federal prosecutors seek the death penalty more often for Hispanics and other minorities than whites); *see also* Pennsylvania Supreme Court Committee, *Final Report on Racial and Gender Bias in the Justice System* (2003). Mexico has documented numerous cases in which Mexican nationals have been subjected to discriminatory treatment.

776. Mexican consular officers, at the minimum, ensure by their very presence that a foreign national is treated with fairness in the detaining state's judicial system. Here, a whole year passed before the Consulate was notified and able to participate. Had Consular officers been involved from the beginning, they could have detected the presence of unfair bias and raised such concerns with the appropriate authorities and, if need be, with the court itself. Exh. 124, de la Gala Affidavit, PE 1144.

777. The most serious prejudice from violation of Petitioner's Vienna Convention rights was in the penalty phase of the trial. Claim 1.D. sets forth in detail the inadequacies of the investigation, development and presentation of mitigation evidence by Trial Counsel. In particular, Trial Counsel's investigators were able to interview only four potential witnesses in the remote area of Mexico where Petitioner spent his childhood. And, they did not follow up with even those few witnesses, none of whom testified at trial. In contrast, a proper investigation has generated some 39 declarations containing compelling mitigation evidence based on Petitioner's poverty, physical and emotional abuse, mental impairments,

substance abuse, exposure to guns and violence and culture. *See* Claim 1.D.1-5, above. But, none of that evidence was adequately investigated and presented to the jury. While Trial Counsel failed to properly develop that evidence, the Mexican Consulate could have helped to track witnesses and develop the evidence that Trial Counsel did not. Had the Mexican Consulate been contacted at the time of Petitioner's arrest, it would have been able to secure an expert witness, provide logistical assistance, investigators and interpreters in accessing the remote areas of Mexico where Petitioner was raised. Exh. 124, de la Gala Affidavit, PE 1144. The Mexican Consulate could have provided the investigation necessary to find and present crucial mitigating evidence that Trial Counsel with his limited resources could not.

778. In short, had the Mexican Consulate been contacted when Petitioner was arrested, the development of the case against Petitioner would have been very different. The penalty phase investigation would have begun at an early stage. The materials gathered by present counsel would have been obtained at a more useful stage, and matters Trial Counsel could not develop would have been pursued by experienced Mexican investigators without financial limitations, likely resulting in the location, preparation and presentation of a better defense at the guilt stage, and a meaningful penalty phase defense. The failure to advise Petitioner of his Vienna Convention rights was prejudicial.

779. The prejudice was not cured by the Consular notification that was finally given a year after Petitioner's arrest. That was obviously too late to prevent the violation of Petitioner's *Miranda* rights. But, it was also too late to do the kind of investigation necessary to a proper defense. Because so many crucial witnesses were in remote Mexican ranchos, and were likely to be transient, it was vital that the investigation commence promptly after Petitioner was arrested. The year long delay was highly prejudicial, and the Consulate's assistance was eventually limited to "facilitating visas for a list of witnesses in Mexico that was provided to the consulate by the defense team approximately one week before commencement of the penalty phase." Exh. 124, de la Gala Affidavit, PE 1144. And, none of those witnesses even testified. The prejudice is clear.

780. Although the *Avena* judgment grants U.S. courts discretion in awarding appropriate relief, that discretion is "not without qualification." *Avena*, 2004 I.C.J. at 64. The ICJ judgment and the Presidential directive require at a minimum that Petitioner receive an evidentiary hearing to determine the effect of the Vienna Convention violation. *Avena,* 2004 I.C.J. at 62. According to the ICJ, U.S. courts must "examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." *Avena,* 2004 I.C.J. at 60. Therefore, notwithstanding any procedural rules that may otherwise bar

review, Petitioner is at least entitled to a full evidentiary hearing on the merits of his Vienna Convention claim.

781. This habeas corpus proceeding does not provide the required "review and reconsideration" of Petitioner's convictions and death sentences. Under *Avena*, review and reconsideration must evaluate whether the Convention violations impaired the fairness of Petitioner's underlying convictions and sentences.

782. This Court's standards of prejudice for granting habeas relief are not appropriate for evaluating *Avena* claims. Such a prejudice standard would fail to provide for review of the rights the ICJ has ruled must be addressed under the Convention. *Avena*, 2004 I.C.J at 34 (prejudice analysis is focused on whether violation impacts *Convention* rights, not *constitutional* rights). A process that turns the prejudice inquiry into an analysis of whether the judicial proceedings violate constitutional due process does not satisfy the principles of the Convention or *Avena*: "The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law." *Avena*, 2004 I.C.J at 64. Therefore, the proper analysis of prejudice turns not on whether the violation of Petitioner's Vienna Convention rights resulted in a violation of constitutional due process, but on whether the denial of rights would have had an effect on the fairness of

the trial.

783. Alternatively, the violation of Petitioner's Vienna Convention rights had a substantial and injurious influence or effect on the jury's verdicts in both phases of the trial. Because the Mexican Consulate was not contacted in a timely manner, Petitioner was deprived of critical advice, assistance and mitigating evidence. Had the Mexican Consulate been contacted at the time of arrest, the jury would have heard very different evidence, and Petitioner likely would not have been sentenced to death. Respondent's violation of Petitioner's Vienna Convention rights was prejudicial, and requires that his sentences be set aside.

784. To the extent the foregoing challenges were not raised before, the failure(s) constitutes prejudicially ineffective assistance of counsel and/or ineffective assistance of Appellate Counsel.

CLAIM 14: EXECUTION OF PETITIONER WOULD VIOLATE HIS RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT BECAUSE HIS SENTENCES WERE BASED ON INCOMPLETE AND UNRELIABLE EVIDENCE AND ARE A DISPROPORTIONATE PUNISHMENT.

785. Petitioner's death sentences violate his rights to due process, a fair trial, and a reliable verdict under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and Article I, Sections 1, 7, 13, 14, 15, 16, 17, 24, and 28 of the California Constitution, in that the jury's first-degree murder verdicts rest on weak, inaccurate,

incomplete and unreliable evidence.

786. A verdict based on insufficient evidence violates a defendant's rights to due process, under the Fifth and Fourteenth Amendments. *Jackson v. Virginia*, 443 U.S. 307, 313-14 (1979); *Summit v. Blackburn*, 795 F.2d 1237, 1244 (5th Cir. 1986). Such a verdict also violates a defendant's right to present a defense, under the Sixth Amendment. *Jackson,* 443 U.S. at 314 ("[A] meaningful opportunity to defend . . . presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused."). Moreover, in a capital case, such a verdict also violates the Eighth Amendment's requirement of heightened reliability in the determination to impose the death penalty. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

787. The rule that a first degree murder must have been premeditated and deliberate requires specific proof that the defendant actually had the required mental state. A finding of first degree murder due to premeditation and deliberation is proper only when the slayer killed as the result of careful thought and weighing of considerations, as a deliberate judgment or plan, carried on coolly and steadily, especially according to a preconceived design. *People v. Rowland*, 134 Cal. App. 3d 1, 7 (1982) (citing *People v. Anderson*, 70 Cal. 2d 15, 26 (1968)).

788. "In this context, 'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined

upon as a result of careful thought and weighing of considerations for and against the proposed course of action.'" *People v. Mayfield*, 14 Cal. 4th 668, 767 (1997) (citations omitted). To meet this standard, the prosecution must show more than the type of "reflection that may be involved in the mere formation of a specific intent to kill." *Anderson*, 70 Cal. 2d at 26.

789. The penalty of death is unique in its severity and finality. The United States Constitution therefore requires individualized sentencing in a capital case, which considers the character of the individual defendant as an "indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304.

790. Because the death penalty is qualitatively different from any other criminal punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson*, 428 U.S. at 305 (opinion of Stewart, Powell, and Stevens, JJ.). "In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases." *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring). "Because sentences of death are 'qualitatively different' from prison sentences, . . . this Court has gone to extraordinary measures to ensure that the person sentenced to be executed is afforded due process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings v. Oklahoma*, 455 U.S.

104, 117-18 (O'Connor, J., concurring).

791. Petitioner specifically incorporates by reference the allegations of Claims 1, 6, 8, and 9. As detailed in those allegations, the prosecution's evidence was marginal at best as to both guilt and penalty. As also detailed in those allegations, the prosecution's case, weak as it was, was still much stronger than it would have been but for Trial Counsel's ineffective assistance, prosecutorial misconduct and suppression of evidence which resulted in admission of improper evidence and a failure to present a wealth of evidence that rebutted and undermined the Prosecutor's evidence, again as to both guilt and penalty.

792. Among other things, Trial Counsel failed to impeach prosecution witnesses or to exclude prosecution evidence not properly admissible or to request jury instructions necessary to a jury verdict that was fair and not biased toward verdicts of first degree murder and death sentences. Had Trial Counsel done a competent job he would have presented expert testimony on ballistics and eyewitness identification to undermine and refute the prosecution's theories and testimony. Instead, those theories and testimony were left uncontested before the jury.

793. Trial Counsel also failed to present a wealth of evidence of Petitioner's mental and physical condition and social history that were directly relevant to issues in both the guilt and penalty phases of the trial. As a result, the jury was never told of Petitioner's serious substance abuse,

cognitive deficiencies, posttraumatic stress disorder, abnormal response to stress or his social and cultural history. That evidence negated Petitioner's eligibility for convictions of first degree murder and sentences of death.

794. In combination, the weakness of the evidence the Prosecutor presented and the strength of the evidence Trial Counsel should have presented demonstrate that the verdicts and sentences are unreliable and unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 1, 7, 13, 14. 15, 16, 17, 24, and 28 of the California Constitution. The evidence presented fails Fourteenth Amendment due process analysis, in that "after viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of [first degree murder] beyond a reasonable doubt" for each charge separately. *Jackson*, 443 U.S. at 319; U.S. Const., amend. XIV; *see also In re Winship*, 397 U.S. 358 (1970). Indeed, the evidence as to each charge was too weak to overcome the well-established "presumption that the unjustified murder of a human being constitutes murder of the second, rather than of the first, degree." *Anderson*, 70 Cal. 2d at 25. When, as here, "[t]he evidence is insufficient, as a matter of law, to establish the requisite premeditation and deliberation, a conviction of first degree murder cannot stand." *People v. Theriot*, 252 Cal. App. 2d 222, 240 (1967); *People v. Guiton*, 4 Cal. 4th 1116, 1126-27 (1993) (a reviewing court "must intervene" where the evidence is such that

no reasonable jury could have found the defendant guilty). The verdicts also violate the Eighth Amendment's requirement of heightened reliability in capital case sentencing. *Woodson*, 428 U.S. at 305. Petitioner's death sentences are invalid.

795. To the extent that the foregoing challenges were not raised before, the failure constitutes prejudicial ineffective assistance of counsel and/or ineffective assistance of Appellate Counsel.

CLAIM 15: PETITIONER'S PROLONGED CONFINEMENT UNDER SENTENCE OF DEATH AND EXECUTION FOLLOWING SUCH CONFINEMENT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

796. Petitioner's convictions, sentences of death, and confinement violate his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 1, 7, 13, 14, 15, 16, 17, 24, and 28 of the California Constitution, because his lengthy confinement under judgment of death (now over 14 years) and execution after such prolonged confinement would constitute cruel and unusual punishment. Confinement under a judgment of death for such a prolonged time subjects Petitioner to extraordinary psychological duress as well as the severe physical and social restrictions that inhere in life on death row. This violates the Eighth and Fourteenth Amendments. Furthermore, execution so long after his convictions and judgment of death would be excessive because the penalty would no longer serve the penological

purposes of either deterrence or retribution, and there is no other legitimate and constitutional justification for capital punishment.

797. This claim is supported by, among other cases, *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976).

A. Prolonged Confinement is Cruel and Unusual in Itself.

798. Petitioner was sentenced to death on November 16, 1993. CT 956-57, 959-67. A certified copy of the Judgment of Death Rendered was filed with this Court on February 22, 1994, but it was not until October 29, 1998, that the Court appointed the State Public Defender as counsel for Petitioner's direct appeal.

799. The record on appeal was filed on March 22, 2002, and briefing in this Court was completed on February 7, 2004. This Court's opinion affirming the judgment in its entirety issued on December 5, 2005.

800. Confinement under a judgment of death subjects a condemned inmate to extraordinary psychological duress, as well as the extreme physical and social restrictions that inhere in life on death row. Accordingly, such confinement, if unduly prolonged, in and of itself, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

801. The psychological torment of awaiting execution for a long period of time has been termed the "death row phenomenon." *See* Renee E.

Boxman, Comment, *The Road to Soering and Beyond: Will the United States Recognize the "Death Row Phenomenon?"* 14 Hous. J. Int'l L. 151 (1991).

802. While the label is relatively new, the phenomenon is not. 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*, 134 U.S. 160, 172 (1890).

803. In *Medley*, the period of uncertainty was only four weeks. *Medley*'s description applies with even greater force where, as here, the delay has lasted "many years." *See Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., joined by Breyer, J., respecting the denial of certiorari).

804. Two justices of the Supreme Court have repeatedly recognized that prolonged confinement on death row, and execution after such confinement, presents an important question under the Eighth Amendment's prohibition on cruel and unusual punishments. *Lackey*, 514 U.S. 1045 (Stevens, J., respecting denial of certiorari); *Foster v. Florida*, 537 U.S. 990 (2002) (Breyer, J., dissenting from denial of certiorari); *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J., dissenting from denial of certiorari); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J. dissenting from denial of certiorari); *see also Ceja v. Stewart*, 134 F.3d 1368 (9th Cir.

1998) (Fletcher, J., dissenting from order denying stay of execution).

805. This Court found a similar argument persuasive in *People v. Anderson*:

> 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 of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.

People v. Anderson, 6 Cal. 3d 628, 649 (1972) (internal citations omitted); *but see, e.g., People v. Frye*, 18 Cal. 4th 894, 1030-31 (1998) (rejecting *Lackey* claim).

806. The "frightful toll" exacted "during the inevitable long wait between the imposition of sentence and the actual infliction of death" has thus long been a concern of Eighth Amendment jurisprudence. *Furman v. Georgia,* 408 U.S. 238, 288-89 (1972) (Brennan, J., concurring). As Justice Frankfurter observed, the "onset of insanity while awaiting execution of a death sentence is not a rare phenomenon." *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting). As delays grow longer, and conditions on death row become more restrictive, the psychic toll, including insanity and suicide, also grows. *See Knight*, 120 S.Ct. at 462 (Breyer, J., dissenting from denial of certiorari) (citing study

showing 35 percent of Florida death row inmates had attempted suicide); *see also*, Exh. 39, Mark Donald, *Stuck in Habeas Hell: Bush Breathes New Life into Texas Death-Row Inmate's Case*, Texas Lawyer, May 2, 2005, at 1 (recounting mental decomposition of inmate confined on Texas' death row for 25 years, while asserting potentially meritorious claims), PE 0311.

807. Dr. Stuart Grassian, a leading expert on the psychological effects of stringent conditions of confinement, explained in the case of a Connecticut inmate who sought to waive his appeals, "[T]he conditions of confinement are so oppressive, the helplessness endured in the roller coaster of hope and despair so wrenching and exhausting, that ultimately the inmate can no longer bear it, and then it is only in dropping his appeals that he has any sense of control over his fate." Exh. 51, Death Penalty Information Center, Time on Death Row, PE 0373.

808. The average time under sentence of death, before execution, in the United States is over 10 years. Thomas P. Bonczar & Tracy L. Snell, *Capital Punishment, 2004*, U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin, Nov. 2005, at 11. Petitioner has already spent substantially more than 10 years on death row.

809. The problem of delay is acute in California, which has the nation's largest death row. *Id.* at 1 (California had 637 inmates on death row in 2004 compared to 446 for Texas and 364 for Florida). Due to a chronic shortage of qualified lawyers, inmates must wait an average of

about five years before even being assigned a lawyer for appeal. Robert Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California*, 44 Santa Clara L. Rev. 101, 105 & n.18 (2003). Moreover, because capital defendants in California who have been erroneously convicted or sentenced to death often do not get relief until they reach federal court, they must wait many more years for errors to be corrected.

810. Because of such delays, the death row population is becoming increasingly geriatric. Exh. 45, Richard Willing, *Death Row Population is Graying*, USA Today, Feb. 10, 2005, at A3, PE 0334. In addition to the psychological toll of living on death row awaiting execution, inmates are developing serious age-related illnesses, including cancer, heart disease, and dementia. *Id.* Medical care at San Quentin, which houses California's death row, has been found so "appallingly bad" that it is "dangerous" to ailing inmates. Exh. 44, Don Thompson, *Report Blasts Prison Conditions*, Ventura County Star, Apr. 4, 2005, PE 0332.

811. Thus, Petitioner has been, and will continue to be, subjected to unlawful pain and suffering due to his prolonged, uncertain confinement on death row. This long delay in resolving Petitioner's case, for which Petitioner is in no way to blame, is both cruel and unusual in violation of the Eighth and Fourteenth Amendments.

812. The Supreme Court has recently reaffirmed that

> [t]he prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion).

Roper v. Simmons, 543 U.S. 551, 560-61 (2005). At least since its decision in *Trop*, the Court has "referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" *Roper*, 543 U.S. at 575 (citation omitted). The Supreme Court accordingly cited the international community's overwhelming disapproval of executing the mentally retarded and juvenile offenders in concluding that such executions also ran afoul of the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Roper*, 543 U.S. at 575 ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.").

813. The United States similarly 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 increasingly recognizes that prolonged confinement under these circumstances is cruel and degrading and in violation of international human rights law. *See Foster*, 537 U.S. at 991 (Breyer, J., dissenting from denial of certiorari) ("[c]ourts of other nations have found that delays of 15 years or less can render capital punishment degrading, shocking, or cruel"); *see also Knight*, 528 U.S. at 995-96 (Breyer, J., dissenting from denial of certiorari). The Canadian Supreme Court recently cited such delays as "a relevant consideration" in holding that extradition of a murder suspect to the United States without first obtaining assurances that the death penalty would not be imposed "violates principles of 'fundamental justice.'" *Foster*, 537 U.S. at 991 (Breyer, J., dissenting from denial of certiorari) (citing *United States v. Burns*, 1 S.C.R. 283, 353 ¶ 123 (2001)). In so holding, the Canadian Supreme Court reversed the position it had taken in *Kindler v. Canada*, 2 S.C.R. 779 (1991), and *Reference re Ng Extradition*, 2 S.C.R. 858 (1991). The court explained that "[t]he arguments against extradition without assurances have grown stronger since this Court decided *Kindler* and *Ng* in 1991." *Burns*, 1 S.C.R. at ¶ 131.

814. Nevertheless, some lower U.S. courts, including this Court, have rejected *Lackey* claims on the ground that delays in the imposition of the death penalty are inevitable:

> The delay has been caused by the fact that McKenzie has availed himself of procedures our law provides to ensure that executions are carried out only in appropriate circumstances. That this differs from the practice at common law, where executions could be carried out on the dawn following the pronouncement of sentence, [citations omitted] is a consequence of our evolving standards of decency, which prompt us to provide death row inmates with ample opportunities to contest their convictions and sentences. Indeed, most of these procedural safeguards have been imposed by the Supreme Court in recognition of the fact that the common law practice of imposing swift and certain executions could result in arbitrariness and error in carrying out the death penalty.

McKenzie v. Day, 57 F.3d 1461, 1466-67 (9th Cir. 1995); *see also Frye*, 18 Cal. 4th at 1030-31.

815. This reasoning is erroneous. Indeed, the acknowledgment that capital punishment cannot be reliably administered without subjecting death row inmates to lengthy, agonizing limbo only further undermines the constitutionality of the punishment the state seeks to exact on Petitioner.

816. Thus, the Canadian Supreme Court's primary concern in *Burns* was the fallibility of the criminal justice system. The Court reviewed the history of wrongful convictions in Canada, the United Kingdom, and the United States, taking note of death row exonerations in this country. *Burns*, 1 S.C.R. at ¶¶ 95-117. Death row exonerations now stand at 119. Exh. 52, Death Penalty Information Center, *Innocence and the Death Penalty*, PE 0379. This history, the Canadian court concluded, "provide[s] tragic

testimony to the fallibility of the legal system, despite its elaborate safeguards for the protection of the innocent." *Burns*, 1 S.C.R. at ¶ 117. The Court agreed that "lengthy delays, and the associated psychological trauma" were inevitable in the not always successful effort to avoid wrongful convictions. *Burns*, 1 S.C.R. at ¶ 122. The inevitability of delay did not, however, provide an excuse for subjecting death row inmates to the psychological torment of the death row phenomenon, but rather was grounds for concluding that the death penalty itself was cruel and unusual punishment. *See Burns*, 1 S.C.R. at ¶ 78 (death penalty is contrary to the prohibition on cruel and unusual punishment because it is "final," "irreversible," and "[i]ts implementation necessarily causes psychological and physical suffering"). The Constitutional Court of South Africa relied on a similar rationale in concluding that the death penalty constituted "cruel, inhuman and degrading punishment" under its constitution. *See The State v. Makwanyane & Mchunu*, 1995(3) SA 391 (CC) ¶¶ 55-56 (Constitutional Court of South Africa) (op. of Chaskalson, P.) ("The difficulty of implementing a system of capital punishment which on the one hand avoids arbitrariness by insisting on a high standard of procedural fairness, and on the other hand avoids delays that in themselves are the cause of impermissible cruelty and inhumanity is apparent.") (*citing Callins v. Collins*, 510 U.S. 1141 (1994) (Blackmun, J., dissenting) (concluding that "the death penalty experiment" in the United States "has

failed")).

817. This developing international consensus demonstrates that, in addition to being cruel and degrading, 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. To the extent that the death penalty cannot be reliably administered without subjecting inmates to the death row phenomenon, it violates Petitioner's rights under the due process clause of the Fourteenth Amendment and the corresponding provision of the California Constitution.

B. Execution After Long Delay Is Cruel and Unusual Because It Does Not Serve the Purposes of Capital Punishment.

818. Carrying out an execution after such prolonged confinement fails to withstand Eighth Amendment scrutiny because it does not serve legitimate and substantial penological goals:

> [T]he penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it 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, 408 U.S. at 312 (White, J., concurring).

819. The Supreme Court has "identified 'retribution and deterrence of capital crimes by prospective offenders'" as the two constitutionally legitimate purposes served by the death penalty. *Atkins*, 536 U.S. at 319 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)). Unless imposition of the death penalty "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment.'" *Atkins*, 536 U.S. at 319 (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)); *see also Gregg*, 428 U.S. at 183 (joint op. of Stewart, Powell, & Stevens, JJ.) ("[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.").

820. Thus, if the death penalty "serves no penal purpose more effectively than a less severe punishment, then it is unnecessarily excessive within the meaning of the Punishments Clause." *Ceja*, 134 F.3d at 1373 (Fletcher, J. , dissenting) (citing *Furman*, 408 U.S. at 280 (Brennan, J., concurring)); *see also Roper*, 543 U.S. at 572 (finding that "neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders"); *Atkins*, 536 U.S. at 319-20 (death penalty for mentally retarded individuals violates the Eighth Amendment because it does not serve the penological purposes of retribution and deterrence).

821. As Chief Justice Rehnquist recognized, "[T]here can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution." *Coleman v. Balkcom*, 451 U.S. 949, 960 (1981) (Rehnquist, J., dissenting from denial of certiorari). Similarly, the deterrent effect of capital punishment, if any, is undermined by inordinate delays between sentencing and execution. *Coleman v. Balkcom*, 451 U.S. at 959 (Rehnquist, J., dissenting from denial of certiorari) ("When society promises to punish by death certain criminal conduct, and then the courts fail to do so, the courts . . . lessen the deterrent effect of the threat of capital punishment . . . ."). Actually executing a defendant under such circumstances is an inherently excessive punishment that no longer serves any legitimate purpose. *See Ceja v. Stewart*, 134 F.3d 1368, 1373 (1998) (Fletcher, J., dissenting); *see also Furman*, 408 U.S. at 312 (White, J., concurring).

822. 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 arrest, convictions and judgment of death. *See Knight*, 120 S. Ct. at 462 (Breyer, J., dissenting from denial of certiorari).

823. Because it would serve no legitimate penological interest to execute Petitioner after this passage of time, and because Petitioner's confinement for over 14 years on death row itself constitutes cruel and

unusual punishment, execution of Petitioner is prohibited by the Eighth and Fourteenth Amendments.

824. Petitioner's death sentences must be vacated permanently, or a stay of execution must be entered permanently.

CLAIM 16: PETITIONER CANNOT BE EXECUTED LAWFULLY BECAUSE HIS DEATH SENTENCES VIOLATE INTERNATIONAL LAW.

825. Petitioner's death sentences were unconstitutionally and unlawfully imposed in violation of international law, covenants, treaties and norms, which obligate the United States to comply with human rights principles and to guarantee a fair trial, meaningful access to court, and a competent defense. These violations of international law implicate Petitioner's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 1, 7, 13, 14, 15, 16, 17, 24, and 28 of the California Constitution. This claim is supported by, among other cases, *The Paquete Habana*, 175 U.S. 677 (1900); *Clinton v. City of New York*, 524 U.S. 417 (1998); *Bowsher v. Synar*, 478 U.S. 714 (1986); and *INS v. Chadha*, 462 U.S. 919 (1983).

826. 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, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const., art. VI; *see also United States v. Pink*, 315 U.S. 203, 230-31 (1942) ("[S]tate law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement.").

827. The United States Supreme Court has recognized that "[i]nternational 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*, 175 U.S. at 700.

828. This law is determined by both treaty obligations and customary practices that define the law of nations. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (content of international law determined by reference "to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators") (citing *The Paquete Habana*, 175 U.S. at 700); Restatement (Third) of Foreign Relations Law of the United States (1987), § 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.") and § 702, cmt. 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.").

829. Even treaties and international agreements that are not ratified by a particular country may still be binding as demonstrating the customary law of nations. "International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted." Restatement (Third) of Foreign Relations Law of the United States, § 102 (1987); *see also North Sea Continental Shelf Cases*, 1969 I.C.J. 3 (state practices may be deduced from treaties, whether ratified or not); Constance de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, 11 Harv. Blackletter J. 37, 41 (1994); Restatement (Third) of Foreign Relations Law of the United States, § 324 (1987) ("[A]n agreement among a large number of parties may give rise to a customary rule of international law binding on non-party states.").

830. Because international law is the established law of this State and country, courts must interpret domestic law consistently with international law whenever possible. *Murray v. Charming Betsy*, 6 U.S. 64, 118 (1804).

831. Courts in this country have acknowledged and followed the principles establishing the importance of international law. *See, e.g., First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S.

611, 623 (1983) ("[The claim] arises under international law, which, as we have frequently reiterated, is part of our law.") (citation and internal quotations omitted); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) ("[I]t is, of course, true that United States courts apply international law as part of our own in appropriate circumstances.").

832. Many United States courts have recognized and applied international law in the area of human rights. *See, e.g., Jama v. United States Immigration and Naturalization Service*, 22 F. Supp. 2d 353, 362 (D. N.J. 1998); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1474-76 (9th Cir. 1994); *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980).

833. The body of international law that governs the administration of capital punishment by the State of California and the United States includes the International Covenant on Civil and Political Rights (ICCPR); 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; the European Convention for the Protection of Human Rights and Fundamental Freedoms; and the Vienna Convention on the Law of Treaties. Decisions of the Human Rights Committee (established under ICCPR, article 28) and

other bodies interpreting these treaties provide authoritative guidance for this Court.

834. These and other treaties require signatory nations to protect the rights of all humans, including Petitioner and others who have been accused of capital crimes. The "object and purpose" rule bars 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." Restatement (Third) of Foreign Relations Law of the United States, § 313 (1987), Reporters' Notes n.1. Accordingly, the rules found in these treaties and the customary law that they establish are directly enforceable in U.S. courts and are available as an alternate basis for granting habeas corpus relief. *See* Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 Mich. J. Int'l L. 301, 325-27 (1999).

835. The European Convention for the Protection of Human Rights and Fundamental Freedoms has been ratified by all the member states of the Council of Europe. Accordingly, it is part of the customary law of nations that is a binding part of our law as well. *See* Restatement (Third) of Foreign Relations Law of the United States, §§ 102, 702 (1987); *Alvarez-Machain v. United States*, 266 F.3d 1045, 1052 (9th Cir. 2001) (citing Convention in establishing controlling principles of the "law of nations");

Mojica v. Reno, 970 F. Supp. 130, 148 (E.D. N.Y. 1997) (citing Convention as part of international standards governing rights of aliens).

836. The United States has ratified the ICCPR. 138 Cong. Rec. S. 4781-84 (Apr. 2, 1992). A United Nations General Assembly resolution has recognized that provisions of the ICCPR constitute a "minimum standard" for all member states, not only ratifying states. G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980). Thus it is enforceable both as a treaty and as customary international law.

837. 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 and under the Treaty Clause. The United States ratified the ICCPR on September 8, 1992 with five reservations, five understandings, four declarations, and one proviso. 138 Cong. Rec. S. 4781-84 (Apr. 2, 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. The ratification of the ICCPR by the United States 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.

International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 7, S. Exec. Doc. No. 95-2 (1977), 999 U.N.T.S. 171.

838. However, the Treaty Clause of the federal Constitution does not authorize the Senate to partially consent to a treaty or create a new one by placing conditions on it that materially alter the treaty proffered by other nations. Nor does the alleged "reservation power" survive analysis under the United States Supreme Court's recent decisions regarding the separation of powers, culminating in *Clinton v. City of New York*, 524 U.S. 417 (1998) (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*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983).

839. 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. Exec. Order No. 13107, 3 C.F.R. 234 (1999). 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[.]" *Id.* Executive 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 (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.*

Id. (emphasis added).

840. In addition to violating federal constitutional and separation of powers principles, the attempt by the United States to condition its consent to the treaty on 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, art. 19(c); *see also* Restatement (Third) of Foreign Relations Law of the United States, § 313(1)(c) (1987) ("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, 1951 I.C.J. 15; U.N. GAOR, 6th Sess., 360th plenary meeting at 84, U.N. Doc. A/L.37 (1952).

841. 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 ICCPR, and recommended that it be withdrawn. *See* Consideration of Reports Submitted by State Parties Under art. 40 of the Covenant, U.N. Hum. Rts. Comm., 53rd Sess., 1413th mtg., at ¶ 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." *Id.* at ¶ 279.

842. Because the United States' "reservation" to article 6, paragraph 5, violates the object and purpose of the ICCPR and its Second Optional

Protocol, it is void. Therefore, 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, G.A. res. 2200 A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A16316 (1966), 999 U.N.T.S. 171, *entered into force* March 23, 1976; *The Paquete Habana*, 175 U.S. at 700; *Clinton v. City of New York*, 524 U.S. 417 (1998); *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983); Exec. Order No. 13107, 3 C.F.R. 234 (1999); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 7, S. Exec. Doc. No. 95-2 (1977), 999 U.N.T.S. 171.

843. Human rights treaties are by their nature designed to give citizens of a country rights to be free of human rights abuses perpetrated by their own governments. To the extent that the treaties and customary law discussed herein have not been uniformly enforced in the United States, that simply reflects a "lack of awareness of United States International obligations." United Nations, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (1988), U.N. Doc. E/CN.4/1998/681 (Add. 3) (1998).

844. Accordingly, this Court must give effect to international law established through treaty provisions and customary application. In

particular, Petitioner submits that his trial and the penalty judgment violated the provisions and standards discussed below.

A. Petitioner's Death Sentences Violate His Right to Life.

845. The "object and purpose" of the International Covenant is to bestow and protect inalienable human rights to citizens: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life." Art. 6, para. 1, International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6(1), 999 U.N.T.S. 171. The right to life is a fundamental human right expressed throughout the International Covenant. The death penalty clearly contravenes the "right to life."

846. Article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable. *See* Second Optional Protocol to the International Covenant on Civil & Political Rights, Aiming at the Abolition of the Death Penalty, Adopted by the General Assembly, December 15, 1989.

847. The use of the death penalty in this country is increasingly at odds with other nations:

> The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment . . . [and] with China, Iran, Nigeria, Saudi Arabia, and South

> Africa [under 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.

Regina C. Donnelly, *Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking*, 16 New Eng. J. on Crim. and Civ. Confinement 339, 366 (1990); *see also Ring v. Arizona*, 536 U.S. 584, 618 (2002) (Breyer, J., concurring) (other nations have abolished capital punishment); *People v. Bull*, 185 Ill. 2d 179, 225 (Ill. 1998) (Harrison, J., concurring in part and dissenting in part). Since this review was published in 1995, South Africa has abandoned the death penalty.

848. In particular, the nations of Western Europe uniformly reject the death penalty. *See, e.g., Stanford v. Kentucky*, 492 U.S. 361, 389 (1989) (Brennan, J., dissenting); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plur. opn. of Stevens, J.). All Western European nations have now abolished the death penalty. *See* Michael A. Cokley, *Whatever Happened to That Old Saying "Thou Shalt Not Kill?": A Plea for the Abolition of the Death Penalty*, 2 Loy. J. Pub. Int. L. 67, 119-20 (2001).

849. This uniformity position among Western European nations is especially important because our Founding Fathers looked to those countries for the "law of nations," as models of the laws of civilized

nations, 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.'" *Miller v. United States*, 78 U.S. 268, 315 (1871) (Field, J., dissenting) (*quoting* 1 Kent's Commentaries, 1); *Hilton v. Guyot*, 159 U.S. 113, 227 (1895); *Sabariego v. Maverick*, 124 U.S. 261, 291-92 (1888).

850. International law must be used in determining our constitutional standards. "'Cruel and unusual punishments' and 'due process of law' [are not] 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*, 408 U.S. 238, 420 (1972) (Powell, J., dissenting). 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*, 356 U.S. 86, 101 (1958).

851. Thus, constitutionally "cruel and unusual punishment" is not limited solely to whatever violated the standards of decency of the civilized nations of Europe in the 18th century; it encompasses whatever violates evolving standards of decency. Eighth Amendment jurisprudence must recognize that the standards of decency of the civilized nations of Europe have evolved, and in so doing re-examine use of the death penalty in this

country. These standards should now prohibit using a form 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 "standards of decency" are antithetical to our own. *See Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (the fact that the "world community" disapproves of executing the mentally retarded supports the conclusion that it violates the Eighth Amendment).

852. Assuming *arguendo* that capital punishment itself is not contrary to international norms of human decency, using it as regular punishment for substantial numbers of crimes, rather than as an extraordinary punishment for extraordinary crimes, certainly is. The ICCPR, article 6(2), states: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes. . . ." The Human Rights Committee established under this treaty states that this section must be "read restrictively to mean that the death penalty should be a quite exceptional measure." International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6, General Comment, 999 U.N.T.S. 171. Since the law of nations considers it improper to use capital punishment as regular punishment, it is unconstitutional in this country because international law is a part of our law. *Hilton v. Guyot*, 159 U.S. 113 (1895); *see also Jecker, Torre & Co. v. Montgomery*, 59 U.S. 110, 112 (1855).

853. Application of international norms to the death verdict in this case is particularly appropriate because California's death penalty law fails to narrow the application of the penalty. *See* Claim 12, above. The overbroad use of the death penalty in this case violates international law.

B. International Law Requires Effective Assistance of Counsel.

854. The Basic Principles on the Role of Lawyers were adopted by consensus at the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders in 1990 and welcomed by the UN General Assembly. *See* Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990). The UN Crime Congress explained that "the adequate protection of the human rights and fundamental freedoms to which all persons are entitled requires that all persons have effective access to legal services provided by an independent legal profession." *Id.*

855. Although basic principles of equal protection, due process, and the right to counsel under the Sixth Amendment of the United States Constitution protect a defendant's right to effective assistance of counsel (*see also* Cal. Const., art. 1, §§ 7, 15, 16, and 17), international law also requires a trial court to ensure that these standards are met.

856. Everyone arrested or detained – whether or not on a criminal charge – and everyone facing a criminal charge – whether or not detained – has the right to the assistance of legal counsel. Int'l Covenant on Civ. and Pol. Rights, art. 14, § 3(d), 999 U.N.T.S. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, ¶ 3, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953; Principle 1 of the Basic Principles on the Role of Lawyers, ¶ 1, U.N. Doc. A/CONF. 144/28/Rev.1 at 118 (1990).

857. The right to counsel means the right to competent counsel. All states must ensure that assigned counsel provide effective representation for suspects and the accused. Attorneys representing defendants in a criminal case must act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession. They must advise their clients of their legal rights and obligations, and about the legal system. They must aid their clients in every appropriate way, taking such action as is necessary to protect their clients' rights and interests, and assist their clients before the courts. Basic Principles on the Role of Lawyers, ¶ 13 U.N. Doc. A/CONF. 144/28/Rev.1 at 118 (1990); Human Rights Committee General Comment 13, ¶ 9, article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. 6 at 135 (2003).

858. In protecting the rights of their clients and in promoting the cause of justice, lawyers must seek to uphold human rights and fundamental freedoms recognized by national and international law. Basic Principles on the Role of Lawyers, ¶ 14 U.N. Doc. A/CONF. 144/28/Rev. 1 at 118 (1990).

859. When an accused is represented by assigned counsel, the authorities must ensure that the lawyer assigned has the experience and competence commensurate with the nature of the offence of which their client is accused. *Id.* at ¶ 6. The authorities have a special duty to take measures to ensure that the accused is effectively represented. *Kelly v. Jamaica,* (253/1987), 8 April 1991, Report of the Human Rights Committee, (A/46/40) at 248, ¶ 5.10 (ICCPR requires that "measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice"). If the appointed counsel is not effective, the authorities must ensure that counsel performs one's duties or is replaced. *Artico v. Italy*, 13 May 1980, 3 E.H.R.R.1. [37 Ser. A 16].

860. Accordingly, in the seminal *Artico* case, the European Court of Human Rights stated that:

> it was for the competent Italian authorities to take steps to ensure that the applicant enjoyed effectively the right to which they had recognised he was entitled. Two courses were open to the authorities: either to replace [the attorney] or if appropriate, to cause him to fulfill his obligations. They chose a third

> course – remaining passive –, whereas compliance with the Convention called for positive action on their part.

Artico v. Italy, at ¶ 36 (*citing* Convention for the Protection of Human Rights and Fundamental Freedoms).

861. *Artico* found that the right to effective counsel was so important that a violation of the international standard may occur "even in the absence of prejudice." *Artico*, at ¶ 35.

862. It has also been recognized that "the Convention is designed to 'guarantee not rights that are theoretical or illusory but rights that are practical and effective' and that assigning a counsel does not in itself ensure the effectiveness of the assistance he may afford an accused." *Imbrioscia v. Switzerland*, (1994) 17 E.H.R.R. 441, Ser. A no. 275, ¶ 60 (*quoting Artico v. Italy*, at ¶ 33); *see also* European Court of Human Rights, *Daud v. Portugal*, (2000) 30 E.H.R.R. 400 at ¶ 42 (Covenant violated after letters written by defendant should have alerted the trial court to problems with attorney; court should not have remained passive).

863. The Human Rights Committee has expressed concern about "the lack of effective measures [in the USA] to ensure that indigent defendants in serious criminal proceedings, particularly in state courts, are represented by competent counsel." HRC, Comments on U.S.A., U.N. Doc. CCPR/C/79/Add.50, 7 April 1995, ¶ 23.

864. Petitioner's trial violated international standards. Petitioner

was not afforded effective assistance of counsel in either the guilt or penalty phase of his trial. Petitioner's Trial Counsel's performance was prejudicially deficient throughout his representation. *See* Claim 1, above. Nor did the trial court ensure that Petitioner's counsel was providing effective representation. The trial court's failure to take any action in regard to Petitioner's complaints violated its duty under international law to ensure that Petitioner was provided with effective representation. As in *Artico* and *Daud*, the trial court chose an impermissible "passive course" rather than protect Petitioner's right to effective counsel. *Artico v. Italy*, at ¶ 36; *Daud v. Portugal*, at ¶ 42.

C. Petitioner Was Denied His International Law Right of Access to Court.

865. The right of meaningful access to the courts is recognized in every major human rights instrument and is protected by the due process guarantees of the federal and state Constitutions. U.S. Const. amends. V, XIV; Cal. Const. art. 1, §§ 7, 15.

866. The United States has signed and ratified multilateral instruments, such as the ICCPR and the American Declaration on Human Rights that require it, as a matter of law, to provide detainees with effective access to the courts. *See, e.g.,* Int'l Covenant on Civ. and Pol. Rights, art. 9(4), 1999 U.N.T.S. 171 ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order

that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."); American Declaration of the Rights and Duties of Man, art. 18, O.A.S. Res. XXX, reprinted in OEA/Ser. L. V/II. 82 doc. 6 rev. 1 at 17 (1992) ("[e]very person may resort to the courts to ensure respect for his legal rights").

867. International tribunals have observed that the right to effective recourse to a competent court "constitutes one of the basic pillars. . . of the very rule of law in a democratic society," and must be more than a mere formality. *See, e.g., Suarez Rosero v. Ecuador*, Inter-Am. Ct. H.R., Nov. 12, 1997, at ¶¶ 63, 65 (article 7(6) of the American Convention on Human Rights, involving right of access to a competent tribunal, is not satisfied "with the mere formal existence" of the remedy).

868. A trial court has a fundamental duty to rule on issues that are brought to its attention. Here, the trial court's refusal to exercise its discretion to sever the charges against Petitioner deprived Petitioner of his right to meaningful access to court. Petitioner moved to sever this case into "five separate matters," with Counts I through IV of the Information to be tried individually, and Counts V through XI tried jointly, because the five charged incidents were "factually unrelated" and a joint trial on all of them "would [be] severely prejudic[ial]." CT 712, 715, 729. Before it heard that motion, the trial court consolidated the charges against Petitioner in Case No. VA0004848 with those in Case No. BA048823 against Paciano

Jacques Ochoa, and then severed those charges from the four charges involved in this appeal (Counts I–IV). CT 731; RT 35, 64-66, 72-73. The court said that it had thereby denied Petitioner's severance motion "sub silentio," because it could not "find a case that says it's prejudicial to try multiple counts against the same person . . . ." RT 78.

869. When Trial Counsel raised the severance issue again after the guilt phase verdicts were rendered, RT 2095-96, he argued that at separate trials "it would have been impossible to get more than three death verdicts on [the four charges]," RT 2097, and pointed out that the charges involved "unrelated incidences [sic], [with] different guns," and did not have a common "M.O." RT 2103. The trial court replied that the Legislature did not "contempla[te]" severing murder counts in capital cases involving a multiple murder special circumstance, RT 2100, and indicated that a joint trial of all the charges was required under *People v. Sandoval*, 4 Cal. 4th 155 (1992); RT 2103 ("I need some precedent that would overrule Sandoval."). The court further said that a joint trial was appropriate because the four crimes shared a "pattern of relatively motiveless crime," making them analogous to "serial kill[ings]" like the "Hillside Strangler case, the Night Stalker case, [and] the Freeway Killings [sic] case . . . ." RT 2103-05. Thus, the trial court actually embraced the idea that the four counts were connected in a "pattern" – the very prejudice that required severance.

870. The trial court abused its discretion by denying Petitioner's motion to sever these charges. The court failed to exercise its discretion in denying the motion, basing its ruling on a mistaken belief that it lacked any discretion. *See* Claim 4.

D. Petitioner Was Denied His International Law Right to Protection Against Prosecutorial Misconduct.

871. A defendant in a criminal case has the right to expect that a prosecutor will not exceed the boundaries of proper conduct. This right is protected by the due process guarantees of the state and federal Constitutions, but must also by the standards set by customary international law.

872. The Guidelines on the Role of Prosecutors were adopted by consensus at the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders in 1990 and welcomed by the UN General Assembly. *See* Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990). The Guidelines were adopted in an effort to assist governments in "securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings." *Id.*.

873. The Guidelines provide that prosecutors are to "perform their duties fairly, consistently and expeditiously, and respect and protect human

dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system." Guidelines on the Role of Prosecutors.

874. As alleged above, the Prosecutor here engaged in serious misconduct. *See* Claims 1, 5, 6, and 9. He repeatedly and improperly encouraged the jurors to cumulate the evidence of the four charges. He appealed to racial bias and improperly challenged minority jurors. He made inflammatory comments about Petitioner and Trial Counsel and he made arguments for which there was no evidence. Thus, the prosecution failed to uphold international standards in deciding to seek the death penalty, in its conduct throughout the trial, and in its arguments to the jury during trial and at closing.

E. Petitioner's Prolonged Confinement and Delay in Execution Violate International Law

875. Petitioner's prolonged confinement and subsequent execution also violates international law. Customary international law includes the right against "torture or other cruel, inhuman or degrading treatment or punishment." Restatement (Third) of Foreign Relations Law of the United States, § 702.

876. 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. Quite apart from the question of whether the death

penalty is ever appropriate, the international community increasingly recognizes that prolonged confinement under these circumstances is cruel, degrading and in violation of international human rights law. *Pratt v. Attorney General for Jamaica*, 4 All. E. R. 769 (P.C. 1993); *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. *Soering v. United Kingdom*, 11 E.H.R.R. 439, § 111.

877. Article 7 of the International Covenant on Civil and Political Rights ("ICCPR") provides in part: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Int'l Covenant on Civ. and Pol. Rights, art. 7, 999 U.N.T.S. 171. In 1992, the United States ratified the ICCPR. In consenting to the ICCPR, the United States Senate made a declaration that several of the provisions of the ICCPR, including article 7, are not self-executing. This declaration violates federal constitutional and separation-of-powers principles. It is also invalid because it conflicts with the object and purpose of the ICCPR and therefore violates the rule on reservations contained in the Vienna Convention on the Law of Treaties. Finally, the declaration is ineffective here because declarations that a provision is non-self-executing do not apply to persons

who attempt to invoke a treaty provision defensively.

878. Petitioner's confinement under threat of imposition of the death penalty and under sentences of death constitutes cruel, inhuman or degrading treatment or punishment in violation of article 7 of the ICCPR, which has the force and effect of federal law under the Supremacy Clause, U.S. Const., art. VI, cl. 2, and customary international law, which applies directly in the United States.

879. Petitioner's prolonged confinement and death sentences also violate 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).

880. 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 or at the direction of 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 was sentenced to death in 1993. 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.

881. 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. *See Johnson v. Jamaica*, Comm. No. 588/1994, U.N. Doc. CCPR/C/56/D/588/1994 (1996), ¶ 8.8 (delay of 51 months between conviction and dismissal of appeal to be violation of ICCPR, art. 14, para. 3(c) and 5).

F. Petitioner Was Denied His International Law Right to a Fair Hearing.

882. The right to a fair hearing lies at the heart of the concept of a fair trial that is protected by both the state and federal Constitutions, due process guarantees and international standards. International standards require this Court to look at Petitioner's trial as a whole to ensure that he

was given a reliable and fair hearing.

883. Under international law, everyone is entitled to a fair hearing. This right encompasses all the procedural and other guarantees of fair trial laid down in international standards, but is wider in scope. It includes compliance with national procedures, provided they are consistent with international standards. Despite fulfilling all national and international procedural guarantees, however, a trial may still not meet the criteria of a fair hearing. Universal Declaration of Human Rights, art. 10 U.N. General Assembly Resolution 217A(111) (1946); Int'l Covenant on Civ. and Pol. Rights, art. 14(1), 999 U.N.T.S. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms at article 6(1); American Declaration of the Rights and Duties of Man, article XXVI; American Convention on Human Rights, article 8.

884. The right to a fair hearing in criminal trials includes a number of concrete rights that are minimum guarantees. However, the observance of each of these guarantees does not, by itself, ensure that a hearing has been fair. The right to a fair trial is broader than the sum of the individual guarantees, and depends on the entire conduct of the trial. *See* Human Rights Committee, General Comment 13 at ¶ 5; Advisory Opinion of the Inter-American Court of Human Rights, OC-11/90, Exceptions to the Exhaustion of Domestic Remedies, 10 August 1990, Annual Report of the Inter-American Court, 1990, OAS/Ser L./V/III.23 doc.12, rev. 1991, at 44,

¶ 24.

885. In an advisory opinion sought by Mexico concerning failure to adhere to the Vienna Convention, the Inter-American Court on Human Rights has found that states may impose the death penalty only if they rigorously adhere to the fair trial rights set forth in the ICCPR. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of law, Advisory Opinion OC-16/99, Oct. 1, 1999, Inter-Am. Ct. H.R. (Ser A) No. 16 (1999).

886. The Human Rights Committee has held that when a state violates an individual's due process rights under the ICCPR, it may not carry out his execution. *See, e.g., Johnson v. Jamaica*, Comm. No. 588/1994 at ¶ 8.9 (delay of 51 months between conviction and dismissal of appeal to be violation of ICCPR art. 14, para. 3(c) and 5, and reiterating that imposition of a death sentence is prohibited where the provisions of the ICCPR have not been observed); *Reid v. Jamaica*, Comm. No. 250/1987, U.N. Doc. CCPR/C/39/D/250/1987 (1990), ¶ 5 ("[T]he imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes . . . a violation of Article 6 of the Covenant."); Report of the Human Rights Committee, Vol. II, GAOR, 45th Session, Supplement No. 40 (1990) Annex IX, J, ¶ 12.2, *reprinted in* 11 Hum. Rts. L.J. 321 (1990) ("in capital punishment cases, the duty of States parties to observe rigorously all the guarantees for

a fair trial . . . is even more imperative").

887. Petitioner was denied his right to a fair hearing as shown by the cumulative effect of all claims raised in this Petition. Under these circumstances, Petitioner's trial failed to meet the minimum guarantees of fairness required by international law. Petitioner's convictions and sentences are invalid.

CLAIM 17: PETITIONER IS INELIGIBLE FOR A DEATH SENTENCE DUE TO HIS MENTAL ILLNESS AND IMPAIRMENTS.

888. The judgments of conviction and sentences of death were unlawfully and unconstitutionally imposed in violation of Petitioner's rights to a fair trial, to due process, to be free from cruel and unusual punishment, to an individualized and reliable capital-sentencing determination, and to equal protection of the law as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution, because the imposition of the death penalty on an individual suffering from the mental illness and impairments under which Petitioner suffers is excessive, cruel and unusual.

A. Petitioner Suffers from Serious Mental Illness and Impairments.

889. As discussed in Claim 1.D.6-7 above, Petitioner "suffers from multiple mental impairments and neurocognitive disorders, each of which

was present and acute at the time of the offenses. Abelino suffers from Posttraumatic Stress Disorder (PTSD), chronic, severe; Mood Disorder, not otherwise specified; Alcohol and Cocaine Dependence; and multiple neurocognitive deficits including problems with executive functioning." Exh.129, P. Stewart Decl., PE 1261 ¶ 82; *see also id.*, PE 1261-63 ¶¶ 83-87.

890. Petitioner's "symptoms of posttraumatic stress disorder with its resultant problems with executive functioning caused him genuinely to believe in his mind that he had to act in self-defense or be killed by the victims. He was hypervigilant to assault and threats of being killed as a result of a life long pattern of being tortured in near fatal abuse inflicted by his father. His ability to plan alternative action and to carry through with a plan was compromised by overwhelming fear and terror, significant cognitive deficits, and mental disease which distorted his perception of reality. Noting his tendencies to dissociate when confronted with stressful stimuli, he very likely dissociated, entered an altered state of consciousness, and responded without insight or understanding of his present reality. At the time of the offenses, he was likely in a dissociative state. Even if he were not in a completely dissociative state, the totality of his chronic mental impairments prevented him from appreciating the wrongfulness of his actions, impaired his judgment and insight, and obliterated his ability to plan out alternative actions." *Id.*, PE 1263 ¶ 87; *see also* Exh. 126,

A. Llorente Decl., PE 1165 ¶ 40 (Petitioner is susceptible to "poor planning, impaired judgment, diminished self-monitoring, modulation and inhibition leading to a reduction in the control of emotions, behaviors and actions, and when coupled with his history of PTSD and alcohol-drug abuse, such deficits in executive control, particularly disinhibition, are exacerbated leading to responses and behaviors that may be less controlled by cortical outputs and instead dominated by instincts.").

B. Petitioner's Mental Illness and Impairments Render His Execution Unconstitutional.

891. The Supreme Court has consistently held that the punishment imposed must be humane and sensible to the uniqueness of the individual, and comport with evolving standards of decency. *See Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (Eighth Amendment permits only a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (Eighth Amendment interpreted in light of "evolving standards of decency"). In making this determination, the court must look to relevant legislative enactments and jury determinations and consider reasons why a civilized society may accept or reject the death penalty for certain individuals. *See Thompson v. Oklahoma*, 487 U.S. 815, 822 (1988).

892. The imposition of the death penalty in light of Petitioner's

severe mental illness and impairments is neither humane nor sensible. *See e.g., Atkins v. Virginia*, 536 U.S. 304 (2002) (executions of mentally retarded criminals were cruel and unusual punishments prohibited by Eighth Amendment); *see also People v. Danks*, 32 Cal. 4th 269, 322 (2004) (conc. & dis. opn. of Kennard, J.) (acknowledging that while the disability at issue in *Atkins* was mental retardation, other mental impairments may be equally grave). In *Atkins*, the Supreme Court stated that mentally retarded offenders had diminished culpability because "they 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," and that "they often act on impulse rather than pursuant to a premeditated plan." *Atkins*, 536 U.S. at 318. These shortcomings are precisely those from which Petitioner suffers, and demonstrate precisely why Petitioner's execution would violate the Eighth Amendment.

893. Execution of Petitioner also fails to comport with evolving community standards. Although capital punishment still enjoys public support among Americans, a Gallup Poll conducted in October, 2003, found that while almost two-thirds of Americans surveyed support the death penalty, 75 percent of those surveyed opposed executing the mentally ill. *See* Exh. 40, Kevin Drew, *Arkansas Prepares to Execute Mentally Ill Inmate*, CNN.com, Jan. 5, 2004, PE 0316. Further, a consensus has formed

that persons suffering from Petitioner's illnesses are relatively less culpable offenders, are undeserving of the death penalty, and the execution of such individuals serves no legitimate penological purpose. For example, after forming a task force to study the issue of executing the mentally ill, the American Bar Association recently adopted a resolution opposing the execution of the mentally ill. *See* Exh. 46, ABA Report with Recommendation No. 122A, Adopted August 2006, PE 0337. Moreover, virtually every major mental health association in the United States has published a policy statement advocating either an outright ban on executing all mentally ill offenders, or a moratorium until a more comprehensive evaluation system can be implemented. The organizations that take positions against execution of mentally ill offenders include, but are not limited to, the American Psychiatric Association (*see* Recommendations and Report on the Death Penalty and Persons with Mental Disabilities; Mentally Ill Prisoners on Death Row (approved December 2005)); the American Psychological Association (*see* Resolution on the Death Penalty in the United States, attached as Exh. 47, PE 0361), and the National Mental Health Association (see Death Penalty and People with Mental Illness (approved March 2001), attached as Exh. 48, PE 0366).

894. The imposition of the death penalty on a defendant diagnosed with severe and serious mental impairments also creates a constitutionally unacceptable risk that the death penalty will be imposed in spite of factors

that call for a less severe punishment. In other words, volitionally incapacitated defendants like Petitioner tend to be poor witnesses and their demeanor may create an unwarranted impression of lack of remorse for their crimes. In addition, the effects of severe mental illness in defendants such as Petitioner sharply constrict the ability to give meaningful assistance to his counsel in proceedings leading to the determination of culpability, eligibility for the death penalty, and the appropriate penalty. Mentally ill, neurocognitively impaired defendants like Petitioner are significantly less able than other defendants to assist their attorneys in presenting factors which may call for a reduction in the level of legal culpability and/or a less severe penalty because they are unable to appreciate, recall, assess and meaningfully communicate information necessary to question the accuracy of aggravating details of the crime or identify the existence of mitigating circumstances. *See, e.g.*, Exh. 129, P. Stewart Decl., PE 1256-58 ¶¶ 68-74, 83 (documenting Petitioner's tendency to minimize and avoid discussions of the abuse he suffered due to his posttraumatic stress disorder; "His avoidance of stimuli associated with the trauma was most evident during my interviews of him. He consistently minimized the extent of the trauma, even when confronted with evidence to the contrary.").

895. Under these circumstances, Petitioner's sentences are invalid.

CLAIM 18: PETITIONER'S TRIAL AND/OR APPELLATE COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE BY FAILING TO RAISE AND ASSERT THE ARGUMENTS DESCRIBED IN CLAIMS 2, 3, 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, AND 17.

896. Petitioner was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 13, 14, 15, 16, 17, 24, and 28 of the California Constitution because Trial and/or Appellate Counsel were prejudicially ineffective in failing to assert the arguments described in Claims 2 (juror misconduct), 3 (Batson/Wheeler), 5 (prosecutorial misconduct), 6 (failure to disclose exculpatory evidence), 10 (unconstitutional selection of jury), 11 (discriminatory charging), 12 (unconstitutionally broad selection of death cases), 13 (violation of Vienna Convention), 14 (unreliable evidence to support death penalty), 15 (unconstitutionally long confinement), 16 (violation of international law), 17 (death sentence unconstitutional due to mental impairment). Petitioner hereby specifically incorporates by reference each and every paragraph in each of those claims.

897. Each of those claims is meritorious, as demonstrated in the claim itself. Any reasonably competent attorney in a capital case would have considered and evaluated each of those claims and concluded that it should have been asserted in the trial court. Trial and/or Appellate Counsel's failure to assert each of those claims, to the extent that the Court

concludes that such challenges could have been asserted at trial and/or on the appeal, fell well below the standard for competent counsel and constituted prejudicial ineffective assistance of counsel in violation of Petitioner's Sixth Amendment rights. *See Strickland v. Washington*, 466 U.S. 668 (1989).

898. No tactical consideration justifies the failure to assert each of those claims. Had counsel raised each of those claims, it is likely that Petitioner would have received a more favorable outcome in the trial court or in this Court on appeal.

CLAIM 19: PETITIONER'S CONVICTIONS AND DEATH SENTENCES MUST BE VACATED BECAUSE OF THE CUMULATIVE EFFECT OF ALL THE ERRORS AND CONSTITUTIONAL VIOLATIONS SHOWN IN THIS PETITION AND THE AUTOMATIC APPEAL.

899. Petitioner's convictions, sentences, and confinement were unlawfully obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitutional and Article I, Sections 1, 7, 13, 14, 15, 16, 17, 24, and 28 of the California Constitution and State and international law because the multiple errors complained of in this Petition and the automatic appeal which, taken together, rendered Petitioner's trial fundamentally unfair and rendered the resulting verdicts and sentences unreliable.

900. 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 the claims raised in Petitioner's automatic appeal (No. SO38073), compels vacation of judgment and issuance of the writ.

901. 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 basic human and constitutional right to a fundamentally fair and accurate trial and his right to accurate 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, 13, 14, 15, 16, 17, 24, and 28 of the California Constitution.

902. This Court has recognized that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." *People v. Hill*, 17 Cal. 4th 800, 844 (1998). As the Ninth Circuit has held, "[a]lthough no single alleged error may warrant habeas corpus relief, the cumulative effect of errors may deprive a Petitioner of the due process right to a fair trial." *Karis v. Calderon*, 283 F.3d 1117, 1132 (9th Cir. 2002).

903. The prejudicial impact of each of the specific allegations of

constitutional error presented in this Petition and in the direct appeal must therefore 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*, 78 F.3d 1370, 1381 (9th Cir. 1996); *see also United States v. Wood*, 207 F.3d 1222, 1237 (10th Cir. 2000).

904. Petitioner hereby incorporates by specific reference the record on appeal, and each of the claims and arguments raised in the appellate briefing in his related automatic appeal (No. SO38073), 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.

905. Petitioner also incorporates by reference every claim of this Petition, and the appendices incorporated therein, as if fully set forth in this paragraph.

906. Petitioner's convictions, sentences, and confinement were obtained as the result of a plethora of errors constituting multiple violations of his fundamental constitutional rights at every phase of his trial, including

but not limited to erroneous admission of irrelevant, inadmissible and inflammatory evidence, the denial of his right to competent counsel, the failure of the Prosecutor to disclose material and exculpatory information to the defense, prosecutorial misconduct at all phases of the trial, and instructional error.

907. Justice demands that Petitioner's murder convictions, special circumstance findings, and sentences of death be vacated because when considered cumulatively, the errors and violations alleged in the present petition and on his automatic appeal are prejudicial and rendered the trial fundamentally unfair and unreliable. This is also true of state law violations that may not independently rise to the level of a federal constitutional violation. 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 and the right to a reliable, individualized, non-arbitrary and non-capricious sentencing determination under the Eighth Amendment. *See Walker v. Engle*, 703 F.2d 959, 962 (6th Cir. 1983).

908. In light of the cumulative effect of all the errors and constitutional violations that occurred over the course of the proceedings in Petitioner's case, Petitioner's convictions and death sentences must be vacated to prevent a fundamental miscarriage of justice.

VII. PRAYER FOR RELIEF

WHEREFORE, Petitioner Abelino Manriquez respectfully requests that this Court:

1. Take judicial notice of the record, documents, pleadings and exhibits filed in this Court in *People v. Abelino Manriquez*, No. SO38073, and of the record, documents, pleadings and exhibits filed in the Los Angeles County Superior Court in *People v. Abelino Manriquez*, Los Angeles County Superior Court, No. VA004848;

2. Request that the original appendices referred to in this Petition be transmitted to the Court by the Clerk of the Superior Court (Cal. Rules of Court, rule 8.224);

3. Allow Petitioner a reasonable opportunity to supplement the evidentiary showing of the claims presented here to include legal and factual grounds for claims which become apparent from further investigation, or from allegations made in the return or informal opposition to the Petition, and to supplement or amend the Petition to include claims which may become known as a result of further investigation and information which may hereafter come to light;

4. Issue a writ of habeas corpus or order respondent to show cause why Petitioner is not entitled to the relief sought;

5. Grant Petitioner sufficient funds and time to secure additional investigative and expert assistance as necessary to prove the facts

alleged in this Petition;

6. Grant Petitioner the authority to obtain subpoenas for witnesses and documents which are not obtainable by other means;

7. Grant Petitioner the right to conduct discovery including the rights to take depositions, request admissions, and propound interrogatories and the means to preserve the testimony of witnesses;

8. Grant Petitioner relief on the merits of his claims after determining that there are no material facts in dispute or order an evidentiary hearing at which Petitioner will offer the herein stated, and further proof of, the factual allegations stated above;

9. Order that Petitioner has not waived any applicable privileges by the filing of this Petition and the exhibits; that he has not waived either the attorney-client privilege or the work-product privilege; that any waiver of a privilege may occur only after a hearing with sufficient notice and the right to be heard on whether a waiver has occurred and the scope of any such waiver; that Petitioner is granted "use immunity" for each and every disclosure he has made and may make in support of this Petition; and issue any necessary protective orders;

10. Order a hearing and, if necessary, the taking of evidence, upon all allegations by respondent of waiver and/or forfeiture by Petitioner;

11. After full consideration of the issues raised in this

Petition, considered cumulatively and in light of the errors alleged on direct appeal, order that Petitioner's convictions, special circumstance findings, and death sentences be vacated;

12. Issue any stays of execution or proceedings necessary to protect this Court's jurisdiction; and

13. Grant Petitioner such further relief as is appropriate and just in the interest of justice.

VIII. VERIFICATION

909. I am an attorney admitted to practice law in the State of California. I represent Petitioner herein, who is confined and restrained of his liberty at San Quentin Prison, Tamal, California.

910. I am authorized to file this First Amended Petition for Writ of Habeas Corpus on Petitioner's behalf. I make this verification because Petitioner is incarcerated in a county different from that of my law office. In addition, many of the facts alleged are within my knowledge as much as or more than Petitioner's.

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911. I have read this Petition and know the contents of this Petition to be true.

912. Executed under penalty of perjury under the laws of the State of California and the United States on this 10th day of January, 2008 at San Francisco, California.

DATED: January 10, 2008

Respectfully submitted,

BINGHAM McCUTCHEN LLP

By: _____
John R. Reese
Attorneys for Petitioner
Abelino Manriquez

PROOF OF SERVICE

I am over eighteen years of age, not a party in this action, and employed in San Francisco County, California at Three Embarcadero Center, San Francisco, California 94111-4067. I am readily familiar with the practice of this office for collection and processing of correspondence for mailing with the United States Postal Service and correspondence is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 10, 2008, I served the attached:

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS; and

VOLUMES 1 THROUGH 6 OF EXHIBITS IN SUPPORT OF FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

by causing a true and correct copy of the above to be placed in the United States Mail at San Francisco, California in sealed envelope(s) with postage prepaid, addressed as follows:

Sharlene A. Honnaka, Esq.
Deputy Attorney General
Office of the Attorney General,
State of California
300 S. Spring Street
Los Angeles, CA 90013

California Appellate Project
101 2nd Street, Suite 600
San Francisco, CA 94105

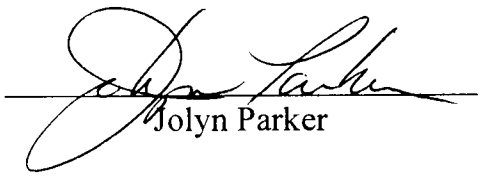
Nora Cregan, Esq.
619 Mariposa Avenue
Oakland, CA 94610

Habeas Corpus Resource Center
50 Fremont Street, Suite 1800
San Francisco, CA 94105

Office of the State Public Defender
221 Main Street, 10th Floor
San Francisco, CA 94105-1925

Service will be made on the Petitioner within 30 days in accordance with the California Supreme Court rules.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed on January 10, 2008, at San Francisco, California.



Jolyn Parker