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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

STEVEN M. BELL,

On Habeas Corpus.

Case No. S151362

Related to California Supreme Court No. S038499

San Diego County Superior Court No. CR133096

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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STEVEN M. BELL,	) Related to Automatic
	) Appeal Case No. S038499
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	) Court Case No. CR133096
	)
	)

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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, Steven M. Bell, through his counsel, the Habeas Corpus Resource Center (HCRC), and by this amendment, petitions this Court for a writ of habeas corpus and requests that this Court set aside the verdicts of guilt and the sentence of death because numerous violations of federal and state constitutional and statutory law and international law rendered the verdicts and sentence invalid.

By this verified Amended Petition for Writ of Habeas Corpus ("amended petition"), Mr. Bell sets forth the following facts and causes for

issuance of the writ:

I. INTRODUCTION

Steven M. Bell was twenty-six years old when he was arrested on June 5, 1992, for the murder of his girlfriend's eleven year old son, Johnny Joseph ("Joey") Anderson, on the preceding day. Through to the tragic events of June 4, 1992, Mr. Bell was beleaguered by several debilitating factors. He had never escaped the effects of his history of childhood physical and emotional trauma and abuse, rejection, abandonment, and neglect. That steady and severe trauma led him to drug use by the age of nine, precipitating a years-long struggle with drug addiction. Additionally, Mr. Bell suffered from cognitive deficits and dysfunctions at least partially attributed to the cumulative effects of his childhood head injuries.

Mr. Bell was born in August 1965, in Spanish Harlem, New York City. Mr. Bell's father, Melvin, was severely addicted to heroin and abandoned his son. Mr. Bell's mother, Leola, also was unable to provide the care and nurturing that Mr. Bell needed for his development. Mr. Bell's life was marked by parents who recapitulated their own experiences of extreme familial and behavioral dysfunction, and passed on to Mr. Bell a genetic legacy of mental illness and severe chemical dependency. Mr. Bell's mother, left with two children to care for alone after Mr. Bell was born, eventually brought into Mr. Bell's life an alcohol and drug-addicted paramour, George Blanding. Mr. Blanding moved into the family's apartment when Mr. Bell was about seven years old and soon thereafter began perpetrating unrelenting physical and sexual abuse on Mr. Bell and his older sister, Lisa, for years. Though unable to physically escape his traumatic environment given his young age, like his parents and extended relatives, Mr. Bell developed dysfunctional psychological mechanisms and

an addiction to drugs before the age of ten as a way to divorce himself from his terrible reality. In 1981, at age fifteen, Mr. Bell was arrested and ultimately convicted for a sudden violent act of assault and sodomy that occurred after he spent the day drinking alcohol and using drugs. Mr. Bell was incarcerated in a youth detention facility for the rest of his teenage years and until age twenty-one. While incarcerated, Mr. Bell was a model inmate. However, as earlier in his life, Mr. Bell did not receive the necessary treatment and support while in the youth facility to ameliorate his multigenerational psychological and cognitive impairments. Rather predictably, Mr. Bell returned to drugs after he was released in 1986. From then to the day of the crime in this case, Mr. Bell battled his addiction, but still tried to better himself through education and work. Tragically, his substance addiction, cognitive impairments, and mental health issues again devastated his functioning.

At the guilt-innocence phase of trial, the prosecution presented its theory of robbery-murder based on Mr. Bell's taking of a television and a radio from the home he shared with Joey Anderson and Joey's mother Debra Mitchell. The defense disputed only the connection between the thefts and the killing, attempting to show that the killing was separate and distinct from the taking. One juror was not convinced beyond a reasonable doubt that the prosecution had proved its case. This juror, however, was dismissed because of alleged misconduct after reporting that she was intimidated and denigrated by other jurors.

At the penalty phase, the defense—hampered as it was at the guilt-innocence phase by its ineffective preparation and investigation of the readily available, favorable evidence—presented a truncated account of Mr. Bell's life history to the jury. Even this deficient presentation in the face of the aggravation, however, resulted in more than seventeen hours of

deliberations over four days before the verdict was reached, just thirty-five minutes before a juror had to be excused because of her known, immutable holiday travel plans.

The San Diego County District Attorney refused an offer made by the defense prior to trial to settle this case for a sentence of life without the possibility of parole and insisted on seeking a death sentence. If this case had been free of prejudicial error and if the record before the jury had resembled that presented here, Mr. Bell would not have been found guilty of first degree murder with special circumstances and he would not have been sentenced to death.

II. PROCEDURAL HISTORY AND BACKGROUND

A. LOWER COURT PROCEEDINGS

1. Steven M. Bell is unlawfully confined and restrained of his liberty at San Quentin State Prison by Matthew Cate, Secretary, California Department of Corrections and Rehabilitation and Robert K. Wong, Acting Warden, San Quentin State Prison, pursuant to the judgment in San Diego County Superior Court Case No. CR133096 entered on March 4, 1994.

2. On the morning of June 5, 1992, Mr. Bell, carrying a newspaper folded open to an article titled "Boy, 11, stabbed to death," approached a San Diego police officer on traffic duty near Balboa Park. (28 Reporter's Transcript on Appeal ["RT"] 2069-71.) Mr. Bell handed the newspaper and his California identification card to the officer and told the officer that he was the one the police were looking for concerning the death but that he did not stab the boy. (28 RT 2071-72.) The officer then took Mr. Bell to speak with detectives at the police station downtown. (28 RT 2072.) After being interviewed by San Diego Police detectives, Mr. Bell was booked for the murder of Joey Anderson on the preceding day, June 4,

1992, and blood and urine samples were collected from Mr. Bell. (29 RT 2177-80; 1 Clerk's Transcript on Appeal ["CT"] 6.) Mr. Bell was then interviewed by police officer Paul Redden, at which time Mr. Bell stated that he stabbed Joey Anderson. (29 RT 2213, 2224.) Mr. Bell, who had been smoking crack cocaine during the two hours preceding the stabbing (29 RT 2144-46, 2151-60), said that he "just flipped" and "just lost it" and he did not "know why" or "how" (29 RT 2224).

3. On June 9, 1992, a Felony Complaint was filed in the San Diego Municipal Court alleging that Mr. Bell committed murder, robbery in the first degree, and residential burglary. (1 CT 2-5.) The San Diego County Public Defender[1] was assigned to represent Mr. Bell, and he pleaded not guilty to all charges and special allegations in the Complaint. (1 CT 8.)

4. A preliminary examination occurred on July 31, 1992, and Mr. Bell was held to answer on all counts and allegations. (1 CT 12.) On August 12, 1992, the San Diego District Attorney filed an Information charging Mr. Bell with murder (count one), pursuant to Penal Code section 187(a), and first degree robbery (count two), pursuant to Penal Code sections 211 and 212.5. (1 CT 15-17.) As to the murder count, the Information alleged the special circumstance that Mr. Bell committed the murder during the course of a robbery, pursuant to Penal Code section 190.2(a)(17). (1 CT 15-16.)[2] As to all of the counts, the Information

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[1] San Diego County Deputy Public Defenders Sharyn Leonard and Peter Liss were the attorneys who jointly represented Mr. Bell at trial. For convenience, Ms. Leonard and Mr. Liss are most often referred to jointly as "trial counsel" or "defense counsel" in this amended petition unless specific reference to Ms. Leonard or Mr. Liss is necessary for clarity.

[2] The Information also contained a charge of residential burglary (count three), pursuant to Penal Code section 459, and a special circumstance

alleged that Mr. Bell personally used a deadly and dangerous weapon—a knife—within the meaning of Penal Code section 12022(b), and as to count two, that Mr. Bell personally inflicted great bodily injury on the victim within the meaning of Penal Code section 12022.7. (1 CT 15-16.)

5. On August 31, 1992, Mr. Bell was arraigned on the Information and pleaded not guilty to all charges and special allegations. (8 CT 1742.) The court set a case status conference for March 9, 1993, and a trial date of May 10, 1993. (8 CT 1742.)[3]

6. On October 28, 1992, trial counsel filed a Motion to Dismiss the Information Pursuant to Penal Code section 995. (1 CT 27-56.)

7. On November 30, 1992, trial counsel filed a Motion to Suppress Evidence Pursuant to Penal Code section 1538.5. (17 CT 3663-74.)

8. On March 24, 1993, trial counsel filed a Motion to Continue the trial. (1 CT 85-123.)

a. Ms. Leonard declared that Mr. Liss and Olive Brown, the lead public defender investigator assigned to the case, had been engaged

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allegation that the murder alleged in count one had been committed during the commission of first or second degree burglary, pursuant to Penal Code section 190.2(a)(17). On August 30, 1993, the Fourth District Court of Appeal, Division One granted, in part, Mr. Bell's request for a writ of prohibition concerning the trial court's denial of his Motion to Dismiss the Information pursuant to Penal Code section 995. The court of appeal directed the superior court to vacate the portion of its order denying the motion to dismiss the charge of residential burglary and the special circumstance of murder in the commission of residential burglary and enter a new order granting that portion of Mr. Bell's motion. (5 CT 979-86.) The superior court, on September 7, 1993, struck count three and the special circumstance related to the burglary charge. (8 CT 1761; 13 RT 190-91.)

[3] The case status conference was continued and ultimately held on March 26, 1993. (8 CT 1745-46.)

by other more urgent matters than Mr. Bell's case. (1 CT 103.) Ms. Leonard averred that, while "many of the preliminary matters that are required in a case of this magnitude" had been done, "the real nuts and bolts of a case such as this one require the team members to meet and truly act as a team. When most of the members of a team are unavailable to meet and work, progress cannot be made in any meaningful fashion. That is what has happened in this case." (1 CT 103-104.) Ms. Leonard also recounted that trial counsel informed the prosecutor in December 1992 of Mr. Bell's willingness to plead guilty to the murder charge in exchange for a sentence of life without the possibility of parole. Trial counsel were not informed of the district attorney's decision to reject the offer until the middle of March 1993, and, while the plea offer was pending, Mr. Liss was "tied up with both personal and business matters" and Ms. Leonard did not have "the leisure to devote all of [her] time to preparation of the Bell case." (1 CT 104-05.) Ms. Leonard's supervisory duties also took up "at least two-thirds of [her] time," thus limiting the number of hours she had available to work on Mr. Bell's case. (1 CT 106.) Ms. Leonard stated that the defense had not yet completed the guilt phase investigation and had "barely started" the penalty phase investigation, and that the defense could not be prepared to try Mr. Bell's case until late fall. (1 CT 108.)

b. Mr. Liss informed the trial court that he was assigned to represent Mr. Bell on the day of his arraignment on June 9, 1992. (1 CT 120.) However, except for a period of time in October and November 1992, Mr. Liss was assigned a full caseload of, on average, twelve cases every third week from the time he received Mr. Bell's case until early March 1993. (1 CT 121.) Mr. Liss stated that he was very busy with other matters in his caseload since beginning his representation of Mr. Bell, had five other cases pending trial, and would not be available to work on Mr. Bell's

case "without disturbance until July." (1 CT 121-23.)

c. Ms. Brown declared that she was assigned to Mr. Bell's case in July 1992. (1 CT 97.) At that time, she also supervised other investigators as an investigative team leader. (1 CT 98.) In January 1993, Ms. Brown was promoted to the position of administrative investigator, taking on additional supervisory and administrative duties. (1 CT 98.) At about the time she first began working on Mr. Bell's case, Ms. Brown was forced to become heavily involved in another death penalty case on which she was the lead investigator. Her work on that case required a commitment of substantial time and extensive travel. Ms. Brown was involved in that case until the end of January 1993. (1 CT 98-99.) After that, Ms. Brown worked on the investigation of a special circumstances murder case that was in trial. (1 CT 99.) She agreed with trial counsel that the defense investigation for Mr. Bell's case could not be completed until the fall. (1 CT 100.)

9. On March 26, 1993, the trial court held a status conference and heard trial counsel's Motion to Continue. (7 RT 2-6.)[4] Trial counsel requested that the trial date be continued to November 1, 1993, based upon their unavailability to work on Mr. Bell's case and the amount of work that remained to be done in preparation for trial. (7 RT 3-4.) The trial court inquired of the prosecutor about the possibility of a disposition of the case by guilty plea, and the prosecutor informed the court that on March 12, 1993, the district attorney decided to reject the plea offer. (7 RT 4.) However, at trial counsel's request, the district attorney and the prosecutor met with trial counsel the next day about the plea offer, at which time the district attorney was "undecided" and "thinking about the situation." (7 RT

[4] The court also heard the prosecution's Motion for a Continuance of the trial to July 12, 1993. (1 CT 80-84; 7 RT 3-6.)

4.) The trial court took the motions to continue the trial under submission. (7 RT 5-6; 8 CT 1748.)

10. On April 12, 1993, the prosecutor announced in court that the district attorney had rejected the plea offer and the district attorney's office was determined to seek a death sentence. (9 RT 2-3.) The trial court, after hearing further argument on the motions to continue (including trial counsel's recitation on difficulties with the defense investigation), granted the motions and set an October 4, 1993 trial date. (9 RT 3-10; 8 CT 1750.)

11. At the request of the trial court, on May 27, 1993, trial counsel filed a document titled "Availability of Defense Attorneys Prior to Commencement of Trial on October 4, 1993." (Exhibit [hereafter "Ex."] 92 at 1715-16.) Mr. Liss indicated that he had other cases scheduled for trial, including one case that would take the entire month of June to try. (Ex. 92 at 1715.) He also continued receiving new case assignments that could result in future trial dates and scheduling problems. (Ex. 92 at 1715-16.) Ms. Leonard did not have any other cases on which she would be required to appear in court. (Ex. 92 at 1716.)

12. On May 27, 1993, the trial court held a hearing on the defense Motion to Suppress Evidence Pursuant to Penal Code section 1538.5 and Motion to Dismiss the Information Pursuant to Penal Code section 995. (8 CT 1754.) The Motion to Suppress was denied that day (8 CT 1754), and the Motion to Dismiss was denied the next day, May 28 (8 CT 1756).[5]

13. On June 1, 1993, the trial court issued an order setting a briefing and hearing schedule for pretrial and in limine motions and

[5] As noted above, the court of appeal subsequently vacated the trial court's order as to the charge of residential burglary and the related special circumstance allegation, and the burglary count and the related special circumstance allegation were struck from the Information.

directing that the October 4, 1993 trial date was "firm and no further continuances [would] be granted." (1 CT 184-85.)

14. On June 7, 1993, the prosecutor filed a Motion in Limine Regarding Admissibility of Evidence of Other Offenses Committed by the Defendant. (1 CT 214-229.)

15. On June 16, 1993, the prosecutor filed a Motion in Limine for an Order Directing the Psychiatric Evaluation of the Defendant. (1 CT 233-38.)

16. On July 1, 1993, trial counsel filed an Evidence Code section 402(b) Motion to Suppress Statements of the Defendant, asserting that Mr. Bell did not waive his *Miranda* rights and that his statements were not shown by the prosecution to have been made voluntarily. (3 CT 495-500.)

17. On July 7, 1993, trial counsel filed a Reply Brief to the People's Motion in Limine Regarding Admissibility of Evidence of Other Offenses Committed by the Defendant, discussing the dissimilarities between Mr. Bell's prior conviction from New York for assault and sodomy and the pending charged crimes, and the extremely inflammatory nature of the prior sodomy. (3 CT 538-47.)

18. On August 2, 1993, the prosecutor filed Points and Authorities in Opposition to Motion to Suppress Statements. (3 CT 675-95.)

19. On August 2, 1993, trial counsel filed the Defendant's Opposition Brief to Prosecution Request for Psychiatric Evaluation. (3 CT 696-706.)

20. On August 2, 1993, the prosecutor filed a Notice of Evidence in Aggravation Pursuant to Penal Code section 190.3. (3 CT 589-90.)

21. On September 7, 1993, the trial court heard and decided several of the pending pretrial and in limine motions. (8 CT 1761-62.)

a. After holding a hearing on the Evidence Code section 402(b) Motion to Suppress Statements of Defendant (13 RT 192-244), the trial court denied the motion (13 RT 245-48, 269-70; 8 CT 1761).

b. The trial court denied, in part, the prosecution's Motion in Limine Regarding Admissibility of Evidence of Other Offenses Committed by the Defendant as to Mr. Bell's New York prior crime finding it insufficiently similar to be admissible to prove intent in the prosecution's case-in-chief at the guilt-innocence phase of trial. (8 CT 1761; 13 RT 248-50, 266-67.)

c. The trial court found the prosecution's Motion in Limine for an Order Directing the Psychiatric Evaluation of the Defendant was not ripe and deferred ruling on it until such time as the defense presented evidence at trial placing Mr. Bell's mental state in issue. (13 RT 292-95; 8 CT 1761.)

d. Trial counsel also informed the court that the defense was "not contemplating requesting a continuance [of the scheduled trial date] at this time." (13 RT 297.)

22. On September 8, 1993, the trial court again heard and decided several pending motions. (8 CT 1763-64.)

23. Jury selection for Mr. Bell's trial began on October 1, 1993 (8 CT 1769), and ended on October 21, 1993 (8 CT 1796).

a. On October 19, 1993, trial counsel made four motions pursuant to *People v. Wheeler*, 22 Cal. 3d 258 (1978) and *Batson v. Kentucky*, 476 U.S. 79 (1986). (8 CT 1790.) The motions challenged the prosecutor's exercise of peremptory challenges against prospective jurors on the basis of race, gender, and sexual orientation. (7 CT 1644-46; 8 CT 1790; 24 RT 1500-02, 1505-13, 1519-26, 1527-29.) The motions were denied. (8 CT 1790.)

b. On October 19, 1993, twelve jurors were sworn to hear the case. (8 CT 1790.)

c. On October 21, 1993, during the selection of the alternate jurors, trial counsel challenged the prosecutor's exercise of peremptory challenges against two prospective jurors on the basis of race and gender. (8 CT 1795; 7 CT 1644-46; 26 RT 1734-55.) The motions were denied. (8 CT 1795-96.)

d. At the conclusion of jury selection, trial counsel objected to the denial of the *Wheeler/Batson* motions, expressed dissatisfaction with the jury as constituted, and requested the dismissal of the jury and the alternates. (8 CT 1796; 26 RT 1758-59.) The trial court denied the motion. (28 CT 1796; 26 RT 1759.)

e. On October 21, 1993, four alternate jurors were sworn to hear the case. (8 CT 1796.)

24. On October 25, 1993, the guilt-innocence phase of Mr. Bell's trial began (8 CT 1800), and it ended on November 22, 1993 (8 CT 1835).

a. The prosecution and the defense presented opening statements, and the prosecution began its case-in-chief on October 25, 1993. (8 CT 1800.)

b. On November 1, 1993, the prosecution rested and the defense began its case. (8 CT 1807.)

c. The defense rested its case on November 8, 1993, and the prosecution began its rebuttal. (8 CT 1818.)

d. The prosecution concluded its rebuttal on November 10, 1993. (8 CT 1823.)

e. The prosecution and the defense presented closing arguments on November 15 and 16, 1993. (8 CT 1825-26.)

f. On November 16, 1993, the trial court instructed the

jury, and the case was submitted to the jury for deliberations at 2:20 p.m. (8 CT 1826.) The jury was excused for the evening at 4:00 p.m. after deliberating for one hour and forty minutes. (8 CT 1827.)

g. On November 17, 1993, the jury resumed deliberations at 9:00 a.m. (8 CT 1828.) At 9:40 a.m., Jury Note 19—requesting a clearer definition of the words "accomplished by" in the robbery instruction—was received by the trial court. (5 CT 1188; 8 CT 1828; 40 RT 3372-74.) The trial court responded to the jury note (40 RT 3375), and the jury continued its deliberations, concluding for the day at 4:00 p.m., having completed a total of approximately seven hours of deliberations. (8 CT 1828-29.)

h. On November 18, 1993, the jury resumed deliberations at 9:00 a.m. (8 CT 1830.) At 1:45 p.m., Jury Note 20—indicating that the jury was unable to arrive at a unanimous verdict—was received by the trial court. (5 CT 1189; 8 CT 1830; 40 RT 3378.) The defense objected to the trial court's proposed response to the jury note and moved for a mistrial, which was denied. (8 CT 1830; 40 RT 3380-84.) The trial court read an admonition instructing the jury to continue its deliberations. (8 CT 1830-31; 40 RT 3383-84.) The jury concluded its deliberations for the day at 4:00 p.m., having completed a total of approximately twelve hours and thirty-five minutes of deliberations. (8 CT 1830-31.)

i. At 4:00 p.m. on November 18, 1993, the trial court received Jury Note 21 from juror Aron Gladney stating: "Sir, I am in psychological pain. I wish to be excused from this jury. I feel the level of intimidation from a couple of jurors toward me that make [sic] this process impossible. I am emotionally battered by this situation and can no longer tolerate the strain. I am very sorry but I can no longer function in this environment." (5 CT 1190-90.1; 8 CT 1831; *see also* 40 RT 3385-95.)

j. On November 19, 1993, the trial court examined juror

Gladney outside the presence of the other jurors. (8 CT 1832; 40 RT 3396-99.) Trial counsel renewed a motion for an admonition to the jurors concerning their duty to be courteous and respectful during deliberations and a motion for a mistrial, which were both denied. (8 CT 1832-33; 40 RT 3400-01; 41 RT 3418.) The trial court then excused the jury from deliberations until November 22, 1993. (8 CT 1832; 40 RT 3401-02.)

k. At 8:40 a.m. on November 22, 1993, the trial court received Jury Note 22—a two-page letter from juror Gladney. (5 CT 1191-91.1; 8 CT 1834; 42 RT 3447-51.) The defense renewed its motion for a mistrial, which ultimately was again denied. (8 CT 1834; 42 RT 3454-56, 3484-87, 3494.) The trial court examined juror Gladney and the jury foreman, Mark Daniels. (8 CT 1834; 42 RT 3458-81.) Upon completion of the examinations, the trial court excused juror Gladney, finding that she committed misconduct when she discussed the case with her husband and she was emotionally unable to continue, and the court replaced her with an alternate juror, Nancy Martin. (8 CT 1834-35; 42 RT 3484-85, 3491-92, 3494-96.)

l. At 11:07 a.m. on November 22, 1993, the newly constituted jury began its deliberations. (8 CT 1835.) The jury was excused for lunch from 12:00 p.m. to 1:00 p.m. (8 CT 1835.) At 2:02 p.m., after only one hour and fifty-five minutes of deliberations, the jury informed the trial court that it had reached a verdict. (8 CT 1835.) The jury found Mr. Bell guilty on all counts and found the special circumstance allegation to be true. (8 CT 1835-39; 42 RT 3500-3507.)

25. On November 24, 1993, trial counsel filed a Motion to Exclude Evidence of Victim Impact During the Penalty Phase (6 CT 1294-1302), and Supplemental Points and Authorities in Support of a Motion for

a Separate Penalty Phase Jury (6 CT 1315-27).[6]

26. On November 29, 1993, the prosecutor filed a Motion in Limine in Support of Admission of Victim Impact Evidence. (6 CT 1371-76.)

27. On November 29, 1993, the trial court denied both the Motion to Exclude Evidence of Victim Impact During the Penalty Phase and the Motion for a Separate Penalty Phase Jury. (8 CT 1840-41; 43 RT 3577-82.)

28. The penalty phase of Mr. Bell's trial began on November 30, 1993 (8 CT 1842), and ended on December 17, 1993 (8 CT 1865).

a. The prosecution and the defense presented opening statements, and the prosecution commenced its case on November 30, 1993. (8 CT 1842.)

b. The prosecution rested its case and the defense began its penalty phase case on December 3, 1993. (8 CT 1846.)

c. On December 6, 1993, juror Wendy Rankin submitted Jury Note 26, informing the court of the unavoidable financial loss she would suffer from unalterable travel scheduled for December 18, 1993, and requesting a guarantee that she would be dismissed and replaced by an alternate juror on December 17 if the case was not complete by that date. (7 CT 1475-75.1.)

d. On December 7, 1993, the trial court informed juror Rankin that it was inclined to excuse her on December 17 if a verdict had not been reached by that date, and asked juror Rankin not to discuss this situation with the jurors any more than she had done so already. (48 RT 4083-84; 8 CT 1852.)

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[6] Trial counsel initially filed a Motion for a Separate Penalty Phase Jury on July 1, 1993. (2 CT 416-23.) That motion was denied on September 8, 1993. (8 CT 1763; 13 RT 361-64.)

e. On December 9, 1993, the defense rested its case and the prosecution presented its rebuttal. (8 CT 1855.)

f. The prosecution presented its closing argument on December 13, 1993. (8 CT 1858.)

g. On December 14, 1993, trial counsel presented closing arguments, and the jury was instructed by the trial court and began its deliberations at 11:27 a.m. (8 CT 1859.) The jury was excused for the evening at 3:58 p.m., having completed a total of approximately three hours and ten minutes of deliberations. (8 CT 1859-60.)

h. The jury deliberated for approximately five hours and twenty minutes on December 15, 1993. (8 CT 1861.)

i. The jury deliberated for approximately five hours and twenty minutes on December 16, 1993. (8 CT 1863.)

j. On December 17, 1993, juror Rankin submitted Jury Note 29, reminding the trial court that she needed to be excused from jury service that day and had to leave by 3:00 p.m. to deliver insurance forms and receive travel-related medical shots before 5:00 p.m. (7 CT 1528; 8 CT 1865.)

k. On December 17, 1993, at 2:25 p.m., after deliberating for approximately three hours and twenty-five minutes (with a total deliberation of approximately seventeen hours and fifteen minutes), the jury reached its verdict of death. (8 CT 1865.)

29. On January 21, 1994, trial counsel filed a Motion to Reduce the Sentence from Death to Life in the State Prison Without Possibility of Parole in Accordance with Penal Code sections 190.4(e), 1385, and 1181(7). (7 CT 1591-97.)

30. On January 25, 1994, the prosecutor filed an Opposition to the Motion to Modify the Death Verdict per Penal Code sections 190.4(e) and

1181(7). (7 CT 1598-1602.)

31. On January 25, 1994, trial counsel filed a Motion to Voir Dire the Trial Judge Regarding His Political Intentions and to Recuse Him in Accordance with Code of Civil Procedure section 170.1(a)(6). (7 CT 1603-19.)

32. On January 27, 1994, the trial court denied the defense request to voir dire the trial court, declined to recuse itself, and transferred the recusal motion to the presiding judge of the superior court. (8 CT 1872.)

33. On January 28, 1994, trial counsel filed a Motion for a New Trial. (7 CT 1641-52.)

34. On February 3, 1994, the trial court filed an Answer of Trial Judge in Response to Motion to Disqualify Him. (7 CT 1653-59.)

35. On February 3, 1994, the San Diego County Counsel filed a Memorandum of Points and Authorities in Opposition to Disqualification of Trial Judge. (7 CT 1660-73.)

36. On February 4, 1993, a hearing was held on the defense motion to recuse the trial court in accordance with Code of Civil Procedure section 170.1(a)(6). (8 CT 1875-76; 59 RT 4570-607.) The court found, and it was stipulated by the parties, that the trial court was considering running for Congress by October of 1993. (8 CT 1876; 59 RT 4602-03.) The motion was denied. (8 CT 1876; 59 RT 4603-05.)

37. On February 24, 1994, the Fourth District Court of Appeal, Division One, denied Mr. Bell's Petition for Writ of Mandate (Case No. D020513) concerning the denial of the motion to recuse the trial court. (8 CT 1708.)

38. On February 25, 1994, the prosecutor filed Points and Authorities in Opposition to Motion for New Trial (8 CT 1682-1707), and a

Supplemental Response to Defendant's Motion for New Trial (7 CT 1679-81).

39. On March 4, 1994, the trial court denied the defense motions for a new trial and to reduce Mr. Bell's sentence to life without the possibility of parole. (8 CT 1879-82; 61 RT 4634, 4650). The trial court then imposed a sentence of death for the special circumstance felony-murder in count one. (8 CT 1710, 1712-16, 1881-82; 61 RT 4656). The trial court also sentenced Mr. Bell to a total determinate term of ten years for count two, which it stayed pursuant to Penal Code section 654; ordered Mr. Bell to pay a $1,000 restitution fine pursuant to Government Code section 13967; and ordered that Mr. Bell receive a total of 956 days of custody credits. (8 CT 1711, 1712-16, 1881-82; 61 RT 4655-56).

40. On January 15, 1997, the trial court destroyed all of the exhibits in the case. (18 CT 3985-86; 19 CT 4188, 4189-90.)

41. On July 13, 2001, the trial court issued an order detailing the efforts made to reconstruct the trial exhibits. (19 CT 4188-90, 4194-4202.) Numerous exhibits could not be reconstructed or substituted. (19 CT 4194-95, 4201.)

B. PROCEEDINGS IN THIS COURT

1. Mr. Bell's automatic appeal began on March 11, 1994, with the filing of the judgment of death in this Court, and concluded with the United States Supreme Court's denial of his Petition for Writ of Certiorari on October 1, 2007.

a. On September 16, 1998, this Court appointed Anthony J. Dain to represent Mr. Bell for both the automatic appeal and related state habeas corpus and executive clemency proceedings.

b. The record on appeal was filed on November 5, 2001.

c. Appellant's Opening Brief on appeal was filed on June

12, 2003.

d. Respondent's Brief was filed on November 4, 2003.

e. Appellant's Reply Brief was filed on January 28, 2005.

f. On August 23, 2006, this Court issued an order inviting supplemental briefing from the parties concerning the effect of *Johnson v. California*, 545 U.S. 162 (2005) and *People v. Johnson*, 38 Cal. 4th 1096 (2006) on Argument I in Appellant's Opening Brief.

g. Respondent's Supplemental Letter Brief was filed on September 22, 2006.

h. Appellant's Supplemental Letter Brief was filed on September 25, 2006.

i. Respondent's Supplemental Reply Letter Brief was filed on October 11, 2006.

j. Appellant's Response to Respondent's Supplemental Letter Brief was filed on October 13, 2006.

k. The automatic appeal was argued and submitted on December 5, 2006.

l. This Court issued its opinion on February 15, 2007, affirming the judgment. *People v. Bell*, 40 Cal. 4th 582 (2007).

m. Appellant's Petition for Rehearing was filed on March 2, 2007.

n. On March 28, 2007, this Court denied rehearing and issued a remittitur.

o. Mr. Bell filed a Petition for Writ of Certiorari in the United States Supreme Court on June 26, 2007, which was denied on October 1, 2007. *Bell v. California*, ___ U.S. ___, 128 S. Ct. 202 (2007).

2. On March 7, 2006, Anthony J. Dain filed a Motion to Withdraw as habeas corpus and executive clemency counsel for Mr. Bell.

3. On June 21, 2006, this Court granted Mr. Dain's motion to withdraw and appointed the Habeas Corpus Resource Center to represent Mr. Bell in habeas corpus and executive clemency proceedings related to the then pending automatic appeal.

4. Habeas corpus proceedings in this Court began on March 29, 2007, with the filing of a Petition for Writ of Habeas Corpus on Mr. Bell's behalf. Therein Mr. Bell requested that the petition be deemed properly and timely filed, and that he be permitted to file an amended petition within the timeframe set forth by this Court in its June 21, 2006 order appointing the Habeas Corpus Resource Center as counsel and this Court's timeliness standards set forth in its Policies Regarding Cases Arising from Judgments of Death.

5. As part of the present proceedings, Mr. Bell obtained from the San Diego County District Attorney's Office a copy of numbered discovery documents provided to trial counsel and requested additional discovery materials as part of informal efforts pursuant to Penal Code section 1054.9. However, the informal efforts to resolve other discovery issues over the past several months did not result in disclosure of requested discovery. Thus, Mr. Bell recently filed a motion for post-conviction discovery in the San Diego Superior Court to obtain court-ordered discovery. The motion is pending.

6. No other petition has been filed on Mr. Bell's behalf, in this or any other state court, challenging the legality of his confinement, conviction, and sentence of death for which he is presently incarcerated.

7. This amended petition is necessary because Mr. Bell has no other plain, speedy, or adequate remedy at law for the substantial violations of his constitutional rights as protected by the state and federal constitutions; mandatory state statutes, decision, or regulations; and

international law in that the factual bases for these claims lie wholly or significantly outside the record developed on appeal or the claims involve allegations detailing the inadequacy of trial counsel's and appellate counsel's representation. Moreover, Mr. Bell's automatic appeal has concluded and the petition filed on his behalf must be amended so that all the bases for the illegality of his confinement, conviction, and sentence are presented in a single action.

8. This amended petition is timely and properly amends the properly filed petition dated March 29, 2007. In its June 21, 2006 order, this Court determined that, "in light of prior habeas corpus counsel's declaration, in support of his motion to withdraw, to the effect that he was unable to discharge his duty to investigate and, if appropriate, present a habeas corpus petition on behalf of [Mr. Bell]," this amended petition would not be deemed unjustified or untimely. This amended petition is filed within 36 months of this Court's June 21, 2006 order.

9. Mr. Bell requests that this Court take judicial notice of all of the records, documents, exhibits, orders, and pleadings filed in this case in the courts below in: *People v. Steven M. Bell*, San Diego County Superior Court Case No. CR133096; *Steven M. Bell v. Superior Court (The People, R.P.I.)*, Court of Appeal, Fourth Appellate District, Division One Case No. D019085; and *Steven M. Bell v. Superior Court (The People, R.P.I.)*, Court of Appeal, Fourth Appellate District, Division One Case No. D020513.

10. Mr. Bell requests that this Court take judicial notice of the certified record on appeal and all of the briefs, motions, orders, and other documents filed with this Court in *People v. Steven M. Bell*, Case No. S038499.

a. Mr. Bell makes this request to avoid duplication of those voluminous documents, a copy of which this Court and counsel for

respondent already possess.

b. By this request, Mr. Bell realleges the arguments made on his behalf in the automatic appeal so that they may be considered cumulatively with the claims raised herein in determining whether constitutional error and/or the prejudice flowing therefrom existed.[7]

11. Mr. Bell incorporates by reference all exhibits filed in support of this amended petition and the facts contained in those exhibits and realleges the material in these documents to avoid wholesale repetition of all facts contained therein, while allowing their consideration as if each of the facts and conclusions in the exhibits was repeated in each relevant

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[7] Such a cumulative review is mandated under the Eighth and Fourteenth Amendments in light of the heightened scrutiny and need for reliability in capital cases. Moreover, Mr. Bell's request is consistent with this Court's jurisprudence, *see, e.g.*, *People v. Holt*, 37 Cal. 3d 436, 458-59 (1984) (cumulating effect of errors); *People v. Cardenas*, 31 Cal. 3d 897, 907 (1982) (recognizing cumulative error analysis), and this Court's special duty in capital cases to examine the complete record to ascertain whether a capitally-charged defendant received a fair trial. *People v. Easley*, 34 Cal. 3d 858, 863 (1983); *see also United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) ("'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors." (quoting *United States v. Wallace*, 848 F.2d 1464, 1476 (9th Cir. 1988)); *United States v. Tory*, 52 F.3d 207, 211 (9th Cir. 1995); *United States v. Wallace*, 848 F.2d at 1475-76.

Multiple deficiencies merit a collective or cumulative assessment of prejudice, because errors that do not require that a judgment be set aside when viewed alone, or do not rise to the level of a constitutional violation when viewed singly, may violate the federal constitution and require relief in the aggregate. *Alcala v. Woodford*, 334 F.3d 862, 883-94 (9th Cir. 2003) (cumulating the issues of both error and prejudice); *Killian v. Poole*, 282 F.3d 1204, 1211 (9th Cir. 2002); *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992) (cumulating trial court errors and deficiencies of trial counsel); *United States v. Tucker*, 716 F.2d 576, 595 (9th Cir. 1983); *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978); *see also Henry v. Scully*, 78 F.3d 51, 53 (2d Cir. 1996).

allegation in this amended petition. *See In re Fields*, 51 Cal. 3d 1063, 1070 n.2 (1990).

12. The filing of this amended petition does not constitute a waiver, express or implied, of any applicable privilege or protection including, but not limited to, the privilege against self-incrimination, the attorney-client communication privilege, and the work-product protection. *See People v. Ford*, 45 Cal. 3d 431 (1988); Evid. Code § 955. Mr. Bell hereby requests that any waiver of a privilege or protection 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. Mr. Bell also requests "use immunity" for each and every disclosure he has made, or may make, in support of his amended petition.

13. Mr. Bell has provided this Court with all allegations and claims known to him to date. Because 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 have not been provided to Mr. Bell or his habeas corpus counsel, the full evidence in support of the claims which follow is not presently reasonably obtainable.

14. The factual allegations set forth below, as supported by reasonably available documentation, adequately support each claim and justify issuance of the order to show cause, an evidentiary hearing if necessary, and the grant of relief under clearly established federal law as determined by the Supreme Court of the United States; state constitutional, statutory, and decisional law;[8] and international law.[9]

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[8] State statutes and rules may create liberty interests protected by the Due Process Clause of the Fourteenth Amendment to the United States

III. CLAIMS FOR RELIEF

A. CLAIM ONE: MR. BELL WAS DENIED HIS RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY

Mr. Bell's conviction, sentence, and confinement are unlawful and were unconstitutionally obtained in violation of his rights to due process; a fair and impartial jury selected by nondiscriminatory practices from a fair cross-section of the community; equal protection of the laws; confrontation; effective assistance of counsel; notice of the evidence against him; conviction upon proof beyond a reasonable doubt on record evidence by a unanimous jury; the enforcement of state-mandated jury selection procedures and jury trial rights, including the exercise of peremptory challenges and challenges for cause, and a unanimous verdict of twelve jurors; and to reliable guilt and penalty assessments based upon accurate, reliable, relevant, and non-prejudicial record evidence as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution; international law as set forth in treaties,

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Constitution. *Hewitt v. Helms*, 459 U.S. 460, 466 (1983); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). In this case, Mr. Bell was arbitrarily denied his rights under state statutes, constitutional provisions, and decisional law. All of the violations of state law alleged herein were also violations of Mr. Bell's federal right to due process of law.

[9] International law from several sources—treaties, human rights law, customary law, and under the doctrine of *jus cogens*—has been a part of the federal law of this country since its establishment and was affirmed as such over a century ago by the United States Supreme Court. *See The Paquete Habana,* 175 U.S. 677, 700 (1900); *see also* Restatement (Third) of Foreign Relations Law of the United States § 111 (1987) ("International law and international agreements of the United States are law of the United States and supreme over the law of the several States."); *Id.* § 702. cmt. c (customary law of human rights is part of the law of the United States to be applied as such by state and federal courts).

customary law, human rights law, including the International Convention on the Elimination of All Forms of Racial Discrimination, and under the doctrine of *jus cogens*, by discriminatory jury selection practices, systematic exclusion of distinctive groups in the community, improper jury selection processes, and trial counsel's failure to properly raise these jury issues as set forth below.

In support of this claim, Mr. Bell alleges the following facts, among others to be presented after access to a complete and accurate record of the proceedings in the municipal and superior courts, full discovery and investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims Two through Six and Eight and the exhibits cited therein are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. The prosecutor's discriminatory jury selection practices and the trial court's bias and improper rulings during jury selection violated Mr. Bell's rights to due process, equal protection, and an impartial jury.

a. The facts and arguments set forth in Appellant's Opening Brief at pages 63-102, Appellant's Reply brief at pages 2-33, Appellant's Supplemental Letter Brief, and Appellant's Response to Respondent's Supplemental Letter Brief are incorporated by reference as if fully set forth herein.

b. The prosecutor in Mr. Bell's case, and prosecutors in the San Diego County District Attorney's office, engaged in a pattern and practice of peremptorily challenging jurors on the basis of race, gender, and sexual orientation.

(1) A San Diego County prosecutor struck on the basis of race the only three black prospective jurors on the jury panel in the trial of Curtis Eugene Washington in the mid-1980s. *People v. Washington*, 234 Cal. Rptr. 204, 210-11 (1987) (review denied and ordered unpublished).

(2) San Diego County prosecutors were alleged to have struck prospective jurors on the basis of race and/or gender in several cases before and after Mr. Bell's trial. *See People v. Harvey*, 163 Cal. App. 3d 90, 108-12 (1984); *People v. Charron*, 193 Cal. App. 3d 981, 986-92 (1987); *People v. Yarborough*, 244 Cal. Rptr. 352, 355-59 (1988) (review denied and ordered unpublished); *People v. Christopher*, 1 Cal. App. 4th 666, 669-73 (1991); *People v. Bernard*, 27 Cal. App. 4th 458, 464-69 (1994); *People v. Perez*, 29 Cal. App. 4th 1313, 1320-30 (1994); *People v. Perez*, 48 Cal. App. 4th 1310, 1313-15 (1996); *People v. Tritchler*, 55 Cal. Rptr. 2d 650, 653 (1996) (review denied and ordered unpublished); *People v. Ayala*, 24 Cal. 4th 243, 259-60 (2000) (1989 trial); *People v. Box*, 23 Cal. 4th 1153, 1185-90 (2000) (1990 trial); *People v. Rodriguez*, No. D035046, 2001 WL 1194003, at *3-*8 (Cal. Ct. App. Oct. 4, 2001) (unpublished opinion); *People v. Trice*, No. D035246, 2001 WL 1382742, at *9-*10 (Cal. Ct. App. Nov. 7, 2001) (unpublished opinion); *People v. Rodriguez*, No. D035167, 2001 WL 1297739, at *1-*4 (Cal. Ct. App. Oct. 25, 2001) (unpublished opinion); *Mitleider v. Hall*, 391 F.3d 1039, 1045-51 (9th Cir. 2004); *People v. Jurado*, 38 Cal. 4th 72, 102-08 (2006) (1994 trial); *People v. Hoyos*, 41 Cal. 4th 872, 899-03 (2007) (1994 trial).

c. The San Diego County District Attorney's Office engaged in a pattern and practice of peremptorily challenging jurors on the basis of race, gender, and sexual orientation, and trained prosecutors to engage in discriminatory and unlawful jury selection practices.

d. The reliability of the jury's fact-finding process was compromised by the constitutional and statutory violations that occurred in the selection of jurors in Mr. Bell's case, resulting in structural error that mandates habeas corpus relief. The errors affecting the jury composition and selection also had a substantial and injurious influence and effect on the jury's determinations of the verdicts at the guilt phase and penalty phase. Absent these errors, Mr. Bell would not have been convicted or sentenced to death.

3. The death qualification of Mr. Bell's jury and the removal of jurors because of their views concerning the death penalty violated his state and federal constitutional rights to a fair trial; an impartial jury; a jury drawn from a fair cross-section of the community; equal protection; due process; and a reliable determination of guilt and penalty.

a. Trial counsel filed a Motion for a Separate Penalty Phase Jury on July 1, 1993, arguing the unconstitutionality of the death qualification of Mr. Bell's jury. (2 CT 416-23.) The prosecution filed an opposition (3 CT 642-45), and the trial court denied the defense motion on September 8, 1993. (8 CT 1763; 13 RT 361-64.)

b. During jury selection the prospective jurors completed a questionnaire and were questioned by the trial court and counsel about their views on the death penalty. (9 CT 1882 – 15 CT 3449 (jury questionnaires); 21 RT 938 – 25 RT 1721 (voir dire).) The written questionnaire and the oral questioning were designed and used to identify the prospective jurors' views in favor of and against the death penalty. The trial court excused 14 prospective jurors for cause as not qualified based upon their views on the death penalty. (21 RT 939, 949-50, 1015-16, 1023, 1101-03, 1109; 22 RT 1286-89; 23 RT 1383-87, 1388, 1401-04, 1485-87, 1489; 24 RT 1630-33, 1635, 1639; 8 CT 1784-85, 1787-89, 1791.)

c. Empirical research demonstrates that the death qualification process employed in Mr. Bell's case fails to ensure that jurors will consider a life sentence and give meaningful consideration to a defendant's mitigation evidence, and arbitrarily and unfairly skews the jury and the trial process against the defendant and his defense during both the guilt phase and penalty phase of his trial.

(1) Research shows that death qualification results in juries that are more conviction-prone and death-prone than other juries. *See* Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 Ariz. St. L.J. 769, 777-93 (2006).

(2) Studies of actual death-qualified jurors who participated in capital trials—including in California—show that many jurors approached their task believing that the death penalty is the only appropriate penalty for the kinds of murder commonly tried as capital offenses. William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: The Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 Crim. L. Bull. 51, 62-63 (2003).

(3) Studies show that evidence typically considered as mitigation legally, such as abuse as a child or good behavior in jail or prison, is often not considered mitigating by death-qualified capital jurors. *See* Marla Sandys & Scott McClelland, *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 402-06 (James R. Acker et al. eds., 2nd ed. 2003).

(4) Research shows that the penalty determination of death-qualified jurors is distorted by a preoccupation with

evidence of guilt, a perception that death is required if aggravation is presented, and a pattern of failing to discuss and consider mitigation. *See* Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 Brooklyn L. Rev. 1011, 1019-53 (2001).

(5) The death-qualification process itself influences the mindset of the jurors, their evaluation of the evidence, and the deliberative process by biasing the jurors toward pro-prosecution and pro-death sentence views. Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 L. & Hum. Behav. 121 (1984).

d. As shown by several studies, death qualification disproportionately and systematically excludes from capital juries jury-eligible citizens who are minorities, women, and religious—distinctive groups in the community. Numerous studies have shown that proportionately more blacks than whites and more women than men are against the death penalty. Death qualification tends to eliminate proportionately more blacks than whites and more women than men (as occurred in Mr. Bell's case) from capital jury panels, thereby adversely affecting two distinctive groups under a fair cross-section analysis. The process has a detrimental effect on the representation of blacks and women on capital juries.

e. The prosecutor in this case improperly and unconstitutionally used the death-qualification process and peremptory challenges to systematically exclude prospective jurors based on their views on the death penalty, including a juror who declared he could impose a death sentence but had reservations about the death penalty, further illegitimately skewing the jury in favor of a death sentence. (23 RT 1382-

83, 24 RT 1529.)

f. Only select criminal defendants, like Mr. Bell, against whom the prosecutor has decided to seek a death sentence—and at times those jointly tried with a capital defendant—are subject to biased death-qualified juries.

g. Mr. Bell's trial by a death-qualified jury, conviction, and death sentence offend the evolving standards of decency and requisite heightened reliability under the state and federal Constitutions.

h. Mr. Bell's death-qualified jury was arbitrarily assembled, biased against him and his defense, and failed to provide a reliable and individualized determination of his guilt/innocence and penalty as mandated by the federal and state Constitutions. The death qualification of prospective jurors generally and as applied in Mr. Bell's case constitutes structural constitutional error requiring reversal of the conviction, special circumstance findings, and death sentence. Alternatively, Mr. Bell has demonstrated that the constitutionally flawed death qualification of his jury had a substantial and injurious effect and influence on the determination of the jury's guilty verdicts, special circumstance findings, and penalty determination; and he is entitled to relief.

4. Mr. Bell's trial counsel were constitutionally and prejudicially ineffective for not investigating or seeking discovery from the San Diego County District Attorney's Office concerning its policies and procedures for jury selection, and for not presenting all available evidence of the District Attorney's discrimination during jury selection, including the pattern and practice of peremptorily challenging jurors on the basis of race, gender, and sexual orientation. Trial counsel also were constitutionally and prejudicially ineffective for failing to raise all available and meritorious arguments against a trial of Mr. Bell by a death-qualified jury. Trial

counsel's actions and omissions were not strategic, fell below the standards for reasonably competent counsel, and prejudiced Mr. Bell. But for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different.

5. Trial counsel was constitutionally and prejudicially ineffective for failing to investigate the jury selection process and the jury composition, for failing to seek discovery from the jury commissioner, for failing to research and raise the jury selection and composition issues before the trial court, and for failing to request a hearing to present evidence of violations of Mr. Bell's constitutional and statutory rights. Trial counsel's actions and omissions were not strategic and fell below the standards for reasonably competent counsel, and prejudiced petitioner. But for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different.

6. Mr. Bell's trial counsel were constitutionally and prejudicially ineffective for not adequately questioning and peremptorily challenging jurors Mark Daniels, Wendy Rankin, and Martin Spring based on their personal and professional backgrounds. (*See* 22 RT 1182-83, 1249-52; 23 RT 1452-53.) Trial counsel's actions and omissions were not strategic, fell below the standards for reasonably competent counsel, and prejudiced Mr. Bell. But for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different.

7. To the extent appellate counsel was required or permitted to raise on appeal the above arguments, appellate counsel was constitutionally ineffective in failing to do so. Appellate counsel's actions and omissions were not strategic, fell below the standards for reasonably competent counsel, and prejudiced Mr. Bell.

B. CLAIM TWO: MR. BELL WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIBUNAL

Mr. Bell's conviction and sentence of death were rendered in violation of his rights to due process; a trial before a fair and impartial tribunal; equal protection; a fair and impartial jury; confrontation; compulsory process; present a defense; notice of the evidence against him; the effective assistance of counsel; the presumption of innocence; and fair, accurate, and reliable guilt and penalty determinations; and the enforcement of mandatory state laws, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution; Code of Civil Procedure section 170.1 and other state laws and rules; and international law as set forth in treaties, customary law, human rights law and under the doctrine of *jus cogens*, because the trial judge was considering running for Congress and also intent on seeking re-election to the superior court while sitting on Mr. Bell's case. The trial judge was influenced by his political and judicial career and aspirations, which created an actual bias, a probability of or potential for bias, and an appearance of partiality. The trial judge prejudicially and improperly failed to disclose anything about his political considerations and aspirations to Mr. Bell or his trial counsel.

In support of this claim, Mr. Bell alleges the following facts, among others to be presented after access to a complete and accurate record of the proceedings in the municipal and superior courts, full discovery and investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts set forth in Claim One and Claims Three through Eight and the exhibits cited therein are incorporated by this reference as if

fully set forth herein. A fair and impartial tribunal, not burdened by concern over its own political motivations, would not have permitted Mr. Bell's trial to proceed as alleged in these claims.

2. During Mr. Bell's trial, the trial judge was acting under an actual bias, a probability of or potential for bias, and an appearance of partiality based on his political career, motivations, and aspirations.

a. The trial judge was a former politician who was interested in pursuing political elective office again and influenced by his political aspirations while sitting on the bench in Mr. Bell's case.

(1) The trial judge served on the San Diego City Council from 1981 to 1985. (Ex. 96 at 2130.) He was appointed to his seat by the council itself, which was then led by former Governor Pete Wilson. (Ex. 95 at 2118.)

(2) The trial judge was appointed to the municipal court in 1985 by then-Governor George Deukmejian. (Ex. 96 at 2130.)

(3) Until July 1988, the trial judge maintained his campaign committee, Friends of Dick Murphy, which collected tens of thousands of dollars in contributions from numerous donors during its existence. (Ex. 93 at 1717-2107.)

(4) The trial judge was elevated to the superior court in 1989. (Ex. 96 at 2130.)

(5) On December 21, 1993, The San Diego Union-Tribune reported that the trial judge was a potential Republican challenger to Democratic Congresswoman Lynn Schenk in the 1994 election. (7 CT 1658.)

(6) On January 14, 1994, The San Diego Union-Tribune reported that, "Next in the pecking order [to challenge Rep. Schenk] was thought to be Superior Court Judge Richard Murphy, a

onetime city councilman who is said to miss partisan politics. But if Murphy ever gave serious thought to a congressional campaign, someone (possibly a wise wife) seems to have persuaded him to forget it." (7 CT 1655, 1659.)

(7) On January 18, 1994, when trial counsel raised the issue of the trial judge's possible campaign for Congress and appearance of bias, the trial judge said, "First of all, I have really made no decision one way or another about running for congressional office." (56 RT 4529-30.) The judge declined to be voir dired by trial counsel on the subject (56 RT 4531), and said, "I'm sort of reluctant to say much [about the issue] until I've had a chance to think about it" (56 RT 4536).

(8) On January 25, 1994, when discussing trial counsel's Motion to Voir Dire the Trial Judge Regarding His Political Intentions and to Recuse Him (7 CT 1603-19), the trial judge said he did not intend to run for an elective political office in 1994 or 1995, but he declined to address trial counsel's third proposed voir dire question that "look[ed] into the mind set [sic] of a judge during his hearing of a case" (57 RT 4552).

(9) On January 26, 1994, The San Diego Union-Tribune reported that the trial judge "long has been rumored to be a possible Republican candidate for Congress." (Ex. 95 at 2111.)

(10) On February 3, 1994, the trial judge stated in an Answer of Trial Judge in Response to Motion to Disqualify Him, "I do not intend to run for any elected political office during the calendar year 1994, nor do I have any plans to run for elective political office in the foreseeable future. I do intend to seek re-election to the San Diego County Superior Court in 1996." (7 CT at 1653.)

(11) On February 6, 1994, The San Diego Union-

Tribune reported that the trial judge "finally declin[ed] to run in the 49th Congressional race." (Ex. 95 at 2113.)

(12) On February 28, 1998, The San Diego Union-Tribune described the trial judge as a person "who frequently is rumored to be interested in returning to politics." (Ex. 95 at 2117.)

(13) On March 5, 1994, the day after Mr. Bell was sentenced, The San Diego Union-Tribune printed the trial judge's final comment when sentencing Mr. Bell: "'What has become of San Diego that we have murderers stalking our children?' Murphy said. 'That is unacceptable in our society. It must stop.'" (Ex. 95 at 2114; *see also* 61 RT 4656-57.)

(14) Five years later, in April 1999, the trial judge took a leave of absence from his judicial position to begin his campaign for mayor of San Diego. (Ex. 95 at 2118.)

(15) On April 5, 1999, The San Diego Union-Tribune reported that the trial judge pointed to his judicial experience as a positive fact for his mayoral candidacy. The trial judge said that "he is used to making 'what are literally life-and-death decisions.'" (Ex. 95 at 2118.) The news story also reported that, "Although removed from the political limelight as a judge, Murphy at times has hankered to return to elective office, and he was mentioned in recent years as a potential candidate for both mayor and Congress. He said he previously gave serious consideration to only one race, when Republican leaders were seeking an opponent for then-Rep. Lynn Schenk in 1994." (Ex. 95 at 2118.)

(16) On April 6, 1999, the trial judge filed documents evidencing his intention to run for mayor and the organization of his campaign committee. (Ex. 94 at 2108.)

(17) The trial judge was endorsed for mayor in the

2000 election by "Hon. Ed Miller," the District Attorney who prosecuted Mr. Bell and denied his offer to plead guilty in exchange for a sentence of life without the possibility of parole. (Ex. 96 at 2134.)

(18) On November 7, 2000, the trial judge was elected as mayor of San Diego. (Ex. 95 at 2120.)

(19) In February 2003, when serving as mayor, the trial judge selected former District Attorney Ed Miller for nomination to the San Diego Ethics Commission. (Ex. 95 at 2122.)

(20) On April 25, 2005, during his second term as mayor of San Diego, the trial judge resigned amid criticism of his handling of the city's pension deficit, threats of a recall, and federal investigations into city finances. (Ex. 95 at 2124.)

b. The trial judge improperly failed to disclose to Mr. Bell and trial counsel his true, "serious consideration" of a run for Congress during Mr. Bell's trial. The trial judge should have recused himself or been recused from the proceedings because of an actual bias, a probability of or potential for bias, or an appearance of partiality based on his political career, motivations, and aspirations.

(1) On January 25, 1994, trial counsel filed a Motion to Voir Dire the Trial Judge Regarding His Political Intentions and to Recuse Him in Accordance with Code of Civil Procedure section 170.1(a)(6). (7 CT 1603-19.) Trial counsel detailed the grounds for their assertion that the trial judge had intended for some time to run for Congress in 1994, noting the judge's statements about his political career, his attendance at public functions during the trial, and his eagerness to conclude the case. (7 CT 1611-17.)

(2) On January 27, 1994, the trial judge issued an order denying the defense request to voir dire him (characterizing it as "an

intrusion into the subjective thought processes of a trial judge"), declining to recuse himself, and transferring the recusal motion to the presiding judge of the superior court. (8 CT 1872.)

(3) On February 4, 1994, a hearing was held on the defense motion to recuse. (8 CT 1875-76; 59 RT 4570-4607.) At the hearing the court commented to trial counsel, "I think you certainly have a reasonable belief to think [the trial judge] has been thinking about [running]. That is hardly the most closely-guarded secret in the world." (59 RT 4580.) The court went on, "I have no doubt about it. He discussed it with me; I heard other judges talk about it. You may assume ... that is true. I'm sure Judge Murphy would be the first person to state that." (59 RT 4589-90.) Trial counsel said they would have used a Code of Civil Procedure section 170.6 peremptory challenge against the trial judge if they had been aware that he was seriously entertaining a run for Congress. (59 RT 4589; *see also* 4594-95.) The court found and it was stipulated by the parties that the trial judge was considering a run for Congress when Mr. Bell's trial began in October of 1993. (8 CT 1876; 59 RT 4602-03.) The motion to recuse was then improperly denied. (8 CT 1876; 59 RT 4603-05.)

c. The trial judge's "serious consideration" of a campaign for Congress during Mr. Bell's case rendered the judge partial and/or created the appearance of partiality. The judge—as evidenced by his statements and political actions—was aware that his political career and aspirations were related to and affected by his judicial decisionmaking.

3. During Mr. Bell's trial, the trial judge was acting under an actual bias, a probability of or potential for bias, and an appearance of partiality based on his plan to run for re-election to the superior court.

a. On February 3, 1994, in his Answer of Trial Judge in Response to Motion to Disqualify Him, the trial judge stated, "I do intend to

seek re-election to the San Diego County Superior Court in 1996." (7 CT at 1653.)

b. The trial judge's intent to seek re-election rendered the judge partial and/or created the appearance of partiality. The judge—as evidenced by his statements and political actions—was aware that his future judicial career and aspirations were related to and affected by his judicial decisionmaking.

4. Research shows that elected judges respond to and make decisions in criminal cases that are influenced by potential electoral consequences. *See* Gregory A. Huber & Sanford C. Gordon, *Accountability & Coercion: Is Justice Blind when It Runs for Office?*, 48 Am. J. Pol. Sci. 247, 248, 261-62 (2004).

5. The facts and arguments set forth in Appellant's Opening Brief at 102-12 and Appellant's Reply Brief at 33-44 raising the trial judge's misconduct based on disparaging remarks made about the defense counsel in front of the jury are incorporated by this reference as if fully set forth herein. A fair and impartial tribunal, not concerned about its own political future and dedicated solely to doing justice, would not have made the disparaging remarks.

6. The facts and arguments set forth in Appellant's Opening Brief and Appellant's Reply Brief, Appellant's Supplemental Letter Brief, and Appellant's Response to Respondent's Supplemental Letter Brief setting forth the trial judge's erroneous rulings are incorporated by this reference as if fully set forth herein. A fair and impartial tribunal, not concerned about its own political future and dedicated solely to doing justice, would not have made the challenged rulings.

7. To the extent appellate counsel was required or permitted to challenge the denial of the request to voir dire and recuse the trial judge,

appellate counsel was constitutionally ineffective in failing to do so. Appellate counsel's actions and omissions were not strategic, fell below the standards for reasonably competent counsel, and prejudiced Mr. Bell.

8. The trial judge's implied and actual bias, his failure to advise counsel of his political intentions and recuse himself or be recused, and the appearance of partiality, cumulatively or singly, deprived Mr. Bell of a fair and impartial tribunal and had a substantial and injurious effect or influence on the jury's determination of Mr. Bell's guilt, death eligibility, and sentence.

C. CLAIM THREE: MR. BELL WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO A FAIR AND RELIABLE DETERMINATION OF GUILT BY TRIAL COUNSEL'S PREJUDICIALLY DEFICIENT PERFORMANCE

The judgment of conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of Mr. Bell's rights to a trial by a fair and impartial jury; a reliable, fair, non-arbitrary, and non-capricious determination of guilt and penalty; the effective assistance of counsel; present a defense; confrontation and compulsory process; the privilege against self-incrimination; the enforcement of mandatory state laws; a trial free of materially false and misleading evidence; a fair trial; an impartial and disinterested tribunal; equal protection; due process of law; and a fair and objective judicial determination pursuant to Penal Code section 190.4, subdivision (e) as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution and mandatory state statutes and rules; customary international law, international human rights law, and *jus cogens*, because Mr. Bell's trial counsel rendered constitutionally deficient representation in failing

adequately to investigate, prepare or present meritorious guilt and special circumstance defenses thereby prejudicing Mr. Bell at all critical stages of the criminal proceedings.

Trial counsel unreasonably and prejudicially failed to conduct a timely or adequate investigation of the potential guilt issues, did not make informed and rational decisions regarding potentially meritorious defenses and tactics, did not properly object and raise meritorious legal issues, and did not develop or present an adequate and coherent trial defense, including but not limited to challenging the prosecution's theory of the crime and the evidence presented at trial in support of that theory.

Trial counsel's errors and omissions were such that a reasonably competent attorney acting as a diligent and conscientious advocate would not have performed in such a fashion. Reasonably competent counsel handling a capital case at the time of Mr. Bell's trial would have known that it was essential to the development and presentation of a defense at trial to conduct a thorough investigation of the prosecution's theories of guilt, to perform an independent analysis of the evidence supporting those theories, to review and examine law enforcement's investigation, to examine witnesses' statements, to review potential defenses, to prepare and submit necessary pretrial and in limine motions, to investigate witnesses' reliability and credibility, and to review potential defenses that were essential to the development and presentation of a defense at trial. Reasonably competent counsel also would have conducted a thorough investigation of Mr. Bell's background and family history, including medical, mental health, academic, and social history, for evidence of his physical, psychological, psychiatric, cognitive, emotional, and social deficits and the developmental operative impact of such deficits on his functioning and behavior.

Trial counsel unreasonably and prejudicially failed to adequately

investigate, develop, and present a defense to the crimes charged. Mr. Bell was prejudiced by trial counsel's failure to investigate and adequately present defenses and protect his statutory and constitutional rights. But for counsel's unprofessional errors, the result of the proceedings would have been different.

In support of this claim, Mr. Bell alleges the following facts, among others to be presented after access to a complete and accurate record of the proceedings in the municipal and superior courts, full discovery and investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims One, Two, Four, and Five and any accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. Trial counsel unreasonably and prejudicially lacked sufficient experience and training to effectively handle Mr. Bell's case and unreasonably and prejudicially failed to devote adequate time and resources to the investigation and presentation of Mr. Bell's defense.

a. Trial counsel were not adequately trained and experienced in the skills and knowledge required to effectively investigate, prepare, and present a defense in a capital case.

b. Trial counsel unreasonably failed to commence their investigation and preparation of Mr. Bell's case in a timely manner.

(1) Attorney Sharyn Leonard was a Supervising Attorney in the Office of the Public Defender. (1 CT 111, 115.) In May 1992, prior to Mr. Bell's arraignment, Ms. Leonard was made an acting team leader/supervisor because the attorney in that position was preparing to try a capital case. (1 CT 102.) As of March 1993, because of her time-

consuming supervisory obligations, Ms. Leonard had been unable to absent herself from the office to go to the library, and seldom had thirty minutes of uninterrupted time to work on Mr. Bell's case. (1 CT 106.) While Ms. Leonard's predecessor as supervisor was relieved of supervisory duties to permit him to effectively prepare for a capital case, Ms. Leonard was not afforded the same treatment. It was planned that Ms. Leonard's supervisory duties would be temporary, but they persisted at least through the end of March 1993. (1 CT 102, 105-06.)

(2) Although the Public Defender's Office knew from the beginning that Mr. Bell's case would likely be tried as a death penalty case, attorney Peter Liss continued to be assigned a full caseload of about twelve cases every third week for almost the entire time starting from the arraignment on June 9, 1992 through early March 1993. (1 CT 120-21.) After that, Mr. Liss still received new case assignments on less serious felony cases until about one month prior to trial, and had another homicide trial to complete. (*See* 1 CT 120-22; Ex. 92 at 1715-16.)

(3) Mr. Liss was unable to work substantially on Mr. Bell's case until the end of July 1993 due to other cases scheduled for trial. (7 RT 3; 9 RT 4.) He had a homicide trial set for May 1993, a child molestation case set in May 1993, and a spousal rape trial set for early June 1993. (9 RT 5-6.)

(4) Mr. Liss was unable to assist the trial team in meeting the June 7, 1993 motion deadline set by order of the trial court because he was involved in another trial. (12 RT 167-68.) Without Mr. Liss's assistance, Ms. Leonard was unable to meet the deadline because her efforts were directed at preparing a writ regarding the adverse ruling on defense's motion under Penal Code section 995. (12 RT 167-68.)

(5) The defense team's only investigator, Olive

Brown, was hampered by supervisory obligations much like Ms. Leonard was and by the press of a large caseload much like Mr. Liss was.

(a) At the inception of Mr. Bell's case, Ms. Brown was an investigative team leader. (1 CT 98.) This obligated her to spend half of each month on supervisorial duties rather than actually performing investigation duties. (1 CT 98.) Beginning in January 1993, Ms. Brown was promoted to the position of administrative investigator, which increased her administrative duties and prevented her from investigating Mr. Bell's case. (1 CT 98.)

(b) Ms. Brown also had a substantial caseload that prevented her from spending on Mr. Bell's case what little investigative time she did have. (1 CT 98.) Just after Mr. Bell's case was arraigned, Ms. Brown was forced to become heavily involved in investigating another capital case to which she had previously been assigned as chief investigator. (1 CT 98.) That capital trial lasted from October 1992 through the end of January 1993. (1 CT 99.) Immediately thereafter, Ms. Brown had to shift her attention to a special circumstances homicide case, which occupied her time through the end of March 1993. (1 CT 99.) Additionally, Ms. Brown had to attend to investigation on other serious cases, including an attempted homicide case and two child molestation cases. (1 CT 99.) It was not essentially until April 1993 that Ms. Brown's caseload permitted her to begin working on Mr. Bell's case, although she still had to balance it with her administrative duties. (1 CT 100.)

(6) Even after receiving a continuance of the trial date in April 1993, trial counsel failed to file motions in a timely manner due to time constraints caused by their respective workloads. (12 RT 167-68.)

(7) Trial counsel were not prepared at the time of the hearing on their motion to present evidence to challenge the voluntariness of the statements, introducing no witnesses or evidence. *See* section 3 *infra.*

(8) In a March 1993 pretrial conference, trial counsel acknowledged that they were not ready for trial and had not spent as much time preparing the case as they would have had they been private lawyers without the full caseload of public defenders. (6A RT 8-9.)

(9) In March 1993, trial counsel sought a continuance of the trial until November 1, 1993. (1 CT 108.) The prosecution asked for continuance until July 12, 1993. (9 RT 9.) On April 12, 1993, the court set a new trial date of October 4, 1992 – less than six months later. (9 RT 9.) The court indicated that the new trial date was firm and "not to be trifled with." (9 RT 9.)

(10) At the point the court granted the continuance, trial counsel's guilt-phase investigation was not complete, their penalty-phase investigation had barely started, and they were experiencing difficulties conducting necessary out-of-state investigation. (1 CT 108; 9 RT 3, 5.) Despite the difficulties they continued to experience in conducting out-of-state investigation, trial counsel failed to seek another continuance.

c. Trial counsel unreasonably failed to seek and devote adequate resources to effectively investigate and prepare Mr. Bell's case in a timely manner.

(1) The Public Defender's Office only allocated one investigator to Mr. Bell's case. (1 CT 97.) At least one other capital case in the office was assigned three investigators. (1 CT 99.) Given the nature and circumstances of the case, this was simply inadequate to complete a

minimally adequate investigation.

d. Mr. Bell was prejudiced by trial counsel's inadequate training, experience, time, and resources. As a result, trial counsel's performance fell below the standards for reasonably competent counsel and prejudiced Mr. Bell. But for counsel's unprofessional errors, the result of the trial proceedings would have been different. The facts, allegations, and exhibits cited in the balance of this Claim and those in Claim Four are incorporated herein.

3. Trial counsel unreasonably and prejudicially failed to investigate, research, prepare, and argue their motion to preclude the prosecution's use of Mr. Bell's post-arrest statements. Reasonably competent counsel would have investigated, developed, and presented all available evidence supporting the involuntariness of Mr. Bell's statements, and the objection would have been sustained. The facts evidencing trial counsel's prejudicial errors include, but are not limited to, the following:

a. On June 5, 1992 at approximately 10:55 a.m., Mr. Bell approached officer Prutzman. Mr. Bell handed officer Michael Prutzman a newspaper with an article about the death of Joey Anderson. He pointed to it and said, "I did not stab that boy." (11 RT 48.) Officer Prutzman asked Mr. Bell if he wanted to talk to someone about it, and Mr. Bell answered yes. (11 RT 48.) Officer Prutzman handcuffed Mr. Bell and drove him to the police station to talk to a detective. (11 RT 49.) Mr. Bell was under arrest at that time, without a warrant. (11 RT 93.)

b. At the police station, Mr. Bell was first interrogated by Detective John Doucette for about twenty minutes. (11 RT 79.) Then he was given a polygraph examination and interrogated by Paul Redden for approximately two hours. (11 RT 79.) Mr. Bell cried at points in his interrogation by Mr. Redden. (Prelim. Hrg. RT 21.)

c. Officer Prutzman testified that Mr. Bell did not appear to be under the influence of alcohol or illegal drugs, but admitted that his focus was not on making such observations and that he had made no written report regarding the presence or absence of any objective symptoms of Mr. Bell being under the influence. (13 RT 197, 200.) Detective Doucette testified that Mr. Bell did not appear to be under the influence of cocaine, but that he was not assessing him for that purpose. (13 RT 213, 218, 222.) Detective Jesse Almos testified that Mr. Bell did not appear to be under the influence of any drug or intoxicant, but that making such observations was not his primary purpose and that his written report did not discuss whether or not Mr. Bell was under the influence. (13 RT 201, 206, 210.) Mr. Redden testified that Mr. Bell did not appear to him to be under the influence of a controlled substance, but he admitted that he had never made a narcotics arrest involving crack cocaine because he had moved to San Diego from Wyoming where the drug was not common. (13 RT 229-30.)

d. Mr. Bell ingested large quantities of crack cocaine throughout the day and night prior to his arrest and interrogation.

(1) Prior to Mr. Bell being brought to the station on June 5, Detective Doucette had been told by a witness that Mr. Bell was "at least at one time a heavy drug user." (11 RT 61.) Doucette was also aware that Joey Anderson's mother, Debra Mitchell, had told officers that Mr. Bell had a serious drug problem, but she was not sure if he was back into heavy usage, though she knew that Mr. Bell was supposed to pick up a check earlier in the day and if he had cashed the check and bought some rock cocaine "he would have used it all." (11 RT 65-66.)

(2) Over the course of the several hours of interrogation he endured, Mr. Bell detailed his crack usage.

(3) Mr. Bell told Detectives Almos and Doucette

that he began smoking crack the previous day shortly after 12:45 p.m. (29 RT 2142.)

(4) After first smoking crack around 12:45 p.m. on June 4, 1992, it was clear that Mr. Bell smoked substantial additional quantities of crack in multiple doses throughout the day. He explained to Detectives Almos and Doucette that his usage pattern that day was "bought some, smoked some, ran out, bought some more. Same thing over and over, until I finally ran out of money." (29 RT 2145.) He estimated that he made about six or seven purchases of crack in various quantities. (29 RT 2145.) He recalled purchasing $90 of crack in three installments and smoked it with two women. (29 RT 2146, 2151-60.) Shortly thereafter, he finished smoking the remaining quantity of crack with another woman. (29 RT 2160.) Officer Doucette suggested to Mr. Bell that he must have been "insanely...ripped" on crack at that point, with which Mr. Bell agreed. (29 RT 2161.) Mr. Bell's next usage occurred a short time later. He and the woman sold the radio for $20, which they used to buy and smoke two more rocks of crack. (29 RT 2165-66.) After finishing that, they sold the television for $80, and used it to purchase more crack, which they smoked. (29 RT 2166-70.) When Mr. Bell left the woman's company, it was still light outside. (29 RT 2170.)

(5) The questioning by Detectives Almos and Doucette was followed immediately by two hours of questioning by polygrapher Paul Redden, which included the polygraph examination. During this questioning, Mr. Bell recalled his crack usage substantially the same way. He recalled that he first purchased $110 of crack, not $90, and estimated that he parted ways with the woman at about 7:00 p.m. (Ex. 105 at 2390-95.)

(6) Mr. Bell said he had last used cocaine

approximately ten hours prior to the polygraph examination, putting his last use at approximately 2:40 a.m. on June 5, 1992. (13 RT 231-32.)

e. Trial counsel failed to present all available evidence in support of their motions to suppress Mr. Bell's post-arrest statements.

(1) First, trial counsel moved for suppression of the statements as the fruit of an illegal arrest. (17 CT 3663-74.) The hearing on that motion was held on May 27, 1993. The prosecution called four witnesses, and trial counsel called none and introduced no evidence of its own. (8 CT 1754-55; 11 RT 17-85.)

(2) Later, trial counsel moved to suppress Mr. Bell's statements on other statutory and constitutional grounds, including involuntariness. (3 CT 495-500.) The hearing on this motion to suppress Mr. Bell's post-arrest statements was held on September 7, 1993. Again, the prosecution called four witnesses, and trial counsel called none and introduced no evidence of its own. (8 CT 1761; 13 RT 235-37.)

(3) Reasonable trial counsel would have presented all available witnesses, evidence, and argument, including the following:

(a) In addition to his substantial crack use in multiple doses the day before, Mr. Bell had last used cocaine approximately ten hours prior to the polygraph examination, putting his last use at approximately 2:40 a.m. on June 5, 1992. (13 RT 231-32.)

(b) Urine and blood samples were taken from Mr. Bell on June 5, 1992, at 3:29 p.m. and 3:40 p.m., respectively. (28 RT 2048; 29 RT 2178-79; Ex. 104 at 2338-2340.) Five and a half months later, after substantial degradation would have occurred, Mr. Bell's blood and urine samples still tested positive for benzoylecgonine, a metabolite of cocaine. (Ex. 109 at 2410-2414; 31 RT 2383, 2403-05, 2399.)

(c) Prior to June 4, 1992, Mr. Bell had not ingested cocaine in several months. (Ex. 91 at 1706; 29 RT 2140-42.)

(d) Mr. Bell had only approximately two hours of sleep the night before, in small increments. (Ex. 105 at 2389, 2395.)

(e) At the time of his interrogation, Mr. Bell suffered from significant neurocognitive, psychiatric, and psychological impairments and brain injury. (Ex. 88 at 1636-38; Ex. 89 at 1643-49; Ex. 91 at 1696-1714; Ex. 113 at 2540-62.)

f. Trial counsel unreasonably and prejudicially failed to renew the motion to suppress once further evidence became available. Subsequent to the trial court's denial of the suppression motion, trial counsel received more complete discovery regarding toxicological analyses of Mr. Bell's blood and urine samples as well as relevant information regarding Mr. Bell's social history, brain injury, neuropsychiatric deficits and dysfunctions, and psychological state. Because trial counsel failed to renew the suppression motion, the trial court was never presented with the totality of the relevant circumstances.

g. Mr. Bell's statements were introduced by the prosecution. (29 RT 2137-76, 2222-33.)

h. Mr. Bell's statements were the product of his illegal detention.

i. Mr. Bell's cocaine intoxication, brain injury, and neuropsychiatric deficits and dysfunctions, coupled with his shock, anxiety, and remorse and the psychologically coercive conditions of his arrest and lengthy interrogation all operated to render Mr. Bell susceptible to external and internal stimuli and rendered him to be liable to providing unreliable information.

j. To avoid unnecessary duplication, the facts, allegations, and supporting exhibits set forth in Claim Four, concerning Mr. Bell's background and social history, impaired mental functioning, and neuropsychological deficits are incorporated by reference as if fully set forth herein.

k. Mr. Bell's statement was not preceded by a knowing, voluntary, and intelligent waiver of his *Miranda* rights; was involuntary and/or substantially unreliable; and was obtained in violation of his rights to be free of unreasonable seizures, not to incriminate himself, to the assistance of counsel, and to due process of law, and his state statutory rights.

l. All of the facts and law supporting a motion to preclude the prosecution's use of Mr. Bell's statements were either known to counsel or readily available through reasonable preparation and research. Trial counsel did not investigate, consider, or present all available factual and legal grounds for suppression of Mr. Bell's statements. Trial counsel's actions and omissions were not strategic, fell below the standards for reasonably competent counsel, and prejudiced Mr. Bell. If reasonably litigated, a motion to exclude the illegally-obtained statements would have been granted. But for counsel's unprofessional errors, the result of the trial proceedings would have been different.

4. Trial counsel unreasonably and prejudicially failed to investigate, research, and prepare its opposition to the prosecution's motion to conduct a mental examination of Mr. Bell. Reasonably competent counsel would have researched and presented all legal bases for precluding the examination, and the objection would have been sustained. The facts evidencing trial counsel's prejudicial errors include, but are not limited to, the following:

a. On June 16, 1993, the prosecutor filed a Motion in Limine for an Order Directing the Psychiatric Evaluation of the Defendant. (1 CT 233-38.)

b. On August 2, 1993, trial counsel filed the Defendant's Opposition Brief to Prosecution Request for Psychiatric Evaluation. (3 CT 696-706.)

(1) In their opposition, trial counsel argued that the issue was not ripe for review by the trial court unless and until the defense put Mr. Bell's mental condition at issue. (3 CT 696-700.) Trial counsel also raised constitutional concerns under the Fifth and Sixth Amendments. (3 CT 700-04.) Finally, trial counsel argued that evidence of any refusal by Mr. Bell to be examined by a prosecution expert should be excluded under Evidence Code section 352. (3 CT 704-06.)

(2) In their opposition, trial counsel did not cite Penal Code section 1054.1 et seq. or aver that a psychiatric evaluation by a prosecution expert would constitute discovery of testimonial evidence not permitted by the discovery statute. (3 CT 696-706.)

c. On September 7, 1993, the trial court found the prosecution's Motion in Limine for an Order Directing the Psychiatric Evaluation of the Defendant was not ripe for adjudication and deferred ruling on it until such time as the defense presented evidence at trial placing Mr. Bell's mental state at issue. (13 RT 292-95; 8 CT 1761.)

d. On October 6, 1993, the trial court reiterated that it had deferred ruling on the prosecutor's motion, but opined that "if the defense tenders a mental condition, the ruling under *McPeters* and *Danis* suggests that [the prosecutor] should be able to do the examination." (19 RT 868.)

e. On November 4, 1993, the trial court revisited the prosecutor's motion for a psychiatric evaluation of Mr. Bell. Trial counsel

maintained their opposition but submitted on their previously-filed papers, offering no further argument or authorities. (34 RT 2817.) The trial court granted the prosecutor's motion and ordered that Mr. Bell submit to a psychiatric evaluation—free of any predetermined restrictions—by a psychologist or psychiatrist of the prosecutor's choice. (34 RT 2817-18; *see also* 34 RT 2815-22; 8 CT 1815.) The trial court then issued an order directing that Dr. Mills be admitted into the county jail for the purpose of interviewing and examining Mr. Bell. (34 RT 2824; 5 CT 1146.)

f. Later that day, the trial court denied a defense request to have defense counsel, a defense psychological expert, or both present for the evaluation by Dr. Mark Mills. (34 RT 2837-47; 8 CT 1815-16.)

g. On November 8, 1993, the trial court ruled that the prosecutor could introduce evidence that Mr. Bell had declined to be evaluated. (35 RT 2901.) The defense objected, and then agreed to enter a stipulation that the trial court had authorized the evaluation and that Mr. Bell was aware of that authorization. (35 RT 2901-07; 8 CT 1819.)

h. On November 10, 1993, the stipulation was read to the jury during the testimony of Dr. Mills (37 RT 3051; 8 CT 1822), and Dr. Mills testified that Mr. Bell declined to be interviewed when Dr. Mills asked to do so on November 5 (37 RT 3051-53).

i. Three jurors submitted jury notes on November 10, 1993, inquiring about the facts and circumstances of Mr. Bell's declination. (5 CT 1154-55, 1174.)

(1) Juror Assad Kabban asked if Mr. Bell was "given the opportunity to have his lawyers with him for the interview to be conducted by Dr. Mark J. Mills." (5 CT 1154.) In response, the trial court told the jury that the court had ruled that Mr. Bell "did not have the right to have his attorneys present." (37 RT 3085.)

(2) Juror Clifton Cunningham asked if Mr. Bell was "advised to decline the interview with Dr. Mills." (5 CT 1155.) The trial court told the jury that it could not answer that question. (37 RT 3085; *see also* 37 RT 3083.)

(3) Juror Marianne Hall asked if Mr. Bell knew "about the court order before Dr. Mills showed up at the jail" and if the defense could have let Mr. Bell know about the interview. (5 CT 1174.) In response, the trial court told the jury that "Mr. Bell was present in court when [it] authorized an interview by the People's psychiatrist to take place on Friday afternoon, November 5th." (37 RT 3133.)

j. On November 15, 1993, the defense moved to strike the testimony of Dr. Mills. Counsel did not offer additional authorities, relying instead on its previous argument that the trial court had erred. The trial court denied the motion to strike. (39 RT 3234-36; 8 CT 1825.)

k. As part of the guilt-innocence phase jury instructions, the trial court instructed the jury that they "heard evidence that the court authorized the prosecution to have their psychiatrist examine Mr. Bell, and that Mr. Bell declined to submit to the evaluation. You are advised that Mr. Bell was entitled to decline to submit to the psychiatric evaluation." (39 RT 3272; 6 CT 1280.) The trial court refused the defense request to include the phrase "as a matter of law" at the end of this instruction. (38 RT 3191-93; 5 CT 1177.)

l. As expected, the prosecution commented on Mr. Bell's refusal during closing argument. (40 RT 3352.)

m. Trial counsel's failure to raise the discovery provisions of Penal Code section 1054.1 et seq. in opposition to the prosecution's motion was unreasonable.

(1) The examination was a form of discovery of

testimonial evidence, not permitted by the discovery statute.

(2) Trial counsel was aware of the relevant discovery provisions and related case law, and/or such law was readily available through reasonable preparation and research.

(a) In opposing a different motion (the prosecution's motion to obtain psychiatrist's notes) trial counsel cited *In re Littlefield* in their written opposition as well as oral argument. (5 CT 974-78; 14 RT 430-31.)

(b) The trial court itself had mentioned relevant case law. (18 RT 770-93; 19 RT 846-73.)

n. All of the facts and law supporting the defense's opposition to the prosecution's motion for a psychiatric examination of Mr. Bell were either known to counsel or readily available through reasonable preparation and research. Trial counsel did not present all available grounds for suppression of the statement. Trial counsel's actions and omissions were not strategic, fell below the standards for reasonably competent counsel, and prejudiced Mr. Bell. If the defense's opposition had been reasonably litigated, the prosecution's motion would have been denied. But for counsel's unprofessional errors, the result of the trial proceedings would have been different.

5. Trial counsel unreasonably and prejudicially failed to investigate and adequately prepare for plea negotiations.

a. Counsel failed to investigate and present mitigating information about Mr. Bell's social and mental history. Because throughout all plea negotiations, counsel had conducted minimal and/or inadequate investigation, they could not adequately inform the prosecution of the equities of Mr. Bell's case.

6. Trial counsel unreasonably and prejudicially failed to

investigate and to prepare for pretrial proceedings and the guilt-innocence phase of Mr. Bell's case. Reasonably competent counsel would have commenced investigation immediately upon being assigned to Mr. Bell's case and would have been adequately prepared for pretrial proceedings and the guilt-innocence phase of Mr. Bell's case. The facts evidencing trial counsel's prejudicial errors include, but are not limited to, the following:

a. The facts and allegations and exhibits cited in Claim Four are incorporated by reference as if fully set forth herein to avoid unnecessary duplication.

b. Trial counsel unreasonably and prejudicially focused on the prospect of settling Mr. Bell's case in lieu of immediately commencing the necessary investigation and preparation.

(1) Mr. Bell was arraigned and counsel appointed on June 9, 1992. (1 CT 8.)

(2) As late as March 24, 1993, trial counsel had not completed their guilt phase investigation and had barely started their penalty phase investigation. (1 CT 108.)

(3) On March 26, 1993, the trial court inquired of the prosecutor about the possibility of a disposition of the case by guilty plea, and the prosecutor informed the court that on March 12, 1993, the district attorney decided to reject the plea offer. (7 RT 4.) However, at trial counsel's request, the district attorney and the prosecutor met with trial counsel the next day about the plea offer, and the district attorney was then "undecided" and "thinking about the situation." (7 RT 4.)

(4) On April 12, 1993, the prosecutor announced in court that the district attorney had rejected the plea offer and the district attorney's office was determined to seek a death sentence. (9 RT 1-3.)

(5) Trial counsel did not begin the investigation in

any significant way until April 1993.

(6) As of May 27, 1993, trial counsel were still attempting to settle the case. (11 RT 140.)

(7) After reiterating their offer to have Mr. Bell plead guilty for a sentence of life without parole, trial counsel indicated that they "see the protracted and lengthy nature of this . . . and of the costs—at all times we've made an effort to resolve this case—and . . . any judgment regarding our trying to get [motions] done should be taken in that context [of ongoing plea negotiations]." (11 RT 140.)

(8) Trial counsel's desire and efforts to settle the case delayed and otherwise negatively impacted their preparation of the case.

c. Trial counsel unreasonably and prejudicially failed to seek a continuance of the trial beyond October 1993.

(1) On March 24, 1993, trial counsel filed a Motion to Continue the trial from May until November 1, 1993. (1 CT 85-123.) On April 12, 1993, the trial court continued the trial date until October 4, 1993.

(2) On August 30, 1993, the Fourth District Court of Appeal, Division One granted, in part, trial counsel's request for a writ of prohibition concerning the trial court's denial of their Motion to Dismiss the Information pursuant to Penal Code section 995. The court of appeal directed the superior court to vacate the portion of its order denying the motion to dismiss the charge of residential burglary and the special circumstance of murder in the commission of residential burglary, and enter a new order granting that portion of Mr. Bell's motion. (5 CT 979-86.) The superior court, on September 7, 1993, struck count three of the Information and the special circumstance related to the burglary charge. (8 CT 1761; 13

RT 190-91.)

(3) On September 7, 1993, trial counsel noted that the striking of the burglary count and related special circumstance was a late development that changed the complexity of the case and trial counsel's strategy. (13A RT 308.)

(4) On September 7, 1993, less than one month before jury selection was scheduled to start, trial counsel represented that "[W]e find ourselves in the situation where we're not exactly sure who, if anyone, we are going to be calling to testify in our case in chief in the guilt phase." (13A RT 306.) This statement was made in the context of informing the court of their efforts to comply with discovery requirements; they had not forwarded the name of any psychiatric expert to the prosecution, because they did not reasonably anticipate calling one. (13A RT 307.) Trial counsel acknowledged, "I suppose in light of what has happened to the mental health portion of the case, we might be entitled to ask for a continuance." (13A RT 309.) However, despite having no idea who they would call as a mental health expert, trial counsel maintained, "Right now, we don't see the need for that." (13A RT 309.)

(5) On September 7, 1993, trial counsel informed the court that the defense was "not contemplating requesting a continuance [of the scheduled trial date] at this time." (13 RT 297.)

(6) On September 16, 1993, just ten working days before trial started, trial counsel finally determined that they would use Dr. Richard Levak. (14 RT 421, 423, 425.) This determination, although very late, was also premature, as Dr. Levak had not yet prepared a report. (14 RT 430, 436.) Indeed, as of September 24, 1993, Dr. Levak had not yet even finalized his conclusions. (14 RT 436.)

(7) Trial counsel knew or should have known that

they were not prepared to go to trial in October 1993 and that additional investigation and preparation would have yielded strategies and evidence that they would have or should have used in Mr. Bell's defense.

(8) Trial counsel unreasonably and prejudicially failed to seek a further continuance of the trial.

d. Trial counsel unreasonably and prejudicially failed to investigate the facts surrounding the charges against Mr. Bell and evidence supporting possible defenses.

(1) Trial counsel unreasonably relied on the state's investigation, foregoing its own.

(2) Trial counsel unreasonably and prejudicially failed to attempt to locate, contact, and interview relevant witnesses, including:

(a) Witnesses from the local neighborhood, including those listed in police reports: Leon Rivers, Susanna Forney, Eric Forney, Bertha Booker, Winifred Booker, Freddrick Booker, Jose Castaneda.

(b) Witnesses with whom Mr. Bell interacted on June 4, 1992, including: those from whom he purchased drugs and those with whom he used drugs, including Louise Payne (also known as "Chocolate" and/or "Mama Chocolate"); those to whom he sold the radio and television; and those with whom he interacted at the all-night movie theatre, including the ticket-taker. (29 RT 2170.)

(3) Trial counsel unreasonably and prejudicially failed to investigate the toxicology aspects of Mr. Bell's case.

(a) Trial counsel failed to obtain chain-of-custody logs from the San Diego Police Department crime laboratory showing when Mr. Bell's blood and urine samples where moved in and out

of the lab. (*See* 37 RT 3038, 3045.)

(b) Reasonably effective trial counsel would have immediately requested that Mr. Bell's blood and urine samples be analyzed to measure both their cocaine and benzoylecgonine concentrations. Law enforcement and the prosecution waited nearly five and a half months before performing any analysis. Belatedly, law enforcement and the prosecution had Mr. Bell's blood sample analyzed for cocaine and benzoylecgonine and his urine sample for benzoylecgonine, but his urine sample was never analyzed for cocaine. Reasonably effective trial counsel would have had both samples analyzed for any and all substances that could support Mr. Bell's cocaine intoxication at the time of the killing. Trial counsel did not.

(4) Trial counsel failed to request a report of the second test on Mr. Bell's urine sample that accurately reflected the final non-diluted benzoylecgonine concentration. The final report did not specify any quantity, and the worksheet that was prepared by the lab did not specify the final non-diluted quantity. (Ex. 109 at 2411-12; Ex. 104 at 2364-65.) Robert West, the director of forensic toxicology at the laboratory that performed the testing, testified that the lab prepared such reports as were requested. (31 RT 2412.)

e. Trial counsel unreasonably and prejudicially failed to develop exculpatory evidence, including evidence corroborating the defense theory that Mr. Bell was under the influence of crack cocaine and dissociated around and during the time that Joey Anderson was killed.

f. Trial counsel unreasonably and prejudicially failed to pursue timely and complete discovery from the prosecution, including the following:

(1) San Diego Police Department crime laboratory

logs regarding Mr. Bell's blood and urine samples. (37 RT 3037, 3045.)

(2) Complete surveillance recordings from the S&M Market.

(3) School journals of victim Johnny Joseph Anderson.

(4) Complete social history records pertaining to Mr. Bell, including educational, medical, mental health, and correctional institution records.

7. Trial counsel unreasonably and prejudicially introduced at the guilt-innocence phase evidence of Mr. Bell's prior violent crime, which the trial court had excluded as unduly prejudicial, and counsel did so without mitigating its prejudicial effect by investigating, developing, and presenting available evidence to explain and contextualize the prior bad act.

a. On July 1, 1993, trial counsel moved the trial court to exclude evidence of Mr. Bell's 1981 juvenile adjudication for assault and sodomy. (3 CT 495-500.) The prosecution responded with a motion to admit the evidence. (1 CT 214-229.) The prosecution's motion proffered a list of ten similarities between the two crimes, including that both crimes involved victims of similar young age who were stabbed in the back with a kitchen knife while in a bedroom and after Mr. Bell had consumed intoxicants. (1 CT 216-17.) On July 7, 1993, trial counsel submitted their reply brief in opposition to the prosecution's motion to admit the evidence. (3 CT 538-547.) Trial counsel argued in part that the prejudicial nature of the prior crime outweighed any probative value because the facts of the prior were so inflammatory, involving as they did the stabbing and sodomy of a young boy while the knife remained embedded in the victim's back. Trial counsel argued that "[n]o limiting instruction could effectively prevent the undue prejudicial affect that the admission of such evidence is certain to

have on the jury." (3 CT 545-46.) Counsel further argued that, at the very least, the trial court should exclude the sodomy aspect of the prior crime because of its particular lack of probative value and extraordinary prejudicial nature. (3 CT 546.)

b. Additionally, trial counsel were acutely aware of the extraordinary problems inherent in raising the 1981 offense and of its impact on their effectiveness and on Mr. Bell's fair-trial rights. (6 CT 1323.)

c. On September 7, 1993, the trial court denied the prosecution's motion to admit evidence relating to the 1981 incident. (13 RT 98–99.) The court ruled that the evidence would not be admissible in the prosecution's case-in-chief. The motion was denied without prejudice. The court ruled that it might be admissible on cross-examination, but admonished the prosecutor, "I don't want you holding your breath on that." (13 RT 267.)

d. Despite prevailing on the issue and successfully excluding evidence of Mr. Bell's 1981 prior, trial counsel introduced the evidence themselves during direct examination of one of their expert witnesses, Dr. David Smith. (32 RT 2557.) Counsel elicited from Dr. Smith not only the fact of the prior, but the several similarities between the prior and charged offenses, as well as the sodomy aspect of the prior incident. (32 RT 2557-60.)

e. After the conclusion of Dr. Smith's direct examination, the court called for a sidebar, at which the trial judge stated, "Well, you certainly threw us a surprise by bringing out the first incident." (32 RT 2561.) Defense counsel agreed that the prosecution was entitled to cross examine the witness on the subject of the prior incident and explained, "We've made a strategic decision to introduce that prior episode because

we think it confirms the diagnosis of borderline personality disorder. Obviously, we think that it supports our theory, and that we still oppose—at first we did oppose the People's use of it, because we didn't think it properly fit the 1101(B) issue of intent, but we think it properly focuses on our claims of intent, or lack thereof." (32 RT 2561-62.)

f. Trial counsel acted unreasonably and prejudicially in introducing the prior incident. Counsel exacerbated matters by introducing and in fact highlighting the several similarities between the prior and charged offenses.

g. Even if trial counsel's introduction of the prior incident were reasonable, trial counsel's introduction of the sodomy aspect of it was not. Introduction of that aspect of the prior carried substantial prejudice with no probative value. Its introduction was unreasonable and prejudicial.

h. Even if trial counsel's introduction of the prior incident were reasonable, trial counsel acted unreasonably and prejudicially by failing to mitigate the evidence's prejudicial effect by investigating, developing, and presenting available evidence to explain and contextualize the prior bad act.

i. Trial counsel unreasonably and prejudicially failed to pursue their stated objective in introducing the incident – to confirm their expert witnesses' psychological diagnosis. Trial counsel knew or should have known that a comprehensive understanding of Mr. Bell's multigenerational biopsychosocial history, including his childhood that preceded the 1981 incident, would have assisted their expert witnesses in placing that incident in its proper psychological context. In turn, this would have permitted the jury to learn of and appreciate the incident in a manner that both explained how it corroborated trial counsel's theory of defense while acting to mitigate the prejudicial aspects of which trial counsel were

aware.

j. Trial counsel knew or should have known that Mr. Bell's numerous genetic, developmental, and environmental risk factors as detailed in Claim Four (and incorporated herein) were crucial to an understanding of his overall psychological and social development and functioning, including especially the 1981 incident. Minimally-competent counsel would have presented all such relevant evidence to their experts as well as the jury, including the following: that Mr. Bell experienced risk factors including genetic risks that he was born into; that his parents and stepfather were ill-equipped to provide even the most basic of protective qualities; that he endured intense ongoing abuse; that he sustained numerous head injuries and suffered cognitive deficits; that he suffered from a debilitating stutter that even his mother could not make the effort to bridge; that he suffered from a dissociative disorder that made focusing and relating a fragmented experience; that he suffered from a debilitating substance-abuse problem; and that he suffered from impaired neurocognitive functioning. Counsel would have presented to their experts and the jury evidence that the risk factors and lack of sufficient supports stunted Mr. Bell's early development, formed a very negative self-image, impaired his ability to regulate his behavior and emotions, and ultimately debilitated his psychological, cognitive, and social functioning throughout his life. (Ex. 113 at 2561-62; Ex. 88 at 1636-38; Ex. 89 at 1643-49.)

k. Trial counsel's decision to introduce the 1981 incident was not based on reasonable investigation into the facts and circumstances of Mr. Bell's childhood that preceded and precipitated the incident. A reasonably-adequate investigation would have revealed the facts, allegations, and exhibits set forth in Claim Four, which are incorporated herein.

l. Trial counsel's failure to present the 1981 incident in its full psychological and neurobiological context conflicted with counsel's stated intention to present as complete a picture of Mr. Bell's life as they could so the jury could make an informed and compassionate decision. (21 CT 4500.)

8. Trial counsel unreasonably and prejudicially failed to investigate, research, prepare, and present all available evidence and testimony regarding Mr. Bell's cocaine intoxication. Trial counsel's theory of defense relied in part on the fact that Mr. Bell was intoxicated on cocaine at the time Joey Anderson was killed. Reasonably competent counsel would have researched and presented all evidence that Mr. Bell had consumed and was under the influence of a substantial amount of cocaine at the time of the killing. The facts evidencing trial counsel's prejudicial errors include, but are not limited to, the following:

a. Minimally-adequate trial counsel would have investigated, prepared, and presented all toxicology evidence supporting the fact that Mr. Bell had not used cocaine for months and then ingested a substantial amount of crack cocaine in multiple doses throughout the two-and-one-half hours prior to the killing of Joey Anderson. The facts that trial counsel could have and should have developed and presented include the following:

(1) Mr. Bell reported smoking substantial quantities of crack in multiple doses throughout the day on June 4, 1992.

(a) Mr. Bell reported that, prior to June 4, 1992, he had not used cocaine for months. (Ex. 91 at 1706; 29 RT 2140-42.)

(b) He described his usage pattern on June 4, 1992 as "bought some, smoked some, ran out, bought some more. Same

thing over and over, until I finally ran out of money." (29 RT 2145.) He estimated that he made about six or seven purchases of crack in various quantities. (29 RT 2145.)

(c) He recalled commencing his usage that day shortly after 12:45 p.m., when he purchased approximately $90-$110 worth of crack in three installments and began smoking it with two women. (29 RT 2146, 2151-60; Ex. 105 at 2390-95.) Shortly thereafter, he smoked the remaining quantity of crack with another woman. (29 RT 2160.) Mr. Bell's usage at that point had occurred in approximately two-and-a-half hours, and Detective Doucette suggested to Mr. Bell that he must have been "insanely ... ripped" on crack at that point, with which Mr. Bell agreed. (29 RT 2161.) This was the point at which Mr. Bell killed Joey Anderson.

(d) Mr. Bell's next usage occurred a short time later. He and a woman sold the radio for $20, which they used to buy and smoke two more rocks of crack. (29 RT 2165-66.) After finishing that, they sold the television for $80, and used it to purchase more crack, which they smoked. (29 RT 2166-70.) When Mr. Bell left the woman's company, it was still light outside, approximately 7:00 p.m. (29 RT 2170; Ex. 105 at 2395.)

(e) Mr. Bell recalled last ingesting cocaine at approximately 2:40 a.m. on the morning of June 5, 1992. (13 RT 231-32; Ex. 105 at 2389.)

(2) After Mr. Bell's arrest on June 5, 1992, law enforcement obtained blood and urine samples from him. These samples were obtained approximately 23 hours after Mr. Bell's cocaine use began the day before. (28 RT 2046, 2051, 2126; 29 RT 2179; Ex. 109 at 2408.)

(3) Law enforcement and/or the prosecution did not request analysis of Mr. Bell's blood and urine samples until nearly five and

one half months later, on November 16, 1992. (Ex. 104 at 2341, 2366; Ex. 109 at 2408; 31 RT 2378.)

(4) Mr. Bell's urine sample was analyzed on November 16 and 17, 1992. (Ex. 109 at 2410; Ex. 104 at 2341-2364.)

(a) The lab used a technique called Gas Chromatography/Mass Spectrometry ("GCMS") to test Mr. Bell's urine sample for benzoylecgonine, a chemical that is produced when the body metabolizes cocaine. (Ex. 109 at 2409-2410.) The urine sample was not tested for cocaine itself. (Ex. 109 at 2417.)

(b) The GCMS instrument was not freshly calibrated, increasing the likelihood of inaccurate results. (Ex. 109 at 2410.)

(c) The sample was tested twice because of some errors and anomalies on the first test. (Ex. 109 at 2410-11; 31 RT 2384, 2389; Ex. 104 at 2354-2364.)

(d) In the first test, the urine sample was diluted by a factor of ten. The diluted sample showed a benzoylecgonine concentration of 10788 nanograms per milliliter (ng/ml). Multiplied by the dilution factor of ten, the test reflected a final concentration of 107,880 ng/ml of benzoylecgonine. (Ex. 109 at 2410-11; Ex. 104 at 2354-55.)

(e) In the re-test, the urine sample was diluted by a factor of twenty. The diluted sample showed a benzoylecgonine concentration of 5095 ng/ml. Multiplied by the dilution factor of twenty, the test reflected a final concentration of 101,900 ng/ml of benzoylecgonine. (Ex. 109 at 2411-12; Ex. 104 at 2361-62.)

(f) The results of the first test were not an accurate measurement of the benzoylecgonine concentrations in the urine sample at the time of the test, but the results of the second test were

accurate within the limits of the instrument's calibration. (31 RT 2405; Ex. 109 at 2410-11.)

(g) At the lab, the results of the second, accurate, test were copied onto a worksheet. The worksheet reflected the diluted concentration of "5095" and the dilution ratio of "1:20" but did not specify the final non-diluted concentration of 101,900 ng/ml of benzoylecgonine. (Ex. 109 at 2411-12; Ex. 104 at 2364.)

(h) On November 20, 1992, the lab produced a report regarding the analysis of Mr. Bell's urine sample. (Ex. 109 at 2412; Ex. 104 at 2365.) It stated only "cocaine/benzoylecgonine identified" and failed to specify the quantity as 101,900 ng/ml. (Ex. 109 at 2412; Ex. 104 at 2365.)

(i) The results of the urine analysis were also copied onto the San Diego Police Department Drug Screen Request that had been submitted with the sample. There, the result of the test was stated as "> 6000 ng/ml" but again the 101,900 ng/ml quantity was not specified. (Ex. 109 at 2412; Ex. 104 at 2365.)

(5) GCMS analysis of Mr. Bell's blood sample was performed on November 19, 1992. (Ex. 109 at 2412; Ex. 104 at 2374-75.)

(a) No cocaine was detected, and the sample was measured to contain a concentration of 92.88 ng/ml of benzoylecgonine at the time the analysis was performed. (Ex. 109 at 2412; Ex. 104 at 2374-75.)

(b) The results were copied onto a worksheet, specifying the quantity as 92.8 ng/ml. (Ex. 109 at 2412-13; Ex. 104 at 2376.)

(c) On November 20, 1992, a report of the blood analysis was prepared. It stated "cocaine/benzoylecgonine identified"

but did not specify the quantity as 92.88 ng/ml. (Ex. 109 at 2413; Ex. 104 at 2377.)

(d) On July 28, 1993, a supplemental report of the blood analysis was prepared. It stated "Benzoylecgonine = 92 ng/ml." (Ex. 109 at 2413; Ex. 104 at 2377.)

(6) Cocaine and benzoylecgonine in blood and urine samples are subject to degradation over time.

(a) Degradation in the urine depends largely on the acidity of the urine. (Ex. 109 at 2418, 2420.)

(b) After five-and-one-half months, benzoylecgonine in a urine sample would be partially or substantially degraded, depending on the acidity of the urine. (Ex. 109 at 2418, 2420.)

(c) Degradation in the blood can be slowed but not eliminated by use of chemical preservatives and refrigeration. (Ex. 109 at 2418-20.)

(d) Studies in the field – including one co-authored by the prosecution's expert Dr. Randall Baselt and published just a few months before Mr. Bell's trial – have shown that, even where a blood sample is properly preserved both chemically and by refrigeration, cocaine in the sample can be expected to degrade by about 96% in a period of five-and-a half months. (Ex. 109 at 2418-20; Ex. 114 at 2563-65.)

(e) In a properly-preserved blood sample containing benzoylecgonine but no cocaine, after five-and-one-half months the benzoylecgonine would be at least partially degraded. (Ex. 109 at 2418, 2420.)

(f) Degradation of cocaine and benzoylecgonine in a blood sample will be even greater in a sample that is not properly preserved throughout its storage. (Ex. 109 at 2419-20.)

(7) It is uncertain whether Mr. Bell's blood sample was properly preserved throughout the storage period prior to its transfer to the testing laboratory on November 16, 1992.

(a) San Diego Police Department forensic alcohol analyst Winifred Del Rosario testified that he drew Mr. Bell's blood sample and then put it in an envelope and handed it to Detective John Doucette, who impounded it "in a lock box, which is located at the blood drawing room, room 138." (28 RT 2046, 2051.)

(b) Detective Doucette testified that he took Mr. Bell's urine sample and received Mr. Bell's blood sample from Mr. Del Rosario. (28 RT 2126; 29 RT 2179.) Detective Doucette further testified that to the best of his knowledge the specimens were maintained at the police department. (29 RT 2180.)

(c) Melvin Kong, the supervising criminalist at the San Diego Police Department Crime Laboratory, testified that the crime lab maintained Mr. Bell's blood samples, but Mr. Kong did not have personal knowledge of Mr. Bell's samples and the crime lab did not maintain records indicating how they were preserved. (37 RT 3037, 3043, 3045.) Mr. Kong testified that it was the crime lab's practice to preserve two vials with sodium fluoride (gray-topped tubes), one with EDTA (ethylenediaminotetraacetate) (a purple-topped tube), and one with citric acid (a yellow-topped tube). (37 RT 3037-38.) Mr. Kong also testified that in driving-under-the-influence and drug cases the samples would not be refrigerated, but that in homicides and other major crimes the two vials preserved with sodium fluoride would be refrigerated at approximately 40 degrees. (37 RT 3038, 3042.)

(d) An October 22, 1992, San Diego Police Department Serology Unit Report by Criminalist P. Aiko Lawson indicates

that two whole-blood samples of Mr. Bell's were used for blood typing and then "returned to the Narcotics Vault." (Ex. 104 at 2386-87.)

(e) A narcotics vault is not typically a refrigerated storage area. (Ex. 109 at 2420.)

(f) It is uncertain whether Mr. Bell's blood samples were properly preserved throughout their storage. (Ex. 109 at 2419-20.)

(8) The benzoylecgonine concentration measured in Mr. Bell's urine on November 17, 1992 was lower than it was when the sample was obtained on June 5, 1992. (Ex. 109 at 2420.) The urine benzoylecgonine levels would have been degraded either partially or substantially, depending on the acidity of the urine. (Ex. 109 at 2420.)

(9) The cocaine and benzoylecgonine concentrations measured in Mr. Bell's blood sample on November 19, 1992, were lower than they were when the sample was obtained on June 5, 1992. (Ex. 109 at 2420.) The blood cocaine levels were certain to have been totally or near-totally degraded, even assuming proper preservation. The blood benzoylecgonine levels would have been either relatively unaffected (if properly preserved) or likely degraded partially or even substantially (if not properly preserved and/or if there was no cocaine in the sample to begin with). (Ex. 109 at 2420.)

b. Trial counsel unreasonably and prejudicially delayed in retaining expert assistance in investigating, analyzing, and reviewing toxicology evidence and preparing expert testimony regarding toxicology.

(1) Trial counsel did not begin seeking expert assistance regarding toxicology until approximately July 1993.

(2) Trial counsel did not retain Dr. Alex Sevanian, their trial expert regarding toxicology, until September 1993.

(3) Trial counsel did not meet Dr. Sevanian in person until October 22, 1993. This was after the jury had been selected and sworn (8 CT 1790, 1795) and just three days prior to opening statements. (27 RT 1831; 8 CT 1800.)

c. Trial counsel unreasonably and prejudicially failed to retain a qualified practicing forensic toxicologist.

(1) Dr. Sevanian was a professor of Molecular Pharmacology at the University of Southern California. (31 RT 2418.)

(2) He was not a practicing forensic toxicologist. (31 RT 2482-84; Ex. 109 at 2415.)

(3) Dr. Sevanian made several errors in his testimony, calculations, and demonstrative exhibits. (Ex. 109 at 2415.)

(a) Among Dr. Sevanian's errors was the use of calculations pertaining to blood plasma and serum, which are used in a clinical setting, rather than whole blood, which is used in a forensic setting. (Ex. 109 at 2415.)

(b) Dr. Sevanian's various errors were noted by the prosecution's expert, Dr. Randall Baselt. (35 RT 2861-70.)

(c) They were also identified by the trial judge and a juror. (31 RT 2474-76, 2480, 2482.)

(4) Trial counsel knew or should have known that the prosecution would retain a qualified forensic toxicologist, and that the prosecution would assail Dr. Sevanian for being unqualified. (40 RT 3358.)

d. Trial counsel unreasonably and prejudicially failed to prepare themselves and their expert regarding the toxicological aspects of the case.

(1) Trial counsel knew that "[h]iring an expert does not relieve the need for an attorney to be familiar with the field." (1 CT

106-07.)

(a) When trial counsel thought DNA would be an issue in Mr. Bell's case, trial counsel took steps to educate and prepare themselves regarding relevant aspects of that science. (1 CT 107.)

(b) Trial counsel nonetheless failed to educate and prepare themselves in the relevant aspects of toxicology and the meaning of the toxicology evidence in Mr. Bell's case.

(2) Trial counsel knew or should have known that Dr. Sevanian's calculations, opinions, and demonstrative exhibits were erroneous.

(3) Trial counsel spent an inadequate amount of time working with Dr. Sevanian reviewing discovery and preparing his testimony.

(4) Trial counsel failed to supply Dr. Sevanian with accurate information and concomitantly failed to introduce accurate information to the jury.

e. Trial counsel unreasonably and prejudicially failed to be aware of, understand, and introduce all evidence regarding the second test of Mr. Bell's urine sample.

(1) At least at the time of calling their first two toxicology witnesses, Robert West and Alex Sevanian, trial counsel were unaware and/or failed to comprehend that Mr. Bell's urine sample had been tested twice, and that the first test was not considered accurate.

(2) Trial counsel unreasonably and prejudicially only introduced the results of the first urine test. (31 RT 2375-2398.) Trial counsel introduced as an exhibit the GCMS instrument's data regarding the first, unreliable test but did not introduce the corresponding material regarding the second test. The only exhibits that trial counsel introduced

regarding the urine sample analyses were incomplete and confusing. None specified the final result of the second, reliable urine test – 101,900 ng/ml of benzoylecgonine. (Ex. 109 at 2411.) One (the results copied onto the Drug Screen Request Form) stated only "cocaine/benzoylecgonine identified." (Ex. 104 at 2365.) Another (the "SDPD Drug Screen Report") stated the quantity of benzoylecgonine as "> 6000 ng/ml." (Ex. 104 at 2341.) The most detailed exhibit introduced by trial counsel, the lab's worksheet, was also the most confusing. It reflected that the benzoylecgonine ("BE") quantity was "> 6000" [ng/ml], and in the comments field listed "5095" (the diluted quantity) and in the margin noted "1:20" (reflecting that the sample was diluted by a factor of twenty.) (Ex. 104 at 2364, Ex. 109 at 2411.) Trial counsel failed to introduce the GCMS instrument's data regarding the second urine test – documentation that was not only the primary source regarding the test, but also the only complete and accurate document that would clearly indicate to a reasonably competent toxicologist that the final non-diluted quantity of benzoylecgonine was 101,900 ng/ml. (Ex. 104 at 2361-62; Ex. 109 at 2411-12.)

(a) Both trial counsel and their expert, Dr. Sevanian, were unaware that "5095" [ng/ml] on the lab's worksheet indicated the diluted rather than final quantity of benzoylecgonine. In Dr. Sevanian's direct examination, trial counsel referred to the benzoylecgonine urine concentration as "greater than 6,000" nanograms per milliliter rather than 101,900 nanograms per milliliter. (31 RT 2450.) Dr. Sevanian stated that it was not clear to him "whether the greater than 6,000 nanograms per milliliter represents the calculated amount after dilution or the amount that was actually present in the diluted sample." (31 RT 2453.) He continued that if 5,095 were the final non-diluted quantity then it would be "a

relatively high concentration" but that if it were the diluted quantity with a 1:20 dilution ratio it would be "an enormous amount of cocaine." (31 RT 2453.) On redirect examination, trial counsel again elicited testimony from Dr. Sevanian suggesting that it was unclear whether the results of the 5095 from the second test represented a diluted value or a total value (31 RT 2494-95), when in fact Robert West, the director of forensic toxicology at the laboratory that performed the testing, had already clarified that the figure needed to be multiplied by a factor of 20 to capture an accurate reading of the benzoylecgonine found in the urine (31 RT 2405).

(b) The jury was confused by the apparent inconsistency between Mr. West's testimony that the 5,095 figure had to be multiplied by 20 and trial counsel's retained expert witness, Dr Sevanian, who said he was unclear on the point. One juror submitted a note stating, "I believe that witness West testified that the level of concentration after dilution was under 6,000 nanograms per milliliter. Current witness [Sevanian] said it never got below 6,000." (31 RT 2476.) Trial counsel still did not recognize the source of the confusion, asking on the record, "[H]ow is that inconsistent with anything Dr. Sevanian has said?" (31 RT 2477.) The trial court asked defense counsel, "[D]o you want to just leave it that way, that I'll say that the attorneys are aware of your question, and if they care to address it, they may, or do you want to stipulate to something?" (31 RT 2478.) The parties ultimately resolved that the court would respond to the question by instructing the jury that they could have the testimony reread during deliberations, and the court did so instruct them. (31 RT 2481.) Trial counsel did nothing to alleviate the confusion.

(c) The following week in rebuttal, the prosecution's expert, Dr. Baselt, similarly claimed that he did not understand whether the "5095" number on the lab's worksheet was a

diluted or final quantity. (35 RT 2891-92.)

(d) Trial counsel failed to introduce and to confront both Dr. Sevanian and Dr. Baselt with the raw GCMS results. This would have made the accurate answer clear to any qualified forensic toxicologist. (Ex. 109 at 2411-12.)

(3) The prosecution introduced testimony regarding the second urine test on cross-examination of Robert West. (31 RT 2403.) Trial counsel stated they had never seen it, and the prosecution noted it was produced in discovery. (31 RT 2403.)

f. Trial counsel unreasonably and prejudicially failed to introduce evidence that Mr. Bell's blood and urine samples were degraded by the time they were analyzed. Reasonably effective trial counsel would have done so in order to demonstrate that the cocaine and benzoylecgonine levels in the blood and urine samples were higher when the samples were obtained than when they were analyzed five and a half months later.

(1) Trial counsel knew or should have known that degradation of the samples would affect the results of their analysis.

(2) Trial counsel knew or should have known to obtain the San Diego Police Department crime laboratory log regarding the samples. Testimony at trial revealed that such a log existed. (37 RT 3037, 3045.) Trial counsel failed to obtain it.

(3) Trial counsel unreasonably and prejudicially failed to introduce the evidence of sample degradation with any of its witnesses.

(4) Trial counsel unreasonably and prejudicially failed to effectively cross-examine the prosecution's expert, Dr. Randall Baselt, regarding sample degradation.

(a) Trial counsel first raised the issue of

sample degradation during the prosecution's rebuttal case, in its cross-examination of Dr. Baselt.

(b) Dr. Baselt acknowledged and discussed the degradation phenomenon generally. (35 RT 2886-89.)

(c) Dr. Baselt stated he did not realize until re-cross-examination that in Mr. Bell's case there had been a substantial delay in testing. (35 RT 2894.) Trial counsel failed to confront Dr. Baselt regarding the effect that the delay would have on the calculations and other opinions he had previously testified to. (35 RT 2894.)

(d) Minimally-adequate trial counsel would have been familiar with research in the field regarding the rates of degradation of cocaine and benzoylecgonine in blood and urine samples. Such counsel would have confronted and cross-examined Dr. Baselt with his own study, published in July 1993 – only a few months prior to Mr. Bell's trial – in which it was observed inter alia that cocaine in a properly-preserved blood sample decayed by over 96% in a six-month period. (Ex. 114 at 2563-65; Ex. 109 at 2418-19.)

(e) Dr. Baselt expressed difficulty answering important questions on cross-examination due to lack of preparation. (35 RT 2897.) Reasonably-competent counsel would have re-called Dr. Baselt after giving him time to prepare. Trial counsel did not do so.

g. Trial counsel knew or should have known that only limited information regarding Mr. Bell's cocaine use on June 4, 1992 could be accurately reverse-extrapolated from the available toxicology data. (Ex. 109 at 2413-21.)

h. Trial counsel unreasonably and prejudicially failed to retain and consult an expert to test the hair samples taken from Mr. Bell.

(1) The San Diego Police Department obtained hair

samples from Mr. Bell shortly after his arrest. (Ex. 104 at 2338.)

(2) Trial counsel knew or should have known that such testing could be performed and that it could corroborate Mr. Bell's statement that prior to June 4, 1992 he had not used cocaine in several months.

(3) Trial counsel knew or should have known that the period of abstention was relevant to the toxicology analyses as well as to expert testimony regarding the level of subjective intoxication induced by Mr. Bell's cocaine ingestion on June 4, 1992. (Ex. 109 at 2413-18; Ex. 88 at 1647.)

(4) Trial counsel knew or should have known that the period of abstention was relevant to the affect on Mr. Bell of his cocaine use on June 4, 1992, as sufficient abstention would eradicate his tolerance to cocaine thus aggravating the effects of the cocaine he ingested on June 4, 1992. (*See* Ex. 89 at 1647.)

i. Mr. Bell was prejudiced by trial counsel's unreasonable errors and omissions regarding the investigation, preparation and presentation of toxicology evidence. Trial counsel failed to develop and present all evidence supporting the level of Mr. Bell's cocaine intoxication. The evidence that trial counsel did introduce was incomplete, incoherent, and contradictory. Reasonably competent trial counsel would have fully and directly presented to the jury in a clear fashion the full, final, non-diluted results of the second test on Mr. Bell's urine sample. Such counsel would also have fully and directly presented to the jury in a clear fashion the evidence of and science regarding the degradation of Mr. Bell's blood and urine samples caused by law enforcement's and the prosecution's unexplained delay in having the samples analyzed. Reasonably competent counsel would also have fully and directly presented to the jury the

complexities and imprecision involved in reverse-extrapolating information from the toxicological results in Mr. Bell's case, but would have demonstrated that the evidence supports Mr. Bell's statements regarding his pattern of usage on June 4, 1992. (Ex. 109 at 2413-21.) Trial counsel's performance fell below the standards for reasonably competent counsel, and prejudiced Mr. Bell. But for counsel's unprofessional errors, the result of the trial proceedings would have been different.

9. Trial counsel unreasonably and prejudicially failed adequately to investigate and present evidence of Mr. Bell's mental health and functioning, and to provide mental health professionals with information necessary to conduct minimally competent psychological and psychiatric evaluations of Mr. Bell, and to explain the impact of Mr. Bell's deficits on his behavior throughout his life, including in and around the time of the crime, arrest, pretrial, and during trial. Reasonably competent counsel would have investigated, developed and presented evidence of Mr. Bell's life-long history of mental, psychological, neuropsychological, emotional, cognitive, social, and adaptive functioning deficits as related to his involvement in the crime, his inculpatory statements to police, and his ability to attend to and understand the proceedings against him including, but not limited to the following:

a. The facts, allegations, and exhibits in Claim Four and in Exhibit 113 are incorporated herein to avoid unnecessary duplication.

b. Trial counsel unreasonably and prejudicially failed to introduce evidence of Mr. Bell's brain injury and neuropsychological deficits and cognitive dysfunctions.

(1) In March 1993, trial counsel retained Dr. Lorraine Camenzuli to conduct neuropsychological testing of Mr. Bell. (Ex. 88 at 1635.)

(2) On April 14, 1993, Dr. Camenzuli administered a battery of neuropsychological tests to Mr. Bell. (Ex. 88 at 1635-36.) Mr. Bell showed impairment in three specific areas of functioning, including attention, spatial abilities, and visuospatial problem-solving. Specifically, Mr. Bell exhibited borderline impairments in complex and divided attention, as well as mild impairments in sustained attention and concentration for both auditory and visuospatial material. Further, he demonstrated borderline impairments in facial recognition and constructional or drawing abilities, reflective of an underlying problem in visuospatial organization. Finally, he was moderately to severely impaired (less than first percentile) on a visual problem-solving task that is dependent upon visual organization, planning, and divergent thinking or creativity. Verbal abilities, intelligence, learning, memory, and motor abilities all appeared to be within the normal range for an individual at his age and level of education with the exception of elaboration of abstract ideas. (Ex. 88 at 1636-37.)

(3) Mr. Bell's most significant impairment presented in a test of his non-verbal fluency. Fluency is the ability to generate alternative solutions to problems, sometimes referred to as divergent thinking or creativity. Verbal fluency, as measured by Mr. Bell's capacity to generate words beginning with specific letters, was in the average range. Non-verbal fluency, as measured by his capacity to generate unique designs, was in the moderately to severely impaired range. The total number of designs Mr. Bell was able to generate over five trials placed him at less than the first percentile compared to others of his approximate age after education was taken into account. On this task he was not observed to use any strategies whatsoever for varying his designs, further suggesting a significant impairment in planning abilities. (Ex. 88 at 1637.)

(4) Dr. Camenzuli observed that, even in areas where Mr. Bell did not register significant cognitive impairment, the addition of time pressure revealed mild impairment. For example, on one divided attention task, Mr. Bell was asked to add pairs of digits presented serially. On the first three trials, Mr. Bell was able to process incoming information with average speed and accuracy. However, on the fourth trial, when speed of the task increased considerably, Mr. Bell's performance deteriorated to the borderline impaired region. During this trial, he became visibly anxious, whereas his demeanor throughout most of the testing was calm. He volunteered, "My brain just stopped." When asked to explain, he replied, "I tell myself to calm down and listen to what they're saying [on the audio tape]," but he also felt an urge to "keep going, keep going, keep going." He was overwhelmed and distracted by this internal conflict. His results on this test are consistent with other tests, which revealed an inability to sustain attention over time, and the tendency to compromise accuracy in favor of speed. (Ex. 88 at 1637-38.)

(5) Dr. Camenzuli concluded that the configuration of Mr. Bell's deficits suggested a compromise to the right fronto-parieto-temporal regions of his brain, particularly the frontal lobe. Though few and fairly specific, Dr. Camenzuli determined that these deficits could significantly impact cognitive executive functions such as goal-setting, planning, problem-solving, insight, and judgment insofar as these higher level functions are dependent upon an ability to attend to all features of a problem situation over an extended period of time and in the presence of other distractions in the environment. Dr. Camenzuli further concluded that Mr. Bell's most significant deficit in visuospatial problem-solving would interfere to a large extent with his ability to develop alternative strategies for solving problems, particularly if these problems were of a visual or

conceptual nature versus a rational verbal nature. Finally, Dr. Camenzuli determined, that the use of drugs such as crack cocaine would result in even greater impairment of Mr. Bell's cognitive functioning. (Ex. 88 at 1638.)

(6) Dr. Camenzuli's neuropsychological findings are consistent with mild to moderate brain injury, such as that caused by a blow or blows to the head. Mr. Bell was able to recollect for Dr. Camenzuli several such traumas, the cognitive effects of which are additive. (Ex. 88 at 1638.) Mr. Bell has suffered several other brain injuries beyond those he was able to recall for Dr. Camenzuli. The facts alleged in Claim Four are incorporated herein.

(7) Dr. Camenzuli reported her findings to trial counsel. (Ex. 88 at 1639.)

(8) Trial counsel failed to call Dr. Camenzuli to testify.

(9) Trial counsel knew or should have known that Dr. Camenzuli's neuropsychological evidence would be useful to their other medical and psychological expert witnesses and would have helped form and support those experts' conclusions.

(10) Dr. Camenzuli's findings would have informed and bolstered the findings and testimony of Dr. David Smith. (Ex. 89 at 1646-47.)

(11) Trial counsel failed to provide Dr. Camenzuli's neuropsychological findings and evidence to their other expert witnesses, including Dr. Smith.

c. Trial counsel unreasonably and prejudicially failed to develop and supply all relevant social history information to their medical and psychological witnesses, Dr. Smith and Dr. Levak. Reasonably competent counsel would have developed and supplied to their expert

witnesses and the jury all the facts, allegations, and exhibits in Claim Four and in Exhibit 113, which are incorporated herein.

(1) If trial counsel had provided the reasonably available psychosocial history to Dr. Smith, he could have testified to the following:

(a) Prior to and at the time of the crimes, Mr. Bell suffered early onset addictive disease and other co-occurring mental disorders. Mr. Bell exhibited dissociative behaviors that, in combination with his pre-existing psychological trauma, increased the likelihood that he dissociated when using crack cocaine on the day of the crime. (Ex. 89 at 1643-46.)

(b) Mr. Bell's cognitive dysfunction and pre-existing head trauma also acted synergistically with drugs to affect and impair his behavior during the crime and at other points in his life. Mr. Bell's cognitive deficits and head injuries exacerbated the deleterious effects of the crack he consumed on the day of the crime, intensifying and prolonging his impairment, his craving to consume more crack, and the other consequent, negative effects caused by use of the drug. (Ex. 89 at 1646-47.)

(c) Mr. Bell's co-morbid dissociative tendencies also would have been amplified by the combination of his brain dysfunction and drug use. (Ex. 89 at 1646-48.)

(d) Mr. Bell's biopsychosocial history makes it likely that he experienced a psychiatric disturbance involving irrational behavior at the time of the crime. (Ex. 89 at 1648.)

d. Trial counsel unreasonably and prejudicially failed to develop and supply all relevant biopsychosocial history information to the prosecution's experts at trial, Dr. Mark Mills and Dr. Reese Jones.

Relevant background information is necessary to ensure an accurate mental health evaluation, reliable opinions, and accurate, relevant and admissible testimony. Trial counsel's unreasonable failure to provide this evidence to the prosecution experts, interview the prosecution experts, and/or to cross-examine the prosecution experts using the information resulted in erroneous and prejudicial testimony by the prosecution's experts about Mr. Bell's mental, cognitive, and social functioning.

10. Trial counsel unreasonably and prejudicially failed to object to and/or investigate, develop, and present evidence and cross-examination to challenge evidence and arguments presented by the prosecution including, but not limited to, the following:

a. Trial counsel failed to properly object to testimony by Detective Doucette that during his interrogation Mr. Bell did not show any remorse. (28 RT 2124.) Trial counsel's only objection was Evidence Code section 1500, the best evidence rule. (28 RT 2124.) Reasonable trial counsel would have also objected on the grounds that the testimony's probative value was outweighed by its prejudicial nature as well as that its introduction would violate Mr. Bell's constitutional rights to due process and a fair trial. Trial counsel knew that they should have objected on those bases. Previously, regarding testimony by Detective Almos on the same subject, trial counsel objected on those bases. (28 RT 2095-2104.) The facts and arguments set forth in Mr. Bell's Appellant's Opening Brief at 113-26 and Appellant's Reply Brief at 44-53 are incorporated herein by this reference as if fully set forth.

b. Trial counsel unreasonably failed to object to several instances of persistent, intentional, and prejudicial acts of state/prosecutorial misconduct, as alleged with more particularity in Claim Five. There was no strategic reason to forego objecting to the prosecutor's

misconduct that prejudiced Mr. Bell. Reasonably competent counsel would have objected to the misconduct. But for trial counsel's deficient performance, the results of the guilt and special circumstance determinations would have been different.

11. Trial counsel unreasonably and prejudicially failed to understand the difference in legal elements of the robbery felony-murder and the robbery-murder special circumstance. Counsel failed to propose adequate jury instructions and failed to object to false and misleading argument by the prosecution; counsel further presented false, misleading, inadequate, and ineffective argument to the jury.

a. Trial counsel incorrectly argued to the jury that the robbery felony-murder and the robbery-murder special circumstance were "really the same" and "go hand in hand." (40 RT 3311-13.)

b. Trial counsel also unreasonably failed to object when the prosecution falsely told the jury that the elements of robbery felony-murder and robbery-murder special circumstance are identical, stating, "Once you find felony murder, you will find the special circumstance to be true." (39 RT 3287.)

c. Trial counsel's erroneous argument and failure to object to the prosecution's false argument misled the jury into believing that once they found the robbery felony-murder to have been established, the robbery-murder special circumstance followed inexorably. Mr. Bell was thus prejudiced by trial counsel's ineffectiveness.

12. By virtue of defense counsel's failures, Mr. Bell was denied the effective assistance of counsel, and a fair and reliable determination of guilt to which he was entitled. Trial counsel's failings, individually and cumulatively, had a substantial and injurious influence and effect on the determination of the jury's verdicts at the guilt phase of Mr. Bell's trial, and

unfairly deprived him of a rational and reliable determination of guilt. But for any or all of counsel's failings, the jury would have reached a more favorable result at the guilt and penalty phases of Mr. Bell's trial.

D. CLAIM FOUR: MR. BELL WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO A FAIR AND RELIABLE DETERMINATION OF PENALTY BY TRIAL COUNSEL'S PREJUDICIALLY DEFICIENT PERFORMANCE

The judgment of conviction and sentence of death was unlawfully and unconstitutionally imposed in violation of Mr. Bell's rights to a trial by a fair and impartial jury; a reliable, fair, non-arbitrary, and non-capricious determination of penalty; effective assistance of counsel; present a defense; confrontation and compulsory process; privilege against self-incrimination; enforcement of mandatory state laws; a trial free of materially false and misleading evidence; a fair trial; an impartial and disinterested tribunal; equal protection; due process of law; and a fair and objective judicial determination pursuant to California Penal Code section 190.4, subdivision (e), as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution; mandatory state laws and rule; and customary international law, international human rights law, and *jus cogens*, because Mr. Bell's trial counsel rendered constitutionally deficient representation in the investigation, preparation, and presentation of a penalty phase defense that prejudicially impaired and undermined counsel's performance at critical stages of the proceeding.

Trial counsel unreasonably failed to conduct a timely or adequate investigation of the potential penalty phase evidence and issues, did not develop or present a coherent penalty phase defense, and was unable and failed to make informed and rational decisions regarding potentially

meritorious defenses and tactics. Trial counsel's errors and omissions were such that a reasonably competent attorney acting as a diligent and conscientious advocate would not have performed in such a fashion.

Trial counsel's performance fell below an objective standard of reasonableness, and below professional norms prevailing at the time of trial. But for trial counsel's unprofessional errors, the result of the proceeding would have been different.

In support of this claim, Mr. Bell alleges the following facts, among others to be presented after access to a complete and accurate record of the proceedings in the municipal and superior courts, full discovery and investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims One, Two, Three, Five, Six, Seven, Eight, Nine, Ten, and Twelve, and any accompanying exhibits are incorporated by reference as if fully set forth herein.

2. Trial counsel unreasonably failed to investigate, develop, and/or present readily available and compelling mitigation evidence at the penalty phase of Mr. Bell's trial. Trial counsel's failures, errors, and omissions in this regard include, but are not limited to the following:

a. Trial counsel unreasonably failed to begin their investigation into Mr. Bell's family history and other mitigating life circumstances in a timely manner.

(1) Trial counsel did not meaningfully begin their social history investigation until nearly a year after they assumed their duties of representation. As of late March 1993, six months prior to the commencement of jury selection in Mr. Bell's trial, counsel had "barely started" to conduct any investigation into the preparation of the penalty

phase case. (1 CT 108.) This was true despite the fact that the case had nominally been staffed by two attorneys and an investigator almost from the outset. Attorney Peter Liss was assigned to the case at Mr. Bell's initial arraignment, which took place on June 9, 1992. (1 CT 120.) Attorney Sharyn Leonard was officially assigned to the case by the Public Defender on August 10, 1992, after the preliminary hearing, which was held on July 31, 1992. (1 CT 102-03.) Although she had been told that she would be assigned to the case as lead attorney in the event that the prosecution alleged special circumstances, she did little more other than visit Mr. Bell, review discovery materials, and observe the preliminary hearing. (1 CT 102.) Olive Brown became the lead investigator on Mr. Bell's case after an initial investigation request was submitted in July 1992. (1 CT 97.) However, from July 1992 to January 1993, Ms. Brown was "completely tied up" as lead investigator on another special circumstances case. (1 CT 99.)

(2) Trial counsel unreasonably failed to adequately prioritize the investigation and development of Mr. Bell's penalty phase presentation. Peter Liss spent the limited time he had to devote to the case working on two pretrial motions in the fall of 1992 (1 CT 120-21) and participated very little in the penalty phase investigation until August 1993, little more than one month prior to the commencement of jury selection. He took a month-long vacation in 1993. (1 CT 121.) He carried a full caseload until shortly before the trial began. (*See* 1 CT 120-22; Ex. 92 at 1715-16.) Mr. Bell effectively had one attorney working on the penalty phase of his case for significant and crucial periods. However, even that one attorney, Sharyn Leonard, failed to adequately prioritize Mr. Bell's case over the supervisory duties assigned to her by the Public Defender's Office. (*See* 1 CT 102, 105, 106.) As a result of these duties, she found that she "rarely had uninterrupted time to work on the case." (1 CT 106.) The

unavailability of Ms. Brown and Mr. Liss meant that as of mid-March 1993, progress had not been made "in any meaningful fashion" on Mr. Bell's case. (1 CT 103-04.)

(3) Trial counsel unreasonably delayed the penalty phase investigation in Mr. Bell's case because they hoped that the prosecution would settle the case. After conferring with the prosecutor, Robert Sickels, on August 14, 1992, they "were left with the impression that some sort of disposition could be worked out." (1 CT 103.) Even after their offer to plead guilty in exchange for a sentence of life without parole was rejected by the prosecutor, trial counsel still hoped that District Attorney Ed Miller would reconsider. (1 CT 104.)

(a) This erroneously held belief that the case would settle prejudiced Mr. Bell's penalty phase presentation because trial counsel did not request any funds for investigation until after they realized the case would not settle.

(4) Compounding their failure to begin meaningful penalty phase investigation until a late date, trial counsel unreasonably diverted resources away from the penalty phase investigation in order to pursue insignificant guilt phase issues. In particular, trial counsel responded to the prosecution's intention, stated in February 1993 (1 CT 106), to introduce DNA evidence against Mr. Bell, in an unreasonable fashion. Despite the fact that identity was not at issue in Mr. Bell's case, trial counsel invested significant resources in educating themselves about DNA evidence, with which neither counsel had experience. (1 CT 107.) Since it was "the policy of the office of the Public Defender that each assigned attorney must be able to deal with all of the issues himself or herself" (1 CT 106), they took it upon themselves to educate themselves on DNA, at the expense of Mr. Bell's penalty phase investigation. Ms.

Leonard attended three seminars on DNA evidence. (1 CT 107.) That trial counsel diverted time and resources away from penalty phase investigation and allocated them toward DNA evidence was particularly unreasonable given that both counsel conceded almost from the outset that they did not anticipate this and similar issues to be contested at the guilt phase.

b. Trial counsel were not adequately trained and experienced in the skills and knowledge required to effectively investigate, prepare, and present a defense in a capital case.

c. Trial counsel unreasonably failed to adequately investigate Mr. Bell's family and social history. A minimally competent investigation into Mr. Bell's maternal, paternal, and step-paternal family history would have revealed substantial mitigation, which any minimally competent attorney would have presented to Mr. Bell's jury. Counsel interviewed family members and others who knew Mr. Bell, but wholly and unreasonably neglected to obtain relevant and significant mitigating evidence of the multigenerational patterns and histories of mental illness, substance abuse, physical abuse, sexual abuse, trauma, and other behavioral and cognitive dysfunctions that affected Mr. Bell's development and functioning in every significant respect.

d. A reasonable investigation would have uncovered documentary evidence and lay witness observations detailing the origins and nature of Mr. Bell's compromised functioning, including credible evidence of familial psychopathology extant for generations on both sides of Mr. Bell's family, such as substance abuse, marital conflict, physical abuse, sexual abuse, criminality, psychological and behavioral disturbance, child neglect and maltreatment, poverty, and community isolation.

(1) Trial counsel's failure to conduct an adequate investigation was particularly unreasonable given that Mr. Bell was fully

cooperative and enabled their investigation in every way he possibly could. He provided trial counsel with names and in some cases addresses of family members, teachers, employers, friends, doctors, counselors, and others who had relevant mitigating evidence. Despite the fact that Mr. Bell pointed trial counsel to dozens of witnesses, they unreasonably failed wholly or adequately to interview these witnesses.

(2) Trial counsel unreasonably failed to devote adequate effort and resources to identify, locate, and interview numerous witnesses who possessed valuable information regarding the conditions of Mr. Bell's life.

(a) Trial counsel made two limited trips to the East Coast to identify and interview witnesses for the penalty phase of Mr. Bell's case.

(b) Trial counsel had no strategic reason for failing to speak with many witnesses they identified, and no strategic reason for picking some witnesses over others. Trial counsel unreasonably failed to locate and interview reasonably available witnesses, including a single maternal family member; additional paternal family members; teachers; childhood friends and classmates; healthcare and social workers; and neighbors. Had they done so, these witnesses would have provided relevant and compelling mitigating evidence to trial counsel. (*See, e.g.*, Ex. 76 at 1537-38 (Declaration of Oscar Washington); Ex. 74 at 1512 (Declaration of Alice Bishop); Ex. 80 at 1572 (Declaration of Frederick Crockett); Ex. 79 at 1562 (Declaration of Vanessa Brade); Ex. 83 at 1600 (Declaration of Lorenzo Murania); Ex. 77 at 1545 (Declaration of Mary Ann Werntz); Ex. 78 at 1554 (Declaration of Delores Young).)

(c) Trial counsel unreasonably failed to develop and/or present relevant compelling mitigating evidence in the

possession of witnesses with whom they did speak, despite the fact that these witnesses were ready, willing, and able to provide the information to trial counsel and testify on behalf of Mr. Bell. (*Compare* Ex. 72 (Declaration of Lisa Marie Johnson) *with* 49 RT 4105-53; Ex. 75 (Declaration of Shirley Bell Mercer) *with* 46 RT 3757-69; Ex. 82 (Declaration of Kenneth Berman) *with* 47 RT 3818-66; Ex. 87 (Declaration of Michael Carwile) *with* 48 RT 3976-87; Ex. 84 (Declaration of James Clancy) *with* 48 RT 3908-31; Ex. 86 (Declaration of Howard A'Brial) *with* 48 RT 3955-67; *see also* Ex. 73 (Declaration of Leola Blanding); Ex. 81 (Declaration of Tarence Davis).)

e. Trial counsel unreasonably and prejudicially failed to obtain reasonably available relevant social history records which trial counsel knew or should have known existed. A reasonable effort by trial counsel would have produced readily available records containing relevant social history information and compelling mitigation which could have been used to corroborate lay and expert testimony.

(1) Trial counsel failed to obtain reasonably available records pertaining to Mr. Bell. (*See, e.g.*, Ex. 1 (Birth Certificate of Steven M. Bell); Ex. 3 (Education Records of Steven M. Bell from the New York State Education Department—GED Testing); Ex. 5 (Education Records of Steven M. Bell from Dutchess Community College); Ex. 7 (Medical Records of Steven M. Bell from Childhood—New York Presbyterian Hospital); Ex. 13 (Mental Health Records of Steven M. Bell from New York State Office of Mental Health).)

(2) Trial counsel failed to obtain reasonably available records pertaining to Melvin Bell, Mr. Bell's biological father. (*See, e.g.*, Ex. 18 (Birth Certificate of Melvin Bell); Ex. 19 (Military Records of Melvin Bell); Ex. 20 (Criminal Court File for Melvin Bell—

Case No. 74CRS3416—New Hanover County North Carolina—Breaking and Entering); Ex. 21 (Criminal Court File for Melvin Bell—Case No. 78CRS4060—New Hanover County North Carolina—Breaking and Entering); Ex. 22 (Criminal Court File for Melvin Bell—Case No. 78CRS4061—New Hanover County North Carolina—Breaking and Entering); Ex. 23 (Criminal Court File for Melvin Bell—Case No. 81CRS12697—New Hanover County North Carolina—Murder); Ex. 99 (Social Security Administration Records of Melvin Bell).)

(3) Trial counsel failed to obtain reasonably available records pertaining to Leola Washington Bell Blanding, Mr. Bell's biological mother. (*See, e.g.*, Ex. 26 (Birth Certificate of Leola Washington); Ex. 27 (Marriage Certificate of Melvin Bell and Leola Washington); Ex. 28 (Divorce File of Melvin Bell and Leola Bell); Ex. 29 (Marriage Certificate of George Blanding and Leola Bell); Ex. 97 (Social Security Administration Records of Leola Blanding).)

(4) Trial counsel failed to obtain reasonably available records pertaining to Lisa Bell Graves Johnson, Mr. Bell's biological sister. (*See, e.g.*, Ex. 30 (Birth Certificate of Lisa Bell); Ex. 31 (Education Records of Lisa Bell); Ex. 32 (Military Records of Lisa Bell).)

(5) Trial counsel failed to obtain reasonably available records pertaining to George Blanding, Mr. Bell's stepfather. (*See, e.g.*, Ex. 106 (Birth Certificate of George Blanding); Ex. 107 (Education Records of George Blanding from Lincoln High School); Ex. 108 (Education Records of George Blanding from Morris College); Ex. 33 (Military Records of George Blanding); Ex. 34 (Marriage Certificate of George Blanding and Birnie Ragins); Ex. 35 (Marriage Certificate of George Blanding and Carrie Lee Williams); Ex. 36 (Marriage Certificate of George Blanding and Alice M. Cousins); Ex. 37 (*People of New York v.*

George Blanding, Case No. 41159-1978, New York County Supreme Court); Ex. 38 (*George Blanding v. Security Unit Employees 82, et al.*, Case No. 16643, New York County Supreme Court); Ex. 39 (*George Blanding v. Steven E. Katz, et al.*, Case No. 17567-1991, New York County Supreme Court); Ex. 98 (Social Security Administration Records of George Blanding).)

(6) Trial counsel failed to obtain reasonably available records pertaining to Mr. Bell's paternal family members. (*See, e.g.*, Ex. 40 at 1187 (Birth Certificate of Gloria Bell); Ex. 40 at 1188 (Birth Certificate of Jacqueline Bell); Ex. 40 at 1189 (Birth Certificate of Joseph Bell); Ex. 42 at 1203-05 (Marriage Certificate of Edgar S. Wilson and Inez Bell); Ex. 42 at 1206-09 (Marriage Certificate of Kenneth Bishop and Alice Bell); Ex. 42 at 1210-11 (Marriage Certificate of William Davis and Jacqueline Bell); Ex. 42 at 1212-14 (Marriage Certificate of Joseph Bell and Theresa Mitchell); Ex. 41 at 1193 (Death Certificate of Henry Bell); Ex. 41 at 1195 (Death Certificate of Dorothy Bell); Ex. 41 at 1197 (Death Certificate of Joseph Bell); Ex. 41 at 1198 (Death Certificate of Gloria Bell Barrow).)

(7) Trial counsel failed to obtain reasonably available records pertaining to Mr. Bell's maternal family members. (*See, e.g.*, Ex. 40 at 1190 (Birth Certificate of Laverne Washington); Ex. 40 at 1191 (Birth Certificate of Carlton Washington); Ex. 41 at 1192 (Death Certificate of Luelva Washington); Ex. 41 at 1194 (Death Certificate of Earline Washington); Ex. 41 at 1196 (Death Certificate of Laverne Washington); Ex. 68 (Excerpts from *People of New York v. Ernest Spruill*, Case No. 5K044984, Kings County Criminal Court, Murder of Laverne Washington); Ex. 43 (*United States v. Oscar Washington*, Case Nos. 73 Crim 193 and 73 Crim 319, Criminal Court File, United States District

Court, Southern District of New York, Bank Robbery, Docket Only); Ex. 44 (Federal Bureau of Prisons Information Data for Oscar Lee Washington); Ex. 69 (David Washington Inmate Information Data Sheets from the New York State Department of Correctional Services); Ex. 57 (*People of New York v. James Washington*, Case No. 6K005897, Kings County Criminal Court); Ex. 58 (*People of New York v. James Washington*, Case No. 6K036137, Kings County Criminal Court); Ex. 59 (*People of New York v. James Washington*, Case No. 8K034038, Kings County Criminal Court); Exhibit 60 (*People of New York v. James Washington*, Case No. 9K028884, Kings County Criminal Court); Ex. 61 (*People of New York v. James Washington*, Case No. 90K032518, Kings County Criminal Court).)

(8) Trial counsel failed to obtain other reasonably available documents relating to Mr. Bell's social history, including medical, mental health, educational, and employment records of maternal and paternal family members. Had trial counsel obtained these records, which have since been destroyed, they would have provided additional substantiation and further compelling evidence of the multigenerational patterns of substance abuse, physical and sexual abuse, mental illness, and behavioral dysfunction that affected Mr. Bell.

f. The reasonably available and compelling mitigating evidence—as presented *infra* sections 5 and 7—that trial counsel could have developed and presented to experts and at the penalty phase of Mr. Bell's trial is incorporated by reference as if fully set forth herein.

3. Trial counsel's inadequate investigation resulted in their failure to present substantial amounts of compelling and mitigating evidence during the penalty phase of Mr. Bell's trial.

a. Trial counsel presented testimony from 16 lay witnesses. This number is misleading, however, for the testimony of these

witnesses was largely superficial, limited, redundant, and ultimately distorting of the true nature of Mr. Bell's social history. Trial counsel failed or substantially failed to elicit testimony on major aspects of Mr. Bell's social history, including the multigenerational history present in Mr. Bell's paternal and maternal families, of substance abuse, incest and sexual abuse, violence, criminality, and poverty; the emotional and physical abuse endured by Mr. Bell at the hands of his mother; the psychiatric and behavioral dysfunctions of Mr. Bell's father and mother; the intense psychological and physical abuse perpetrated on Mr. Bell by his stepfather; the presence of dissociative behavior in Mr. Bell from a very young age continuing through adulthood; and the history of major head trauma and the demonstrated presence of neurological impairment in Mr. Bell.

(1) The defense called four relatives of Mr. Bell as witnesses. The testimony of the two paternal aunts, Shirley and Jacqueline Bell, was very similar. (*Compare* 46 RT 3756-66 *with* 46 RT 3779-96.) Both had not seen Mr. Bell for over 23 years (46 RT 3765-66, 3796), a fact that was used by the prosecutor to minimize their testimony but which, if placed in the broader context of Mr. Bell's life, is the result of maternal cruelty and contributed greatly to the pattern of abandonment and isolation experienced by Mr. Bell throughout his life. (Ex. 113 at 2478-79, 2560.) Both aunts testified that as a young child, Mr. Bell had a stutter (46 RT 3759-60, 3786-87) and was uncomfortable around his mother (46 RT 3762, 3786), who was not very affectionate (46 RT 3762, 3784). Kenneth Bishop Jr., a paternal cousin of Mr. Bell, also had not seen Mr. Bell in more than a decade. (48 RT 3993.) He testified that Mr. Bell's father, Melvin, had been incarcerated in Brooklyn and North Carolina (48 RT 3991-92) and that Mr. Bell missed him acutely (48 RT 3995). However, his testimony also misled the jury about the extent of physical abuse and psychological trauma

endured by Mr. Bell at the hands of his mother and stepfather, George Blanding. Mr. Bishop characterized the relationship between them as "strained" and "distant," and said that Mr. Bell "did not get along" with his stepfather. (48 RT 3995.) Lisa, Mr. Bell's sister, testified that their father, Melvin, used intravenous drugs (49 RT 4106) and was absent from their lives since they were very young (49 RT 4106-08). Lisa was sexually abused by their stepfather, George Blanding. (49 RT 4123-25.) However, she too spoke in minimizing terms about the "discipline" that Mr. Bell received from their mother and stepfather (49 RT 4113-14) and suggested that Mr. Bell's own actions provoked "discipline" by being "rebellious" (49 RT 4114). She testified that she "can't say that Steven got beat for no reason" (49 RT 4115), when in fact this routinely happened (Ex. 113 at 2493-95). The defense did not produce testimony from any other members of Mr. Bell's family.

(2) Trial counsel did not present testimony from any childhood friends of Mr. Bell, nor did they present testimony from any of his school teachers. However, the defense did call eight witnesses from Harlem Valley Secure Center ("Harlem Valley"), the New York prison facility in which Mr. Bell was incarcerated after his juvenile crime. Two of these witnesses, Kenneth Berman (47 RT 3818-66) and Michael Carwile (48 RT 3976-87), knew Mr. Bell through a theater company that ran a program at Harlem Valley. The rest of the witnesses, James Clancy (48 RT 3908-31), Sarah Syniec (48 RT 3932-46), Howard A'Brial (48 RT 3955-67), Lawrence Seavers (48 RT 4029-40), Wendy Cannon (48 RT 4048-62), and Felix Rodriguez (48 RT 4062-82), were employees of the prison at the time Mr. Bell was incarcerated there. None were psychiatrists or psychologists. Their testimony was largely cumulative and superficial. They were not afraid of Mr. Bell. (48 RT 3934-35, 3938 (Syniec); 48 RT

3958 (A'Brial); 48 RT 4030 (Seavers); 48 RT 4050-51 (Cannon); 48 RT 4071 (Rodriguez).) Some felt he would be a model inmate or contribute in a prison environment in the future. (48 RT 3924 (Clancy); 48 RT 4034 (Seavers); 48 RT 4057 (Cannon); 48 RT 4072 (Rodriguez).) Mr. Bell did not receive many visits while at Harlem Valley. (47 RT 3835-36 (Berman); 48 RT 3924 (Clancy); 48 RT 3938 (Syniec); 48 RT 3960 (A'Brial); 48 RT 4033 (Seavers); 48 RT 4050 (Cannon); 48 RT 4071 (Rodriquez).) Some expressed that they would feel sad or disappointed if Mr. Bell were executed. (47 RT 3857 (Berman); 48 RT 3924-25 (Clancy); 48 RT 3940 (Syniec); 48 RT 3964 (A'Brial).) This testimony was undercut somewhat by the fact, pointed out by the prosecution, that none of these witnesses (save Mr. Berman) had been in contact with Mr. Bell since he left Harlem Valley. (*See* 48 RT 3984-88, 3929, 3942, 3965, 4035, 4059, 4073.) In some instances, witness testimony undermined existing evidence of Mr. Bell's mental health issues, such as when Mr. Rodriguez testified that Mr. Bell "did not seem to have a mental disturbance" (48 RT 4076) and Mr. A'Brial testified that Mr. Bell "seemed as normal as any other resident at Harlem Valley" (48 RT 3962-63; *Contra* Ex. 86 at 1622-24).

(3) The remaining witnesses did not substantially contribute to the jury's understanding of the mitigating circumstances of Mr. Bell's life because they had only very limited knowledge of Mr. Bell. Charles Fort worked at the San Diego Urban League (46 RT 3770), where Mr. Bell took a sixteen week course in microcomputer repair (46 RT 3772). Mr. Fort had no specific memories of Mr. Bell and only vaguely recollected him. (46 RT 3775-77.) When asked if he remembered Mr. Bell, Mr. Fort responded, "Oh, yeah, I look at him, I know him. I mean, there's a lot of them [students] I see now, I see them, I might not know their names, when I see their faces I know who they are." (46 RT 3778.) Deberah Glenn knew

Mr. Bell from his short enrollment at Kelsey-Jenney College. (46 RT 3797-98.) Her testimony that Mr. Bell was a "normal person" and that the school would not have accepted a student with a personality disorder (46 RT 3803) undercut the defense's own evidence. Alfred Carlton Williams knew Mr. Bell from San Diego (49 RT 4155) and testified that he briefly acted as a father figure to him, teaching him how to drive (49 RT 4156-57). Douglas Wilson, an actor, knew Mr. Bell for six months (48 RT 3974) when Mr. Bell worked for a theater company after being released from prison in New York (48 RT 3968-69). Mr. Bell was the first black person Mr. Wilson really got to know. (48 RT 3973.)

(4) The prosecution was able to easily minimize the value of information offered by these witnesses. In closing argument, the prosecutor emphasized to the jury that although the prosecution could only present evidence within factors (a), (b), and (c) of California Penal Code section 190.3 (52 RT 4416), the defense, under factor (k), could present "every piece of information that's available for you to consider about the defendant so you know all the good and all the bad before you reach the decision you must make." (52 RT 4417.) Thus, the defense's inadequate penalty phase presentation was characterized by the prosecution as including "anything and everything that may arouse sympathy, mercy, compassion." (52 RT 4417.) The prosecutor summarized the defense's substantively meager and disjointed presentation as follows: "He worked in the kitchen with knives and he didn't stab anyone. People that worked with him weren't afraid to turn their back on him. His childhood, not the best perhaps, worse than many, but not unlike a lot of childhoods where the child does not grow up to be a child murderer. Video work, electronics training, repairing of radios, participation in a play. ... He will be a model prisoner." (52 RT 4428.)

b. Trial counsel unreasonably failed to investigate, develop, and present compelling evidence in their possession regarding the existence of multigenerational patterns of substance abuse and behavioral dysfunction, especially as it pertained to Mr. Bell's biological father, Melvin Bell. Trial counsel had in their possession voluminous records documenting Melvin Bell's psychiatric disorders, substance abuse problems, behavioral dysfunction, and criminality, including records compiled during Melvin Bell's incarceration in North Carolina (Ex. 101) and following his death from a heroin overdose in San Diego (Ex. 24; Ex. 25). The failure of trial counsel to investigate, develop, and introduce this evidence during the penalty phase of Mr. Bell's trial was particularly unreasonable given that trial counsel was at least minimally aware that Melvin's conditions and problems potentially predetermined some of Mr. Bell's psychosocial development, dysfunctions, and behaviors. Peter Liss referenced genetics in his penalty phase closing argument, stating, "Now, to the extent genetics play any factor, maybe there is a problem here. I can't prove that to you, and frankly, we're just at the beginning stage of trying to understand genetically how the attributes of our parents might affect us. But it does seem awful coincidental that Steven developed some of the same attributes, negative ones, that his father had." (53 RT 4470-71.) Trial counsel's failure to fully develop and present this information to the jury was unreasonable, prejudicial, and not the product of any reasoned or reasonable strategic decision.

4. Trial counsel unreasonably failed to utilize mental health and other experts in order to develop and present relevant mitigating evidence at the penalty phase of Mr. Bell's trial. Had counsel conducted a reasonably adequate investigation into Mr. Bell's life history, they could have provided this information to expert witnesses who would have synthesized

information from documentary evidence and lay and expert witnesses into a compelling presentation of substantial and compelling themes of mitigation.

a. The reasonably available and compelling mitigating evidence—as presented *infra* sections 5 and 7—that trial counsel could have developed and presented to experts and at the penalty phase of Mr. Bell's trial is incorporated by reference as if fully set forth herein.

b. Trial counsel unreasonably failed to consult with and provide readily available mitigating evidence to the mental health experts they did retain in order to identify the most compelling and relevant information to be developed and presented regarding Mr. Bell's psychosocial history.

c. The failure of trial counsel to offer a compelling or coherent story at the penalty phase of Mr. Bell's trial was in part the result of their failure to adequately utilize expert witnesses and to identify and present important mitigating evidence and themes in Mr. Bell's life and psychosocial development.

d. Trial counsel unreasonably failed to present testimony from Dr. Richard Levak at the penalty phase of Mr. Bell's trial. Trial counsel called Dr. Levak at the guilt phase and then unreasonably failed to call Dr. Levak again at the penalty phase to present even the relevant mitigating evidence they had uncovered. Alternatively, trial counsel unreasonably failed to have another expert witness prepared to present the relevant mitigating evidence they had developed in the context of Mr. Bell's biopsychosocial history.

(1) Trial counsel's failure to call Dr. Levak as a witness in the penalty phase prejudiced Mr. Bell because Dr. Levak had provided an incomplete picture of Mr. Bell's social history during the guilt phase. Dr. Levak could have provided additional compelling mitigation

evidence about Mr. Bell's social history and psychosocial development during the penalty phase, and trial counsel's failure to provide the jury with this information was unreasonable and prejudicial.

(2) Dr. Levak's testimony at the guilt phase focused largely on his conclusion—founded primarily on his reading of a Minnesota Multiphasic Personality Inventory (MMPI) exam given to Mr. Bell—that Mr. Bell had a borderline personality disorder (33 RT 2660) and that he suffered a "brief psychotic decompensation" at the time of the commission of the offense (33 RT 2682). Since Dr. Levak's conclusions were informed partially by reference to Mr. Bell's life history (33 RT 2661), he shared such information as was in his possession and as was necessary to buttress his reading of the MMPI. Thus, in the guilt phase, he testified that Mr. Bell had "a difficult childhood" (33 RT 2662) and that his mother was "extremely hard working, very diligent, but from an early age she didn't like him. He reminded her of her ex-husband, who had caused great harm to the family." (33 RT 2662.) Mr. Bell had a stutter, like his father. His mother was impatient with his stutter, and Mr. Bell stopped communicating with her. (33 RT 2662.) Maternal rejection is "the origination of the borderline personality. It is a major break in an early developmental step. That child never learns basic trust from the age of two...." (33 RT 2663.) Mr. Bell's stepfather was initially friendly, but then began to beat Mr. Bell, and tried to drown him on one occasion. His mother did not take his side. (33 RT 2663-64.) The beatings were part of a pattern in which Mr. Bell "exasperated" his stepfather "because he had difficulties with school and lying and later stealing." (33 RT 2664.) Furthermore, "[T]here were a couple of times when he clearly exasperated his parents, where they whipped him with such frenzy, both of them, that he was terrified they were going to kill him." (33 RT 2666.) Mr. Bell learned to link aggression and

affection by virtue of his stepfather's behavior. (33 RT 2665.) Mr. Bell's mother "dressed him in sort of preppy clothes, clearly trying to be caring in the external way, but that just caused more teasing and humiliation, and children would throw rocks at him and so on." (33 RT 2664.) Mr. Bell had such a "damaged self-identity" that he "escape[d] into fantasy" and "shut down all emotions to just not feel." (33 RT 2666.) He turned to drugs for "self-medication." (33 RT 2666-67.) According to a psychological report issued during Mr. Bell's incarceration at Harlem Valley, his IQ was in the superior range (123). (33 RT 2660.)

(3) Trial counsel's failure to conduct an adequate social history investigation, outlined *supra*, circumscribed Dr. Levak's utility as a social history witness, as did their failure to allow Dr. Levak an adequate amount of time to develop his opinions. Dr. Levak first met with Mr. Bell in August 1993, just two months before jury selection began. (33 RT 2696.) Even so, had trial counsel presented testimony from Dr. Levak at the penalty phase, he could have imparted additional relevant mitigating evidence to the jury. At a minimum, Dr. Levak could have testified to the following facts, summarized in his written report:

(a) Mr. Bell's school records indicated that he was malnourished and undersized. His father's North Carolina prison records evidenced a concern that Mr. Bell's mother was not adequately supporting Mr. Bell and his sister. (Ex. 91 at 1697.)

(b) That "from an early age [Mr. Bell] began to 'numb himself' to develop a 'survivor' profile in order to eradicate vulnerable feelings because he did not have a consistent source of emotional support from an adult." (Ex. 91 at 1698.)

(c) Mr. Bell's social and emotional development was severely hampered by his stuttering problem. He became

extremely anxious when called upon to speak in class. (Ex. 91 at 1698.)

(d) Mr. Bell's school records indicate that he repeated the eighth grade due to poor attendance. "The poor attendance was contemporaneous with some episodes of running away from home, which is often associated with a depressed child that feels hopelessly trapped." (Ex. 91 at 1698.)

(e) Mr. Bell reported the abuse of his stepfather to a doctor, who encouraged Mr. Bell to press charges. Mr. Bell did report the abuse to the police. Two months went by, and Mr. Bell's stepfather learned that he had made a report. Mr. Bell received a severe beating, but no intervention occurred. (Ex. 91 at 1699.)

(f) Contrary to Dr. Levak's testimony (33 RT 2664, 66), the abuse Mr. Bell received from his stepfather was "unpredictable and often undeserved." (Ex. 91 at 1699.)

(g) Mr. Bell's stepfather was a severe alcoholic. (Ex. 91 at 1699.)

(h) Because of his stepfather's unpredictable, violent, and drunken behavior, Mr. Bell "developed a common response to unpredictable abuse" and "became hyper-vigilant, almost paranoid, trying to read the cues in his environment so as to be able to avoid a terrifying experience. On many occasions, he would walk into the house extremely apprehensive about the mood of his stepfather, and then he could tell by the 'look in George's eye' whether he was in for physical abuse." (Ex. 91 at 1699.)

(i) Mr. Bell began drinking alcohol at age 12 and began using cocaine and PCP at age 13. (Ex. 91 at 1701.)

(j) Mr. Bell had sexual intercourse for the first time at age 12 with a 32 year old woman who was a friend of his

mother's. (Ex. 91 at 1702.)

(k) While at Harlem Valley, Mr. Bell was diagnosed with having severe psychological problems, but did not receive any in-depth treatment. (Ex. 91 at 1704.)

e. Trial counsel called Dr. Alex Caldwell at the penalty phase, and in so doing, unreasonably failed to present to the jury readily available mitigating evidence. Trial counsel used the testimony of Dr. Caldwell to bolster the interpretation of the MMPI offered by Dr. Levak at the guilt phase. Dr. Caldwell, an expert in interpreting the MMPI (47 RT 3869-71) testified that he reached the same diagnostic impression as had Dr. Levak, that Mr. Bell has borderline personality disorder (47 RT 3874, 3897) and that the killing of Joey had "all the hallmarks" of a transient psychotic episode (47 RT 3883). Dr. Caldwell also testified that Mr. Bell had elements of antisocial personality disorder and that such a diagnosis would not be "inappropriate." (47 RT 3888.)

(1) Trial counsel's substitution of Dr. Caldwell for Dr. Levak was particularly unreasonable given that he offered none of the social history information as could have Dr. Levak, and because Dr. Levak had earlier emphasized to the jury that knowledge of the client was crucial for accurate reading of results from an MMPI. Without personal knowledge, Dr. Levak testified, one will rely too heavily on a computer report that attempts to fit individuals rigidly into categories. (33 RT 2670.) Personal knowledge of the client is required to resolve inconsistencies and inaccuracies in computer-generated profiles. (33 RT 2670.) Thus, Dr. Levak interviewed Mr. Bell for approximately ten hours on five or six separate occasions, and had reviewed all of the social history records that trial counsel had provided. (32 RT 2659.) In contrast, Dr. Caldwell never met with Mr. Bell. (47 RT 3897.)

f. Trial counsel unreasonably failed to present evidence that Mr. Bell had suffered multiple significant head traumas and that these traumas may have caused Mr. Bell to experience significant impairments in neurological functioning, in addition to making him more susceptible to the effects of drugs and alcohol. (Ex. 88 at 1638.) Trial counsel failed to present testimony of Dr. Lorraine Camenzuli, who performed a battery of neuropsychological tests on Mr. Bell (Ex. 88 at 1635-36) and found that Mr. Bell showed impairment in three specific areas of neuropsychological functioning including attention, spatial abilities, and visuospatial problem solving, and furthermore that the configuration of these impairments suggested a compromise to Mr. Bell's right fronto-parieto-temporal brain region, particularly the frontal lobe. (Ex. 88 at 1636-38.) Dr. Camenzuli's conclusion that Mr. Bell's deficits could significantly impact his cognitive executive functions, such as goal-setting, planning, problem-solving, insight, and judgment (Ex. 88 at 1638), was shared with trial counsel (Ex. 88 at 1635, 1639) who had no valid strategic reason for not introducing this mitigating evidence for consideration by the jury in the penalty phase of Mr. Bell's trial.

g. Trial counsel unreasonably failed to introduce compelling evidence regarding the abusive and dysfunctional environment and community in which Mr. Bell was raised. Trial counsel knew that such evidence existed or was readily available, and they retained Dr. Terry Williams, a sociologist with expertise in many aspects of New York City including housing projects, jails and prisons such as the ones that Mr. Bell had been incarcerated in as a young person, and the culture surrounding crack cocaine and male prostitution. Trial counsel unreasonably failed to provide Dr. Williams readily available information about Mr. Bell's social history, which he would have utilized in his testimony at the penalty phase.

As a result of trial counsel's failures, the information provided to the jury by Dr. Williams did not relate to Mr. Bell's personal history. (*See* 48 RT 4004-07, 4010-23.)

h. Trial counsel unreasonably failed to buttress the testimony of James Park, a prison consultant, who testified that Mr. Bell would be "an excellent prisoner" (50 RT 4204) and described the living conditions at a "level 4" prison in California (50 RT 4194-4201). On cross examination, the prosecution questioned Mr. Park regarding the manner in which Mr. Bell's psychological makeup might affect his future behavior in prison (50 RT 4207). Since Mr. Park had not met with Mr. Bell (50 RT 4211) and did not have psychological expertise, he could not address this question.

i. Trial counsel unreasonably failed to present testimony from Dr. David E. Smith at the penalty phase of Mr. Bell's trial.

(1) Dr. Smith testified at the guilt phase that Mr. Bell was, at the time of the crime, in a cocaine-precipitated psychotic decompensation that was co-occurring with and related to his borderline personality; and that the decompensation was characterized by Mr. Bell's dissociation and depersonalization during the violent act. (32 RT 2536, 2578-79, 2595.)

(2) If trial counsel had undertaken a minimally competent investigation and provided the reasonably available and compelling mitigating evidence—as presented *infra* section 5—Dr. Smith would have been able to testify comprehensively about and explain the following substantially mitigating facts and opinions:

(a) Mr. Bell's multigenerational history of addiction and the importance of this risk factor to Mr. Bell's development of early onset addictive disease and his addiction-related behavior during

his life and at the time of the crime (Ex. 89 at 1644);

(b) Mr. Bell's traumatic experiences and disruptive environment in childhood which placed him at a substantially greater risk of negative outcomes for his psychiatric, emotional, and social development and functioning, including the development of addictive and other commonly co-occurring mental disorders (Ex. 89 at 1644);

(c) Mr. Bell's dissociative behaviors throughout his life and the significance of his history in relation to Mr. Bell's cocaine-precipitated psychotic decompensation during the crime (Ex. 89 at 1645);

(d) Mr. Bell's history of dissociative behaviors, the interaction of pre-existing psychological trauma and dissociative behaviors, and the increased likelihood that Mr. Bell, based on his history, would dissociate when using crack or other psychoactive substances (Ex. 89 at 1645-46);

(e) Mr. Bell's cognitive deficits and head injuries and their exacerbation of the deleterious effects of the crack he consumed on the day of the crime, including the intensification and prolongation of Mr. Bell's impairment, his craving to consume more crack, and the other consequent negative effects caused by use of the drug (Ex. 89 at 1646);

(f) Mr. Bell's co-morbid dissociative tendencies would have been amplified by the combination of his brain dysfunction and drug use (Ex. 89 at 1646);

(g) The relevance and significance of Mr. Bell's biopsychosocial history on the effects of abstinence (Ex. 89 at 1647);

(h) Mr. Bell's risk factors for addiction and the synergistic effect of his cognitive, psychiatric, and psychological

conditions upon his mental state and behavior at the time of the crime, and increased likelihood that he could experience a psychiatric disturbance involving irrational behavior for a relatively short period of time that was preceded and followed by goal-directed, addiction behavior (Ex. 89 at 1648); and

(i) Mr. Bell's unmet need to habilitation treatment for his addiction, and the positive effect on Mr. Bell's functioning of a structured and stable environment (Ex. 89 at 1648-49).

j. Trial counsel unreasonably failed to present testimony of a mental health expert to counter the impression, created by the prosecution, that Mr. Bell did not experience remorse for either of the violent crimes he committed.

(1) The prosecutor argued that Mr. Bell showed a "complete lack of remorse, emotion, feelings, on and on" and that "it's an aggravating circumstance that you may consider." (52 RT 4420.) Furthermore, he argued, "the evidence indicates no remorse, not through his actions, not through his witnesses, not through his contact with the police and statements to the police. Nowhere can you find remorse." (52 RT 4425.)

(2) If trial counsel had conducted a minimally adequate investigation into Mr. Bell's social history and provided the results of such an investigation to a mental health expert, that expert would have testified about the available evidence of Mr. Bell's remorse and the circumstances of Mr. Bell's life—from his debilitating stutter to the long-term effects of his traumatic childhood, including relational dysfunction and a dissociative disorder—that undermined Mr. Bell's ability to express himself to others. (*See* Ex. 113 at 2540-62.)

5. A minimally competent investigation undertaken by

reasonably competent counsel would have uncovered extensive documentary evidence and lay witness observations detailing the origins and operative effect of Mr. Bell's compromised functioning including, but not limited to, reliable, credible evidence of a multigenerational psychosocial history of mental illness, substance abuse, physical abuse, sexual abuse, trauma, and other cognitive and behavioral dysfunctions. Such evidence could and should have been used to present, consistent with the adequate and minimally competent investigation challenging the prosecution's guilt theory that counsel reasonably should have conducted but did not, a more cohesive, comprehensive, and accurate psychosocial history than that which was presented at trial. But for trial counsel's unprofessional and unreasonable failure to conduct an adequate investigation in order to develop and present reasonably available and compelling mitigating evidence at the penalty phase of Mr. Bell's trial, the jury would have learned the following:

a. Steven M. Bell was born on August 10, 1965, in New York City. (Ex. 1.) Mr. Bell was the second child born to Leola Washington Bell and Melvin Bell. (Ex. 73 at 1480.) Leola and Melvin were both 23 years old when Mr. Bell was born and had been married for almost three years. (Ex. 73 at 1480.) By the time of Mr. Bell's birth, Melvin had been addicted to drugs for years. (Ex. 73 at 1490-91.) Leola and Melvin's marriage was in shambles. (Ex. 73 at 1490.) Mr. Bell's parents were both the products of multigenerational patterns of chemical dependency, violence, neglect, physical and sexual abuse, mental disorders, and poverty. (Ex. 113 at 2540-44.) As such, they were predetermined to be unable to adequately care for Mr. Bell from the time he was conceived. (Ex. 113 at 2544.) The result for Mr. Bell was a life of severe and unrelenting rejection, abandonment, neglect, violence, physical and

emotional trauma and abuse, and substance abuse. Predictably, the extreme dysfunction that pervaded Mr. Bell's personal and familial psychosocial history and the lack of adequate support to counteract that dysfunction placed Mr. Bell at great risk for significant brain and behavioral dysregulation and interpersonal and intrapersonal difficulties that tragically affected the course of his life. (Ex. 113 at 2561-62.)

b. Both of Mr. Bell's parents came from large African American families that migrated from the South to the urban north in the middle part of last century. (Ex. 72 at 1455.) The Bell family originally came from South Carolina (Ex. 75 at 1513), and the Washington family (Leola's family) came from Louisiana (Ex. 73 at 1480). When both families moved north, they both settled in the Harlem area of New York City. (Ex. 73 at 1480; Ex. 74 at 1501; Ex. 75 at 1514.) After years of living in upper Manhattan and the Bronx, both families moved to Brooklyn, where they took up residence in neighboring buildings of the same public housing project. (Ex. 73 at 1483; Ex. 74 at 1497, 1502.)

c. Both Mr. Bell's maternal and paternal family histories are marked by poverty, upheaval, and isolation.

(1) Mr. Bell's paternal grandfather, Henry Bell, was born on October 14, 1900, in Columbia, South Carolina. (Ex. 75 at 1513; Ex. 41 at 1193.) Mr. Bell's paternal grandmother, Dorothy Brown Bell, was born on May 1, 1909, in the greater Washington, D.C. area. (Ex. 41 at 1195.)

(2) Henry Bell and his four siblings (Ex. 75 at 1513) were part of a moderately well off family—their parents owned a shop in downtown Columbia. (Ex. 75 at 1513.) However, their family was forced to flee Columbia after Henry's uncle was caught having an affair with a married white woman and threatened with lynching. (Ex. 75 at 1513;

Ex. 74 at 1497.)

(3) Henry and Dorothy married in Washington, D.C. (Ex. 75 at 1513) and moved to New York City in 1927 or 1928 (Ex. 75 at 1514). Henry and Dorothy had nine children together, including Melvin, Mr. Bell's father. (Ex. 75 at 1513.)

(4) The Bell family was extremely poor. They lived at the subsistence level. (Ex. 101 at 2185.) When they first moved to New York City, Dorothy worked as a domestic laborer three days a week and Henry took up with a musical band. (Ex. 75 at 1514.) Later, Dorothy did not work outside the home, and Henry worked sporadically as a handyman. (Ex. 74 at 1501.) Henry abandoned the family at different points, and when this happened, the family's sole means of survival was from social services. (Ex. 101 at 2214.)

(5) When Melvin Bell was born on October 8, 1941, in New York City (Ex. 75 at 1516; Ex. 74 at 1509), he was not born in a hospital. (Ex. 18 at 537.) He was born in the family's crowded apartment at 2664 8th Avenue, between 141st and 142nd Streets, in the Harlem neighborhood of Manhattan. (Ex. 18 at 537.) The addition of Melvin brought the number of children living in the Bell household to six. Both Dorothy and Henry were unemployed at that time. (Ex. 18 at 537.)

(6) Melvin's family lived in considerable chaos. Henry worked intermittently as an apartment handyman or janitor in different apartment buildings in Harlem. (Ex. 74 at 1501.) He often traded his labor for an apartment, which was often undesirable because it was dark, cramped, and usually below ground level. (Ex. 74 at 1501.) If a paying tenant wanted the apartment, or if Henry was fired, the family was evicted, often without notice. (Ex. 74 at 1501.) Multiple times they were left on the street in the middle of the winter. (Ex. 74 at 1501.) Sometimes

the family stayed with relatives for short periods of time while Henry looked for another apartment and job. (Ex. 74 at 1501.) Birth records of Melvin's siblings attest to the family's peripatetic ways. (Ex. 18 at 537; Ex. 40 at 1188; Ex. 74 at 1498.) They moved six or more times before Melvin left high school in 1959. (Ex. 101 at 2214.)

(7) Around the late 1940s, the Bell family settled in a basement apartment in a tenement building at 111th Street and 7th Avenue. (Ex. 74 at 1501.) However, Henry rented the apartment out to other tenants in order to make extra money, and moved his own family, which included at least five or six children, from the apartment into one of two coal bins in the basement. (Ex. 74 at 1502.) The coal bin was small and made of concrete; it had no kitchen or bathroom. The family defecated on scraps of paper, which they burned in the boiler oven. The only source of clean running water was from a sink in a small janitorial closet. At least one of Melvin's siblings developed asthma from sleeping on top of coal. (Ex. 74 at 1502.)

(8) An added factor in the chaos of the Bell family was the fact that Henry was a bigamist. Shortly after Henry and Dorothy moved to New York City, before Mr. Bell's father Melvin was born, Henry entered in to a second, non-legal marriage with a Puerto Rican woman named Marie. (Ex. 42 at 1203; Ex. 74 at 1510.) Together, Henry and Marie Bell had at least eight children, whom they raised as husband and wife: Anthony, Ralph, Rose, Inez, John, William, Mary, and Roger. (Ex. 74 at 1510.) Their births roughly tracked the births of Melvin and his siblings. Apparently whenever Henry got one of his wives pregnant, he immediately tried to do the same with the other one. (Ex. 73 at 1489.) Henry's second family was an open secret to Melvin and his siblings; it was known, but not the topic of much conversation. (Ex. 74 at 1510.)

Sometimes Henry badmouthed Marie in front of Melvin and his siblings, calling her a "spic" and saying she was "no good." (Ex. 74 at 1510.) He also used to brag to his children about his many extramarital affairs, telling them, "I got children all over the world," and admonishing them, "If you see someone on the street who looks like you, you should smile because he or she might be your brother or sister." (Ex. 75 at 1520.)

(9) Henry often abandoned the family for days, weeks, or more. The children did not know where he had gone. (Ex. 75 at 1519.) Melvin's younger sister, Shirley, remembers at least three periods during which she did not see her father for at least a year. (Ex. 75 at 1519.)

(10) Mr. Bell's maternal grandmother, Lucille Williams, was born in Opelousas, Louisiana around 1918. (Ex. 26 at 812.) Mr. Bell's paternal grandfather, Joseph Washington, was born on September 19, 1921, in New Iberia, Louisiana. (Ex. 41 at 1199.) His mother, Caressa Washington, worked as a servant for a white family in Louisiana. (Ex. 73 at 1481.) The man of the house raped Caressa, and he was the father of Joseph's sister, Beulah. (Ex. 73 at 1481.)

(11) Lucille and Joseph married in 1938. (Ex. 73 at 1481-82.) Together they had 14 children, though only 11 survived infancy. (Ex. 73 at 1484.) Mr. Bell's mother, Leola, was the third oldest, born on May 22, 1942, in New Iberia, Louisiana. (Ex. 73 at 1480; Ex. 26 at 812.) Nine of the Washington's children were born in Louisiana. (Ex. 76 at 1532.) Two, Sherline and Russell, were stillborn (Ex. 73 at 1486) and a third, Caroline, died from pneumonia at around one year of age (Ex. 73 at 1480).

(12) The childhood of Mr. Bell's mother, Leola, was marked by poverty. (Ex. 76 at 1532; Ex. 72 at 1455.) Neither Lucille nor Joseph Washington was educated. Joseph's education ended in the third

grade. (Ex. 41 at 1199.) He worked odd jobs in New Iberia—building headstones for graves, as a handyman, and as a cook. (Ex. 76 at 1532.) Lucille did domestic labor for wealthier families in the area. (Ex. 76 at 1532.) Their combined income was not enough to support such a large family. (Ex. 73 at 1481.) Meals were never plentiful, and Mr. Bell's mother and her siblings were often hungry. His paternal uncle, Oscar, was once so hungry that he ate scraps of food that were left under the porch for the family dog. (Ex. 76 at 1533.) Leola and her siblings went barefoot because the family could not afford shoes. (Ex. 76 at 1533.)

(13) Shortly after Caroline and Russell died, the Washington family's house, at 818 Field Street in New Iberia, Louisiana (Ex. 73 at 1481) burned down (Ex. 76 at 1533; Ex. 73 at 1480). Joseph Washington's sister, Beulah, had moved to New York City with her husband, Larry. They settled in Harlem (Ex. 73 at 1482) and reported to the Washington family that New York City was a land of opportunity with many jobs (Ex. 73 at 1482). Mr. Bell's maternal grandfather, Joseph, departed Louisiana for the north in 1949 or 1950, and the rest of the family, including Leola, followed about a year later. (Ex. 76 at 1533, 1535.) Leola, her mother, and her six surviving siblings, all crowded into the car of their uncle Larry in order to make the journey to New York. (Ex. 73 at 1482.) Leola was eight years old. (Ex. 73 at 1481.)

(14) Life in New York City was not as ideal as the Washingtons had hoped. They moved into a cramped one-bedroom apartment in a tenement building in Harlem. (Ex. 73 at 1480; Ex. 76 at 1535.) Even though Leola and her siblings had been poor in Louisiana, they felt extremely poor in New York, where they saw people with real wealth for the first time, and could not enjoy playing and running outside as they had in Louisiana. (Ex. 73 at 1481-82.) Mr. Bell's maternal

grandfather, Joseph, had difficulty finding work in New York. He was an experienced chef, but had never had any schooling, and could neither read nor write. (Ex. 73 at 1482.) No restaurant would hire a chef who could neither read recipes nor orders. (Ex. 73 at 1482.) Joseph was adamant that Mr. Bell's maternal grandmother, Lucille, not work outside the home, as she had in Louisiana. (Ex. 76 at 1532.) Eventually Joseph found employment in construction (Ex. 40 at 1190) and then worked for several years at the Brooklyn Navy Yard (Ex. 73 at 1482).

(15) Their family also continued to grow. Anthony Washington was born in 1952. (Ex. 76 at 1535.) Following him, Laverne Washington was born on December 28, 1954, at Harlem Hospital. (Ex. 40 at 1190.) Laverne was followed by Carlton, who was born on September 29, 1958, at Cumberland Hospital in Brooklyn. (Ex. 40 at 1191.) Mr. Bell's youngest maternal uncle, David, was born on April 3, 1961. (Ex. 76 at 1535.)

(16) The Washington family lived at the subsistence level. (Ex. 101 at 2185; Ex. 73 at 1484.) They sometimes relied on baskets of food from churches or other charities in order to survive. (Ex. 73 at 1484.) There was no money for things beyond food. (Ex. 73 at 1484-85.)

(17) In the late 1950s, the Washingtons moved into an apartment in a city housing project in Brooklyn. (Ex. 76 at 1535.) The apartment was located at 111 Bridge Street, and was part of the same housing project in which the Bell family lived. (Ex. 73 at 1488.)

d. Multigenerational patterns of substance abuse and addiction pervaded both the paternal and maternal sides of Mr. Bell's family and were a contributing factor to the chaos, neglect, poverty, and physical and sexual abuse that existed in both families.

(1) Mr. Bell's paternal grandfather, Henry, was a

severe alcoholic. (Ex. 75 at 1518.) He began drinking when he was a child, and made moonshine in the family's bathtub. (Ex. 74 at 1500.) When he drank, his behavior turned mean, nasty, lecherous, and violent. (Ex. 75 at 1518.) He drank almost constantly, such that his youngest daughter, Mr. Bell's paternal aunt Shirley, cannot recall ever witnessing him sober. (Ex. 75 at 1518.)

(2) Dorothy was an apologist for Henry's behavior, and told Mr. Bell's father and his siblings that they were not aware of what their father had been through that made him need to drink. Dorothy did not explain what she meant. (Ex. 75 at 1519.)

(3) Henry's drinking contributed to the chaotic life of his family. He often lost jobs because of his drinking. (Ex. 74 at 1501.) When Henry lost a job, the family lost their home. He also placed his substance abuse and addiction over the basic needs of his family. When he moved the family into a coal bin, it was so that he could obtain extra money by renting the apartment out to other tenants; he spent this money on alcohol. (Ex. 74 at 1502.) He prostituted his daughters to strangers in the neighborhood when he needed money for alcohol. (Ex. 74 at 1507.)

(4) The vast majority of Henry's children—Mr. Bell's paternal aunts and uncles, and his father—struggled with chemical dependency.

(a) Gloria Bell, born October 13, 1928 (Ex. 74 at 1505; Ex. 41 at 1198), was a severe alcoholic (Ex. 75 at 1522). She became violent when she drank. She fought with her husband, Loverture Barrow (Ex. 74 at 1505), and once stabbed her father, Henry, several times with an ice pick (Ex. 74 at 1505). Her life ended prematurely as a result of her drinking. (Ex. 74 at 1505; Ex. 41 at 1198.)

(b) Robert "Bobby" Bell was a drug addict.

(Ex. 74 at 1506; Ex. 75 at 1515.) He was a gifted musician and served in the Korean War, but he also was an intravenous drug user. (Ex. 74 at 1506; Ex. 75 at 1515.) He contracted HIV from his girlfriend, who was also an intravenous drug user. (Ex. 74 at 1506; Ex. 75 at 1515.) He committed suicide by overdosing on drugs. (Ex. 74 at 1506; Ex. 75 at 1515.)

(c) Jacqueline Bell, whose psychiatric problems and history of sexual abuse are discussed *infra*, was born on March 23, 1945. (Ex. 40 at 1188.) She struggled with substance abuse and became addicted to crack cocaine. (Ex. 75 at 1522.) She managed to hold down a job in the real estate department at Forbes Magazine, and was known as a beautiful and kind person. (Ex. 74 at 1509; Ex. 75 at 1521.) However, she was very troubled. Her husband, William Davis, whom she married at age 20 (Ex. 42 at 1207-08) was a heavy drug user, and he and Jacqueline often found themselves homeless (Ex. 74 at 1509). She died in 2002. (Ex. 72 at 1461.)

(d) Joseph Bell, Mr. Bell's youngest paternal uncle, was born on November 24, 1947. (Ex. 40 at 1189.) He married Theresa Mitchell of Queens, New York, on October 21, 1969. (Ex. 42 at 1212-14.) He joined the Air Force and fought in Vietnam, where he was regularly exposed to shocking violence. (Ex. 41 at 1197.) He witnessed his best friend from childhood have his face blown off in combat. (Ex. 74 at 1509.) After returning home, he became a heroin addict. (Ex. 72 at 1462.) He contracted HIV from sharing a needle with his brother Bobby. (Ex. 74 at 1510; Ex. 75 at 1516.) He died on April 4, 1989, at the Bronx Veterans Hospital. (Ex. 41 at 1197; Ex. 74 at 1510.) The immediate cause of death was pneumocystis carinii pneumonia, which was attributed to AIDS and chronic intravenous drug abuse. (Ex. 41 at 1197.)

(5) Mr. Bell's maternal grandmother, Lucille,

abused alcohol. She became too drunk to care for her children. (Ex. 78 at 1548.)

(6) Nearly every single one of Mr. Bell's maternal aunts and uncles developed substance abuse problems.

(a) Joseph Washington Jr., the eldest of Mr. Bell's maternal uncles (Ex. 73 at 1480) began using intravenous drugs when he was an adolescent and continued to shoot drugs for his entire adult life (Ex. 76 at 1537). He developed severe kidney problems; it was difficult for him to receive dialysis because his veins were compromised from drug use. (Ex. 76 at 1534.) He received a transplanted kidney, donated by his brother Oscar, but his body rejected it. (Ex. 76 at 1534.) He continued to use drugs, and died in 1972. (Ex. 76 at 1534.)

(b) Clara Washington, born next after Leola (Ex. 76 at 1534), was addicted for many years to barbiturates (Ex. 76 at 1534; Ex. 73 at 1487). She developed kidney problems and required dialysis. (Ex. 76 at 1534.)

(c) Pearl Washington, born in 1945 (Ex. 76 at 1534), was addicted to crack cocaine. She developed kidney problems in her mid 50s (Ex. 73 at 1487) but continued to use drugs even while receiving dialysis (Ex. 72 at 1458-59). At the time she died in 2001, she was living on the streets. (Ex. 76 at 1534.)

(d) Oscar Washington, born on August 11, 1946 (Ex. 76 at 1532), developed substance abuse and kidney problems. He began using cocaine upon his release from federal prison—where he had been serving a sentence for bank robbery—in 1981. (Ex. 76 at 1537; Ex. 44 at 1227.) He experienced kidney failure requiring dialysis in 1983, but persisted in using cocaine even after this point. (Ex. 76 at 1537.)

(e) Anthony Washington, in 1952 the first of

Mr. Bell's maternal relatives to be born in New York (Ex. 76 at 1535), is an alcoholic and has been for most of his adult life. When he drinks he becomes argumentative and obstinate. He is largely estranged from the rest of the Washington family. (Ex. 72 at 1460-61.)

(f) Laverne Washington, born on December 28, 1954 (Ex. 40 at 1190), developed a substance abuse problem. She was stabbed to death at age 29 in a Brooklyn apartment where she had gone to obtain drugs. (Ex. 76 at 1535.) Her body was found on the morning of October 11, 1984. (Ex. 68 at 1434.) Her death certificate lists the cause of death as multiple stab wounds to the neck, chest, extremities, jugular veins, trachea, and esophagus. Post-mortem testing of her blood and urine revealed the presence of morphine. (Ex. 41 at 1196.) At the time of her death, she was living at 111 Bridge Street with her parents. (Ex. 41 at 1196.) Ernest Spruill, a 30 year old black man, was held responsible for the murder, as well as for stabbing Sharon McBride, the woman whose apartment Laverne had visited. (Ex. 68 at 1432.)

(g) Carlton Washington, born September 29, 1958, in Brooklyn (Ex. 40 at 1191), was a heavy drug user, and died from AIDS on April 20, 2000 (Ex. 41 at 1200).

(h) David Washington, the youngest of Mr. Bell's maternal uncles, is addicted to crack, and lives for periods of time on the street or in jail. (Ex. 76 at 1535.) He has stolen from his mother in order to buy drugs, causing her to change the locks on her Brooklyn home. (Ex. 76 at 1535.) He is trapped in a cycle of stealing in order to buy drugs, getting caught, going to jail, getting out, stealing in order to buy drugs, getting caught, and returning to jail. (Ex. 72 at 1460; Ex. 73 at 1488; Exs. 45-56, 65, 69.)

e. Mr. Bell's father Melvin was born into an incredibly

chaotic household characterized by interfamilial violence.

(1) Henry Bell beat Dorothy, Mr. Bell's paternal grandmother, frequently and in front of their children. (Ex. 74 at 1503.) He sometimes beat her bloody, injuring her so badly with his fists and other objects that she went to the emergency room. (Ex. 74 at 1503.) It was Dorothy's habit to keep her coat hung outside the apartment door, in case she had to flee from one of Henry's beatings. (Ex. 74 at 1503.)

(2) The violence directed at Dorothy took a toll on both Dorothy and her children. Dorothy tried to act strong in front of the children, but she was often tired, remained in bed during the day, and suffered debilitating headaches. (Ex. 74 at 1503.) She seemed sad and depressed. (Ex. 74 at 1503.) It was traumatic for Dorothy's children to witness her being beaten, but it was particularly difficult for Mr. Bell's father and uncles. (Ex. 74 at 1504.) They felt responsible for providing physical protection to their mother, and sometimes tried to intervene to stop the beatings. (Ex. 74 at 1504.) There were times when they got caught in the crossfire and received some of Henry's blows. (Ex. 74 at 1504.)

f. The lives of both of Mr. Bell's parents were permeated by incest, inappropriately sexualized environments, and other forms of sexual abuse.

(1) The formative years of Mr. Bell's paternal grandmother, Dorothy, were marked by trauma and exposure to a sexualized environment. She never knew her father, and her mother, Agnes, died when Dorothy was fifteen years old. (Ex. 75 at 1514.) Dorothy was left to the care of an aunt who also lived in the Washington, D.C. area. This aunt was a bootlegger and a madam, and ran a brothel out of her home. (Ex. 74 at 1499.) Dorothy did not say whether she was forced to work in the brothel as a prostitute, but she did tell her children that one of

her jobs was to clean up after customers in the brothel. (Ex. 74 at 1499.)

(2) Henry Bell sexually abused all of his daughters: Agnes, Gloria, Alice, Jacqueline, and Shirley. (Ex. 75 at 1523.) Agnes left home at age sixteen in order to escape Henry's abuse. (Ex. 74 at 1505.) Gloria married very young for the same reason. (Ex. 74 at 1505.) Alice married at eighteen. (Ex. 74 at 1508.)

(3) Her father's sexual abuse turned Alice's childhood into a nightmare. (Ex. 74 at 1507-08.) When Alice was five, Henry brought her into the basement of a building located near where the family lived at the time, in Harlem, and molested her, causing her to bleed. (Ex. 74 at 1507.) He continued to sexually abuse her from this point until Alice left the family home at age eighteen to marry Kenneth Bishop. (Ex. 74 at 1507-08.) When Henry intended to molest Alice, he sent her siblings out to the store with money to buy candy. (Ex. 74 at 1507-08.) He forced her to perform oral sex on him and rubbed his penis on the outside of her vagina until he ejaculated. (Ex. 74 at 1507-08.)

(4) Henry molested Alice and one of her friends, who had come over after school to play. (Ex. 74 at 1508.)

(5) Jacqueline Bell was so traumatized by the sexual abuse she endured at the hands of her father that she developed an alternate personality named "Barbara" to help her escape. (Ex. 75 at 1521-22.) Jacqueline was timid and weak, and "Barbara" was strong and powerful, and took over when Jacqueline felt overwhelmed by memories of abuse. (Ex. 75 at 1522.) Jacqueline was also raped by three men near her house when she was a teenager. (Ex. 75 at 1521.)

(6) Henry prostituted his daughters to strangers in the neighborhood when he needed money. (Ex. 74 at 1507.)

(7) The environment in the Bell household was

sexualized. Henry was openly lecherous and regularly walked around the family's apartment nude. (Ex. 74 at 1504.)

(8) Mr. Bell's mother, Leola, was apparently sexually abused at some point in her life. When Mr. Bell's sister, Lisa, confronted Leola about being sexually abused by Leola's husband, George Blanding, Leola replied, "These things happen. It happened to me growing up too. ... This stuff happens and people just don't talk about it. It's a fact of life." (Ex. 72 at 1477.)

g. Both of Mr. Bell's parents exhibited signs of emotional, psychological, and behavioral disturbance.

(1) The following factors indicate that Mr. Bell's father, Melvin, had a genetic predisposition towards psychological and behavioral disturbance and dysfunction and substance abuse, and that he was not equipped to adequately nurture or parent Mr. Bell.

(a) Melvin Bell was born on October 8, 1941, in New York City. (Ex. 75 at 1516; Ex. 74 at 1509.) As noted *supra*, his childhood was characterized by poverty, abandonment, neglect, violence, abuse, and exposure to substance abuse. He lacked a positive father figure. (Ex. 101 at 2185.). Henry was frequently absent from Mr. Bell's life. (Ex. 75 at 1519.) He was missing altogether, and his whereabouts were unknown, from the time that Melvin was eighteen years old until after he married Mr. Bell's mother, Leola. (Ex. 27 at 813-15.)

(b) As a child, Melvin got along well with his siblings and was particularly close with his mother. (Ex. 101 at 2185.) As a teenager, he was social, but hardworking, and people loved to be around him. (Ex. 75 at 1530.) He helped his younger siblings, Joseph and Shirley, with their homework, and worked at a deli and washing windows around their Brooklyn housing project. (Ex. 75 at 1530.)

(c) Melvin dropped out of high school after three years. (Ex. 101 at 2215; Ex. 19 at 587.) He was intelligent, but he had a stuttering problem that began when he was young and persisted throughout his life, and this inhibited him as a student. (Ex. 8 at 121-25; Ex. 101 at 2187.) He was not delinquent, though. He had no contacts with the criminal justice system. (Ex. 19 at 546.) He found work as a tailor and continued to live with his mother, Dorothy, and siblings in public housing on Sand Street in Brooklyn. (Ex. 19 at 589.)

(d) Melvin joined the Air Force in November 1959, just one month after his eighteenth birthday. (Ex. 19 at 589, 538, 546.) He enlisted for four years of service as an Airman, and left Brooklyn for basic training at Lackland Air Force base in Texas on December 10, 1959. (Ex. 19 at 589, 538, 546.)

(e) Initially, Melvin adapted well to the military. In February 1960 he was promoted to Airman Third Class and became an Air Policeman. (Ex. 19 at 589, 570, 538.) He was promoted to the rank of Private, grade A/B, Rate E-1 while stationed at Dow Air Force Base in Bangor, Maine. (Ex. 19 at 589.) Melvin's performance evaluation noted that he "has many attributes that mark him as a very good airman," including the fact that he was "attempt[ing] to further his own education thereby benefiting himself as well as the Air Force" by enrolling in a mathematics course. Additionally, Melvin demonstrated "a very good attitude of cooperation with his supervisors" and was recommended for a good conduct medal. (Ex. 19 at 552-53.)

(f) However, Melvin struggled with homesickness and heroin addiction. (Ex. 101 at 2187.) He retained ties to his family in Brooklyn, and frequently returned home on furlough. The chaos in his family life had a destabilizing effect on Melvin. Soon after

being promoted to Private, Melvin was cited for his first reported disciplinary infraction, for failing to report to duty. (Ex. 19 at 556-58.) His grade was reduced to Basic Airman. (Ex. 19 at 556-58.)

(g) The military detected that Melvin might have had psychiatric problems. He was sent for a medical and psychiatric evaluation in March 1961. (Ex. 19 at 559-60.) The commander of Melvin's squadron noted that Melvin's stutter worsened when he was anxious: "[Melvin] seems to go all to pieces when speaking under pressure, to anyone with rank. This includes both Officers and NCOs. This difficulty manifests itself in the form of severe stuttering, in fact, at times Airman Bell is reduced to making guttural sounds." (Ex. 19 at 559.) This stuttering "limits his usefulness with the Air Police Career Field." (Ex. 19 at 560.)

(h) Melvin sought out treatment for his stutter but it was largely ineffective. (Ex. 19 at 554-61.) As his frustration grew, Melvin's performance in the Air Force declined. He received two disciplinary sanctions in the summer of 1961 for failing to report to duty. (Ex. 19 at 562-65, 567.) Melvin's life in Brooklyn weighed on him. He suffered severe headaches one or two times per week. He also experienced symptoms of anxiety or panic attacks, including shortness of breath. These symptoms were accompanied by worry, sleeplessness, and nerves, which Melvin attributed to "family troubles at home." (Ex. 19 at 577-79.) He reported drinking in excess of a fifth of a gallon of alcohol per week (Ex. 19 at 577-79) and struggled with heroin addiction during this period (Ex. 101 at 2187).

(i) In late August 1961, a board of officers recommended that Melvin be discharged from the Air Force, due to his "frequent involvement of a discreditable nature with military authorities"

and the fact that "despite counseling and disciplinary action, Melvin did not favorably respond." (Ex. 19 at 582.) He was officially discharged on September 7, 1961, under honorable conditions, at the rank of Private, Grade A/B, after a total term of service of one year, eight months, and two days. (Ex. 19 at 589.) The discharge was pursuant to Air Force Regulation no. 39-17, which provided for the release of airmen deemed unfit for service. (Ex. 19 at 589.)

(j) After being discharged from the Air Force, Melvin returned to Brooklyn and again lived with Dorothy. (Ex. 19 at 587; Ex. 75 at 1523.) His family noticed a change in him, and that he was using drugs. (Ex. 75 at 1523.) He stared off into space and nodded in and out of consciousness (Ex. 75 at 1523), and he began stealing from everyone in the family as a means to get drugs (Ex. 75 at 1524; Ex 74 at 1509). Dorothy encouraged him to enter a treatment program. He tried, but was unable to kick his habit, and became estranged from his family for a time. (Ex. 75 at 1524.)

(2) The following factors, many of which were present before Mr. Bell was even born, rendered Mr. Bell's maternal figure, Leola Bell Blanding, completely incapable of adequately parenting Mr. Bell:

(a) As one of the eldest children in a big family, Leola shouldered much responsibility from a young age. In the early 1950s, Mr. Bell's paternal grandmother was diagnosed with tuberculosis and pneumonia. She spent six to nine months in a hospital. (Ex. 73 at 1483; Ex. 76 at 1535.) Then, Leola's oldest sister, Luelva, was diagnosed with cancer. She died at age 17 on April 13, 1957. (Ex. 41 at 1192.) After Luelva's death, Leola was the eldest daughter. She became the second mother in the home, and did most of the housework and chores

and disciplining of her younger siblings. (Ex. 73 at 1484.) She also took on responsibility for other things, such as arranging her sister's funeral, since she was the only one who could read and write well enough to do it. (Ex. 73 at 1484.)

(b) From her childhood, Leola took the lesson that life was very difficult; her expectation was that life will be disappointing in most regards. (Ex. 74 at 1485-86.) When Mr. Bell was a young child, she held the belief that "she would always lead a life of misery with nothing ever working out" and that any attempt at change was futile. (Ex. 8 at 110-11.)

(c) She repressed her emotions and was distant from other people. (Ex. 8 at 110-11.) Leola expressed concern to a social worker regarding her "inability to display any form of affection or warmth towards Steven and Lisa." (Ex. 8 at 111.) When Mr. Bell was six years old, a social worker described Leola as "very withholding, rigid, and repressed." (Ex. 8 at 110.) Another social worker described Leola as being in "an overall state of depression." (Ex. 8 at 110.) Family members noted that she rarely smiled. (Ex. 75 at 1525.) She was "overly concerned with cleanliness." (Ex. 8 at 111.)

(d) Leola had substance abuse problems. She smoked marijuana. (Ex. 75 at 1525.) She drank increasingly heavily during Mr. Bell's early childhood. (Ex. 78 at 1549; Ex. 72 at 1457.)

h. The relationship between Mr. Bell's parents was highly dysfunctional, which further prevented Mr. Bell from receiving adequate parenting and protection from the various risk factors that were present in his parents, his relatives, and the community.

(1) Mr. Bell's parents met in the period after Melvin was discharged from the Air Force in September 1961. Both were

living in the Farragut Houses in Brooklyn. (Ex. 19 at 587; Ex. 73 at 1488.) They began dating when Leola's brother, Joseph, introduced them. (Ex. 73 at 1488.) Leola and Melvin decided very quickly to get married. Leola was nineteen when they began dating, and became pregnant after they dated for only a few months. (Ex. 73 at 1488.) Neither family supported the marriage. Leola's father told her she would regret getting married in haste (Ex. 73 at 1488) and Melvin's family thought Leola was snobbish (Ex. 72 1456) and that her family was full of alcoholics and drug users (Ex. 74 at 1510). They worried that Melvin's drug problems would worsen because of his association with the Washington family. (Ex. 74 at 1510.)

(2) Melvin and Leola were married on September 7, 1962 in Brooklyn, New York. (Ex. 27 at 816.) Both were 20 years old. (Ex. 27 at 815.) At the time, Melvin was working as a houseman at a hotel, and Leola was a clerk in a department store. (Ex. 27 at 813-15.)

(3) After they married, Leola and Melvin moved into an apartment on 6th Avenue in Brooklyn. (Ex. 73 at 1489.) This is where they lived when Leola delivered Mr. Bell's only sibling, Lisa Marie Bell, at Greenpoint Hospital on November 5, 1962. (Ex. 30 at 843.)

(4) Leola did not know about Melvin's drug addiction when she married him, and would not have married him had she known. (Ex. 73 at 1490.) She learned that he was addicted to heroin soon after Lisa was born. His drug use became apparent when he returned from work after paydays but had no money. (Ex. 73 at 1490.) Leola was extremely angry at Melvin's family, for she perceived that they had hidden Melvin's drug use from her. (Ex. 73 at 1490.)

(5) Sometime after Lisa was born, Melvin, Leola, and Lisa moved from Brooklyn to an apartment in Manhattan, located at 1536 Lexington Avenue, in a housing project called the Lexington Houses.

Their apartment was on the first floor (1C). The Lexington Houses consisted of four buildings located between Park and 3rd Avenues and East 98th and 99th Streets. Lexington Avenue ran down the middle of the complex. (Ex. 81 at 1573.) The development was run by the New York City Housing Authority. (Ex. 78 at 1546.) The neighborhood was known as Spanish Harlem. (Ex. 73 at 1489.) This is where the family lived when Steven was born.

i. The rejection of Mr. Bell by his maternal figure began before he was even born.

(1) Melvin's drug use had impoverished the family and ruined his marriage with Leola. His earnings declined over the first few years of his marriage, reaching $0. (Ex. 99 at 2162.) Additionally, he stole from the family in order to support his heroin addiction. He took whatever he could get his hands on. (Ex. 8 at 110-11.)

(2) By the time Leola got pregnant with Mr. Bell, her marriage was in total shambles. (Ex. 73 at 1491.) She threw Melvin out of the house for the first time while she was pregnant with Mr. Bell. (Ex. 73 at 1492.) She did not want to raise a second baby on her own, and she was embittered and resentful. (Ex. 75 at 1524.) She had already spent years raising her younger siblings, and was looking for a chance to put herself first in life. (Ex. 73 at 1485, 1492.)

(3) Mr. Bell was born on August 10, 1965, at Mount Sinai Hospital in Manhattan. (Ex. 1 at 1.) Leola's delivery of him was difficult and traumatic. She went into labor on Saturday evening, in her ninth month of pregnancy. She had premature rupture of the membranes before admission to the hospital. (Ex. 8 at 121.) She did not deliver Mr. Bell until the following Tuesday evening. Her doctors tried to induce labor three or four times without success. They told Leola, "You

have one lazy baby," and that no matter what actions they took, the labor would not be over until Mr. Bell was ready to be born. (Ex. 73 at 1491.) After Mr. Bell was finally delivered, Leola developed a high fever and did not hold Mr. Bell for three days. (Ex. 73 at 1491.) Both Leola and Mr. Bell stayed in the hospital for approximately eight or nine days. (Ex. 8 at 121.)

(4) After Mr. Bell was born, Leola could not continue to receive welfare benefits unless she returned to work. (Ex. 73 at 1492.) She began working full-time when Mr. Bell was an infant. (Ex. 73 at 1492.) She worked night shifts, and went immediately to sleep when she got home. (Ex. 73 at 1493.) Mr. Bell, along with his sister Lisa, was cared for by relatives or by workers at Lexington Children's Center, a facility located in the Lexington Houses. Mr. Bell was enrolled there on April 28, 1969, when he was three years old. (Ex. 8 at 110-11.)

j. Mr. Bell was traumatized and abandoned by his paternal figure almost immediately upon birth.

(1) Melvin was around very infrequently during Mr. Bell's first year of life. (Ex. 73 at 1492.) When he was around, he became violent, and threatened and abused Leola, Lisa, and Mr. Bell. (Ex. 8 at 110-11.) At one point, Leola went to court in order to take out an order of protection against Melvin, and insisted that he leave the home. (Ex. 8 at 110-11.) Mr. Bell's parents finally separated in 1966, when Mr. Bell was one. (Ex. 72 at 1456; Ex. 73 at 1492.) (They officially divorced, on the grounds of abandonment, on October 26, 1976. (Ex. 28 at 837.)) After this, Melvin was intermittently present but not a parent by any means to Mr. Bell. The sole parenting responsibility fell to Leola. (Ex. 72 at 1456.)

(2) As described *supra*, Melvin's relationship with Leola fell apart, and they separated shortly after Mr. Bell was born. Melvin came around periodically throughout the early years of Mr. Bell's life. (Ex.

72 at 1456, 1463; Ex. 73 at 1492.) Mr. Bell has very few early childhood memories of his father. (Ex. 91 at 1696.) Lisa recalls Melvin shooting heroin in the bathroom of their Lexington Houses apartment with another man. (Ex. 72 at 1463.) He was frequently high and nodding off when he was around Mr. Bell and Lisa. (Ex. 73 at 1493.) Sometimes Melvin visited Mr. Bell and Lisa in order to steal things from their apartment. (Ex. 72 at 1463.) He once stole an entire dinette set, which Leola had just bought. (Ex. 73 at 1493.) Leola banned him from the apartment altogether after an "unpleasant experience" with him in August 1971. (Ex. 8 at 111.) After this, Mr. Bell could only see Melvin on the streets or at the home of his paternal grandmother, Dorothy, in Brooklyn. (Ex. 8 at 111; Ex. 75 at 1524.) Leola made arrangements for Melvin to visit with Mr. Bell and Lisa at Dorothy's, but he often did not show up, or stayed for a short time. (Ex. 75 at 1524; Ex. 74 at 1510.) Sometimes Lisa saw him on the streets near the Lexington Houses, where he was possibly to buy drugs. (Ex. 72 at 1464.)

(3) Melvin was further unavailable as a father to Mr. Bell because he was jailed several times in 1970 and 1971. (Ex. 101 at 2184.)

(4) By 1974, Melvin was living in North Carolina and continuing to lead a troubled life. He was arrested multiple times in 1974, and eventually was sent to prison for a minimum term of five years for burglary and theft. (Ex. 101 at 2178-79, 2182.) In February 1974, Melvin was arrested for breaking into a restaurant in Wilmington, North Carolina, and stealing beer, food, and canned goods. (Ex. 20 at 590.) He was also charged with receiving stolen goods around this time. (Ex. 101 at 2184.) Melvin pleaded *nolo contendere* to charges related to these incidents in April 1974 and received a suspended sentence and five to seven years of probation. (Ex. 20 at 600.) At the time of these crimes, Melvin had been

working at a Coca Cola Bottling Company, making $88 per week. (Ex. 20 at 598.) On April 23, 1974, Melvin was arrested for breaking into a furniture store and stealing some items. He was sent to Dorothea Dix Hospital, North Carolina's oldest public psychiatric hospital, for three weeks in June 1974 in order to determine his competency to stand trial. (Ex. 101 at 2184.) He pleaded guilty to this offense. (Ex. 101 at 2184.) He was found to have violated the terms of his probation and was confined to prison. (Ex. 20 at 604.)

(5) Melvin's severe substance abuse, mental health, and stuttering problems were noted by workers at the North Carolina Department of Correction. (Ex. 101 at 2187.)

(6) While incarcerated, Melvin wrote letters to Mr. Bell and Lisa, but Leola intercepted most of them and did not pass them on. (48 RT 3992-93.) Melvin was disciplined for failing to turn in one of his work release checks on December 11, 1976. His explanation was that Leola was not adequately supporting his children. (Ex. 101 at 2203.)

(7) Melvin was paroled in 1977 after serving three years of his sentence. He lived by himself and worked in Wilmington, North Carolina. (Ex. 101 at 2207.) On February 25, 1978, Melvin broke into a doctor's office in Wilmington and stole some items. (Ex. 21 at 623.) Then, on February 27, 1978, he broke into a café with his fist. Inside, he stole "various assorted frozen meats." (Ex. 22 at 630, 636.) He left a trail of blood from the café to his house nearby. When police officers found him, he had no recollection of the events. After he pleaded guilty on April 5, 1978, the judge sentenced him to six to eight years in prison, and noted Melvin's moodiness, blackouts, and states of unconsciousness, and his need for a thorough psychiatric evaluation. (Ex. 101 at 2209.) The prison officials also noted Melvin's depression, anxiety, sleep disturbance, and

blackouts. (Ex. 101 at 2213, 2217, 2220-21.)

(8) Melvin was paroled on May 6, 1981. (Ex. 101 at 2235.) He was only free for several weeks before he became embroiled in further trouble. He was charged on July 20, 1981 (Ex. 23 at 652) with the June 13, 1981 murder of Willie Hamilton (Ex. 23 at 644). Hamilton was a 70 year old man, who had been found dead in his home. He appeared to have been beaten with a blunt object and castrated. Melvin entered a plea of not guilty. His half-brother, John Bell, worked at a law firm in New York and was able to get Melvin legal help. (Ex. 75 at 1528.) Melvin was convicted of second degree murder after a jury trial, and sentenced to state prison for a term of 25 years. (Ex. 101 at 2246; Ex. 23 at 693.) When he was again received by the North Carolina Department of Correction, records indicate that he complained of frequent headaches. (Ex. 101 at 2241.) He was subsequently evaluated at the mental health clinic at the North Carolina Central Prison on December 10, 1981, and his addiction, marital, criminal, and stuttering problems were noted. (Ex. 101 at 2244.) On December 6, 1983, Melvin's conviction was overturned by the North Carolina Court of Appeals. (Ex. 23 at 749-60.) The opinion found that the evidence presented at his trial was insufficient to support his conviction. However, Melvin was not released from prison until the North Carolina Supreme Court affirmed the reversal of his conviction one year later, on December 5, 1984. (Ex. 23 at 768.)

(9) After Melvin was released from prison, he married a woman named Judy. (Ex. 74 at 1509.) They lived in Raleigh, North Carolina for a while. Melvin was off drugs, and started working. (Ex. 75 at 1528; Ex. 99 at 2165.) Melvin and Judy, who was white, were an interracial couple. They eventually relocated to San Diego, California, where there was less social approbation. (Ex. 75 at 1528.)

(10) Mr. Bell saw his father Melvin for the last time when he was 21 years old. They saw each other for a period of a week, when Melvin was in New York City. (Ex. 91 at 1696.) Melvin died on September 17, 1987, in San Diego, of acute morphine and ethyl alcohol poisoning from a self-administered overdose. (Ex. 24 at 801.)

(11) At the time of his death, Melvin had been living in San Diego for a time, with his wife Judy. Melvin was staying off drugs. He was visited by his sister, Shirley, who observed that Melvin looked happy and seemed in great shape. (Ex. 75 at 1529.) However, Shirley thereafter began receiving disturbing phone calls from Melvin and Judy. Melvin had started using drugs again, which he needed to "get away." He was depressed, and knew that he needed help. He felt he was going crazy. Judy was unsure of how to help him, but confirmed that he was in a complete state of depression and would not leave the house. (Ex. 75 at 1529-30.) On May 3, 1987, Melvin was admitted to the emergency room at San Diego Physicians and Surgeons Hospital. He was unconscious and unresponsive after self-injecting a combination of cocaine and heroin. He relayed that he had relapsed three weeks ago after being clean for eight years. He was treated overnight and released. (Ex. 24 at 803.) On the afternoon of September 17, 1987, a security guard at that same hospital noticed a person slumped in the passenger seat of a station wagon across the street from the emergency room. An investigation revealed that person to be Melvin Bell. The left sleeve of his sweatshirt was pushed up to the elbow, and his extremities were cooling; he was obviously dead. No drug paraphernalia were found in the car. The keys were in the ignition. The car belonged to Judy, who had last seen Melvin earlier that morning. An autopsy noted that Melvin had needle marks on his left arm. Noting the past history of heroin and alcohol abuse, confirmed by Judy, and the

absence of a suicide note, the death was ruled an accidental self-administered overdose. (Ex. 24 at 803; Ex. 25 at 810.) A small service was held for Melvin in San Diego, which Lisa attended. (Ex. 72 at 1475.) Melvin was then interned at Raleigh National Cemetery in North Carolina. (Ex. 25 at 810.)

(12) It is not clear what Mr. Bell learned of the cause of his father's death, and when. At various times he reported that his father died of a heart attack. (Ex. 113 at 2532.) When Ken Berman asked Mr. Bell what became of his father, he said, "You don't want to know." (Ex. 82 at 1591.)

k. Mr. Bell's early childhood was marked by chaos, neglect, emotional and physical trauma and abuse, and other developmental insults.

(1) Mr. Bell was neglected from birth by his mother, Leola.

(a) As noted *supra*, Mr. Bell's mother worked full time at First National City Bank, beginning in 1966. (Ex. 73 at 1480.)

(b) When Leola was not working, she made it clear to Mr. Bell and Lisa that she needed to take a break and they were not to bother her. She was unattainable and distant. (Ex. 72 at 1457.)

(c) Leola's primary way of "taking a break" was to socialize and party. (Ex. 72 at 1457.)

(d) During Mr. Bell's early childhood, Leola was preoccupied with dating and men. She spent a great deal of energy pursuing relationships and grew depressed when they did not work out. She dated a man for a year, from October 1970 to October 1971. (Ex. 8 at 118.) She brought this man around Mr. Bell and Lisa. (Ex. 8 at 118.) Soon after

that relationship ended, in part because Leola was so ambivalent about marriage after her experience with Melvin (Ex. 8 at 108), she began dating an older man, whom she also brought around Mr. Bell (Ex. 8 at 108, 110). When the man ended the relationship in December 1971, Leola was overcome with depression and disappointment, feelings that lasted for several months. (Ex. 8 at 110-11.)

(e) Leola did not show any affection toward Mr. Bell or Lisa. (Ex. 75 at 1527; Ex. 78 at 1549-50.) Dorothy Bell was prompted to question Leola about whether she even wanted her children at all. She offered to take care of them, but Leola turned her down. (Ex. 75 at 1527.)

(f) Leola's apartment in Lexington Houses was dark, gloomy, and silent. (Ex. 75 at 1525.) It was poorly maintained. (Ex. 78 at 1549.)

(g) Leola did not keep much food in the apartment, and Mr. Bell and Lisa were frequently hungry. (Ex. 75 at 1525.) Leola rarely cooked. (Ex. 78 at 1550.) When Mr. Bell was hospitalized at age two, he was emaciated. (Ex. 75 at 1525.) Lisa became responsible for most of the household chores by the time she was ten or eleven. She did the laundry in the laundry room of the Lexington Houses and took out the trash. (Ex. 79 at 1559.) Lisa also did the grocery shopping. Her friend, Vanessa Brade, saw Lisa at the grocery store, staring at the meat counter, unsure how to buy meat. Vanessa was with her own mother, who helped Lisa. It was common for other mothers in the Lexington Houses to help Lisa when they saw her doing household chores. (Ex. 79 at 1559.)

(h) Leola regularly left Mr. Bell and Lisa in the care of others so that she could "do her thing." (Ex. 72 at 1457.)

(i) Mr. Bell and Lisa spent days and sometimes weeks staying at

the homes of relatives, such as their paternal grandmother, Dorothy Bell, who lived in the Farragut Houses in Brooklyn. (Ex. 72 at 1461.)

(ii) Leola dropped Mr. Bell and Lisa off with their paternal aunt Alice, sometimes leaving them for weeks at a time. (Ex. 74 at 1510-11.) Leola sometimes checked on them, but did not express much interest in them. (Ex. 74 at 1510.) In October 1967, Lisa (and possibly Mr. Bell) spent so much time living at Alice's that she transferred from the kindergarten near Lexington Houses, P.S. 198, to P.S. 297, near Alice's Marcy Avenue apartment in Brooklyn. (Ex. 31 at 845.) Her kindergarten teacher there noted Lisa's "inability to concentrate" (Ex. 31 at 847), a departure from the usual reports of Lisa being bright and delightful (Ex. 31 at 846). During this period, it appears that Mr. Bell was also living in Brooklyn, because when he became ill with pneumonia, he was hospitalized at Cumberland Hospital, in Brooklyn. (Ex. 8 at 132; Ex. 75 at 1525.)

(iii) Leola also left Mr. Bell and Lisa, sometimes for a week at a time, with their paternal uncle Joseph, a heroin addict who did not work. (Ex. 72 at 1462.)

(iv) Leola also left Mr. Bell and Lisa with their maternal grandmother, Lucille Washington, for weeks at a time during the summers. (Ex. 73 at 1493.)

(v) Maternal aunt Pearl Washington lived at Mr. Bell's apartment in the Lexington Houses until Mr. Bell was about five years old. (Ex. 73 at 1493; Ex. 78 at 1547.) Pearl frequently babysat for Mr. Bell and Lisa. (Ex. 73 at 1493.)

(vi) If no relatives were available, Leola left Mr. Bell and Lisa with friends or coworkers. She left them for entire weekends with a coworker, Alice, who had a relationship with George Blanding—who would later become Leola's paramour and Lisa and Mr. Bell's stepfather.

(Ex. 72 at 1464.) She sent them to the apartment of neighbor Delores Clark Young, who fed Mr. Bell and Lisa in the mornings before school, while Leola slept. (Ex. 78 at 1547-48.)

(i) By virtue of Leola's neglect, Mr. Bell and his sister were exposed to substance abusing adults and sexually abusive environments.

(i) With the extensive history of substance abuse in both sides of Mr. Bell's extended family, and Leola's pattern of shunting Mr. Bell off to the care of family members, Mr. Bell was regularly exposed to family members who were high, withdrawing from drugs, or seeking drugs. (Ex. 72 at 1458.) For example, Pearl Washington, who lived with Mr. Bell and frequently babysat for him and Lisa, was a drug addict. (Ex. 72 at 1458.) Her behavior was erratic and unpredictable. (Ex. 72 at 1458.) When Mr. Bell was five or six, Pearl brought him and Lisa with her to the apartment of a stranger. She left them in a room with five other children and went into another room to get high. (Ex. 72 at 1458.) The Washington family also often had parties with drinking at their apartment when Mr. Bell and Lisa were staying with them. (Ex. 72 at 1458-59.)

(ii) David Washington, the youngest of Leola's siblings, was frequently present in the Washington home when Lisa and Mr. Bell stayed there. He was close in age to Lisa, and slept in the same full-sized bed as Lisa, Mr. Bell, and their cousins Sharline and James. (Ex. 72 at 1459-60, 1468-69.) When Mr. Bell was around three or four, David sexually abused Lisa. When the others were asleep, he woke Lisa up and told her to be quiet. He then touched her under the blankets, from her chest area to her genitals. This happened whenever Lisa and Mr. Bell were sent to stay with their grandmother until around 1970, when David began sleeping in another room. (Ex. 72 at 1468-69.)

(iii) When Mr. Bell and Lisa were left in the care of their paternal uncle, Joe, Lisa was again sexually abused. Joe did not work, and when his wife Theresa was at work, he called Lisa into his bedroom, where he orally sodomized her. This happened two or three times over the course of one week. Lisa begged to never return, but Leola left Mr. Bell and Lisa with Joe again, and the sexual abuse continued to happen. (Ex. 72 at 1462, 1469.)

(2) When Leola was not neglecting Mr. Bell, her attention subjected Mr. Bell to rejection and emotional and physical abuse.

(a) Leola was impatient with Mr. Bell's stutter. It reminded her of Melvin, and she chastised him to "spit it out" or "shut up." (Ex. 78 at 1552-53.) This made Mr. Bell ashamed. Leola was convinced that Mr. Bell's stutter got worse when he was lying, which raised the stakes even more for Mr. Bell when he struggled with his speech impediment. (Ex. 73 at 1495.) A health care worker at Mount Sinai Hospital suggested that Mr. Bell's stutter got worse when he was upset. (Ex. 8 at 102.) Leola's harsh reaction to his stutter made Mr. Bell afraid to speak, especially to her, and he began communicating to his mother through Lisa. (Ex. 72 at 1465.) If he had to speak to his mother, he became acutely anxious. He began to sweat, and his speech impediment became insurmountable. (Ex. 113 at 2471.)

(b) Mr. Bell told Lisa, "Mommy doesn't like me because I look like Dad." (Ex. 72 at 1465.) Leola clearly favored Lisa over Mr. Bell. Lisa's delivery was easy and without complication and Leola perceived that Lisa was an easier baby to look after, which she attributed to the fact that Lisa was a girl. (Ex. 73 at 1489.) Also, Mr. Bell was less tidy than Lisa (Ex. 72 at 1462), and because of her obsession with cleanliness, Leola placed a premium on this quality (Ex. 8 at 110-11).

Leola frequently admonished Mr. Bell to "be more like Lisa." (Ex. 113 at 2476.)

(c) Leola subjected Mr. Bell to harsh punishments. She sent him to his room for hours for small failings, where he would sit alone without any toys or games. (Ex. 75 at 1528.)

(d) Leola physically abused Mr. Bell. She acknowledged in 1971 to a psychiatrist at Mount Sinai, Dr. Aschkinasi, that she inflicted "firm punishment" on Mr. Bell. (Ex. 8 at 111.) She beat him with a strap on his backside (Ex. 8 at 108-09) and struck him "severely" (Ex. 8 at 110-11). Mr. Bell's paternal aunt Alice noticed bruises on Mr. Bell's body when she cared for him, from the time he was a toddler until around age six. (Ex. 74 at 1511.) Delores Clark Young witnessed Leola strike Mr. Bell with a belt, over and over again, because she believed he had taken some money that she could not find. Mr. Bell screamed and tried to run away from Leola, but she chased him down and continued beating him with the belt. The entire time, Leola yelled, "I know you did it. I know you did it. Don't you lie to me." (Ex. 78 at 1553.) A friend of Mr. Bell, Vanessa Brade, also noticed bruises on Mr. Bell. (Ex. 79 at 1558.)

(e) Leola prevented Mr. Bell from maintaining positive contacts with his paternal family members. Mr. Bell spent much time with his paternal grandmother, Dorothy, and paternal aunt, Alice, as noted *supra*. Compared with his own home, Dorothy's apartment was brimming with life and love. (Ex. 72 at 1461.) Alice, one of the few relatives on either side of Mr. Bell's family who lived a sober life, provided a very structured and loving environment for Mr. Bell and his sister, when they stayed there. (Ex. 72 at 1461-62.) In contrast to Mr. Bell's home, it was safe and secure. (Ex. 72 at 1461-62.) After Melvin and Leola split up, the Bell family continued to reach out to Leola and the children. (Ex. 75 at

1524-25.) However, Leola was bitter, and rejected their advances. She sometimes dropped them off at Dorothy's house if she was going to visit her own mother, but as time went on and she began dating other men, Leola cut off contact with the Bell family. (Ex. 75 at 1524-25.)

(3) Mr. Bell was exposed to crime, drugs, racial tension, and environmental factors from the beginning of his life.

(a) The residents of the Lexington Houses had a sense of community (Ex. 79 at 1555; Ex. 78 at 1546), but the conditions in the project were not idyllic. For example, there was a rape shortly after Delores Clark Young moved into the Lexington Houses in 1966. (Ex. 78 at 1546.) The Washington Houses, located just one block away, were very dangerous. Drug trafficking was heavy in the neighborhood, and particularly centered around 100th Street, where one could find drug dealers and users at any time of the day. (Ex. 81 at 1574.)

(b) The residents of Lexington Houses were racially isolated. The neighborhood to the south, Upper Yorkville, was mostly middle to upper-class whites. (Ex. 81 at 1574; Ex. 78 at 1546.) To the north was Spanish (or East) Harlem, made up primarily of Hispanics with a large Puerto Rican community. (Ex. 81 at 1574; Ex. 78 at 1546.) The residents of Lexington Houses were mostly African American, making them a third and easily identifiable racial group in the neighborhood. (Ex. 80 at 1563; Ex. 81 at 1573-74). Racial tensions were high, and wandering onto the wrong block meant being subjected to racial taunts and assaults. (Ex. 80 at 1564.)

(c) The Lexington Houses were located adjacent to a city bus depot, and idling buses lined Park Avenue in the evening next to the Lexington Houses. When Mr. Bell was nine or ten, a group of residents, spurred by the abnormally high incidence of asthma

among residents, got together to complain about the idling buses. (Ex. 79 at 1555.) Mr. Bell had childhood asthma. (Ex. 11 at 338, 342.)

(d) The walls of Mr. Bell's apartment apparently were covered with paint that contained lead, a known neurotoxin. (Ex. 71 at 1446.)

(4) The neglect, rejection, chaos, emotional and physical trauma and abuse, and other developmental insults had a marked effect on Mr. Bell's early childhood development.

(a) Mr. Bell was bottle fed; Leola did not nurse him. (Ex. 8 at 108.) At seven months, Mr. Bell was treated at New York Presbyterian Hospital for an illness that was diagnosed as an upper respiratory tract infection. (Ex. 7 at 98-99.) He said his first words at seven to eight months. Leola reported that Mr. Bell's speech was marked by a stutter or stammer from the outset. (Ex. 8 at 107.) He talked at two (Ex. 73 at 1494), but people could not understand what he was saying until he was two and a half or three years old (46 RT 3759). He took longer to learn to use the toilet than did Lisa, and wet the bed until age five or six. (Ex. 73 at 1494; Ex. 10 at 267.)

(b) Mr. Bell was not needy or affectionate with Leola, even as an infant—he did not climb onto her lap, or cry out for her when she left the room. (Ex. 73 at 1494; Ex. 8 at 111.) Mr. Bell barely cried at all, even when his diaper needed changing or when he was hungry. (Ex. 73 at 1494.) He seemed flat, unusual, and sad. (Ex. 75 at 1526.) He did not know how to show or receive affection; he did not hug; he barely made eye contact; even when he received a bottle, he did not seem relaxed. (Ex. 75 at 1526.) Mr. Bell slept a lot; he preferred being in his crib rather than being around other people. (Ex. 73 at 1494.) He hid in the corner when strangers entered a room. (Ex. 73 at 1494.)

(c) Mr. Bell seemed in his own little world as an infant, and did not respond to those around him. (Ex. 75 at 1526-27.) His attention could not be drawn to things like a toy. (Ex. 75 at 1526-27.) As a toddler, he avoided other children and preferred to play by himself. (Ex. 73 at 1495.) He was rarely excited to go outside and play; even when he was in a group, he seemed to be by himself. (Ex. 73 at 1495.) He had sudden temper tantrums and would then fall immediately silent, as though nothing had happened. (Ex. 75 at 1527-28.) Mr. Bell was extremely quiet and shy; he only spoke when spoken to, and in a very small voice. (Ex. 78 at 1550-51.) He kept to himself; he did not holler or yell, get excited or cry, or laugh or shout like other young boys; he had a slouchy posture, like he was trying to retreat inward. (Ex. 78 at 1551.) His paternal grandmother, Dorothy, speculated that he was autistic or otherwise developmentally impaired, based on his behavior. (Ex. 75 at 1527.)

(d) Mr. Bell did not reach out to Leola or want to be around her. (Ex. 75 at 1526-27.) At his relatives' houses, he only relaxed and smiled after Leola left; when she returned, he stiffened up again. (Ex. 75 at 1526.)

(e) Mr. Bell was far more comfortable around Lisa than around his mother. (Ex. 73 at 1492.) He looked to Lisa for comfort and nurturing. In recognition of this, Leola referred to Lisa as "Little Momma." (Ex. 73 at 1492.)

(f) Mr. Bell's medical and educational records indicate that he suffered from chronic ear infections, sore throats, recurrent colds, and frequent headaches throughout his childhood. (Ex. 8 at 122; Ex. 2 at 5.) Available data from Mr. Bell's school and medical records, when compared against national statistics for measuring height and weight as a function of age, show that from birth, Mr. Bell was consistently

at or below the tenth percentile in height and weight for his age group, and never at more than the twenty-fifth percentile. (Ex. 8 at 100-23; Ex. 2 at 19; Ex. 2 at 5; Ex. 113 at 2481.) This overall pattern is consistent with malnourishment and parental neglect. (Ex. 113 at 2481.)

(g) Mr. Bell's elementary school teachers found his behavior to be unusual or off, which they reported to Leola. (Ex. 73 at 1495.) Mr. Bell attended P.S 198 from 1970 to 1977 for kindergarten through sixth grade. The school was located on 3rd Avenue and 96th Street. (Ex. 2.)

(h) In 1971, when Mr. Bell was about to enter the first grade, a worker at Lexington Children's Center referred Mr. Bell to Mount Sinai Hospital for a psychiatric evaluation. This worker, Mary Ann Werntz, found that Mr. Bell could not "differentiate when he does things out of curiosity or for any other reason" and picked things up and hid them in the closet, claiming that they were his. He "at times appeared detached from his surroundings." (Ex. 8 at 110.) He had frequent temper tantrums at daycare (Ex. 8 at 110) and appeared emotionally immature for his age (Ex. 8 at 109). The referral was a rarity, and an indication of notable problems on Mr. Bell's part. (Ex. 77 at 1545.) Leola resisted the referral, refusing it several times before accepting it in late 1971. (Ex. 8 at 110-11.) Leola was contacted by both the social service department and the department of child psychiatry at Mount Sinai. She and Mr. Bell were seen twice in child psychiatry by Dr. Sonja Aschkinasi. (Ex. 8 at 110.) Leola expressed that there was no need for the appointments; that Mr. Bell only acted out at daycare because they were not firm enough with their discipline. (Ex. 8 at 107.) Dr. Aschkinasi found that Mr. Bell was "shy but relates well" and that it was "difficult to understand some of the things he was saying." (Ex. 8 at 108.) In "some areas" he seemed "younger

than the age of 6 years." (Ex. 8 at 108.) Mr. Bell was diagnosed with having a "learning disturbance" and being an "emotionally immature boy." (Ex. 8 at 106.) Dr. Aschkinasi directed that Mr. Bell be seen at the Mount Sinai speech clinic for evaluation and treatment of his stutter and directed that social services "evaluate the home situation and determin[e] Mrs. B's receptivity for casework treatment." (Ex. 8 at 110.) She also asked that Mr. Bell be reexamined in one year, which apparently did not occur. (Ex. 8 at 109.)

(i) Leola was not receptive to casework treatment. When first contacted by social worker Jessica Hellinger, she "expressed considerable hesitation" because "she did not like to talk or share her feelings with anybody." (Ex. 8 at 110.) She failed to keep three out of five appointments, but did keep two appointments in December 1971 and January 1972. (Ex. 8 at 111.) Leola discussed her relationship troubles and admitted to severely striking Mr. Bell. (Ex. 8 at 110-11.) An excerpt from Ms. Hellinger's report demonstrates Leola's lack of receptivity to treatment, her depressed outlook, and her inability to place Mr. Bell's needs above her own:

> In my last contact with Mrs. B. on 1/25/72, she stated that she felt she really did not want to come to talk about herself or the problems with Steven. . . . Nevertheless, Mrs. B. talked at length about her feelings of rejection and disappointment with the termination of her relationship with this older man. It was pointed out to Mrs. B. that she is continually repeating that she cannot talk but that in both sessions with her she has been able to talk about some of the things that were bothering her. It is interesting to note that Mrs. B. herself observed that she comes here with a specific purpose of talking about Steven but within a very short time always reverts to talking about herself. There was some focus on the fact that Mrs. B. believes that she will always lead a life of misery and nothing will ever work out for her. Mrs. B. pointed out that she has

> little desire to talk about herself, her children, and how she is feeling, or making any changes because she doesn't feel that anything will come of it. (Ex. 8 at 111.)

(j) Perhaps because Leola would not agree to continued sessions, Ms. Hellinger's disposition plan stated that "inasmuch as Steven would be followed in the Speech Clinic, casework contacts would be continued with the social worker in that clinic." (Ex. 8 at 111.) Even for this limited plan, Leola expressed hesitancy. (Ex. 8 at 111.) She failed to keep Mr. Bell's first appointment at the speech pathology department of Mount Sinai, and was an hour and a half late to another. (Ex. 8 at 110.) Mr. Bell was evaluated in December 1971 by a speech therapist, Lynn Rosen (Ex. 8 at 112), who found that Mr. Bell had "mild and infrequent clonic block" that was "noted during spontaneous speech" and that Leola's "tendency to be very withholding, rigid, and repressed is having a direct affect [sic] on Steven's stuttering." (Ex. 8 at 110.) Psychometrics and parental coaching were recommended. (Ex. 8 at 119.) However, Mr. Bell's records indicate that he did not continue with treatment. A notation in his chart from the summer of 1972 indicates that he could not keep an appointment because he had been sent away for the summer; after this, the speech clinic was informed that "family [is] no longer interested in receiving speech therapy." (Ex. 8 at 113.)

(k) Mr. Bell's untreated stutter impacted his ability to form any positive relationships with his peers. When he spoke, it was difficult for others to understand him (Ex. 8 at 108), and he became the object of ridicule and teasing from his peers (Ex. 91 at 1698). He was also teased and called "Fangs," because he chipped his front teeth after falling from a ledge when he was in first or second grade. (Ex. 113 at 2485.) He was also teased about his clothes, which were old and worn. (Ex. 79 at 1556.) In response to this, he was withdrawn, internally focused, and

largely silent. (Ex. 91 at 1698.)

(l) Mr. Bell exhibited signs of dissociative behavior at a young age. As noted, he appeared to a social worker to be detached from his surroundings." (Ex. 8 at 110.) When there were other children playing in the courtyard of the Lexington Houses, he acted as if they did not exist, and avoided them as much as possible. (Ex. 79 at 1557.) He sometimes drifted off in the middle of a sentence, as if something in his mind grabbed his focus away. (Ex. 79 at 1557.)

l. Mr. Bell's adolescence was marked by further trauma including significant physical and psychological abuse, precipitated by the entrance of his stepfather, George Blanding.

(1) George Blanding moved into Mr. Bell's apartment at the Lexington Houses in late 1972 or early 1973, when Mr. Bell was seven years old. (Ex. 73 at 1480.) He and Leola began an affair while George was still dating or married to Leola's coworker, Alice. (Ex. 72 at 1464; Ex. 78 at 1550.) Leola did not tell Mr. Bell or Lisa in advance that George was moving in with them. (Ex. 72 at 1464.) George, who was born November 17, 1938, in Sumter County, South Carolina (Ex. 106), had moved to Brooklyn sometime prior to 1961, when he joined the United States Army (Ex. 33 at 944, 947). He spent roughly two years as an active soldier, and was stationed for some time in Okinawa where he worked as a telephone operator and rifleman. (Ex. 33 at 944, 955.) George had already been married three times before he moved in with Leola. He married Birnie Jean Ragins on November 15, 1963. (Ex. 34 at 995.) On April 16, 1970, he married Carrie Lee Williams, also in Brooklyn. George stated on his marriage certificate that Birnie had died in February 1968. (Ex. 35 at 996.) On July 28, 1972, he married Alice Cousins in Brooklyn. He stated on his marriage certificate that he had never before been married. (Ex. 36 at 999.)

(2) George did not have much to contribute to the Bell household. (Ex. 98 at 2150.) Between July 22 and September 27, 1973, George received unemployment checks from the State of New York to which he was not legally entitled. The total amount of fraudulently obtained unemployment benefit was determined to be $449.50. On May 16, 1978, George signed a confession of judgment. (Ex. 37 at 1003.)

(3) The arrival of George increased the chaotic and violent atmosphere in Mr. Bell's home. George drank heavily and smoked marijuana in the apartment, around Mr. Bell and Lisa. (Ex. 72 at 1466.) Leola joined him in partying, and they frequently left Mr. Bell and Lisa home alone. (Ex. 78 at 1549.) Leola also began to smoke marijuana in front of Mr. Bell and Lisa. (Ex. 113 at 2488.) Leola and George also used cocaine, which Lisa found in the freezer of their apartment. (Ex. 72 at 1457.) Playmates were not allowed to go over to Mr. Bell's apartment because it was known in the neighborhood that they were heavy alcohol and drug users. (Ex. 79 at 1556; Ex. 80 at 1564.)

(4) Leola and George had a volatile relationship. They were swingers, and propositioned their neighbors for sexual activity. (Ex. 78 at 1554.) George was not faithful to Leola; Lisa saw him with another woman in the backseat of a car outside Lexington Houses (Ex. 72 at 1466), and he also propositioned Lisa's friends for sex (Ex. 72 at 1470). When George drank, he became belligerent and shouted and cursed at Leola in front of Mr. Bell and Lisa. (Ex. 72 at 1466.) A neighbor of theirs heard violent and aggressive arguing and breaking sounds from Mr. Bell's apartment. (Ex. 79 at 1558.) Another neighbor overheard Leola screaming and crying in pain. (Ex. 81 at 1578.) Mr. Bell and Lisa often fled to the courtyard of the Lexington Houses in order to avoid the fighting. (Ex. 79 at 1558.)

(5) Leola relinquished responsibility for the care of Mr. Bell and Lisa to George. (Ex. 73 at 1496.) Mr. Bell was hopeful that George would become a father figure to him, and George was initially very solicitous of Mr. Bell. (Ex. 91 at 1698.) Lisa was wary of George; he seemed phony. (Ex. 72 at 1465-66.) He spun vivid, but apparently untrue, stories of his combat experience in Vietnam, and hung a photograph of himself in uniform in the Bell's living room. (Ex. 72 at 1465-66.)

(6) George quickly assumed the role of chief disciplinarian, bossing Mr. Bell around and yelling at him. (Ex. 78 at 1550.) Mr. Bell's hopes for a loving father figure were vanquished about six to nine months after George moved into the house. One day, after Mr. Bell forgot his jacket at school, George entered the bathroom while Mr. Bell was taking a bath and held Mr. Bell's head under water, as if trying to drown him. Mr. Bell believed he was going to die. (Ex. 91 at 1698; Ex. 113 at 2493.) He told Leola about the incident, but she downplayed it and took George's side. (Ex. 91 at 1698; Ex. 113 at 2493.)

(7) Because Leola continued to work long hours late into the evening and sometimes on weekends (Ex. 73 at 1496), George had time alone with Mr. Bell and Lisa (Ex. 73 at 1496). Mr. Bell was subject to George's domination and control. George had a low tolerance for anything he perceived as misbehavior, and gave Mr. Bell beatings. (Ex. 72 at 1469.) He also arbitrarily beat Mr. Bell for no reason, especially if he had been drinking. (Ex. 72 at 1469.) Mr. Bell was beaten by George at least twice a week. (Ex. 72 at 1469.) George took Mr. Bell into one of the apartment's two bedrooms and locked the door behind them. (Ex. 72 at 1469.) He frequently made Mr. Bell undress until he was completely naked before beating him. When this happened, Lisa could hear the sound of George striking Mr. Bell's skin. He used a belt, an electrical cord, or his

bare hands. (Ex. 72 at 1470.) Lisa tried to shut out Mr. Bell's screams as best she could, but she could hear them through the closed door. (Ex. 72 at 1469.)

(8) George's beatings and unpredictability kept Mr. Bell in a constant state of arousal and fear. He was on pins and needles. He knew that George kept a loaded gun in the house, under the mattress of the bed he shared with Leola. Mr. Bell tried as best as possible to stay out of Leola's and George's way, which was hard between the ages of seven and ten because he was frequently on "lock down" as a punishment and was not allowed to go outside. He tried to do his chores perfectly. If he did not, George beat him and cursed at him. Sometimes George assigned Mr. Bell arbitrary chores, only to make him repeat them upon completion. (Ex. 113 at 2494.) The worst time of day for Mr. Bell was when George returned from work, around 3 p.m. The sound of George's key in the front lock triggered terror in Mr. Bell, who became expert at reading George's face for clues about his mood. He did the same with his mother. Sometimes George waited until Leola got home and then relayed to her that Mr. Bell had done something wrong earlier. Then they would jointly beat him. (Ex. 113 at 2494.) Other times, they told him to go into his bedroom, take his clothes off, and wait for them to come beat him. They sometimes left him there for hours, but never gave him a beating. Other times, they came together into his room and beat him until he was lying on the floor with both of them standing over him, striking him. (Ex. 113 at 2495.)

(9) Mr. Bell developed a pattern of dissociation in reaction to these beatings. If he anticipated receiving a beating, he would go to someplace else in his mind, and turn numb. He kept his mind on anything but the present, because the present meant pain. (Ex. 113 at 2495.)

(10) Other people saw signs of the abuse Mr. Bell

endured. Tarence Davis, a contemporary of Mr. Bell's who also lived in Lexington Houses, saw Mr. Bell covered in welts and bruises. (Ex. 81 at 1579.) Mr. Bell, who rarely talked about the beatings, explained that he had run away from home and was sleeping on the streets for a few nights. When he came home, Leola and George acted happy to see him. They told him to take a shower and clean up; while he was showering, they both surprised him and started whipping him with extension cords. (Ex. 81 at 1578-79.) Another friend, Frederick Crockett, knew that George beat the hell out of Mr. Bell and kept him locked inside the apartment at least once a week and sometimes daily. He saw welts up and down Mr. Bell's legs and back. (Ex. 80 at 1565.) Mr. Bell's classmates Willie Leroy and Lorenzo Murania once got caught by George in Mr. Bell's apartment—they had all skipped school. Upon discovering them, George immediately began to strike Mr. Bell. The two friends left, but could hear Mr. Bell whimpering and crying from outside the apartment. (Ex. 83 at 1598.)

(11) At age 13, around January 1979, Mr. Bell reported to a probation officer associated with the Manhattan Family Court that he ran away from home because Leola and George beat him regularly with an electrical cord and a stick. (Ex. 9 at 169.) The interview occurred as a result of a "Person In Need of Supervision" (PINS) petition filed with the family court. A PINS petition can be initiated in New York when a child under the age of 18 engages in behavior like running away from home or truancy. This caused the Bureau of Child Welfare to initiate an Emergency Application for Child Welfare Services. A child welfare caseworker apparently contacted Leola and George, and referred the family to James Weldon Johnson, a community counseling center in Harlem. (Ex. 9 at 169.) Mr. Bell attended a few counseling sessions, but was afraid to speak openly about the abuse he suffered at home because he had been

beaten badly after making the report to the probation officer in the first place. (Ex. 113 at 2496-97.) The caseworker completed a diagnostic study in July 1979, stating that the "family [was] no longer in need of services at this time." The case was closed as unfounded. (Ex. 9 at 167, 171.)

(12) After George arrived, the environment in Mr. Bell's home became sexualized. Shortly after he moved in, George began sexually abusing Mr. Bell's sister, Lisa. (Ex. 72 at 1467.) She was 11 years old. (Ex. 72 at 1467.) The abuse continued on a weekly basis until Lisa left home to join the Army in 1980. (Ex. 72 at 1467.) George's pattern was to wait until Leola passed out for the night from drinking wine and smoking marijuana. (Ex. 72 at 1467.) He went into Mr. Bell's and Lisa's bedroom and woke up Lisa. He brought her into the living room and led her to the couch. He provided her with marijuana to loosen her up and make her more docile. Then, he touched her and orally sodomized her. If Lisa resisted, George held her down. (Ex. 72 at 1467-68.) As a result of this abuse, Lisa experienced terror every night, wondering if George was going to come in and abuse her. (Ex. 72 at 1468.)

(13) Mr. Bell was also traumatized by abusive sexual environments and actions. He learned about sex from his maternal uncles, Anthony and Carlton, who was gay. (Ex. 72 at 1461.) When he saw them at his maternal grandmother's house in Brooklyn, they routinely showed him explicit, hardcore pornographic magazines. (Ex. 113 at 2510.) Mr. Bell had his first experience with heterosexual intercourse at 12 years. (Ex. 11 at 358.) A neighbor in the Lexington Houses named Bernadette, a friend and contemporary of Leola's, caught Mr. Bell smoking marijuana. She told him that she would tell Leola about his marijuana smoking unless he had sex with her. They had intercourse that day and multiple times after. It ended when Bernadette and her husband moved away from the Lexington

Houses several months later. (Ex. 113 at 2510.)

(14) The sexual abuse of Lisa by George and others compromised Lisa's ability to serve as a protective factor to Mr. Bell. She coped with the abuse by smoking marijuana, and she introduced Mr. Bell to it at age eight or nine. They stole it from Leola's and George's stash, and waited to smoke it until Leola and George were smoking themselves, so that the odor blended. (Ex. 72 at 1472.) As she got older, Lisa began spending more and more time outside the house. She went to parties and drank alcohol, and she spent the night at the houses of friends. (Ex. 72 at 1472-73; Ex. 79 at 1559.)

(15) Mr. Bell was acquainted with a handful of boys who lived in the Lexington Houses and attended the same schools as Mr. Bell, including Tarence Davis, Frederick Crockett, Charles Michael Williams, Victor Maldonado, and Kalvin Patterson. (Ex. 81 at 1573.) None of these children had much, so they spent most of their time hanging out in the courtyard of the Lexington Houses, improvising implements of play out of shopping carts or other detritus. (Ex. 81 at 1574-75.) Mr. Bell and Frederick Crockett used to climb over two fences in order to sneak into a power plant that was under construction at East 99th Street and 3rd Avenue—they played in the piles of sand. (Ex. 80 at 1563.) Mr. Bell did not play organized sports, but played baseball, basketball, and stickball in the neighborhood streets. (Ex. 81 at 1574.) These boys noticed that Mr. Bell had even less than they did; if they went for food or to the movies, they would chip in to cover for Mr. Bell. (Ex. 81 at 1574.) Even to these friends, Mr. Bell seemed different or unusual. (Ex. 80 at 1567.) Tarence Davis recalled Mr. Bell as very shy and awkward. The slightest rejection made him even more introverted and depressed. (Ex. 81 at 1580.) He liked to stay on the sidelines. (Ex. 81 at 1580; Ex. 80 at 1567.)

(16) Mr. Bell had several significant health episodes as an adolescent. On October 3, 1978, Mr. Bell was admitted to the emergency room at Mount Sinai Hospital for having blood in his urine and pain upon urination. (Ex. 8 at 126.) In May 1979, Mr. Bell was again seen at Mount Sinai Hospital. He complained that he injured his elbow by falling off a skateboard. An x-ray revealed a possible fracture and his arm was put in a splint. (Ex. 8 at 152-55.) On the evening of October 2, 1979, he was brought to Mount Sinai Hospital by George, who reported that Mr. Bell was punched in the mouth while playing. The records indicate that Mr. Bell sustained a fracture of his upper jaw and that one tooth was knocked out and another displaced. He apparently was treated in the department of oral surgery, where his mouth was stitched, his teeth realigned, and his palate stabilized with an acrylic cast. (Ex. 8 at 156.)

m. Mr. Bell continued to exhibit signs of psychological disturbance and dysfunction in his adolescence, the likely effects of trauma.

(1) Mr. Bell showed patterns of dissociation. By accounts of his friends, he disappeared both physically and mentally. (Ex. 81 at 1580.) Even if he was hanging out with their group, he could be in his own world, lost in thought. (Ex. 80 at 1567-68.) He went missing, only to be found later with a spaced out look. (Ex. 80 at 1567-68.) He was seen wandering in the courtyard of Lexington Houses early in the morning, mumbling to himself. (Ex. 79 at 1561.) He transformed whenever Leola or George was present. He would immediately shut down and become numb or distant. (Ex. 81 at 1577; Ex. 80 at 1566-67.)

(2) Mr. Bell spent a lot of time by himself, bouncing a tennis ball off a wall or shooting baskets. He went to the roof of his apartment building by himself and screamed at the top of his lungs. (Ex. 113 at 2502-03.)

(3) Mr. Bell began escaping his abusive home environment by running away from home. Before Mr. Bell was even ten years old, he tried to convince Frederick Crockett to run away from home with him. (Ex. 80 at 1569.) When he was 11 or 12 years old, Vanessa Brade began seeing him asleep in the hallway of his apartment building or on one of the benches in the courtyard of the Lexington Houses. (Ex. 79 at 1557, 1559, 1561.) Mr. Bell often spent the night in all-night arcades in Chinatown and Times Square. He once ran away and spent two weeks at the home of his friend, Skip. (Ex. 113 at 2505.) A note from Mr. Bell's medical files indicate that he ran away from home on Tuesday, November 14, 1978, and did not return home until Saturday, November 25, 1978. While Mr. Bell was away, Leola contacted Dr. Gilbert Velez of the Mount Sinai Adolescent Health Clinic (who had recently treated Mr. Bell for a possible hematuria). (Ex. 8 at 149.) On November 28, Dr. Velez met with Mr. Bell and Leola. During the visit, Mr. Bell presented as "very anxious and almost trembling." As such, Dr. Velez "did not feel it was appropriate to explore Steven's condition any further." (Ex. 8 at 149.) A follow up visit with just Mr. Bell was arranged for December 5, 1978, but the visit was rescheduled. (Ex. 8 at 149.) When they met on December 11, Mr. Bell shared with Dr. Velez that he felt anger, shame, and guilt in relation to running away. Dr. Velez noted that he needed further interviews and requested that he return to the clinic in one week. (Ex. 8 at 149.) The records do not indicate that another interview occurred. However, on April 4, 1979, Mr. Bell again appeared in the Adolescent Clinic at Mount Sinai Hospital. A note in his chart indicated the reason for his visit as "stuttering." (Ex. 8 at 151.) During this visit, a psychiatric evaluation was performed and Mr. Bell was referred for counseling. (Ex. 8 at 151.)

(4) Mr. Bell also turned to alcohol and drugs as a

means to prevent against being overwhelmed by intrusive thoughts of anxiety and fear. (Ex. 113 at 2554-55.) As noted, he began smoking marijuana with Lisa when he was around eight or nine years old. (Ex. 72 at 1472.) By the time he was in junior high school, Mr. Bell smoked several joints per day. (Ex. 10 at 268; Ex. 12 at 402.) He also helped himself to alcohol left in his apartment by Leola and George. (Ex. 81 at 1577.) He began regularly using hard drugs like PCP, cocaine, and LSD. (Ex. 12 at 402; Ex. 10 at 268.) He smoked marijuana joints laced with PCP with his uncle, David Washington. (Ex. 113 at 2509.)

(5) Mr. Bell attended junior high school at Wagner Junior High School (school no. 167), located on East 76th Street between 2nd and 3rd Avenues in the Yorkville neighborhood. (Ex. 2 at 8.) He started the seventh grade there in 1977. (Ex. 2 at 8.) Mr. Bell began to spend less time with his neighborhood friends, because he wanted to be as far away from the Lexington Houses and Leola and George as possible. (Ex. 113 at 2504.) If he hung out near the Lexington Houses, George could find him. A few times, George came into the courtyard to drag Mr. Bell away from his friends, choking him and pulling him inside. (Ex. 81 at 1579.) He began to spend time with a crowd of mostly white students from Wagner. (Ex. 81 at 1579.)

(6) Mr. Bell was seen as a weirdo or misfit at school. (Ex. 83 at 1597.) He was from the projects, and the students at Wagner who were not from the projects feared and disdained those who were. (Ex. 83 at 1598.) He was small for his age and had to withstand the threat of being jumped by "wolf packs." (Ex. 83 at 1598.) Mr. Bell continued to seem depressed and preoccupied with sad thoughts. (Ex. 83 at 1599.) He was teased and bothered at school (Ex. 79 at 1556) and at times his peers threw rocks and dirt at him (Ex. 10 at 267). He was ridiculed

because of his stutter (Ex. 10 at 267) and because he wore the same, worn clothes (Ex. 10 at 267). After he began running away and sleeping outside, Mr. Bell had poor hygiene and looked homeless. (Ex. 79 at 1561.)

(7) Mr. Bell's performance and attendance at school indicated his unrest. In seventh grade, he was absent just four times but missed part of 67 days. (Ex. 2 at 8.) In the 1978-1979 school year, he was absent 50 times and missed part of 35 days. (Ex. 2 at 8.) He skipped school, often with classmate Lorenzo Murania. (Ex. 83 at 1596.) They bought drugs in various run-down tenement buildings and projects and got high. (Ex. 83 at 1596-97.) Mr. Bell received failing grades in English, Math, Science, and Foreign Language. (Ex. 2 at 13.) He had low ratings in hygiene. (Ex. 2 at 13.) He was held back at the end of eighth grade in June 1979. The next year, he was absent 23 times and late 87 times. (Ex. 2 at 8.) His grades were mediocre. (Ex. 2 at 13.) His scores on New York City's standardized testing program indicated mastery of reading and vocabulary and aspects of reading comprehension. (Ex. 2 at 15.)

(8) Mr. Bell also engaged in risky behaviors. He wandered by himself in Central Park, which at the time was quite dangerous and full of roving gangs and drug traffickers. His friends from Lexington Houses would not walk there alone, but Mr. Bell did. (Ex. 80 at 1567-68.) Mr. Bell also rode on the top of the elevators in the Lexington Houses, snuck into abandoned buildings, and walked on the tracks in the subway tunnels. (Ex. 80 at 1568.) He also jumped onto the roofs of moving trains and walked on the edge of rooftops. (Ex. 113 at 2506.)

(9) Mr. Bell displayed signs of sexual trauma. He engaged in sexual play, around age ten, with his friend Kevin. (Ex. 113 at 2510.) He appeared to Frederick Crockett to possess an advanced understanding of sex and touching, which made Frederick wonder if Mr.

Bell had been touched sexually at home. (Ex. 80 at 1569-70.) Mr. Bell was very touchy and tried to get physical with his male friends. Once, when Mr. Bell was about 12, he and Frederick Crockett were hanging out with another boy, Bruce. Bruce said he really wanted to give someone oral sex, and Mr. Bell let him do it to him, in front of Frederick, like it was no big deal. (Ex. 80 at 1570.) Mr. Bell and Bruce, who was openly gay at that age, continued to have oral sex on a regular basis for a time. (Ex. 113 at 2511.) Tarence Davis also wondered if Mr. Bell had been sexually abused at home. He noticed that as time went on, there came a point when Mr. Bell would just not go home; his fear seemed even worse than it had been before. (Ex. 81 at 1579-80.)

n. The crime committed by Mr. Bell in March 1981 was uncharacteristic, and the time immediately preceding this event was marked by significant and difficult experiences.

(1) Leola and George sent Mr. Bell away to South Carolina with their neighbors, the Gibbs family, for most of the summer of 1980. (Ex. 113 at 2511.) While in South Carolina, Mr. Bell was struck by a car. He was riding his bicycle and zoned out. He thought he heard someone yell his name. When he turned his head and looked back, an oncoming car was right in front of him. He was hit and thrown from his bicycle. (Ex. 113 at 2511-12.) He lost consciousness for three to four minutes and fractured his head and left knee. (Ex. 10 at 267.) Several of his teeth were knocked out. (Ex. 113 at 2512.) He was brought to the emergency room in an ambulance. (Ex. 113 at 2512.)

(2) Lisa graduated from Norman Thomas High School in the spring of 1980. (Ex. 44 at 844.) On August 21, 1980, at age 17, she enlisted in the United States Army. (Ex. 32 at 862.) She enlisted for a term of at least four years, and reported for duty on September 22,

1980. (Ex. 32 at 878.) Mr. Bell was so upset that he did not remember her going away party. Lisa's departure put Mr. Bell in a fog. (Ex. 113 at 2512.) Lisa underwent basic training at Fort Leonard Wood, located in Missouri. (Ex. 32 at 878.) In November 1980, she was transferred to Fort Benjamin Harrison in Indiana. (Ex. 32 at 878.) She trained for a job as a Personnel Administration Specialist (Ex. 32 at 868) and was scheduled to leave the United States for Germany on March 23, 1981 (Ex. 32 at 939).

(3) On March 17, 1981, Mr. Bell skipped school in order to watch the Saint Patrick's Day Parade on 5th Avenue with a group of boys from school. Most of the boys besides Mr. Bell were white and lived in Yorkville. The group began drinking alcohol while watching the parade. They also smoked marijuana apparently laced with PCP. (Ex. 10 at 268.) After the parade, they continued to drink alcohol and use drugs. They went to a pizza parlor, and later to the apartment of Christopher Cap. Around 10:30 p.m., one boy named Derek Porter began vomiting from intoxication. Mr. Bell and others walked Derek to Lenox Hill Hospital, where they left him. After this, Mr. Bell and another boy named Kim returned to Christopher's apartment. Shortly after, Kim left. Chris and Mr. Bell continued to drink and play video games. At some point, around 11:40 p.m., Mr. Bell stabbed Christopher in the back and sodomized him. (5 CT 1156-1173.)

o. Mr. Bell continued to display signs of trauma, psychological dysfunction, and dissociative behavior in the period of his juvenile incarceration, during which he was subjected to violent and abusive environments.

(1) From the time of his arraignment on March 26, 1981 (Ex. 10 at 235) until Leola posted his bail on May 26, 1981 (Ex. 10 at 235), Mr. Bell was housed at Spofford Juvenile Center in the Bronx. His

bail was exonerated on July 17, 1981, and he was returned to Spofford. (Ex. 10 at 218.) Spofford, located in the Hunts Point neighborhood of the Bronx and administered by the city of New York, was a dysfunctional institution. It was a secure center and housed juveniles convicted of violent crimes, those awaiting trial on violent charges, as well as those being detained on less serious offenses. The facility was decrepit and filled with rats. It was not designed for long-term detention. It had limited educational and recreational programs, and no rehabilitative services. Spofford was chronically overcrowded. Escapes were common, as were attacks on staff by groups of residents, physical and sexual assaults on inmates by staff and other residents, and the trafficking of drugs. In November 1980, New York City Mayor Ed Koch declared that overcrowding at Spofford, the result of harsher juvenile sentencing laws and the failure of New York State's Division for Youth to provide permanent beds for juveniles, was at "emergency" proportions. Spofford was described as a "tinderbox." Between January and October 1980, there were 61 confirmed suicide attempts, 96 allegations of child abuse, and 485 fights at Spofford. (Ex. 102 at 2292-2328.) While Mr. Bell was at Spofford, he was given the antipsychotic drugs Mellaril and Thorazine. (Ex. 11 at 362.) He was noted to have had difficulty adjusting to incarceration during each initial period. (Ex. 11 at 301.)

(2) On February 26, 1982, Mr. Bell entered a plea of guilty to assault and sodomy charges. In exchange for his acceptance of responsibility, the charge of attempted murder was dropped. (Ex. 10 at 261.) When he was sentenced on April 22, 1982, Judge Burton B. Roberts directed that Mr. Bell "be given psychiatric help while incarcerated." (Ex. 10 at 264, 265.)

(3) Mr. Bell was moved from Spofford to Harlem

Valley Secure Center on June 16, 1982. (Ex. 11 at 281.) The facility was opened in January 1981 (Ex. 84 at 1601) and the administration had not yet established consistent control over the facility at the time Mr. Bell was housed there (Ex. 86 at 1620). The residents, who mostly came from New York City, shared a culture that was tough, violent, and suspicious. (Ex. 85 at 1609.) Fights between residents were very common (Ex. 86 at 1620) and happened several times per day (Ex. 84 at 1605). Attacks on staff were not uncommon. (Ex. 86 at 1620.) The environment was scary. (Ex. 85 at 1609.)

(4) Several incidents of violence against Mr. Bell were documented in his institutional records. On July 25, 1982, he was punched in the right ear by another resident. His ear was cut. (Ex. 11 at 334.) On October 17, 1984, Mr. Bell reported to medical personnel at Harlem Valley that he had been punched in the right eye. His injuries warranted an x-ray to rule out fracture. (Ex. 11 at 320.) On November 30, 1984, Mr. Bell was bitten by another resident on his finger and the skin was broken. (Ex. 11 at 346.)

(5) Mr. Bell was housed for a time on the Therapeutic Alternative Placement (TAP) Unit. (Ex. 12 at 403.) This unit housed residents who required additional psychiatric care or who might be victimized by other residents and therefore were more vulnerable in the general population. (Ex. 84 at 1603.) Mr. Bell was assigned to TAP based on the results of his initial psychological assessment and the fact that he was small. (Ex. 84 at 1603-04.) Mr. Bell was warned by other residents not to speak openly with counselors at Harlem Valley because doing so would allow staff to use his words against him. (Ex. 113 at 2518.) Counselors described Mr. Bell as a loner, lonely, depressed, and in need of "a great deal of counseling and group therapy." (Ex. 11 at 296, 300.) Mr. Bell was "very

passive" (Ex. 11 at 297) and "was unable to participate actively in therapy" while on the TAP unit (Ex. 12 at 403). His stutter hampered Mr. Bell's ability to participate in group therapy. Mr. Bell became visibly nervous, quiet, and self-contained during these sessions. (Ex. 12 at 403-04; Ex. 11 at 296.) The method of providing treatment at Harlem Valley was unsophisticated; it was a means of controlling the residents as opposed to a means of treating issues underlying those problems. (Ex. 86 at 1622-23.) The counseling sessions were run by Youth Division Aides (YDA), who had no particular training in counseling. (Ex. 86 at 1618.)

(6) Staff at Harlem Valley noted that Mr. Bell was a loner with "no close relationships." (Ex. 11 at 296; Ex. 86 at 1621.) He was targeted by other residents and apparently advised staff that he had been sodomized by another resident while on the TAP unit. (Ex. 12 at 407.) A staff psychiatrist noted that Mr. Bell was "anxious, depressed, and picked upon by his peers." (Ex. 12 at 406.) Mr. Bell was mocked for his stutter, and as a small, dark-skinned African American boy, he was on the bottom of the caste system at Harlem Valley. (Ex. 82 at 1583-84; Ex. 85 at 1615.) He hung around with another resident named Enzo Dellamadaglia, who was large, tough, and exuded confidence; Mr. Bell seemed to gravitate toward him for approval and protection. (Ex. 82 at 1584.) The tougher, dominant residents on the unit hung out in the common area. (Ex. 86 at 1621.) They controlled what was played on the radio and on the television. (Ex. 85 at 1615.) Mr. Bell spent most of his time in his room or in the office of the YDA. (Ex. 86 at 1621.) He always did what he could to be housed in the room that was right next to the YDA's office. (Ex. 86 at 1621.)

(7) Mr. Bell continued to display signs of trauma and psychiatric problems while at Harlem Valley. He appeared distant and out of touch with the present, and he engaged in what Ken Berman called

"The Harlem Valley Space Out." (Ex. 82 at 1585.) Howard A'Brial also noted that Mr. Bell got completely lost in his own world. He stared into space and got a glassy look in his eye; other times, he zoned out in the middle of a conversation. (Ex. 86 at 1623-24.) When Howard A'Brial engaged Mr. Bell about difficult subjects such as his home life, Mr. Bell shut down and went into his room for an hour or more. Because of this recurrent "spacey behavior," A'Brial referred to Mr. Bell as a "paint chip baby." (Ex. 86 at 1624.)

(8) Mr. Bell continued to display signs of possible sexual trauma while at Harlem Valley. Staff psychiatrist Arthur Murphy and TAP unit administrator Barbara Simmons noted that they:

> [A]ttempted to actively enagage [Mr. Bell] in individual and group therapy concerning his homosexuality and his behavior in the instant offense. He denied his homosexuality, and was resistant to discussing his behavior in the instant offense on other than a superficial level. However he did divulge his anger and confusion about his relationship with his step-father—indicating that he was physically and psychologically abused, repeatedly, by this man. (Ex. 12 at 406.)

Howard A'brial noted that Mr. Bell's sexuality and sexual identity was notably different than that of his peers. He seemed more uncertain in his sexuality and went out of his way to engage in banter about women that was too full of bravado to be convincing or authentic. (Ex. 86 at 1622.) He developed a crush on a kitchen worker, Sally Syniec, but this was odd, because Sally seemed old enough to be Mr. Bell's grandmother. (Ex. 86 at 1622.) Ken Berman also noted that Mr. Bell engaged in conversation designed to mask sexual insecurity or confusion, and that he was attracted to older, maternal women. (Ex. 82 at 1589.) Howard A'Brial suspected that Mr. Bell had been sexually abused by his stepfather. When they talked about him, Mr. Bell's anger and pain seemed to be huge, of a different order

than it would have been if the abuse had just been physical. (Ex. 86 at 1623.) When Mr. Bell spoke of his stepfather, it was like he was cut down, and could not reconcile his image of himself with the fact that he had been taken advantage of. Sometimes Mr. Bell cried during these discussions. (Ex. 86 at 1623.)

(9) Mr. Bell took courses through Marist College in Poughkeepsie, New York, from the fall of 1982 through the fall of 1983. One of his instructors noted, "Steven needs to be pushed. He needs both tutoring and counseling for growth. He was not the most vocal in class. I always had to pull answers out of him." (Ex. 12 at 403.) Another report indicated that he had no behavioral problems and was "motivated and eager to learn." (Ex. 12 at 403.) In January 1984, Mr. Bell began taking classes through Dutchess Community College. (Ex. 5 at 28.) The program between the school and Harlem Valley was discontinued at that point. By September 1985, Mr. Bell had exhausted all "day" programs at Harlem Valley and had no further options for education. He requested a transfer to Goshen, another correctional facility. However, the request was denied for administrative reasons. (Ex. 11 at 294.) An alternative program was proposed by his unit administrator—that Mr. Bell be allowed to work in the kitchen Monday through Friday from 8 to 11 in the morning; that he be allowed to work in the automotive repair shop, assisting the instructor, from eleven until the close of the school day; and that he be given "intensive psychological therapy with a concentration on his initial offense." (Ex. 11 at 294.)

p. After his release from prison, Mr. Bell returned to the abusive and dysfunctional environment of his mother and stepfather's home, wherein he was subjected to continued trauma and rejection.

(1) On September 12, 1986, Mr. Bell was

conditionally released to parole supervision from Elmira Correctional Facility—an adult correctional facility to which he had been transferred from Harlem Valley on August 11, 1986. (Ex. 11 at 305; Ex. 11 at 276.) When Mr. Bell's initial parole report was prepared three years earlier in 1983, Mr. Bell stated that he planned to attend college after his release to parole. (Ex. 12 at 402, 405.) However, he was told by a parole officer at Harlem Valley that, due to his status as a sex offender, Marist College was unlikely to accept him. Mr. Bell had not been aware of this policy. Mr. Bell's alternative plan was to

> Return to the home of his mother and step-father, Leola and George Blanding, 1536 Lexington Ave., New York, N.Y. However, we must note that Steven advised us that his relationship with his step-father is not good, and, therefore, unless that relationship improves, approving this home as the residence for Steven, given his emotional problems, is questionable.

(Ex. 12 at 405.) Mr. Bell shared with psychiatric staff in 1983 at Harlem Valley his desire to return home to "straighten things out, and protect my sister." (Ex. 12 at 406.)

(2) Mr. Bell had little contact with his family while he was incarcerated at Spofford and Harlem Valley. Lisa married a fellow soldier, Angelo Graves, in Germany on September 15, 1981, at age 18. She gave birth to a daughter, Lanise Graves, on February 7, 1982. (Ex. 72 at 1473.) Later in 1982, Lisa began experiencing kidney failure and was admitted to a hospital in Germany. (Ex. 32 at 878.) In October 1982, she was transported back to the United States and admitted to Walter Reed Medical Center in Washington, D.C. (Ex. 32 at 875.) On November 29, 1982, a renal biopsy revealed extensive chronic tubule-interstitial disease. (Ex. 32 at 879.) She was found unable to perform her duties, and directed to return to the apartment of Leola and George while her condition was

further evaluated. (Ex. 32 at 907.) She was placed on the Temporary Disability Retired List on April 19, 1983. (Ex. 32 at 937.) Lisa and Lanise lived with Leola and George, and Angelo joined them for a period, but he was addicted to heroin and their relationship deteriorated. (Ex. 72 at 1474.) George again attempted to have sex with Lisa. (Ex. 72 at 1474.) She was declared permanently disabled by the Army in January 1985. (Ex. 32 at 936.) Soon thereafter, in June 1985, Leola and George married. (Ex. 29 at 842.) Lisa moved out of Leola's and George's apartment and became addicted to cocaine. (Ex. 72 at 1474.)

(3) By the time Mr. Bell was released in September 1986, Lisa had already left New York City for Ohio, where Angelo had been living. She stayed with him for three months before moving to San Diego, California. Mr. Bell's father, Melvin, was living in San Diego at that time. (Ex. 72 at 1475.) In June 1986, George began working as a permanent security hospital treatment assistant at Kirby Forensic Psychiatric Center on Ward's Island. (Ex. 39 at 1114.) However, three years later, on June 30, 1989, he was found away from his post, asleep, and impaired. (Ex. 39 at 1101.) Subsequently, he was placed on a probationary period and then terminated on March 20, 1991. (Ex. 39 at 1115.)

(4) Among the mandatory conditions of Mr. Bell's parole release in September 1986 were the requirements that he seek, obtain, and maintain meaningful employment and attend ongoing psycho-sexual counseling. (Ex. 16 at 529.) He was initially supervised by a parole officer Nowlin in Manhattan. (Ex. 16 at 528.) On October 7, 1986, Mr. Bell was seen by the forensic services department of the State of New York Office of Mental Health. Psychiatrist Sharon Packer summarized her initial meeting in a report to parole officer Nowlin. Her clinical impressions were that Mr. Bell "appeared to have some trouble concentrating, and some

thought blocking, otherwise cooperative. Affect is restricted. Mood is depressed." (Ex. 13 at 411.) Dr. Packer listed her impressions as "PCP, Organic Brian Syndrome. Patient should also go for urinary testing." She recommended psychotherapy. His next appointment was scheduled for November 11, 1986. (Ex. 13 at 411.) Though available records do not reveal the full course of treatment, a progress note entered in January 1987 indicates that Mr. Bell was referred by a psychologist to a sexual offenders clinic in the Bronx. The next notation made by the Office of Mental Health is from May 6, 1987. A psychologist noted that they talked about Mr. Bell's "job situation." Furthermore, Mr. Bell "indicated that he went to the sexual offenders clinic, but that he is an inappropriate candidate for their clinic." (Ex. 13 at 412.) There is no indication in the records of a second referral. The next and final notation was made on May 13, 1987. Mr. Bell failed to keep this appointment, and the mental health worker spoke to parole officer Nowlin. The file notation reads, "seems to be [illegible] O.K. No further services indicated at the present time." (Ex. 13 at 412.) Mr. Bell's case was officially terminated as a patient on September 25, 1989. (Ex. 13 at 409.) Mr. Bell's parole supervision was spotty. His case was transferred to parole officer Muldoon on April 11, 1988, for "administrative reasons." Parole officer Muldoon acknowledged that "the subject's adjustment to Parole between 6/8/87 and 4/11/88 is difficult to assess due to lack of information." (Ex. 16 at 528.)

(5) Mr. Bell had some difficulty finding work upon his release. In 1986, he reported earnings of just under $500 from work as a messenger for a messenger service in Manhattan. (Ex. 17 at 535.) In late 1986, Ken Berman hired Mr. Bell to work for his theater group, TRY, which was based in the New York City area at that time. (Ex. 82 at 1590.) Mr. Bell worked for TRY for about a year in 1986 and 1987 as a lighting

technician. (Ex. 82 at 1590.) Part of Mr. Bell's job was to assemble the set in different performance spaces, like schools. He sometimes became very anxious or agitated, to the point of shutting down, about being able to arrange the pieces of the sets in noncomforming spaces. (Ex. 82 at 1592.) Other TRY workers noticed that Mr. Bell had the tendency to space out, and that his speech trailed off in the middle of sentences. (Ex. 82 at 1592.)

(6) During this time, a close friend of Mr. Berman's was murdered. Mr. Bell was very caring and empathetic to him. (Ex. 82 at 1590-91.)

(7) Mr. Bell began smoking crack cocaine during this period. (Ex. 80 at 1571.) He later reported that when he smoked crack, it gave him a feeling of euphoria and well-being unlike anything he otherwise experienced. This was followed, though, by depression, low self-esteem, and craving for more. (Ex. 91 at 1704.) Ken Berman suspected that Mr. Bell was using drugs because Mr. Bell's behavior changed. He took less care with his work, spaced out more frequently, and stuttered more. (Ex. 82 at 1592.) His hygiene was poor, and it seemed that he was not living at home. (Ex. 82 at 1592-93.) Mr. Berman also suspected that Mr. Bell supplemented his income during this period by prostituting himself to other men. His salary from his work with TRY was not enough for him to live and support a drug habit. Additionally, Mr. Bell was sending money to his sister, Lisa. When Mr. Berman confronted Mr. Bell with this suspicion, Mr. Bell did not deny it, and seemed ashamed. (Ex. 82 at 1593.) Mr. Bell was eventually fired from TRY for stealing. He accepted responsibility and was apologetic. (Ex. 82 at 1594.)

(8) In April 1988, Leola gave Mr. Bell a one-way plane ticket to San Diego and told him to go live with his sister, despite the fact that this move would violate the terms of his parole. (Ex. 91 at 1704.)

When parole officer Muldoon telephoned Mr. Bell's home on July 15, 1988, Mr. Bell's stepfather stated, "He's not here, he's out of state," and then hung up the telephone. (Ex. 16 at 528.) When the parole officer called the home again in August 1988, the phone had been disconnected (Ex. 16 at 528) and a visit to the Lexington Houses confirmed that Leola and George had moved (Ex. 16 at 527). Mr. Bell was in violation of the conditions of his parole; a violation of release report was prepared, and a warrant for Mr. Bell's arrest was issued in New York on September 20, 1988. (Ex. 16 at 526.)

q. While living in San Diego from 1988 to 1991, Mr. Bell was plagued by addiction, relational upheaval, and homelessness.

(1) Mr. Bell met Debra Mitchell, through Lisa, soon after he moved to San Diego. (Ex. 72 at 1475.) They bonded quickly, and Mr. Bell moved in with her about two weeks after they met. (Ex. 11 at 365; Ex. 72 at 1475.) Mr. Bell seemed drawn to Ms. Mitchell in part because she wanted to take care of and mother him. (Ex. 72 at 1476.) Ms. Mitchell was older than Mr. Bell by 12 years. She had an older daughter and a young son, Johnny (Joey) Anderson, born on September 27, 1980. Joey lived with Debra. (44 RT 3659-61.)

(2) Mr. Bell enjoyed spending time with Joey. They played games like Nintendo together, and Mr. Bell helped him with his homework. (Ex. 91 at 1704-05.) Debra sometimes punished Joey by giving him whippings with a belt. When this happened, it was difficult for Mr. Bell to witness. Sometimes he left the house. Other times, he prevented the whippings by talking Debra out of it, or by using sex to distract her. (Ex. 91 at 1705.)

(3) Mr. Bell was unable to leave his drug addiction behind him in New York. He continued to smoke crack cocaine while

living in San Diego, sometimes in binges of a couple of days; he also had periods of abstinence but would then become overwhelmed by his urges to use drugs. (Ex. 91 at 1705)

(4) Lisa's life was devolving. She was heavily addicted to crack cocaine by the time Mr. Bell moved to California. (Ex. 72 at 1476.) Her hopes of reuniting with her father, Melvin, and building a father-daughter relationship were dashed when Melvin died of an overdose in September 1987. (Ex. 72 at 1475.) In November 1988, Lisa and her daughter Lanise had been evicted from their apartment and Lisa was seriously ill. Lanise stayed with Mr. Bell and Ms. Mitchell for a few weeks while Lisa recovered in the hospital. Lisa stayed with Mr. Bell and Ms. Mitchell for a time after getting out of the hospital, in part because she (Lisa) and Lanise had no other place to go. (Ex. 72 at 1476.) Lisa reunited with her estranged husband, Angelo, and left California with him in 1989. (Ex. 72 at 1476.) They ultimately settled in Delaware. (Ex. 72 at 1477.)

(5) Mr. Bell participated in vocational training and other educational opportunities while in San Diego. He completed a five month course in microcomputer repair at the San Diego Urban League in May 1989. (Ex. 14 at 454.) The Urban League offered classes to disadvantaged people in the San Diego area. In order to qualify, one had to fit certain criteria, such as being a welfare recipient. (47 RT 3771.) In July 1990, Mr. Bell enrolled in a two-year accounting program at Kelsey-Jenney Business College in San Diego. During the first quarter, which began on July 10, 1990, Mr. Bell's performance was excellent. He received an A in all of his courses. (Ex. 6 at 32.)

(6) Mr. Bell was unemployed but looking for work during this first quarter of school. On October 3, 1990, Mr. Bell applied for employment at the San Diego Marriot Hotel and Marina. (Ex. 14 at 456.)

He was hired to work as busboy or runner in the hotel's Sea Grille restaurant on October 4, 1990. (Ex. 14 at 455.)

(7) Initially, Mr. Bell's performance at his job was good. Evaluations from his first month on the job indicate that he was well groomed, always on the floor and ready to work and help out. He "gets along well with everyone," does "more than his share" and was a team player. (Ex. 14 at 416) However, Mr. Bell's personal life soon began to fall apart. In the fall of 1990, Mr. Bell was using crack cocaine again and his relationship with Debra was stormy. His performance at Kelsey-Jenney suffered during the second quarter. His attendance was erratic. (46 RT 3799.) He and Ms. Mitchell had a major falling out. Mr. Bell typically contributed his paycheck to the household expenses, but in December he spent his entire paycheck on crack cocaine, and also sold some items from his and Ms. Mitchell's house for additional drug money. Ms. Mitchell kicked him out. He was essentially homeless for five months, staying with friends when he could. (Ex. 91 at 1705.) He withdrew from Kelsey-Jenney on December 6, 1990. (Ex. 6 at 32.)

(8) By January 1991, the turmoil in Mr. Bell's personal life became evident in his work performance. Mr. Bell was found to have violated a hotel policy by eating in the cafeteria while off duty (Ex. 14 at 439), and then was suspected of theft of a purse (Ex. 14 at 441-45). Mr. Bell also missed a scheduled shift without notice on January 31, 1991. He was on a crack binge. (Ex. 91 at 1705-06.) Mr. Bell's employment was terminated on February 8, 1991, for "excessive unexcused tardiness and/or absenteeism." Steven's manager related that he "had a good understanding of his job" and was "very willing to do tasks beyond his normal duties." However, his dependability and organization needed improvement, and his judgment was unsatisfactory. (Ex. 14 at 434.) In an exit interview, Mr.

Bell indicated that he "had no complaints" and "was very happy" working at the Marriott. (Ex. 14 at 419-20.)

(9) Mr. Bell's social security records indicate that he was paid $1,437.63 for his work at the Marriott (listed as Sodexho, Inc.) in 1990. (Ex. 17 at 536.) Mr. Bell also earned $111.85 from the United States Department of Commerce Census Bureau that year. (Ex. 17 at 536.) Mr. Bell received another $1,045.13 from the Marriott/Sodexho in 1991.

(10) On April 4, 1991, Mr. Bell was arrested for attempting to cash a stolen and forged check in the amount of $200 at a Wells Fargo Bank branch in San Diego. (Ex. 15 at 469.) He was also accused of cashing a forged check for $150 at a different Wells Fargo branch a day earlier, on April 3, and of having forged and stolen checks on his person. (Ex. 15 at 486-87.)

(11) Mr. Bell was homeless, as he had been since breaking up with Ms. Mitchell in December (Ex. 15 at 474), and he informed the authorities that he had no place to go if he were released (Ex. 15 at 474).

(12) On April 15, 1991, Mr. Bell entered a plea of guilty to one count of forgery. (Ex. 15 at 462-63; People's Exhibit 43.) On May 10, 1991, Mr. Bell received a sentence of 120 days and a suspended sentence of two years. (Ex. 15 at 464-65; People's Exhibit 43.) In June 1991, Mr. Bell was extradited to New York in order to answer his parole violation there. (Ex. 16 at 524.)

r. Between June 1991 and June 1992, Mr. Bell underwent further upheaval. He was again subjected to abusive environments and familial rejection, and was confronted by his sister's dire health condition and his own inability to protect her from this condition.

(1) On June 11, 1991, Mr. Bell was admitted to the

custody of the City of New York Department of Correction on Rikers Island. (Ex. 16 at 516.) Mr. Bell listed Ms. Mitchell as his "closest person to contact in case of emergency." (Ex. 16 at 516.)

(2) A parole Revocation Hearing was held on August 23, 1991, at which Mr. Bell pleaded guilty to failing to notify his parole officer of his change of address, and the parole violation was sustained. (Ex. 12 at 391; Ex. 16 at 519.) On November 22, 1991, Mr. Bell was assigned by the City of New York Department of Correction to the medium custody classification level, which limited the types of job assignments he could have while incarcerated, and meant that he would be housed in a dormitory. (Ex. 16 at 520.) Mr. Bell was discharged from parole supervision on March 18, 1992, and then released from custody having completed the remainder of his sentence. (Ex. 16 at 518.)

(3) After his release, Mr. Bell spent one day with his mother and George, and one day with his maternal grandmother, Lucille, in Brooklyn before going to Delaware to live with Lisa. He felt he was not wanted by his family in New York. (Ex. 91 at 1706.)

(4) Mr. Bell also had another purpose in going to stay with Lisa. On August 24, 1991, the day after Mr. Bell's parole revocation hearing, Lisa was admitted to a hospital emergency room for kidney failure. (Ex. 100 at 2166.) After this, Lisa continued to receive dialysis. Her kidneys were in end-stage renal failure, and she began to explore the possibility of a kidney transplant. On April 30, 1992, Mr. Bell underwent testing at the Thomas Jefferson University Hospital in Philadelphia, Pennsylvania, in order to ascertain his suitability to serve as a kidney donor for Lisa. (Ex. 70 at 1443.) Tests revealed that he was not a compatible match, in part because Lisa had received so many blood transfusions. (48 RT 4136.)

(5) Mr. Bell had to choose between staying in Delaware with Lisa and returning to San Diego to be with Ms. Mitchell, who wanted him to come back. He told Lisa that he wanted to stay in Delaware but felt guilty because he had promised Ms. Mitchell, with whom he had reconciled, that he would return to San Diego. Ms. Mitchell was angry that Mr. Bell had chosen to go to Delaware after being released from jail, instead of coming straight to San Diego to see her and Joey. She wrote Mr. Bell at Lisa's address, and expressed her frustration and impatience. Ms. Mitchell recognized that Lisa's health was deteriorating, but felt that by not immediately returning to San Diego, Mr. Bell was placing Lisa before her and Joey. She wanted for them to be a family unit, and she wanted Mr. Bell to place them first. She acknowledged that she had always been jealous of Mr. Bell's closeness with Lisa. She signed the letter in both her and Joey's name. (Ex. 103.) Mr. Bell asked Lisa for advice about what to do. Ultimately, he decided that he had to honor his word. (Ex. 72 at 1477.) Mr. Bell returned to San Diego in the middle of May 1992. (Ex. 91 at 1706.)

(6) Once in San Diego, Mr. Bell reenrolled in the accounting program at Kelsey-Jenney, with plans to start in August. Deberah Glenn, an admissions counselor there, was pleased that Mr. Bell reenrolled. She remembered him as an intelligent student and friendly person. She took an interest in him from the beginning. Mr. Bell was upbeat about returning, and seemed committed to moving forward with his education. (46 RT 3801-02.)

(7) On June 4, 1992, Mr. Bell purchased and smoked crack cocaine after receiving a food stamp allotment from the social services department. That afternoon Joey Anderson was killed and Mr. Bell was arrested the following day for the murder of Joey. (Ex. 91 at

1706-07.)

6. Trial counsel unreasonably and prejudicially failed to present evidence and argument to rebut and mitigate the aggravating evidence concerning Mr. Bell's prior crime of assault and sodomy in 1981 when he was fifteen years old. Minimally competent counsel would have developed and presented existing, readily available, and substantially mitigating evidence that would have lessened the aggravating effect of the prosecution's evidence.

a. The reasonably available, relevant, and compelling mitigating evidence—set forth *supra* section 5 and *infra* section 7—that trial counsel could have developed and presented to experts and at the penalty phase to rebut the aggravation is incorporated by reference as if fully set forth herein.

b. Mr. Bell suffered a significant head injury less than a year before his prior crime when he was hit by a car while riding his bicycle. (Ex. 88 at 1638; Ex. 113 at 2512-13.)

c. Mr. Bell had cognitive deficits that could significantly impact his executive functions, such as goal-setting, planning, problem-solving, insight, and judgment, and which would have been exacerbated by the use of drugs or alcohol. (Ex. 88 at 1638.)

d. Mr. Bell suffered early onset addictive disease. (Ex. 89 at 1643-44.) Mr. Bell's traumatic experiences and disruptive environment in childhood placed him at a substantially greater risk of negative outcomes for his psychiatric, emotional, and social development and functioning, including the development of addictive and other commonly co-occurring mental disorders. (Ex. 89 at 1644.) Mr. Bell exhibited dissociative behaviors that in combination with his pre-existing psychological trauma increased the likelihood that he would dissociate

when using a psychoactive substance. (Ex. 89 at 1645.) Mr. Bell's cognitive dysfunction and pre-existing head trauma acted synergistically with drugs to affect and impair his behavior. (Ex. 89 at 1646.) Mr. Bell's co-morbid dissociative tendencies also would have been amplified by the combination of his brain dysfunction and drug use. (Ex. 89 at 1646.)

7. The substantially mitigating facts and evidence that minimally competent counsel would have uncovered and presented would have led the jury to conclude, consider, and give full effect to the fact that Mr. Bell suffered severe and unrelenting rejection, abandonment, neglect, violence, physical and emotional trauma and abuse, and substance abuse; Mr. Bell's significant impairments in neurological and cognitive functioning; the extreme dysfunction that pervaded Mr. Bell's personal and familial psychosocial history; and the lack of adequate support to counteract that dysfunction placed Mr. Bell at great risk for significant brain and behavioral dysregulation and interpersonal and intrapersonal difficulties that tragically affected the course of his life. The credible, reliable, and material evidence, set forth in the preceding sections, individually and cumulatively, mitigates Mr. Bell's actions, reduces Mr. Bell's legal and moral culpability for the capital offense, and leads to the following, among other, conclusions:

a. Mr. Bell was born into a family with extensive preexisting risk factors and forced to face multiple risk factors in his most vulnerable development periods. These multiple risk factors of both pre- and postnatal origin amassed and operated synergistically upon each other, leaving Mr. Bell with few resources with which to counter the flood of negative impacts he experienced throughout his life. (Ex. 113 at 2540.)

b. Both of Mr. Bell's biological parents came from families with substance abuse issues affecting multiple generations. Mr. Bell's paternal grandfather, Henry, was addicted to alcohol, as was his

sister, Mr. Bell's great aunt. Mr. Bell's father was a heroin addict from age twenty until his death at age forty-five from a drug overdose. Only three of Mr. Bell's nine paternal aunts and uncles were spared from drug or alcohol addiction. Similarly, Mr. Bell's maternal grandmother and almost all of her children were addicted to alcohol and/or other drugs. Both of Mr. Bell's parents were addicted to drugs and alcohol long before Mr. Bell was born. The effects of substance abuse on parenting capacity include emotional disconnection and dysregulation, difficulty assessing the emotional cues of the child, depressed affect, diminished interest, greater levels of neglect, and self-injurious behaviors. The substance abuse of Mr. Bell's parents created in Mr. Bell the inability to contain painful psychological states, purposeful numbing, self-injurious behavior, and emotional disconnection. Mr. Bell's genetic inheritance may have included a predisposition to the abuse of drugs and alcohol. (Ex. 113 at 2540-41.)

c. Mr. Bell was born into a family with extensive preexisting mental health dysfunction and mental illness. The histories of both sets of Mr. Bell's grandparents and family ancestors are replete with examples of erratic behavior such as sudden disappearances from the family, multiple and simultaneous marriages, violence, spousal abuse, and other traumatogenic behaviors. (Ex. 113 at 2541.)

d. Mr. Bell's father, Melvin Bell, suffered from an emotional disorder whose features included panic attacks, intense anxiety, moodiness, depression, and the use of drugs in a possible attempt to self-medicate. Mr. Bell's mother, Leola Bell Blanding, reported that she suffered from depression as well as an emotional rigidity that prevented her from showing any signs of affection to Mr. Bell. She also reported being unduly preoccupied with cleanliness. Unipolar depression, part of the group of affective disorders that also includes bipolar illness, has been

clearly linked to genetic inheritance. The chance of inheriting an affective disorder if one parent suffers from unipolar depression is twenty to twenty-five percent as compared with a general population risk of seven percent. That number increases dramatically when both parents are depressed. (Ex. 113 at 2541-42.)

e. Mr. Bell was born into a family with a multigenerational pattern of sexual abuse and incest on both sides. One major feature of incestuous families is their isolation, which both protects the secret and prevents new, non-abusive experiences. This culture of secretiveness and of shame helps perpetuate the pattern of molestation, boundary confusion, and negative self-image. The intergenerational dimension of sexual abuse and incest is well-documented. The lack of protection from the previous generation is a potential cause of the trauma being repeated. Sexually abusive families suffer from long histories of loss, including loss of trust, the breakup of the family unit, and the loss of bodily integrity. These losses tend to remain unresolved and continue to impact the functioning of the family. The attempts to avoid dealing with prior victimization only increase the possibility that future victimization will occur. (Ex. 113 at 2542-43.)

f. Mr. Bell was born into a family that suffered the effects of historical institutional and interpersonal racism. Racial subordination, often enforced through coercion and violence, has known psychological sequelae such as internalized racism, victimization dynamics, and community violence. (Ex. 113 at 2543.)

g. Both of Mr. Bell's parents were born into intense poverty. Some of the effects of poverty include lack of access to medical care and inadequate nutrition potentially impairing both physiological and psychological development. Additional sequelae of poverty include a

greater likelihood of child neglect, abuse reports, fewer educational resources, and an orientation towards deprivation. (Ex. 113 at 2543-44.)

h. Mr. Bell's father was addicted to heroin and not present in Mr. Bell's life from a very early time. The effect of Melvin's drug addiction on Mr. Bell's childhood was that he was completely unavailable as a parent and contributed nothing positive, financially or emotionally, to Mr. Bell's care. His drug addiction contributed to the chaotic and volatile environment in which Mr. Bell was brought up. Melvin's behavior had a direct impact on Leola's state of mind and the manner in which she related to Mr. Bell as a newborn. (Ex. 113 at 2544.)

i. Mr. Bell's mother expressed ambivalence and even antipathy towards Mr. Bell from the time he was born. Her attitude towards Mr. Bell interfered with his development. On the most fundamental level, Leola did not provide for Mr. Bell's basic food and safety needs. She did not respond to his cries for hunger. She exhibited dismissiveness and hostility towards Mr. Bell. She was physically abusive to him. Mr. Bell learned that proximity to Leola inevitably resulted in rejection, anxiety, and fear. Mr. Bell showed numerous signs of disorganized attachment, an indication of a dysfunction in the child-caregiver bond and a sign of pathological attachment behavior. (Ex. 113 at 2545-47.)

j. Mr. Bell developed avoidant behavior in order to protect himself from the disorganizing level of fear and need created by his neglectful and abusive caregiver. In the absence of an appropriate caregiver reaction to his cries, Mr. Bell learned to abandon his attempts to achieve protection and safety. (Ex. 113 at 2547-48.)

k. The dysfunction, depression, and substance abuse of Leola caused Mr. Bell to create a negative model of the self. His negative and distorted internal model profoundly impacted Mr. Bell's ability to form

relationships with others because he had no ability to expect that relationships could bring anything other than rejection. Mr. Bell's attachment with Leola led to severe developmental-neurobiologic pathology with negative consequences such as impacts on intrapsychic development and relational capabilities. (Ex. 113 at 2549-50.)

l. Ongoing trauma of the kind experienced by Mr. Bell caused him to overuse the parts of his brain designed for danger and alert. This causes an increase in the release of chemicals, such as norepinephrine and stress hormones, which alter neural pathways. The healthy development of neural pathways is integral for cognitive, emotional, and social functioning. The brain of an infant or small child is infinitely more malleable than the adult brain because the child's brain is undeveloped and undergoes rapid neuronal growth. Thus, children are particularly vulnerable to experiencing long-term brain alteration as a result of repeated exposure to anxiety-producing trauma. The long-term consequences include an increased startle response; sleep disturbances; affect regulation problems; and generalized (or specific) anxiety. (Ex. 113 at 2550.)

m. The dysfunction of Mr. Bell's relationship with his mother left him particularly vulnerable to the abuse of his stepfather, George Blanding. Mr. Blanding physically abused Mr. Bell, in a manner that left him terrified and in a constant state of anxiety. Mr. Blanding's treatment confirmed Mr. Bell's prior belief that caregivers are dangerous and potentially confirmed his sense of himself as a person worthy not of love but of abuse. The introduction of the abusive male figure of George Blanding had a significant impact on Mr. Bell because it happened while Mr. Bell was in a developmental stage during which he needed to build his self-image and sense of how to be a productive male in the world. (Ex. 113 at 2551-52.)

n. Mr. Bell was exposed to risk and trauma by virtue of George Blanding's systematic raping of Mr. Bell's sister. Mr. Blanding's molestation of Lisa (and possibly Mr. Bell) created an environment where sexual abuse was rampant. This potentially affected Mr. Bell's development of gender identity. Conflict regarding sexual identity and sexual orientation in male victims of sexual abuse can be a greater trauma than the aspect of abuse which creates powerlessness. (Ex. 113 at 2553-54.)

o. Mr. Bell was exposed to substance abuse from birth. Almost half of the children who are brought to court for protection issues related to child abuse have had at least one parent with substance abuse issues. Mr. Bell had three such parents. Abused children are much more likely to abuse drugs, engage in high risk behaviors, run away, and skip school. (Ex. 113 at 2554.)

p. Mr. Bell began using substances in his late childhood and adolescence as a means to escape reality. He began drinking alcohol at age eight or nine, and began smoking marijuana by age ten. He began using harder drugs such as PCP, cocaine, and LSD in junior high school. It is common for victims of various types of maltreatment to turn to substance abuse. Male victims of child abuse and sexual abuse often start drinking alcohol and use drugs earlier in comparison with non-abused boys. Substance abuse at an early age is often related to the poor decision making skills that are caused by damage to the part of the brain responsible for executive functioning. The child's ability to refuse drugs, to consider alternatives, and to see a future has been compromised. The more drugs Mr. Bell used, the more susceptible his brain became to ongoing negative effects. (Ex. 113 at 2554-55.)

q. Mr. Bell exhibited dissociative behaviors and posttraumatic stress reactions from an early age and throughout his life.

These behaviors are attributable to ongoing trauma and neglect. Dissociation is a defense against overwhelming stimuli where the mind disconnects from the present in order to maintain a sense of control. Massive and ongoing trauma produces overwhelming anxiety and has great effects on the deeper psychological structures that form one's coherent sense of self. That Mr. Bell's dissociative behavior was noticeable to those around him from a very young age indicates that his dissociation was pathological rather than a normal developmental behavior. In pathological dissociation, distinguished by the amount of dissociating and the impact and nature of the trauma, the mind too often enters the alternate world that dissociation offers and can impact many aspects of relating such as creating friendships and learning in school. The most likely explanation for Mr. Bell's pathological and increasing dissociation and the classic symptoms of PTSD he exhibited is the accumulation and ongoing nature of the maltreatment he experienced. Sexual abuse is also known to be a "dissociogenic" factor. Additionally, there is a possible genetic component to dissociative behavior. Both Mr. Bell's father and paternal aunt had dissociative issues. (Ex. 113 at 2556-58.)

r. The only significant positive relationship experienced by Mr. Bell was the one with his sister, Lisa. However, Lisa was only three years older than Mr. Bell, and so was not sufficiently mature to offer him maternal or paternal qualities that might have allowed for some normative development. Lisa was herself severely affected by her mother's neglectful and abusive parenting. Lisa was also being severely molested on a continual basis by George Blanding. It is highly probably that she had no support to give Mr. Bell given that her own trauma was so severe and unacknowledged. (Ex. 113 at 2560.)

s. Mr. Bell's numerous genetic, developmental, and

environmental risk factors are crucial to an understanding of his overall psychological and social development and functioning. Mr. Bell experienced risk factors including genetic risks that he was born into; three parents, all ill-equipped to provide even the most basic of protective qualities; intense ongoing abuse meted out upon him; numerous head injuries and cognitive deficits; a debilitating stutter that even his mother could not make the effort to bridge; a dissociative disorder that made focusing and relating a fragmented experience; and a debilitating substance abuse problem. The risk factors and lack of sufficient supports stunted his early development, formed a very negative self-image, impaired his ability to regulate his behavior and emotions, and ultimately debilitated his psychological and social functioning throughout his life. (Ex. 113 at 2561-62.)

8. Trial counsel had no reason—informed, tactical, strategic, or otherwise—for the foregoing acts or omissions, nor could such acts or omissions have been committed by any attorney reasonably and sufficiently well experienced and qualified to represent a defendant in a capital case at the time of Mr. Bell's trial.

9. But for trial counsel's unprofessional failures, errors, and omissions, Mr. Bell would not have been sentenced to death. Trial counsel's unreasonable failure prejudicially deprived Mr. Bell of the benefit of reasonably available evidence relevant to the question of the appropriate sentence, all of which would have lead to a different result in the penalty phase of Mr. Bell's trial, had counsel reasonably investigated, prepared, and presented it.

E. CLAIM FIVE: STATE AUTHORITIES ENGAGED IN A PATTERN OF MISCONDUCT THAT CREATED PREJUDICIALLY FALSE AND MISLEADING PROOF OF GUILT AND MORAL CULPABILITY

Mr. Bell's conviction and sentence of death were unlawfully imposed in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; the California constitutional analogues; Penal Code section 1473 and other state laws and rules; and international law as set forth in treaties, customary law, human rights law, and under the doctrine of *jus cogens*, because state authorities systematically committed specific acts and omissions which were designed to and which did in fact create false, misleading, and unreliable proof of Mr. Bell's requisite mental state and guilt, and aggravated his sentence, and which precluded the jury from giving due consideration and full effect to all evidence in mitigation. Mr. Bell's constitutional rights that were violated by these acts and this course of conduct include but are not limited to deprivations of his rights to due process; a fair trial; the right to present a defense, including the rights to compulsory process and to present all relevant evidence; the right to disclosure of all material, exculpatory and/or impeaching evidence; the right to a trial free from intentionally, demonstrably, or inferentially false inculpatory or impeaching evidence; the right to a reliable, rational, and accurate determination of guilt, death-eligibility, and death-worthiness, free of any unconstitutionally unacceptable risk that such determinations were the product of bias, prejudice, arbitrariness, or caprice; the right to effective assistance of counsel and access to competent mental health experts who are qualified to assist in the investigation, preparation, and presentation of evidence relevant to significant mental state issues, including the assistance of counsel and experts that is unencumbered by interference of state officials

in withholding, mischaracterizing, suppressing, or altering evidence, or otherwise unfairly manipulating the proceedings to affect the introduction and/or exclusion of material, probative evidence.

The violations of these rights individually and cumulatively prejudicially affected and distorted the investigation, discovery, presentation, and consideration of evidence, as well as each and every factual and legal determination made by trial counsel, the state courts, and the jurors at all stages of the proceedings from the time of Mr. Bell's arrest through and including the rendering of the judgment of death and continue to unfairly, misleadingly, and prejudicially affect his custodial status.

In support of this claim, Mr. Bell alleges the following facts, among others to be presented after access to a complete and accurate record of the proceedings in the municipal and superior courts, full discovery and investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims One, Two, Three, Four, and Seven, and any accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. Law enforcement and the prosecution intentionally and prejudicially destroyed, failed to collect, failed to preserve, and/or failed to disclose evidence. Due to law enforcement and the prosecution's actions, the defense was unable to examine, test, or otherwise obtain materially favorable evidence or evidence that would have lead to such. The evidence includes, but is not limited to, the following:

a. Blood and urine samples were obtained from Mr. Bell on June 5, 1992.

(1) Law enforcement and/or the prosecution

delayed testing the samples for five and a half months, during which time the cocaine and benzoylecgonine in the samples were degraded partially or substantially. (Ex. 109 at 2408, 2418-20.)

(2) Law enforcement and/or the prosecution failed to properly preserve the blood samples prior to their analysis. (Ex. 109 at 2408, 2418-20.)

(3) The facts alleged in Claim Three are incorporated herein.

b. Law enforcement and the prosecution destroyed the notes generated during their investigation of this case. (3 CT 592.)

c. The trial exhibits were destroyed in this case on January 15, 1997. The facts, allegation and exhibits cited in Claim Seven are incorporated herein.

3. The prosecution and law enforcement unconstitutionally engaged in an egregious and pervasive pattern and practice of falsifying notes and reports; coercing, threatening, intimidating, tampering with, and/or coaching witnesses; manufacturing false evidence against Mr. Bell; offering undisclosed inducements to witnesses in exchange for testimony; improperly tailoring their investigation; presenting and failing to correct false evidence; and withholding material exculpatory information from the defense throughout the investigation and trial.

4. The prosecutor and his agents introduced false and/or misleading testimony against Mr. Bell by securing witnesses' agreements to testify in a particular manner, favorable to the prosecution, in exchange for financial or other inducements, which the prosecution failed to disclose, in whole or in part, to the defense.

5. The prosecution knowingly, intentionally, and/or recklessly presented false, misleading, and/or unreliable evidence, and failed to correct

and investigate such testimony.

a. The prosecution knowingly or recklessly misrepresented to the court, counsel, and/or the jury that Mr. Bell felt and showed no remorse.

(1) The prosecution elicited such testimony from Detectives Almos and Doucette. (28 RT 2104, 2124.)

(2) The prosecution argued to the jury that Mr. Bell felt no remorse. (39 RT 3292-94; 52 RT 4420.)

(3) The prosecution knew that the testimony was false, unreliable, and misleading. The prosecution knew that Mr. Bell felt remorse, as he displayed it to polygraph examiner Paul Redden by breaking down and crying. (Prelim. Hrg. RT 21.)

b. The prosecution introduced false, misleading, and unreliable testimony from Susanna Forney.

c. The prosecution introduced false, misleading, and unreliable testimony regarding the toxicological analyses of Mr. Bell's blood and urine samples.

(1) The prosecution knew or should have known that the analyses of Mr. Bell's blood and urine underreported the cocaine and benzoylecgonine concentrations that existed at the time the samples were obtained from Mr. Bell. (Ex. 109 at 2418-20.) This was because the samples had degraded during the five-and-a-half-month delay that occurred prior to their testing. (Ex. 109 at 2418-20.) Law enforcement and the prosecution caused the delay.

(2) The prosecution's expert, Dr. Randall Baselt, testified regarding the amount and timing of Mr. Bell's ingestion of cocaine on June 4, 1992 based on the analyses of Mr. Bell's blood and urine samples taken on November 16, 1992. (35 RT 2871-2898.) Dr. Baselt's

calculations and testimony were materially false, misleading, and unreliable because Dr. Baselt misleadingly did not consider that Mr. Bell's blood and urine samples were degraded after having been stored for five-and-a-half months prior to analysis. (Ex. 109 at 2415-21.)

(3) Dr. Baselt claimed that he did not realize until re-cross-examination that in Mr. Bell's case there had been a substantial delay in testing. (35 RT 2894.)

(4) The prosecution introduced false, misleading, and unreliable testimony and argument to the effect that Mr. Bell's blood sample did not contain cocaine at the time the sample was obtained on June 5, 1992, that benzoylecgonine concentrations in Mr. Bell's blood and urine samples were not high, that they did not reflect substantial cocaine usage, and that the toxicology analyses were inconsistent with Mr. Bell's reported usage. (31 RT 2406, 2487; 40 RT 3357-59.)

(5) The prosecution introduced false, misleading, and unreliable testimony regarding the testing of Mr. Bell's urine sample. The prosecution knew or should have known that the second urine test reflected a benzoylecgonine concentration of 101,900 nanograms per milliliter (ng/ml), but misled the jury into believing it only contained 6000 ng/ml. (35 RT 2877.) The prosecution knew or should have known that the urine benzoylecgonine concentration was never that low, and in fact that it was twenty times higher when tested on November 17, 1992, and was even higher still when the sample was obtained on June 5, 1992. (Ex. 109 at 2418-20.)

6. The prosecution deliberately and repeatedly misstated the law to the jury.

a. The prosecution falsely misled the jury that the elements of robbery felony-murder and robbery-murder special

circumstance are identical, stating, "Once you find felony murder you will find the special circumstance to be true." (39 RT 3287.)

b. The prosecution falsely misled the jury to believe that in order for the robbery to be "incidental" to the murder, the intent to commit robbery had to be formed after the murder was completed. (39 RT 3287; 40 RT 3353-54, 3359-60.)

7. The prosecution failed to timely disclose all requisite discovery and all evidence materially favorable to Mr. Bell, including:

a. The prosecution delayed until late September 1993, about a week before trial, sending to trial counsel complete discovery regarding the analyses of Mr. Bell's blood and urine samples and other toxicology evidence. The delay was purposeful and deliberate, and prejudicial to Mr. Bell, as trial counsel lacked sufficient time to effectively use the discovery material.

b. The prosecution failed to disclose to trial counsel the chain-of-custody logs from the San Diego Police Department crime laboratory regarding Mr. Bell's blood and urine samples. (*See* 37 RT 3038, 3045.)

c. The prosecution failed to disclose the study by its retained toxicologist, Dr. Baselt, regarding degradation of cocaine and benzoylecgonine in blood samples, and any other evidence and information it possessed regarding the degradation in Mr. Bell's blood and urine samples. (Ex. 114; Ex. 109 at 2418-19.)

8. Trial counsel was constitutionally ineffective in failing to challenge and object to the State's misconduct on any and all of the foregoing grounds. Trial counsel's actions and omissions were not strategic, fell below the standards for reasonably competent counsel, and prejudiced Mr. Bell.

9. To the extent appellate counsel was required and/or permitted to challenge the misconduct of law enforcement and the prosecution on any and all of the foregoing grounds, appellate counsel was constitutionally ineffective in failing to do so. Appellate counsel's actions and omissions were not strategic, fell below the standards for reasonably competent counsel, and prejudiced Mr. Bell.

10. The state's misconduct in falsifying information, withholding material exculpatory information, introducing false, misleading and unreliable evidence, failing to correct false, misleading and unreliable evidence and creating false and misleading inferences, individually and collectively, violated Mr. Bell's above-enumerated constitutional rights, rendered the trial proceedings fundamentally unfair and had a substantial and injurious effect influence in the determination of the jury's verdict, and unconstitutionally deprived Mr. Bell of a fair and reliable determination of guilt and penalty.

F. CLAIM SIX: SEVERAL INSTANCES OF UNCONSTITUTIONAL AND PREJUDICIAL JUROR MISCONDUCT OCCURRED DURING TRIAL, DEPRIVING MR. BELL OF A FAIR TRIAL

Mr. Bell's conviction, sentence, and confinement are unlawful and were unconstitutionally obtained in violation of his rights to due process; a fair and impartial jury selected by nondiscriminatory practices; equal protection of the laws; confrontation; compulsory process; effective assistance of counsel; notice of the evidence against him; conviction upon proof beyond a reasonable doubt on record evidence and by a unanimous jury; the enforcement of state-mandated jury selection procedures and jury trial rights, including the exercise of peremptory challenges and challenges for cause; a unanimous verdict of twelve jurors; and to reliable guilt and penalty assessments based upon accurate, reliable, relevant, and non-

prejudicial record evidence as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution; international law as established by customary international law, international human rights law, and under the doctrine of *jus cogens*. Each one of these rights was violated by each instance of juror taint, bias and/or misconduct set forth below.

In support of this claim, Mr. Bell alleges the following facts, among others to be presented after access to a complete and accurate record of the proceedings in the municipal and superior courts, full discovery and investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims One through Five, Claim Eight, and the exhibits supporting those claims are incorporated by this reference as if fully reproduced herein.

2. At various points, the trial court specifically instructed Mr. Bell's jurors on their obligations and duties to answer all questions asked of them truthfully and accurately and under penalty of perjury; not to discuss the case with anyone apart from the other jurors during deliberations; to base their decisions only upon the evidence presented in the case; not to prejudge the case before hearing all of the evidence to be presented; and to otherwise follow and decide the case in accordance with the court's instructions. (*See, e.g.*, 16 RT 528-29, 533-34; 21 RT 1112; 24 RT 1549-51; 26 RT 1768-70; 39 RT 3238-39; 42 RT 3509-10; 44 RT 3671; 46 RT 3810; 49 RT 4168; 52 RT 4434; 53 RT 4495-96.)

3. Despite these clear and emphatic admonitions, members of Mr. Bell's jury failed to fulfill their duties as jurors, including, but not limited to, the obligations to: (1) avoid the consideration of improper

extrinsic evidence; (2) avoid prejudging the case before the presentation of all evidence; (3) avoid discussing the case outside of deliberations; (4) deliberate appropriately; and (5) otherwise follow the court's instructions.

4. At the guilt-innocence phase, the jury deliberations were marked by an impasse, intimidation, and a finding of juror misconduct. The trial court committed error, *inter alia*, by denying the defense request to voir dire the jurors about their deliberations.

a. The facts and arguments set forth in Appellant's Opening Brief at pages 154-195 and Appellant's Reply Brief at pages 65-80 are incorporated by reference as if fully set forth herein.

b. The deliberations began on November 16, 1993, at 2:20 p.m. (8 CT 1826.) The jury resumed deliberations on November 17, 1993, at 9:00 a.m. (8 CT 1828-29).

c. On November 18, 1993, at 1:45 p.m., the jury sent a note to the trial court indicating that it was unable to arrive at a unanimous verdict. (5 CT 1189; 8 CT 1830; 40 RT 3378.) Over defense objections, the trial court read an admonition instructing the jury to continue its deliberations. (8 CT 1830-31; 40 RT 3380-84.) At 4:00 p.m. on November 18, 1993, the trial court received a note from juror Aron Gladney asking to be excused from the jury because of the "psychological pain," emotional battering, and intimidation she was enduring from two jurors. (5 CT 1190-90.1; 8 CT 1831; *see also* 40 RT 3385-95.)

d. On Friday, November 19, 1993, the trial court examined juror Gladney and then excused the jury from deliberations until November 22, telling the jury that "a legal issue concerning deliberations has come up." (8 CT 1832; 40 RT 3396-99, 3401-02.)

e. On November 22, 1993, the trial court received Jury Note 22—a two-page letter from juror Gladney. (5 CT 1191-91.1; 8 CT

1834; 42 RT 3447-51.) In the letter, juror Gladney said, among other things, about the deliberations:

(1) "[M]ost of your jurors are sensible, supportive and fair. However as time went by a couple became increasingly impatient and frustrated, which eventually precipitated the personal attack and conveniently overhearable [sic] sarcastic and demeaning comments about my intelligence and decision making skills. Although not specifically directed at me, additional comments about the time waste, cost and inconvenience of my position, served to further heighten my sense of isolation and duress." (5 CT 1191; 42 RT 3449.)

(2) "I have no intention to being part of a situation where a man's life is in the balance, and such a lack of basic human respect exists [among the jurors]." (5 CT 1192; 42 RT 3450.)

f. The trial court examined juror Gladney and the foreman Mark Daniels about the deliberations. (8 CT 1834; 42 RT 3458-81.)

(1) Juror Gladney stated that while the jurors were looking at a big picture depicting the victim's stab wounds, juror Martin Spring made a comment directed toward her, "You think this is crazy. What's really crazy is anyone who can look at all this and not see that a robbery was committed. That's what's really crazy." (42 RT 3474.) At the time after the "hung jury" note was sent and before it was answered, jurors made such comments as: "I can't believe the waste of time. This has got to be costing a lot of money. This is really fucked up;" and "I can't believe this is happening. This should have been over by now." (42 RT 3475.)

(2) Juror Daniels said that there was no intimidation of juror Gladney (42 RT 3479), but he admitted that he and juror Spring were both "aggressive" and "very strong opinionated individuals" and the

"strongest personalities" on the jury (42 RT 3480-81).

g. The trial court rejected trial counsel's request to voir dire all of the jurors on the intimidation in the jury room. (42 RT 3453.) If the trial court had not improperly denied trial counsel's request, the trial court would have learned at least the following:

(1) Juror Marianne Hall recalled that the guilt-innocence phase deliberations "got kind of heated" when juror Gladney refused to vote the same way as the other jurors. (Ex. 111 at 2429.)

(2) Similarly, juror Phylis Roberts recalled "rather heated" argument between juror Gladney and foreman Daniels, who were sitting at opposite ends of the table. Daniels was "louder and more forceful" than the other jurors who were also arguing with Gladney. (Ex. 110 at 2424.) The conflict between Gladney and Daniels went on for what seemed to Roberts like a long time. (Ex. 110 at 2424.)

(3) The impasse in the deliberations frustrated the jurors—particularly the foreman—and the jurors became "antsy and tired of going over the evidence." (Ex. 111 at 2429; *see also* Ex. 110 at 2424.)

h. Upon completion of the examinations of jurors Gladney and Daniels, the trial court excused juror Gladney because she was emotionally unable to continue and because she committed misconduct when she discussed the case with her husband, and replaced her with an alternate juror, Nancy Martin. (8 CT 1834-35; 42 RT 3484-85, 3491-92, 3494-96.)

i. These events had an impact on the ability and willingness of jurors to deliberate at the guilt-innocence phase and the penalty phase of Mr. Bell's trial.

(1) The newly-constituted jury soon returned a verdict of guilt. (8 CT 1835.)

(2) Jurors at the penalty phase were reticent to argue their positions and hold out for life. (Ex. 110 at 2425, 2426.)

5. Mr. Bell's right to a fair trial and his other constitutional rights set forth above were violated by the jury's failure to deliberate appropriately at the guilt-innocence phase.

a. After the trial court dismissed juror Gladney and replaced her with alternate juror Martin, it admonished the newly constituted jury to start deliberations again from the beginning. (42 RT 3497.)

b. After only one hour and fifty-five minutes of deliberations, the newly constituted jury reached its verdict. (8 CT 1835.)

c. Had the trial court conducted additional voir dire of the other jury members, it would have learned, as stated *supra*, that other jurors were in fact intimidated as a result of the conflict between juror Gladney and jurors Spring and Daniels. This intimidation made it impossible for the jury to openly deliberate as required by law.

d. The amount of time the jury spent on the guilt-innocence question and the existence of the special circumstance indicates an absence of adequate deliberations. The remaining jurors greeted alternate juror Martin happily, because they had the impression that she was going to vote for guilt and not be a holdout juror. (Ex.110 at 2424.) The cries of happiness exhibited when she joined the jury further contributed to the coercive and non-deliberative environment.

6. Mr. Bell's right to a fair trial and his other constitutional rights set forth above were violated by the presence of juror Daniels on the jury. Juror Daniels' behavior during the trial demonstrated his actual or implied bias against Mr. Bell and the defense and juror Daniels' prejudgment of the case, and the presence of juror Daniels on Mr. Bell's

jury deprived Mr. Bell of his right to a jury that impartially and indifferently adjudicated his guilt, death eligibility, and penalty.

a. On December 7, 1993, during the penalty phase, defense counsel informed the trial court that they perceived juror Daniels glaring at Mr. Bell and the defense team beginning at about the middle of the guilt-innocence phase. (48 RT 3947-50, 3952-53.) Trial counsel also noted juror Daniels' inattention to the defense presentation and frequent smirking when evidence favorable to the prosecution was elicited. (48 RT 3948-51, 3952-53.) The trial court denied defense requests to: voir dire juror Daniels on the subject; have the trial court admonish him to abide by his responsibilities as a juror; and excuse him if he did not behave in accord with his duties as a juror. (48 RT 3948-49, 3951.)

b. Two days later, on December 9, 1993, defense counsel again raised juror Daniels' bias based on his behavior in court. (50 RT 4257-59) The trial court denied the defense requests to voir dire, admonish or excuse juror Daniels. (50 RT 4259.)

c. Juror Daniels made disparaging remarks to juror Roberts about one member of the defense counsel and gave juror Roberts the impression that juror Daniels formed his opinion about the verdict before hearing all of the evidence. (Ex. 110 at 2422.)

d. Juror Daniels entered the deliberations with his decision made, and was very vocal and forceful with the other jurors during the guilt and penalty deliberations. (Ex. 110 at 2422.)

e. Juror Daniels was one of the two jurors who inflicted their opinions and arguments on juror Gladney loudly and forcefully. (Ex. 110 at 2422, 2424; 42 RT 3480-81.)

f. Juror Roberts was intimidated by juror Daniels. (Ex. 110 at 2422.)

g. During the penalty phase deliberations, juror Daniels announced that voting for death was not hard for him and that he "could pull the switch" on Mr. Bell himself. (Ex. 110 at 2426.)

h. Juror Daniels was biased against Mr. Bell and his defense and breached his obligations as a juror in several respects, including by improperly prejudging the case prior to the conclusion of the evidence at both guilt-innocence and penalty phases, failing to properly deliberate over or consider the evidence presented at both phases, and intimidating other jurors during the deliberations.

i. Mr. Bell was prejudiced by the presence of juror Daniels on his jury; and juror Daniels's misconduct had a substantial and injurious effect or influence on the jury's determination of Mr. Bell's guilt and penalty.

7. Two of Mr. Bell's jurors committed prejudicial misconduct by discussing the case with people who were not members of the jury during the penalty phase deliberations..

a. Juror Assad Kabban, in anguish about the life or death decision he was charged with making and fearing God's judgment, called his Catholic priest during the penalty phase deliberations to ask the priest what he should do in deciding the verdict. (Ex. 112 at 2432.) The priest did not tell juror Kabban what to do, but told him that God would not judge him for sentencing Mr. Bell to death and that he should do what he thought was right. (Ex. 112 at 2432.) Juror Kabban discussed the case and deliberations with a non-juror in direct contravention of the court's admonitions, and was influenced by his conversation with his priest in voting for a death sentence.

b. In addition, juror Roberts reported that juror Hall talked to her husband about the case on the night before the verdict was

returned. (Ex. 110 at 2426; *compare* Ex. 111 at 2430.)

c. The prejudice to Mr. Bell resulting from two jurors discussing the case with non-jurors and being influenced by those interactions in their sentencing decision is patent. Moreover, the misconduct of the jurors had a substantial and injurious effect and/or influence on the jury's determination of the penalty.

8. The penalty verdict rendered by Mr. Bell's jury was improperly influenced by the looming vacation of juror Wendy Rankin and the bias and intimidation of other jurors.

a. On October 19, 1993, when juror Rankin asked about her plan to schedule a vacation, the trial court informed juror Rankin, in the presence of the other jurors, that December 17, 1993, "would be the absolute outside" date for the end of the trial, and "that's even way beyond what we would expect." (24 RT 1553-54.)

b. On November 30, 1993, in the presence of all of the jurors, juror Daniels reminded the court that juror Rankin had a pre-paid vacation to Brazil scheduled for December 18, 1993. (44 RT 3669-70.) The trial court expressed concern and was troubled about a "potential crisis" if there were no alternate jurors remaining to fill in, but "did not want the jury to feel pressured to make a decision . . . by such and such date." (44 RT 3670.) After the jury was excused for the day, the trial court and counsel discussed the situation further and the court decided to speak further with juror Rankin about her vacation plans. (44 RT 3676-78.)

c. On December 3, 1993, the trial court questioned juror Rankin about the details of her travel plans, and asked her to find out whether her she could reschedule or obtain a refund for her travel plans. (46 RT 3810-17.) Rankin informed the court that she could only take the trip at the scheduled time because of her own work schedule and the

schedule of her travelling companion/caretaker (Juror Rankin is confined to a wheelchair). (46 RT 3810-12.) At this point, trial counsel had just completed the first day of their penalty-phase presentation.

d. On December 6, 1993, juror Rankin submitted Jury Note 26, informing the court of the unavoidable financial loss, approaching $12,000, she would suffer from unalterable travel scheduled for December 18, 1993, and requesting a guarantee that she would be dismissed and replaced by an alternate juror on December 17 if the case was not complete by that date. (7 CT 1475-75.1.)

e. On December 7, 1993, the trial court informed juror Rankin that it was inclined to excuse her on December 17, 1993, if a verdict had not been reached by that date, and asked juror Rankin not to discuss this situation with the jurors any more than she had done so already. (48 RT 4083-84; 8 CT 1852.)

f. The jury began deliberating the penalty for Mr. Bell on December 14, 1993, at 11:27 a.m. (8 CT 1859-61.)

g. On December 17, 1993, juror Rankin submitted Jury Note 29, reminding the trial court that she needed to be excused from jury service that day and had to leave by 3:00 p.m. to deliver insurance forms and receive travel-related medical shots before 5:00 p.m. (7 CT 1528; 8 CT 1865.)

h. On December 17, 1993, at 2:25 p.m., the jury reached its penalty verdict of death. (8 CT 1865.)

i. The jurors were all well aware the juror Rankin could not deliberate beyond December 17, 1993. (Ex. 110 at 2425; 24 RT 1553-54; 44 RT 3669-70.) They also knew, based on the excusal of juror Gladney during the guilt-innocence phase deliberations, that they would have to begin deliberating anew if an alternate juror replaced juror Rankin.

j. Juror Rankin and the other jurors wanted to reach a verdict before juror Rankin's departure date. (Ex. 110 at 2425.) She was popular amongst the members of the jury, as evidenced by the fact that she hosted a party at her home following the verdict (and her vacation), which was attended by most of the jurors and their spouses. (Ex. 112 at 2433.) The jurors also did not want to interfere with each other's holiday plans. The trial had gone on for a very long time (jury selection began on October 1), and the jurors wanted to bring it to an end. (Ex. 110 at 2425.)

k. On the last day of deliberations, juror Hall, after talking with her husband about the case, decided to change her vote to death. (Ex. 110 at 2426.) After telling this to juror Roberts, Roberts changed her vote too because she did not want to endure the intimidation of jurors Daniels and Spring and be viewed as responsible for causing a hung jury and wasting time and money. (Ex. 110 at 2426.)

l. The jury's penalty verdict was improperly influenced by the pressure of juror Rankin's need to be excused from the jury on the day the verdict was returned, and the bias and intimidation of jurors Daniels and Spring. Mr. Bell was prejudiced by the actions of the jurors, and the jurors' misconduct had a substantial and injurious effect or influence on the jury's determination of the penalty.

9. Mr. Bell's jurors committed prejudicial misconduct by improperly injecting their own untested, specialized knowledge into the guilt and penalty phase deliberations, including but not limited to the following:

a. Despite the court's admonitions and their oaths, some jurors committed prejudicial misconduct by improperly representing themselves to the jury as authorities on drugs, prison violence, and the availability of drugs in prison, extraneous information that was improperly

used by the jury in determining their verdict.

b. Juror Kabban worked at Donovan state prison at the time of trial, where he was in charge of the maintenance department. (Ex. 112 at 2431; 22 RT 1152-53.) When asked about his contact with inmates, he told the trial court that he exchanged pleasantries with inmates but did not "listen to their problems and stuff like that" because it was "not [his] business" and he kept "out of their problems." (22 RT 1153.) Despite this answer, juror Kabban believed he knew from this work as chief maintenance engineer that it was very possible that Mr. Bell would obtain and use drugs in prison and kill or attempt to kill staff or an another inmate. (Ex. 112 at 2431-32.) Juror Kabban shared his information about prison violence and the availability of drugs with the other jurors during the deliberations. (Ex. 110 at 2424-25.)

c. Other jurors shared their own experiences and knowledge about drugs with the jury during the deliberations. (Ex. 110 at 2424-25.)

d. The information shared in the deliberations was extraneous to that which was presented at trial. By virtue of these jurors' injecting their own information into the jury deliberations, Mr. Bell's constitutional rights to counsel and to confront and cross-examine witnesses were violated; and such jurors essentially became unsworn "expert" witnesses at Mr. Bell's trial.

e. The prejudice to Mr. Bell was heightened by the fact that the unsworn testimony of these jurors related to the issue of future dangerousness and was calculated to influence members of the jury who were favoring a life sentence. (Ex. 110 at 2425.) The issues involved were not general matters of fact that find their source in everyday life. These jurors affirmatively sought to sway the other jurors with their information;

and the jury's verdict indicates that their statements had the desired effect on the other jurors.

10. Two jurors had their automobiles stolen during Mr. Bell's trial. (Ex. 111 at 2428-29.) Neither juror reported this fact to the trial court. The trial court had earlier asked each juror during jury selection about whether they had been a victim of a crime (5 CT 964) and each juror had an ongoing obligation to inform the trial court of their status as crime victims so that the court could make an assessment of any potential bias or impartiality occurring as a result.

11. Each constitutional violation alleged herein, alone or in combination, was prejudicial, had a substantial and injurious influence or effect on the jury's determination of the verdicts during both phases of the trial, and rendered the proceedings fundamentally unfair. Mr. Bell's conviction and sentence must be reversed.

G. CLAIM SEVEN: THE DESTRUCTION OF THE TRIAL EXHIBITS AND FAILURE TO PRESERVE A COMPLETE, ACCURATE AND RELIABLE RECORD OF THE PROCEEDINGS DEPRIVED MR. BELL OF HIS CONSTITUTIONAL RIGHTS

Mr. Bell's conviction and sentence of death were rendered in violation of his rights to due process; equal protection; access to the courts; a reliable determination of guilt and punishment; reliable and meaningful appellate and collateral review based on a full and accurate record; effective assistance of counsel at trial and on appeal; trial before an impartial tribunal; the enforcement of mandatory state-created rights; and a determination of guilt and punishment untainted by state misconduct as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution; Penal Code sections 190.7, 1417.1, and 1417.9 and other state laws and rules; and customary

international law, international human rights law, and under the doctrine of *jus cogens*, by the superior court's failure to maintain an accurate, reliable, and complete record of the case by destroying all of the exhibits from Mr. Bell's trial.

In support of this claim, Mr. Bell alleges the following facts, among others to be presented after access to a complete and accurate record of the proceedings in the municipal and superior courts, full discovery and investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. The facts and allegations contained in Claims Three, Four, Five, and Eight and any supporting exhibits are incorporated by reference as if fully set forth herein.

2. Appellate and post-conviction review of the proceedings leading to the imposition of a death sentence is constitutionally indispensable to the reliability of both the jury's findings and the ultimate judgment.

3. The superior court knew or reasonably should have known that, as a matter of First, Eighth and Fourteenth Amendment jurisprudence and other protections, the law requires the perfection of a record of trial court proceedings in death penalty cases that accurately and comprehensively reflects the substance of all proceedings conducted in the case. The superior court also knew or reasonably should have known that California Penal Code sections 190.7 and 1417.1, and California Rules of Court, Rule 8.320 (formerly Rule 4.5 (1997)) further enforced this right by conferring on Mr. Bell a state-created right to have all trial exhibits preserved until after execution, and to have a complete record on appeal, including all exhibits whether admitted or refused.

4. On January 15, 1997, the trial court destroyed all of the

exhibits in Mr. Bell's case, apparently because the court's computer system did not include an indication that the case was a death penalty case. (18 CT 3985-86; 19 CT 4188, 4189-90.) Despite efforts to reconstruct the trial exhibits during the record correction proceedings, several unique exhibits could not be recreated. (19 CT 4188-90, 4194-4202; *see also* 18 CT 4120-21; 7 CT 1575-80.) The trial exhibits that could not be reconstructed or substituted include, but are not limited to the following items:

a. Chicago Bulls baseball hat (People's exhibit 9);

b. Portion of a TV cable (People's exhibit 10);

c. Knife (People's exhibit 11);

d. Four vials of Mr. Bell's blood (People's exhibit 14);

e. Vial of Mr. Bell's urine (People's exhibit 15);

f. Two vials of Joey Anderson's blood (People's exhibit 16);

g. Black sneakers and white socks of Mr. Bell (People's exhibit 20);

h. Jeans of Mr. Bell (People's exhibit 22);

i. Cuttings from Mr. Bell's socks and jeans (People's exhibit 23);

j. Dark blue towel with dark stains (People's exhibit 24); and

k. White t-shirt with red stains (People's exhibit 25).

5. The superior court's improper destruction of the trial exhibits resulted in an inadequate, unreliable, and incomplete appellate record, and has prejudicially prevented Mr. Bell from obtaining meaningful review of his conviction and sentence on appeal and in habeas corpus proceedings.

a. The prosecution used the destroyed exhibits in its effort to prove Mr. Bell's guilt of first degree murder with special

circumstances and to obtain a death sentence. Mr. Bell is unable to examine or test the destroyed exhibits to challenge the prosecution's theory of guilt, to demonstrate potential state or prosecutorial misconduct in either the investigation or presentation at trial, or to show that Mr. Bell's trial counsel provided prejudicially ineffective assistance of counsel. The facts and allegations demonstrating Mr. Bell's inability to obtain meaningful review of his conviction include, but are not limited to the following:

(1) The prosecution's serologist testified that a dark towel (People's exhibit 24) found at the crime scene contained a fairly large blood transfer stain on it that was consistent with a person wiping his bloody hands on the towel. (29 RT 2193-94.)

(2) The serologist testified that a white t-shirt (People's exhibit 25) found at the crime scene also had a transfer blood stain on it that was consistent with a person having picked it up with blood on his hands and wiped his hands clean with the shirt. (29 RT 2194-95.)

(3) The serologist testified about her typing of the blood of Mr. Bell (People's exhibit 14) and Joey Anderson (People's exhibit 16), and her comparisons of the known blood samples to blood found on Mr. Bell's clothing (People's exhibits 20, 22, and 23) and on Joey Anderson. (29 RT 2196-2207.)

(4) The serologist testified that the blood stains on Mr. Bell's jeans, socks, and shoes (People's exhibits 20 and 22) appeared to be transfer stains, which could be consistent with Mr. Bell having straddled Joey Anderson as he stabbed him. (29 RT 2205-06.)

(5) The prosecutor questioned defense expert Dr. David Smith about the alleged transfer stains on the towel and shirt, and the wiping of bloody hands in an effort to show Mr. Bell's behavior was goal oriented. (32 RT 2599.)

(6) The prosecutor argued in his closing argument that Mr. Bell stood over Joey Anderson when stabbing him. (40 RT 3348.)

(7) Both the defense and the prosecution presented extensive testimony and argument concerning the toxicology results obtained from testing performed by law enforcement's laboratory on Mr. Bell's blood and urine. (*See, e.g.*, 31 RT 2375-2413 (testimony of Robert West); 31 RT 2418-2499 (testimony of Alex Sevanian); 35 RT 2853-2898 (testimony of Randolph Baselt); 40 RT 3330-31 (defense counsel's argument); 40 RT 3356-59 (prosecutor's argument).)

b. Mr. Bell does not have access to any meaningful substitutes for the destroyed exhibits, and thus cannot fully evaluate, test, or challenge the related evidence and argument presented at his trial or raise claims for relief. The evidence, if it still existed, would support Mr. Bell's claims. The facts and allegations demonstrating this include the inability to test Mr. Bell's blood samples (People's exhibit 14) for the presence of chemical preservatives. (Ex. 109 at 2420.)

6. The prosecution's failure to prevent the destruction of the exhibits amounts to misconduct and interference with Mr. Bell's right to meaningful review of his conviction and sentence on appeal and in habeas corpus proceedings.

7. To the extent appellate counsel was required or permitted to challenge the incomplete and inadequate appellate record or otherwise ensure that the record was complete and adequate, appellate counsel was constitutionally ineffective in failing to do so. Appellate counsel's actions and omissions were not strategic, fell below the standards for reasonably competent counsel, and prejudiced Mr. Bell.

8. To the extent that trial counsel's actions or omissions in failing to adequately review the trial exhibits, otherwise challenge the

prosecution's case as founded on the trial exhibits, or prevent the destruction of the exhibits, these actions or omissions were not strategic and fell below the standards for reasonably competent counsel and prejudiced Mr. Bell.

9. The trial court's errors have substantially and prejudicially deprived Mr. Bell of his constitutional rights to due process, equal protection, and a meaningful appeal and collateral review of his capital murder conviction and sentence of death, as well as his rights to fair and reliable adjudicatory procedures leading to the determinations of guilt and penalty as guaranteed by the federal and state constitutions and state statutes.

H. CLAIM EIGHT: MR. BELL WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

Mr. Bell's confinement is unlawful and his conviction, and sentence were unlawfully obtained and affirmed in violation of his rights to due process; equal protection; counsel and the effective assistance of counsel; full and fair appellate proceedings based on a complete, accurate and reliable record; and reliable determinations of his guilt, death eligibility, and punishment as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments; Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution and mandatory state laws and rules concerning the appointment of counsel and meaningful appellate review in capital cases; and international law as set forth in treaties, customary international law, and under the doctrine of *jus cogens*, including but not limited to Article 14 of the International Covenant on Civil and Political Rights, by errors and omissions that caused appellate counsel's performance to fall below an objective standard of reasonableness under professional

norms prevailing at the time of Mr. Bell's appeal. But for appellate counsel's errors, singly or cumulatively, there is a reasonable probability that Mr. Bell's case would have been reversed on appeal.

In support of this claim, Mr. Bell alleges the following facts, among others to be presented after access to a complete and accurate record of the proceedings in the municipal and superior courts, full discovery and investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims One through Seven and Nine through Thirteen and the supporting exhibits are incorporated by this reference as if fully set forth herein.

2. Mr. Bell is indigent and the state therefore appointed counsel to represent him on appeal.

a. On September 16, 1998, this Court appointed Anthony J. Dain as counsel for both the automatic appeal and related state habeas corpus and executive clemency proceedings.

b. The record on appeal was filed on November 5, 2001.

c. Appellate counsel filed Appellant's Opening Brief on June 12, 2003, raising seven arguments (including a cumulative error argument) for reversal of Mr. Bell's conviction and sentence.

d. Appellant's Reply Brief was filed on January 28, 2005.

e. At this Court's invitation, appellate counsel filed supplemental letter briefs on September 25, 2006, and October 13, 2006, concerning the effect of *Johnson v. California*, 545 U.S. 162 (2005) and *People v. Johnson,* 38 Cal. 4th 1096 (2006), on Argument I in Appellant's Opening Brief.

f. This Court affirmed the judgment in its entirety on February 15, 2007. *People v. Bell*, 40 Cal. 4th 582 (2007).

3. Omissions or errors of commission by appellate counsel that this Court or respondent may note, such as the failure to marshal all available facts in support of legal claims, the failure to advance legal claims which could have been raised on appeal because they fully appear in the certified record, the failure to advance every available legal basis for a litigated claim, or the failure to advance applicable exceptions to procedural bars were not the product of a reasonable—or any—tactical decision by appellate counsel.

4. Error which is apparent on the face of the record but which, due to the ineffectiveness of trial counsel, was not objected to, need not be raised on direct appeal. *See In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998). If this Court finds that any errors raised in this amended petition to which trial counsel did not raise objections should have been raised on direct appeal, then the failure of appellate counsel to do so was unreasonable, ineffective, and prejudicial.

5. Mr. Bell believes that every issue presented in this amended petition rests in whole or in material part on matters outside the certified record on appeal, involve allegations of trial counsel's ineffectiveness, or are otherwise cognizable on habeas corpus, thereby making the present amended petition the only adequate and proper method of redress. However, should respondent and this Court disagree, then each issue or relevant subpart thereof must be considered in this proceeding in the context of appellate counsel's deficient performance as each one of the issues presented in this amended petition is sufficiently meritorious and would have resulted in the grant of relief had it been presented on appeal.

6. In the automatic appeal to this Court, appellate counsel unreasonably and prejudicially failed to raise the trial court's disparate and biased questioning of prospective jurors concerning their views on the death

penalty.

a. Trial counsel objected to the trial court's disparate and inappropriate questioning of prospective jurors, in a non-sequestered setting, concerning their views on the death penalty which had the potential of biasing the voir dire of other jurors. (21 RT 959-62, 1015-20, 1028-30, 1101; 22 RT 1293-1303.)

b. The trial court improperly rejected defense requests for attorney-conducted, sequestered individual voir dire of the prospective jurors. The trial court's conduct prejudicially impaired trial counsel's ability to effectively use voir dire to ensure an unbiased and unprejudiced jury and thus violated Mr. Bell's state and federal constitutional rights to due process, an impartial jury, the effective assistance of counsel, and reliable determinations of his guilt, death eligibility, and punishment.

7. Appellate counsel unreasonably and prejudicially failed to raise the trial court's error in ordering, without statutory or constitutional authority, Mr. Bell to submit to a psychiatric evaluation by a prosecution-retained psychiatrist, ruling that Mr. Bell was not entitled to have his trial counsel or a defense-retained psychologist or psychiatrist present at the evaluation, permitting the prosecution to inform the jury that Mr. Bell declined to submit to the evaluation, refusing to strike the testimony of Mark Mills, M.D.—the prosecution expert who attempted to evaluate Mr. Bell—and refusing to use the proposed jury instruction offered by the defense without modification.

a. On June 16, 1993, the prosecutor filed a Motion in Limine for an Order Directing the Psychiatric Evaluation of the Defendant. (1 CT 233-38.)

b. On August 2, 1993, trial counsel filed the Defendant's Opposition Brief to Prosecution Request for Psychiatric Evaluation. (3 CT

696-706.)

c. On September 7, 1993, the trial court found the prosecution's Motion in Limine for an Order Directing the Psychiatric Evaluation of the Defendant was not ripe for adjudication and deferred ruling on it until such time as the defense presented evidence at trial placing Mr. Bell's mental state in issue. (13 RT 292-95; 8 CT 1761.)

d. On October 6, 1993, the trial court reiterated that it had deferred ruling on the prosecutor's motion, but opined that "if the defense tenders a mental condition, the ruling under *McPeters* and *Danis* suggest that [the prosecutor] should be able to do the examination." (19 RT 868.)

e. On November 4, 1993, the trial court revisited the prosecutor's motion for a psychiatric evaluation of Mr. Bell. Over defense objection, the trial court granted the prosecutor's motion and ordered that Mr. Bell submit to a psychiatric evaluation—free of any predetermined restrictions—by a psychologist or psychiatrist of the prosecutor's choice. (34 RT 2817-18; *see also* 34 RT 2815-22; 8 CT 1815.) The trial court then issued an order directing that Dr. Mills be admitted into the county jail for the purpose of interviewing and examining Mr. Bell. (5 CT 1146.)

f. Later that day, the trial court denied a defense request to have defense counsel, a defense psychological expert, or both present for the evaluation by Dr. Mills. (34 RT 2837-47; 8 CT 1815-16.)

g. On November 8, 1993, the trial court ruled that the prosecutor could introduce evidence that Mr. Bell had declined to be evaluated. (35 RT 2901.) The defense objected, and then agreed to enter a stipulation that the trial court had authorized the evaluation and that Mr. Bell was aware of that authorization. (35 RT 2901-07; 8 CT 1819.)

h. On November 10, 1993, the stipulation was read to the jury during the testimony of Dr. Mills (37 RT 3051; 8 CT 1822), and Dr.

Mills testified that Mr. Bell declined to be interviewed when Dr. Mills asked to do so on November 5, 1993. (37 RT 3051-53).

i. Three jurors submitted jury notes on November 10, 1993, inquiring about the facts and circumstances of Mr. Bell's declination. (5 CT 1154-55, 1174.)

(1) Juror Assad Kabban asked if Mr. Bell was "given the opportunity to have his lawyers with him for the interview to be conducted by Dr. Mark J. Mills." (5 CT 1154.) In response the trial court told the jury that the court had ruled that Mr. Bell "did not have the right to have his attorneys present." (37 RT 3085.)

(2) Juror Clifton Cunningham asked if Mr. Bell was "advised to decline the interview with Dr. Mills." (5 CT 1155.) The trial court told the jury that it could not answer that question. (37 RT 3085; *see also* 37 RT 3083.)

(3) Juror Marianne Hall asked if Mr. Bell knew "about the court order before Dr. Mills showed up at the jail" and if the defense could have let Mr. Bell know about the interview. (5 CT 1174.) In response the trial court told the jury that "Mr. Bell was present in court when [it] authorized an interview by the People's psychiatrist to take place on Friday afternoon, November 5th." (37 RT 3133.)

j. On November 15, 1993, the defense moved to strike the testimony of Dr. Mills based on the trial court's erroneous rulings, over defense objections, authorizing Dr. Mills to examine Mr. Bell without limitation or counsel and allowing the jury to be informed that Mr. Bell declined to be examined. (39 RT 3234-36; 8 CT 1825.)

k. The trial court instructed the jury, as part of the guilt-innocence phase jury instructions, that they "heard evidence that the court authorized the prosecution to have their psychiatrist examine Mr. Bell, and

that Mr. Bell declined to submit to the evaluation. You are advised that Mr. Bell was entitled to decline to submit to the psychiatric evaluation." (39 RT 3272; 6 CT 1280.) The trial court refused the defense request to include the phrase "as a matter of law" at the end of this instruction. (38 RT 3191-93; 5 CT 1177.)

l. Trial counsel's numerous objections and requests concerning the evaluation of Mr. Bell by a prosecution-retained expert should have been sustained, and the trial court's rulings were uniformly unauthorized and erroneous under constitutional and statutory law.

8. Appellate counsel unreasonably and prejudicially failed to raise the trial court's error in denying the defense request for a separate penalty phase jury and to voir dire the jury after the guilty verdicts.

a. Prior to trial, the defense filed a Motion for a Separate Penalty Phase Jury. (2 CT 416-23.) That motion was denied on September 8, 1993. (8 CT 1763; 13 RT 361-64.)

b. The defense filed Supplemental Points and Authorities in Support of a Motion for a Separate Penalty Phase Jury after the guilt phase verdicts. (6 CT 1315-27.) The trial court improperly denied the defense request. (43 RT 3577-78; 8 CT 1841.)

9. Appellate counsel unreasonably and prejudicially failed to raise on direct appeal the trial court's use of an erroneous reasonable doubt instruction at both the guilt-innocence phase and the penalty phase of trial.

a. On October 28, 1993, the defense submitted Proposed Jury Instructions that included reasonable doubt instructions. (5 CT 1080-89.) The defense also filed Points and Authorities in Support of Defendant's Proposed Instruction on Reasonable Doubt challenging the constitutionality of the standard reasonable doubt instruction—CALJIC 2.90. (5 CT 1073-79.)

b. The trial court improperly refused the proposed jury instructions and denied the defense objection to the use of CALJIC 2.90. (8 CT 1824; 38 RT 3143-45, 3206-07.)

c. The trial court instructed the jury using CALJIC 2.90 at the guilt-innocence phase (6 CT 1281; 39 RT 3272), and at the penalty phase (7 CT 1536; 52 RT 4386).

d. The defense Motion for a New Trial again raised the trial court's instructional error on the reasonable doubt standard. (7 CT 1650-51.)

e. The trial court denied the new trial motion. (8 CT 1879-82; 61 RT 4633-34.)

10. Appellate counsel unreasonably and prejudicially failed to raise on direct appeal the trial court's refusal to instruct the jury in accord with the penalty phase jury instructions proposed by the defense.

a. On December 6, 1993, the defense filed a Motion for Factually Tailored Penalty Phase Jury Instructions. (6 CT 1434-41.)

b. The defense filed four sets of Proposed Penalty Phase Jury Instructions. (6 CT 1396-1442; 7 CT 1442-74, 1481-1500, 1501-09.)

c. The trial court wrongly rejected the vast majority of the defense proposed jury instructions (52 RT 4348-59, 4360-71, 4376-81), and the final instructions given to the jury included only nine of the seventy-two defense proposed jury instructions—and some of nine were given as modified. (7 CT 1537, 1539-46.)

d. In the Motion for a New Trial, the defense again challenged the trial court's failure to instruct the jury in accord with defendant's proposed penalty phase jury instruction no. 70, which clearly and appropriately set forth the manner in which the jury was to consider the aggravation and mitigation and decide the appropriate penalty. (7 CT 1651-

52; *see also* 52 RT 4360-71, 4376-81.)

e. The trial court denied the new trial motion. (8 CT 1879-82; 61 RT 4633-34.)

11. Appellate counsel unreasonably and prejudicially failed to raise on direct appeal the trial court's erroneous admission of impermissible victim impact evidence at the penalty phase of Mr. Bell's trial.

a. The defense filed a Motion to Exclude Evidence of Victim Impact During the Penalty Phase (6 CT 1294-1302), and the prosecutor filed a Motion in Limine in Support of Admission of Victim Impact Evidence (6 CT 1371-76).

b. After hearing argument the trial court denied the Motion to Exclude Evidence of Victim Impact During the Penalty Phase. (8 CT 1840-41; 43 RT 3539-51, 3578-82; 44 RT 3683-84.)

c. The prosecutor presented impermissible victim impact evidence at the penalty phase during the testimony of Joseph Fuller, the grandfather of Joey Anderson (44 RT 3617-23), Christopher Cap (44 RT 3624-41), and Deborah Mitchell, the mother of Joey Anderson (44 RT 3659-68).

12. Appellate counsel unreasonably and prejudicially failed to raise on direct appeal the erroneous denial of the defense Motion to Voir Dire the Trial Judge Regarding His Political Intentions and to Recuse Him in Accordance with Code of Civil Procedure section 170.1(a)(6). (7 CT 1603-19.)

a. On February 3, 1994, in an Answer to the defense motion, the trial court denied any present intention of running for elected political office during the calendar year 1994 or the foreseeable future, but expressed an intention to seek re-election to the San Diego Superior Court in 1996. (7 CT 1653.)

b. At a hearing on the defense motion, the court found and the parties stipulated that the trial court was considering running for Congress when Mr. Bell's trial began in October of 1993. (8 CT 1876; 59 RT 4603.) Nevertheless, the motion was denied. (8 CT 1876; 59 RT 4603-05.)

c. On February 24, 1994, the Fourth District Court of Appeal, Division One denied Mr. Bell's Petition for Writ of Mandate (Case No. D020513) concerning the denial of the motion to recuse the trial court. (8 CT 1708.)

13. Appellate counsel had no reasonable, informed basis for failing to raise the above errors, nor is there any reason that justifies or excuses appellate counsel's failings. In the absence of the errors by appellate counsel, individually and cumulatively, Mr. Bell's convictions and sentence would not have been affirmed on appeal by this Court. Appellate counsel's prejudicially deficient performance had a substantial and injurious influence and effect on this Court's resolution of Mr. Bell's automatic appeal.

I. CLAIM NINE: THE CALIFORNIA DEATH PENALTY STATUTE UNCONSTITUTIONALLY FAILS TO NARROW THE CLASS OF OFFENDERS ELIGIBLE FOR THE DEATH PENALTY

Mr. Bell's capital murder conviction, judgment of death, and confinement are unlawful and were obtained in violation of his right to be free of the infliction of cruel and unusual punishment; due process; counsel and the effective assistance thereof; and equal protection as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution and other state law; and international law as set forth in treaties, customary law, human rights law, and under the

doctrine of *jus cogens*, because the California death penalty statute fails to narrow the class of offenders eligible for the death penalty; fails to justify the imposition of a more severe sentence on defendants like Mr. Bell compared to others found guilty of murder; permits the imposition of a freakish, wanton, arbitrary, and capricious judgment of death; and allows the arbitrary selection of defendants such as Mr. Bell for prosecution without consistent guidelines to ensure reliability.

In support of this claim, Mr. Bell alleges the following facts, among others to be presented after access to a complete and accurate record of the proceedings in the municipal and superior courts, full discovery and investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. The facts and arguments challenging California's death penalty statute and the operation of the special circumstances in California Penal Code section 190.2 set forth at pages 196-207 of Mr. Bell's opening brief on appeal and at pages 80-91 of Mr. Bell's reply brief in *People v. Bell*, California Supreme Court Case No. S038499, are incorporated by this reference as if fully alleged herein.

2. This claim is represented in this amended petition because the factual support contained herein was not in the record on appeal in *People v. Bell*, and thus was not available for the Court's consideration.

3. Mr. Bell was arrested in June 1992. He was tried and convicted in 1993-1994 on one count of murder with the special circumstance of murder in the commission of a robbery.

4. Under the Eighth and Fourteenth Amendments, a death penalty statute must, by rational and objective criteria, genuinely narrow the group of murderers who may be subject to the death penalty.

5. California's death penalty statute as written fails to perform

this narrowing, and this Court's interpretations of the statute have actually expanded the statute's reach.

6. As written and applied, the California death penalty statute potentially applies to the great majority of murders and permits any conceivable circumstance of a crime—even diametrically opposite ones, e.g., the fact that a decedent was young as well as the fact that a decedent was old, the fact that a decedent was killed at home as well as the fact that a decedent was killed outside the home—to be used to justify the imposition of the death penalty.

7. Interpretations of California's death penalty statute by this Court and the United States Supreme Court have placed the burden of narrowing the class of murderers to those most deserving of death on California Penal Code section 190.2, the "special circumstances" section of the statute.

8. When the charged crime was committed in this case, California Penal Code section 190.2 contained 28 different crimes punishable by death.[10] (Ex. 90 at 1688.)

9. Empirical evidence shows that the overwhelming majority of murders in California could be charged as capital murders and in virtually all of them, at least one special circumstance could be proved. As a result, the California death penalty statute failed and fails to genuinely narrow the class of death-eligible murderers in violation of the Eighth and Fourteenth Amendments, and there was and is no meaningful basis upon which to distinguish the cases in which the death penalty was or is imposed from

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[10] A twenty-ninth special circumstance—the "heinous, atrocious, or cruel" special circumstance, Penal Code section 190.2(a)(14)—had been invalidated previously by this Court but remains in section 190.2. (Ex. 90 at 1688.)

those in which it was not at the time of Mr. Bell's case and presently. *See* Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. Rev. 1283, 1332-35 (1997); Steven F. Shatz, *The Eighth Amendment, The Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 Fla. L. Rev. 719 (2007).

10. California's death penalty scheme defines death-eligibility so broadly that it creates a greater risk of arbitrary death sentences than the death penalty schemes in place prior to *Furman v. Georgia*, 408 U.S. 238 (1972). California's statutorily-defined death-eligible class is so large and imposition of the death penalty on members of the class so arbitrary and infrequent that it violates *Furman* and its progeny.

11. The failure of California Penal Code section 190.2 to genuinely narrow the class of death eligible murderers is neither corrected nor ameliorated by Penal Code section 190.3, the statute that sets forth the circumstances in aggravation and mitigation which the jury is to consider in determining whether to impose a sentence of death upon a defendant convicted of special circumstance murder. In practice and as a result of interpretation by this Court, the factors in Penal Code section 190.3 have been used in ways so arbitrary and contradictory as to violate due process of law. Furthermore, this Court's interpretations of the section 190.3 factors have created a process biased in favor of death that does not genuinely narrow the pool of murderers to those most deserving of death.

12. Safeguards employed by most other states to ensure a fair jury verdict are not a part of California law, and the review of death judgments by this Court yields an extraordinarily high affirmance rate.

13. Individual prosecutors in California are afforded completely unguided discretion to determine whether to charge special circumstances and to seek penalties of death, thereby creating a substantial risk of county-

by-county arbitrariness. *See People v. Adcox*, 47 Cal. 3d 207, 275-76 (1988) (Broussard, J., concurring).

14. The present death penalty law in California is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few persons for the ultimate sanction.

15. The number and breadth of the special circumstances, i.e., the death-eligibility finding under California's death penalty statute, has steadily increased since 1977.

a. In 1977, the California Legislature enacted a new death penalty law. Under that law, one of twelve special circumstances had to be proved beyond a reasonable doubt to make a murderer death-eligible. Stats. 1977, ch. 316, at 1255-66. Under the 1977 statute, death eligibility was to be the exception rather than the rule.

b. The 1977 law was superseded in 1978 by the enactment of Proposition 7, known as the "Briggs Initiative." Mr. Bell was tried and convicted under this 1978 death penalty law. The intent of the voters as expressed in the ballot proposition arguments was to make the death penalty applicable to all murders.

c. The Briggs Initiative sought to achieve this result by expanding the scope of Penal Code section 190.2 in a number of respects.

(1) The Briggs Initiative more than doubled the number of special circumstances.

(2) 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 have no homicide mens rea requirement for the actual killer.

See Penal Code § 190.2(a)(17); *see also People v. Anderson*, 43 Cal. 3d 1104, 1138-39 (1987).

d. Since adoption of the Briggs initiative in 1978, the Legislature, the electorate, and the California Supreme Court have continued to expand the scope of both first-degree murder and the special circumstances.

16. The death-eligible class created by the California death penalty scheme is too broad to comply with *Furman*.

a. As a result of the number of special circumstances, the definition of first-degree murder, and judicial rulings on the scope of first-degree murder, the special circumstances, and common felony statutes, a substantial majority of murders in California could be charged as first-degree murder and, in virtually all of them, at least one special circumstance could be proved.

b. First-degree murder in California is defined by Penal Code section 189. As it read at the time of the crime charged in this case, 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.

c. At the time of Mr. Bell's crime, Penal Code section 190.2 contained twenty-eight special circumstances, or twenty-eight different crimes punishable by death.

d. In 1992, there were only seven fact situations where a defendant could theoretically have been guilty of first degree murder and not have been death eligible. (Ex. 90 at 1688-89.)

e. Virtually all premeditated murders would have been capital murders because, by definition, most premeditated murders are

committed while the defendant was lying in wait. Penal Code § 190.2(a)(15); *see People v. Morales*, 48 Cal. 3d 527, 557 (1989); *Morales*, 48 Cal. 3d at 575 (Mosk, J., concurring and dissenting); *see also People v. Ceja*, 4 Cal. 4th 1134, 1146-47 (1993) (Kennard, J., concurring).

f. The situation is similar with regard to unintentional first-degree murders. Unintentional murders can be first-degree murders by virtue of the felony-murder rule. Penal Code § 189. An unintentional killing during one of the listed felonies makes the actual killer death eligible.

g. Empirical evidence based on a survey of 596 published and unpublished appellate decisions from first- and second-degree murder convictions 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 ("statewide study"), demonstrates that Penal Code section 190.2 fails to perform the narrowing function required under the Eighth and Fourteenth Amendments. Shatz & Rivkind, at 1327-35. (Ex. 90 at 1689-92.)

(1) The 596 appellate decisions included 253 published opinions by this Court and the Court of Appeal for the First District; 151 unpublished opinions by the Court of Appeal for the First District, and 192 appellate decisions in second degree murder cases decided by this Court and the Court of Appeal for the First District. Special circumstances were or could have been found in 87 percent of the first degree murder conviction cases.

(2) When juvenile first degree murderers were excluded from these groups because they are not death eligible, the result was still that more than 84 percent of first degree murderers were statutorily death eligible during the period covered by the study.

(3) The 78 unappealed murder conviction cases included all known cases from Kern County and San Francisco County and a substantial majority of the cases from Alameda County. Special circumstances were or could have been found in 89 percent of the first degree murder conviction cases.

(4) Even among convicted second degree murderers the percent against whom special circumstances could have been found was never below 80 percent during the period covered by the statewide study.

h. Approximately seven out of eight first-degree murder cases were factually special circumstances cases, the majority of first-degree murders were felony-murders, and felony-murders were virtually all special circumstance murders. California's felony-murder special circumstances alone defeat any possibility of genuine narrowing. Shatz & Rivkind, at 1332.

i. Only 9.6 percent of those convicted of first degree murder were sentenced to death during the period from 1988 to 1992. (Ex. 90 at 1690.)

j. By using the same calculation methods as were used in the statewide study, at the time of the homicide in Mr. Bell's case, approximately 87 percent of first-degree murder convictions were factual special circumstance cases. (Ex. 90 at 1690.) The death sentence rate was approximately 11 percent. (Ex. 90 at 1690-91.)

k. A second survey of murder conviction cases in Alameda County ("Alameda County study") involved 803 murders (including all the death penalty cases) committed between November 8, 1978 (the effective date of the 1978 Death Penalty Law) and November 7, 2001. Steven F. Shatz, *The Eighth Amendment, The Death Penalty, and*

Ordinary Robbery-Burglary Murderers: A California Case Study, 59 Fla. L. Rev. 719 (2007).

l. The results of the Alameda County study revealed a death sentence rate for convicted first-degree murderers who were eligible for the death penalty of 12.6 percent. This higher rate is likely attributable to Alameda County's status as a "high death" county and, as with the rate noted above, it likely overstates the actual death sentence rate. (Ex. 90 at 1692-93.)

m. The death sentence rate for convicted murderers who committed the murder during the commission of a robbery, a burglary, or a robbery and burglary (and where the facts did not support another special circumstance) was approximately 5.5 percent in the statewide study and 4.5 percent in the Alameda County study, an average rate of 5 percent. (Ex. 90 at 1694-95.)

n. These rates are significantly below the assumed percentage of death judgments at the time of *Furman* (15-20 percent), a percentage impliedly found by the majority of the United States Supreme Court to create enough risk of arbitrariness to violate the Eighth Amendment.

17. 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 from those in which it is not. 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.

18. The failure of California Penal Code section 190.2 to narrow the death-eligible class is neither corrected nor ameliorated by controls at other points in the process. The failure of Penal Code section 190.2 to narrow is not ameliorated by the aggravating and mitigating circumstances in Penal Code section 190.3.

a. Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having found that the broad term "circumstances of the crime" meets constitutional scrutiny, this Court has never applied any limiting construction to this factor.

b. Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

(1) Because the defendant struck many blows and inflicted multiple wounds, or because the defendant killed with a single execution-style wound;

(2) Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification), or because the defendant killed the victim without any motive at all;

(3) Because the defendant killed the victim in cold blood, or because the defendant killed the victim during a savage frenzy;

(4) Because the defendant engaged in a cover-up to conceal his crime, or because the defendant did not engage in a cover-up and so must have been proud of it;

(5) Because the defendant made the victim endure the terror of anticipating a violent death, or because the defendant killed instantly without any warning;

(6) Because the victim had children, or because the victim had not yet had a chance to have children;

(7) Because the victim struggled prior to death, or because the victim did not struggle;

(8) Because the defendant had a prior relationship with the victim, or because the victim was a complete stranger to the defendant.

c. Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of factors inevitably present in every homicide:

(1) The age of the victim: Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.

(2) The method of killing: Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed, or consumed by fire.

(3) The motive of the killing: Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating

circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.

(4) The time of the killing: Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning, or in the middle of the day.

(5) The location of the killing: Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park, or in a remote location.

d. The factor (a) aggravating circumstance is applied in practice by prosecutors as an aggravating factor in every case without limitation.

19. Individual prosecutors in California are afforded complete discretion to determine whether to charge special circumstances and whether to seek death, thereby creating substantial risk of county-by-county arbitrariness. Mr. Bell would not have been charged with the death penalty had he been arrested and prosecuted for the same crimes in many other counties in California. As a result of the definition of first-degree murder, judicial rulings on the scope of first-degree murder and the special circumstances, and the nature and number of special circumstances and the common felony statutes, a substantial majority of murders in California could be charged as first-degree murder and, in virtually all of them, at least one special circumstance could be proved.

20. The California death penalty scheme does not afford any additional protections by statute or decisional law that serve to narrow the class of death-eligible murderers or meaningfully distinguish the cases in

which the death penalty is imposed from those in which it is not. Nothing in California's death penalty scheme that might otherwise save the infirm eligibility mechanism does so.

a. The California death penalty statute, with one exception, does not require the jury to find the existence of any aggravating factor beyond a reasonable doubt and this Court has not imposed such a requirement judicially.

b. The California scheme does not require the jury to find that the aggravating factors outweigh those in mitigation by proof beyond a reasonable doubt.

c. The California scheme does not require any written findings specifying the aggravating factors that the jury relied on in reaching a death verdict.

d. The California scheme does not require the jury to agree unanimously (or even by a majority) on the aggravating factors used to decide the appropriate sentence.

e. The California scheme does not require the jury to determine beyond a reasonable doubt that a death sentence is appropriate.

f. The California scheme does not require either the trial court or the California Supreme Court to compare death-eligible cases and examine the proportionality of the sentences imposed, i.e., inter-case proportionality review.

21. Because almost all first-degree murders in California fall within the special circumstances enumerated in Penal Code section 190.2, California's individual prosecutors are afforded complete discretion to determine whether to charge special circumstances and seek penalties of death, and the California statutory scheme contains none of the safeguards common to other death penalty sentencing schemes to guard against the

arbitrary imposition of death, California's death penalty statute fails to genuinely narrow 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.

22. Because Mr. Bell was prosecuted under this overly inclusive and unconstitutional statute, his death sentence is invalid and a writ of habeas corpus should issue reversing his penalty.

23. Trial counsel's failure to raise the challenges contained in this claim prejudicially violated Mr. Bell's constitutional right to the effective assistance of counsel. Trial counsel did not have any legitimate strategic reason for failing to raise the above challenges to the prosecution of Mr. Bell for capital murder.

24. To the extent appellate counsel was required or permitted to raise the above challenge to Mr. Bell's conviction and sentence of death on any of the foregoing grounds, appellate counsel was constitutionally ineffective for failing to do so. Appellate counsel's actions and omissions were not strategic, fell below the standards for reasonably competent counsel, and prejudiced Mr. Bell.

J. CLAIM TEN: MR. BELL'S CONVICTION AND DEATH SENTENCE VIOLATE INTERNATIONAL LAW

Mr. Bell's conviction, sentence, and confinement were unlawfully obtained in violation of international human rights law as established in treaties, customary international law, and under the doctrine of *jus cogens*, as recognized by established federal constitutional principles and binding on all California and federal agencies and entities under Article VI, section 2 of the United States Constitution, because these authorities prohibit the execution of individuals, like Mr. Bell, who have been deprived of fundamental rights, whose trials were infected with racial animus, and who

were mentally disordered at the time of the crime and remain so presently.

In support of this claim, Mr. Bell alleges the following facts, among others to be presented after access to a complete and accurate record of the proceedings in the municipal and superior courts, full discovery and investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in each claim in this Amended Petition and accompanying exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. International law, including international human rights law, has three primary sources: treaties, custom, and *jus cogens*.

a. Treaty law consists of obligations that nations expressly accept between and among themselves by a formal agreement or document.

b. Customary law is derived from the consistent practices of states or nations ("customs and usages of civilized nations") and includes international norms to which most countries adhere because of a sense of legal duty or "*opinio juris.*"

c. Certain norms or principles become so widespread throughout the world's major legal systems that they achieve the binding force of a peremptory norm or *jus cogens*. *See* Vienna Convention on the Law of Nations, Article 53 (defining *jus cogens* as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character").

3. International law from all of these sources has been part of the federal law of this country since its establishment and was affirmed as such more than a century ago by the United States Supreme Court. *See The*

Paquete Habana, 175 U.S. 677, 700 (1900); *Lawrence v. Texas*, 539 U.S. 558 (2003) (citing decisions of the European Court of Human Rights in analysis of Due Process Clause requirements as indicative of relevant "values we share with a wider civilization"); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (Court expressly considers the opinion of the "world community" in concluding that the execution of mentally retarded offenders violates the Eighth Amendment); *Roper v. Simmons,* 543 U.S. 551, 575-78 (2005) (discussing foreign and international law prohibiting the execution of juvenile offenders); *see also* Rest.3d Foreign Relations Law of the United States, § 111, p.1 (1987) ("International law and international agreements of the United States are law of the United States and Supreme over the law of the several states"); § 702, Commentary c. (customary law of human rights is part of law of the United States to be applied as such by states and federal courts).

4. International treaties to which the United States is a party, including the International Covenant on Civil and Political Rights, recognize the right to life. International Covenant on Civil and Political Rights ("ICCPR"), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), adopted December 19, 1966, art. 6; 999 U.N.T.S. 171 (entered into force March 23, 1976).

a. The ICCPR, which was ratified by the United States on June 8, 1992, guarantees a range of rights including that "every human being has the inherent right to life" and "[n]o one shall be arbitrarily deprived of his life." ICCPR, Art. 6.

b. The ICCPR requires the United States, as a state party to the covenant, to protect against official violations of the Covenant. Article 2(1) of the ICCPR obligates parties to the Covenant to "respect and ensure to all individuals within its territory . . . the rights recognized in the

present Covenant, without distinction of any kind . . . ." ICCPR, Art. 2.

c. The State of California is bound by the ICCPR because the United States has signed and ratified the treaty. In addition, under Article 4 of the ICCPR, no country is allowed to derogate from Article 6. ICCPR at Art. 4. Therefore, the State of California has an obligation not to take life arbitrarily.

d. In *Van Alphen v. The Netherlands*, the Human Rights Committee held that "arbitrariness" encompasses notions of inappropriateness, injustice, and lack of predictability. No. 305/1988, U.N. Doc. A/45/40, Vol. II, p. 108, § 5.8. In addition, a United Nations report on human rights in the United States lists several specific ways in which the American legal system operates to take life arbitrarily. *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/1998/68 (Add. 3) (1998).

e. U.N. Special Rapporteur Bacre Waly Ndiaye found "[m]any factors other than the crime itself, appear to influence the imposition of the death sentence [in the United States]." Class, race, and economic status, both of the victim and the defendant, are said to be key elements. *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/1998/68 (Add. 3) (1998). Other elements he found to unjustly affect decisions regarding whether convicted persons should live or die include: the qualifications of the capital defendant's lawyer; the exclusion of people who are opposed to the death penalty from juries; varying degrees of information and guidance given to the jury, including the importance of mitigating factors; prosecutorial discretion to seek the death penalty; and judicial elections and retention requirements. *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/1998/68 (Add. 3) (1998).

f. Other applicable treaty articles forbidding the imposition of the death penalty on Mr. Bell include, but are not limited to, ICCPR, Art. 9 ("[n]o one shall be subjected to arbitrary arrest"), ICCPR, Art. 14 (right to review of conviction and sentence by a higher tribunal "according to the law"), ICCPR, Art. 18 ("right to freedom of thought"), UDHR, Art. 18 (same), and ICCPR, Art. 7 (prohibition against cruel, inhuman or degrading treatment or punishment). *See also* The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

5. Customary international law prohibits the imposition of the death penalty on Mr. Bell. The Universal Declaration of Human Rights ("UDHR"), a fundamental expression of customary international law, includes declarations of rights belonging to each individual, including "the right to life, liberty, and security of the person" (UDHR, G.A. Res. 217, U.N. Doc. A/810, art. 3 (1948)) and the "right to fair and public hearing by independent and impartial tribunal" (UDHR, art. 10). The State of California is bound by the UDHR because the document is a fundamental element of customary international law.

6. Reasons why Mr. Bell's conviction, sentence, and confinement are arbitrary and therefore violate international law are described throughout this Amended Petition. Some examples include, but are not limited to: Mr. Bell is indigent, Mr. Bell's attorneys failed to provide reasonable representation at trial, unreliable evidence was used to convict Mr. Bell and sentence him to death, his jury was selected in an unjust manner, his jurors committed misconduct when deciding the case, compelling mitigation was not presented or considered by the jury, and the prosecutor had overly broad discretion in whether or not to seek the death

penalty against Mr. Bell.

7. The prohibition against the imposition of the death penalty on mentally disordered individuals qualifies as an international norm or legally binding international law.

a. In 1984, the United Nations Economic and Social Council (ECOSOC) adopted standards relating to the death penalty, prohibiting the execution of pregnant women, new mothers, and persons who have become insane. *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, ECOSOC Resolution 1984/50 (May 15, 1984) U.N. ESCOR Supp. (No. 1) at 33, U.S. Doc E/1984/84, Para. 3.

b. In 1989, the ECOSOC recommended that member states eliminate the death penalty for individuals suffering from mental retardation or extremely limited mental competence at the time of sentencing or execution. *Implementation of Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, ECOSOC Resolution 1989/64 (May 24, 1989) Para. 1(d).

c. On June 25, 2001, the Parliamentary Assembly of the Council of Europe, an entity made up of 43 member nations from Europe and on which the United States enjoys observer status, condemned the execution of juvenile offenders, persons suffering from mental illness, and persons afflicted with mental retardation. Eur. Parl. Ass., 2001 Sess., Res. 1253, ¶ 5 (2001).

d. In February 2002, the Council of Europe adopted Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) extending the abolition of the death penalty to all circumstances, regardless of declarations of war. Twenty-six countries have ratified the protocol and

sixteen additional nations have signed it. Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Eur., protocol no. 13, May 3, 2002, Europ. T.S. No. 187.

e. For the many years, the United Nations Commission on Human Rights officially registered the position that the continued use of the death penalty against mentally disordered individuals in the United States is a violation of international law. Beginning in 1999, the U.N. Commission on Human Rights specifically urged "all States that still maintain the death penalty . . . not to impose the death penalty on a person suffering from any forms of mental disorder or to execute any such person." *See The Question of the Death Penalty*, Hum. Rts. Comm., 61st Sess., Resolution 2005/59 (2005) E/CN.4/2005/135; *The Question of the Death Penalty*, Hum. Rts. Comm., 60th Sess., Resolution 2004/67 (2004) E/CN.4/RES/2004/67; *The Question of the Death Penalty*, Hum. Rts. Comm., 59th Sess., Resolution 2003/67 (2003) E/CN.4/RES/2003/67 *The Question of the Death Penalty,* Hum. Rts. Comm., 58th Sess., Resolution 2002/77 (2002) E/CN.4/RES/2002/77; *The Question of the Death Penalty,* Hum. Rts. Comm., 57th Sess., Resolution 2001/68 (2001) E/CN.4/RES/2001/68; *The Question of the Death Penalty,* Hum. Rts. Comm., 56th Sess., Resolution 2000/65 (2000) E/CN.4/RES/2000/65; *The Question of the Death Penalty,* Hum. Rts. Comm., 55th Sess., Resolution 1999/61 (1999) E/CN.4/RES/1999/61.

f. The United Nations Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions has repeatedly found the United States to be in contravention of accepted international standards relating to the execution of mentally disordered individuals.

g. In December 1996, the Special Rapporteur issued a report stating that the Rapporteur intervenes when capital punishment is

imposed upon the "mentally retarded or insane." United Nations, *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, E/CN.4/1997/60 (Dec. 24, 1996) Para. 9(a). In the addendum to the report, which addressed the actions of individual countries, the Rapporteur made specific findings with regard to the United States, concluding that the United States does not conform to the safeguards and guarantees contained in international instruments prohibiting the execution of the mentally retarded and the mentally ill. United Nations, *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, E/CN.4/1997/60 (Dec. 24, 1996) Para. 9(a) at E/CN.4/1997/60/Add.1 (Dec. 23, 1996). In 2000, the Special Rapporteur urged "Governments which continue to enforce death penalties . . . to take immediate steps to bring their domestic legislation and legal practice into line with international standards prohibiting the imposition of death sentences in regard to minors and mentally ill or handicapped persons." United Nations, *Extrajudicial, Summary or Arbitrary Executions: Report by the Special Rapporteur*, E/CN.4/2000/3, Para. 97 (Jan. 25, 2000).

8. The international law norm prohibiting the execution of mentally disordered individuals has become so widespread as to be peremptory, a *jus cogens* norm that is non-derogable.

a. As demonstrated by the treaties, pronouncements, and practices described above, the prohibition of the execution of the mentally disordered has become as widespread and clear as the prohibition on slavery, torture, or genocide.

b. Except for the United States, the consensus of the world on this point is absolute, and there are no contrary expressions of opinion by any country or agency charged with the enforcement and interpretation of these documents.

c. As set forth in detail in Claims Three, Four, and Ten and the exhibits cited therein, which are incorporated into this claim by reference, Mr. Bell at all relevant times suffered from and exhibited mental, cognitive, and neuropsychological deficiencies.

(1) Mr. Bell has cognitive and neuropsychological deficits affecting a broad array of neurocognitive domains. Mr. Bell's deficiencies are in the following areas: attention, spatial abilities, visuospatial problem-solving, non-verbal fluency, divided attention under pressure, and cognitive executive functioning. (Ex. 88 at 1636-38.) Mr. Bell's neuropsychological deficits are consistent with mild to moderate brain injury, such as that caused by a blow or blows to the head. (Ex. 88 at 1638.)

(2) The configuration of Mr. Bell's deficits suggests a compromise to the fronto-parieto-temporal regions of his brain, particularly the frontal lobe. These deficits, though few and fairly specific, significantly impact cognitive executive functions such as goal setting, planning, problem-solving, insight, and judgment insofar as these higher level functions are dependent upon an ability to attend to all features of a problem situation over an extended period of time and in the presence of other distractions in the environment. Mr. Bell's most significant deficit in visuospatial problem-solving interferes to a large extent with his ability to develop alternative strategies for solving problems, particularly when these problems are of a visual or conceptual nature versus a rational verbal nature. The use of drugs such as crack cocaine would result in even greater impairment of Mr. Bell's cognitive functioning. (Ex. 88 at 1638.)

(3) Mr. Bell suffered early-onset addictive disease and other co-occurring mental disorders. Mr. Bell exhibited dissociative behaviors that in combination with his pre-existing psychological trauma

increased the likelihood that he dissociated on the day of the crime. (Ex. 89 at 1643-45.) Mr. Bell's cognitive dysfunction and pre-existing head trauma also acted synergistically with drugs to affect and impair his behavior during the crime and at other points in his life. Mr. Bell's cognitive deficits and head injuries exacerbated the deleterious effects of the crack he consumed on the day of the crime, intensifying and prolonging his impairment, his craving to consume more crack, and the other consequent, negative effects caused by use of the drug. Mr. Bell's co-morbid dissociative tendencies also would have been amplified by the combination of his brain dysfunction and drug use. (Ex. 89 at 1646-47, 1648.) Mr. Bell's biopsychosocial history makes it likely that he experienced a psychiatric disturbance involving irrational behavior at the time of the crime. (Ex. 89 at 1648.)

(4) Mr. Bell's biopsychosocial history is replete with multiple severe risk factors that affected his emotional, relational, cognitive, and neuropsychological development and functioning. Mr. Bell's history is marked by multigenerational substance abuse, mental illness, sexual abuse, and poverty. (Ex. 113 at 2540-44.) Mr. Bell's parents were addicted to drugs and alcohol and abandoned, neglected, and abused him from birth, causing severe negative effects on Steven's emotional and neurobiological development, relational capabilities, and affect regulation. (Ex. 113 at 2549-50.) Mr. Bell also suffered relentless emotional and physical abuse perpetrated by his stepfather starting at about age eight, which further undermined and damaged Mr. Bell's emotional, relational, and cognitive development. (Ex. 113 at 2551-54.) Substance use became a means of escape for Mr. Bell from his abuse, anxiety, and abandonment, but also severely impaired his ability to modulate his behavior and make good life decisions. (Ex. 113 at 2554-56.) Mr. Bell exhibited pathological

dissociative behaviors and posttraumatic stress reactions from an early age and throughout his life, attributable in large part to his traumatic psychosocial history. (Ex. 113 at 2556-58.) Mr. Bell's neurocognitive deficits were affected by, and combined synergistically with, his other major risk factors to debilitate his overall ability to develop psychologically and emotionally and to regulate his behavior and emotional responses. (Ex. 113 at 2561-62.)

d. Mr. Bell's biopsychosocial history of impairments and dysfunctions demonstrates that at the time of his arrest and trial, Mr. Bell functioned with a diminished ability to appreciate or control his actions.

9. Mr. Bell's death sentence violates binding international law and *jus cogens* and is therefore unlawful. The Court should modify the judgment by vacating the sentence of death, or afford Mr. Bell a full and fair evidentiary hearing at which he can prove his entitlement to relief under the federal constitution and separately under international law as part of the supreme law of the United States.

10. Trial counsel's failure to raise any and all of the foregoing grounds was constitutionally unreasonable and prejudicial to Mr. Bell. Trial counsel did not have any legitimate strategic reason for failing to raise the above challenges to the prosecution of Mr. Bell for capital murder.

11. To the extent appellate counsel was required or permitted to raise the above challenge to Mr. Bell's conviction and sentence of death on any of the foregoing grounds, appellate counsel was constitutionally ineffective for failing to do so. Appellate counsel's actions and omissions were not strategic, fell below the standards for reasonably competent counsel, and prejudiced Mr. Bell.

K. CLAIM ELEVEN: EXECUTION FOLLOWING A LONG PERIOD OF CONFINEMENT UNDER A SENTENCE OF DEATH WOULD VIOLATE MR. BELL'S RIGHT TO BE FREE FROM CRUEL, TORTUROUS, AND UNUSUAL PUNISHMENT

Mr. Bell's sentence of death and continued confinement are unlawful and unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution; state statutes, decisional law, and other mandatory rules; and international law as set forth in treaties, customary law, international human rights law, and under the doctrine of *jus cogens*, because the California death penalty appellate and post-conviction procedures fail to provide Mr. Bell with a constitutionally full, fair, and timely review of his conviction and sentence.

In support of this claim, Mr. Bell alleges the following facts, among others to be presented after access to a complete and accurate record of the proceedings in the municipal and superior courts, full discovery and investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Mr. Bell was sentenced to death on March 4, 1994, when he was 28 years old. He is now nearly 44 years old.

2. Through no fault of Mr. Bell's, more than four and one-half years passed before this Court appointed counsel, Anthony J. Dain, on September 16, 1998, to represent Mr. Bell on appeal and in post-conviction proceedings.

3. Again, without fault on Mr. Bell's part, the corrected record on appeal was filed on November 5, 2001. Appellant's Opening Brief was filed on June 12, 2003, or nearly five years after the appointment of counsel. Respondent's Brief was filed on November 4, 2003, and Appellant's Reply Brief was filed on January 28, 2005. On March 7, 2006,

Mr. Dain filed a Motion to Withdraw as habeas corpus counsel for Mr. Bell. On June 21, 2006, this Court granted Mr. Dain's motion to withdraw and appointed the Habeas Corpus Resource Center to represent Mr. Bell in post-conviction proceedings. This Court issued its direct appeal opinion on February 15, 2007. Mr. Bell's right to make use of the automatic appeal and post-conviction process provided by law in California does not negate the cruel and degrading character of the length of continuous confinement of many years, owing in part to that process, under a sentence of death.

4. Mr. Bell was received at San Quentin State Prison on March 11, 1994, and assigned to Death Row, where he currently lives with more than 600 condemned men, awaiting execution.

5. Since Mr. Bell's arrest and confinement in June 1992, a dozen men have been executed; two more came within hours of their execution before those executions were stayed; ten more committed suicide; and forty-two more have died of natural causes, overdose, or violent means. During this time, several of the executions have been botched, and unprecedented publicity has focused on the torturous nature of the method of execution employed in California. Many of Mr. Bell's neighbors are floridly psychotic and profoundly disturbed.

6. Mr. Bell lives in a solitary cell, a 5-by-10 foot box, consisting of three concrete walls and a fourth wall of bars and wire mesh. Mr. Bell cannot see other prisoners through the bars. Both in and out of his cell, Mr. Bell is under surveillance by one or more guards armed with loaded weapons. He eats meals in his cell, and is restricted severely in the amount and type of personal property that he is permitted to possess. His time out of his cell is restricted, and whenever he is transported he is handcuffed behind his back.

7. The United States stands virtually alone among the nations of

the world in confining individuals for periods of many years continuously under a sentence of death.

a. The international community recognizes that, without regard for the question of the appropriateness or inappropriateness of the death penalty itself, prolonged confinement under these circumstances is cruel and degrading and in violation of international human rights law. *Pratt v. Attorney General for Jamaica*, 4 All. E.R. 769 (1993), 3 W.L.R. 995 (1995) (Privy Council); *Soering v. United Kingdom*, 11 E.H.R.R. 439, 440-41 (1989) (Euro. Ct. of Human Rights).

b. *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.

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

8. Execution of Mr. Bell following such lengthy confinement under a sentence of death would constitute cruel and unusual punishment because of the physical and psychological suffering inflicted on Mr. Bell.

a. Given the psychologically torturous, degrading, brutalizing, and dehumanizing experience of living on Death Row, the confinement itself constitutes cruel and unusual punishment.

b. "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) (four week period of confinement); *see also Lackey v. Texas,* 514 U.S. 1045 (1995) (Stevens, J., joined by Breyer, J., respecting the denial of certiorari) (fifteen years).

9. Execution of Mr. Bell following such confinement under a sentence of death for this lengthy period of time would constitute cruel and unusual punishment because the State's ability to exact retribution and to deter other serious offenses by actually carrying out such a sentence is drastically diminished, such that this extraordinary sentence does not serve any legitimate state interest.

a. Imposition of a death sentence must serve legitimate and substantial penological goals that could not otherwise be accomplished in order to survive Eighth Amendment scrutiny.

b. If the punishment serves no penal purpose more effectively than a less severe punishment, then it is unnecessarily excessive within the meaning of the Punishments Clause. *Furman v. Georgia,* 408 U.S. 238, 280 (Brennan, J. concurring), 312-13 (White, J. concurring); *Ceja v. Stewart,* 134 F.3d 1368, 1373-78 (9th Cir. 1998) (Fletcher, J. dissenting from order denying stay of execution).

c. A death sentence executed against Mr. Bell serves neither a deterrent nor retributive purpose given his extended existence on Death Row. The acceptable state interest in retribution has been satisfied by the psychological and physical severity of his sentence, and the additional deterrent effect after many years in prison (and a continuing lifetime of incarceration) is minimal at best.

10. Because of the following circumstances, the State has no legitimate penological interest (deterrent or retributive) in executing Mr. Bell and his execution would involve the needless infliction of avoidable

mental anguish and psychological pain and suffering were it to occur.

a. The facts and exhibits set forth in Claims Three, Four, Ten, and Twelve concerning Mr. Bell's mental state at the time of the crime, his character and background, and his neurocognitive and mental vulnerabilities are incorporated by this reference.

b. Mr. Bell has been involved in only one relatively minor altercation since arriving at San Quentin over 15 years ago. Otherwise, he has maintained the highest classification status possible and his conduct has been exemplary.

11. Mr. Bell's sentence of death under these circumstances is prohibited and must be set aside and modified.

L. CLAIM TWELVE: MR. BELL IS INELIGIBLE FOR A DEATH SENTENCE UNDER THE LAWS OF THE UNITED STATES AND INTERNATIONAL LAW

Mr. Bell's confinement, death eligibility finding, and sentence of death were unlawfully and unconstitutionally obtained in violation of his rights to freedom from cruel and unusual punishment; a fair trial; due process; equal protection; and a punishment that is not arbitrarily, wantonly, and capriciously imposed as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution; state statutes, decisional law, and other mandatory rules; and international human rights law as established in treaties, customary law, and under the doctrine of *jus cogens*, because the imposition of the death penalty on offenders with mental deficits and vulnerabilities that render them unable to modulate or control their behavior offends a long-standing collective judgment of the American people as expressed in laws and sentencing practices, is grossly disproportionate to such offenders' moral

culpability, serves no permissible purpose, and carries an enhanced risk of error.[11]

In support of this claim, Mr. Bell alleges the following facts, among others to be presented after access to a complete and accurate record of the proceedings in the municipal and superior courts, full discovery and investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts, allegations, and exhibits set forth in Claims Three, Four, and Ten relating to Mr. Bell's neurocognitive and mental deficits are incorporated by this reference as if fully set forth in this claim.

2. Prior to and at the time of the crimes and trial, Mr. Bell suffered from cognitive brain dysfunction, with damage in the right fronto-parieto-temporal regions of his brain, particularly the frontal lobe. (Ex. 88 at 1636-38.) Mr. Bell's deficits can significantly impact his cognitive executive functions such as goal-setting, planning, problem-solving, insight, and judgment and interfere with his ability to develop alternative strategies

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[11] 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 on executing such offenders until a more comprehensive evaluation system can be implemented. The organizations that take positions against the execution of mentally ill offenders include, but are not limited to, the American Psychiatric Association, the American Psychological Association, the National Alliance for the Mentally Ill, and the National Mental Health Association.

Under principles of international law, the prohibition against the imposition of the death penalty on mentally disordered individuals qualifies as an international norm or legally binding international law. Currently over 100 nations prohibit the execution of mentally disordered individuals by treaty, legislation, or practice. The execution of persons suffering from mental illness has been condemned explicitly, inter alia, by the Parliamentary Assembly of the Council of Europe and the United Nations Commission on Human Rights as a violation of international law.

for solving problems. (Ex. 88 at 1638.)

3. Prior to and at the time of the crimes, Mr. Bell suffered early onset addictive disease and other co-occurring mental disorders. Mr. Bell exhibited dissociative behaviors that, in combination with his pre-existing psychological trauma, increased the likelihood that he dissociated when using crack on the day of the crime. (Ex. 89 at 1643-46.) Mr. Bell's cognitive dysfunction and pre-existing head trauma also acted synergistically with drugs to affect and impair his behavior during the crime and at other points in his life. Mr. Bell's cognitive deficits and head injuries exacerbated the deleterious effects of the crack he consumed on the day of the crime, intensifying and prolonging his impairment, his craving to consume more crack, and the other consequent, negative effects caused by use of the drug. (Ex. 89 at 1646-47.) Mr. Bell's co-morbid dissociative tendencies also would have been amplified by the combination of his brain dysfunction and drug use. (Ex. 89 at 1646-48.) Mr. Bell's biopsychosocial history makes it likely that he experienced a psychiatric disturbance involving irrational behavior at the time of the crime. (Ex. 89 at 1648.)

4. Mr. Bell's biopsychosocial history is replete with multiple severe risk factors that affected his emotional, relational, cognitive, and neuropsychological development and functioning. Mr. Bell's history is marked by multigenerational substance abuse, mental illness, sexual abuse, and poverty. (Ex. 113 at 2540-44.) Mr. Bell's parents were addicted to drugs and alcohol and abandoned, neglected, and abused him from birth, causing severe negative effects on his emotional and neurobiological development, relational capabilities, and affect regulation. (Ex. 113 at 2549-50.) Mr. Bell also suffered relentless emotional and physical abuse perpetrated by his stepfather starting at about age eight, which further undermined and damaged Mr. Bell's emotional, relational, and cognitive

development. (Ex. 113 at 2551-54.) Substance use became a means of escape for Mr. Bell from his abuse, anxiety, and abandonment, but also severely impaired his ability to modulate his behavior and make good life decisions. (Ex. 113 at 2554-56.) Mr. Bell exhibited pathological dissociative behaviors and posttraumatic stress reactions from an early age and throughout his life, attributable in large part to his traumatic psychosocial history. (Ex. 113 at 2556-58.) Mr. Bell's neurocognitive deficits were affected by, and combined synergistically with, his other major risk factors to debilitate his overall ability to develop psychologically and emotionally and to regulate his behavior and emotional responses. (Ex. 113 at 2561-62.)

5. As a result of the combined effects of Mr. Bell's brain dysfunction and mental vulnerabilities, the existence of which are supported by data from mental health professionals and anecdotal information from informants about Mr. Bell's life history, Mr. Bell, at the time of the crime, lacked the ability to modulate the behaviors for which he was sentenced to death.

6. Mr. Bell's significantly impaired functioning at the time of the crime negates any purported moral justification for imposing the death penalty. Evolving standards of decency and international norms prohibit the execution of a person for conduct he was unable to avoid or control.

7. Mr. Bell's sentence is disproportionate to his personal moral culpability because impaired individuals such as Mr. Bell are so lacking in moral blameworthiness as to be ineligible for the penalty of death.

8. Neither retribution nor deterrence is served by Mr. Bell's death sentence.

a. The execution of criminal defendants whose cognitive and mental deficits render them incapable of modulating their conduct does

not contribute measurably to the goals of deterrence or retribution, and thereby involves the needless infliction of pain and suffering.

b. Deterrence cannot justify imposing the death penalty upon cognitively impaired, mentally disordered defendants because, by definition, they lack the ability to modulate their behavior, control their impulsivity, or inhibit their self-destructive behavior.

9. The capital prosecution of offenders like Mr. Bell, who suffered at the time of the crime and trial from brain dysfunction, substance abuse disorders and dependence, pathological dissociative behaviors, and the sequelae of trauma, carries a heightened risk of unjustified executions.

a. The jury used the behavioral manifestations of Mr. Bell's mental deficits and brain damage as evidence in aggravation, in violation of the Constitution, which prohibits the use of mental deficits to sentence a person to death. (Ex. 112 at 2431)

10. Mr. Bell's death sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment, the state Constitution, and international law, including, but not limited to, the authorities set forth above and the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment. Consequently, the death sentence must be vacated.

11. Trial counsel's failure to raise the challenges contained in this claim prejudicially violated Mr. Bell's constitutional right to the effective assistance of counsel. Trial counsel did not have any legitimate strategic reason for failing to raise the above challenges to the prosecution of Mr. Bell for capital murder.

12. To the extent appellate counsel was required or permitted to raise the above challenge to Mr. Bell's conviction and sentence of death on

any of the foregoing grounds, appellate counsel was constitutionally ineffective for failing to do so. Appellate counsel's actions and omissions were not strategic, fell below the standards for reasonably competent counsel, and prejudiced Mr. Bell.

M. CLAIM THIRTEEN: THE CUMULATIVE NATURE OF THE ERRORS REQUIRES THE GRANTING OF HABEAS CORPUS RELIEF

Mr. Bell's conviction, sentence, and confinement were unlawfully obtained in violation of his rights under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution; mandatory state statutes and rules; and international human rights law as established in treaties, customary law, and, under the doctrine of *jus cogens*, because of the multiple constitutional errors committed by state actors, counsel for Mr. Bell, the jury, and the trial court, which together rendered Mr. Bell's trial fundamentally unfair and the resulting verdicts and judgment unreliable.

1. The facts and allegations contained in each and every Claim contained in this amended petition and its accompanying exhibits are hereby incorporated by reference as if fully set forth herein. Mr. Bell expressly requests that this Court examine the errors set forth on appeal and above cumulatively, and cumulatively assess their prejudicial effect on Mr. Bell's rights to reliable assessments of guilt, death eligibility, and punishment, and evaluate the harm caused to him thereby.

2. Mr. Bell's request is consistent with this Court's jurisprudence, *see, e.g.*, *People v. Holt*, 37 Cal. 3d 436, 458-59 (1984) (cumulating effect of errors); *People v. Cardenas*, 31 Cal. 3d 897, 907 (1982) (recognizing cumulative error analysis), and its special duty in

capital cases to examine the complete record to ascertain whether a capitally-charged defendant received a fair trial. *People v. Easley*, 34 Cal. 3d 858, 863-64 (1983); *see also United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) ("'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors..." (quoting *United States v. Wallace*, 848 F.2d 1464, 1476 (9th Cir. 1988)); *United States v. Tory*, 52 F.3d 207, 211 (9th Cir. 1995); *Wallace*, 848 F.2d at 1475-76.

3. Multiple deficiencies merit a collective or cumulative assessment of prejudice; even errors that do not require that a judgment be set aside when viewed alone, or do not rise to the level of a constitutional violation when viewed singly, may require relief in the aggregate. *See, e.g.*, *Alcala v. Woodford*, 334 F.3d 862, 883-95 (9th Cir. 2003) (cumulating the issues of both error and prejudice); *Killian v. Poole*, 282 F.3d 1204, 1211 (9th Cir. 2002); *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992) (cumulating trial court errors and deficiencies of trial counsel); *United States v. Tucker*, 716 F.2d 576, 595 (9th Cir. 1983); *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978); *see also Henry v. Scully*, 78 F.3d 51, 53 (2d Cir. 1996). This is particularly true because a fragmented assessment of error and prejudice is antithetical to capital jurisprudence.

4. Therefore, Mr. Bell is entitled to have this Court cumulatively examine the assignments of error here with each other and with those found in the automatic appeal. This analysis is required by the Court's mandatory duty to examine the complete record independently to determine whether a capitally-convicted defendant received a fair trial.

5. The constitutional violations alleged in this amended petition individually had a substantial and injurious influence and effect on the jury's determinations of guilt, death eligibility, and death. A fortiori, the

cumulative prejudice of the errors entitles Mr. Bell to habeas corpus relief.

PRAYER FOR RELIEF

WHEREFORE, petitioner respectfully requests that this Court:

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

2. Take judicial notice of the certified record on appeal and all pleadings filed in *People v. Steven M. Bell*, California Supreme Court Case No. S038499;

3. Take judicial notice of all of the records, documents, exhibits, orders, and pleadings filed in this case in the courts below in: *People v. Steven M. Bell*, San Diego County Superior Court Case No. CR133096; *Steven M. Bell v. Superior Court (The People, R.P.I.)*, Court of Appeal, Fourth Appellate District, Division One Case No. D019085; and *Steven M. Bell v. Superior Court (The People, R.P.I.)*, Court of Appeal, Fourth Appellate District, Division One Case No. D020513;

4. Grant Mr. Bell the right to seek sufficient funds and time to secure additional investigative and expert assistance as necessary to prove the allegations in this amended petition;

5. Order the San Diego County District Attorney to disclose all materials not previously provided that pertain to Mr. Bell's case and grant Mr. Bell leave to conduct additional discovery, including the right to take depositions, request admissions, propound interrogatories, issue subpoenas for documents and other evidence, and afford Mr. Bell the means to preserve the testimony of witnesses;

6. Order an evidentiary hearing at which Mr. Bell will offer this and further proof in support of the allegations herein;

7. Permit Mr. Bell a reasonable opportunity to supplement the evidentiary showing in support of the claims presented here and to

supplement the amended petition to include claims that may become known as a result of further investigation and information that may hereafter come to light;

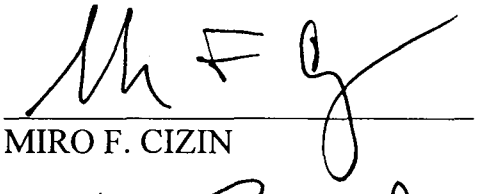
8. After full consideration of the issues raised in this amended petition, considered cumulatively and in light of the errors alleged on direct appeal, vacate the judgment and sentence imposed upon Mr. Bell in San Diego County Superior Court Case No. CR133096; and

9. Grant Mr. Bell such further relief which is appropriate and just in the interest of justice.

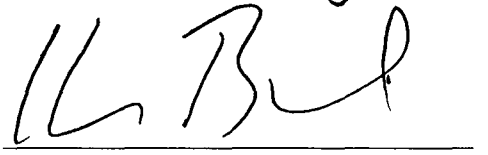
Dated: June 20, 2009

Respectfully Submitted,

Habeas Corpus Resource Center



MIRO F. CIZIN



KEVIN BRINGUEL

EILEEN CONNOR
Counsel for Steven M. Bell

VERIFICATION

I, Miro F. Cizin, declare as follows:

I am an attorney admitted to practice in the State of California. I represent petitioner Steven M. Bell herein, who is confined and restrained of his liberty at San Quentin Prison, San Quentin, California.

I am authorized to file this amended petition for writ of habeas corpus on Mr. Bell's behalf. I make this verification because Mr. Bell 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 or more than Mr. Bell's knowledge.

I have read the amended petition and know the contents of the amended petition to be true.

Executed under penalty of perjury on this 20th day of June 2009, at San Francisco, California.

MIRO F. CIZIN

PROOF OF SERVICE

I, Carl Gibbs, declare that I am a citizen of the United States, employed in the City and County of San Francisco, I am over the age of 18 years and not a party to this action or cause. My current business address is 303 Second Street, Suite 400 South, San Francisco, California 94107.

On June 22, 2009, I served true copies of the following documents:

Amended Petition for Writ of Habeas Corpus and Volumes I-IX of Exhibits in Support of Amended Petition for Writ of Habeas Corpus

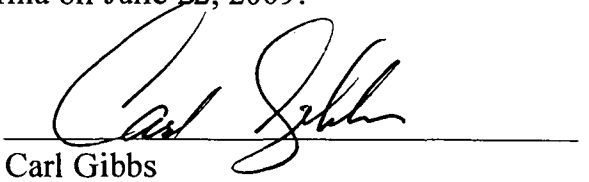
by enclosing such documents in a sealed box and depositing the sealed box with the United Sates Postal Service with postage fully prepaid, and addressed as follows:

Attorney General - San Diego Office
Lynne G. McGinnis, Deputy Attorney General
P.O. Box 85266
San Diego, CA 92101

Service for Steven M. Bell (J-13200) will be completed by utilizing the 30-day post-filing period within which we will hand deliver a copy to him at San Quentin State Prison.

The Habeas Corpus Resource Center will provide an electronic courtesy copy of the Amended Petition and Exhibits to the California Appellate Project at 101 Second Street, Suite 600, San Francisco, California within the 30-day post-filing period.

I declare under penalty of perjury that the foregoing is true and correct. Executed in San Francisco, California on June 22, 2009.



Carl Gibbs