SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	) No. S153073
	)
ROBERT WESLEY COWAN,	) Related to:
	) *People v. Robert Wesley Cowan*
Petitioner,	) Automatic Appeal No. S055415
	)
On Habeas Corpus	) Kern County
	) Superior Court No. 05961-5A

SUPREME COURT
FILED
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PETITION FOR WRIT OF HABEAS CORPUS
AND REQUEST FOR CONSOLIDATION

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

Petitioner ROBERT WESLEY COWAN, by and through his attorneys Mark Goldrosen and Nina Wilder, respectfully petitions this Court for a writ of habeas corpus challenging the convictions and judgment of death imposed by the Superior Court of Kern County on August 5, 1996. Petitioner's automatic appeal presently is pending before this Court in Case No. S055415. This petition raises certain claims related to arguments presented in the direct appeal, and other claims factually independent of the appeal, which cumulatively demonstrate the invalidity of the convictions and judgment of death. By this verified petition, petitioner sets forth the following facts and causes for issuance of the writ:

I.

INTRODUCTION

1. Petitioner is a prisoner of the State of California. He is illegally and unconstitutionally confined at the California State Prison at San Quentin by Warden Robert L. Ayers, Jr. and Secretary of the California Department of Corrections and Rehabilitation

James E. Tilton, pursuant to convictions and a death sentence imposed by the Kern County Superior Court on August 5, 1996.

II.

JURISDICTION AND TIMELINESS

2. No other petition has been filed for petitioner or on his behalf in this Court in connection with this judgment. This petition is necessary because petitioner has no other plain, speedy or adequate remedy at law for the substantial violations of his constitutional rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; sections 1, 7, 15, 16, and 17 of Article I of the California Constitution; and Penal Code section 1473, in that the crucial factual bases for these claims lie outside the record developed on appeal.

3. Under Article 6, section 10 of the California Constitution, this Court has original jurisdiction over a petition for writ of habeas corpus. Petitioner has filed this petition in this Court because petitioner's automatic appeal presently is pending before this Court.

4. The claims asserted in this petition are cognizable on habeas corpus. The petition is presumptively timely because it has been submitted within three years of the appointment of habeas corpus counsel on November 10, 2004.

III.

INCORPORATION AND REQUEST FOR JUDICIAL NOTICE

5. Petitioner hereby incorporates by reference every paragraph of this petition in every claim presented, as if fully set forth therein.

6. Petitioner hereby incorporates by reference all exhibits and declarations appended to this petition as if fully set forth herein. Moreover, to the extent applicable, each

claim stated herein incorporates the facts stated in other parts of the petition and the accompanying exhibits and declarations.

7. Petitioner asks the Court to take judicial notice of the certified record on appeal, and all pleadings, briefs, orders and exhibits on file in this Court in the case of *People v. Robert Wesley Cowan*, S055415, to avoid the expense and time of duplicating materials already in the possession of the Court and the Attorney General.

8. Because a reasonable opportunity for full factual development through adequate funding, access to this Court's subpoena power and an evidentiary hearing has not been provided to petitioner, all of the evidence supporting the claims below has not been obtainable. Nonetheless, the evidence presented below adequately supports each claim and justifies issuance of an order to show cause and relief.

IV.

ALLEGATIONS APPLICABLE TO EACH AND EVERY CLAIM

9. Petitioner makes the following allegations applicable to every claim and allegation in the petition.

10. The facts in support of each claim are based on the allegations in the petition; the declarations and other documents contained in the exhibits; the entire record of the proceedings involving petitioner in the trial courts of Kern County; the documents, exhibits, and pleadings in *People v. Robert Wesley Cowan*, S055415 on direct appeal; judicially noticed facts; and any other documents and facts petitioner may develop.

11. Legal authorities in support of each claim are identified within that claim. Each claim is based on both the state and federal constitutions.

12. Petitioner does not waive any applicable rights or privileges by filing this

petition and exhibits, and in particular, does not waive either the attorney-client or the work-product privilege. Petitioner requests that any waiver of privilege occur only after a hearing with notice and the right to be heard on whether a waiver has occurred and the scope of any such waiver. Petitioner also requests "use immunity" for each and every disclosure he has made and may make in support of the petition.

13. If the state disputes any material facts alleged below, petitioner requests an evidentiary hearing so that the factual disputes may be resolved. After petitioner has been afforded (1) disclosure of all material evidence by the state, (2) use of this Court's subpoena power, and (3) funds and opportunity to investigate fully, petitioner requests an opportunity to supplement or amend this petition. Petitioner and his counsel are presently aware of the facts set forth below, establishing a prima facie case for relief.

14. To the extent the error or deficiency alleged was due to defense counsel's failure to investigate and/or litigate in a reasonably competent manner on petitioner's behalf, petitioner was deprived of the effective assistance of counsel, in violation of the state and federal constitutions. To the extent defense counsel's actions and omissions were the product of purported strategic and/or tactical decisions, such decisions were based upon state interference, prosecutorial misconduct, inadequate and unreasonable investigation and discovery, and/or inadequate consultation with independent experts, and therefore were not reasonable, rational or informed, in violation of the state and federal constitutions.

15. To the extent facts set forth below could not reasonably have been uncovered by defense counsel, those facts constitute newly-discovered evidence which casts fundamental doubt on the accuracy and reliability of the proceedings below and undermines the prosecution's case against petitioner such that his rights to due process and a fair trial

under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and cognate provisions of the California Constitution, have been violated.

16. But for the misconduct of the state, the trial court's errors and the deficient performance of defense counsel, petitioner would not have been convicted of first-degree murders and special circumstances, and he would not have been sentenced to death.

17. Defense counsel was ineffective at both the guilt and penalty phases of petitioner's trial, in violation of the state and federal constitutions.

18. Petitioner's convictions and sentences, including the sentence of death, were obtained in violation of his state and federal constitutional rights, including the right to a fair trial, to an impartial jury, to be given notice and be heard, to effective representation of counsel, to procedural and substantive due process, and to reliable guilt and penalty convictions in a capital case. (U.S. Const. Amends. V, VI, VIII & XIV; Cal. Const., art., I, §§ 1, 7, 15, 16, 17.) Accordingly, the entire judgment must be reversed.

V.

STATEMENT OF THE CASE

19. On August 10, 1994, a four-count complaint was filed in the Kern County Municipal Court against petitioner, Robert Wesley Cowan, and co-defendant Gerald Thomas Cowan. (CT 2.)[1] Count I charged the defendants with the murder of Clifford Merck (Pen. Code, § 187), occurring on or about August 31, 1984 through September 4, 1984, and alleged

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[1]"CT" refers to the clerk's transcript on appeal; "RT" refers to the reporter's transcript on appeal. Gerald Thomas Cowan is defendant's brother. On February 20, 1997, Gerald Cowan pled no contest to voluntary manslaughter, a lesser included offense of Count III of the information, and admitted to personally using a knife. All other counts were dismissed. (Augmented CT 892.) Gerald Cowan was later sentenced to four years in state prison. (Augmented CT 894; *see People v. Cowan* (1996) 14 Cal.4th 367.)

that each defendant personally used a firearm during the commission of the offense (Pen. Code, § 12022.5, subd. (a)). (CT 2-3.) The count further charged petitioner with two special circumstances: multiple murders (Pen. Code, § 190.2, subd. (a)(3)) and murder during the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)); and charged Gerald Cowan with two special circumstances: multiple murders (Pen. Code, § 190.2, subd. (a)(3)) and murder during the commission of a burglary (Pen. Code, § 190.2, subd. (a)(17)(vii)). (CT 3.)

20. Count II charged the defendants with the murder of Alma Merck (Pen. Code, § 187), occurring on or about August 31, 1984 through September 4, 1984, and alleged that each defendant personally used a firearm during the commission of the offense (Pen. Code, § 12022.5, subd. (a)). (CT 5.) The count further charged petitioner with one special circumstance: murder during the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)); and charged Gerald Cowan with one special circumstance: murder during the commission of a burglary (Pen. Code, § 190.2, subd. (a)(17)(vii)). (CT 5-6.)

21. Count III charged the defendants with the murder of Jewell Francis Russell, occurring on or about September 4, 1984 through September 7, 1984. (CT 8.) The count further charged petitioner with two special circumstances: multiple murders (Pen. Code, § 190.2, subd. (a)(3)), and murder during the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)); and charged Gerald Cowan with two special circumstances: multiple murders (Pen. Code, § 190.2, subd. (a)(3)), and murder during the commission of a burglary (Pen. Code, § 190.2, subd. (a)(17)(vii)). (CT 8-9.)

22. Count IV charged the defendants with the first-degree robbery of Clifford Merck, occurring on or about September 4, 1984 through September 7, 1987, and alleged that each defendant personally used a firearm during the commission of the offense (Pen. Code, §

12022.5, subd. (a)). (CT 10-11.) Finally, the complaint alleged that petitioner previously served three separate prison sentences (Pen. Code, § 667.5, subd. (b)) and previously suffered two serious felony convictions (Pen. Code, § 667, subd (a)). (CT 3-5, 6-8, 9-10, 11-13.)

23. Petitioner was arraigned on August 10, 1994, and pled not guilty to each count of the complaint. Petitioner also denied the truth of all enhancement and special circumstance allegations. (CT 18.) At a hearing on August 24, 1994, the municipal court granted petitioner's motion to strike Count IV on the ground the charge was barred by the statute of limitations. (CT 19; Reporter's Transcript, August 24, 1994, p. 4.)

24. A preliminary examination commenced on September 6, 1994 and concluded on September 12, 1994. (CT 21.) Petitioner and his co-defendant were held to answer for the offenses charged in Counts I-III of the complaint. (CT 22-23.)

25. On September 23, 1994, a three-count information against petitioner and co-defendant Gerald Cowan was filed in the Kern County Superior Court. (CT 647-656.) Counts I-III of the information were the same as Counts I-III of the complaint, except for the following additions. In both Counts I and II, the information added the enhancement allegation that each defendant was armed with a firearm during the commission of the offense (Pen. Code, § 12022, subd. (a)(1)). Petitioner was also charged in each count with the special circumstance that the murder occurred during the commission of a burglary (Pen. Code, § 190.2, subd. (a)(17)(vii)). Gerald Cowan was further charged in each count with the special circumstance that the murder occurred during the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)). (CT 648, 649, 650, 651.) With respect to Count III, the information added the enhancement allegation that each defendant was armed with a deadly weapon (Pen. Code, § 12022, subd. (b)). Petitioner was also charged with the special

circumstance that the murder occurred during the commission of a burglary (Pen. Code, § 190.2, subd. (a)(17)(vii)). Gerald Cowan was further charged with the special circumstance that the murder occurred during the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)). (CT 653-654.) Finally, the information modified the prior conviction allegations to allege that petitioner previously served only one prison term (Pen. Code, § 667.5, subd. (b)) and suffered only one serious felony conviction (Pen. Code, § 667, subd. (a)). (CT 649-650, 652, 654-655.)

26. Petitioner was arraigned on the information on September 26, 1994. He pled not guilty to all counts and denied the truth of all enhancement and special circumstance allegations. (CT 663-664.)

27. Jury selection began on April 8, 1996. (CT 1284.) From April 8 to April 15, 1996, prospective jurors were screened for hardships and their knowledge of the case. (CT 1284-1298.) Those found to be eligible for jury selection were required to complete questionnaires. Individual, sequestered voir dire of the prospective jurors commenced on April 17, 1996, and concluded on May 2, 1996. (CT 1299, 1318.) On May 7, 1996, counsel exercised their peremptory challenges, and a jury with two alternates was sworn. (CT 1320.)

28. The prosecution began its case-in-chief on May 13, 1996, and rested on May 28, 1996. (CT 1330, 1357.) The defense case was presented on May 28 and 29, 1996. (CT 1357, 1361.)

29. On June 2, 1996, the jury began its deliberations. (CT 1364.) Verdicts were returned on June 6, 1996, at 3:30 p.m. (CT 1458.) With respect to Counts I and II, the jury

found that petitioner was guilty of first degree murder and that he was armed with a weapon.[2] Also found true were all special circumstances charged in both counts – multiple murder, murder during the commission of a robbery, and murder during the commission of a burglary. (CT 1461-1471.) With respect to Count III, the jury was unable to reach a verdict and the court declared a mistrial. (CT 1459.)

30. Petitioner waived jury trial on the truth of the prior conviction allegations. On June 10, 1996, the superior court found petitioner had previously suffered a serious felony conviction within the meaning of Penal Code section 667, subdivision (a), but had not previously served a prison term within the meaning of Penal Code section 667.5, subdivision (c). (CT 1477.)

31. The penalty phase commenced on June 11, 1996, and presentation of evidence was completed on June 12, 1996. (CT 1479, 1482.) Jury deliberations began later that day (CT 1482), and the jury returned verdicts at 2:10 p.m. on June 14, 1996 (CT 1487, 1573). With respect to Count I, the jury returned a verdict of life without possibility of parole; with respect to Count II, the jury returned a verdict of death. (CT 1573, 1582-1583.)

32. On August 5, 1996, the superior court entered judgment and sentenced petitioner. On Count I the court imposed a sentence of life without possibility of parole, enhanced by one year for being armed with a firearm. (CT 1636.) With respect to Count II, the court imposed a sentence of death, enhanced by one year for being armed with a firearm. (CT 1636.) The sentences on the two counts were ordered to run consecutively. (CT 1637.)

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[2]The verdict forms inadvertently omitted the allegations in Counts I and II that petitioner personally used a firearm during the commission of the offenses. (Pen. Code § 12022.5, subd. (a).) After the guilt phase, the prosecutor struck these allegations. (RT 2805.)

In addition, the court added five years to petitioner's sentence for the prior serious felony conviction. (CT 1637.)

VI.

STATEMENT OF FACTS[3]

33. On September 4, 1984, the bodies of Alma Merck, 81 years old, and Clifford Merck, 75 years old, were found at their residence in Bakersfield. Clifford Merck was killed by two gunshots; Alma Merck was killed by strangulation. (RT 2263; 2265.)

34. Investigators from the Kern County Sheriff's Department lifted 44 latent fingerprints from the Merck residence. (RT 1542.) On November 1, 1984, Jerry Roper, an evidence technician, compared the lifted latent prints to petitioner's known prints and found they did not match. (RT 1589.)

35. No suspects were arrested for the homicides, and the investigation by law enforcement eventually terminated. (RT 1890.) In May, 1994, the case was reopened by the Sheriff's Department. (RT 1891, 1897.) Technician Sharon Pierce re-examined the latent fingerprints lifted from the residence. She found a latent lifted from the bottom of a sewing tray matched petitioner's left middle finger, and a latent lifted from the edge of the back door matched petitioner's left thumb. (RT 1957.) Pierce's identifications were confirmed by her supervisor and the Department of Justice. (RT 1994-1995, 2029.)

36. The prosecution also introduced evidence petitioner possessed property allegedly belonging to the Mercks after the homicides. Relatives of Alma Merck identified a lighter case, a ring, and a handgun with the initials "CM" engraved in it that belonged to the

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[3]The statement of facts does not include facts relating to the murder of Jewel Russell because the jury deadlocked on that count and the charge was later dismissed.

Mercks. (RT 1874, 1882, 2054.) Ronnie Woodin testified that on approximately September 12 or 13, 1984, he bought the lighter case from petitioner. (RT 1926.) Woodin admitted he was probably high on marijuana when he received the lighter case and had a prior misdemeanor conviction. (RT 1923, 1924.)

37. Petitioner's sister, Catherine Glass, testified that in September, 1984, petitioner sold a ring to her. Glass was unable to identify whether the ring shown to her in court, which allegedly belonged to Alma Merck, was the ring she had bought. (RT 1942.)

38. Danny Phinney testified about a meeting he had with petitioner in September, 1984. Petitioner showed Phinney property that included a driver's license with a name "like Mirck or Merck," and social security checks made out to persons with the last name Merck. (RT 1657, 1659.) Petitioner also traded the handgun allegedly belonging to Clifford Merck to Phinney and Robb Lutts for drugs. (RT 1660-1661.) On October 14, 1984, the handgun was seized from a motel room where Phinney and Lutts were arrested for felony drug charges. (RT 1659, 1660.)

39. Phinney's credibility was substantially impeached at trial. He suffered from a life-long bipolar disorder that jumbled his thought processes and impaired his short term memory. (RT 1674.) He experienced "periods of paranoia or delusions" resulting from methamphetamine addiction. (RT 1677.) His testimony at trial was often inconsistent with his prior statements to law enforcement. (RT 1659, 1660, 1736.) Prior to telling law enforcement about the gun he received from petitioner and other property he saw in petitioner's possession, Phinney had read a newspaper article about the Merck homicides. (RT 1665, 1728.) Phinney hoped his cooperation with law enforcement would result in his being released from jail so he could resume using drugs, and would "exonerate him[] from

anything to do with the weapon." (RT 1660, 1724.) Phinney had a lengthy criminal record that included a number of county jail incarcerations for being under the influence of drugs. (RT 1652.)

40. Rob Lutts testified that due to the passage of more than 12 years and his heavy drug use in 1984, he did not have a clear memory of how he and Phinney obtained the handgun that allegedly belonged to Clifford Merck. (RT 1631, 1635.) He believed he received the handgun in a trade for drugs with petitioner in which Phinney was "somehow" involved. (RT 1631, 1648.) Lutts had a lengthy criminal record that included both misdemeanor convictions and felony convictions for robbery and possessing methamphetamine and cocaine for sale. (RT 1628.)

41. Lieutenant John Porter testified that he was told by Emma Foreman, the mother of petitioner's former girlfriend, that petitioner admitted that he found an elderly couple in a bedroom and beat them to death. (RT 2392.) Foreman was uncertain whether petitioner made this statement before or after the date that the Mercks were killed. (RT 2403.)

42. On October 14, 1984, Gregory Laskowski, a criminalist with the Kern County Laboratory, determined the handgun seized during the arrest of Phinney and Lutts did not fire the bullets extracted from Clifford Merck's body. (RT 2189.) Laskowski re-examined the gun and bullets on April 15, 1996 after being informed the gun barrel had been altered by Phinney and Lutts. (RT 1894, 1905, 2192-2193.) The criminalist employed a silicone rubber compound to make a mold of the interior of the gun barrel. Laskowski had never used this technique before when examining a firearm and was not aware of any other criminalist who had a made a casting in a forensic firearms examination. (RT 2137-2142, 2150-2151.)

After comparing the mold of the gun barrel to the recovered bullets, Laskowski concluded that the bullets had been fired by the handgun seized during the arrest of Phinney and Lutts. (RT 2197.)

43. Petitioner did not testify during the guilt phase. The defense presented expert testimony that the lighter case petitioner sold to Woodin and the ring petitioner gave to his sister were common items available for purchase in many stores in the Bakersfield area. (RT 2478, 2480, 2484, 2510-2511.) The defense also presented testimony from a clinical psychologist concerning the effects that methamphetamine and heroin use may have had on prosecution witnesses. These effects included impairment of language comprehension, memory, perception, and visual motor control. (RT 2251-2252.)

44. In the penalty phase, the prosecution presented victim impact evidence from three relatives of the Mercks. (RT 2845-2852.) Also introduced was evidence that petitioner was convicted of robbery in 1970 (RT 2872-2875); burglarized an apartment and robbed its occupants in 1985 (RT2855-2857); and assaulted his girlfriend and her children in 1993 (RT 2866, 2869).

45. In mitigation, the defense presented testimony from petitioner's aunt and cousin establishing that petitioner was physically abused by his alcoholic father during childhood (RT 2891, 2906, 2907, 2914); petitioner witnessed his father physically abusing his mother (RT 2893, 2910); petitioner's family was poor because his father spent too much money on drinking (RT 2895, 2905); petitioner was depressed during childhood (RT 2911); and petitioner's father took him to bars to get him drunk when he was a teenager (RT 2998).

46. Testimony was also presented from petitioner's girlfriend, Brenda Hunt, and three of her children. According to Hunt, petitioner encouraged her to stop using drugs and

helped pay household bills. (RT 2921-2923.) He also did not abuse the children, helped them with their homework, entertained them by performing music, took them camping and to the park, and treated them as if they were his own. (RT 2925-2926.) The children corroborated that they were treated well by petitioner and often referred to him as "Dad." (RT 2930-2931, 2932-2933, 2935, 2940, 2942, 2948.)

VII.

CLAIMS FOR RELIEF

Petitioner's confinement, convictions and death sentence are illegal under the laws of the United States; the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their individual clauses and sections, as they have been interpreted by this Court and the courts of the United States; Article I, sections 1, 7, 15, 16, and 17 of the California Constitution; California statutes; and California case law.

The grounds upon which petitioner contends he is entitled to relief are as follows:

CLAIM 1: PETITIONER WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE LEAD TRIAL COUNSEL HAD A CONFLICT OF INTEREST HAVING PREVIOUSLY PROSECUTED PETITIONER FOR A ROBBERY CONVICTION THAT WAS CHARGED AS A SENTENCING ENHANCEMENT UNDER PENAL CODE SECTIONS 667(A) AND 667.5(B) AND INTRODUCED AS A CIRCUMSTANCE IN AGGRAVATION IN THE PENALTY PHASE

Petitioner's confinement is unlawful in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15, 16, and 17 of the California Constitution. Petitioner's rights to the effective assistance of counsel, to due process, to fair trial, to present a defense, and to reliable guilt and penalty determinations were violated by lead trial counsel's conflict of interest. (*Cuyler v. Sullivan* (1980) 446 U.S. 335; *People v. Cox* (2003) 30 Cal.4th 916.) Lead trial counsel, Michael L. Sprague, had previously prosecuted petitioner for the 1970 robbery conviction that was charged in the information as a sentencing enhancement under Penal Code sections 667(a) and 667.5(b) and introduced as a circumstance in aggravation in the penalty phase. When this error is considered separately, or in conjunction with other claims alleged herein, the verdicts in the guilt and penalty phases of petitioner's trial must be set aside.

The facts supporting this claim, among others to be developed after full investigation, adequate funding and access to this Court's subpoena power, and other available court processes, including an evidentiary hearing to further develop this claim, are:

1. Petitioner's lead trial counsel was Michael L. Sprague. Mr. Sprague was appointed as attorney of record on August 19, 1994 when a complaint was filed against petitioner in municipal court (CT 18), and remained lead counsel throughout the case.

2. Mr. Sprague had previously been employed as a deputy district attorney in the Kern County District Attorney's Office. (Declaration of Robert B. VanderNoor, ¶ 1, appended as Exhibit A.) In that position, Mr. Sprague participated in the prosecution of petitioner for robbery in Kern County Case No. 13733. Petitioner was arrested for the offense on January 6, 1970, and held to answer after a preliminary examination on January 14, 1970. Petitioner was arraigned in superior court on January 22, 1970, and a jury trial was set for March 9, 1970. (Court File, Kern County Superior Court Case No. 13733, appended as Exhibit B.)

3. The court file for Case No. 13733 reveals that on March 3, 1970, Mr. Sprague filed requests for orders directing the Kern County Sheriff to transport two inmates from state prison to superior court. Each request was signed by Mr. Sprague His declarations explained that the inmates were material prosecution witnesses who would be called by the prosecution to testify against petitioner at trial on March 9, 1970. (Requests for Removal of Prisoners, Kern County Superior Court Case No. 13733.) The requests were granted by the superior court on March 3, 1970. Each order had Mr. Sprague's name listed in the upper left hand corner as the deputy district attorney representing the plaintiff. (Orders, Kern County Superior Court Case No. 13733.) The fact that Mr. Sprague filed the requests for orders for

removal of inmates indicates that he was the deputy district attorney assigned to prepare and conduct the trial in *People v. Robert Wesley Cowan*, Kern County No. 13733. (Declaration of Robert B. VanderNoor, ¶ 6.)

4. On March 5, 1970, petitioner changed his plea to guilty and the trial date was vacated. Petitioner was sentenced to state prison on March 26, 1970. (Kern County Superior Court Case No. 13733.)

5. In the present capital case the 1970 robbery conviction was charged as a sentencing enhancement pursuant to both Penal Code sections 667(a) and 667.5(b). (CT 649-650, 652, 654-655.) Petitioner waived jury trial and the truth of the prior conviction was decided by the trial judge. At the court trial, Mr. Sprague did not present any evidence to rebut the conviction records introduced by the prosecution. He also did not contest that the records established that petitioner suffered a prior serious felony conviction within the meaning of section 667(a). Mr. Sprague's only argument was that the evidence was insufficient to prove the 667.5(b) allegation because petitioner had not committed another felony within five years of his release from prison. The trial court found that allegation pursuant to section 667(a) was true and added five years to petitioner's sentence. The allegation pursuant to 667.5(b) was found not true. (RT 2802-2805.)

6. The prosecution filed its notice of intention to introduce evidence in aggravation on December 1, 1995. The notice included, "The March 26, 1970 conviction of robbery in the first degree in the Superior Court in Kern County Case number 13733." (CT 1064.) During the penalty phase, Mr. Sprague again did not contest the validity or existence of the prior robbery conviction. Instead, he informed the trial court he had no objection to its coming into evidence as a circumstance in aggravation. (RT 2872.) His only objection

concerned hearsay documents attached to the record of the conviction. The prosecutor agreed that the trial court should remove those documents from the exhibit. (RT 2872-2874.)

7. Mr. Sprague's representation of petitioner after previously prosecuting him in the 1970 robbery conviction amounted to an actual conflict of interest. The robbery offense was used both as a sentencing enhancement and a penalty phase circumstance in aggravation, requiring Mr. Sprague to defend petitioner against a prior conviction that he himself had helped to secure. In representing petitioner, Mr. Sprague was obligated to analyze, critique and challenge his own work product from the previous case. Mr. Sprague's own interests were thus contrary to those of petitioner, and inconsistent with providing petitioner with zealous representation.

8. Despite having notice that the prosecution was relying on the 1970 robbery conviction as a sentencing enhancement pursuant to Penal Code sections 667(a) and 667.5(b) and as an aggravating circumstance in support of the death penalty, Mr. Sprague did not inform petitioner or the trial court of his participation in the prosecution of that case. Moreover, petitioner would not have known that Mr. Sprague had prosecuted him from his appearing in court during the robbery case because other prosecutors made court appearances while Mr. Sprague was preparing the case for trial. (Declaration of Robert B. VanderNoor, ¶¶ 4-5.) Thus, during the entire time Mr. Sprague was attorney of record, petitioner never learned that lead trial counsel was involved in convicting him of the robbery offense being used against him. Petitioner therefore never made a knowing and intelligent waiver of his right to be represented by an attorney who was did not have a conflict of interest.

9. Mr. Sprague's actual conflict of interest adversely affected his representation of petitioner. An adverse effect occurs when a conflict of interest is likely to have had some

effect on an attorney's handling of the trial. (*People v. Dunkle* (2005) 36 Cal.4th 861.) Here, as explained in paragraphs 4 and 5 of this claim, Mr. Sprague did not contest the existence or validity of the prior conviction he had helped to secure. The prosecutor argued that the prior conviction was a circumstance in aggravation that supported the death penalty. (RT 2984-2985.)

10. In addition, Mr. Sprague's representation was seriously deficient in numerous other aspects, including failing to object adequately to inadmissible evidence and improper jury instructions, failing to request necessary jury instructions and an adequate evidentiary hearing regarding juror misconduct, failing to present expert evidence to contest the reliability of fingerprint and ballistic identifications, failing to present mitigation evidence in the penalty phase, and undermining the penalty phase by firing the sole defense expert immediately prior to the date he was scheduled to testify. (*See* Claims 3 and 5, Declaration of James V. Sorena, appended as Exhibit C, and Declaration of Mark Goldrosen, appended as Exhibit D.) It is reasonable to infer that this sub-standard representation emanated from the conflicting position in which Mr. Sprague found himself but failed to disclose either to his client or to the trial court.

11. The record thus establishes that Mr. Sprague's actual conflict of interest adversely affected his representation of petitioner. Petitioner is entitled to reversal of his conviction and death judgment.

CLAIM 2: PETITIONER WAS DENIED HIS RIGHT TO AN IMPARTIAL JURY BECAUSE DURING VOIR DIRE JUROR 045882 INTENTIONALLY CONCEALED THAT HE PREVIOUSLY HAD BEEN ARRESTED FOR A CRIMINAL OFFENSE AND WAS THEN ON PROBATION

Petitioner's confinement is unlawful in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15, 16, and 17 of the California Constitution. Petitioner's rights to be tried by an impartial jury, to the effective assistance of counsel, to due process, to a fair trial, to present a defense, and to reliable guilt and penalty determinations were violated during voir dire because Juror 045882 intentionally concealed that he previously had been arrested for a criminal offense and was then on probation. (*Dyer v. Calderon* (1998) 151 F.3d 970; *People v. Cox* (2003) 30 Cal.4th 916.) When this error is considered separately, or in conjunction with other claims, the verdicts in the guilt and penalty phases of petitioner's trial must be set aside. There is a reasonable probability that but for these errors and omissions, the outcome of petitioner's trial would have been more favorable to petitioner.

The facts supporting this claim, among others to be developed after full investigation, adequate funding and access to this Court's subpoena power and other available court processes, including an evidentiary hearing to further develop this claim, are:

1. All prospective jurors in petitioner's trial were required to answer a questionnaire under penalty of perjury. (Questionnaire of Juror 045882, appended as Exhibit E.)

2. Question 34 asked if the prospective juror had ever been arrested, and if so, to provide information regarding the type of criminal charge, the approximate date and location of the arrest, and the outcome of the case. In response to this question, Juror 045882 wrote,

"assault and battery. 1991 From my hous (sic) charges dropped." The juror also indicated in response to Question 35 that his brother previously had been arrested. No details about that arrest were provided in that response, but in response to Question 50, the juror wrote that his "brother was partly wrong but still had to serve 6 month[s] . . . for anothers (sic) fault." (*Ibid.*)

3. During voir dire, Juror 045882 further discussed the prior arrests suffered by his family members and himself. He stated, "My brother was just in here not too long for assault and battery. . . . And me, it was about three years back – well, I didn't come to court, my brother went through. I didn't get convicted or nothing; dropped charges against me." (RT 1040-1041, Voir Dire of Juror 045882, appended as Exhibit F.)

4. Juror 045882 was untruthful in his response to Question 34 and in his voir dire answers. He concealed that he was on misdemeanor probation at the time of his jury service. On January 14, 1995, this juror was arrested for a misdemeanor violation of Penal Code section 415(1) (fighting in a public place). The arrest occurred at the Valley Plaza Mall, Bakersfield. On January 18, 1995, the District Attorney filed a complaint charging the juror with violating Penal Code section 415(1) in Bakersfield Municipal Court No. 506741-B. On February 6, 1995 – 14 months prior to his jury service – Juror 045882 entered a guilty plea to the misdemeanor offense and was sentenced to three years probation and ordered to pay a $225 fine. (Court File, Bakersfield Municipal Court No. 506741-B, appended as Exhibit G.[4])

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[4]In order to preserve the privacy of Juror 045882, the name of the defendant in the court file submitted as Exhibit G was redacted and replaced with the designation Juror 045882. Petitioner is concurrently moving this Court to permit the filing under seal of both the unredacted court file (Exhibit G1) and counsel's declaration (Exhibit G2) explaining how it was determined Juror 045882 and the defendant in Bakersfield criminal case No. 506741-B are the same person.

No mention of this arrest and conviction was made in the juror's answers to the questionnaire or in the voir dire.

5. There is no reasonable explanation for Juror 045882's failure to mention his misdemeanor conviction and probation sentence other than he was intentionally attempting to conceal the information during voir dire. Given that the conviction occurred only 14 months before his jury service and that he was still on probation, it is inconceivable that the juror forgot about his criminal record. In addition, Question 34 was not vague or ambiguous and the juror certainly understood the question. The juror volunteered that an assault and battery charge had been dismissed in 1991, but withheld that he had been sentenced for the misdemeanor offense in 1995.

6. Juror 045882's intentional concealment of his misdemeanor conviction and probation sentence constituted juror misconduct. (*People v. Farris* (1977) 66 Cal.App.3d 376, 385-387.) Moreover, the juror's decision not to reveal the prior conviction, when combined with his determination to serve on the jury ("a great chance for me") and his support for the death penalty ("if guilty why not") strongly suggested an affinity for the prosecution. Juror 045882's concealment of his misdemeanor conviction and probation status was thus likely to have been rooted in bias against the defense and indicates that he prejudged the case for the prosecution. The juror lied about his background in order to improve his chances of serving on the jury and to secure the opportunity to convict petitioner and sentence him to death.

7. On these facts, there is a presumption under state law that Juror 045882's misconduct resulted in prejudice to petitioner. (*People v. Green* (1995) 31 Cal.App.4th 1001, 1017.) That presumption is not rebutted because the record of the case indicates a substantial

likelihood that the juror was biased against petitioner. In his questionnaire, the juror expressed a strong desire to serve on the jury and a bias in favor of the death penalty. Question 30 asked, "What is your attitude toward serving on this jury?" Juror 045882 responded, "I feel that it is a great chance for me." (Questionnaire of Juror 045882) In response to Question 56, which asked the prospective juror to describe his feelings about the death penalty, Juror 045882 stated, "If guilty why not." He also stated that he believed that the death penalty was imposed "too seldom." (*Ibid.*)

8. In addition, Juror 045882's concealment of his criminal record prevented petitioner form intelligently inquiring into an area of potential bias upon which to base a challenge for cause or to knowingly exercise one of his remaining peremptory challenges. Petitioner did not exhaust all of his peremptory challenges during jury selection (RT 1434-1438), and would have been able to excuse Juror 045882 had the defense known about his conviction and probationary status.

CLAIM 3: PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT PHASE

Petitioner's confinement is unlawful in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15, 16 and 17 of the California Constitution. Petitioner's rights to the effective assistance of counsel, to due process, to a fair trial, to present a defense, and to a reliable guilt and penalty determination were violated by: (1) trial counsel's failure to present material exculpatory evidence; (2) trial counsel's failure to adequately confront evidence introduced by the prosecution; (3) trial counsel's failure to adequately object to inadmissible evidence; and (4) other omissions specified below (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Pope* (1979) 23 Cal.3d 412, 423-425). When these errors are considered separately, or in conjunction with each other and other claims, the verdicts in the guilt and penalty phases of petitioner's trial must be set aside. There is a reasonable probability that but for these errors and omissions, the outcome of petitioner's trial would have been more favorable to petitioner.

The facts supporting this claim, among others to be developed after full investigation, discovery, adequate funding and access to this Court's subpoena power and other available court processes, including an evidentiary hearing to further develop this claim, are:

A. Failure to Present Expert Evidence That Criminalist Gregory Laskowski's Use of Mikrosil Casting to Make a Firearm Identification Was an Unreliable New Scientific Technique Not Generally Accepted in the Scientific Community

1. Trial counsel failed to present expert evidence that criminalist Gregory Laskowski's use of Mikrosil casting to make a firearm identification was: (1) a new scientific technique; (2) was not generally accepted in the scientific community; and (3) did not employ

correct scientific procedures.

2. During voir dire on the morning of April 15, 1996, the prosecution disclosed for the first time that criminalist Gregory Laskowski had made a positive match between the .25 Colt handgun petitioner had allegedly given to Robb Lutts and Danny Phinney and the two bullets recovered from victim Clifford Merck. (RT 433.) Earlier ballistics comparisons between the same gun and the bullets had been negative. (RT 435.) Defense counsel was surprised by the revelation and objected to admission of the newly-discovered evidence on various grounds. (RT 472-473, 477-478, 478-485.) Counsel also stated that they intended to seek a *Kelly-Frye* foundational hearing on Mikrosil casting but had insufficient information to proceed at that time.[5] (RT 477-478.) The hearing was deferred.

3. On May 22, 1996, prior to Laskowski's testimony, defense counsel renewed their substantive objections to the proffered ballistics evidence and requested a foundational hearing under Evidence Code section 402. (RT 2118.) The court agreed to first hear testimony regarding the procedures used by Laskowski for the ballistics comparison to determine preliminarily whether those procedures involved a new scientific methodology. (RT 2124.)

4. Laskowski was the only witness who testified at the evidentiary hearing. (RT 2127, et seq.) On direct examination, Laskowski initially described his experience and training in the field of firearms and tool mark identification. (RT 2128-2130.) He then recounted the sequence of events that led him to re-examine the Colt handgun on or about April 12, 1996. (RT 2130.) The impetus for the new comparison was information received

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[5]*People v. Kelly* (1976) 17 Cal.3d 24, and *Frye v. United States* (D.C. Cir. 1923) 292 F. 1013 (hereafter *Kelly-Frye*).

by Laskowski from Detective Christopherson, based on an interview with Danny Phinney, that the Colt pistol had been altered after it was obtained from petitioner.[6] According to Laskowski, such an alteration would have made it difficult to accurately compare the gun with the known bullets. (RT 2131.)

5. After closer inspection of the Colt's barrel, Laskowski concluded that, because of the damage to the inside of the gun, he would be unable to accurately match bullets test-fired from the gun to the bullets recovered from Clifford Merck. As a result, Laskowski decided to try a novel technique to cast the interior of the gun barrel. (RT 2132.) Laskowski had learned one such casting method, generally used for tool mark identification, as part of his training. (RT 2133.) Based on tests performed during his training, Laskowski believed that barrel molds could reproduce the unique characteristics of a particular firearm. (RT 2133.) He decided to use Mikrosil, a rubbery silicone material, to cast the interior of the barrel because of its reputation "as the premier casting material for toolmarks." (RT 2134.)

6. Laskowski proceeded to prepare the Mikrosil and cast the barrel of the Colt. He testified that he was guided by the manufacturer's instructions and a scientific research paper reported in the Association of Firearms and Tool Marks Journal. (RT 2134.) After removing the hardened Mikrosil, Laskowski compared the impressions left on the mold with

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[6]The timing of events leading to the re-examination of the Colt pistol is as follows: on August 23, 1994, in preparation for petitioner's preliminary hearing, Detective Christopherson re-interviewed Danny Phinney. (RT 1902.) In that interview, Phinney mentioned for the first time that he believed Lutts had tampered with the barrel of the Colt. (RT 1902.) Christopherson did not convey this new information to Laskowski until April 11, 1996, more than a year-and-a-half later. (RT 436.) Laskowski retested the Colt, using the Mikrosil-casting method on Friday, April 12, 1996, and reported the new findings to Christopherson and the District Attorney that same afternoon. (RT 440, 457.) The Deputy District Attorney attempted to contact one of petitioner's attorneys later that day, but failed to reach him and left no message. (RT 411.)

the markings on the two bullets recovered during the autopsy. (RT 2135.) After making these comparisons, Laskowski concluded the two spent bullets came from the Colt handgun. (RT 2136-37.)

7. Although Laskowski testified that the procedure was a generally-accepted scientific methodology for firearms identification, (RT 2137), Laskowski could not name a single ballistics expert who had used Mikrosil casting in a forensic firearms examination, or anyone in his profession who had testified in court regarding this technique. (RT 2137-2142, 2150-2151.) In fact, Laskowski had conducted a survey throughout California to determine if any other examiner had performed a Mikrosil-based firearms comparison and had testified to the results in court; he could not find a single instance where this had occurred or where the technique had withstood a *Kelly-Frye* objection. (RT 457, 2142.)

8. Laskowski acknowledged a variety of problems affecting Mikrosil casting. These included distortions caused by problems with light absorption under the microscope, as well as bubbles, limpness and shrinkage of the material. (RT 2148-2158). He also admitted that the procedure he used was "rare," and "not routine." (RT 2143, 2152.)

9. Trial counsel did not present any expert testimony to establish that the use of Mikrosil casting to make a firearm identification was an unreliable, new scientific technique which was not generally accepted in the scientific community. Instead, trail counsel's argument to exclude the evidence was based only on the testimony given by Laskowski. (RT 2158-59.) The trial court overruled the objection, characterizing Laskowski's method as only "a little bit different technique." (RT 2162.)

10. Jim Norris, former director of the San Francisco Police Department Forensic Services Division and now a forensic science consultant with special expertise in the field of

firearms identification, has evaluated the firearm identification made by Laskowski. He reviewed transcripts of testimony given by Laskowski at a pretrial hearing on April 15, 1996, at a hearing pursuant to Evidence Code section 402 on May 22, 1996, and at trial on May 22, 1996. He also reviewed examination reports prepared by Laskowski on October 17, 1984 and April 15, 1996, and copies of photographs taken during the second examination. (Declaration of Jim Norris, at ¶ 5. Petitioner hereby incorporates by reference, as if fully set forth herein, the Declaration of Jim Norris, appended as Exhibit H.)

11. Mr. Norris concluded that "the analysis performed by Mr. Laskowski on April 15, 1996 constituted a new scientific methodology or technique for determining whether a bullet had been fired from a particular firearm." (*Id.*, at ¶ 7.) According to Mr. Norris,

> Under the traditional method long approved by the community of firearms identification experts, the markings on a spent bullet are compared with the markings on a test fired bullet to determine if they match. A match in the markings means that the spent bullet was fired from the same weapon that was used to test fire the comparison bullet. The Mikrosil method employed by Mr. Laskowski differed significantly from the traditional technique. Instead of comparing the markings on bullets that had actually been fired through the barrel of the firearm, Mr. Laskowski compared the markings on the spent bullets with the markings made from a cast of the gun barrel. It is this comparison with the markings from the stationary gun barrel that made Mr. Laskowski's technique so novel.

(*Ibid*).

12. In addition, "[n]ot only was the Mikrosil technique significantly different from the long accepted, traditional method of firearms identification," to Mr. Norris's knowledge this method had never been used before. (*Id.*, at ¶ 8.) Mr. Norris himself had never used the Mikrosil method in any firearm identifications he had performed and he was not aware of any other criminalists in the laboratories in which he had worked who employed such a method. (*Ibid.*)

13. Mr. Norris further concluded that the Mikrosil casting method had not gained acceptance in the community of firearms identification and ballistics experts in 1996, or since.

> In 1996, there was no literature in the field that approved of Mikrosil casting as a method of firearms identification. In addition, the use of Mikrosil casting as a method of firearms identification was a topic that had been discussed amongst the experts in the field, including myself. These discussions occurred in crime laboratories, and at meetings and seminars attended by experts. The consensus of the experts was that the Mikrosil casting technique *was not reliable and should not be used as a method of firearms identification.*

(*Id*, at ¶ 9, italics added.)

14. Experts in 1996 recognized a significant problem with the method of comparing markings from a spent bullet with markings from a gun barrel cast.

> The problem was that the unique markings on a spent bullet resulted from the bullet coming in contact with the rifling and other minute features located on the entire, interior surface of the gun barrel. In other words, it was the process of the bullet being shot through the length of the gun barrel that created the combination of markings that were common to all bullets fired by a particular gun. When a bullet is fired through a barrel it is moving at very high speed, often near 1000 feet per second. The bullet is made of a soft metal, usually either lead or copper. The high pressures involved in the discharge of a firearm cause the bullet to expand and form a gas-tight seal within the barrel. A cast of a stationary gun barrel does not account for markings that are created by the bullet being propelled through the length of the barrel. For example, a slight, sharp protrusion on the interior surface of the barrel will be replicated in the Mikrosil cast. However, when a bullet is shot through the barrel, the protrusion will cut a line into the entire length of the bullet. A comparison of the line on the bullet with the small protrusion in the cast will not allow an accurate determination of whether the bullet was fired by the gun from which the barrel cast was made. Similarly, a small cavity in the interior surface of the barrel will be replicated in the Mikrosil cast. When a bullet is shot through the barrel, however, the cavity will cause a raised area on the bullet that will not look anything like the cavity itself. Thus the Mikrosil cast simply fails to replicate what happens to the surface of the bullet during the firing process.

(*Id.*, at ¶ 10.)

15. Other problems with Mikrosil casting that were recognized by experts in 1996 included the formation of air bubbles in the silicone compound and the presence of residue in the gun barrel during the making of the cast. Air bubbles in the compound and residue in the gun barrel will preclude the Mikrosil cast from replicating all of the significant markings in the gun barrel. (*Id.*, at ¶ 11.)

16. Finally, Mr. Norris found that Laskowski "did not employ correct scientific procedures when he used Mikrosil casting to make his firearm identification." (*Id.*, at ¶ 12.) As Mr. Norris explained,

> In 1996 it was well settled in the field of firearms identification and ballistics that any scientific test had to be validated. In other words, the test had to be performed with both positive and negative controls to show that it really worked. Nowhere in his reports or his testimony did Mr. Laskowski indicate that he validated his novel technique. Such validation would have involved: (1) comparing the markings on a bullet known to have been fired by a particular gun with a Mikrosil cast of the gun barrel; and (2) comparing the markings on a bullet known not to have been fired by a particular gun with a Mikrosil cast of the gun barrel. If the technique was valid, the first comparison should have resulted in a positive identification, and the latter in no identification. In the absence of any validation of the Mikrosil casting technique, it cannot be concluded that the firearms identification made by Mr. Laskowski was reliable.

(*Ibid.*) Indeed, the standards for the proper operation of crime laboratories in effect in 1996 included the requirement that new technical procedures be validated through the use of positive and negative controls before being utilized in casework. (*Id.*, at ¶ 13.)

17. In light of Mr. Norris's declaration, trial counsel was ineffective in failing to present expert testimony to challenge the admissibility of Laskowski's firearm identification based on the Mikrosil casting technique. The factual bases of Mr. Norris's opinion were all well known at the time of petitioner's trial. The consensus of the experts who had discussed the use of Mikrosil casting as a method of firearms identification was that the technique was

unreliable and should not be used. In addition, at the time of petitioner's trial validating new scientific techniques through the use of positive and negative controls was mandated by standards for the proper operation of crime laboratories. These facts t were well known in the relevant scientific community at the time of petitioner's trial, and trial counsel could readily have obtained expert testimony to support the defense motion to exclude Laskowski's firearm identification.

18. Had testimony from a qualified expert been presented by trial counsel, it is reasonably probable that the trial court would have excluded Laskowski's testimony that the bullets recovered from Merck were fired by the .25 Colt handgun petitioner allegedly gave to Lutts and Phinney. Such expert's testimony, coupled with Laskowski's own inability to identify anyone who had previously used the Mikrosil technique to make a firearm identification, would have resulted in overwhelming evidence that: (1) the Mikrosil casting was a new scientific method subject to *Kelly-Frye* analysis; (2) the technique was not generally accepted in the scientific community; and (3) Laskowski did not employ correct scientific procedures in utilizing the Mikrosil method.

B. Failure to Present Evidence That the Match Between the Latent Prints from the Merck Residence and Petitioner's Known Prints Was Unreliable

19. Trial counsel failed to present evidence that the match between the latent prints from the Merck residence and petitioner's known prints was unreliable.

20. Investigators from the Kern County Sheriff's Department lifted 44 latent fingerprints from the residence in which Alma and Clifford Merck were killed. (RT 1542.) On November 1, 1984, Jerry Roper, an evidence technician, compared the lifted latent prints to petitioner's known prints and found they did not match. (RT 1589.)

21. In May, 1994, after the case was reopened by the Sheriff's Department, Technician Sharon Pierce re-examined the latent fingerprints lifted from the residence. She found that a latent lifted from the bottom of a sewing tray matched petitioner's left middle finger and that a latent lifted from the edge of the back door matched petitioner's left thumb. (RT 1957.) Pierce's identifications were confirmed by her supervisor and an examiner from the Department of Justice (RT 1994-1995, 2029.)

22. Trial counsel did not elicit evidence, either through cross-examination of the prosecution witnesses or through presentation of their own expert witnesses, that the reliability of latent print identifications was unproven. The available evidence that trial counsel could have presented to cast grave doubt on the reliability of the alleged identifications of petitioner's fingerprints includes the following.

23. No attempt to validate the underlying premise of forensic fingerprint identification has ever been made. It is often thought that the reliability of forensic fingerprint identification is vouched for by the "fact" that no two fingerprints are exactly alike. This claim, however, has never been proven, nor could it be. It has been inferred from the failure of criminal identification bureaus to find exactly identical fingerprints emanating from different fingers. However, the systems of fingerprint filing used by criminal identification bureaus are not designed to look for identical fingerprints from two different individuals. (Declaration of Simon Cole, Ph.D., at ¶¶ 9, 14, 18, 23. Petitioner hereby incorporates by reference, as if fully set forth herein, the Declaration of Simon Cole, appended as Exhibit I.)

24. Moreover, even if it were true that no two fingerprints in the world are exactly alike, that finding would be almost entirely irrelevant to the question of how accurate is

forensic fingerprint evidence. The underlying issue in fingerprint identification is one of reliability, not uniqueness. There are undoubtedly different persons who have very similar friction ridge patterns on their fingers. No empirical studies have been conducted to determine how similar fingerprints from two different fingers might be. Thus, there has been no measurement of the underlying variability of human fingerprint patterns. (*Id.*, at ¶¶ 23-24.)

25. In addition, the fingerprint community has failed to devise an adequate and uniform standard for what constitutes a fingerprint "match." It is well understood that similarities in location, type, and orientation of what are called "ridge characteristics" lead fingerprint examiners to conclude that a "latent" (that is, a print taken from a crime scene) print and an inked print from a known source come from the same finger. What is not agreed upon is how many of these similarities, or how much similarity, is necessary to warrant this conclusion. This lack of a uniform standard is especially troublesome because an expert finding of an identification is expressed not in terms of probability or error rate, but as an unqualified opinion. (*Id.*, at ¶12.)

26. Many fingerprint examiners use "point standards" to establish a fingerprint identification. However, there is no agreement amongst examiners as to the minimum number of points of similarity necessary to establish a match. An alternative viewpoint is there should not be a point standard. Instead, it should be up to the examiner in each individual case to decide whether sufficient matching detail is present to warrant the conclusion a suspect is the only anatomical entity in the universe capable of creating the unknown print. Thus, there is no clearly established articulated standard for what constitutes a fingerprint match and, to the extent any standards do exist, they are not uniform. In the

absence of uniform standards, examiners are asked to intuit subjectively the rarity of the identifying features of the latent print and there will be disagreements between examiners in determining whether a match exists. (*Id.*, at ¶¶ 12-17.)

27. In addition, there has also been no comprehensive attempt to measure the accuracy of forensic fingerprint analysis and identification, and importantly no testing has established the accuracy of fingerprint identifications made from partial, distorted prints, which is typically the condition of latent prints in criminal cases. The absence of error rates is of great concern to both academicians and forensic scientists. Indeed, within the scientific community that has sufficient training to conduct or evaluate validation studies, there is no general acceptance of the claim that latent print identification is valid. (*Id.*, at ¶¶11, 18-22.)

28. Even in the absence of validation studies, it is indisputable that latent print examiners make mistakes. There have been a number of documented cases in which latent prints examiners have made erroneous identifications, some of which have led to the imprisonment of innocent persons. (*Id.*, at ¶ 25.)

29. The high likelihood of false identifications is apparent from the poor performance of latent print examiners on non-blind proficiency tests (i.e., the examiners knew they were being tested). While these examinations do not constitute controlled scientific studies, they nevertheless do provide some indication of the lack of proficiency of examiners throughout the United States. These examinations conducted since 1983 have consistently reported false positive errors. The most egregious results were on the 1995 test, in which 22 percent of the examiners taking the test reported at least one false positive. Unlike with a false negative, the consequence of a false positive is that an innocent person could (and, given the power of fingerprint evidence, probably would) be falsely convicted of

a crime. In a 1987 poll of 978 potential jurors, 85 percent viewed fingerprint evidence as the most reliable means of identification. (*Id.*, at ¶ 28.)

30. In light of the facts described above, trial counsel was ineffective in failing to elicit evidence that would have established the unreliability of the fingerprint identifications made by the prosecution witnesses. Evidence showing that fingerprint identification was not a valid science – absence of scientific validation, unknown rate of error, absence of uniform standards for identification, high rate of false positives in the 1995 proficiency testing, and absence of peer analysis or review – was well known at the time of petitioner's trial.

C. Failure to Adequately Object to Emma Foreman's Alleged Extrajudicial Statement

31. Petitioner's claim is related to Argument E contained in the opening appellate brief, at pages 152-163, and a copy of that argument is appended to this petition as Exhibit J and incorporated by reference as if fully set forth herein.

32. Prosecution witness Emma Foreman was the mother of Gerry Tags, petitioner's former girlfriend. During Foreman's direct examination in the guilt phase, the prosecutor asked Foreman to testify about what petitioner had said about an elderly couple he had harmed. Foreman answered nonresponsviely, "he said that he would cut her mother-fucking throat." (RT 2246-2247.)

33. After Foreman completed her testimony, the prosecutor sought to impeach her with the testimony of Shafter Police Lieutenant John Porter, who had interviewed Foreman on January 26, 1990. According to Porter, Foreman stated she was told by petitioner that he had killed an old couple in Bakersfield. (RT 2389.) Defense counsel objected to admission of the prior statement pursuant to Evidence Code section 1235 because it was not

inconsistent with Foreman's prior testimony. (RT 2390.) That objection was overruled. (RT 2391.) Defense counsel did not object on the constitutional grounds that admission of Foreman's extrajudicial statement violated petitioner's right to confrontation under the Sixth Amendment and his right to due process under the Fourteenth Amendment.

34. Trial counsel had no tactical reason for their omission, and no acceptable reason exists. Counsel Sorena is not aware of any strategic decision that was the basis for failing to object to the evidence on constitutional grounds. (Declaration of James V. Sorena, ¶ 4, appended as Exhibit C; Declaration of Mark Goldrosen, ¶ 5, appended as Exhibit D.)

D. Failure to Adequately Object to Danny Phinney's Alleged Extrajudicial Statements

35. Petitioner's claim is related to Argument F contained in the opening appellate brief, at pages 164-185, and a copy of that argument is appended to this petition as Exhibit K and incorporated by reference as if fully set forth herein.

36. Danny Phinney testified that petitioner gave him and Rob Lutts a Colt handgun in exchange for methamphetamine. Other witnesses identified the handgun as belonging to victim Clifford Merck.

37. After Phinney completed his testimony, the prosecution introduced prior statements Phinney had made in an interview with Sergeant John Diederich. Trial counsel objected that the prior statements were hearsay, and that the foundations for admission of prior inconsistent statements, prior consistent statements, and past recollection recorded had not been established. (RT 1779, 1787-1789, 1791-1796, 1801-1806.) Those objections were overruled. Defense counsel did not object on the constitutional grounds that admission of Phinney's extrajudicial statement as past recollection recorded violated petitioner's right to

confrontation under the Sixth Amendment and his right to due process under the Fourteenth Amendment.

38. Trial counsel had no tactical reason for their omission, and no acceptable reason exists. Counsel Sorena is not aware of any strategic decision that was the basis for failing to object to the evidence on constitutional grounds. (Declaration of James V. Sorena, ¶ 4, appended as Exhibit C; Declaration of Mark Goldrosen, ¶ 6, appended as Exhibit D.)

E. Failure to Include the Magistrate Judge's Admonition Concerning the Limited Purpose of Gerry Tag's Former Testimony When Reading the Testimony to the Jury

39. Petitioner's claim is related to Argument J contained in the opening appellate brief, at pages 211-223, and a copy of that argument is appended to this petition as Exhibit L and incorporated by reference as if fully set forth herein.

40. Gerry Tags testified as a prosecution witness at the preliminary examination, but died before the trial. On re-direct examination Tags stated she believed petitioner committed the three charged murders. The magistrate judge explained on the record that he was considering this testimony not for the truth of the matter stated, but only as an explanation of why the witness hated petitioner. (PERT, 9/7/94, 169-170.) At trial Tags's previous testimony was admitted due to her unavailability. Both the prosecutor and defense counsel Michael Sprague read portions of the testimony to the jury. When Mr. Sprague read the re-direct examination, he failed to include the limiting admonition regarding the purpose of admitting Tags's belief that petitioner committed the murders. (RT 2385.)

41. Trial counsel had no tactical reason for their omission, and no acceptable reason exists. Counsel Sorena is not aware of any strategic decision that was the basis for Sprague's failure to include the limiting instruction in the reading of the testimony.

(Declaration of James V. Sorena, ¶ 4, appended as Exhibit C; Declaration of Mark Goldrosen, ¶10, appended as Exhibit D.)

F. Failure to Adequately Object to Mitzi Cowan's Testimony That in Early September, 1984, Gerald Cowan Returned to Her Apartment with Folded U.S. Currency

42. Petitioner's claim is related to Argument K contained in the opening appellate brief, at pages 224-230, and a copy of that argument is appended to this petition as Exhibit M and incorporated by reference as if fully set forth herein.

43. Mitzi Cowan, who at the time of the trial was married to petitioner's brother, Gerald Cowan, testified about events that occurred one day in early September, 1984, when petitioner and Gerry Tags visited her and Gerald at their apartment. Petitioner and Gerald left together from the apartment at about 5:00 p.m. (RT 2431.) Gerald returned alone at approximately 10:00 p.m., borrowed Mitzi's car, and left again. (RT 2432.) At 1:00 a.m., Gerald came back to the apartment by himself. (RT 2433.)

44. The prosecutor elicited testimony from Mitzi that when Gerald returned, he had more than two hundred dollars in U.S. currency that was folded in half, similar to how Mitzi's father, Jewell Russell, folded his money. (RT 2429, 2440.) Defense counsel objected to this testimony on the ground that Gerald's statements and actions were irrelevant, since there was "no showing of a conspiracy or relationship between this defendant and his brother" in connection with the Russell murder. (RT 2433, 2434-2435, 2436.) That objection was overruled. (RT 2437.) Defense counsel did not object on the federal constitutional grounds that admitting the irrelevant testimony violated petitioner's Eighth Amendment right to a reliable penalty determination and his due process right to a fair trial.

45. Trial counsel had no tactical reason for their omission, and no acceptable

reason exists. Counsel Sorena is not aware of any strategic decision that was the basis for the failure to object to the evidence on constitutional grounds. (Declaration of James V. Sorena, ¶ 4, appended as Exhibit C; Declaration of Mark Goldrosen, ¶7, appended as Exhibit D.)

G. Failure to Present Testimony from Gerald Cowan That Petitioner Did Not Participate in the Killing of Jewell Russell

46. Gerald Cowan was initially charged as petitioner's co-defendant in the murders of Clifford and Alma Merck and the murder of Jewell Russell.

47. Gerald Cowan's case was severed from petitioner's after he entered into a plea agreement with the prosecution. On January 29, 1996, Gerald agreed to plead no contest to the charge that he committed voluntary manslaughter by killing Jewell Russell. The prosecution dismissed all charges relating to the murders of the Mercks. The no contest plea was set aside at the request of the prosecution on February 9, 2006. (Augmented CT 869.) After this Court found that the statute of limitations did not preclude a conviction for voluntary manslaughter, Gerald's no contest plea was reinstated on February 20, 1997. (Augmented CT 892; *see People v. Cowan* (1996) 14 Cal.4th 367.) On March 20, 1997, Gerald was sentenced to four years in state prison. (Augmented CT 894.)

48. During petitioner's trial, defense counsel did not call Gerald Cowan as a witness for the defense.

49. Had Gerald been called as a defense witness, he would have provided critical, exculpatory evidence regarding petitioner's noninvolvement in the Russell killing. At the time of Russell's killing, Gerald was the boyfriend of Russell's daughter Mitzi, and they later married. (RT 2426.) Gerald would have testified that he killed Jewell Russell by himself. Gerald went to Russell's home after learning that Russell had recently molested

Mitzi's daughter and had molested Mitzi when she was young. Gerald confronted Russell about his conduct, and Russell swung a knife at him. After avoiding the knife, Gerald knocked Russell to the kitchen floor. Gerald then beat Russell with his fist and tried to stab him in the chest but the knife bent. Gerald dragged Russell to the living room, where he slit his throat, and then to the bedroom, where he put his body under the bed. After killing Russell, Gerald decided to take money from his pockets and search through the dresser drawers. Gerald drove away in Russell's Fort Pinto car, which he later abandoned. Petitioner was not present at any time during the killing and had nothing to do with it. (Declaration of Gerald Cowan, at ¶ 14, appended as Exhibit N.)

50. Gerald's testimony would have been consistent with physical evidence obtained from the crime scene. Impressions found on a cigarette butt recovered from Russell's home were found to be consistent with Gerald's teeth. (Report of Dr. Gerald Vale, February 15, 1995, appended as Exhibit O.)

51. If asked about the Merck homicides, Gerald would have testified that he was not involved and had no personal knowledge or other information about them. He could not have implicated Robert in the Merck homicides. (Declaration of Gerald Cowan, ¶ 14 .)

52. Given the importance of Gerald's testimony, it was unreasonable for defense counsel not to investigate Gerald's knowledge of the Russell killing or to call him to testify on petitioner's behalf.[7]

H. Petitioner was Prejudiced by Trial Counsel's Deficient Representation

53. Petitioner was prejudiced in the guilt phase by trial counsel's deficient

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[7]Had Gerald exercised his constitutional right to remain silent because he had not yet been sentenced when petitioner's trial was scheduled to commence, defense counsel could have obtained a continuance of the trial until after the sentencing had occurred.

representation. The guilt determination was close, as reflected in the time the jury deliberated before reaching verdicts. On the first day of deliberations, June 3, 1996, the jury deliberated from 3:45 p.m. to 4:38 p.m. (CT 1364.) The jury then deliberated for half a day on June 4, 1996 (CT 1369), a full day on June 5, 1996 (CT 1373), and until 3:30 p.m. on June 6, 1996 before returning verdicts (CT 1458) – a total of more than two full days. (See *People v. Woodard* (1979) 23 Cal.3d 329, 341 ["issue of guilt in this case was far from open and shut, as evidenced by the sharply conflicting evidence and the nearly six hours of deliberations by the jury before they reached a verdict"]; *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, 637 ["jurors deliberated over nine hours over three days, which suggests that they did not find the case to be clear-cut"].)

54. The prosecution's case against petitioner was so tenuous that for years the prosecution believed it did not have enough evidence to charge petitioner. There was no eyewitness testimony identifying petitioner as the killer, and other than Emma Foreman's ambiguous and suspect statement to Lieutenant Porter, there was no evidence that petitioner ever admitted committing the crimes. (RT2389.) According to Foreman, petitioner said he beat the couple to death, which was inconsistent with the manner in which the Mercks were killed (gunshot wounds and strangulation). In addition, Foreman said petitioner's alleged confession may have been made up to one month before Jewell Russell was killed, which would have been before the deaths of the Mercks. Significantly, when Gerry Tags asked petitioner if he "did . . . those two old people on McClean Street," petitioner replied, "No, I did not do them." (RT 2403.)

55. The prosecution's case rested primarily on two pieces of circumstantial evidence – petitioner's fingerprints at the Mercks' home and testimony from witnesses who

claimed to have seen petitioner in possession of property allegedly taken during the killings, including Clifford Merck's firearm that allegedly was used to shoot him. The credibility of this evidence, however, was highly suspect.

56. With respect to the fingerprint evidence, the positive fingerprint match criminalists found in 1994 was contradicted by the prior findings of criminalist Jerry Roper. When Roper reviewed the latent fingerprints in 1987, he did not find any latents that matched petitioner's known fingerprints. (RT 1589-1590, 1595.)

57. In addition, the witnesses who claimed they saw petitioner in possession of the property allegedly belonging to the Mercks were not credible. That property included a lighter case, a Colt handgun, Social Security checks, a wallet, a driver's license, and a white ring with a turquoise stone.

58. Testimony about the lighter case was elicited from Ronnie Woodin, who claimed to have purchased the item from petitioner. Woodin's credibility, however, was severely impeached. The witness admitted that he smoked marijuana "all of the time" and was probably "high" at the time that he allegedly bought the lighter case, as well as during his interview with Sergeant Fraley. (RT 1924, 1932, 1937.) Smoking marijuana caused Woodin to be forgetful about events he observed. (RT 1931.) Woodin also was impeached with a prior misdemeanor conviction for driving under the influence of alcohol. (RT 1923-1924.) Finally, when shown a lighter case in court, Woodin could not be certain it was the case he allegedly bought from petitioner. (RT 1925-1926.)

59. Equally unconvincing was the prosecution's attempt to link petitioner to a ring that allegedly had belonged to Alma Merck. The prosecution's theory was that petitioner sold the ring to his sister, Catherine Glass, in September, 1984. At trial, however, Glass

testified that she could not remember whether petitioner had sold her a ring. (RT 1940.) Then, after further questioning, Glass acknowledged that petitioner probably had sold her a ring, but she was still not sure. (RT 1942.) Moreover, when shown the ring that the prosecution claimed was Alma's, Glass did not recognize the it as having been sold to her by petitioner. (RT 1942.)

60. Also lacking credibility were prosecution witnesses Danny Phinney and Robb Lutts. Phinney was a particularly critical witness because he claimed to have seen petitioner in possession of Clifford Merck's Colt handgun that was allegedly used to kill Clifford, Clifford's wallet and driver's license, and the Mercks' Social Security checks. Phinney's capacity to perceive, process and recall information, however, was gravely impaired. At the time Phinney knew petitioner, he was a long-time methamphetamine addict who was injecting methamphetamine at least once a day. (RT 1665, 1672.) This addiction caused Phinney to "go through periods of paranoia or delusions" (RT 1677-1678), during which he would see things and hear sounds that were not real (RT 1678). Moreover, Phinney was still using methamphetamine at the time he testified at petitioner's trial. (RT 1688.)

61. In addition to being a drug addict, Phinney suffered from a life-long bipolar disorder, which he described as "having two centers to [his] brain," one manic and the other depressed. (RT 1673, 1674.) Phinney testified that his bipolar disorder caused his mind to race, jumbled his thought processes and impaired his short term memory. (RT 1674.) As a result of these impairments, Phinney could recall only "to an extent" what occurred when he and petitioner allegedly met in September, 1984. (RT 1652.)

62. Moreover, Phinney had a strong motive to cooperate with the prosecution when he first came forward to make a statement about petitioner. Phinney was in custody

awaiting trial on felony drug charges. He not only was seeking lenient treatment in his own case, but he was concerned that the Colt handgun seized during his arrest might be linked to the murders of the Mercks. He hoped to "exonerate himself from anything to do with the weapon." (RT 1660.)

63. There were two other reasons why Phinney desperately wanted to be released from jail. First, he was being housed in protective custody, and he "wanted to get out of P.C. real bad" so that other inmates would not believe he was a snitch. (RT 1721-7122, 1724.) Second, Phinney was undergoing methamphetamine withdrawal and wanted to be released so he could use drugs again. (RT 1724.) Phinney realized providing information about petitioner and the Colt handgun might allow him to be released from custody, and he later "wound up getting some kind of deal." (RT 1660, 1724.)

64. The record also indicates that, prior to his first interview with Sergeant Diederich, Phinney learned about the killings from reading the newspaper. (RT 1663, 1665, 1728.) The newspaper article may well have been the source of much of the information he provided in the interview.

65. Phinney's lack of credibility was further evident from a significant inconsistency between his statement to Sergeant Diederich on December 21, 1984 and his trial testimony. In his prior statement, Phinney claimed that he was not present when Lutts obtained the Colt handgun, and had only heard that petitioner sold the gun to Lutts. (RT 1855, 1866, 1870.) In addition, contrary to his trial testimony Phinney never mentioned acting as an intermediary in the transfer of the handgun from petitioner to Lutts. (RT 1856.)

66. Phinney also acknowledged his willingness to lie to Sergeant Diederich in order to win his release from jail. (RT 1734-1735.) According to Phinney, it was "a

possibility" he told the sergeant whatever he believed would get him out of jail, regardless of the truth. (RT 1735.) Phinney just wanted to "give them something to investigate" and "give [himself] a little break on some time." (RT 1735.)

67. Finally, Phinney's extensive criminal record added to his lack of credibility. Phinney testified that he had a lengthy criminal record resulting from his addiction to narcotics and alcohol. (RT 1652.) He had never been sentenced to state prison, but had served a number of county jail incarcerations for being under the influence of various drugs. (RT 1652.)

68. The credibility of prosecution witness Robb Lutts was also seriously lacking. During September of 1984, Lutts was deeply involved in the sale and use of drugs. (RT 1627.) According to Lutts, he used at least a gram of methamphetamine every day, and was under the influence of methamphetamine most of the time. (RT 1638-1640.) The use of methamphetamine made Lutts paranoid and impaired his ability to accurately perceive and recall events he witnessed. (RT 1639, 1640.)

69. Lutts testified that due to the passage of time and his drug use, he did not have a clear memory of how he obtained the Colt handgun was seized by the police during his arrest on October 14, 1984. (RT 1631, 1635.) Although Lutts believed that he received the gun in a trade for drugs with petitioner, he had no recollection of ever seeing petitioner in possession of the weapon and he not recall petitioner being present when the transaction took place. (RT 1631, 1640, 1641, 1648.)

70. Lutts's extensive criminal record cast further doubt on his credibility. He had suffered a number of misdemeanor convictions, as well as felony convictions for possession of methamphetamine for sale, possession of cocaine for sale, and robbery. Lutts had

previously served a prison sentence and been released on parole about three and a half years before his testifying. (RT 1628.)

71. Thus the prosecution's attempt to establish that petitioner possessed items of property allegedly belonging to the Mercks was far from convincing. In addition, even if the jury were to believe that petitioner did sell a ring to his sister and a lighter case to Ronnie Woodin, defense evidence raised substantial doubts as to whether the items petitioner sold were actually taken from the Mercks. Ruth Scott testified her former jewelry business manufactured the lighter case the prosecution claimed belonged to Clifford Merck. (RT 2477, 2485.) According to Scott, the lighter case shown was not unique; her company made 50,000 such cases from 1976 to 1981. Some of these cases were sold in California. (RT 2478.) Moreover, Damon Taylor testified that when he managed a Bakersfield discount cigarette store in 1984, the style of the lighter case allegedly owned by Clifford Merck was very common. Taylor's store ordered 50 to 100 such cases each week, and sold each case for a dollar or a dollar and a half. (RT 2483.)

72. Equally common was the ring Catherine Glass allegedly bought from petitioner. Scott recognized the ring as a piece of Navajo jewelry with a low-grade turquoise stone. (RT 2480, 2483.) She had previously seen thousands of such rings, as they were very popular, low-cost tourist items. (RT 2480, 2484.) Moreover, Scott testified that the inscription on the inside of the ring was not Alma's initial, but the number three, which meant the wholesaler had paid three dollars for the ring. (RT 2483.)

73. Furthermore, even if this defense evidence was rejected by the jury and the jury found petitioner possessed property belonging to the Mercks, this did not necessarily mean petitioner was involved in the killings. A third party could have committed the killings

and then sold the stolen property to petitioner. Even if petitioner had known the property he was buying was taken from the Mercks, he would still be guilty only of receiving stolen property, not murder.

74. Had defense counsel not been deficient by (1) failing to present expert evidence that the use of Mikrosil casting to make a firearm identification was an unreliable, new technique not generally accepted in the scientific community; (2) failing to present evidence that the match between the latent prints from the Merck residence and petitioner's known prints was unreliable; (3) failing to adequately object to the extrajudicial statements allegedly made by Emma Foreman and Danny Phinney; and (4) failing to include the magistrate judge's admonition concerning the limited purpose of Gerry Tag's former testimony when reading that testimony to the jury, the prosecution's case for guilt would have been even weaker.

75. Criminalist Laskowski's identification of the Colt firearm petitioner allegedly gave to Phinney and Lutts as the weapon used to shoot Clifford Merck was a critical part of the prosecution's case linking petitioner to the murders. Had defense counsel presented evidence that the Mikrosil casting was a new technique not generally accepted in the scientific community and that Laskowski did not employ correct scientific procedures, the trial court would likely have excluded the evidence. Even if the firearm identification had still admitted, the jury was likely to have found the evidence lacking in credibility.

76. The expert testimony that petitioner's known prints matched two latent prints lifted from the Mercks' residence was also an important part of the prosecution's case. Indeed, it was not until the purported print identifications were made, ten years after the homicides, that petitioner was arrested. Had defense counsel presented evidence that

fingerprint identification was not a valid science – due to the absence of scientific validation, an unknown rate of error, the absence of uniform standards for identification, the high rate of false positives in proficiency testing, and the absence of peer analysis or review – the trial court would likely have excluded the evidence. Even if the firearm identification had still been admitted, the jury was likely to have found the evidence lacking in credibility.

77. Emma Foreman's prior statement that petitioner admitted fatally beating an elderly couple in Bakersfield was the only evidence suggesting that petitioner had confessed to murdering the Mercks. The jury asked for a readback of Foreman's testimony towards the end of its deliberations. Had trial counsel adequately objected to Foreman's prior statement, on the basis of the Sixth and Fourteenth Amendments, the trial court was likely to have excluded the evidence.

78. Danny Phinney was the critical prosecution witness in establishing that petitioner had possession of Clifford Merck's Colt handgun shortly after the killings. Robb Lutts had only a vague recollection of how he and Phinney had obtained the weapon. Trial counsel was able to substantially impeach Phinney based on the witness's drug use, mental illness, criminal record, and bias. Admission of the prior statements made to Sergeant Diederich served to rehabilitate Phinney and bolster his credibility. Sergeant Diederich was allowed to substitute his law enforcement credibility for Phinney's impaired credibility, thereby skewing the jury's calculus in favor of guilt. Had trial counsel adequately objected to Phinney's prior statement on the basis of the Sixth and Fourteenth Amendments, the trial court was likely to have excluded the evidence on those grounds.

79. Trial counsel's failure to inform the jury of the limited purpose for admitting Tags's opinion that petitioner had killed the Mercks was also a critical omission. In the

absence of the admonition, the jury was unaware it was not to utilize the evidence as proof petitioner committed the murders. Moreover, the jury was likely to give this testimony great weight, and accept it for the truth of its contents. Because Tags was petitioner's girlfriend at the time of the killings, the jury was likely to believe she knew whether petitioner committed the murders and had additional information, not revealed to the jury, establishing his guilt. Her insider's opinion would have greatly influenced the jury's deliberations.

80. Trial counsel's deficient performance in the guilt phase also prejudiced the jury's penalty phase verdict. The omissions that tainted the jury's deliberations regarding petitioner's sentence included: (1) the failure to present testimony from Gerald Cowan that petitioner did not participate in the killing of Jewell Russell; (2) the failure to adequately object to Mitzi Cowan's testimony that in early September, 1984, Gerald Cowan returned to her apartment with folded U.S. currency; and (3) the failure to inform the jury of the limited purpose for admitting Tags's opinion that petitioner had killed Russell.

81. These omissions all related to trial counsel's deficient performance in defending petitioner against the Russell murder charge. Although the jury ultimately deadlocked on whether petitioner was guilty of murdering Russell, the court's instructions directed those jurors who voted for petitioner's conviction to consider evidence relating to that crime in the penalty phase. (RT 2969, 2972.) Petitioner was prejudiced because if trial counsel had performed reasonably, the jurors who did vote to convict petitioner of the Russell murder likely would not have found that the killer's identity was proven beyond a reasonable doubt and therefore would not have considered the Russell murder as a circumstance in aggravation.

82. Indeed, the prosecution's case against petitioner in the Russell case was very

weak. The jury deadlocked nine to three, which means at least three jurors found petitioner not guilty of first degree murder. (RT 2771.) No eyewitness testimony identified petitioner as the killer, and his fingerprints were not found at the crime scene. Although circumstantial evidence provided by four witnesses – Emma Foreman, Ray Davidson, Gerry Tags and Mitzi Cowan – implicated petitioner in the Russell murder, the credibility of each witness was highly suspect and their testimony was not persuasive.

83. Emma Foreman claimed she heard petitioner admit killing Russell during an argument he was having with Gerry Tags. (RT 2246.) In a prior interview with Sergeant Fraley, however, Foreman did not mention overhearing petitioner make this admission. (RT 2515.) Additionally, the record establishes Foreman was biased against petitioner; she told Sergeant Fraley she hated him with a "purple passion." (RT 2249.)

84. The incriminating testimony provided by Ray Davidson, who was Gerry Tags's step-uncle, similarly lacked credibility. Davidson testified that after Russell's death: (1) he saw a knife and a blood-stained combat boot in petitioner's car (RT 2254, 2255, 2272); (2) he saw petitioner with quite a bit of money and jewelry, including a watch he thought was Russell's (RT 2272, 2273); and (3) he heard petitioner admit he had "done away" with Russell (RT 2255).

85. A number of circumstances, however, cast doubt on the credibility of Davidson's testimony. During the time he allegedly made these observations and heard petitioner's statement, Davidson was a user of heroin and methamphetamine. (RT 2253, 2275, 2288.) He also had an extensive criminal record that included an arrest for passing valium and codeine prescriptions that belonged to other persons (RT 2275); jail incarcerations for possession of drugs, assault with a deadly weapon and being under the

influence of drugs (RT 2252); and a 17-month prison sentence for a felony conviction (RT 2252). Finally, Davidson had a motive to gain favor with the prosecution. When he first came forward with information about petitioner, Davidson had just been arrested and was suffering from cramps and vomiting caused by withdrawal from his drug addiction. (RT 2277, 2282-2284.) Davidson wanted to obtain his release from custody in exchange for his cooperation with the prosecution. (RT 2277, 2280.) According to defense expert, Dr. David Bird, a heroin addict undergoing withdrawal, like Davidson, would do anything, including "lie, cheat, steal, borrow [or] swindle," in order to free himself to use more heroin. (RT 2535.)

86. The third witness to incriminate petitioner in the murder of Jewell Russell was Gerry Tags. According to Tags, she and petitioner were visiting with Mitzi Culbertson and Gerald Cowan on the evening before she learned of Russell's death. (RT 2335-2336.) Tags and petitioner had an argument, and Tags went upstairs to sleep. When Tags woke up early the next morning, petitioner and Gerald were arguing. (RT 2339.) She noticed petitioner had changed his clothes since she last saw him the evening before. (RT 2338, 2440.) About a week or two later Tags saw the clothes petitioner was initially wearing at Mitzi's home in the trunk of the car Tags and petitioner owned. (RT 2342-2343.) The clothes appeared to have blood on them and were wrapped around a knife Tags claimed to have previously seen at Russell's house. (RT 2342-2344, 2371.) Finally, Tags testified that shortly after Russell's funeral, she, petitioner and Gerald Cowan traveled out of state for two or three weeks. (RT 2348-2386.) During the trip, petitioner admitted he had cut Russell's throat. (RT 2349, 2361, 2365-2366.)

87. The credibility of Tags's testimony was greatly undermined by her drug use,

prior inconsistent statements made to law enforcement officers, and her bias against petitioner. At the time of Russell's death Tags was a heavy user of methamphetamine. (RT 2333, 2352.) She injected all of the methamphetamine she could find and was high most of the time. (RT 2352.) Her drug use caused her to stay awake for long periods of time; once she remained awake for nine days. (RT 2353-2354.) Dr. Bird testified Tags suffered from the usual effects of prolonged methamphetamine abuse. (RT 2525, 2541.) These consequences included impairment of language comprehension, memory, perception, and visual motor control. (RT 2521-2522.)

88. Additionally, Tags made numerous statements to law enforcement officers that were inconsistent with her testimony. In an interview with Sergeant Fraley on February 14, 1985, Tags initially denied having any knowledge of Russell's killing. (RT 2370.) Later, in an interview with District Attorney Investigator Hillis on June 18, 1986, Tags provided information that contradicted many of the details of her testimony. Tags, for example, stated that she was awake when petitioner left Mitzi's apartment, and that petitioner changed his clothes before leaving. When petitioner returned the next morning, he was still wearing the same clothes. (RT 2495.) Tags also told Hillis she had never seen the knife she found in the trunk of their vehicle. (RT 2497.) Finally, Tags told Hillis that the morning after petitioner admitted cutting Russell's throat, petitioner said to her that he actually had not killed Russell and had claimed to have done so only because he was drunk. (RT 2497.)

89 Tags's bias against petitioner is also apparent from the trial record. Tags admitted she began hating petitioner about a year or two after they got together and continued to hate him through the time that she testified at the preliminary examination. (RT 2373.) Tags's hatred of petitioner was especially significant because, as Dr. Bird testified, a

methamphetamine user's feeling of hatred for a person will taint the user's perception and recollection of events related to that person. (RT 2529.) That taint results from the fact that methamphetamine use causes the development of a paranoid schizophrenic personality syndrome in the user. The user will then project her paranoid delusions onto the person she hates. (RT 2529.) As a result of this process, the user may falsely imagine that the hated person has made certain statements or engaged in certain conduct and recount them as true. (RT 2530.)

90. The final witness relied upon by the prosecutor in the Russell case was Mitzi Cowan, who was both Gerald Cowan's wife and Russell's daughter. Her testimony, like that of the other witnesses, was unpersuasive. Like Tags, Mitzi testified about the evening in early September, 1984, when petitioner and Tags visited her and Gerald Cowan. According to Mitzi, petitioner and Gerald left the apartment at about 5:00 p.m. (RT 2431.) Gerald returned alone at approximately 10:00 p.m., borrowed Mitzi's car, and left again. (RT 2432.) At 1:00 a.m. Gerald came back to the apartment alone, carrying more than two hundred dollars in U.S. currency folded in half, similar to how Russell folded his currency. (RT 2429, 2440.) At about 3:00 a.m. petitioner returned to the apartment. (RT 2441.) Gerald was angry petitioner had left him and demanded to know where petitioner had gone. According to Mitzi, petitioner was wearing clothes different from those he was wearing when he left the apartment. (RT 2442.)

91. Mitzi's testimony failed to provide strong support for the prosecution's contention that petitioner and his brother murdered Russell after they left together from Mitzi's apartment. She was very confused about the date petitioner and Gerald had gone out. She testified it could have been the third, fourth or fifth of September. (RT 2446.) Russell's

body, however, was not discovered until the evening of September 7, 1984 (RT 2064), an indication he may not have been killed until after petitioner came back to the apartment. Moreover, Mitzi never saw petitioner in possession of any property belonging to her father (RT 2455), and never heard petitioner make any statements indicating he was involved in Russell's death (RT 2456).

92. Given this record, there is a reasonable probability that had defense counsel not performed deficiently by (1) failing to present testimony from Gerald Cowan that petitioner did not participate in the killing of Jewell Russell; (2) failing to adequately object to Mitzi Cowan's testimony that in early September, 1984, Gerald Cowan returned to her apartment with folded U.S. currency; and (3) failing to inform the jury of the limited purpose for admitting Tags's opinion that petitioner had killed Russell, fewer jurors would have believed beyond a reasonable doubt that petitioner murdered Russell, and therefore, fewer jurors would have considered the Russell killing as an aggravating circumstance in the penalty phase.

93. Testimony from Gerald Cowan that he alone killed Jewell Russell would have been very convincing to the jury. His description of and explanation for the killing are highly credible.

94. During his closing argument, the prosecutor emphasized Gerald's possession of the folded currency in support of her contention that petitioner was guilty of Russell's murder. (RT 2676.) Had that evidence been excluded, the prosecution's case against petitioner would have been even weaker.

95. Trial counsel's failure to inform the jury of the limited purpose for admitting Tags's opinion that petitioner had killed Russell was also a critical omission.. In the absence

of the admonition, the jury was unaware that it was not to utilize the evidence as proof that petitioner committed the murders. Moreover, the jury was likely to give this testimony great weight and accept it for its truth. Because Tags was petitioner's girlfriend at the time of the killing, the jury likely believed that Tags knew whether petitioner committed the murder, and that she had additional information, not revealed to the jury, that established petitioner's guilt. Therefore, her insider's opinion that petitioner was guilty was apt to greatly influence the jury's deliberations.

96. If fewer, or even no jurors, considered the Russell murder as a circumstance in aggravation, it is highly likely that there would have been a more favorable penalty determination. The consideration by the guilt-voting jurors of another gruesome murder as an aggravating circumstance undoubtedly led those jurors to return a death verdict.

97. The penalty decision was a close one. The defense introduced mitigating evidence, albeit limited and incomplete, and the jury returned a death sentence on only one of the two murder counts.

98. This mitigating evidence included testimony from Selma Yates, petitioner's aunt, and Leroy Cowan, petitioner's cousin, concerning petitioner's troubled childhood. From age two to 14 or 15, petitioner suffered brutal, unwarranted beatings from his alcoholic father. (RT 2889, 2890, 2891, 2906, 2907, 2914.) Petitioner also witnessed his father inflict violence on his mother and often had to intercede to protect her. (RT 2893, 2908.) In addition, as a result of his father's spending so much money on alcohol, there was often little, if any, money left over to buy food and clothing for the family or to pay for adequate housing. (RT 2895, 2905.) Finally, the guidance provided by petitioner's father consisted of taking him to bars to show him how to get drunk. (RT 2898.)

99. Evidence of petitioner's good character was presented by Brenda Hunt and three of her children. Hunt met petitioner in 1993 and became his girlfriend. (RT 2920.) Petitioner moved in with Hunt and helped pay the bills, buy food and care for her five children. (RT 2921, 2923.) At petitioner's suggestion, Hunt and petitioner tried very hard to stop using drugs. (RT 2922, 2923.) Petitioner also treated the children as if they were his own. (RT 2925.) He was kind to them, helped them with their homework, and entertained them by singing and playing the guitar. He also took the children camping and fishing, and to the park to view fireworks on the Fourth of July. (RT 2926.)

100. In light of the close guilt and penalty phase decisions by the jury, there is a reasonable probability that had defense counsel performed reasonably, the jury would have returned more favorable verdicts. Petitioner was therefore deprived of due process and a fair trial, the effective assistance of counsel (*Strickland v. Washington* (1984) 466 U.S. 668), the right to present a defense (*Williams v. Taylor* (2000) 529 U.S. 362), and reliable guilt and sentencing determinations (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 876; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, sections 1, 7, 15, 16, and 17 of the California Constitution.

CLAIM 4: NEWLY DISCOVERED EVIDENCE THAT FINGERPRINT IDENTIFICATIONS ARE UNRELIABLE ESTABLISHES PETITIONER'S INNOCENCE OF CAPITAL MURDER

Petitioner's confinement is unlawful in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15, 16, and 17 of the California Constitution because execution of an innocent person is unconstitutional. (*Herrera v. Collins* (1993) 506 U.S. 390 [execution of innocent person violates Eighth Amendment]; *In re Hall* (1981) 30 Cal.3d 408, 417; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1246.) Newly discovered evidence that fingerprint identifications are unreliable establishes that petitioner is innocent of capital murder.

The facts supporting this claim, among others to be developed after full investigation, adequate funding and access to this Court's subpoena power and other available court processes, including an evidentiary hearing to further develop this claim, are:

1. Petitioner incorporates by reference, as though fully set forth herein, the factual allegations contained in Claims 3B and 3H and the Declaration of Simon Cole, Ph.D., appended as Exhibit I.

2. If this Court were to determine that defense counsel should not have been aware of evidence establishing the unreliability of fingerprint identifications at the time of petitioner's trial in 1996, petitioner alleges that this evidence is newly-discovered and establishes his innocence of capital murder. In addition to the facts described in Claims 3B and 3H, the following facts further establish this claim.

3. Since 1996, there is increasing evidence that the relevant scientific community, which includes scientists who have sufficient training to conduct or evaluate validation studies of whether fingerprint identifications are valid, does not generally accept

the validity of latent print identifications. Virtually no scholarly or scientific literature supports the claim that latent print identifications has been validated. (Declaration of Simon Cole, Ph.D., at ¶ 18, appended as Exhibit I.)

4. In 2001, two highly credentialed, doctoral-level forensic scientists from the Forensic Science Service in Britain published an article contending that the current methodology of forensic fingerprint identification is not scientific and emphasizing the problems inherent in making identifications from latent fingerprints: "[T]he crux of the matter is not the individuality of the friction skin ridges but the ability of the examiner to recognize sufficient information for the disclosure of identity from a small distorted latent fingerprint fragment that may reveal only limited information in terms of quantity or quality." (*Id.*, at ¶ 21, quoting Christopher Champod & Ian W. Evett, *A Probabilistic Approach to Fingerprint Evidence*, 51 J. Forensic Identification 101, 115 (2001).)

5. In 2002, a leading treatise on scientific evidence concluded that forensic fingerprint evidence had not been adequately tested. (*Id.*, at ¶ 19, citing *Fingerprint Identification: Legal Issues,* Modern Scientific Evidence: the Law and Science of Expert Testimony, §27-1.0 at 347 (David L. Faigman, David H. Kaye, Michael J. Saks & Joseph Sanders, eds., 2002).) In addition, Drs. Lyn and Ralph Norman Haber, distinguished experimental psychologists, examined the literature on forensic fingerprint identification and came to the same conclusion. (*Ibid.*, citing Lyn Haber & Ralph Norman Haber, *The Accuracy of Fingerprint Evidence*, Address at the Annual Convention of the Psychonomics Society, Orlando, Florida (Nov. 2001); *see also*, Lyn Haber & Ralph Norman Haber, *Error Rates for Human Latent Fingerprint Examiners,* Automatic Fingerprint Recognition Systems 339, 358 (Nalini K. Ratha & Ruud Bolle eds., 2004).)

6. In 2003, an editorial in the prestigious magazine *Science* noted that fingerprinting's "reliability is unverified either by statistical models on fingerprint variation or by consistent data on error rates." (*Id.*, at ¶ 22, quoting Donald Kennedy, "Forensic Science: Oxymoron?" 302 Science 1625 (2003).)

7. In 2006, an Amicus Curiae Brief, signed by sixteen scientists and scholars from a variety of disciplines, including members of the National Academy of Science, the President Emeritus of Stanford University and the editor of the journal *Science*, stated that latent print identification remains unvalidated. The brief cited to 21 published legal and scientific authorities in support of its conclusion. (*Id.*, at 20, citing David M. Siegel, et al., *The Reliability of Latent Print Individualization: Brief of Amici Curiae submitted on Behalf of Scientists and Scholars by The New England Innocence Project, Commonwealth v. Patterson*, 42 Crim. L. Bull. 21 (2006).)

8. Despite the lack of validity testing in the field of forensic fingerprint identification, indisputable evidence has emerged that latent fingerprint examiners do make mistakes. There have been a number of recent documented cases in which latent fingerprint examiners have made erroneous positive identifications. (*Id.*, at ¶¶ 24-25, and authorities cited therein.) On May 24, 2004 the FBI issued the following press statement regarding its own misidentification of a print in the Madrid terrorist attacks and apologizing to the mistakenly identified former-suspect Brandon Mayfield and his family.

> After the March terrorist attacks on commuter trains in Madrid, digital images of partial latent fingerprints obtained from plastic bags that contained detonator caps were submitted by Spanish authorities to the FBI for analysis. The submitted images were searched through the Integrated Automated Fingerprint Identification System (IAFIS). An IAFIS search compares an unknown print to a database of millions of known prints. The result of an IAFIS search produces a short list of potential matches. A trained fingerprint

examiner then takes the short list of possible matches and performs an examination to determine whether the unknown print matches a known print in the database.

Using standard protocols and methodologies, FBI fingerprint examiners determined that the latent fingerprint was of value for identification purposes. This print was subsequently linked to Brandon Mayfield. That association was independently analyzed and the results were confirmed by an outside experienced fingerprint expert.

Soon after the submitted fingerprint was associated with Mr. Mayfield, Spanish authorities alerted the FBI to additional information that cast doubt on our findings. As a result, the FBI sent two fingerprint examiners to Madrid, who compared the image the FBI had been provided to the image the Spanish authorities had.

Upon review it was determined that the FBI identification was based on an image of substandard quality, which was particularly problematic because of the remarkable number of points of similarity between Mr. Mayfield's prints and the print details in the images submitted to the FBI.

The FBI's Latent Fingerprint Unit will be reviewing its current practices and will give consideration to adopting new guidelines for all examiners receiving latent print images when the original evidence is not included.

The FBI also plans to ask an international panel of fingerprint experts to review our examination in this case.

The FBI apologizes to Mr. Mayfield and his family for the hardships that this matter has caused.

(Statement on Brandon Mayfield Case, Federal Bureau of Investigations (May 24, 2004), at http://www.fbi.gov/pressrel/pressrel04/mayfield052404.htm.)

9. The FBI's misidentification of Mayfield's fingerprints occurred even though at least three highly experienced FBI latent print examiners conducted comparisons. The response to the FBI's mistake has included three insightful reports by the Department of Justice regarding fingerprint identifications. The first, issued by the head of the FBI Quality Assurance Unit, adopted the extraordinary position that latent print analysis is so subjective

that it is more prone to error in high profile cases. The second, by the Department of Justice Inspector General, decried the FBI's "overconfidence in the skill and superiority of its examiners." The third report, authored by three FBI scientists, laid out an ambitious research agenda necessary to put latent evidence on a firm scientific footing, thus implicitly acknowledging the current lack of such research. (Declaration of Simon Cole, Ph.D., at ¶ 26.)

10. Proficiency tests for latent print examiners since petitioner's trial continue to find examiners making false positive identifications. (*Id.*, at ¶28.)

11. A 2005 study conducted by Dr. Cole, provided further confirmation that the possibility of erroneous fingerprint identifications cannot be ignored. (*Id.*, at ¶ 29, citing *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. Crim. L. & Criminology 985 (2005).) In this study, Dr. Cole attempted to compile all publicly exposed cases of latent print misattributions in the United States and United Kingdom. Although the raw number of such cases was small, Dr. Cole opined that one should not necessarily infer that the number of actual misidentifications is equal to the number of disclosed misidentifications. Rather, one must assume that latent print misattributions become known at a fairly low rate. Dr. Cole's study supported this assumption, for several reasons. (*Id.*, at ¶ 29.)

12. First, only 27% of the misattributions compiled by Dr. Cole were exposed through routine criminal justice procedures, such as review by a defense expert. More than 60% of the misattributions came to light through relatively extraordinary circumstances, such as the trial of a co-conspirator (which easily might not have occurred) or the confession of the true perpetrator. (*Id.*, at ¶ 30.)

13. Second, 80% of the misattributions occurred in the last two decades. According to Dr. Cole, "Either one has to believe that the misattributions are occurring more frequently or that they are being exposed at a greater rate. If the latter is true, then there are presumably many unexposed misattributions in the period before our exposure mechanisms became more effective." (*Id.*, at ¶ 31.)

14. Third, more than half of the misattributions occurred in homicide cases, which comprise only approximately 1% of all criminal cases. According to Dr. Cole, "Either one has to believe that misattributions occur more frequently in homicide cases or that they are exposed more frequently in homicide cases. If the latter, then, again, there are presumably many unexposed misattributions in non-homicide cases." (*Id.*, at ¶32.)

15. Dr. Cole's study also demonstrated that none of the supposed safeguards fingerprint proponents claim protect defendants against the possibility of error are truly failsafe. Even the small set of cases reviewed by Dr. Cole contained cases in which verifications by other examiners, comparisons by certified examiners, and defense review of prints all failed to prevent misattributions (and at least one case in which all three failed). (*Id.*, at ¶¶ 33-35.)

16. Dr. Cole found that even highly skilled examiners were not immune to error, and, indeed, may even be more prone to it precisely because of their overconfidence based on their higher skill level. In addition, according to Dr. Cole, a verification of a fingerprint match does not ensure accuracy. More than half of the misattributions studied by Dr. Cole were verified by a second and, in some cases, a third and fourth examiner. Recent psychological studies strongly suggest that latent print examiners are sensitive to "context effects" - their decisions can be influenced by external cues having nothing to do with the

analysis itself. Thus a verifier may tend to support a match because he or she knows a trusted fellow examiner has reached a conclusion of individualization. (*Id.*, at ¶¶ 27, 35.)

17. Dr. Cole's findings indicate the possibility of error cannot be ruled out simply because a qualified examiner has reached a conclusion of individualization and another examiner has "verified" it.

18. As Dr. Cole concluded, "Because fingerprint analysis is subjective, and the certainty of an individual examiner is not scientifically absolute and quantifiable by error rates, it would be highly misleading and scientifically incorrect for a latent examiner to testify that a latent print 'was made by' the defendant's finger." (*Id.*, t ¶ 37.) Yet, that was precisely the testimony of the prosecution's latent examiners. Their fingerprint identifications were very critical to the prosecution's case because they linked petitioner to the scene of the murders. The new evidence establishing the unreliability of fingerprint identifications, described above and in Claim 3B, completely undermines the prosecution's case against petitioner and compromises the reliability of the death judgment. Petitioner's capital conviction is therefore unconstitutional.

CLAIM 5: PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE

Petitioner's confinement is unlawful in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15, 16, and 17 of the California Constitution. Petitioner's rights to the effective assistance of counsel, to due process, to a fair trial, to present a defense, and to a reliable penalty determination were violated by: (1) trial counsel's failure to present evidence that petitioner, prior to and at the time of the killings, suffered from longstanding neuropsychological deficits that impaired his overall cognitive and neurological functioning; (2) counsel's failure to adequately develop and corroborate the mitigating circumstances presented at trial, and to introduce additional circumstances in mitigation, through the testimony of petitioner's family members and friends, and through evidence contained in petitioner's social history records; (3) counsel's failure to present expert testimony that petitioner had suffered numerous physical and psychological traumas, deprivations, and developmental obstacles which thwarted his development as a child and adolescent, and compromised his ability to function adequately as an adult, including at the time of the killings; (4) counsel's failure to present any evidence that petitioner had adjusted well during prior incarcerations in state prison and while living in the Prison Ministries program for ex-offenders; (5) counsel's failure to object adequately to the admission of evidence; (6) counsel's failure to request appropriate jury instructions; ((7) counsel's failure to object to jury instructions given; (8) counsel's failure to request a further hearing regarding potential juror misconduct; and (9) other omissions specified below. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Pope* (1979) 23 Cal.3d 412, 423-425.) When these errors are considered separately, or in conjunction with

each other and other claims, the verdicts in the penalty phase of petitioner's trial must be set aside. There is a reasonable probability that but for these errors and omissions, the outcome of petitioner's trial would have been more favorable to petitioner.

The facts supporting this claim, among others to be developed after full investigation, adequate funding and access to this Court's subpoena power and other available court processes, including an evidentiary hearing to further develop this claim, are:

A. Trial Counsel's Failure to Present Evidence That Petitioner, Prior to and at the Time of the Killings, Suffered from Longstanding Neurological Deficits That Impaired His Overall Cognitive and Neurological Functioning

1. Subsequent to the death judgment, Natasha Khazanov, Ph.D., a clinical psychologist who specializes in forensic psychology and neuropsychological assessment, conducted a comprehensive neuropsychological assessment of petitioner and reviewed his psychosocial history, including educational records, employment records, medical records, psychological and psychiatric records, probation reports, and institutional and medical records generated by adult penal institutions. She also reviewed to the extent available Cowan family history documents including declarations by friends, relatives and acquaintances who knew petitioner and his family, and probations reports, death records, school records, and divorce records for petitioner's parents and siblings. (Declaration of Natasha Khazanov, Ph.D., at ¶ 11, 19, 63, appended as Exhibit P. Petitioner hereby incorporates by reference, as if fully set forth herein, the appended Declaration of Natasha Khazanov, Ph.D.)

2. Dr. Khazanov concluded that at the time of petitioner's trial in 1996, there were "numerous, very strong indicators of possible brain damage in Mr. Cowan's history, including experiences and situations that put him at a very high risk for neurological injury."

(*Id.*, at ¶ 65.) These "indicators" of possible brain damage included "Mr. Cowan's family history of alcoholism; multiple head traumas beginning in early childhood, some of which resulted in loss of consciousness; long-term alcohol and polysubstance abuse, beginning at a very early age; and domestic violence, including parental abuse and neglect, both physical and emotional." (*Ibid.*)

3. According to Dr. Khazanov, "Neuropsychological assessment is indicated when a patient has a known history of physical victimization, especially chronic violence in early childhood. The need is particularly great when the violence sustained was repeated, chronic, or experienced at critical developmental periods in a patient's life. Multiple neurocognitive studies have established that trauma-induced prolonged stress response hinders normal brain development in children and is linked to high incidence of psychiatric and cognitive problems later in life." (*Id.*, at ¶ 77.) Here, trial counsel were well aware, or reasonably should have been aware from interviewing petitioner and his family members, that chronic physical violence was inflicted upon petitioner in childhood.

4. Brain injury is also likely to result from a history of closed head injuries, especially when the injuries cause unconsciousness. (*Id.*, at ¶ 78.) Here, trial counsel were well aware, or reasonably should have been aware from interviewing petitioner and his family members, that petitioner had suffered a number of insults to his brain and had lost consciousness on several occasions.

5. Trial counsel was also well aware, or reasonably should have been aware from interviewing petitioner and his family members, that petitioner had a long standing addiction to alcohol and drugs. Alcohol "can cause cortical atrophy of brain tissue which can result in a range of debilitating and irreversible impairments, including severe memory loss, mental

inflexibility, learning deficits or exacerbation of pre-existing deficits, and a marked tendency to perseverate." (*Id.*, at ¶ 85.)

6. Petitioner's records further indicated to trial counsel, or reasonably should have indicated to trial counsel, that there likely was early acquisition of brain impairments by petitioner, and a need for neuropsychological assessment. Petitioner's academic grades were consistently poor, and his school work was consistently below grade level. Petitioner was required to repeat both first and eighth grades. (*Id.*, at ¶ 91.) His IQ and CAT test scores revealed the strong likelihood he had learning disabilities, and possibly Attention Deficit/Hyperactive Disorder as well. (*Id.*, at ¶¶ 93-95.)

7. Other symptomatology consistent with brain damage was apparent, or reasonably should have been apparent, from petitioner's history. Petitioner suffered brief lapses in consciousness while engaged in conversation with others; he experienced nightmares during which he screamed and yelled; he often closed the curtains in the house and then peeked through them to see what was occurring outside; he was frequently found crying hard behind the closed door of the bathroom; and he suffered from memory impairments. These symptoms also raised the strong possibility he suffered from posttraumatic stress disorder, a condition common in victims of abuse. (*Id*, at ¶¶ 97-98.)

8. Since the indicators of petitioner's brain damage were known, or reasonably should have been known, at the time of petitioner's trial, the need for a neuropsychological assessment should have been apparent to defense counsel and their experts. To the extent trial counsel failed to discover this information and/or failed to communicate it to the experts he consulted, trial counsel provided ineffective assistance. Reasonable counsel would have been on notice of the importance of unearthing all information relevant to possible

neurological impairments, of communicating that information to any mental health experts consulted, and of ensuring that appropriate testing was administered. Trial counsel had no justification for failing to have an expert administer a neuropsychological test battery that was available in 1996.

9. The psychological testing that trial counsel did arrange for petitioner was inadequate to detect brain impairment. During preparation for trial, petitioner underwent limited psychological testing. On July 13, 17 and 28, 1995, Dr. John Byrom, a clinical psychologist retained by the defense, administered the following tests to petitioner: The Minnesota Multiphasic Personality Inventory-2 (MMPI-2), Millon Clinical Multiaxial Inventory-II (MCMI-II), Wechsler Adult Intelligence Scale Revised, Wide Range Achievement Test-Revised, Shipley Hartford Intelligence Test, Forer Structured Sentence Completion Test, Bender Visual Motor Gestalt Test, House-Tree-Person Projective Drawings, and Hare Psychopathy Checklist Revised. (*Id.*, at ¶¶ 53, 55,) These psychological tests, however, did not constitute a neuropsychological examination and were not designed to determine whether petitioner suffered from brain impairment. Instead, tests such as the Minnesota Multiphasic Personality Inventory-2 (MMPI-2), the MCMI and the Hare Psychopathy Checklist assess a subject's personality. They are not reliable tools for detecting the presence of brain damage or dysfunction.[8] (*Id.*, at ¶ 55.) Indeed, in a letter dated July 12, 1995, Dr. Byrom advised counsel to refer petitioner for "some sort of neuropsychiatric testing" because of his history of head trauma. (*Id.*, at ¶ 56.) No adequate

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[8]The results of Dr. Byrom's testing are unknown. Dr. Byrom did not testify at trial and is now deceased. Trial counsel did not keep a copy of the test results in their file, and Dr. Byrom's file was destroyed by his widow before she was contacted by petitioner's habeas counsel. (*Id.*, at ¶ 53.)

neuropsychiatric testing was arranged by trial counsel.

10. Petitioner did undergo an electroencephalogram on August 8, 1995, and a SPECT brain scan on August 22, 1995. "Although the findings were normal, these tests are notoriously insensitive to many brain disorders and are not an adequate substitute for the neuropsychological test battery that was available for testing Mr. Cowan before his trial in 1996." (*Id.*, at ¶ 57.)

11. The comprehensive neuropsychological evaluation that trial counsel failed to arrange for petitioner was conducted by Dr. Khazanov on June 21 and 22, 2005, at the California State Prison at San Quentin. The evaluation included approximately 11 hours of testing and assessment. (*Id.*, at ¶¶ 11, 19.)

12. The results of the neuropsychological evaluation gave clear and consistent evidence that petitioner does have significant brain damage localized predominantly in the left temporal, parietal and frontal lobes. (*Id.*, at ¶ 22.) The summary indices from the *Halstead-Reitan Neuropsychological Battery* indicated petitioner's neuropsychological dysfunction is of moderate severity, meaning his Halstead Impairment Index falls at least two standard deviations below the mean, and is in the 2nd percentile in his age group (i.e., 98% of persons tested scored higher than did petitioner). (*Id.*, at ¶ 50.) In addition, the brain dysfunction was acquired early in petitioner's life and existed at the time of the murders and at the time of the trial. (*Id.*, at ¶¶ 28, 102.) As Dr. Khazanov explained, "The signs and symptoms of the damage manifested in the testing I performed have been documented since elementary school." (*Ibid.*)

13. Dr. Khazanov found that petitioner has a Full scale IQ of 84 (14th percentile), which is in the low average range of intelligence. His Verbal IQ is 74 (4th percentile), which

is in the borderline range. His Performance IQ, however, is 99 (47th percentile), placing him in the average range. The substantial discrepancy of 25 points between petitioner's Verbal and Performance IQ is indicative of left hemisphere brain damage. (*Id.*, at ¶ 24.) Petitioner's scores on the reading, spelling, and arithmetic achievement tests are consistent with his overall IQ score. (*Id.*, at ¶ 27.)

14. The brain impairments found by Dr. Khazanov include deficits in memory, especially with auditory verbal material; mental flexibility and shifting of attention; language and language-related tasks; ability to inhibit unwanted responses; and visual/spatial integration and learning; (*Id.*, at ¶¶ 29, 36, 39, 43, 47.) "In addition, there are prominent signs of executive dysfunction specifically related to cognitive inflexibility, i.e., a tendency to becoming stuck in a mental set." (*Id.*, at ¶ 56.)

15. Of particular significance is the existence of deficits in petitioner's frontal lobes. "The frontal lobes of the brain are primarily responsible for the organization, planning, execution and regulation of complex motor movements and actions." (*Id.*, at ¶ 60.) "Symptoms of frontal lobe damage are many and varied, and include such behavioral effects as problems of starting (decreased initiative, productivity, spontaneity), difficulties making mental or behavioral shifts (impaired flexibility, disrupted attention, cognitive rigidity, perseveration, difficulty shifting attention from one activity to another), problems of stopping (difficulty modulating emotions and behavior, impulsivity, over-reactivity, disinhibition, impulse control problems, poor emotional control, difficulty inhibiting inappropriate or unwanted responses, diminished frustration tolerance, disinhibition regarding aggression and/or sexual behavior, outbursts of anger over trivial stimuli), deficient judgment and self-awareness (misperception of social expectations, inability to perceive performance

errors, inability to appreciate one's impact on others, inappropriate social comments, poor judgment, lack of insight, inability to adapt to new situations, irritable and labile mood, inability to understand consequences, inability to profit from experience), and deficits in abstract thinking (deficiencies in planning and goal-directed behavior, impaired ability to plan, organize, initiate, regulate, or monitor behavior, difficulty considering alternative solutions, deficits in problem-solving abilities.)" (*Id.*, at ¶ 62.) Thus, frontal lobe dysfunction can result in impulsive acts or behaviors, as well as the failure to monitor or terminate one's behavior once it has begun.

> Theoretical models emerging from neuropsychology [citations omitted] and neurology [citations omitted] suggest that brain damage increases the risk of violent behavior. Abnormal brain functioning may impair inhibition of violent impulses and/or stimulate excesses in impulsivity and behavioral dyscontrol. Either mechanism may increase an individual's propensity to aggressive or violent behavior, particularly in combination with other characterological, environmental, or situational risk factors. Researchers have begun to document the importance of several types of brain impairment in violent behavior, including *head injury*, mental retardation, *frontal and temporal dysfunction*, seizure disorder, and *neurological abnormalities*.

(Martell, D.A. *Forensic neuropsychology and the criminal law* (1992, June) Law & Human Behavior. Vol. 16(3) pps. 320-321, italics added.) Thus, the frontal lobe regions

> play[] a crucial role in constraining impulsive outbursts . . . . In normal individuals, activations in these brain regions that occur during anger arousal and other negative emotions constrain the impulsive expression of emotional behavior. Deficits in this circuit are hypothesized to increase a person's vulnerability to impulsive aggression.

(Davidson, R.J., Putnam, K.M., & Larson, C.L. *Dysfunction in the neural circuitry of emotion regulation – A possible prelude to violence* (July 28, 2000) Science, 289, p. 592.)

16. Dr. Khazanov's findings reveal that a neuropsychological assessment done at the time of trial would have produced substantial, relevant evidence helpful to the defense in

the penalty phase. Prior to, and at the time of the killings, Cowan had "both localized dysfunction – primarily in the left temporal, parietal and frontal lobes – and diffuse damage in both the left and right hemispheres, affecting his overall cognitive and neurological functioning. As a result of these impairments, his abilities to plan or carry out a specific course of action, to act independently or make informed decisions, to interpret social or interpersonal cues (verbal or nonverbal), and to assess his environment or specific situations and respond rationally or thoughtfully are severely and chronically impaired. These impairments, debilitating in themselves, were likely exacerbated both by the presence of alcohol and drugs and by the residual long-term effects of chronic alcohol abuse, which is essentially a form of repeated exposure to highly damaging neurotoxins and a prominent factor in Mr. Cowan's history." (Declaration of Natasha Khazanov, Ph.D., ¶ 99.)

17. The relevance of this evidence in the penalty phase is readily apparent. Petitioner's brain impairment was relevant to several factors in mitigation under Penal Code section 190.3. The evidence: (1) helped to explain the circumstances of the killings under section 190.3(a) (i.e., petitioner's impulse control problems, over-reactivity, deficient judgment, difficulty inhibiting inappropriate or unwanted responses); (2) established a mitigating aspect of petitioner's character, history and background under section 190.3(k); (3) demonstrated that the killings were committed while petitioner was under the influence of extreme mental or emotional disturbance under section 190.3(d); and (4) demonstrated petitioner's capacity to conform his conduct to the requirements of law was impaired at the time of the offenses as a result of mental defect under section 190.3(h). Further, just as evidence of petitioner's brain impairments would have helped to explain and mitigate petitioner's killing of the Mercks, that evidence also would have helped to explain and

mitigate the additional incidents of violent, impulsive criminal activity introduced by the prosecution at penalty phase as factor (b) aggravating circumstances (alleged robberies of James Foster and Jessie Cruz and assaults of Brenda Hunt and Robert Hunt), and thus lessened the aggravating force of that evidence. Without the evidence of petitioner's brain dysfunction, the picture of petitioner presented to the jury was woefully incomplete and misleading. The defense mitigation case would have been substantially enhanced by evidence that petitioner, through no fault of his own, suffered from a brain condition that caused him to respond to conflict with impulsive, unplanned outbursts of aggression. Had this evidence been presented, there is a strong probability the jury would have found the balance of aggravating and mitigating circumstances did not warrant death. (*In re Fields* (1990) 51 Cal.3d 1063, 1078.)

18. Moreover, "it is undisputed that [a capital defendant] had a right – indeed, a constitutionally protected right – to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." (*Williams v. Taylor*, *supra*, 529 U.S. at p 393.) "[W]here counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition as a mitigating factor in a penalty phase hearing, without a supporting strategic reason, constitutes deficient performance." (*Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1043.)

19. Defense counsel acted unreasonably in failing to recognize the need to inquire into whether petitioner suffered from a brain impairment, to retain a neuropsychologist, and to arrange for appropriate testing. Additionally, defense counsel failed to provide the mental health experts whom he did retain with all of the readily available information about petitioner's background (multi-generational family history of alcoholism, chronic physical

abuse as a child, emotional trauma, family violence, multiple incidents of closed head injuries, chronic drug and alcohol abuse, learning difficulties in school, and frequent loss of consciousness) that would have made the need for a neuropsychological examination apparent. Trial counsel's omissions were not based on "a rational and informed decision . . . founded on adequate investigation and preparation." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

B. Failure to Develop and Corroborate Mitigating Circumstances Presented at Trial, and to Introduce Additional Circumstances in Mitigation Through the Testimony of Petitioner's Family Members and Friends and Evidence in Social History Records

20. During penalty phase trial counsel presented limited evidence of mitigating circumstances in petitioner's childhood and background. Petitioner's cousin, Leroy Cowan, and his aunt, Selma June Yates, were the only family members who testified as defense witnesses. Leroy Cowan and Selma Yates had frequent contact with petitioner until 1962 when petitioner was 14 years old. (RT 2903-2904.) The witnesses' testimony briefly touched on mitigation themes regarding the violent demeanor and alcoholism of petitioner's paternal grandfather (RT 2890); the alcoholism of petitioner's father (RT 2889, 2890); the physical abuse inflicted on petitioner by his father during childhood (RT 2891, 2906-2907, 2913-2914); the physical abuse inflicted by petitioner's father on his mother (RT 2893, 2908-2910); the absence of money for food and toys due to drinking by petitioner's father (RT 2895, 2905); poor role modeling by petitioner's father (RT 2899); petitioner being endangered by his father leaving him in a locked car while drinking in a bar (RT 2915-2916); petitioner's depression during childhood (RT 2911); and petitioner's learning difficulties at school (RT 2896).

21. Trial counsel did not present testimony from petitioner's mother, his seven siblings, or any other persons who knew him who would have corroborated and developed the mitigation themes presented in the penalty phase, as well as established additional circumstances in mitigation. Nor did counsel introduce any information from relevant social history records, including petitioner's school and prison records and court records from his parents' divorce. Additional mitigating circumstances that could have been established through these witnesses and sources included petitioner's multiple head traumas, petitioner's frequent moving and changing of schools throughout childhood, emotional abuse inflicted by petitioner's father, petitioner's long-term alcohol and substance abuse, the incarceration of petitioner's father in prison when petitioner was 12, the divorce of petitioner's parents when petitioner was 18, the death of petitioner's father when petitioner was 20, the failure of petitioner's two marriages, and petitioner's infertility.

22. The only additional witnesses whom trial counsel presented in the penalty phase were Brenda Hunt, petitioner's girlfriend at the time of his arrest in 1994, and three of her children. These witnesses had known petitioner for only about one year before he was arrested. (RT 2920.) Hunt and her children gave limited testimony that petitioner helped with financial support (RT2921, 2923), encouraged Hunt to stop using drugs (RT 2922-2923), and treated the children well (RT 2925, 2930-2931, 2940, 2948).

23. Additional evidence to corroborate and develop the penalty phase mitigation themes and establish additional circumstances in mitigation was readily available to defense counsel, in either records or interview reports in counsel's possession, or easily obtainable had counsel conducted a reasonably thorough investigation. The additional evidence

available to defense counsel included the following.[9]

1. Testimony of Betty Jane Cowan

24. Betty Jane Cowan is petitioner's mother. Defense counsel interviewed her before trial, but did not call her at the penalty phase. (Declaration of Betty Jane Cowan, ¶ 44, appended as Exhibit Q.) Betty Cowan was willing and available as a witness. She would have corroborated and developed petitioner's case for mitigation by testifying to the following.

25. Betty, who currently lives in Bakersfield, California, was born on May 23, 1925. Her parents were Bernard and Lucille Breitkreutz, and she had three sisters. Betty grew up in Aberdeen, South Dakota, where her father worked as a mechanic. Betty spent about one month of each summer living with her uncle and aunt who raised wheat and corn on a farm. (*Id.*, ¶ 1.)

26. On June 25, 1943, Betty married Donald Carroll Ivanoff in Webster, South Dakota. Donald's parents did not approve of their relationship so they married in secret. In the fall of 1943, Donald and Betty moved from South Dakota to Richmond, California, where two of her sisters had already relocated. Betty's parents moved to Richmond at the same time. During World War II, many people came to Richmond to work in the shipyards, where

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[9]Many of the witnesses not called by the defense were family members or friends who grew up with petitioner. Their observations of petitioner's background occasionally overlap because critical events in petitioner's life were often observed by more than one witness. In setting forth the proffer of each witness's testimony, the petition recounts the entirety of that witness's observations of events -- even though the proffered testimony may appear repetitious in light of the proffered testimony of one or more other witnesses -- in order to convey to the Court the full breadth of each witness's independent testimony and facilitate the Court's evaluation of the consequences of trial counsel's failure to call these witnesses.

Donald worked as an electrician. They believed that their lives would be more prosperous in the Bay Area than in South Dakota. (*Id.*, ¶ 2.)

27. Donald and Betty had a child, Donny Ivanoff, who was born at Richmond Hospital, on August 4, 1944. When he was young, Donny had at least two epileptic seizures during which he blacked out. The seizures stopped as he grew older. (*Id.*, ¶ 3.)

28. In 1946, Betty decided to divorce Donald. Although he was a good man who treated Betty well, she was dissatisfied with their relationship. While the divorce was proceeding, Betty and Donny moved in with her parents in Richmond. The divorce became final on March 14, 1947. (*Id.*, ¶ 4.)

29. While living at her parents' home, Betty met George Wesley Cowan whose family owned a riding academy where Betty rode horses. Cowan, known as "Wes" to everyone, recently had been discharged from the Navy, where he served on a destroyer that engaged in World War II battles in the Pacific Ocean, including at Iwo Jima. Wes was working as a carpenter and was also a talented musician who played the guitar, fiddle, harmonica and banjo. (*Id.*, ¶ 5.)

30. Wes was born in Oklahoma City, Oklahoma, on November 19, 1925. His parents were George and Ethel Cowan, and he had three brothers and a sister. Wes had a very difficult childhood because his parents were severe alcoholics. George Cowan had an explosive temper, and was physically and verbally abusive to his wife and children. George would tie Wes to a post and whip him with one end of the rope. Even when his children were older, George would drink and then engage his sons in physical fights. (*Id.*, ¶ 6.)

31. Betty fell in love with Wes and they married on March 16, 1948. They lived in Richmond, California. (*Id.*, ¶ 7.)

32. From the time Betty first met Wes when he was 21, Wes modeled himself after his father by drinking large amounts of alcohol, especially on weekends. Wes later began to resemble his father in other ways. He developed an explosive temper, and was physically abusive to Betty and the children. (*Id.*, ¶ 8.)

33. When Wes and Betty married, Betty was pregnant with petitioner, who was born in Richmond on July 17, 1948. Wes and Betty had six more children. Catherine, born June 3, 1950; Gerald, born May 5, 1952; Lesley, born March 6, 1955; Melanie, born October 27, 1956; Jeff, born May 5, 1959; and Stuart Leland (Lee), born March 16, 1962. (*Id.*, ¶ 9.)

34 After Robert was born, the family moved frequently within California so Wes could find carpentry employment. In 1949, they moved to Fort Bragg, where they lived at a saw mill. In early 1951, they moved to Rosedale, where they lived at another saw mill leased by Wes's father. There was too much snow in Rosedale during the winter so the Cowans moved to Santa Maria in late 1951. In 1953 they briefly lived in Grover City and then moved to San Luis Obispo for a few months. In 1954, Betty and the children moved back to Richmond while Wes stayed in San Luis Obispo to work construction at the university. In Richmond, Betty rented a unit converted from a World War II military barrack. Wes soon joined the family in Richmond after he finished his job in San Luis Obispo. Two years later, in early 1956, the Cowans moved to Rodeo, where they again lived in a converted military barrack. In late 1956 they purchased a home in Napa, but were unable to afford the house payments because Wes was spending so much of his paycheck drinking in bars. By late 1957 they sold the house and returned to Rodeo, where they again lived in a converted military barrack. The Cowans remained in Rodeo until 1960, when they finally settled in Bakersfield for the remainder of petitioner's adolescence. As a result of their frequent moving, Robert

attended at least five different schools between kindergarten and sixth grade. (*Id.*, ¶ 10.)

35. Wes's alcoholism was a tremendous problem from the time he and Betty married until the move to Bakersfield in 1960. Wes was repeatedly arrested for public drunkenness and other alcohol-related crimes. He was involved in alcohol-related traffic accidents and was unable to maintain his driver's license. Wes would often stay sober during weekdays if he was working, but on weekends he went on alcohol binges, consuming whiskey, vodka, beer, or any alcoholic beverage he could find. Some Friday evenings he went straight from work to drinking and the family would not see him until the end of the weekend. Other Fridays, he came home first before heading out for a weekend of alcohol consumption. His drinking buddies were usually his brothers. Wes's paycheck was often used to finance his weekend of drinking which left little, if anything, for buying food to feed Betty and the children. Betty's sister would have to help with supplying food or Betty would make do with whatever she could find in the kitchen. (*Id.*, ¶ 11.)

36. When Wes was drunk, his personality underwent a dramatic change. He became mean and violent. He had physical fights with his brothers with whom he was drinking, he beat the children, especially petitioner, for no reason, and he beat Betty. As the years passed, Wes's alcoholism became more severe, and the violence he inflicted on petitioner worsened. In order to avoid beatings from Wes, Betty would try to be out of the house with the children before Wes returned home from his weekend of drinking. Betty would sometimes take them to relatives' homes if family members were living nearby. Other times she would hide with the children in vacant units in the complex of converted barracks in which they lived. If the vacant unit was locked, Betty would break through the door in order to hide the children from Wes. (*Id.*, ¶ 12.)

37. Unfortunately, Betty's efforts to protect the children and herself from Wes's violence were often unsuccessful. Betty remembers a number of incidents when Wes beat her. In 1948 or 1949, the children and Betty were visiting her sister June, who also lived in Richmond. Wes broke into the house by putting his fist through the window of the front door. He then attacked Betty and pulled out some of her hair. The police were called and Wes was arrested. (*Id.*, ¶ 13.)

38. In early 1951, while the Cowans were living in Fort Bragg, Betty hid beer from Wes so he would not drink it. Wes became furious and beat Betty with a belt. At the time Betty was pregnant with her daughter Cathy. (*Id.*, ¶ 14.)

39. On Christmas Eve, 1954, Betty was with Donny, petitioner, Cathy and Gerald at her sister's home while Wes was out drinking for a couple of days. Wes came over drunk and broke into the house. Betty hid with the children in a bedroom but Wes found them. He began to beat Betty while petitioner and her nephew grabbed his legs trying to force him to stop. At the time, Betty was pregnant with Lesley. Wes continued to beat Betty until her sister knocked him out by hitting him in the head with a rolling pin. Betty called the police to arrest Wes. As Wes was waking up, he cursed and threatened to kill them. (*Id.*, ¶ 15.)

40. Betty also remembers many incidents in which Wes beat petitioner and the other children. Petitioner received the brunt of Wes's violence, apparently because he was Wes's oldest child. Wes began spanking petitioner for what he perceived to be misbehavior before petitioner was two years old. Wes also spanked petitioner for soiling his diaper during toilet training, which he did not successfully complete until well after he turned two. As petitioner grew to school age, the spankings turned into more forceful belt whippings and beatings. Petitioner, who was timid and shy as a child, was defenseless against his father's

violence. (*Id.*, ¶ 16.)

41. One of Wes's more severe beatings occurred in Richmond when petitioner was six or seven. Wes took petitioner into the bedroom and repeatedly whipped him with a belt. The sound of the whipping could be heard throughout the house. Petitioner was left with dark bruises covering his back. Betty did not try to stop Wes for fear he would start to beat her. (*Id.*, ¶ 17.)

42. Another severe beating occurred in Napa, on Thanksgiving day 1956. Betty was preparing the Thanksgiving meal when Wes came home drunk. He pushed all the settings off the table and insisted everyone eat the dinner raw. Wes then took off his belt and whipped petitioner, Donny and Cathy, leaving them all with welts. Betty then left the house with Melanie and Lesley to call the police. When they came, they calmed Wes down but did not arrest him. (*Id.*, ¶ 18.)

43. In addition to being beaten by his father, petitioner suffered head injuries and other medical problems during childhood. When petitioner was about three, he suffered what the doctor described as a grand mal seizure. He was unconscious, shaking and drooling at the mouth. Petitioner was taken to the hospital in Santa Maria but the doctor was unable to determine what caused the seizure. In approximately 1956, in Rodeo, petitioner accidentally smashed his head into the side mirror of a truck while playing a game with his siblings. The blow opened a gash in petitioner's head which Betty closed with a butterfly stitch. In 1957, petitioner and Donny were playing an outside game that involved petitioner holding his breath while Donny stood behind him and squeezed his diaphragm. Petitioner passed out and fell forward, hitting his head on the concrete surface. (*Id.*, ¶ 19.)

44. There were also indications petitioner had mental health problems during

childhood. An elementary school teacher thought petitioner might have mental problems because he was inattentive in class and unable to sit still. The teacher suggested petitioner be evaluated but Wes refused to. Wes could not accept that his oldest child might need treatment for mental problems and insisted the teacher was wrong. (*Id.*, ¶ 20.)

45. Several times during petitioner's childhood, Betty separated from Wes in an effort to protect the children and herself from his alcohol-induced explosions of violence. The separations, however, did not last long and Betty always reunited with Wes. While living in Richmond in early 1955, Betty had Wes move to his own apartment. They were apart for about one month until Betty's mother passed away and she allowed Wes to return. In 1956, Betty and the children left Wes to live with Betty's sister in Clovis. When Wes called about a week later, Betty told him that she wanted nothing more to do with him. Wes then drove to Clovis. On the way, he stopped in a bar to drink and offered a ride to two men. They beat Wes and stole his car. Betty took the children to visit Wes in the hospital, and he persuaded her to reunite with him in Napa. (*Id.*, ¶ 21.)

46. Betty again separated from Wes in early 1960. Betty and the children stayed in Rodeo while Wes moved to Bakersfield. In Bakersfield, Wes stopped drinking and became active in the Free Will Baptist Church. He promised he would no longer beat Betty or the children. Betty eventually agreed to reunite, and in the summer of 1960 she and the children moved to 327 H Street, Bakersfield, where they lived with Wes in a rented house. At first Wes kept his promises. The family regularly attended church with him, and there was family prayer at home. Wes obtained some land and began to build a house for the family. (*Id.*, ¶ 22.)

47. When Wes was home, he was very strict with the children. They were not

permitted to speak to adults unless they were first spoken to by them. The children were required to address all male adults as "sir", and all female adults as "ma'am." During meals the children were not permitted to speak. After school, the children had to immediately come home to do homework and household chores. The children were also required to dress very conservatively. (*Id.*, ¶ 23.)

48. Not long after Betty and the children moved to Bakersfield Wes resumed drinking. He was arrested for public drunkenness. When Wes was unable to obtain a driver's license, he had Donny or petitioner drive him around, even though they were unlicensed. Wes would drink while sitting in the passenger seat. On some occasions, such as on a fishing trip, Wes encouraged petitioner to drink with him. Petitioner was only 12 when he started drinking with Wes. (*Id.*, ¶ 24.)

49. Wes also resumed terrorizing the family when drunk. The worst beating Betty suffered in Bakersfield occurred while she was pregnant with Lee in 1961. During this attack, which petitioner witnessed, Wes punched Betty in the shoulder, knocking her from the back porch to the ground. (*Id.*, ¶ 25.)

50. On July 29, 1961, Wes took petitioner, Gerald and Donny on a fishing trip. Wes used a driver's license he had obtained with the false name, "Wesley C. Cowan." Wes was driving the boys home after drinking. He collided with another vehicle and a passenger in the other car was killed. Wes was hospitalized for his injuries and Donny injured his arm. Petitioner and Gerald were not hurt. The police arrested Wes for vehicular manslaughter. On October 6, 1961, Wes pled guilty and was sentenced to state prison. (*Id.*, ¶ 26.)

51. Before going to prison, Wes finished the house he was building for the family. However, the mortgage holder did not permit the Cowans to move in. In January 1962, while

Wes was in prison, Betty's father bought a house at 514 Easter Street, Bakersfield. He transferred the deed to Betty, and she and the children moved to their new home. As a result of the move, petitioner had to change schools once again, now attending Sierra Junior High School. (*Id.*, ¶ 27.)

52. Betty took petitioner and his siblings to visit Wes in prison several times. Wes was paroled in August 1963, and returned home. (*Id.*, ¶ 28.)

53. As an adolescent, petitioner continued to suffer from medical problems. In late 1965, petitioner had surgery in a Bakersfield Hospital for a condition known as hydrocele, an accumulation of fluids in the area of a male's testicles. Petitioner had suffered from this condition since childhood. Betty believes the surgery left petitioner with a low sperm count, which is the reason petitioner was never able to have children. Petitioner's infertility was a tremendous disappointment to him. (*Id.*, ¶ 29.)

54. Not long after Wes was paroled, he resumed drinking and beating the children and Betty. Wes was repeatedly arrested for alcohol-related crimes, including driving while under the influence of alcohol. (*Id.*, ¶ 30.)

55. Life with Wes became so unbearable that in February, 1967, petitioner had to move. Petitioner went to live with the family of his friend Jack Britt, at 3129 Center Street, Bakersfield. Petitioner's change in residence caused him to transfer in the 11th grade from East Bakersfield High School to Foothill High School. (*Id.*, ¶ 31.)

56. On March 3, 1967, Betty asked Wes to leave the house at 514 Easter Street, but he refused. Betty then moved out with the youngest children and filed for divorce on March 16, 1967. The court ordered Wes to vacate the house, and Betty was able to return to 514 Easter Street. The complaint for divorce filed by her attorney stated, "Since the marriage

of the parties hereto defendant has treated plaintiff with extreme cruelty and has wrongfully inflicted upon plaintiff grievous mental suffering and bodily injury, and by reason thereof it is impossible for the parties to live together as husband and wife." In her supporting affidavit Betty wrote,

> Out of fear for her personal safety plaintiff left the family home on March 3, 1967, due to defendant's excessive use of alcoholic beverages and his violent temper while under the influence thereof. Although not in the past year, in the past defendant has on countless occasions severely beaten plaintiff. However, plaintiff believes that violence to herself was avoided because during the past year she called upon defendant's parole officer for assistance on at least three occasions. On two of these occasions defendant was incarcerated in the Kern County Jail as a possible parole violator . . . . Records of local enforcement agencies will reflect numerous arrests of defendant on drunk and/or disturbing the peace charges. ¶ The minor children are afraid of defendant and very unhappy living in the home with him. The oldest son [Petitioner] has departed and is living with friends. The oldest daughter [Cathy] states she can no longer stand defendant's drunkenness and will leave home herself unless defendant leaves and plaintiff returns. Further, plaintiff has been advised by the welfare department that her home cannot be approved for babysitting and issuance of an appropriate license so long as defendant resides on the premises.

(*Id.*, ¶ 32; see also *Cowan v. Cowan*, Court File, Kern County Case No. 98652, appended as Exhibit R.)

57. On April 11, 1967, a hearing was held in the divorce case. Betty's attorney called petitioner to give testimony about Wes's alcoholism and violent behavior. Petitioner was the only one of the children who testified at the hearing, and he was very troubled by having to testify against his father. On April 17, 1967, an interlocutory judgment of divorce on the ground of extreme cruelty was entered by the court . After the divorce, Wes refused to pay court-ordered spousal and child support, so Betty had to collect welfare to support the family. (*Id.*, ¶ 33.)

58. On February 3, 1968, petitioner married Vivian Ann Finnell, who was 19.

Vivian had a daughter from a former relationship who was less than one year old. Petitioner and Vivian lived in their own apartment in the Bakersfield area. (*Id.*, ¶ 34.)

59. In June, 1968, Betty agreed to reconcile with Wes after he again promised to stop drinking and to refrain from abusing her. Betty took the five youngest children and joined Wes in San Jose, where he was living with his brother. As in the past, Wes's reform proved to be short-lived. Wes began drinking again, and Betty and the children moved back to 514 Easter Street, Bakersfield in December, 1968. (*Id.*, ¶ 35.)

60. Betty's divorce from Wes became final on April 29, 1969. In her supporting affidavit, Betty stated,

> In June of 1968, there was an attempt at reconciliation in which plaintiff resumed living and cohabitating with defendant on condition that he would refrain from becoming intoxicated and threatening plaintiff with bodily harm; that for a limited time thereafter defendant refrained from becoming intoxicated and threatening plaintiff with bodily harm, but thereafter defendant resumed becoming intoxicated and threatening plaintiff; and that prior to the end of 1968 plaintiff was forced to leave defendant and the parties have remained separated.

(*Id.*, ¶ 36.)

61. Wes was diagnosed with lung cancer in early 1969 and his health rapidly deteriorated. He died in a San Jose hospital on November 19, 1969, his 44th birthday. At the time of his death, Betty was on her way to San Jose to visit him. Despite all of the abuse petitioner suffered at the hands of his father, petitioner was very upset by Wes's death – more so than any of the other children. When petitioner was first told about Wes's passing, he refused to believe it was true. Petitioner knelt down and repeatedly uttered, "He's not dead." Petitioner's uncle brought him to San Jose before Wes's body was sent to Bakersfield for the funeral. When Betty saw petitioner in San Jose, he was inconsolable and would not

let her touch him. (*Id.*, ¶ 37.)

62. On November 22, 1969, Wes was buried in Bakersfield. Prior to the burial, the family went to the mortuary to view Wes's body in the casket. When petitioner arrived at the front door, he turned around and ran off. Cathy finally found him hiding in bushes, crying. (*Id.*, ¶ 38.)

63. Shortly after Wes's death, petitioner's behavior changed greatly. He had previously been arrested for minor crimes, both as a juvenile and as a young adult. On January 6, 1970, however, less than two months after Wes's death, petitioner was arrested for robbery with use of a knife. He pled guilty, and was sentenced to prison. While he was in prison, Vivian divorced him. Petitioner was deeply hurt by the divorce. (*Id.*, ¶ 39.)

64. Ever since petitioner was a young adult, Betty has observed lapses in petitioner's consciousness, during which he appears to black out. These lapses last a minimum of a few seconds. His eyes change in appearance; if he is talking at the time, he suddenly loses his train of thought. As petitioner regains consciousness, he appears to think intently before recalling what he previously had been talking about. Petitioner has never been evaluated or treated for this condition. (*Id.*, ¶ 40.)

65. In approximately 1977, after petitioner was released from prison, he and a friend were involved in an altercation in a bar, during which a pool stick was broken over his head, causing him to fall to his knees. Petitioner also received injuries in at least two motor vehicle accidents during the mid-1970s. (*Id.*, ¶ 41.)

66. On October 16, 1977, petitioner married a second time, to Deborah Nuner in Sacramento. Petitioner met Deborah while living in the Prison Ministries program after his release from prison following a parole violation. The program housed paroled inmates who

were devoted to Christianity and provided religious counseling and instruction to incarcerated inmates. Petitioner and Deborah remained together until 1981. Their separation resulted in large part from petitioner's inability to satisfy Deborah's strong desire to have children. Deborah obtained a divorce in 1984. Petitioner again was very disappointed by the failure of his marriage. (*Id.*, ¶ 42.)

67. Had Betty Cowan been called to testify, her testimony at the penalty phase would have corroborated and further developed mitigation themes introduced by trial counsel and provided new mitigation evidence. Those themes included physical abuse of petitioner by Wes, petitioner's witnessing of abuse inflicted by Wes on other family members, child endangerment by petitioner's parents, neglect of petitioner's physical needs during childhood, frequent moving of residences and changing of schools during childhood, multi-generational history of alcoholism on Wes's side of the family, lack of positive role modeling by Wes, the divorce of petitioner's parents, the effect of Wes's death on petitioner, petitioner's inability to have children and his failed marriages, and multiple head injuries and other evidence indicating brain damage.

2. Testimony of Maxine Cowan

68. Maxine Cowan is petitioner's aunt. She was married to Wes Cowan's brother Herman. Defense counsel did not call Maxine as a witness in the penalty phase although she was available to testify. (Declaration of Maxine Cowan, ¶ 1, appended as Exhibit S.) She would have corroborated and developed petitioner's case for mitigation by testifying to the following.

69. Maxine first met Herman and the Cowan family in approximately 1940. Herman's father George was an alcoholic with an explosive temper. It seemed George would

become angry about almost anything. Herman told Maxine that when he was growing up his father was almost always drunk and constantly beat him and his brothers. George also showed no affection for his children, and often told them that they would not amount to anything. George made the children work from a young age. He had many rules that he strictly enforced. When Herman was 15, George ran Herman out of the family because he believed that Herman was not abiding by those rules. Even after Herman and Maxine were married, George would still start physical fights with Herman after he had been drinking at family gatherings. (*Id.*, ¶ 2.)

70. Herman's and Wes's approach to parenting mirrored that of their father. They went out drinking instead of staying at home; their tempers were volatile; and after drinking they physically abused their children and spouses. Herman and Maxine had three children (and one who died in infancy). Herman continued to beat them until she finally found the courage to stand up to him. (*Id.*, ¶ 3.)

71. When Herman and Wes drank together, which they did often, they frequently wound up fighting each other. If they were drinking at a family gathering, they would fight in front of the children. (*Id.*, ¶ 5.)

72. In the 1950s, Maxine and Herman lived near Wes and his wife Betty in the Richmond area and the families often visited with each other. When Wes came home drunk, he frequently started fights with Betty, and sometimes locked her out of the house. Betty would then have to spend the night in the car. Other times, Wes hit petitioner and his siblings, and Betty would flee the house with the children to protect them from further abuse. Sometimes, Betty and the children would spend the night in a vacant unit in the converted military barracks in which they lived in order to get away from Wes. (*Id.*, ¶ 4.)

73. Petitioner's family eventually moved to Bakersfield and Maxine's family went to live in San Jose. Over the years, Betty confided in Maxine about the occasions that Wes would either whip the children with a belt or strike them with his hands. (*Id.*, ¶ 6.)

74. Had Maxine Cowan been called to testify, her testimony at the penalty phase would have corroborated and further developed mitigation themes introduced by trial counsel and provided new mitigation evidence. Those mitigation themes included physical abuse of petitioner by Wes, petitioner's witnessing of abuse inflicted by Wes on other family members, multi-generational history of alcoholism on Wes's side of the family, and the lack of positive role modeling by Wes.

3. Testimony of Catherine Glass (née Cowan)

75. Catherine Glass is petitioner's sister. Born on June 3, 1950, she is almost two years younger than petitioner. The prosecution called Catherine as a witness in the guilt phase. Petitioner's trial counsel interviewed her prior to trial, but did not call her to testify in the penalty phase. (Declaration of Catherine Glass, ¶ 25, appended as Exhibit T.) Catherine was willing and available to be a witness. She would have corroborated and developed petitioner's case for mitigation by testifying to the following.

76. Throughout petitioner's childhood and adolescence, Wes Cowan was an abusive, alcoholic father who beat all the children and their mother Betty. Petitioner, who was a shy and timid child, desperately wanted to please Wes. He would do anything to win Wes's love and affection. Petitioner would get very excited when Wes took him to work and allowed him to help with a carpentry project or with chopping wood. (*Id.*, at ¶ 2.)

77. Despite petitioner's dire need for Wes's approval, Wes never expressed any loving feelings for Petitioner. Instead, he singled out petitioner for more frequent and severe

beatings than he inflicted on any of the other children. Wes blamed and beat petitioner for the most minor transgressions. On some occasions petitioner was beaten for wrongdoings committed by their older half-brother Donny. If Wes found something amiss, he would ask Donny what had happened. Donny routinely identified petitioner as the culprit even though he himself had misbehaved. Wes always believed Donny and would then inflict a beating on petitioner. Wes's beatings were forceful; he usually used a belt to whip petitioner on the backside. (*Id.*, at ¶ 3.)

78. Once, when petitioner was very young, he was wearing a long sleeve shirt during hot weather to cover up the bruises on his body. Catherine heard Wes tell petitioner that if he told anyone what happened, he would get the same treatment again. Petitioner looked sad and had his head down while Wes was talking to him. (*Id.*, at ¶ 4.)

79. When Catherine and petitioner were children, Wes was often gone all weekend drinking. Betty hid the children before Wes returned in an effort to protect them from his abuse. Sometimes they hid at the homes of relatives; other times Betty broke into vacant units in their housing complex. On one occasion they hid in an automobile. As Catherine grew older, she helped protect the younger children from Wes. Just before Wes came home drunk, Catherine grabbed them and rushed them to a safe hiding place. (*Id.*, at ¶ 5.)

80. Wes's alcohol-induced abuse caused petitioner great stress. When Wes was gone on the weekend, petitioner worried about whether Wes would return home intoxicated and inflict another beating. Similarly, when petitioner was coming home and expecting Wes to be there, he was extremely anxious about the state of Wes's sobriety. (*Id.*, at ¶ 6.)

81. On some weekends when Wes remained with the family, they would have

family outings in a park or engage in other family activities. These activities began well but usually ended in disaster because Wes drank until he was intoxicated and became abusive to the family. (*Id.*, at ¶ 7.)

82. Wes's alcohol-induced abuse continued through the family's move to Bakersfield in 1960. Finally, there was a respite when Wes was convicted of vehicular manslaughter and sent to prison for almost two years in 1961. With Wes gone, life improved for petitioner and the rest of the family. They no longer had to worry about Wes's drunkeness and his outbursts of violence. (*Id.*, at ¶ 8.)

83. After Wes was paroled from prison, he returned to drinking. To avoid being arrested for driving while under the influence of alcohol, Wes often had petitioner act as his chauffeur even though petitioner was too young to have a license. Wes drank while petitioner was driving the car. (*Id.*, at ¶ 9.)

84. Wes also provided petitioner with alcohol and encouraged him to drink even though he was underage. On one occasion when Wes took petitioner to a bar, the bartender told Wes he could not have petitioner in the bar with him, but Wes refused to leave. The police were called and Wes was arrested. (*Id.*, at ¶ 10.)

85. Wes frequently picked on petitioner by taunting him about being a man. Once when petitioner was about 15 he was sitting in the living room when Wes, who was drunk, told him to stand up and fight Wes, so Wes could make him into a man. Petitioner refused, explaining he did not want to fight his father. When Wes began to beat petitioner badly, petitioner escaped into the bedroom, but Wes followed. Petitioner wound up unconscious on the floor, with Wes kicking him. When Wes realized that Catherine was watching, he told her to go away. On several other occasions Wes initiated similar beatings of petitioner,

claiming petitioner had to fight his father to become a man. (*Id.*, at ¶ 11.)

86. During the mid-1960s both petitioner and Catherine attended East Bakersfield High School. There was a lot of tension between different racial groups. That tension sometimes erupted into violence, and petitioner was the victim of a number of beatings. (*Id.*, at ¶ 12.)

87. Throughout their marriage, Wes was controlling and possessive of Betty. On one occasion he did not even let Betty attend her own relative's baby shower. Wes always wanted Betty to stay home and would not permit her to find a job. (*Id.*, at ¶ 13.)

88. When Wes was drunk he often spoke disparagingly about women to petitioner. He told petitioner that Betty was no good, and that she and other women were just whores. Wes also denigrated Vivian, petitioner's first wife, because she had a child from a former relationship. (*Id.*, at ¶ 14.)

89. In 1967 life became so difficult with Wes that petitioner left home to live with a friend. Betty finally filed for divorce, and Catherine moved to San Jose to get away from Wes. Everyone was tired of Wes's alcoholism and quick temper. Just before Catherine left, there was an incident in which Wes came home drunk and, as he frequently did, accused Betty of cheating on him. Catherine defended Betty, who was always at home caring for the children while Wes was out carousing. Wes was about to attack Catherine when Betty grabbed a hammer in order to protect her. Betty threatened to kill Wes if he touched Catherine, and Wes backed away. (*Id.*, at ¶ 15.)

90. After the court ordered Wes to leave 514 Easter Street, he eventually moved to his brother's home in San Jose, where Catherine was living. Wes had Catherine drive him around town while he drank in the front passenger seat. Catherine could not tolerate living

with Wes, and she soon moved back to Bakersfield. (*Id.*, at ¶ 16.)

91. After Catherine returned to Bakersfield, Wes proclaimed that he had stopped drinking and was devoting himself, once again, to Christianity. Betty agreed to a reconciliation, and she and the younger children moved to San Jose. However, by the time Catherine went to San Jose to visit Wes and Betty, Wes was drinking again. While drunk, Wes argued with Catherine and then strangled her around the neck. Betty protected Catherine by knocking Wes down. Catherine called the police. At the time Wes attacked Catherine, she was pregnant with her first child. (*Id.*, at ¶ 17.)

92. In November, 1969, a short while before Wes died of cancer, petitioner and Catherine went to San Jose to visit him in the hospital. Wes knew he was about to die. He told them that in reflecting on his life, he realized that some things he had done were wrong, and that his problems were caused by alcoholism. He acknowledged he had mistreated petitioner and Catherine, and he asked them to forgive him for all he had done wrong. (*Id.*, at ¶ 18.)

93. Despite all the abuse that Wes inflicted on him, petitioner was more upset about Wes's death than any of the other siblings. Petitioner was so distraught he was unable to enter the mortuary to view the casket. When he reached the front door he turned around and ran off down the street. Catherine went after him and eventually found him crying while huddled up in bushes. (*Id.*, at ¶ 19.)

94. On October 19, 1972, petitioner was paroled from prison to live with Catherine and her husband and children in Nipomo, California. At Catherine's home, petitioner frequently experienced nightmares. Catherine heard him screaming and yelling in his room. On other occasions he was sweating profusely for no apparent reason. He often

closed the curtains in the house and then peeked through them to see what was going on outside. Catherine also frequently found petitioner crying hard behind the closed door of the bathroom. He had cried in a similar manner when he was young. (*Id.*, at ¶ 20.)

95. Petitioner suffered from blackouts throughout his life. Petitioner told Catherine that in November, 1973, he blacked out while driving to Yosemite. The car went over the edge of the road, flipped over, and struck a rock wall. The accident smashed in the car's front end, crushed the roof, and broke all of the windows. (*Id.*, at ¶ 21.)

96. There were other instances in which Petitioner engaged in bizarre activity and then said he was not aware of what he had just done. For example, in the summer of 1985 he was playing with Catherine's 4-year-old son, Dan, at a swimming pool. Petitioner threw Dan in the pool, but Dan could not swim and started to go under. Petitioner just stood there without responding, as if in a trance. Petitioner's sister, Melanie, finally jumped in and pulled Dan out of the water. After petitioner realized what had happened, he started crying and hugging Dan. He apologized, explaining he had blacked out. On other occasions petitioner's eyes suddenly had a blank look, and he lost awareness of what he was doing or saying. These lapses were frequent, although they lasted for just a few seconds. (*Id.*, at ¶ 22.)

97. As a child, Catherine witnessed petitioner suffer head injuries when they were living in Rodeo. Once, petitioner fell after jumping into a pile of hay and striking his head hard on a cement curb. On another occasion, while playing a game, petitioner accidentally slammed his head into the side mirror of a truck. Betty used a butterfly stitch to close the wound. (*Id.*, at ¶ 23.)

98. Catherine's observations of petitioner led her to believe he had some type of

mental problem which should have been treated when he was young. It was difficult to figure out what was going on with petitioner because he held a lot inside and did not talk about his feelings or things that had happened to him. (*Id.*, at ¶ 24.)

99. Had Catherine Glass been called to testify, her testimony at the penalty phase would have corroborated and further developed mitigation themes introduced by trial counsel and provided new mitigation evidence. Those themes included physical abuse of petitioner by Wes, petitioner's witnessing of abuse inflicted by Wes on other family members, emotional battering of petitioner by Wes, child endangerment by petitioner's parents, neglect of petitioner's physical needs during childhood, multi-generational history of alcoholism on Wes's side of the family, lack of positive role modeling by Wes, lack of positive parental guidance by Wes, the divorce of petitioner's parents, the effect of Wes's death on petitioner, and multiple head injuries and other evidence indicating brain damage.

4. Testimony of Donald Ivanoff

100. Donald Ivanoff is petitioner's half-brother. Born August 4, 1944, he is almost 4 years older than petitioner. Betty is the mother of both petitioner and Donald. Donald's father is Betty's first husband, Donald Carroll Ivanoff. Defense counsel interviewed Donald before petitioner's trial, but did not call him as a witness in the penalty phase. (Declaration of Donald Ivanoff, ¶ 15, appended as Exhibit U.) Donald was willing and available to be a witness. He would have corroborated and developed petitioner's case for mitigation by testifying to the following.

101. Betty and Donald's father divorced when Donald was less than two years old. After the divorce, Donald lived with Betty and did not have contact with his father. When Betty married Wes, Wes raised Donald along with his own children. (*Id.*, at ¶ 2.)

102. When Donald was a young child, he suffered from epileptic seizures. While riding his bicycle, he would suddenly black out and fall to the ground. After several minutes, he would regain consciousness. The doctor told Betty the seizures would stop as he grew older, and they did. (*Id.*, at ¶ 3.)

103. Like his brothers Jesse and Herman, Wes was an alcoholic who had a bad temper and often became violent when drunk. Wes did most of his drinking on the weekends. Wes's drinking often led to fights with Betty that were witnessed by Donald, petitioner, and the other children. Sometimes the children hid under the table while Wes and Betty were fighting. When Wes was gone for the weekend, petitioner and Donald worried about what would be in store for them when he came home. Would he be drunk? Would he fight with Betty? Would he try to hit them? (*Id.*, at ¶ 4.)

104. In an effort to keep them away from Wes when he came home drunk, Betty would have the children hide. Sometimes she took them to stay with her sister June. Once Wes came to get them at June's and slapped Betty in the face. On another occasion when Donald was about 10 years old they lived in Rodeo, Betty pulled on Donald's arm to get him away from Wes. Wes then grabbed Donald's other arm and pulled him in the opposite direction, until Betty was finally able to get Donald away. Betty sometimes called the police, who would make Wes leave the house or at least calm him down. (*Id.*, at ¶ 5.)

105. Betty tried to hide money from Wes so he could not go out drinking, but Wes usually found it. When Wes spent all the money on drinking, Betty would have to scrounge for food to feed the family. (*Id.*, at ¶ 6.)

106. When the children were young, Wes used a belt to whip them on their buttocks. Wes held the children by their hands while whipping them so they could not get

away. Betty also disciplined them by giving them spankings with a belt or a switch that each child had to select from the yard. A number of times Donald blamed petitioner for things that Donald had done wrong. Wes or Betty always believed Donald, and petitioner received whippings for Donald's wrongdoing. (*Id.*, at ¶ 7.)

107. Donald does not remember Wes or Betty ever hugging petitioner, or telling petitioner they loved him. (*Id.*, at ¶ 8.)

108. Petitioner and Donald used to play a game in which one of them held his breath and the other squeezed that person's chest. Once when Donald was squeezing petitioner around the chest, petitioner passed out. (*Id.*, at ¶ 9.)

109. Wes sometimes took petitioner, brother Gerald, and Donald fishing on their uncle's boat. During the fishing trips, Wes drank continuously, which led to many problems, including Wes being abusive. (*Id.*, at ¶ 10.)

110. Betty took the children and left Wes a number of times because of his drinking. On each occasion, Wes convinced Betty to return by promising her he would stop and treat the family better. Betty always returned, and shortly thereafter Wes always broke his promises. (*Id.*, at ¶ 11.)

111. During one separation in 1960, Wes moved to Bakersfield. He joined a church and convinced Betty he had changed his life. The rest of the family then joined Wes in Bakersfield where Wes, who was a carpenter, built a house for the family. It was not long, however, before Wes began to drink again. (*Id.*, at ¶ 12.)

112. In 1961, Wes took petitioner, Gerald, and Donald on another fishing trip and again drank. On the way home, Wes was driving drunk and had an accident. The passenger of the other car died. Wes was convicted of vehicular manslaughter and sent to prison. (*Id.*,

at ¶ 13.)

113. Had Donald Ivanoff been called to testify, his testimony at the penalty phase would have corroborated and further developed mitigation themes introduced by trial counsel and provided new mitigation evidence. Those themes included physical abuse of petitioner by Wes, petitioner's witnessing of abuse inflicted by Wes on other family members, child endangerment by petitioner's parents, neglect of petitioner's physical needs during childhood, Wes's alcoholism, the lack of positive role modeling by Wes, the absence of positive guidance from Wes, and head injuries and other evidence indicating brain damage.

5. Testimony of Gerald Cowan

114. Gerald Cowan is petitioner's brother. Born May 5, 1952, he is almost four years younger than petitioner. Defense counsel did not call Gerald at penalty phase. He was willing and available as a witness. (Declaration of Gerald Cowan, ¶ 15, appended as Exhibit N.) Gerald would have corroborated and developed petitioner's case for mitigation by testifying to the following.

115. Throughout Gerald's childhood and adolescence, Wes was an abusive, alcoholic father who beat all of the children and Betty. Petitioner was beaten more than any of the other children. The severity of the beatings depended on Wes's sobriety and his mood. When Wes was intoxicated and in a bad mood, the beatings were more severe. Wes grabbed petitioner with one arm and then used his other arm to whip petitioner with a belt. Wes inflicted repeated, hard blows. Petitioner cried during the beatings and was left with bruises on his body. To try to protect the children from Wes, Betty had them hide before he came home drunk on the weekends. (*Id.*, at ¶ 2.)

116. When Wes used his paycheck to drink, the family was sometimes left with no

money to buy food. On one occasion Betty had only potatoes to cook for dinner because Wes was out drinking. Wes came home before the dinner was ready. He was upset and made all the children go to bed without eating. From Gerald's bedroom, he could hear Betty and Wes in a heated argument. (*Id.*, at ¶ 3.)

117. When petitioner was older, he was sometimes punched in the mouth by Wes rather than whipped with a belt. The punches often caused bleeding. Betty occasionally tried to stop the beatings but Wes did not listen to her. (*Id.*, at ¶ 4.)

118. On one occasion Wes made Petitioner remain in his bedroom for about a week. Petitioner tried to sneak out of his room several times but Wes caught him each time and beat him with a belt. (*Id.*, at ¶ 5.)

119. As a result of Wes's drinking and temper, Wes and Betty were frequently fought with each other while petitioner was growing up. They separated a number of times before they finally divorced. (*Id.*, at ¶ 6.)

120. When Gerald was about nine years old, Wes took petitioner, half-brother Donny and Gerald on a fishing trip. On the drive home, Wes collided with another vehicle in Bakersfield and a passenger in the other car was killed. Wes had been drinking throughout the trip and was very drunk at the time of the accident. Wes was convicted of vehicular manslaughter and sentenced to state prison. (*Id.*, at ¶ 7.)

121. After Wes's release from prison, he often had petitioner or Gerald serve as a chauffeur for him, even though they were too young to have a driver's license. Wes drank in the passenger seat while petitioner or Gerald drove the car. In addition to drinking, Wes also consumed sedative pills. (*Id.*, at ¶ 8.)

122. Wes continued to take petitioner and Gerald on fishing trips. After they were

done fishing, Wes often went drinking in a bar while petitioner and Gerald waited in the car for three or four hours until the bar closed. When Wes was done drinking, he returned to the car, drunk, and drove the boys home. (*Id.*, at ¶ 9.)

123. When Gerald was very young, he saw petitioner playing a game outside that involved petitioner holding his breath while another person – either Donny or a friend – stood behind him and squeezed his diaphragm. Petitioner passed out and fell forward, hitting his head on the concrete surface. (*Id.*, at ¶ 10.)

124. For a while when Gerald was about 16 and petitioner was about 20, they were together frequently. On days that he did not work, petitioner drank a lot of alcohol and used a lot of drugs, including methamphetamine and sedatives. In the evenings, they cruised up and down Chester Street, a main thoroughfare in Bakersfield. Gerald usually drove the car because petitioner was too intoxicated. Petitioner frequently passed out by the end of the evening and Gerald drove him home, where he lived with his wife, Vivian. (*Id.*, at ¶ 11.)

125. Gerald again spent a lot of time with petitioner from approximately 1982 to 1985, after petitioner returned to Bakersfield following the break-up of his marriage to Deborah. During this time, petitioner was living with Gerry Tags in different locations in the Bakersfield area. Both he and Tags were addicted to methamphetamine. Petitioner injected as much as he could obtain every day. Finding and using methamphetamine became the sole focus of petitioner's life. (*Id.*, at ¶ 12.)

126. Had Gerald Cowan been called to testify, his testimony at the penalty phase would have corroborated and further developed mitigation themes introduced by trial counsel and provided new mitigation evidence. Those themes included physical abuse of petitioner by Wes, petitioner's witnessing of abuse inflicted by Wes on other family members, child

endangerment by petitioner's parents, neglect of petitioner's physical needs during childhood, Wes's alcoholism and substance abuse, the lack of positive role modeling and guidance by Wes, petitioner's long term alcohol and substance abuse, and petitioner's suffering from head injuries.

6. Testimony of Melanie Griffith (née Cowan)

127. Melanie Griffith is petitioner's sister. Born October 27, 1956, she is more than eight years younger than petitioner. Defense counsel did not interview Melanie or call her at the penalty phase. Melanie was willing and available as a witness. (Declaration of Melanie Griffith, ¶ 8, appended as Exhibit V.) She would corroborated and develop petitioner's case for mitigation by testifying to the following.

128. Throughout Melanie's childhood and adolescence, Wes was an abusive, alcoholic father who beat Betty and the children, especially petitioner and Lesley. As petitioner grew older, Wes's method changed from belt whippings to punching with his fist. When petitioner was about 16, Melanie watched Wes use his fist to repeatedly punch petitioner in the head. Petitioner crouched down in the corner of the yard and covered his face with his arms. Petitioner pleaded with Wes to stop. (*Id.*, at ¶ 2.)

129. An example of Wes's ongoing abuse of Lesley occurred when Lesley was six years old and having a problem with defecating in his pants. Wes pushed Lesley's head into the toilet and threatened to put his face into the soiled pants. Wes then whipped Lesley as "punishment" for the problem, even though Lesley begged him to stop. (*Id.*, at ¶ 3.)

130. One of the more severe beatings that Wes inflicted on Betty occurred at the Bakersfield home on H Street, when Betty was pregnant with Lee in 1961. Wes punched Betty with his fist, causing her to lose consciousness and fall through a door onto the outside

grass. (*Id.*, at ¶ 4.)

131. On one occasion after Betty and Wes separated, Melanie and her brother Jeff spent the night with Wes at his home. Melanie was about 11 at the time and Jeff was about eight. Wes left the children home alone while he went drinking. Melanie saw a lot of loose pills that Wes had left out on his night table. Melanie's sister Catherine later told her that Wes was using sedatives. (*Id.*, at ¶ 5.)

132. When Wes died in 1969, petitioner was more upset than anyone else in the family even though Wes had been so abusive to him. Petitioner had desperately wanted Wes to love him. At the wake, petitioner was so distraught that he ran crying from the mortuary. (*Id.*, at ¶ 6.)

133. Melanie observed that in approximately 1973, after petitioner returned to Bakersfield from prison, he used a lot of drugs. (*Id.*, at ¶ 7.)

134. Had Melanie Griffith been called to testify, her testimony at the penalty phase would have corroborated and further developed mitigation themes introduced by trial counsel and provided new mitigation evidence. Those mitigation themes included physical abuse of petitioner by Wes, petitioner's witnessing of abuse inflicted by Wes on other family members, child endangerment by petitioner's parents, Wes's alcoholism and substance abuse, the lack of positive role modeling and guidance by Wes, the effect of Wes's death on petitioner, and petitioner's long term alcohol and substance abuse.

7. Testimony of Jeff Cowan

135. Jeff Cowan is petitioner's brother. Born May 5, 1959, he is almost 11 years younger than petitioner. Defense counsel did not call Jeff at the penalty phase. Jeff was willing and available as a witness. (Declaration of Jeff Cowan, ¶ 6, appended as Exhibit W.)

He would have corroborated and developed petitioner's case for mitigation by testifying to the following.

136. Wes Cowan died in 1969 when Jeff was ten years old. Wes was an abusive alcoholic who was drunk almost every weekend. Jeff recalled many occasions when Wes drove drunk while Jeff and his siblings, Melanie and Lee, were in the car. When they lived in San Jose around 1968, Betty and Wes argued about Wes's spending too much money on drinking when Betty needed to pay the bills. (*Id*, at ¶ 2.)

137. When Wes died in 1969, petitioner was more upset than anyone else in the family. Petitioner was distraught and crying uncontrollably at the grave site. (*Id.*, at ¶ 3.)

138. From 1981 until petitioner returned to prison in 1986, petitioner was drinking alcohol, smoking marijuana and ingesting methamphetamine. On one occasion at their brother Lesley's home, petitioner stood up from his seat and then suddenly blacked out for five to ten minutes. ((*Id*, at ¶ 5.)

139. Had Jeff Cowan been called to testify, his testimony at the penalty phase would have corroborated and further developed mitigation themes introduced by trial counsel and provided new mitigation evidence. Those themes included physical abuse of the children by Wes, child endangerment by petitioner's parents, Wes's alcoholism and substance abuse, the lack of positive role modeling and guidance by Wes, the effect of Wes's death on petitioner, and petitioner's long term alcohol and substance abuse.

8. Testimony of Stuart Leland Cowan

140. Stuart Leland Cowan (Lee) is petitioner's brother. Born May 16, 1962, he is almost 14 years younger than petitioner. Defense counsel did not interview Lee or call him at the penalty phase. Lee was willing and available as a witness. (Declaration of Stuart Leland

Cowan, ¶ 10, appended as Exhibit X.) He would have corroborated and developed petitioner's case for mitigation by testifying to the following.

141. Lee was only seven years old when Wes died, but has vivid memories of him. Wes was not home very often, but when he was home he was usually drunk, fought with Betty, and abused the children. Lee watched Wes carefully when he arrived home to see if he was wobbling. If Wes was, Lee knew to get away from him to avoid a beating. (*Id.*, at ¶ 2.)

142. When Wes was home and not drunk, he ate dinner with the family. The family always said grace before dinner. During dinner, Wes did not allow anyone to speak. If the children even whispered, they would be in trouble with Wes. The children had to keep their heads down and eat in silence. After dinner, Wes allowed the children to speak, but Lee and his siblings just wanted to get away from the table as soon as possible. (*Id.*, at ¶ 3.)

143. Around 1968 Lee lived in San Jose with his siblings Gerald, Lesley, Melanie, and Jeff and his parents. On one occasion, Wes came home while they were eating a meal and began to argue with Betty. Lee said something during the argument that upset Wes, who told Lee to shut up, picked him up from his chair, and threw him across the room. (*Id.*, at ¶ 4.)

144. In San Jose petitioner sometimes came to visit the family. Wes was especially abusive to petitioner, constantly taunting him about "not being a man." He laughed at petitioner, calling him names such as "Girl." Wes told petitioner that he would make a man out of him by toughening him up, and if petitioner was "man enough," petitioner would "throw [Wes] through the wall." (*Id.*, at ¶ 5.)

145. When Wes died in 1969, petitioner was more upset than anyone else in the family even though Wes had treated him so badly. At the wake, petitioner screamed

incoherently and could not stop crying. He refused to believe that Wes was dead. After Wes's death, Lee and some of the other siblings played a tape recording Wes had made while on his death bed, in which he said he was giving his life back to God in order to atone for his sins. Petitioner became so emotional when listening to the tape recording that he left the room. Lee does not think petitioner has ever been able to listen to the entire tape recording. (*Id.*, at ¶ 6.)

146. Around 1973, after petitioner returned to Bakersfield from prison, he drank a lot of alcohol. He always had a beer in his hand. (*Id.*, at ¶ 7.)

147. Arouond1981, petitioner returned to Bakersfield from Sacramento after the break-up of his marriage. The marriage ended because Deborah wanted to have children and petitioner was sterile. Petitioner was very depressed about the failure of his marriage. Lee had not seen petitioner so upset since the death of their father. Petitioner drank alcohol until he was drunk, and cried about how much he loved Deborah. He said that he did not care about anything else and that his life was done. Petitioner began to use a lot of drugs and drank daily. His preferred drug was methamphetamine, but he used any drug he could obtain. (*Id.*, at ¶ 9.)

148. Had Lee Cowan been called to testify, his testimony at the penalty phase would have corroborated and further developed mitigation themes introduced by trial counsel and provided new mitigation evidence. Those themes included physical abuse of the children by Wes, child endangerment by petitioner's parents, Wes's alcoholism and substance abuse, the lack of positive role modeling and guidance by Wes, the effect of Wes's death on petitioner, petitioner's inability to have children and his failed marriages, and petitioner's long term alcohol and substance abuse.

9. Testimony of Leroy Cowan

149. Leroy Cowan, petitioner's cousin, testified in the penalty phase. In his testimony he made the observation that petitioner was depressed during his childhood. (RT 2911.) Defense counsel did not ask Leroy to identify the symptoms he observed that led him to conclude petitioner was depressed. Had been asked that question, he would have testified that petitioner's "mood was very solemn. He was often tearful and clearly unhappy. He exhibited very low energy and was unmotivated to participate in activities at home or at school." (Declaration of Leroy Cowan, ¶ 4, appended as Exhibit Y.) In addition, it appeared petitioner did "not care about anything," and "believed that everything was wrong about his life." (*Ibid.*) Leroy often encouraged petitioner to join him in an activity, but petitioner usually did not want to do anything or go anywhere. (*Ibid.*)

10. Testimony of Reverend William E. B. Condit

150. Reverend William E. B Condit was previously the senior pastor of the Free Will Baptist Church in Bakersfield, California. Defense counsel did not interview Reverend Condit or call him at the penalty phase. Reverend Condit was willing and available as a witness. (Declaration of William E. B. Condit, ¶ 8, appended as Exhibit Z.) He would have corroborated and developed petitioner's case for mitigation by testifying to the following.

151. Petitioner and his family became members of the church after they arrived in Bakersfield around the summer of 1960. Reverend Condit served as senior pastor of the church until July, 1964, when the Condit family moved from Bakersfield. (*Id.*, at ¶ 1.)

152. Reverend Condit counseled Wes about his inconsistent attendance at church. Wes was a severe alcoholic who spent too much time in the bars. Wes eventually stopped coming to church, although his children continued to attend. Reverend Condit was informed

by others that Wes mistreated his children by whipping them and neglecting them. (*Id.*, at ¶ 2.)

153. On July 29, 1961, Wes was driving while intoxicated and had a collision with another automobile in Bakersfield. An occupant of the other vehicle was killed. The other passengers in Wes's vehicle were three of his sons, including petitioner. Wes was convicted of vehicular manslaughter and sent to state prison. Reverend Condit visited Wes in prison and continued to counsel him. When Wes was released from prison, he returned to Reverend Condit's church for a brief time and then stopped attending. (*Id.*, at ¶ 3.)

154. Reverend Condit's next contact with Wes was in 1969, when he was the pastor of a church in Campbell, California. Wes and his wife Betty had divorced, and Wes was now living with his brother in San Jose. Wes was very ill with lung cancer. He recommitted himself to his religion and attended Reverend Condit's church until he was too ill to come any more. (*Id.*, at ¶ 4.)

155. About two weeks before Wes's death, Reverend Condit went to see Wes at the hospital. Wes told Reverend Condit he was about to die. He confessed he had made a lot of mistakes in his life but had now made everything right with the Lord. Wes expressed great remorse about the lifestyle he had led; he was very sorry he had let alcohol destroy his life, and he was especially sorry his alcoholism had caused him to be a bad and neglectful husband to his wife, and a bad and neglectful father to petitioner and the other children. Wes regretted that when he was in prison he was unable to help supervise his boys, who were getting into trouble at home. Reverend Condit tape-recorded Wes's confession. (*Id.*, at ¶ 5.)

156. Had Reverend William E. B. Condit been called to testify, his testimony at the penalty phase would have corroborated and further developed mitigation themes introduced

by trial counsel and provided new mitigation evidence. Those mitigation themes included physical abuse of the children by Wes, child endangerment by Wes, neglect of the children by Wes, Wes's alcoholism, and the lack of positive role modeling and guidance by Wes.

11. Testimony of Mary Louise Condit

157. Mary Louise Condit is the wife of Reverend William E. B. Condit, the senior pastor of the Bakersfield church attended by the Cowans. Defense counsel did not interview Mrs. Condit or call her at the penalty phase. Mrs. Condit was willing and available as a witness. (Declaration of Mary Louise Condit, ¶ 9, appended as Exhibit AA.) She would have corroborated and developed petitioner's case for mitigation by testifying to the following.

158. Petitioner Cowan and his family became members of the Free Will Baptist Church after they arrived in Bakersfield around the summer of 1960. The Condits left Bakersfield in July, 1964. (*Id.*, at ¶ 1.)

159. Mrs. Condit was very familiar with petitioner and his family. Petitioner attended Sunday School at the church where she taught (although she did not teach any of petitioner's classes), and he attended many youth activities that she supervised. Mrs. Condit also accompanied her husband to the Cowan home when he counseled Wes Cowan about his inconsistent attendance at church. More frequently she provided counsel for Betty Cowan, who confided in her about the family problems. These meetings with Betty were both in person, when she went by herself to the Cowan home, and in telephone conversations. (*Id.*, at ¶ 2.)

160. Through these contacts with petitioner and his family Mrs. Condit learned a lot about petitioner's family life when he was a young teenager in Bakersfield. Wes was a

severe alcoholic who drank himself into a state of intoxication every weekend after getting his pay check. Wes's use of his pay check to buy alcohol little left money to pay bills or buy food and clothing. The children were forced to wear old clothing and there was little food in the house when Mrs. Condit visited. (*Id.*, at ¶ 3.)

161. Betty told Mrs. Condit that when Wes was drunk his temper was explosive, and he would take his rage out on petitioner and his other sons by whipping them with belts. Betty frequently telephoned Mrs. Condit to report that Wes had just whipped petitioner or his brothers, or that Wes had fought with her when she had complained about his behavior. (*Id.*, at ¶ 4.)

162. During her visits to the Cowan home, Mrs. Condit would frequently see Wes suddenly get angry at petitioner and the other boys. Wes would then forcefully grab one of them and loudly demand that he leave the room. (*Id.*, at ¶ 5.)

163. Mrs. Condit could feel how unsettled home life was for petitioner and his family. She did not feel that Wes expressed any love toward petitioner and his brothers. Betty tried to protect the children from Wes's outbursts. Petitioner seemed nervous and uncertain of himself at home, and acted as if he was afraid he would unknowingly do something to trigger punishment from his father. Wes did not spend much time with petitioner because he was busy with his drinking friends. (*Id.*, at ¶ 6.)

164. Mrs. Condit's observations of petitioner and his brothers, both at church and at their home, led her to believe they had a learning disability. The boys had difficulty reading and did not participate in class. To Mrs. Condit there definitely was something not right about petitioner and his brothers. She saw the same problems in petitioner's grandfather (Wes's father), who also lived in Bakersfield at that time. (*Id.*, at ¶ 7.)

165. Mrs. Condit and the whole church congregation felt sorry for petitioner and the other Cowan children. They knew how difficult it was for them to cope with the problems caused by Wes. After Mrs. Condit's visits at the Cowan home, she often found herself on the verge of crying. Never had she seen a situation sadder than that of the Cowan family. (*Id.*, at ¶ 8.)

166. Had Mary Louise Condit been called to testify, her testimony at the penalty phase would have corroborated and further developed mitigation themes introduced by trial counsel and provided new mitigation evidence. Those themes included physical abuse of petitioner by Wes, petitioner's witnessing of abuse inflicted by Wes on other family members, child endangerment by Wes, neglect of petitioner's physical needs during childhood, the lack of positive role modeling by Wes, Wes's alcoholism, and petitioner's brain impairments.

12. Testimony of Dr. Larry Condit

167. Dr. Larry Condit is the senior pastor for the Capitol Free Will Baptist Church in North Highlands, California. He became petitioner's childhood friend after the Cowans moved to Bakersfield, California and became members of the Free Will Baptist Church around the summer of 1960. Dr. Condit's father, William E. B. Condit, was the senior pastor of the church at that time. The Cowans and the Condits lived a few blocks apart. (Declaration of Dr. Larry Condit, ¶ 1, appended as Exhibit BB.)

168. Defense counsel did not interview Dr. Condit or call him at the penalty phase. Dr. Condit was willing and available as a witness. (*Id.*, at ¶ 16.) He would have corroborated and developed petitioner's case for mitigation by testifying to the following.

169. Dr. Condit and petitioner are the same age and became close friends in

Bakersfield. They attended junior high school together. (*Id.*, at ¶ 2.)

170. Wes Cowan was an alcoholic who was very abusive to petitioner. Dr. Condit witnessed Wes beat petitioner many times. Sometimes the beatings would occur because Wes believed petitioner had done something wrong, such as come home late or fail to do his chores. Wes would hold petitioner by his arm and then grab a belt, stick or whatever object he could find. He would then repeatedly and forcefully strike petitioner all over his body with the object causing petitioner to have welts and to bleed. (*Id.*, at ¶ 3.)

171. Other beatings Wes inflicted on petitioner were for no apparent reason. Dr. Condit would sometimes sleep over at petitioner's home on the weekend. Wes would come home drunk late at night while they were asleep and yank petitioner out of bed. He would then start beating petitioner with a belt or other object. When Wes was sober the next day, he would be very sorry for his conduct.. (*Id.*, at ¶ 4.)

172. Sometimes petitioner would react fast enough to get away before Wes would beat him. Petitioner would run out of the house and jump over the fence that surrounded the yard. As petitioner was fleeing, Wes would yell that when Wes caught him, petitioner would be sorry because Wes would kill him. As petitioner got older, he worked to develop his muscle strength so he would be better able to withstand the his father's beatings. (*Id.*, at ¶ 5.)

173. Wes abused petitioner more than any of his other children. Since petitioner was the oldest, Wes always blamed him for whatever went wrong, and petitioner received the majority of the beatings. (*Id.*, at ¶ 6.) Wes was also very abusive to Betty; he would scream and holler at her. (*Id.*, at ¶ 7.)

174. Despite the terrible abuse petitioner received from his father, petitioner told Dr. Condit he loved his father very much and wanted his father to love him. Petitioner

always defended Wes when anyone spoke badly of him. Petitioner never expressed his feelings about the beatings his father gave him. (*Id.*, at ¶ 8.)

175. In late 1961 Wes was driving his vehicle while intoxicated and had an accident that killed a woman in the other car. Wes was sentenced to prison. While Wes was gone, Betty had to be a single parent for their seven children and her other child from her first marriage. Betty was unable to control the children or keep up the house. The inside of the house was a mess, and the yard was in terrible shape. The Cowan home was the worst property in the neighborhood, and petitioner's life was very chaotic. (*Id.*, at ¶ 9.)

176. Petitioner was a not a very good student at school. He was easily bored in class and had great difficulty with his studies. (*Id.*, at ¶ 10.)

177. Petitioner frequently complained to Dr. Condit about headaches he was experiencing. He was constantly taking aspirin to feel better. (*Id.*, at ¶ 11.)

178. When Wes was paroled from prison, he returned home and continued to beat petitioner. Eventually, the violence and chaos at petitioner's house grew so severe that Dr. Condit began to withdraw from the friendship. In July of 1964, the Condits moved from Bakersfield to Sacramento. (*Id.*, at ¶ 12.)

179. Had Dr. Larry Condit been called to testify, his testimony at the penalty phase would have corroborated and further developed mitigation themes introduced by trial counsel and provided new mitigation evidence. Those themes included Wes's physical abuse of petitioner, petitioner's witnessing of abuse inflicted by Wes on other family members, child endangerment by Wes, the lack of positive role modeling by Wes, Wes's alcoholism, and petitioner's brain impairments.

13. Testimony of Michael Hilburn

180. Michael Hilburn was a close childhood friend of petitioner in Bakersfield. They met after petitioner moved to Bakersfield around 1960. (Declaration of Michael Hilburn, ¶ 1, appended as Exhibit CC.)

181. Defense counsel did not interview Mr. Hilburn or call him at penalty phase. Mr. Hilburn was willing and available as a witness. (*Id.*, at ¶ 9.) He would have corroborated and developed petitioner's case for mitigation by testifying to the following.

182. Petitioner and Michael. Hilburn had a common bond: they both lived in unloving homes and had troubled family lives. In Michael Hilburn's home, his step-father was an alcoholic who beat him badly and his mother was addicted to pills. In petitioner's home, Wes was an abusive alcoholic and Betty had an explosive temper. (*Id.*, at ¶ 2.)

183. When petitioner and Michael Hilburn turned 12 and were celebrating their birthdays, Wes took them on a fishing trip to the Kern River. At the river, Wes had them drink Christian Brothers brandy. This was the first time petitioner or Michael Hilburn had drunk alcohol. Wes had them drink so much brandy they both became drunk. After this celebration, petitioner and Michael Hilburn continued to drink alcohol on other occasions, despite their young age. Wes was aware of their drinking and did not discourage them from using alcohol. (*Id.*, at ¶ 3.)

184. Michael Hilburn observed welts on petitioner's body which indicated to him that petitioner was being beaten at home. Petitioner, however, did not talk about being abused because that was not something discussed back then (*Id.*, at ¶ 4.)

185. On one occasion in 1965, Michael Hilburn was at petitioner's home when Betty was angrily yelling at petitioner, who talked back to her. At the time, Betty was ironing and she had a hot iron in her hand. Betty held the iron up to petitioner's face and threatened

to burn him. Petitioner and Michael Hilburn fled from the house and decided to run away from their terrible home situations. They stole a car and drove to Hanford, where they were arrested. (*Id.*, at ¶ 5.)

186. Petitioner and Michael Hilburn attended East Bakersfield High School together in the mid-1960s. At that time, violence between rival groups of students was common. Although petitioner tended to be nonviolent and peaceful as a youth, there was no avoiding the violence at the high school. On a number of occasions, petitioner and Michael Hilburn had to defend themselves after being jumped by gangs of other students. Petitioner was beaten pretty badly in these fights. (*Id.*, at ¶ 6.)

187. Had Michael Hilburn been called to testify, his testimony at the penalty phase would have corroborated and further developed mitigation themes introduced by trial counsel and provided new mitigation evidence. Those themes included Wes's physical abuse of petitioner, child endangerment by petitioner's parents, the lack of positive role modeling by Wes, Wes's alcoholism, and petitioner's long term alcohol abuse.

188. Defense counsel failure's to investigate, discover and present the evidence described above in Claim 5B was not based on "a rational and informed decision . . . founded on adequate investigation and preparation." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) Moreover, "it is undisputed that [a capital defendant] had a right – indeed, a constitutionally protected right – to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." (*Williams v. Taylor* (2000) 529 U.S. 362, 393.)

C. Failure to Present Expert Testimony That Petitioner Had Suffered Numerous

Physical and Psychological Traumas, Deprivations, and Developmental Obstacles That Thwarted His Development as a Child and Adolescent, and Compromised His Ability to Function Adequately as an Adult, Including at the Time of the Killings

189. During the penalty phase, defense counsel did not present the testimony of a mental health expert to: (1) further develop and analyze the significance of the mitigation evidence introduced by the defense witnesses; (2) identify other traumas, deprivations, and developmental obstacles experienced by petitioner during childhood and adolescence; and (3) explain how all of these factors combined to damage petitioner's development as a child and adolescent, and to impair his functioning and behavior as an adult, including at the time of the killings.

190. Petitioner incorporates by reference, as if fully set forth therein, the Declaration of James V. Sorena, second trial counsel, appended as Exhibit C, and the Declaration of William D. Pierce, Ph.D., appended as Exhibit DD.

191. Petitioner's penalty phase case was jointly developed by lead counsel Michael Sprague (who died on July 26, 2001) and second counsel James Sorena, although Sprague retained final decision-making authority. During the trial, Sprague asked Sorena to present the penalty phase because he believed that Sorena would have a better rapport with the jury. (Declaration of James V. Sorena, ¶¶ 2, 5.)

192. Sorena recognized the importance of presenting expert testimony concerning the traumas and developmental obstacles experienced by petitioner during his childhood, adolescence, and adulthood. Sorena arranged to have Dr. William Pierce, Ph.D., develop a psychological-social profile of petitioner for use in the penalty phase. Sorena had previously worked with Dr. Pierce in other cases and was very impressed with the psychologist's

expertise and persuasive demeanor before a jury. (*Id.*, at ¶ 6; Declaration of William D. Pierce, Ph.D., ¶ 6.)

193. In preparation for his testimony, Dr. Pierce reviewed pertinent social history records and interviewed petitioner and several members of his family. Sorena "intended to use Dr. Pierce as the principal defense penalty phase witness, to testify about numerous mitigating factors relating to [petitioner]'s mental condition and life history." The circumstances Dr. Pierce would have addressed included: (1) physical abuse by petitioner's father of petitioner, his mother, and his siblings; (2) petitioner's intense need to gain approval from his father, who refused to express love for him; (3) petitioner's frequent change of residences and schools during childhood; (4) the death of petitioner's father when petitioner was 21 years old; and (5) petitioner's positive adjustment to prison during incarcerations. (Declaration of James V. Sorena., at ¶ 7; Declaration of William D. Pierce, Ph.D., at ¶ 7.)

194. The defense penalty phase presentation began on the morning of June 12, 1996. Within two days before that date, Dr. Pierce completed his preparation and was meeting with Sprague and Sorena to discuss his testimony. During the meeting, Sprague learned that Dr. Pierce had become aware of certain information known to the prosecution but not yet presented at trial. Sprague became very upset and directed that Dr. Pierce not be called because Sprague feared the information might be elicited through cross-examination or on rebuttal. Sorena does not recall the specific information that Dr. Pierce learned, but Sorena remembers that he did not think it was a big problem. He believed Dr. Pierce could present powerful mitigation testimony and the benefits far outweighed Sprague's concern. Sorena believed the penalty phase was doomed to failure without Dr. Pierce's testimony. (Declaration of James V. Sorena, at ¶ 8; Declaration of William D. Pierce, Ph.D., at ¶ 8.)

195. In Sorena's view, Sprague's decision that Dr. Pierce not testify was unreasonable. Sorena made vigorous efforts to change Sprague's mind, but was unsuccessful. Since Sprague was lead counsel, his decision, despite its unreasonableness, prevailed. Sorena was stunned, as was Dr. Pierce. (Declaration of James V. Sorena., at ¶ 10.) Sorena believe Sprague used Dr. Pierce's awareness of the allegedly adverse information as a pretext for discharging the psychologist. It appeared, for some reason, not disclosed to Sorena, that Sprague disliked Dr. Pierce and was looking for a way to remove him from the case. Dr. Pierce's awareness of the information in question provided that justification, albeit a false one. (*Id.*, at ¶ 9.)

196. With Dr. Pierce dismissed by Sprague, there was a gaping hole in the penalty phase defense that Sorena was unable to fill. Because the defense penalty phase presentation was beginning within two days, Sorena did not have time to find another expert or lay witnesses who could testify about the mitigation themes that would have been presented through Dr. Pierce's testimony. Despite this problem, Sprague instructed Sorena to go forward with the other penalty phase witnesses. Sprague refused to ask the trial court for a continuance because he believed the motion most likely would be denied, but if it were granted the jury would be upset with the defense for delaying the trial. As a result of Sprague's decision, the jury heard none of the evidence about which Dr. Pierce would have testified. (*Id.*, at ¶ 11.)

197. The failure of the defense to present expert testimony concerning the traumas and obstacles faced by petitioner and their effect on his ability to function adequately as an adult was unreasonable. (*Id.*, at ¶¶ 8, 11.) To the extent it was based on a strategic decision by Sprague that strategy was so ill-chosen that it rendered counsel's representation

constitutionally defective.

198. The failure to present testimony from a mental health expert witness deprived petitioner of the opportunity to present the jury with significant mitigating evidence about the difficulties in his life and their effect on his development. The evidence would have demonstrated that petitioner's crimes were attributable to a severely disadvantaged background and to emotional and mental problems,

199. Petitioner incorporates by reference, as if fully set forth therein, the Declaration of Samuel Jinich, Ph.D., appended as Exhibit EE, and the allegations contained in Claim 5B.

200. Samuel Jinich, Ph.D., a psychologist with expertise in the area of child abuse, conducted a comprehensive evaluation of petitioner's background and social history in order to identify those factors that influenced petitioner's social and emotional development, and to explain the significance of those factors for petitioner's functioning and behavior as an adult, including at the time of the killings. (Declaration of Samuel Jinich, Ph.D., at ¶¶ 1, 6.)

201. In reaching his professional opinion, Dr. Jinich conducted clinical interviews with petitioner over a period of approximately 7.5 hours. In addition, Dr. Jinich interviewed petitioner's mother and reviewed extensive documents pertaining to petitioner and his family including: birth, death, marriage and divorce records; school records; medical and psychological records; prison records, police and probation reports; and criminal records. Dr. Jinich also reviewed the reporter's transcript of certain trial testimony. Finally, Dr. Jinich read numerous sworn declarations of family members and other individuals who knew petitioner during significant phases of his life, including his childhood and adolescence, and the declaration of neuropsychologist Natasha Khazanov, Ph.D. (*Id.*, at ¶¶ 7, 8.)

202. As a result of his evaluation, Dr. Jinich identified numerous physical and psychological traumas, deprivations, and developmental obstacles experienced by petitioner that damaged his development as a child and adolescent, and later impaired his functioning and behavior as an adult.

203. Dr. Jinich initially observed that petitioner's father, George Wesley Cowan (Wes), had little opportunity to learn good parenting skills from his own parents because his childhood was replete with experiences of rigid discipline, abuse and unmet needs. Both of Wes's parents were severe alcoholics. His father had an explosive temper, and he was physically and verbally abusive to his wife, to Wes, and to Wes's siblings. Wes's father showed no affection for him and told him he would not amount to anything. Wes and his siblings had to be abide by rigid rules that Wes's father enforced strictly. As a parent Wes had few resources from which to learn effective parenting skills, and as a result, he parented in the same inadequate way in which he had been raised. (*Id.*, at ¶¶ 24-25.)

204. An early obstacle faced by petitioner was his frequent changing of residences and schools during childhood. Petitioner's family moved at least 10 times before settling in Bakersfield when petitioner was 12. Petitioner attended at least 10 different schools before dropping out of high school. (*Id.*, at ¶¶ 26, 28.)

205. Frequent relocations caused petitioner many problems. He was unable to find a community where he felt he belonged. It was difficult for him to be known by other adults, such as teachers, neighbors or health care workers, who might identify him as an at-risk and abused child. Frequent moves place numerous demands on young children who have to adjust to new neighborhoods and physical surroundings, to new friends, and to new schools. These transitions may be sources of considerable disruption in children's social and physical

environments and may adversely affect developmental outcomes. (*Id.*, at ¶ 27.)

206. Petitioner's frequent changes in schools compounded his difficulties. A child's attachment to an adult at school may sometimes compensate for his difficulties at home and enhance the child's self-esteem. Petitioner did not have an opportunity to find relief through school attachments because he did not remain at any school long enough to bond with a teacher or staff member. In addition, children who frequently change schools tend to score lower on reading and mathematics achievements tests than those who are more stable. Transferring students may struggle with instructional practices that proceed at a different pace with each new teacher, and teachers may fail to recognize learning disabilities or problems. Here, petitioner's school grades show a pattern of worsening performance commensurate with his relocations. (*Id.*, at ¶¶ 29-31.)

207. Another difficulty during petitioner's childhood and adolescence was Wes's alcoholism and drug abuse. Wes consumed large amounts of alcohol, especially on the weekends. He was repeatedly arrested for alcohol-related misdemeanors and sometimes served time in jail. In 1961, he was sentenced to state prison following a conviction for vehicular manslaughter; while driving drunk, Wes caused a car accident that resulted in the death of the other driver. Wes also ruined many family outings, gatherings and vacations when, after drinking, he became abusive to the family or caused some disturbance that ended the event prematurely. (*Id.*, at ¶¶ 32-40.)

208. Robert's deep distress over Wes's alcoholism was indicated by psychological testing administered on April 14, 1986, while Robert was in prison.

> "Robert was asked to fill in the blanks on a questionnaire of 49 incomplete sentences that included 'My father annoyed me when _____,' 'My father should have _____,' and 'I wanted my father to _____.' Robert completed

> the sentences to read: "My father annoyed me when he drank.'; 'My father should have stoped (sic) drinking.'; and 'I wanted my father to quit drinking.' (Sentence Completion Test, April 14, 1986.)"

(Declaration of Samuel J. Jinich, Ph.D., at ¶ 41.)

209. Wes's substance abuse posed many risks to Robert's well-being. An alcoholic father's behaviors – unpredictability, discontinuity, unavailability, abandonment/rejection, abusiveness, shutting down, and emotional lability – have negative consequences on the psychological development of a child. These consequences are likely to include depression, anxiety, feelings of insecurity, impulsivity, social isolation, fearfulness, and other emotional problems. In addition, having an alcoholic parent significantly increases the probability that one will develop alcoholism. Many of these risks came to fruition for petitioner. (*Id.*, ¶¶ at 44-45.)

210. The most salient trauma confronted by petitioner during childhood and adolescence was the severe and sadistic beatings that Wes inflicted upon him. The beatings began before petitioner was two and continued until he was a teenager. Wes beat petitioner for the most minor transgressions and sometimes for no apparent reason other than his own inebriety. Wes would grab petitioner with one arm and use his other arm to whip petitioner with a belt. Wes inflicted repeated, hard blows to petitioner's body. Petitioner cried during the beatings and was left with visible bruises. As petitioner grew older, Wes's method of beating petitioner changed from whipping him with a belt to punching him with fists. (*Id.*, at ¶¶ 46-61.)

211. Wes's beatings caused petitioner great emotional anxiety.

> When Wes was gone on the weekends and Robert was home, Robert worried whether Wes would come home intoxicated and inflict another beating. If Robert was returning home and expected that Wes was already there, he was

extremely anxious about whether Wes had been drinking.

(*Id.*, at ¶ 63.) A visitor to petitioner's home observed, "'Robert seemed nervous and uncertain of himself . . . and acted like he was afraid that he would unknowingly do something that would bring on punishment from his father.'" (*Id.*, at ¶ 63, quoting Declaration of Mary Louise Condit, at ¶ 6.) Thus, petitioner "lived in a state of traumatic captivity, not only fearing the anticipated whippings but knowing these moments of pain and fear were inevitable." (*Id.*, at ¶ 64.)

212. There are also indications Robert suffered abuse from his mother, Betty Cowan, in addition to the extreme abuse he suffered from his father. Betty Cowan is reported to have had an explosive temper, and on one occasion when Robert was 16, she held a hot iron to Robert's face and threatened to burn him with it. She also disciplined Robert by spanking him with a belt or a switch that she cruelly made Robert select himself from the yard. The abuse which Betty Cowan inflicted upon Robert had significant psychological consequences for him. Betty was Robert's mother and his primary caregiver . Of necessity he viewed her as his protector from Wes's abuse. If she herself was also a source of physical and verbal abuse, Robert would have been deprived of any safe base or refuge to which he could escape. (*Id.*, at ¶ 73.)

213. The violence experienced by petitioner had a profound effect on his development and functioning as an adult. When parents fail in their role as socializing agents by abusing their children, the children learn profound lessons about the social environment, acceptable behavior, and what to expect in their relationships with others. In addition, when a child is abused repetitively and severely, as petitioner was, the child's expectations of danger are often generalized from the perpetrator to others, thus leading to hypervigilance,

distrust, and hypersensitivity to perceived insult and threat. These misperceptions often remain throughout the traumatized individual's life. Predictable sequelae of chronic abuse are present in petitioner: deficits in self control, impulse control, insight, measured response and the development of social judgment; impairments in social competence and self-esteem; difficulties relating to others in a trusting and emotionally gratifying manner; and feelings of despair and helplessness. (*Id.*, at ¶¶ 72-74.)

214. A child who grows up like petitioner in an environment of coercive control develops a distorted personality that renders him poorly adapted to adult life. He is left with fundamental problems in basic trust, autonomy and initiative, as well as impairments in self-care, cognition and memory, identity, and the capacity to form stable relationships. Ordinary interpersonal conflicts may provoke intense anxiety, depression or rage, and adult survivors of physical abuse often lack the verbal and social skills for peacefully resolving conflict. (*Id.*, at ¶ 76.)

215. In addition to being severely abused by Wes, petitioner witnessed Wes beat his mother and his siblings, although to a lesser extent than he himself was beaten. A child who is unable to protect family members from violence is often psychologically devastated and left with a diminished sense of self worth. (*Id.*, at ¶ 65-72.)

216. Another category of trauma and deprivation identified by Dr. Jinich consisted of the various forms of psychological battering to which petitioner was subjected. Dr. Jinich identified four forms of such maltreatment. One was the neglect by petitioner's parents of his emotional and physical needs. Petitioner's mother, Betty, neglected his need for physical safety by failing to protect him from the severe beatings inflicted by his father. Although Betty separated from Wes several times while petitioner was young, each separation was

short-lived. Betty always returned to Wes knowing full-well that Wes's whippings of petitioner would resume. (*Id.*, at ¶¶ 79-82.) Petitioner was deprived of other physical necessities, such as adequate food, clothing and housing because Wes was spending his paycheck on drinking. Petitioner's emotional needs for love, affection and praise were also not met. (*Id.*, at ¶¶ 83, 85-86.) His parents never told petitioner they loved him. Indeed, despite petitioner's dire need for Wes's approval, Wes failed to express any loving feelings for petitioner. (*Id.*, at ¶ 83.) Additionally, petitioner's parents failed to have him evaluated and treated for mental health problems readily apparent when he was a youngster. When a school teacher recommended that petitioner receive help, his parents ignored the suggestion. (*Id.*, at ¶ 87.)

217. As a result of being neglected, petitioner grew up in a world in which his feelings were discounted. He was deeply hurt by his parents' rejection and their failure to show him that he mattered to them and that they would care for him. By refusing to demonstrate affection for petitioner and failing to acknowledge his accomplishments, petitioner's parents communicated a negative definition of self to petitioner. (*Id.*, at ¶¶ 84, 88-89.) Moreover, their failure to obtain counseling and therapy for petitioner deprived him of the opportunity to address his severe emotional problems. (*Id.*, at ¶ 87.)

218. A second form of psychological battering consisted of humiliation and shaming. Petitioner was frequently berated by his father, who accused him of "not being a man." Wes laughed at petitioner, calling him "girl" and other names that denigrated his masculinity. Wes's constant tirades undermined petitioner's psychological well-being. Petitioner was likely to believe what his father repeatedly told him: that he was not a worthy person. (*Id.*, at ¶ 90-91.)

219. Physical abuse was not the only way Wes threatened petitioner's physical safety during childhood and adolescence. Wes intentionally engaged in other conduct that gravely endangered petitioner's well-being. Examples of such endangerment included Wes's forcing petitioner to eat food until he became sick as "punishment"for snacking; Wes's driving drunk while petitioner was in the car; Wes's locking petitioner in his car for lengthy periods of time while he drank in a bar; Wes's having petitioner drive his car while unlicensed so he could drink in the passenger seat; and Wes's giving petitioner alcohol to drink when petitioner was only 12. These many instances of child endangerment gave petitioner a clear message that he was unworthy of care, love, protection and security, causing him to have a devalued self-image and depleted self-esteem. (*Id.*, at ¶¶ 92-96.) Petitioner "complied with the image Wes projected on him in an effort to have a relationship with his father, even if it meant accepting Wes's view of him as an unworthy person." (*Id.*, at ¶ 97.)

220. Depression was another hardship that petitioner confronted during childhood and adolescence. The combination of physical abuse, verbal humiliation, neglect, and endangerment not only distorted petitioner's socialization and emotional development but also left petitioner suffering from depression during his youth. That depression went untreated because petitioner's parents refused to seek counseling and treatment for him. (*Id.*, at ¶¶ 98-101.)

221. Dr. Jinich also found noteworthy the absence of positive, adult role modeling or guidance to assist petitioner in his social and emotional development. The role modeling that Wes provided – physical abuse, psychological battering, neglect, drinking alcohol to excess, drug use, providing alcohol to minors, driving while intoxicated, domestic violence, and going to jail – was a far cry from what petitioner needed for healthy social development.

Parental modeling has a critical, indelible impact on children. A child observes and is shaped by the way he is raised. Additionally, petitioner's father did not provide him with any sound advice or counseling in dealing with life's obstacles. (*Id.*, at ¶¶ 98-109.)

222. Even though petitioner was badly abused by his father, his parents' divorce, which required petitioner to testify against his father, and Wes's death when petitioner was only 21, deeply disturbed him. A victim of child abuse may idealize the abusive parent and feel more attached to the abuser, who demonstrates a perverse interest in him, than to the non-abusing parent, whom he perceives as indifferent. Petitioner was so distraught by his father's death that he was unable to view his father's body in the casket; he ran from the mortuary and hid in the bushes to cry. Wes's death caused petitioner to experience even greater depression and feelings of hopelessness. Petitioner no longer cared about himself or anything else. Within two months of Wes's death, petitioner committed his first, serious criminal offense – robbery with a knife and assault with intent to commit murder – for which he was sentenced to state prison. (*Id.*, at ¶¶ 110-115.) Petitioner had hoped that by trying hard enough he could eventually earn his father's forgiveness and finally win the protection and care he desperately needed. "Wes's death dealt a final blow to that hope." (*Id.*, at ¶114.)

223. Petitioner's own alcoholism and drug abuse was another significant obstacle to his normal development. The physical abuse and psychological battering experienced by petitioner caused him to be depressed. To relieve the physical and psychological symptoms of depression, petitioner medicated himself with drugs and alcohol. (*Id.*, at ¶ 116.) Petitioner began drinking when he was 12 and continued drinking to excess (except for a short period of sobriety in the late 1970s and during periods of imprisonment) until his arrest in this case. Petitioner began his long-time use of drugs when he was a teenager. From 1982 to 1984,

including the time of the killings, he was heavily addicted to methamphetamine, consuming as much as he could find each day. Other drugs used by petitioner included heroin, LSD, PCP, and glue. (*Id.*, at ¶ 118.)

224. Petitioner's alcohol and drug use further compromised petitioner's internal resources to become a productive person and to make choices to improve his life. Moreover, chronic methamphetamine abuse results in cerebral deficits involving frontal/basal-ganglia regions important for inhibitory control. Alcoholism and methamphetamine addiction are also likely to cause long-term damage to such executive-functioning tasks as anticipating and establishing goals, designing plans and programs, and self-regulation and monitoring of behavior. Damage to petitioner's executive functions was corroborated by the neuropsychological testing conducted by Dr. Natasha Khazanov, Ph.D. (*Id.*, at ¶¶ 119-123.)

225. Lacking a close attachment to his parents or with an adequate replacement, petitioner had a profound need to find someone with whom he could form a secure attachment. Twice petitioner felt he had found just such a person and he married her. Both marriages, however, ended with petitioner's wife obtaining a divorce. Petitioner's inability to stay married was another factor contributing to his despondence and sense of hopelessness. (*Id.*, at ¶ 124.) After the failure of his second marriage, petitioner drank heavily, cried about the loss of his wife, and exclaimed that his life was over. (*Id.*, at ¶ 131.)

226. Petitioner's insecure attachment style was a product of his insecure attachments to his abusive father and neglecting mother. A strong attachment to another person is an internal resource likely to help someone cope successfully with life's problems. An inability to develop secure attachments, on the other hand, hinders one's resilience in times of stress. Persons without secure attachments, like petitioner, have more anxiety and

hostility, and feel more distress when confronted by problems. (*Id.*, at ¶ 135.)

227. A significant source of stress related to petitioner's second marriage was petitioner's infertility, apparently caused by an operation when petitioner was 17. Petitioner's wife desperately wanted to have children but petitioner was unable to impregnate her. (*Id.*, at ¶ 129.) Petitioner was ill-equipped to handle the disappointment he and his wife felt over his inability to produce children. In addition, to petitioner infertility represented not only his failure as a man but a repetition of rejection and abandonment by an attachment figure whom he loved. (*Id.*, at ¶ 136.)

228. Testimony from a clinical psychologist such as Dr. Jinich would have provided powerful mitigation at penalty phase. A psychologist would have identified the totality of traumas, deprivations, and obstacles that thwarted petitioner's childhood development and explained how these experiences turned him into an adult with low self-esteem, deep feelings of inadequacy, depression, a sense of alienation from the world around him, a dependence on methamphetamine and alcohol, and a limited capacity to constrain impulsive behavior.

229. Additionally, testimony from a psychologist would have provided the jury with greater insight into petitioner's state of mind and fragile emotional condition at the time of the killings. In the years before the murders, petitioner's life was on a downward spiral. The dissolution of his second marriage was especially devastating. He became more depressed, and his alcoholism and methamphetamine addiction worsened. By September 1984, petitioner was orienting all of his focus to obtaining methamphetamine, which he was injecting two or three times a day. These circumstances, combined with the trauma and abuse inflicted upon him during childhood and adolescence, stunted petitioner's emotional

and psychosocial development, compromised his ability to function adequately as an adult, and impaired his mental functioning, including his judgment and decision-making, at the time of the homicides.

230. Expert testimony would therefore have been relevant to several factors in mitigation under Penal Code section 190.3. This evidence would have: (1) helped to explain the circumstances of the killings under section 190.3(a); (2) established multiple mitigating aspects of petitioner's character, history and background under section 190.3(k); (3) demonstrated that the killings were committed while petitioner was under the influence of extreme mental or emotional disturbance under section 190.3(d); and (4) demonstrated that at the time of the offenses petitioner's capacity to conform his conduct to the requirements of law was impaired as a result of mental defect under section 190.3(h). Further, just as the expert testimony would have helped to explain and mitigate the circumstances of the killings of the Mercks, it also would have helped to explain and mitigate the circumstances of the additional incidents of violent, impulsive criminal activity the prosecution introduced at penalty phase as factor (b) aggravating circumstances, and thus lessen the aggravating force of that evidence. Absent testimony from a psychologist such as Dr. Jinich the picture of petitioner presented to the jury was woefully incomplete and misleading. The defense mitigation case would have been substantially enhanced by evidence that petitioner had suffered numerous traumas, deprivations, and obstacles which retarded his development as a child and significantly impaired his functioning as an adult.

D. Failure to Present Evidence That Petitioner Had Adjusted Well During Prior Incarcerations in State Prison and While Living in the Prison Ministries Program for Ex-Offenders

231. During the penalty phase, trial counsel failed to present any evidence that

petitioner had adjusted well during prior incarcerations in state prison and while living at the Prison Ministries Program for ex-offenders in Sacramento. Such evidence was admissible as mitigating evidence pursuant to factor (k) of Penal Code section 190.3. (*People v. Ray* (1996) 13 Cal.4th 313, 353; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-7.)

232. Evidence of petitioner's prior good behavior while incarcerated was contained in petitioner's California prison records and readily available to counsel. Those records included petitioner's positive work evaluations and discipline record, and identified the work supervisors, teachers, and counselors who evaluated him.

233. Evidence of petitioner's prior good behavior while living at the Prison Ministries program in Sacramento was readily available to counsel because they interviewed the program director, Bobby Novak, who witnessed petitioner's positive adjustment. In addition, other persons familiar with petitioner's performance in the program could have been located if counsel had conducted a reasonable investigation.

234. The evidence that was available to defense counsel, and should have been introduced, to establish that petitioner had made a positive adjustment when previously incarcerated in prison and while living in the Prison Ministries program included the following.

1. 1970 Incarceration

235. Petitioner was sent to prison in March, 1970. At Soledad Prison, he enrolled in Valley Adult School, which was administered by the Monterey County Office of Education. Petitioner began school in June 1970, taking courses in English, American Government, U.S. History, First Aid, Typing, Economics, and Math. By June 1971 he had completed enough credits to graduate from high school. (CDC High School Academic

Records, appended as Exhibit FF .)

236. After graduating, petitioner took additional classes in the Valley Adult School during the fall 1971 semester and spring 1972 semester. He studied automobile mechanics and service. (CDC Adult Education Academic Records, appended as Exhibit GG.) He also was awarded two certificates from the prison supervisor of recreation: on March 24, 1972, he received a certificate for winning the section championship in a pinochle tournament, and on June 21, 1972, he received a certificate for bench pressing 300 pounds. (Certificates from Prison Supervisor of Recreation, appended as Exhibit HH.) Petitioner also had numerous job assignments at Soledad Prison including kitchen work (dishwashing, cooking, and serving) and outdoor clean-up.

2. 1974 Incarceration

237. On October 29, 1974, petitioner was returned to prison for a parole violation. During this incarceration petitioner became active in Christian religious activities. He joined a group of inmates who spent their days praying together and singing religious songs. Petitioner played guitar to accompany the singing. (Declaration of Reverend Samuel Huddleston, at ¶ 3, appended as Exhibit II.)

238. Petitioner's religious group was unusual because its members were racially diverse; Petitioner befriended African-American inmates. Reverend Samuel Huddleston, an African-American member of the inmate group, noted that "In prison there is a lot of tension between members of different races, and friendships that cross racial lines are rare." (*Id.*, at ¶ 2.)

239. According to Reverend Huddleston, petitioner was not a troublemaker in prison because of his religious commitment. Petitioner "had a lot of compassion and

sympathy for fellow inmates and persons on the outside. He had a tender heart, and would often cry when he was moved by the circumstances of others." (*Id.*, at ¶ 4.)

240. Adhering to a religious lifestyle in prison is a daunting task for an inmate. Religious inmates are viewed as weak by other inmates. "They are subjected to ridicule, mistreatment and taunts. An inmate has to be very strong and disciplined to maintain his religious lifestyle and not to fight back when other inmates are taunting him." Petitioner was able to demonstrate that strength and discipline while participating in the religious group with Reverend Huddleston. (*Id.*, at ¶ 5.)

241. Trial counsel did not interview Reverend Samuel Huddleston or call him as a witness in the penalty phase. Had Huddleston been called as a witness, he would have testified to the facts set forth in his declaration. (*Id.*, at ¶ 7.)

3. Prison Ministries

242. On December 27, 1976, petitioner was paroled to a Sacramento work-furlough program. After completing the program, he moved to the Prison Ministries residence for ex-offenders in Sacramento, where he again excelled in a highly structured environment. The Prison Ministries was an organization that trained former inmates to lead productive Christian lives. (Declaration of Bobby Novak, at ¶ 2, appended as Exhibit JJ.)

243. As a resident in the Prison Ministries program, petitioner was required to find employment and participate in program activities. (*Id.*, at ¶ 4.) He initially worked at a nearby sewing machine company, and later found employment at Dolan's lumber yard.

244. Petitioner's required program activities included ministering to inmates in juvenile custodial facilities and adult prisons in California and Nevada. Petitioner would advise inmates to adopt a Christian lifestyle as an alternative to committing crimes.

Petitioner's presentation included playing guitar and singing Christian. (*Id.*, at ¶¶ 3-4.) Similar presentations were made by petitioner at local churches and community centers. Petitioner also attended daily religious services and counseling sessions at the Prison Ministries residence. (*Id.*, at ¶ 6.)

245. Bobby Novak, who was the program's house manager, "was very impressed" with petitioner's commitment to the program and his religion. Petitioner's "testimony and ministry of music melted the hearts of those who were present at our meetings. He would strap on his guitar and, standing tall, exclaim, 'Hello, I'm Bob Cowan and I'm a born again Christian.'" (*Id.*, at ¶ 4.) Petitioner had a positive influence on the inmates who attended the meetings. His presentations were well received, and he was one of the program's most effective communicators. (*Id.*, at ¶ 5.)

246. Petitioner remained a resident of Prison Ministries for at least six months. According to Mr. Novak, his overall "participation in the program activities was outstanding and he demonstrated a sincere commitment to helping other persons." (*Id.*, at ¶ 7.)

247. Petitioner also joined the Capitol Free Will Baptist Church where he sang and played guitar during church services. He helped with Sunday School classes and with recruiting new church members. Petitioner often shared his life experiences, warning others about the consequences that had resulted from his straying from the church. (Declaration of Dr. Larry Condit, at ¶ 14, appended as Exhibit BB; Declaration of Raymond Williams, at ¶ 5, appended as Exhibit KK.)

248. Trial counsel interviewed Bobby Novak but did not call him as a witness in the penalty phase. Had Novak been called as a witness, he would have testified to the facts set forth in his declaration. (Declaration of Bobby Novak, at ¶ 9.)

249. Trial counsel did not interview Dr. Larry Condit or Raymond Williams, or call them as witnesses in the penalty phase. Had Condit and Williams been called as witnesses, they would have testified to the facts set forth in their declarations. (Declaration of Dr. Larry Condit, at ¶ 16; Declaration of Raymond Williams, at ¶ 7.)

4. 1986 Incarceration

250. On March 12, 1986, petitioner was sentenced to prison after being convicted of two robberies and other felonies. Petitioner's adjustment in prison was again outstanding, as indicated by a stellar work record and only a few minor disciplinary violations.

251. Petitioner began working in the upholstery shop on July 5, 1986. He made furniture that was used in state institutions. On his September 1, 1986 evaluation, petitioner was rated above-average in five work categories and satisfactory in five other categories, and earned a pay raise. Supervisor J. Webb wrote, "He is eager to learn. He listens and follows directions well. He is able to accept criticism. He gets along well with his Supervisor and fellow inmates." (CDC Work Evaluations (Upholstery), appended as Exhibit LL)

252. On his December 1, 1986 evaluation petitioner was rated above-average in all ten work categories and earned a pay raise. Supervisor J. Webb wrote, "He is doing an excellent job . . . with very little supervision. He gets along well with everyone . . . ." (*Ibid.*)

253. On his January 1, 1987 evaluation petitioner was again rated above-average in all ten work categories and earned a pay raise. Supervisor C. Kruger wrote, "Inmate Cowan's interest and quality of work is excellent." (*Ibid.*)

254. On his April 1, 1987 evaluation petitioner was again rated above-average in all ten work categories and earned a pay raise. Supervisor J. Webb wrote, "I/M Cowan is doing an excellent job and works well with little supervision." (*Ibid.*)

255. On his July 1, 1987 evaluation, petitioner was again rated above-average in all ten work categories and earned a pay raise. (*Ibid.*)

256. On his October 1, 1987 evaluation petitioner was again rated above-average in all ten work categories and earned a pay raise. Supervisor J. Webb wrote, "Inmate Cowan continues to do an excellent job. He works well with little supervision. He gets along well with staff and fellow workers." (*Ibid.*)

257. Trial counsel did not call Supervisors J. Webb and C. Kruger as a witnesses in the penalty phase or introduce their evaluations of petitioner's work performance into evidence.

258. On November 11, 1987, petitioner was transferred to the Sierra Conservation Center to train to be an inmate fire fighter. He successfully completed a one-week physical training program on April 6, 1988. (Certificate for Completion of Physical Training Program, appended as Exhibit MM.)

259. On June 3, 1988, petitioner commenced the two-week forestry training program. In the first week he learned fire-fighting techniques and safety rules. In the second week, he was taught to use fire fighting tools, including shovels, axes, and saws. Petitioner not only successfully completed but was designated by the instructor, David Goldemberg, as the "Class Hogg," which meant he was the student who worked the hardest and had the best attitude. (Declaration of David Goldemberg, ¶¶ 4, 5, appended as Exhibit NN; Certificate as Class Hogg, appended as Exhibit OO.)

260. After graduating from the forestry training program, petitioner was transferred to one of the fire fighting camps. At the camps inmates assisted local and state agencies in combating forest fires, floods, and other emergencies. If their assistance was not needed, the

inmates would be sent to nearby communities to participate in public service projects. (Declaration of David Goldemberg, ¶ 6.)

261. Trial counsel did not interview David Goldemberg or call him as a witness in the penalty phase. Had Goldemberg been called as a witness, he would have testified to the facts set forth in his declaration. (*Id.*, at ¶ 7.)

262. In September, 1989, petitioner was temporarily transferred from the fire fighting crew to a dormitory porter position. On his April 19, 1990 evaluation, petitioner was rated exceptional in three work categories and above-average in seven work categories. Supervisor R. R. Miles wrote, "Inmate Cowan demonstrates above average effort and skills in his work assignments." (CDC Work Evaluation (Porter), appended as Exhibit PP.)

263. Trial counsel did not call Supervisor R. R. Miles as a witness in the penalty phase or introduce Miles's evaluation of petitioner's work performance into evidence.

264. In May, 1990, petitioner was returned to a fire fighting position in a camp supervised by the Los Angeles County Fire Department. On his June 1, 1990 evaluation petitioner was rated exceptional in four work categories and above-average in six categories. Supervisors J. A. Horwedel and Rohaley wrote that petitioner "is doing a very good job as a new crewmember." (CDC Work Evaluations (Fire Fighter), appended as Exhibit QQ.)

265. On his July 1, 1990 evaluation petitioner was rated above-average in nine work categories and satisfactory in one work category. Supervisors J. A. Horwedel and Rohaley wrote, "Inmate Cowan has done a good job on crew and is expected to make a good dragspoon." (*Ibid.*) (A dragspoon was a lower level inmate crew position. The swamper made sure that the inmate firefighters in line ahead of him had correctly done their jobs.)

266. On July 4, 1990, the Antelope Valley Press newspaper published an article

describing the efforts of inmate fire fighters who were battling a rash of fires in the valley. Petitioner and his crew were shown in three photographs. Petitioner sent the newspaper to his mother in Bakersfield. On page A1 of the newspaper, he wrote, "This is me Mom," and drew an arrow to himself in the photograph. On page A3, he wrote, "This is me too," and drew arrows to himself in the other two photographs. (Declaration of Betty Jane Cowan, ¶ 43; Antelope Valley Press Newspaper Article, appended as Exhibit RR.)

267. On his September 15, 1990 evaluation petitioner was rated exceptional in three work categories and above-average in seven work categories. (CDC Work Evaluations (Fire Fighter).)

268. On his December 31, 1990 evaluation petitioner was rated exceptional in three work categories and above-average in seven work categories. The camp commander recommended him for a pay increase "due to subject's proven job performance." (*Ibid.*)

269. On his Aril 2, 1991 evaluation petitioner was rated exceptional in six work categories and above-average in four work categories. Supervisors J. A. Horwedel and Rohaley wrote, "Inmate Cowan has done an excellent job so far as swamper and is relied on heavily by this rater to motivate and organize his fellow crew members. He performs his duties in an expedient professional manner." (*Ibid.*) (Swamper was the highest level position amongst the inmate crew. The swamper received orders from the fire captain and then gave instructions to other inmate crew members. The swamper's responsibilities also included maintaining the crew's truck and equipment, and ensuring they had adequate food and water for the inmates.)

270. On his June 25, 1991 evaluation petitioner was rated exceptional in seven work categories and above average in three work categories. Supervisors J. A. Horwedel and

Rohaley wrote, "Inmate Cowan continues to be an exceptional swamper and fulfills his responsibility with a great amount of pride and professionalism." (CDC Work Evaluations (Fire Fighter).)

271. Trial counsel did not call Supervisors J. A. Horwedel and Rohaley as witnesses in the penalty phase or introduce their evaluations of petitioner's work into evidence.

272. While in prison petitioner also made beautiful clocks that he sent to family members. (Declaration of Betty Jane Cowan, ¶ 43; Declaration of Donald Ivanoff, ¶ 14.)

273. Petitioner was paroled from prison on October 7, 1991. In the five-and-a-half years he spent incarcerated during this commitment, his record of disciplinary violations was minimal and the violations never involved acts of violence. Petitioner was once warned for disobeying an order to leave his dormitory so it could be cleaned, once violated for disobeying a fire captain's order regarding the placement of a water bucket, and twice violated for drinking home-made alcohol. (CDC Disciplinary Records, attached as Exhibit SS.) Otherwise, the CDC records indicate petitioner strictly complied with the prison's rules and regulations.

5. Expert Testimony

274. Defense counsel also performed unreasonably in failing to present testimony from an expert witness that petitioner had the capacity to make a positive adjustment when serving a prison sentence.

275. After reviewing petitioner's social history records and relevant declarations regarding petitioner's prior conduct in prison, Dr. Jinich concluded petitioner had the ability to function productively and abide by the rules of conduct while incarcerated in prison.

According to Dr. Jinich petitioner adjusted well when he experienced consistency, structure, nurturance, discipline, responsibilities, and praise. In a prison setting, petitioner's encounters with other inmates who had undergone similar life experiences were likely to reduce his feelings of isolation, shame and stigma, thus giving him a new context in which to live and succeed, and to be accepted and appreciated. (Declaration of Samuel Jinich, Ph.D., ¶¶ 137-138, 172-173.)

276. Defense counsel initially had intended to present evidence of petitioner's capacity to adjust well in prison through the expert testimony of William Pierce, Ph.D. (Declaration of James Victor Sorena, at ¶ 7.) However, as previously explained, just before the defense penalty phase was to begin, lead counsel James Sprague directed that Dr. Pierce not testify. According to second counsel Sorena, Sprague's decision was unreasonable. Sorena made vigorous efforts to change Sprague's mind, but was unsuccessful. Since Sprague was lead counsel, his decision, despite its unreasonableness, prevailed. (*Id.*, at § 10.)

E. Failure to Adequately Object to Improper Victim Impact Evidence

277. Petitioner's claim is related to Argument L in appellant's opening brief, pages 231-244, appended as Exhibit TT and incorporated by reference as if fully set forth herein.

278. At the penalty trial three relatives of Alma Merck were permitted to testify about how they were affected by her murder. Their testimony included opinions about the crime, petitioner, and the appropriate sentence.

279. Denise Cox, Alma Merck's granddaughter, explained that she continued to think in her own mind of what she believed Mrs. Merck experienced just before her death. (RT 2845.) "And it goes over and over in my mind what she must have experienced just minutes prior to her death. I can only imagine her pleading for her life, the terror, the fear of

this evil people or person in this house, and I envision her hearing her husband, my grandfather, being murdered in the other room knowing that her life . . . ." (RT 2845-2846.) Cox emphasized that Alma and Clifford Merck were older people who could not hear or see well, and were defenseless and helpless. (RT 2846.) She could understand someone robbing and tying them up, but not someone brutally murdering them.

280. Cox added that her entire family and their friends had been affected by Alma's death. (RT 2846.) She stated, "I pray for Mr. Cowan because right now I believe his heart is hard and he has no remorse, and he does not realize what he has done." She prayed that his "heart softened" so that he would feel the pain and guilt of what he had done. She then stated, "[A]nd yes, we're asking for the death penalty, and it is not out of revenge. We're not vengeful people. It is out of justice and fairness. An eye for an eye, tooth for a tooth. He made the choice. He should suffer the consequences, and thank you for listening to me." (RT 2847.)

281. Betty Turner, Alma's daughter, testified she knew that Clifford had tried his best to protect her mother. She also knew her mother was terrified and had gone through pure hell before her death. Turner added that she had no sympathy for anyone who took the innocent life of another. (RT 2850.)

282. Defense counsel objected to the testimony of Cox and Turner on the ground that it exceeded the scope of victim impact evidence permitted by the United States Supreme Court. (RT 2846, 2861.) That objection was overruled. (RT 2846-2847, 2862.) Defense counsel did not specify that the victim impact testimony violated petitioner's constitutional right to a reliable and nonarbitrary penalty determination under the Eighth Amendment and petitioner's right to due process under the Fourteenth Amendment. Nor did counsel articulate

that the testimony regarding petitioner's lack of remorse violated *People v. Boyd* (1985) 38 Cal.3d 762, 771-776, 778, which prohibits the prosecutor from presenting evidence in aggravation that is not relevant to the statutory factors enumerated in Penal Code section 190.3.

283. Trial counsel had no tactical reason for their omissions, and no acceptable reason exists. Counsel Sorena is not aware of any strategic basis for the failure to object to the evidence on constitutional grounds. (Declaration of James V. Sorena, at ¶ 4, appended as Exhibit C; Declaration of Mark Goldrosen, at ¶ 5, appended as Exhibit D.)

284. Petitioner was prejudiced by trial counsel's failure to make an adequate objection to the testimony of Cox and Turner. Had trial counsel acted competently, it is reasonably probable that the evidence would have excluded, and that the jury would have reached a more favorable verdict.

285. Admission of the testimony was unconstitutional because it allowed the jury to consider inflammatory and irrelevant evidence during petitioner's penalty phase. *Booth v. Maryland* (1987) 482 U.S. 496, 502 and *Payne v. Tennessee* (1991) 501 U.S. 808, do not permit opinion testimony from a victim's relatives regarding the circumstances of the crime, the defendant's character, or the appropriate sentence. In addition, the evidence violated *People v. Boyd* (1985) 38 Cal.3d 762 because a defendant's lack of remorse after the offense does not relate to any mitigating or aggravating factor in section 190.3.

F. Failure to Adequately Object to Michael Hunt's Alleged Extrajudicial Statement

286. Petitioner's claim is related to Argument R in the appellant's opening brief, pages 269-273, appended as Exhibit UU and incorporated by reference as if fully set forth

herein.

287. During the prosecution's penalty phase case, Betty Abney, who lived next door to petitioner and Brenda Hunt, testified that on April 9, 1993, at about 1:00 p.m., she saw petitioner lift Brenda's son, Robert, by his hair and throw him on the ground. (RT 2866.) This accusation, which resulted in petitioner's arrest, was disputed by the defense. Brenda Hunt testified that petitioner did not abuse Robert, that Robert did not complain of any problem with petitioner, and that she did not observe any injuries on her son. (RT 2923, 2925.) Robert denied that he had been abused or hurt by petitioner; he explained he had tripped over a stump in the front yard and petitioner had picked him up. (RT 2933-2934.)

288. The defense also presented testimony of Robert's younger brother, Michael Hunt. Michael gave no testimony about the incident on April 9, 1993. In the prosecution's rebuttal case, Kern County Deputy Sheriff Michael Rascoe testified about statements previously made to him by Robert and Michael Hunt concerning petitioner's abuse of Robert. According to Rascoe, Michael said petitioner grabbed Robert by the hair and threw Robert backwards, causing Robert to fall on his back. (RT 2955.) Defense counsel objected to admission of the prior statement on the ground that no foundation for admissibility under Evidence Code section 1235 had been established. That objection was overruled. (RT 2954.) Defense counsel did not object on the constitutional grounds that admission of Michael Hunt's extrajudicial statement violated petitioner's right to confrontation under the Sixth Amendment, his right to due process of law under the Fourteenth Amendment, and his right to a reliable penalty determination under the Eighth Amendment.

289. Trial counsel had no tactical reason for their omissions, and no acceptable reason exists. Counsel Sorena is not aware of any strategic basis for the failure to object to

the evidence on constitutional grounds. (Declaration of James V. Sorena, at ¶ 4, appended as Exhibit C; Declaration of Mark Goldrosen, at ¶ 5, appended as Exhibit D.)

290. Admission of Hunt's alleged extrajudicial statement was unconstitutional because it was unreliable. When he testified under oath, Hunt did not testify he had made a statement to Detective Rascoe, and therefore he could not be subjected to full and effective cross-examination about the statement. (*Crawford v. Washington* (2004) 541 U.S. 36.)

G. Failure to Request That the Trial Court's Instructions Include the Jewell Russell Murder as a Crime the Jury Could Not Consider as a Circumstance in Aggravation Unless Proven Beyond a Reasonable Doubt

291. Petitioner's claim is related to Argument M in appellant's opening brief, pages 245-252, appended as Exhibit VV and incorporated by reference as if fully set forth herein.

292. At the conclusion of the penalty trial, the jury was instructed that it "must determine what the facts are from the evidence received during the entire trial unless [it was] instructed otherwise" (RT 2959-2960; CT 1492), and that "[i]n determining which penalty is to be imposed . . . [it] shall consider all of the evidence which has been received during any part of the trial of this case" (RT 2969; CT 1514). In addition, the jury was told that evidence of certain other crimes evidence could not be considered as an aggravating factor unless it found beyond a reasonable doubt that appellant had committed the criminal acts. The instruction listed the other crimes that had to be proven beyond a reasonable doubt but did not include the murder of Jewell Russell. (RT 2972; CT 1518.) The instruction stated:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts. One, residential burglary, two, residential robbery, and three, child abuse which involved the express or implied use of force or violence or the threat of force or violence. Before a juror may consider any of such criminal acts as an aggravating factor, a juror must first be satisfied beyond a reasonable doubt that the defendant did, in fact, commit such criminal acts. A juror may not consider any evidence of any other criminal

act as an aggravating circumstance.

It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider the evidence for any purpose.

(RT 2972, CT 1518.)

293. Trial counsel did not request that the Russell murder be included in the list of crimes that the jury could not consider as a circumstance in aggravation unless proven beyond a reasonable doubt, nor did trial counsel object to the instruction regarding evidence of other crimes that was given.

294. Trial counsel had no tactical reason for their omissions, and no acceptable reason exists. Counsel Sorena is not aware of any strategic basis for failing to request that the Russell murder be included in the instruction requiring proof of other crimes beyond a reasonable doubt.. (Declaration of James V. Sorena, at ¶ 4, appended as Exhibit C; Declaration of Mark Goldrosen, at ¶ 5, appended as Exhibit D.)

H. Failure to Object to Instruction That Jury Could Consider Both the Residential Robbery of James Foster and the Burglary of Foster's Apartment as Separate Circumstances in Aggravation

295. Petitioner's claim is related to Argument O in appellant's opening brief, pages 259-262, appended as Exhibit WW and incorporated by reference as if fully set forth herein.

296. During the penalty phase, the prosecution introduced evidence of crimes petitioner had previously committed against James Foster and Jessie Cruz on October 24, 1985. Foster testified that he and Cruz went to Foster's apartment, where they found petitioner armed with a gun. Petitioner forced them to lie down and bound their hands and feet. Petitioner threatened to kill them and then took several items from the apartment before leaving. (RT 2853-2857.)

297. After the penalty phase evidence was completed, the trial court instructed the jury that it must find beyond a reasonable doubt that petitioner had committed any particular criminal act before it could consider petitioner's commission of that crime as an aggravating circumstance. The trial court further explained that other crimes evidence presented by the prosecution had been introduced for the purpose of showing that petitioner had previously committed the violent crimes of residential burglary, residential robbery and child abuse. (RT 2972; CT 1518.) The burglary and robbery which the court referred to was the testimony given by Foster.

298. Defense counsel did not object on the ground that the instruction indicated to the jury it should consider the residential robbery and burglary crimes as separate aggravating circumstances. Such an objection was appropriate because petitioner had committed only one act of violence that resulted in both a residential robbery and a residential burglary involving the use of force.

299. Trial counsel had no tactical reason for their omission, and no acceptable reason exists. Counsel Sorena is not aware of any strategic basis for the failure to object to the instruction. (Declaration of James V. Sorena, at ¶ 4, appended as Exhibit C; Declaration of Mark Goldrosen, at ¶ 5, appended as Exhibit D.)

I. Failure to Request a Hearing Adequate to Discover Juror Misconduct

300. The jury began penalty phase deliberations on June 12, 1996, at 3:35 p.m. (CT 1483.) The jury continued deliberating for the entire day of June 13, and recommenced on the morning of June 14. (CT 1487,1573.) At 8:50 a.m., on June 14, the jury foreperson

submitted a note stating that Juror 040149 wanted to speak with the court.[10] (RT 3017; CT 1577.)

301. Juror 040149 was then summoned to meet with the trial court in the presence of counsel and petitioner. (RT 3018.) The juror complained about a fellow juror, later identified as Juror 045829:

> We have a juror that was very adamant in her decisions in all three verdicts and, you know, which is fine, everybody is. Now she is adamant in her verdict now, but she is claiming that she has some kind of second thoughts about her original verdict in the two convictions, and I – yesterday, I don't know exactly when it was, it was on return back to the courthouse, she was sitting right next to two of Mr. Cowan's relatives, his aunt and then another – another person. I was over at the stairs. So when her head was turned all I could see is the back of her head. I don't know if she was conversing with them. I did note that they were talking and it was maybe purse room between the three. I don't know if maybe she heard something that she is now, you know, holding up or trying to recant or whatever. I just feel that that needs to be brought to the Court's attention.

(RT 3018-3019). The trial court then asked if there was anything else he wished to bring to the court's attention. The juror said he had nothing to add, and the trial court did not ask any follow-up questions. Juror 040149 was then sent back to the jury room. (RT 3019.)

302. The trial court asked counsel if they had any suggestions concerning Juror 040149. Lead defense counsel, Michael Sprague, responded, "I think that we just have to play it out and see what happens." (RT 3020.) No other suggestions were made by defense counsel.

303. At 9:30 a.m., the trial court received another note, stating that Jurors 045829 and 024178 wanted to speak with the court. (CT 1576, RT 3020-3021.) Juror 045829 was

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[10]The time written on the note itself was 9:50 a.m. (CT 1575.) The trial court pointed out that the recorded time was off by an hour since the note was actually received at 8:50 a.m. (RT 3017.)

first summoned to speak. The trial court invited the juror, in the presence of counsel and petitioner, to explain what she wanted the court to know. Juror 045829 began: "Well, the other juror said I was talking, he thought that I was talking to the –." (RT 3021.) The juror was then interrupted by the trial court, who stated that the other juror had said only that he saw her sitting next to members of petitioner's family, and had not actually said that she was speaking with the family members. (RT 3021-3022.)

304. Juror 045829 explained that in the jury room the other juror had accused her of speaking with petitioner's family. The trial court responded:

> I don't know what was said in there. I don't want to know what was said in there. I can only tell you that the Court wasn't going to take any further action as a result of anything that was told or spoken to the Court by that juror because there wasn't anything indicated by that juror that would have suggested any impropriety on your part.

(RT 3022.) Juror 045829 was then asked if there was anything else she wanted to discuss with the court. The juror answered that there was not, and she was sent back to the jury room. (RT 3022.)

305. Juror 024178 was then brought in to speak with the court. Upon meeting with the court, however, the juror stated she was fine and no longer had anything to say, returned to the jury room. (RT 3022-3023.)

306. The trial court asked counsel if they had any comments or objections they wanted to put on the record. All counsel stated they did not. (RT 3023.)

307. The jury resumed deliberations and returned a death verdict on Count II (murder of Alma Merck) at 2:10 p.m. that day. (CT 1574.) A verdict of life without possibility of parole was returned on Count I (murder of Clifford Merck). (CT 1574.)

308. In light of the statements of Jurors 045829 and 040149, trial counsel was on

notice of the possibility that jurors were engaging in misconduct during penalty phase deliberations. The first possibility was that Juror 045829 had unauthorized communications with trial witnesses. The trial court's statement to Juror 045829 that "there wasn't anything indicated by [Juror 040149] that would have suggested any impropriety" (RT 3022) was incorrect. Although Juror 040149 claimed he could not see if Juror 045829 was actually speaking with petitioner's family members, he also observed that Juror 045829 was very close to the family members and that "*they* were talking." (RT 3019, italics added.) Juror 040149 did not clarify the identity of the persons whom he observed speaking. If Juror 045829 participated in a conversation with petitioners's family members who were penalty phase witnesses, she committed misconduct by engaging in unauthorized contact with a witness. (*People v. Hardy* (1992) 2 Cal.4th 86, 175; Pen. Code § 1122, subd. (a).) Juror 045829's impartiality was thus sufficiently called into question to require that the trial court conduct a hearing adequate to determine the facts. (*People v. Burgener* (1986) 41 Cal.3d 505, 519. The trial court, however, failed to do so. It did not have Juror 040149 clarify what he had seen, and did not ask either Juror 045829 or petitioner's family members what, if any, communications had occurred between them.

309. A second possibility of juror misconduct suggested by the limited hearing was that Juror 045829 was coerced by other jurors to change her vote. The reasonable inference to be drawn from Juror 040149's comments to the court was that Juror 040149 was upset at Juror 045829 because he believed that she was holding out against a death verdict. Moreover, he believed the basis for Juror 045829's opposition to the death sentence was improper, i.e., that she had heard something from petitioner's family members that caused her to feel sympathy for petitioner. As Juror 040149 stated to the court, "I don't know if maybe

she heard something that she is now, you know, holding up or trying to recant or whatever." (RT 3019.) Juror 045829, in turn, reported to the court that during deliberations Juror 040149 falsely accused her of talking to petitioner's family. (RT 3021.)

310. These statements of the jurors suggested that other jurors may have engaged in misconduct by berating Juror 045829 in order to coerce her into voting for death on Count II. The court failed to conduct an adequate investigation into the possibility of such misconduct. Indeed, the trial court refused to allow Juror 045829 to explain the possibly coercive statements that other jurors had made to her during deliberations. The juror was specifically told the court did not "want to know what was said in there." (RT 3022.) The court also did not ask Juror 040149 about any statements he or other jurors had made to Juror 045829, and did not question any other jurors.

311. The inadequacy of the hearing conducted by the trial court to discover possible juror misconduct should have been readily apparent to trial counsel. Counsel were unreasonable in failing to request a more extensive hearing to determine the facts. Trial counsel had no tactical reason for their omission, and no acceptable reason exists.

J. Petitioner was Prejudiced by Trial Counsel's Deficient Representation

312. Petitioner was prejudiced in the penalty phase by trial counsel's deficient performance. The penalty determination was close. The defense contested that petitioner had committed a prior crime involving an assault on Robert Hunt and presented significant mitigation evidence concerning petitioner's background and character. The fact that the jurors returned a death sentence on only one of the two murder counts indicates to the end they remained of two minds as to the appropriate punishment. Indeed, the jury deliberated for approximately 10 hours over three days before reaching a decision. (See *People v.*

Woodard (1979) 23 Cal.3d 329, 341 ["issue of guilt in this case was far from open and shut, as evidenced by the sharply conflicting evidence and the nearly six hours of deliberations by the jury before they reached a verdict"]; *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, 637 ["jurors deliberated over nine hours over three days, which suggests that they did not find the case to be clear-cut"].)

313. Had defense counsel not been deficient – by failing to (1) present evidence that petitioner, prior to and at the time of the killing, suffered from longstanding neuropsychological deficits that impaired his overall cognitive and neurological functioning; (2) adequately develop and corroborate the mitigating circumstances that were presented at trial, and to introduce additional circumstances in mitigation, through the testimony of petitioner's family members and friends, and through evidence contained in social history records; (3) present expert testimony that petitioner had suffered numerous physical and psychological traumas, deprivations, and developmental obstacles that thwarted his development as a child and adolescent, and compromised his ability to function adequately as an adult, including at the time of the killing; (4) present any evidence that petitioner had adjusted well during prior incarcerations in state prison and while living in the prison ministries program for ex-offenders; (5) adequately object to the admission of victim impact evidence and Michael Hunt's alleged extrajudicial statement; (6) request appropriate jury instructions regarding circumstances in aggravation; ((7) object to erroneous jury instructions regarding circumstances in aggravation; and (8) request a hearing adequate to discover juror misconduct – the case for life would have been far stronger and likely to cause the jurors to return verdicts of life without parole on both murder counts instead of only one.

314. "Evidence regarding social background and mental health is significant, as

there is a 'belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" (*Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079, 1090 (quoting *Boyde v. California* (1990) 494 U.S. 370, 382.) Prejudice may occur even when counsel introduced some of the defendant's social history, but "did so in a cursory manner that was not particularly useful or compelling." (*Douglas*, 316 F.3d at 1090.) Moreover, "the [United States] Supreme Court has made clear that counsel's failure to present mitigating evidence can be prejudicial even when the defendant's actions are egregious." (*Stankewitz v. Woodford* (9th Cir. 2004) 363 F.3d 706, 723-24.)

315. Trial counsel fell far short of presenting all available evidence regarding petitioner's social background and mental health. The jury did not hear from: (1) a neuropsychologist who would have testified about petitioner's brain dysfunction including impairments to its executive functions; (2) numerous family members and friends who would have testified about the traumas, obstacles and hardships petitioner confronted in his life; and (3) a mental health expert who would have explained how these traumas retarded petitioner's development and compromised his ability to function adequately as an adult. This evidence would have led the jury to understand petitioner's lesser culpability for his crimes. The jury returned a death sentence against petitioner without full knowledge of the sympathetic aspects of petitioner's character, background and circumstances, and thus without considering evidence that would have provided a compelling basis for a sentence less than death.

316. In addition, evidence that petitioner had adjusted well during prior incarcerations and as a resident at the Prison Ministries program, would have offered the jury

a compelling reason not return a death verdict. The jury would have been much more likely to have returned an LWOP sentence on both homicides if it had known petitioner was capable of being a model inmate who could again make positive contributions through work assignments and religious activities while incarcerated.

317. The improperly-admitted victim impact evidence regarding Alma Merck likely had the effect of swaying the jury with highly emotional, inflammatory opinions and characterizations about petitioner and the crime. Apart from the victim impact evidence, the same aggravating or mitigating circumstances were germane to the penalty determination with respect to both victims. Yet, tellingly, the jury returned a death verdict as to Alma Merck only and a life-without-parole verdict as to Clifford Merck.

318. A critical issue for the jury in deciding penalty was whether petitioner had committed an additional crime of violence by abusing Robert Hunt. The defense strongly disputed the prosecution's case, presenting testimony from Brenda and Robert Hunt that petitioner had not committed the offense. That testimony was greatly undermined by the admission of Michael Hunt's prior statement. Had that statement been excluded, as it should have been, the jury may well have found that the claim of child abuse was not proven beyond a reasonable doubt.

319. Trial counsel's failure to request that the Russell murder be included in the list of crimes that the jury could not consider as a circumstance in aggravation unless proven beyond a reasonable doubt was another significant omission. It is apparent from the readback of the testimony concerning the Russell autopsy that the jury considered the circumstances of the Russell murder in reaching its death verdict. Additionally, the jury's inability to reach a verdict in the guilt phase meant that either three or nine jurors did not find beyond a

reasonable doubt that petitioner murdered Russell. Under these circumstances, it is likely that if the jury been properly instructed to consider the Russell murder only if proven beyond a reasonable doubt, rather than led to believe a lesser standard applied, fewer jurors would have relied on the Russell murder as a factor in aggravation.

320. Also significant was trial counsel's failure to object to the jury instruction that improperly listed the residential burglary and residential robbery occurring at James Foster's apartment as separate circumstances in aggravation. The effect of this erroneous instruction was to artificially inflate the prosecution's case for death by adding another crime of violence to the circumstances considered by the jury.

321. Finally, had trial counsel requested an adequate investigation after Jurors 040149 and 045829 addressed the court, it is reasonably probable that the court would have uncovered juror misconduct. When Juror 040149 reported that Juror 045829 was holding out in the penalty phase deliberations, the jury was beginning its third day of deliberations. Yet four hours later the jury reached a unanimous verdict. No additional readback was heard by the jury during that time, and a plausible explanation is that Juror 045829 was a beleaguered dissident who succumbed to the continued coercion of her fellow jurors. An adequate evidentiary hearing would have found the facts and remedied the misconduct before it influenced the verdict.

322. In light of the closeness of the jury's penalty phase decision, there is a reasonable probability that had defense counsel performed reasonably, the jury would not have sentenced petitioner to death. Accordingly, petitioner was deprived of due process and a fair trial, the effective assistance of counsel (*Williams v. Taylor* (2000) 529 U.S. 362; *Strickland v. Washington* (1984) 466 U.S. 668), the right to present a defense, and a reliable

sentencing determination (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 876; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638), in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, sections 1, 7, 15, 16, and 17 of the California Constitution.

CLAIM 6: PETITIONER DID NOT RECEIVE COMPETENT ASSISTANCE FROM COURT-APPOINTED MENTAL HEALTH EXPERTS WHO FAILED TO ADVISE DEFENSE COUNSEL TO ARRANGE FOR A NEUROPSYCHOLOGICAL EXAMINATION THAT WOULD HAVE SHOWN THAT PETITIONER , PRIOR TO AND AT THE TIME OF THE KILLINGS, SUFFERED FROM LONGSTANDING NEUROPSYCHOLOGICAL IMPAIRMENTS, INCLUDING IMPAIRMENTS IN HIS ABILITY TO MODERATE EMOTIONAL RESPONSES AND CONSTRAIN VIOLENT IMPULSES

Petitioner's confinement is unlawful in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15, 16, and 17 of the California Constitution. Petitioner's rights to the effective assistance of court-appointed experts, to due process, to a fair trial, to present a defense, and to reliable guilt and penalty determinations were violated by the failure of court-appointed mental health experts to provide competent assistance, including the failure to advise defense counsel to arrange for a neuropsychological examination that would have shown that petitioner, prior to and at the time of the killings, suffered from longstanding neuropsychological impairments, including impairments in his ability to moderate emotional responses and constrain violent impulses. (*Ake v. Oklahoma* (1985) 470 U.S 68.) When these errors are considered separately, or in conjunction with each other and other claims, the verdict in the penalty phase of petitioner's trial must be set aside. There is a reasonable probability that but for these errors and omissions, the outcome of petitioner's trial would have been more favorable to petitioner.

The facts supporting this claim, among others to be developed after full investigation, discovery, adequate funding and access to this Court's subpoena power and other available court processes, including an evidentiary hearing to further develop this claim, are:

1. Petitioner incorporates by reference, as though fully set forth herein, the factual allegations contained in Claim 5A, as well as the Declaration of Natasha Khazanov, Ph.D.,

appended as Exhibit P.

2. As an indigent defendant, petitioner was entitled to receive expert assistance appointed by the superior court. Defense counsel requested such assistance and defense counsel was permitted to retain the services of two clinical psychologists, Drs. John Byrom and William Pierce. However, the assistance provided by the mental health experts was incompetent in light of petitioner's impairments.

3. Here, petitioner's background revealed numerous indicators of possible brain damage, including his family history of alcoholism; multiple head traumas, beginning in early childhood, some of which resulted in loss of consciousness; long-term alcohol and polysubstance abuse, beginning at a very early age; and domestic violence, including parental abuse and neglect, both physical and emotional. Based on this history, it should have then been apparent to the experts a neuropsychological examination was necessary to determine whether he suffered from a brain impairment at the time of the killing. (Declaration of Natasha Khazanov, at ¶¶ 65, 77.)

4. As described in Claim 5A, and incorporated by reference, as though fully set forth herein, such neuropsychological testing would have revealed that petitioner, both prior to and at the time of the killing, suffered from longstanding frontal-lobe based impairments in his executive brain functions – impairments that undermined his capacity to moderate emotional responses, constrain violent impulses, or control and terminate violence once a course of violence had begun.

5. Additionally, as described in Claim 5A, and incorporated by reference as though fully set forth herein, the failure to conduct such neuropsychological testing and to present the results of such testing prejudiced petitioner in the penalty phase. Had such evidence been

presented, the jury would have understood petitioner's lesser culpability for his crimes.

CLAIM 7: NEWLY DISCOVERED EVIDENCE THAT PETITIONER SUFFERED FROM A LONGSTANDING BRAIN DYSFUNCTION THAT IMPAIRED HIS ABILITY TO CONSTRAIN IMPULSIVE OUTBURSTS AT THE TIME OF THE KILLING ESTABLISHES HIS INNOCENCE OF CAPITAL MURDER

Petitioner's confinement is unlawful in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15, 16, and 17 of the California Constitution because execution of an innocent person is unconstitutional. (*Herrera v. Collins* (1993) 506 U.S. 390 [execution of innocent person violates Eighth Amendment]; *In re Hall* (1981) 30 Cal.3d 408, 417; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1246.) Newly discovered evidence that petitioner suffered from a brain dysfunction that impaired his ability to constrain impulsive outbursts at the time of the killings establishes his innocence of capital murder. (*Herrera v. Collins* (1993) 506 U.S. 390 [execution of innocent person violates Eighth Amendment]; *In re Hall* (1981) 30 Cal.3d 408, 417; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1246.)

The facts supporting this claim, among others to be developed after full investigation, discovery, adequate funding and access to this Court's subpoena power and other available court processes, including an evidentiary hearing to further develop this claim, are:

1. Petitioner incorporates by reference, as though fully set forth herein, the factual allegations contained in Claim 5A and the Declaration of Natasha Khazanov, Ph.D., appended as Exhibit P.

2. If this Court were to determine that neither defense counsel nor the court-appointed defense experts should have been aware of the need for a neuropsychological examination, petitioner alleges that Dr. Natasha Khazanov's finding of brain impairment is newly-discovered evidence. As described in Claim 5A, and incorporated by reference, as

though fully set forth herein, this new evidence undermines the prosecution's entire penalty phase case and points unerringly to petitioner's reduced culpability. Petitioner's longstanding brain impairment helps to explain and mitigates not only the killings but also the other incidents of violent criminal activity adduced in aggravation of sentence. It so clearly changes the balance of aggravation and mitigation that its omission likely altered the penalty outcome. Had the jurors known of petitioner's brain impairment, it is likely they would have sentenced petitioner to life in prison without possibility of parole on both counts.

CLAIM 8: PETITIONER'S CONVICTIONS AND DEATH SENTENCE MUST BE VACATED BECAUSE OF THE CUMULATIVE EFFECT OF ALL OF THE ERRORS AND CONSTITUTIONAL VIOLATIONS ESTABLISHED IN THIS PETITION AND ON AUTOMATIC APPEAL

Petitioner's confinement is illegal and unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15, 16, and 17 of the California Constitution, because the errors complained of in this petition compounded one another, resulting in a trial that was fundamentally unfair and in the imposition of cruel and unusual punishment.

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

1. All of the other allegations and supporting exhibits are incorporated into this claim by reference.

2. Each of the specific allegations of constitutional error in each claim and sub-claim of this petition requires the issuance of a writ of habeas corpus. Assuming arguendo that the Court finds that the individual allegations are, in and of themselves, insufficient to justify relief, the cumulative effect of the errors demonstrated by this petition, and even more clearly, the cumulative effect of these errors and the errors set forth in the briefing submitted for the automatic appeal (Case No. S055415), compels reversal of the judgment and issuance of the writ. (See, e.g., *People v. Holt* (1984) 37 Cal.3d. 436, 458-459 [discussing cumulative error on direct appeal].) When all of the errors and constitutional violations are considered together, it is clear petitioner has been convicted and sentenced to death in violation of his basic human and constitutional right to a fundamentally fair and accurate trial, and his right

to an accurate and reliable penalty determination, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15, 16, and 17 of the California Constitution.

3. The prejudicial impact of each of the specific allegations of constitutional error presented in this petition and in the direct appeal must be analyzed within the overall context of the evidence introduced against petitioner at trial. No single allegation of constitutional error is severable from any other allegation set forth in this petition and/or in petitioner's automatic appeal. "Where, as here, there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381, *citing United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476; *see also United States v. Green* (9th Cir. 1981) 648 F.2d 587, 597 [combination of errors and lack of balancing probative value and prejudicial effect of testimony and lack of limiting instruction required reversal].) "In other words, a column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts." (*United States v. Sepulveda* (1st Cir. 1993) 15 F.3d 1161, 1196; *see also Taylor v. Kentucky* (1978) 436 U.S. 478, 486-488 & n. 15; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace, supra*, 848 F.2d at 1475-1476; *In re Gay* (1998) 19 Cal.4th 771, 826; *People v. Hill* (1998) 17 Cal.4th 800, 844; *In re Jones* (1996) 13 Cal.4th 552, 583, 587; *People v. Ledesma* (1987) 43 Cal.3d 171, 214-227; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1075-1077.)

4. Petitioner hereby incorporates by specific reference the record on appeal, and

each of the claims and arguments raised in his Opening Brief and Reply Brief in his related automatic appeal (No. S055415) and any appendices and exhibits referred to therein, as if fully set forth in this paragraph. Alternatively, petitioner requests that the Court take judicial notice of the same.

5. Petitioner also incorporates by reference every claim of this petition, and the exhibits incorporated therein, as if fully set forth in this paragraph.

6. If the state disputes any of the facts alleged herein, petitioner requests an evidentiary hearing to resolve the factual disputes.

7. Petitioner and his counsel believe additional facts exist which support this claim, but have been unable to adduce those facts because this Court has not provided petitioner with adequate funding for investigation, access to subpoena power, or an evidentiary hearing. Counsel requests an opportunity to supplement or amend this petition after petitioner has been afforded an opportunity to investigate fully.

8. Petitioner's convictions, sentence, and confinement were obtained as the result of numerous errors constituting multiple violations of his fundamental constitutional rights at every phase of his trial, including the denial of due process, the selection of a biased jury, the prosecution's use of peremptory challenges based on race, the erroneous admission of evidence, the erroneous exclusion of evidence, the denial of his right to the effective assistance of counsel, juror misconduct, judicial bias, attorney conflict of interest, and serious instructional error.

9. Justice demands that petitioner's convictions and sentence of death be reversed because the cumulative effect of all of the errors and violations alleged in this petition and on automatic appeal "was so prejudicial as to strike at the fundamental fairness

of the trial." (*United States v. Parker* (6th Cir. 1993) 997 F.2d 219, 222 (citation omitted); *see also United States v. Tory* (9th Cir. 1995) 52 F.3d 207, 211 [cumulative effect of errors deprived defendant of fair trial].)

10. Petitioner alleges that he has also been prejudiced by state law violations which may not independently rise to the level of a federal constitutional violation, (*see, e.g.*, *Barclay v. Florida* (1983) 463 U.S. 969, 951). The cumulative effect of the state law errors in this case resulted in a denial of fundamental fairness and the due process and equal protection guarantees of the Fourteenth Amendment. (*See Walker v. Engle* (6th Cir. 1983) 703 F.2d 903, 962.)

11. In light of the cumulative effect of all of the errors and constitutional violations that occurred over the course of petitioner's case, petitioner's convictions and death sentence must be vacated to prevent a fundamental miscarriage of justice.

CLAIM 9: THE CALIFORNIA STATUTORY SCHEME UNDER WHICH PETITIONER WAS SENTENCED TO DEATH IS UNCONSTITUTIONAL

The California statutory scheme under which petitioner was convicted and sentenced to death, as set forth in California Penal Code §§ 189 *et. seq.*, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, 16, and 17 of the California Constitution, in that the California statute fails to adequately narrow the class of persons eligible for the death penalty. The facts supporting this claim, among others to be presented after adequate funding, full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to, the following:

1. The California death penalty statute under which petitioner was convicted and sentenced to death fails to adequately narrow the class of persons eligible for the death penalty and creates a substantial and constitutionally unacceptable likelihood that the death penalty will be imposed in a capricious and arbitrary fashion. (*Furman v. Georgia* (1972) 408 U.S. 238, 313 [death penalty statute must provide "a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not"] (White, J., concurring).)[11] A capital murder statute must take into account the Eighth

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[11]In *Furman v. Georgia* (1972) 408 U.S. 238, the Supreme Court, for the first time, invalidated a state's entire death penalty scheme because it violated the Eighth Amendment. Because each of the justices in the majority wrote his own opinion, the scope of, and rationale for, the decision was not determined by the case itself. Justices Stewart and White concurred on the narrowest ground, arguing that the death penalty was unconstitutional because a handful of murderers were arbitrarily singled out for death from the much larger class of murderers who were death-eligible. (*Id.*, at pp. 309-310 (Stewart, J., concurring) and at pp. 311-313 (White, J., concurring).) In *Gregg v. Georgia* (1976) 428 U.S. 153, the plurality understood the Stewart and White view to be the "holding" of *Furman* (*Id.*, at pp. 188-189), and in *Maynard v. Cartwright* (1988) 486 U.S. 356, a unanimous Court cited to the opinions of Stewart and White as embodying the Furman holding. (*Id.*, at p. 362)

Amendment principles that death is different (*California v. Ramos* (1983) 463 U.S. 992, 998-99), and that the death penalty must be reserved for those killings which society views as the most grievous affronts to humanity. (*Zant v. Stephens* (1983) 462 U.S. 862, 877 n.15; *see also Adamson v. Ricketts* (9th Cir. 1988) 856 F.2d 1011, 1025 [blanket eligibility for death sentence may violate the Fifth and Fourteenth Amendment due process guarantees as well as the Eighth Amendment].)

2. California's death penalty statute, which was enacted by an initiative measure, violates the Eighth Amendment by multiplying the "few" cases in which the death penalty is possible into the many. Further, it was enacted for precisely this unconstitutional purpose. The proponents of the initiative measure ("Proposition 7"), as part of their Voter's Pamphlet argument that the initiative statute was necessary, described certain murders that were not covered by the existing death penalty statute, and then stated:

> And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*

(1978 Voter's Pamphlet, p. 34, "Argument in Favor of Proposition 7," italics added.)

3. As of 1984, the date of the homicides charged in the present case, twenty-six "special circumstances"existed under California Penal Code § 190.2, embracing every type of murder likely to occur.[12] (*See* Declaration of Professor Steven F. Shatz, ¶ 5, appended as Exhibit XX. Petitioner hereby incorporates by reference, as if fully set forth herein, the appended Declaration of Professor Steven F. Shatz.) The over-inclusive nature of the death

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[12] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow, and is now 34.

penalty law in California means that death eligibility is the rule, not the exception, as required by the Eighth Amendment.

4. At the time of the decision in *Furman*, the evidence before the high court established, and the justices understood, that approximately 15-20% of those convicted of capital murder were actually sentenced to death. Chief Justice Burger so stated for the four dissenters (402 U.S. at p. 386, n. 11), and Justice Stewart relied on Chief Justice Burger's statistics when he said: "[I]t is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder . . . ." (402 U.S. at p. 309, n. 10)[13] Thus, while Justices Stewart and White did not address precisely what percentage of statutorily death-eligible defendants would have to receive death sentences in order to eliminate the constitutionally unacceptable risk of arbitrary capital sentencing, *Furman*, at a minimum, must be understood to have held that any death penalty scheme under which less than 15-20% of statutorily death-eligible defendants are sentenced to death permits too great a risk of arbitrariness to satisfy the Eighth Amendment.

5. In order to meet the concerns of *Furman*, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.

(*Zant v. Stephens* (1983) 462 U.S. 862, 878.) It was the high court's understanding that, as the class of death-eligible murderers was narrowed, the percentage of those in the class

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[13] In *Gregg*, the plurality reiterated this understanding: "It has been estimated that before *Furman* less than 20% of those convicted of murder were sentenced to death in those states that authorized capital punishment." (428 U.S. at 182, n. 26, citing *Woodson v. North Carolina* (1986) 428 U.S. 280, 295-296, n. 31.)

receiving the death penalty would go up and the risk of arbitrary imposition of the death penalty would correspondingly decline.

> As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate . . . it becomes reasonable to expect that juries – even given discretion not to impose the death penalty – will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device.

(*Gregg v. Georgia*, supra, 428 U.S. at p. 222 (White, J., concurring).)

6. Professor Steven F. Shatz conducted a study of California cases involving murder convictions. His "purpose was to determine: (1) the degree to which the special circumstances listed in the California Penal Code § 190.2 limit death-eligibility for persons convicted of first degree murder and (2) to determine what percentage of persons convicted of first degree murder who are statutorily death-eligible are sentenced to death, *i.e.*, California's death sentence ratio. (Declaration of Professor Steven F. Shatz, § 2.)

7. Under the California scheme, the class of first degree murderers is narrowed to a statutorily death-eligible class by the special circumstance provisions set forth in California Penal Code section 190.2. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 467-468.)[14] There are, however, so many special circumstances, so broadly construed, that the special circumstances accomplish very little narrowing.

8. Professor Shatz's study found that under the death penalty scheme in effect in 1984, 84% of first degree murderers were statutorily death eligible and 9.6% of convicted

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[14] There is some slight additional narrowing as a result of the exclusion of minors. (Penal Code §190.5.) Professor Shatz's analysis takes into account this slight additional narrowing. (Declaration of Professor Steven F. Shatz, ¶ 28.)

first degree murderers were actually sentenced to death. The California death sentence rate for defendants convicted of death-eligible first degree murders was approximately 11.4 percent. (Declaration of Professor Steven F. Shatz, ¶¶ 28-29.)

9. A statutory scheme under which 84% of first degree murderers were death-eligible did not "genuinely narrow" the class of persons eligible for the death penalty. (See *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1319.) In addition, since only 11.4 percent of those statutorily death-eligible were sentenced to death, California's death penalty scheme in 1984 permitted an even greater risk of arbitrariness than the schemes considered in *Furman*, and, like those schemes, was unconstitutional. Accordingly, petitioner's death sentence must be set aside.

CLAIM 10: EXECUTION FOLLOWING LENGTHY CONFINEMENT UNDER SENTENCE OF DEATH WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF PETITIONER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND INTERNATIONAL LAW

Execution of petitioner following his lengthy confinement under sentence of death (now more than ten years) would constitute cruel and unusual punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; Article I, sections 1, 7, 15, 16, and 17 of the California Constitution; and international law, covenants, treaties and norms.

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

1. Petitioner was sentenced to death on August 5, 1996, after almost two years of imprisonment in the county jail. At the time of the present petition, he has been continuously confined for more than 13 years and under sentence of death for more than ten years. His automatic appeal has been pending throughout this time.

2. Petitioner's excessive confinement on death row has been through no doing of his own. The appeal from a judgment of death is automatic (Pen. Code § 1239, subd. (b)), and there is "no authority to allow [the] defendant to waive the [automatic] appeal." (*People v. Sheldon* (1994) 7 Cal.4th 1136, 1139, *relying on People v. Stanworth* (1969) 71 Cal.2d 820, 833-834.) Of course, full, fair and meaningful review of the trial court proceedings, required under the state and federal constitutions and state law, necessitates a complete record (*Chessman v. Teets* (1957) 354 U.S. 156 ; Pen. Code § 190.7; Cal. Rules of Court, rule 8.610) and effective appellate representation (*see People v. Barton* (1978) 21 Cal.3d 513,

518; *People v. Gaston* (1978) 20 Cal.3d 476; *People v. Silva* (1978) 20 Cal.3d 489; *In re Smith* (1970) 3 Cal.3d 192; U.S. Const. amends. VI, VIII, XIV).

3. The delays in petitioner's appeal have been caused by factors over which he has exercised no discretion or control whatsoever, and are overwhelmingly attributable to the system in place, established by state and federal law, which necessitates time-consuming and exhaustive litigation. These delays are not in any way attributable to the exercise of any discretion on petitioner's part. (*Cf. McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, 1466-1467 [claim rejected because delay caused by prisoner "avail[ing] himself of procedures" for post-conviction review, implying volitional choice by the prisoner], *adopted en banc*, 57 F.3d 1493.) The delays here have been caused by "negligence or deliberate action by the State." (*Lackey v. Texas* (1995) 514 U.S. 1045 (mem. of Stevens, J.).) The complaint in this case was filed on August 10, 1994. Petitioner's judgment of death was imposed on August 5, 1996. Appellate counsel was not appointed until January 26, 2000, more than three years later. Lead counsel was replaced on November 29, 2000. The record on appeal was certified on May 23, 2003.

4. The condemned prisoner's non-waivable right to prosecute the automatic appeal remedy provided by law in this state does not negate the cruel and degrading character of long-term confinement under judgment of death.

5. Execution of petitioner following confinement under sentence of death for this lengthy a period of time constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. (*Lackey v. Texas* (1995) 514 U.S. 1045 (Stevens, J., joined by Breyer, J., respecting the denial of certiorari).) (*See Knight v. Florida* (1998) 528 U.S. 990 (Breyer, J., respecting the denial of certiorari)); *Ceja v. Stewart* (9th Cir. 1998) 97 F.3d 1246

(Fletcher, J., dissenting from order denying stay of execution).) If petitioner is executed, his sentence will be at the very least more than 11 years of confinement in a tiny cell in the most horrible portion of San Quentin prison – death row – followed by execution.

6. Carrying out petitioner's death sentence after this extraordinary delay is violative of the Eighth Amendment's Cruel and Unusual Punishments Clause in at least two respects: first, it constitutes cruel and unusual punishment to confine an individual, such as petitioner, on death row for such a prolonged period of time. (*See*, e.g., *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461; *Ceja v. Stewart*, *supra*, (Fletcher, J., dissenting from order denying stay of execution).) Second, after the passage of so much time since conviction and judgment of death, the imposition of a sentence of death upon petitioner would violate the Eighth Amendment because the State's ability to exact retribution and to deter other murders by actually carrying out such a sentence is drastically diminished. (*Id.*)

7. Confinement under a sentence of death subjects a condemned inmate to extraordinary psychological duress, as well as the extreme physical and social restrictions inherent in life on death row. Accordingly, such confinement, in and of itself, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

8. Over a century ago, the United States Supreme Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." (*In re Medley* (1890) 134 U.S. 160, 172.)

9. In *Medley*, the period of uncertainty was just four weeks. As recognized by Justice Stevens, *Medley*'s description should apply with far greater force in a case such as petitioner's, involving a delay that has lasted over 11 years. (*Lackey v. Texas*, *supra*,

(Stevens, J., joined by Breyer, J., respecting the denial of certiorari).)

10. This Court reached a similar conclusion in *People v. Anderson* (1972) 6 Cal.3d 628, 649: "The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."

11. The penological justification for carrying out an execution disappears when an extraordinary period of time has elapsed between the conviction and the proposed execution date, and executing a defendant under such circumstances is an inherently excessive punishment that no longer serves any legitimate purpose. (*Ceja v. Stewart*, *supra*, (Fletcher, J., dissenting from order denying stay of execution); *see also Furman v. Georgia* (1972) 408 U.S. 238, 312 (White, J., concurring).)

12. The imposition of a sentence of death must serve legitimate and substantial penological goals in order to survive Eighth Amendment scrutiny. When the death penalty "ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernable social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." (*Furman v. Georgia*, *supra*, (White, J., concurring); *see also Gregg v. Georgia* (1976) 428 U.S. 153, 183 ["The sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering."].)

13. In order to survive Eighth Amendment scrutiny, "the imposition of the death penalty must serve some legitimate penological end that could not otherwise be accomplished. If 'the punishment serves no penal purpose more effectively than a less severe punishment, *Furman v. Georgia*, *supra* at p. 280, (Brennan, J., concurring), then it is unnecessarily excessive within the meaning of the Punishments Clause."

14. The penological justifications that can support a legitimate application of the death penalty are twofold: "retribution and deterrence of capital crimes by prospective offenders." (*Gregg v. Georgia*, *supra*, at p. 183.) Retribution, as defined by the United States Supreme Court, means the "expression of society's moral outrage at particularly offensive behavior." (*Id*).

15. The ability of the State of California to further the ends of retribution and deterrence has been drastically diminished here as a result of the extraordinary period of time that has elapsed since the date of petitioner's conviction and judgment of death. "It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death . . . . [A]fter such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. . . . [T]he additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal." (*Lackey v. Texas*, *supra*, (Stevens, J., joined by Breyer, J., respecting the denial of certiorari); *see also Coleman v. Balkcom* (1981) 451 U.S. 949, 952, (Stevens, J., respecting denial of certiorari) ["the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself"].)

16. Because it would serve no legitimate penological interest to execute petitioner

after this passage of time and because petitioner's confinement on death row for over ten years, in and of itself, constitutes cruel and unusual punishment, execution of petitioner is prohibited by the Eighth Amendment's Cruel and Unusual Punishments Clause.

17. The United States stands virtually alone among the nations of the world in confining individuals for periods of many years continuously under sentence of death. The international community is increasingly recognizing that, without regard for the question of the appropriateness or inappropriateness of the death penalty itself, prolonged confinement under these circumstances is cruel and degrading and in violation of international human rights law. (*Pratt v. Attorney General for Jamaica* (1993) 4 All.E.R. 769 (Privy Council); *Soering v. United Kingdom* 11 E.H.R.R. 439, ¶ 111 (Euro. Ct. of Human Rights).) *Soering* specifically held that, for this reason, it would be inappropriate for the government of Great Britain to extradite a man under indictment for capital murder in the state of Virginia, in the absence of assurances that he would not be sentenced to death.

18. Prior to the adoption and development of international human rights law, this Court rejected a somewhat similar claim. (*People v. Chessman* (1959) 52 Cal.2d 467, 498-500.) But the developing international consensus demonstrates that, in addition to being cruel and degrading, what the Europeans refer to as the "death row phenomenon" in the United States is also "unusual" within the meaning of the Eighth Amendment and the corresponding provision of the California Constitution, entitling petitioner to relief for that reason as well.

19. While the Ninth Circuit rejected a claim of this type in *Richmond v. Lewis* (9th Cir. 1990) 948 F.2d 1473, 1491-1492, *rev'd. on other grounds,* 506 U.S. 40 (1992), vacated 986 F.2d 1583 (1993), that rejection was deprived of persuasive force when the Arizona

Supreme Court subsequently reduced the death sentence of the defendant in that case to a sentence of life imprisonment, in part because he had changed during his excessively long confinement on death row. (*State v. Richmond* (1994) 180 Ariz. 573 [886 P.2d 1329].)

20. Further, the process used to implement petitioner's death sentence violates international treaties and laws that prohibit cruel and unusual punishment, including, but not limited to, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention), adopted by the General Assembly of the United Nations on December 10, 1984, and ratified by the United States ten years later. (*United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984).) The length of petitioner's confinement on death row, along with the constitutionally inadequate guilt and penalty determinations in his case, have caused him prolonged and extreme mental torture and degradation, and denied him due process, in violation of international treaties and law.

21. Article 1 of the Torture Convention defines torture, in part, as any act by which severe pain or suffering is intentionally inflicted on a person by a public official. (*United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984).) Pain or suffering may be inflicted upon a person by a public official only if the punishment is incidental to a *lawful* sanction. *Id.* Petitioner, however, has made a prima facie showing that his convictions and death sentence were obtained in violation of federal and state law.

22. In addition, petitioner has been, and will continue to be, subjected to unlawful

pain and suffering due to his prolonged, uncertain confinement on death row. "The devastating, degrading fear that is imposed on the condemned for months and years is a punishment more terrible than death." (Camus, *Reflections on the Guillotine*, in *Resistance, Rebellion and Death* 173, 200 (1961).)

23. The violation of international law occurs even when a condemned prisoner is afforded post-conviction remedies beyond an automatic appeal. These remedies are provided by law, in the belief that they are the appropriate means of testing the judgment of death, and with the expectation that they will be used by death-sentenced prisoners. Petitioner's use of post-conviction remedies does nothing to negate the cruel and degrading character of his long-term confinement under judgment of death.

24. Further, in addition to the actual killing of a human being and the years of psychological torture leading up to the act, the method of execution employed by the State of California will result in the further infliction of physical torture, and severe pain and suffering, upon petitioner. *See* Claim 11, below.

25. Petitioner's death sentence must be vacated permanently, and/or a stay of execution must be entered permanently.

CLAIM 11: PETITIONER CANNOT BE LAWFULLY EXECUTED BECAUSE THE METHOD OF EXECUTION IN CALIFORNIA IS FORBIDDEN BY STATE, FEDERAL AND INTERNATIONAL LAW

Petitioner's sentence of death is illegal and unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution, because execution by lethal injection, the method by which the State of California plans to execute him, violates the prohibition of cruel and unusual punishment. The Eighth Amendment prohibits "the unnecessary and wanton infliction of pain," (*Gregg v. Georgia* (1976) 428 U.S. 153, 173), and procedures that create an "unnecessary risk" that such pain will be inflicted, (*Cooper v. Rimmer* (9th Cir. 2004) 379 F.3d 1029, 1033).

The facts supporting this claim, among others to be developed after full investigation, discovery, adequate funding, and access to this Court's subpoena power and other available court processes, including an evidentiary hearing to further develop and support the merits of this claim, are:

1. The State of California plans to execute petitioner by means of lethal injection. In 1992, California added as an alternative means of execution "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections." (Pen. Code, § 3604.) As amended in 1992, Penal Code section 3604 provides that "[p]ersons sentenced to death prior to or after the operative date of this subdivision shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection." As amended, section 3604 further provides that "if either manner of execution . . . is held invalid, the punishment of death shall be imposed by the alternate means . . . ."

2. In 1996, the California Legislature amended Penal Code section 3604 to

provide that "if a person under sentence of death does not choose either lethal gas or lethal injection . . . , the penalty of death shall be imposed by lethal injection." (*See* 15 Cal. Code Regs. § 3349.)

3. The lethal injection method of execution is authorized to be used in thirty-five states in addition to California. From 1976 to November 15, 2001, there were at least 579 executions by lethal injection. Lethal injection executions have been carried out in at least the following states: Arizona, Arkansas, Delaware, Idaho, Illinois, Louisiana, Maryland, Missouri, Montana, Nevada, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Virginia and Wyoming.

4. Consequently, there is a growing body of evidence, both scientific and anecdotal, concerning this method of execution, the effects of lethal injection on the inmates who are executed, and the many instances in which the procedures fail, causing botched, painful, prolonged and torturous deaths for these condemned men.

5. Both scientific evidence and eyewitness accounts support the proposition that death by lethal injection can be an extraordinarily painful death, and that it is therefore in violation of the prohibition against cruel and unusual punishment set forth in the Eighth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment. (*Robinson v. California* (1962) 370 U.S. 660.)

6. The chemicals authorized to be used in California's lethal injection procedure are extremely volatile and can cause complications even when administered correctly. When not administered correctly, the procedure exposes the inmate to substantial and grave risks of prolonged and extreme infliction of pain.

7. Medical doctors are prohibited from participating in executions on ethical

grounds. The Code of Medical Ethics set forth in the Hippocratic Oath in the Fifth Century B.C. requires the preservation of life and the cessation of pain above all other values.[15] Medical doctors may not help the state kill an inmate.[16] The American Nurses Association also forbids members from participating in executions.

8. The dosages to be administered are not specified by California statute, but rather "by standards established under the direction of the Department of Corrections." (Pen. Code, § 3604(a).)

9. The three drugs commonly used in lethal injections are sodium thiopental, pancuronium bromide and potassium chloride. Sodium thiopental renders the inmate unconscious. Pancuronium bromide then paralyzes the chest wall muscles and diaphragm so the inmate can no longer breathe. Finally, potassium chloride causes a cardiac arrhythmia which results in ineffective pumping of blood by the heart and, ultimately, cardiac arrest.

10. The procedures by which the State of California plans to inject chemicals into petitioner's body are so flawed he will not be executed humanely, but will be subjected to cruel and unusual punishment.

11. Death by lethal injection involves the selection of chemical dosages and combinations of drugs by untrained or improperly skilled persons. Consequently, non-

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[15]The Oath provides: "I will follow the method of treatment which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to anyone if asked, nor suggest any such counsel."

[16]During the American Medical Association's annual meeting in July 1980, their House of Delegates adopted the following resolution: "A physician, as a member of a profession dedicated to the preservation of life when there is hope of doing so, should not be a participant in a legally authorized execution. [However, a] physician may make a determination or certification of death as currently provided by law in any situation."

physicians are making the kinds of decisions regarding medication dosages and prescriptions that under other circumstances must under the law be made by physicians.

12. Since medical doctors may not participate or aid in the execution of a human being on ethical grounds, untrained or improperly skilled, non-medical personnel are making what would ordinarily be informed medical decisions concerning dosages and combinations of drugs to achieve the desired result.

13. The effects of the lethal injection chemicals on the human body at various dosages are medical and scientific matters, and properly the subject of medical decision-making. Moreover, the efficacy of the drugs will vary on different individuals depending on many factors and variables, which would ordinarily be monitored by medical personnel.

14. There is a risk that the dosages selected by untrained persons may be inadequate for the purposes for which they were selected, may result in unanticipated or inappropriate effects in a particular individual for medical or other reasons, and may unnecessarily inflict extreme pain and suffering.

15. There is a risk that the order and timing of the administration of the chemicals will greatly increase the risk of unnecessarily severe physical pain and/or mental suffering.

16. The desired effects of the chemical agents to be used for execution by lethal injection in California may be altered by inappropriate selection, storage and handling.

17. Improperly selected, stored and/or handled chemicals will lose potency, and thus fail to achieve the intended results or inflict unnecessary, extreme pain and suffering in the process. Improperly selected, stored, and/or handled chemicals will become contaminated, altering the desired effects and resulting in the infliction of unnecessary, extreme pain and suffering. California provides inadequate controls to ensure that the

chemical agents selected to achieve execution by lethal injection are properly selected, stored and handled.

18. Since medical doctors cannot participate in the execution process, non-medical personnel will necessarily be relied upon to carry out the physical procedures required to execute petitioner.

19. These non-medical technicians will lack the training, skill and experience needed to effectively, efficiently and properly prepare the apparatus necessary to execute petitioner, prepare him physically for execution, ensure that he is restrained in a manner that will not impede the flow of chemicals and result in a prolonged and painful death, insert the intravenous catheter properly in a healthy vein so that chemicals enter the blood stream and do not infiltrate surrounding tissues, and administer the intravenous drip properly so that unconsciousness and death follow quickly and painlessly.

20. Moreover, the inadequately skilled and trained technicians are unequipped to deal effectively with any problems that arise during the procedure. They may fail to recognize problems concerning the administration of the lethal injection. Once problems are recognized, they may not know how to correct the problems or mistakes. Their lack of adequate skill and training may unnecessarily prolong the pain and suffering inherent in an execution that goes awry.

21. The use of unskilled and improperly trained technicians to conduct execution by lethal injection and the lack of adequate procedures to ensure that such executions are humanely carried out have resulted in the unwarranted infliction of extreme pain, resulting in a cruel, unusual, and inhumane death for inmates in numerous cases across the United States in recent years.

22. In *Morales v. Tilton* (2006) 465 F.Supp.2d 972, the federal district court addressed the question of whether "California's lethal-injection protocol – as actually administered in practice – create[d] an undue and unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment." After undertaking "a thorough review of every aspect of the protocol, including the composition and training of the execution team, the equipment and apparatus used in executions, the pharmacology and pharmacokinetics of the drugs involved, and the available documentary and anecdotal evidence concerning every execution in California since lethal injection was adopted as the State's preferred means of execution in 1992," the district court concluded that California's lethal injection protocol was unconstitutional. (*Id.*, at 974.)

23. The execution logs and other evidence indicated to the district court that the inmates being executed may not have lost consciousness despite being injected with sodium thiopental. If that were the case, the later injection of pancuronium bromide and potassium chloride would have caused the conscious inmate an unconstitutional level of pain. (*Id.*, at 975.)

24. The district court identified multiple, critical deficiencies in the lethal injection protocol likely to result in problems in using sodium thiopental. These were: (1) inconsistent and unreliable screening of execution team members; (2) a lack of meaningful training, supervision, and oversight of the execution team; (3) inconsistent and unreliable record-keeping; (4) improper mixing, preparation, and administration of sodium thiopental by the execution team; and (5) inadequate lighting, overcrowded conditions, and poorly designed facilities in which the execution team must work. (*Id.*, at 979-980.)

25. The Eighth Amendment to the United States Constitution prohibits deliberate

indifference to the known risks associated with a particular method of execution. (*Cf. Estelle v. Gamble* (1976) 429 U.S. 97, 106.) As discussed above and as will be demonstrated in detail at an evidentiary hearing, following discovery, investigation, and other opportunities for full development of the factual basis for this claim, there are known risks associated with the lethal injection method of execution, and the State of California has failed to take adequate measures to ensure against those risks.

26. The Eighth Amendment safeguards nothing less than the dignity of man, and prohibits methods of execution that involve the unnecessary and wanton infliction of pain. (*Trop v. Dulles* (1958) 356 U.S. 86, 100.)

27. To comply with constitutional requirements, the State must minimize the risk of unnecessary pain and suffering by taking all feasible measures to reduce the risk of error associated with the administration of capital punishment. (*Glass v. Louisiana* (1985) 471 U.S. 1080, 1086 (Brennan, J., dissenting); *Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, 709-11 (Reinhart, J., dissenting); *see also Zant v. Stephens* (1983) 462 U.S. 862, 884-85 [state must minimize risks of mistakes in administering capital punishment]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 (O'Connor, J., concurring).)

28. California's use of lethal injection to execute prisoners sentenced to death unnecessarily risks "unnecessary and wanton infliction of pain." (*Gregg v. Georgia* (1976) 428 U.S. 153, 173.) Such use constitutes cruel and unusual punishment, offends contemporary standards of human decency, and violates the Eighth Amendment to the United States Constitution.

CLAIM 12: THE PENALTY OF DEATH AND EXECUTION IN CALIFORNIA ARE ARBITRARILY AND CAPRICIOUSLY IMPOSED DEPENDING ON THE COUNTY IN WHICH THE DEFENDANT IS CHARGED, IN VIOLATION OF THE RIGHT TO EQUAL PROTECTION OF THE LAW

Petitioner's death sentence and confinement are unlawful and unconstitutional. They were obtained in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 7(b) and Article IV, section 16(a) of the California Constitution, because the death penalty in California is imposed arbitrarily and capriciously depending on the county in which the case is prosecuted.

The facts supporting this claim, among others to be developed after full investigation, discovery, adequate funding, and access to this Court's subpoena power and other available court processes, including an evidentiary hearing to further develop and support the merits of this claim, are:

1. It is axiomatic that every person in the United States is entitled to equal protection of the law. (U.S. Const., 14th Amend.)

2. It is also true that since 1976 the Supreme Court of the United States has upheld the death penalty in general against Eighth Amendment challenges and allowed the states to vary in their statutory schemes for putting people to death. (*See Jurek v. Texas* (1976) 428 U.S. 262; *Proffitt v. Florida* (1976) 428 U.S. 242; *Gregg v. Georgia* (1976) 428 U.S. 153. *Cf. McCleskey v. Kemp* (1987) 481 U.S. 279.)

3. Nonetheless, on December 12, 2000, the Supreme Court of the United States recognized that when fundamental rights are at stake, uniformity among the counties within a state, in the application of processes that deprive a person of a fundamental right, are essential. (*Bush v. Gore* (2000) 531 U.S. 98, 104-110.) When a statewide scheme is in

effect, there must be sufficient assurance "that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." (*Id.*, at p. 532.) This principle must apply to the right to life as well as the right to vote.

4. In California, the 58 counties, through the respective prosecutors' offices, make their own rules, within the broad parameters of Penal Code sections 190.2 and 190.25, as to who is charged with capital murder and who is not. There are no effective restraints or controls on prosecutorial discretion in California. So long as an alleged crime falls within the statutory criteria of Penal Code sections 190.2 or 190.25, the prosecutor is free to pick and choose which defendants will face potential death and which will face a potential lesser punishment.

5. The result is a lack of uniform treatment within the state. In some California counties a life is worth more than in others, because county prosecutors use different, or no standards, in choosing whether to charge a defendant with capital murder. If different and standardless procedures for counting votes among counties violates equal protection, as in the *Bush* case, *supra*, then certainly different and standardless procedures for charging and prosecuting capital murder must violate the right to equal protection of the law.

6. If any additional showing is necessary to demonstrate the differing standards or lack of standards among the 58 California counties, petitioner requests that funds be made available for further investigation, that discovery be permitted, that the Court issue subpoenas and process as necessary, and that a full evidentiary hearing be held further to develop the facts supporting this claim.

7. This Court must reexamine its prior precedents holding that prosecutorial discretion as to which defendants will be charged with capital murder does not offend

principles of due process, equal protection or cruel and unusual punishment. (*See, e.g., People v. Anderson* (2001) 25 Cal.4th 543, 622-623; *People v. Williams* (1997) 16 Cal.4th 153, 278; *People v. Keenan* (1988) 46 Cal.3d 478, 505.)

8. Unequal treatment among the California counties violates the Fourteenth Amendment's Equal Protection Clause, *Bush v. Gore*, *supra*, and Article 1, section 7(b) and Article IV, section 16(a) of the California Constitution.

CLAIM 13: PETITIONER'S CONVICTION AND DEATH SENTENCE VIOLATE INTERNATIONAL LAW

Petitioner's convictions, death sentence and confinement are unlawful and violate petitioner's rights under state, federal and international law. All of the errors during petitioner's trial identified in Appellant's Opening Brief, Appellant's Reply Brief and this Petition operated to deprive him of a fair trial by a competent court, and therefore operate now to arbitrarily deprive petitioner of his life in violation of customary international law and international instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Declaration of the Rights and Duties of Man. Moreover, the death penalty, as applied in the United States and the State of California, violates customary international law as evidenced by the equal protection provisions of the above instruments as well as the International Convention Against All Forms of Racial Discrimination.

The facts which support this claim, among others to be developed after full investigation, discovery, adequate funding, and access to this Court's subpoena power and other court processes, including an evidentiary hearing, are:

1. Petitioner's conviction and sentence of death were imposed without regard to international treaties and laws to which the United States is a signatory, and which obligate the United States to comply with human rights principles.

2. The State of California is bound by international law and treaties to which the United States is a signatory: "[A]ll treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary

notwithstanding." (U.S. Const., art. VI, cl. 2.)

3. United States courts have recognized that "international law affords substantive rights to individuals and places limits on a State's treatment of its citizens." (*Abebe-Jira v. Negeno* (11th Cir. 1996) 72 F.3d 844; *Filartiga v. Pena-Irala* (2d Cir. 1980) 630 F.2d 876.)

4. "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." (*The Paquete Habana* (1900) 175 U.S. 677, 700; *see also* Rest.3d Foreign Relations Law of the United States, § 111(1) ["International law and international agreements of the United States are law of the United States and supreme over the law of the several States"]; *Id.*, at § 702, comment c ["[T]he customary law of human rights is part of the law of the United States to be applied as such by state as well as federal courts"]; and 22 U.S.C. § 2304(a)(1) ["the United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with constitutional heritage and traditions of the United States, promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language or religion"].) This includes customary international law as well as international instruments. (*The Paquete Habana*, *supra*, 175 U.S. at 700; *Filartiga*, *supra*, 630 F.2d at 881.)

5. The body of international law that governs the administration of capital punishment in the State of California and the United States includes, but is not limited to, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man, the United Nations

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention Against All Forms of Racial Discrimination, and the Vienna Convention on the Law of Treaties. The purpose of these and other treaties is to bind signatory nations, including the United States, to the protection of the rights of all humans, including petitioner and others who have been accused of capital crimes.

6. Human rights treaties are different from other treaties in that parties to human rights treaties agree to protect individuals within their jurisdictions, while parties to other treaties agree how to act with respect to each other. The "object and purpose" rule keeps state parties from eliminating important aspects of human rights treaties by making reservations to them, leaving its own citizens as well as other state parties with no recourse. "[T]he true beneficiaries of the agreements are individual human beings, the inhabitants of the contracting states." (Rest.3d Foreign Relations Law of the United States, § 313, reporter's notes p. 184.)

7. The United States Senate has ratified the International Covenant on Civil and Political Rights (hereinafter "International Covenant"). (International Covenant on Civil and Political Rights, June 8, 1992, 999 U.N.T.S. 171). The United States is therefore bound by its provisions and the provisions of the Second Optional Protocol to the International Covenant, adopted by the United Nations General Assembly in 1989. (*See Ma v. Ashcroft* (9th Cir. 2001) 257 F.3d 1095, 1114 [recognizing the force and effect of the International Covenant in courts in the United States].)

8. The Second Optional Protocol provides for the total abolition of the death penalty, but allows state parties to retain the death penalty only in wartime, if a reservation to that effect was made at the time of ratifying or acceding to the Protocol. The United States

was not at war at the time petitioner was sentenced to death, and his sentence does not arise from convictions for crimes committed during a war.

9. The process by which the President of the United States and the United States Senate ratified the International Covenant, and the substance of the purported reservations and declarations placed upon its ratification, present important federal questions under the separation of powers doctrine as well as the Treaty Clause. The United States ratified the International Covenant on September 8, 1992 with five reservations, five understandings, four declarations, and one proviso. (S. Res. 4783-84, 102d. Cong. (1992).) One of the purported reservations was made to avoid the provisions of article 6 to the International Covenant, which guarantees the right to life and specifically prohibits the execution of juveniles. The United States' ratification of the International Covenant on Civil and Political Rights included a vague declaration

> that the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein and otherwise by the state and local governments. The Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.

(S. Treaty Doc. No. 95-2 (Dec. 16, 1966), International Covenant on Civil and Political Rights.)

10. However, the federal Treaty Clause does not contain any language suggesting that the Senate can partially consent to a treaty or create a new one by placing conditions on it that materially alter the treaty which is proffered by other nations. Nor does the alleged "reservation power" survive analysis under the federal Supreme Court's recent decisions regarding the separation of powers, culminating in *Clinton v. City of New York* (1998) 524

U.S. 417 (line-item veto held invalid because the Constitution does not authorize the president "to enact, to amend or to repeal statutes"). (*See also Bowsher v. Synar* (1986) 478 U.S. 714; *INS v. Chadha* (1983) 462 U.S. 919.

11. President Clinton subsequently issued an executive order adopting a "policy and practice of the Government of the United States" to implement international human rights treaties. (United States Executive Order No. 13107, "Implementation of Human Rights Treaties.") President Clinton specifically referred to the International Covenant when ordering that the United States fully "respect and implement its obligations under the international human rights treaties[.]"[17]

12. In addition to violating federal constitutional and separation-of-powers principles, the United States' attempt to condition its consent to the treaty with a

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[17] Exec. Order No 13107 states, in part:

IMPLEMENTATION OF HUMAN RIGHTS TREATIES

By the authority vested in me as President by the Constitution and the laws of the United States of America, and bearing in mind the obligations of the United States pursuant to the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and other relevant treaties concerned with the protection and promotion of human rights to which the United States is now or may become a party in the future, it is hereby ordered as follows:

"Section 1. Implementation of Human Rights Obligations.

"(a) It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD."

(Exec. Order No. 13107, 63 Fed.Reg. 68991.)

"reservation" to the prohibition against executions violates international law because the "reservation" is inconsistent with the "object and purpose" of the treaty.

13. The Vienna Convention on the Law of Treaties states that a "reservation" is not valid if it "is incompatible with the object and purpose of the treaty." (Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331, pp. 336-37; *see also* Rest.3d Foreign Relations Law of the United States, § 313(1)(c) ["A state may enter a reservation to a multilateral international agreement unless the reservation is incompatible with the object and purpose of the agreement"].) This rule of international law has been adopted by the International Court of Justice and the United Nations General Assembly. (*See* Reservations to the Convention of the Prevention and Punishment of the Crime of Genocide, U.N. GAOR, 6th Sess., 360th plenary meeting, at p. 84, U.N. Doc. A/L.37 (1952).)

14. The "object and purpose" of the International Covenant is to bestow and protect inalienable human rights to citizens: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life." (Article 6, para. 1, International Covenant on Civil and Political Rights, June 8, 1992, 999 U.N.T.S. 171.) The right to life is a fundamental human right which is expressed throughout the International Covenant. Nothing is more contravening to the "right to life" than the death penalty.

15. In 1995 the United Nations Human Rights Committee concluded that the United States' reservation to Article 6, paragraph 5 was incompatible with the object and purpose of the International Covenant, and recommended that it be withdrawn. (*See* Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant, U.N. Hum. Rts. Comm., 53rd Sess., 1413th meeting., at para. 14, U.N. Doc. ICCPR/C/79/Add.50

(1995).) "The Committee [was] particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purposes of the Covenant." (*Ibid.*)

16. Because the United States' "reservation" to Article 6, paragraph 5, violates the object and purpose of the International Covenant and its Second Optional Protocol, it is void. Since the "reservation" is void, the United States is bound by this treaty, and, pursuant to the Supremacy and Treaty Clauses to the United States Constitution and long established rules of international law, *the State of California is prohibited from executing petitioner.* (U.S. Const. art. VI., cl. 2; U.S. Const. art. II, cl. 2; International Covenant on Civil and Political Rights, June 8, 1992, 999 U.N.T.S. 171; *The Paquete Habana*, *supra*,175 U.S. at 700 (1900); *Clinton v. City of New York*, *supra*; *Bowsher v. Synar*, 478 U.S. 714; *INS v. Chadha*, *supra*; Exec. Order No. 13107, 63 Fed.Reg. 68991 (December 10, 1998) [App. 137]; S. Treaty Doc. No. 95-2 (Dec. 16, 1966) International Covenant on Civil and Political Rights.)

17. The use of capital punishment in the United States also violates the International Covenant, the American Declaration, the Race Convention and customary international law because it is imposed in a manner that racially discriminates against African Americans. Article 26 of the International Covenant, Article 2 of the American Declaration and Article 5 of the Race Convention all contain prohibitions against discriminatory and unequal treatment before the law. The death penalty in the United States continues to be, as Justice Harry A. Blackmun said, "fraught with arbitrariness, discrimination, caprice, and mistake." (*Callins v. Collins* (1994) 114 S.Ct. 1127, 1129 (Blackmun, J. dissenting from the Supreme Court's denial of review).) Statistical information from various studies shows that

the death penalty is imposed in a racially discriminatory manner.[18] Because petitioner is part African American, international law prohibits his state-sanctioned execution.

18. The United States' continued use of the death penalty sharply conflicts with evolving international standards of decency and respect for human life. Persistent application of the death penalty violates international law.

19. Petitioner's convictions and sentence also violate his rights under international law to a fair and impartial trial and to a death sentence rendered by a competent and impartial court. These rights are firmly rooted in international jurisprudence. Several international instruments incorporate these rights including, but not limited to, the Universal Declaration, the International Covenant, and the American Declaration. (*See Martinez v. City of Los Angeles* (9th Cir. 1998) 141 F.3d 1373, 1384 [finding a "clear international prohibition against arbitrary arrest and detention" as evidenced by the Universal Declaration, the International Covenant, and 119 national constitutions]; *Filartiga, supra* [the right to be free from torture "has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights"]; *Kadic v. Karadzic* (2nd Cir. 1995) 70 F.3d 232 [plaintiff stated claims under the Alien Tort Claims Act because defendant's conduct violated well-established norms of customary international law]; *Xuncax v. Gramajo* (D. Mass. 1995) 886 F.Supp. 162, 184-85 [plaintiffs' claims for violations of international law for torture,

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[18] *See* United States General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing* (1990) GAO/GGD-90-57; David C. Baldus, George Woodworth, and Charles A. Pulanski, Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (unpublished, September 1988); *Racial Disparities in Federal Death Penalty Prosecutions 1988-1994*, Staff Report by the Subcomittee on Civil and Constitutional Rights, Committee on the Judiciary, 103 Cong. 2nd Sess., March 1994; Keil & Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991* (1995) 20 Am. J. Crim. Just. 17.

summary execution, disappearance, and arbitrary detention are "fully recognizable" as claims in United States courts].)

20. All of the errors during petitioner's trial identified in Appellant's Opening Brief, Appellant's Reply Brief and this Petition operated to deprive petitioner of a fair trial by a competent court and to deprive petitioner arbitrarily of his life, in violation of international law.

CLAIM 14: PETITIONER'S ORGANIC BRAIN DYSFUNCTION AND CONDITION PROHIBITS CAPITAL SENTENCE

1. Petitioner's sentence is unlawfully and unconstitutionally imposed, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, because his organic brain dysfunction and defective condition, neurological impairments, and disabilities constitute a condition for which imposition of the death penalty is cruel and unusual punishment. The facts and allegations supporting this claim include:

2. The United States Supreme Court has held that, under the Eighth Amendment, certain conditions, particularly conditions that significantly limit or impair the mental and psychological processes of a defendant's mind, prohibit application of the death penalty to that person. These conditions include mental retardation (*Atkins v. United States* (2002) 536 U.S. 304), insanity (*Ford v. Wainwright* (1986) 477 U.S. 399), and being under the age of 18 at the time of the offense was committed (*Roper v. Simmons* (2005) 543 U.S. 551). Petitioner's organic brain dysfunction and defective condition, neurological impairments, and disabilities constitute the functional equivalent of these conditions recognized by the United States Supreme Court.

3. After administering neuropsychological testing and reviewing petitioner's social history, Natasha Khazanov, Ph.D. concluded that petitioner "suffers from serious organic brain damage." (Declaration of Natasha Khazanov, Ph.D., ¶ 99, appended as Exhibit P.) Petitioner's brain damage is both localized – primarily in the left temporal, parietal and frontal lobes – and diffuse – in the left and right hemispheres – affecting overall cognitive and neurological functioning. Consequently, petitioner's "abilities to plan or carry out a specific course of action, to act independently or make informed decisions, to interpret social

or interpersonal cues (verbal or nonverbal), and to assess his environment or specific situations and respond rationally or thoughtfully are severely and chronically impaired." (*Ibid.*) In addition, the effects of these brain impairments were exacerbated by petitioner's history of chronic alcohol abuse and chronic physical and psychological trauma. (*Id.*, at ¶¶ 99, 102.)

4. Petitioner's brain was also damaged by his long-time addiction to methamphetamine. This addiction is a disease of the brain. The drug induces changes in dopamine activity and the activity of other neurotransmitter systems which results in potentially irreversible cell damage. Chronic methamphetamine abuse is associated with cerebral deficits, involving frontal/basal-ganglia regions important for inhibitory control. Methamphetamine dependence may cause long-term neural damage, with concomitant deleterious effects on cognitive processes, such as memory, attention, and executive function. The executive functions are a group of superior abilities of organization and integration associated with the prefrontal cortex which include anticipating and establishing goals, designing plans and programs, self-regulation and monitoring tasks, and effective execution and feedback. (Declaration of Samuel Jinich, Ph.D., ¶ 120.)

5. The observations of those who knew petitioner as a child and adolescent, as well as information in petitioner's school records, confirm his lifelong cognitive disabilities, brain dysfunction, and other neurological and behavioral problems. (Declaration of Natasha Khazanov, ¶¶ 91-96; Declaration of Betty Jane Cowan, appended as Exhibit Q; Declaration of Catherine Glass, appended as Exhibit T.)

6. As a result of his impaired condition, petitioner was unable to succeed in school or in life. His judgment, performance, socialization, and behavior have been crippled

due to the damage to his brain.

7. The death penalty is unconstitutional for defendants who have a condition that severely diminishes their ability to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. (*Atkins v. Virginia*, *supra*, 536 at 316; *Roper v. Simmons*, *supra*, 543 U.S. at 568-570.) Petitioner has such a condition., and executing him would be unconstitutional.

CLAIM 15: INADEQUATE POST-CONVICTION REVIEW

1. Petitioner's sentence is unlawfully and unconstitutionally imposed, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because he was deprived of adequate and fair post-conviction review. The California post-conviction procedures fail to protect against capriciousness, prejudice and arbitrariness. Those procedures also fail to provide equal or adequate resources to indigent petitioners, thereby violating the Equal Protection Clause of the Fourteenth Amendment. In addition, because California law requires that any death sentence imposed be free from the influence of passion, prejudice, arbitrariness and disproportionality, and because appellate and post-conviction review is the dictated means of achieving these goals, petitioner has been arbitrarily deprived of a state law entitlement in violation of the Fourteenth Amendment's Due Process Clause. (See, e.g., *Ake v. Oklahoma* (1985) 470 U.S. 68; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Douglas v. California* (1963) 372 U.S. 353; *Griffin v. California* (1956) 351 U.S. 12. The following facts and allegations, among others, support this claim.

2. The procedures adopted by the California Supreme Court regarding capital appeals include the following:

a. The habeas corpus proceedings and the appellate proceedings must be pursued in a simultaneous, rather than seriatim, fashion, to petitioner's prejudice. (California Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3.)

b. The timeliness standards restrict the presentation of claims in an arbitrary, capricious and unfair fashion. (California Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3.)

c. The compensation standards and the compensation for post-conviction

appellate counsel are established at inadequate rates.

d. The payment guidelines for necessary expenses relating to the preparation of a petition for writ of habeas corpus, and the payments actually tendered are inadequate.

e. The limitation of $25,000 specified in the Guidelines for Fixed Fee Appointments, On Optional Basis, to Automatic Appeals and Related Habeas Corpus Proceedings in the California Supreme Court, for expert assistance and investigator fees relating to the preparation of a petition for writ of habeas corpus ancillary to the automatic appeal is capricious, arbitrary, and inadequate.

3. Because some capital petitioners are represented by funded state agencies that do not have the limitations specified in the Guidelines for Fixed Fee Appointments, On Optional Basis, to Automatic Appeals and Related Habeas Corpus Proceedings in the California Supreme Court, the procedures violate Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Specifically, when capital petitioners are represented by the Office of the Public Defender or the Habeas Corpus Resource Center, the habeas corpus investigations are not limited by the $25,000 ceiling on investigation and expert expenditures.

4. The investigation required for petitioner's habeas corpus proceedings took substantially more time that otherwise would have been required due to California's procedures. Inadequate compensation for counsel resulted in a delay of more than eight years in the appointment of habeas counsel, and inadequate funding prevented counsel from retaining investigators and experts necessary to perform a competent investigation. As a result important witnesses, have died or could not be located, memories have faded,

important evidence has disappeared, and social history records have been destroyed, all to petitioner's prejudice.

5. California's post-conviction procedures, and the denial of the right to full and fair post-conviction review, have resulted in an invalid death sentence. These errors have substantially prejudiced petitioner and have rendered the proceeding and judgment fundamentally unfair and unreliable.

VIII.

PRAYER FOR RELIEF

WHEREFORE, petitioner respectfully requests that this Court:

1. Take judicial notice of all records and briefing in *People v. Robert Wesley Cowan*, No. S055415, and all other matters and documents of which judicial notice is requested elsewhere in the present petition;

2. Allow petitioner a reasonable opportunity to amend or supplement this petition to include legal and factual grounds for claims which become apparent from further investigation or from allegations made in the return or informal opposition to the petition;

3. Allow petitioner a reasonable opportunity to amend or supplement this petition to include legal and factual grounds for claims that become apparent from this Court's decision on his pending direct appeal;

4. Grant petitioner, who is indigent, sufficient funds and the opportunity fully to develop and prove the facts and law relevant to the claims raised herein;

5. Issue an order to show cause, returnable before this Court, why petitioner's convictions, special circumstance finding, and death judgment should not be set aside;

6. Grant petitioner an evidentiary hearing at which proof may be offered concerning the allegations of this and any supplemental or amended petition;

7. Authorize petitioner to conduct further discovery and grant petitioner the authority to obtain subpoenas for witnesses, documents and all matters with respect to the claims pleaded herein;

8. Order that petitioner has not waived any applicable privileges by the filing of this petition and the exhibits; that he has not waived either the attorney-client privilege or the

work-product privilege; that any waiver of a privilege may occur only after a hearing with sufficient notice and the right to be heard on whether a waiver has occurred and the scope of any such waiver; that petitioner is granted "use immunity" for each and every disclosure he has made and may make in support of this petition;

9. Order a hearing and, if necessary, the taking of evidence, upon all allegations by respondent of waiver and/or forfeiture by petitioner;

10. Upon final review of the cause, order that petitioner's convictions, special circumstance finding, and death sentence be set aside;

11. Issue any stays of execution or proceedings necessary to protect this Court's jurisdiction; and,

12. Provide petitioner such other and further relief as may be deemed appropriate in the interests of justice.

DATED: November 9, 2007

Respectfully submitted,

MARK GOLDROSEN
NINA WILDER
Attorney for Petitioner
ROBERT WESLEY COWAN

IX.

VERIFICATION

I, MARK GOLDROSEN, declare under penalty of perjury:

I am an attorney duly licensed to practice law in the State of California, and I am the attorney of record for Robert Wesley Cowan, petitioner herein, in his automatic appeal in Supreme Court No.S055415.

I am authorized to file this Petition for Writ of Habeas Corpus and to make this verification on petitioner's behalf. In my capacity as attorney for petitioner, I am making this verification on his behalf because he is incarcerated in Marin County at San Quentin State Prison while my law office is in San Francisco, and because these matters are more within my knowledge than petitioner's. I have read the contents of the petition, and the matters therein are true of my own personal knowledge.

I declare under penalty of perjury that the foregoing is true and correct. Signed this 9th day of November, 2007, at San Francisco, California.

MARK GOLDROSEN

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over eighteen years of age and not a party to the within action; that my business address is 255 Kansas Street, Suite 340, San Francisco, California 94103; and that on November 9, 2007, I served a true copy of PETITION FOR WRIT OF HABEAS CORPUS AND REQUEST FOR CONSOLIDATION on the parties below by depositing a true copy of the original thereof enclosed in a sealed envelope with postage fully prepaid, in the United States mail at San Francisco, California addressed as follow:

Lewis Martinez
Deputy Attorney General
2550 Mariposa Mall
Room 5090
Fresno, CA 93721

Michael Millman
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Executed November 9, 2007 at San Francisco, California.

MARK GOLDROSEN