S084292

SUPREME COURT
FILED
DEC 14 1999
Robert Wandruff Clerk
DEPUTY

No. _____
(Related Appeal No. S005502)
(Kern County Superior Ct. No. 33477)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE DAVID KEITH ROGERS,
Petitioner.

On Habeas Corpus, Following A Judgment Of Death Rendered In The State Of California, Kern County (Hon. Gerald K. Davis, Judge Of The Superior Court)

PETITION FOR WRIT OF HABEAS CORPUS (VOLUME ONE OF TWO)

ALAN W. SPARER (No. 104921)
HOWARD, RICE, NEMEROVSKI, CANADY, FALK & RABKIN
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111-4065
Telephone: 415/434-1600

Attorneys for Petitioner David Keith Rogers

A.J. KUTCHINS (No. 102322)
P.O. Box 5138
Berkeley, California 94705
Telephone: 510/841-5635

DENISE ANTON (No. 91312)
P.M.B. No. 197
38 Miller Avenue
Mill Valley, California 94941
Telephone: 415/388-4677

Of Counsel

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Constitutional Provisions

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

CALJIC

TABLE OF AUTHORITIES

PETITION FOR WRIT OF HABEAS CORPUS

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

DAVID KEITH ROGERS, confined on death row at the California State Prison at San Quentin, petitions this Court by and through the undersigned counsel to issue a writ of habeas corpus ordering that his convictions and sentences in Kern County Superior Court Case No. 33477, including his conviction for capital murder and his sentence of death, be vacated. By this verified petition, Petitioner alleges the following facts and causes for the issuance of said writ:

UNLAWFUL RESTRAINT

1. Petitioner David Keith Rogers is unlawfully confined and restrained of his liberty at San Quentin State Prison, San Quentin, California, by C.A. Terhune, Director of the California Department of Corrections, and by Theresa Rocha, Warden of the San Quentin State Prison.

2. Petitioner David Keith Rogers is confined under sentence of death, pursuant to the judgment of the Superior Court of California in and for the County of Kern, Superior Court Criminal Case No. 33477, rendered on May 2, 1988. RT 5998-99; CT 735-40.[1]

THE UNDERLYING CRIMINAL CASE

A. Proceedings Before Trial.

3. On April 1, 1987, Petitioner Rogers was charged in Information No. 33477 with two counts of murder in violation of Penal Code Section 187.[2] In Count one, Petitioner was charged with the

---

[1]Throughout this Petition, the abbreviation "CT" refers to the Clerk's Transcript, "CTS" refers to the Supplemental Clerk's Transcript and "RT" refers to the Reporter's Transcript on appeal in *People v. Rogers*, No. S005502. "AOB," "Supp. AOB," "RB" and "ARB," refer respectively to Appellant's Opening Brief, Appellant's Supplemental Opening Brief, Respondent's Brief, and Appellant's Reply Brief in the aforementioned direct appeal.

[2]All further statutory references are to the Penal Code, unless (continued . . .)

murder of Tracie Clark on or about February 8, 1987, and in Count two he was charged with the murder of Janine Benintende sometime between January 1 and February 21, 1986. It was further alleged that the multiple murders constituted a special circumstance pursuant to Penal Code Section 190.2(a)(3). Petitioner was also accused of having personally used a handgun in the commission of each of the murders, rendering him subject to the sentence enhancement provisions of Section 12022.5. CT 354.

4. On April 4, 1987, attorney Eugene Lorenz was appointed to represent Petitioner. CT 356. The matter was assigned to Judge Gerald K. Davis for trial, and on November 23, 1987, jury selection began. *Voir dire* continued through February 10, 1988, when a jury was chosen. CT 415-78. The jury was sworn and presentation of evidence in the guilt phase of trial commenced on February 17, 1988. CT 480.

B. Summary Of The Evidence Adduced At Trial: Guilt Phase.

5. The evidence presented at the guilt phase of Petitioner's case is fully described in the Opening Brief submitted in his direct appeal (AOB at 3-20), which is incorporated herein by this reference and to which the Court is respectfully referred. Further, specific facts from the trial record will be set forth below in this Petition, as pertinent to Petitioner's claims for relief. For the convenience of the Court, however, a brief summary of the guilt phase evidence follows.

C. The Prosecution's Case.

6. On February 13, 1987, Petitioner—who was then a Kern County Sheriff's Deputy—was arrested and charged with the murder of Tracie Clark. Following his arrest, Petitioner was interrogated repeatedly, over a number of days, by investigators from the Sheriff's and District Attorney's offices. He immediately admitted killing Ms. Clark, and his statements to the investigators formed the crux of the prosecution's case regarding the Clark killing.

(. . . continued)
otherwise indicated.

7. In those post-arrest statements, Petitioner said that he had picked up a prostitute—Ms. Clark—on Union Avenue in Bakersfield (a locale often used as a meeting place for prostitutes and their customers) in the early morning hours of February 8, 1987. Petitioner was driving his (recently purchased) light-colored Ford pickup truck with a camper shell, and after they negotiated the price and terms of her sexual services, Petitioner drove Ms. Clark out into the countryside. When they reached a spot where he thought they would not be seen, Ms. Clark partially undressed and began performing fellatio on Petitioner.

8. Petitioner told the investigators that, during the sexual act, Ms. Clark stopped and demanded more money. An argument ensued, and Ms. Clark physically attacked him, first with her hands, and then feet—all the while "yelling and hollering at him." Petitioner reached under his seat and took out a gun that he kept there, thinking the sight of it would discourage Ms. Clark's attacks. Instead, she just kept coming, and the gun went off accidentally, wounding her.

9. According to what he told the investigators, Petitioner then started to drive back to town, trying to persuade Ms. Clark to calm down. She kept screaming at him, though, so he stopped the truck, opened the passenger side door, and literally kicked her out of the cab. Petitioner also got out, and again tried to convince Ms. Clark that he would take her back to town, but she was very agitated and still screaming at him.

10. At that point—Petitioner told the investigators—he shot her again, and, realizing that she would turn him in and he would go to jail, he emptied the gun into her. Ms. Clark died, and Petitioner threw her body into an adjacent agricultural canal.

11. Petitioner returned to the scene the following day, but did not attempt to cover his tracks. The body was found that afternoon, and the police soon ascertained that Petitioner was the perpetrator. When he was arrested, Petitioner still had the death weapon in his truck.

12. A ballistics test indicated that the gun that had killed Ms. Clark—that is, Petitioner's gun—had been used in the killing of another Union Avenue prostitute the preceding year. The body of that victim, Janine Benintende, had been found floating in an agricultural canal at another locale, also outside of Bakersfield, on February 21,

1986. She had been killed some weeks earlier, shortly after she first arrived in Bakersfield.

13. On the strength of the ballistics evidence, Petitioner was also charged with Ms. Benintende's murder. There was no other physical or eyewitness evidence linking Petitioner to that crime, and—unlike the Clark killing, to which he immediately confessed—Petitioner refused to admit to killing Ms. Benintende.[3]

14. The remainder of the prosecution guilt phase evidence was largely devoted to proving that Petitioner had stolen the death weapon, some years earlier, from a convenience store at which he was ostensibly investigating a robbery in his official capacity.

D. The Defense.

15. At trial, Petitioner did not deny that he had killed Tracie Clark—although he did give an account very different from his taped confession in regard to how and why that killing occurred. The most important difference was that Petitioner did *not* kill Tracie Clark in an intentional effort to silence her as a potential witness against him, but rather fired the gun while in an utterly dissociative state of fear and confusion, brought on when he was unable to perform sexually and the victim (angry about how long the process was taking) taunted and then physically threatened him. According to the defense, Ms. Clark's insults and threats cracked open Petitioner's fragile shell of normality, and loosed the effects of Petitioner's childhood full of violent sexual abuse, leaving Petitioner actually unable to function as a rational person.

16. Thus, the theory of the defense was that Petitioner suffered from an extreme mental defect or illness that resulted from extensive and prolonged sexual and other physical abuse inflicted upon him as a child and that, as a result, Ms. Clark's conduct during their encounter provoked a mental condition in Petitioner such that he could not and did

---

[3]He first adamantly denied killing anyone other than Tracie Clark. As the interrogations continued and his mental state precipitously declined during his first week of incarceration, Petitioner gradually became willing to accept the explanation suggested by one of the investigators: that he might have killed Janine Benintende, but simply had no memory of it.

not form the *mens rea* requisite to render him culpable of murder in the first degree.[4] To the extent that Petitioner's confession suggested to the contrary, it was part of a calculated attempt on Petitioner's part to, in effect, commit suicide by confessing to capital murder.

17. The defense evidence consisted almost entirely of Petitioner's testimony and the expert evidence of three mental health professionals, who had examined or treated Petitioner in the year since his arrest. Petitioner's account of the Clark killing was similar to that which he told the investigators, until the point where the dispute broke out between the two of them.

18. What really happened after that, Petitioner said, was that he was unable to sustain an erection. Ms. Clark grew irritated and wanted more money. Petitioner, still unable to perform, felt "embarrassed, sort of crushed."

19. Ms. Clark became abusive, and accused him, in the most insulting terms, of being a homosexual. At that point (*before* any shots were fired), Petitioner opened the passenger door and pushed or kicked her out of the truck. Petitioner got out of the truck as well, hoping to calm her down. Instead, she kept coming at him, yelling, her finger pointed. He pulled his gun out of the truck and pointed it at her, thinking she would stop, but she did not. He was afraid of her, and (for reasons he did not understand) he felt threatened—and he shot her. Ms. Clark backed up against the embankment and he shot her again, five more times, killing her.

20. The mental health experts discussed in some detail the abuse Petitioner had suffered at the hands of a succession of sadistic and perverted step-fathers and boyfriends brought into the house by Petitioner's alcoholic mother. Based on his history, his account of the events surrounding the Clark killing, and their examinations of him, the

---

[4]As will be discussed in some detail, below, this theory regarding the Clark killing is apparent from the evidence presented and various remarks of trial counsel, but was never stated by trial counsel in a coherent or unified fashion. Moreover, trial counsel's presentation makes it impossible to be any more specific about his theory—either in regard to the mental disease or defect at issue or precisely which mental elements of the offense were missing.

mental health professionals concluded that Petitioner suffered from a "dissociative disorder, such that he was not in full control of his thoughts, feelings or behaviors." They opined that he could not and did not plan the killing of Tracie Clark, and that he was simply unable at that point to premeditate or deliberate.

21. As for the Benintende killing, trial counsel did not present any evidence and never settled on any theory of defense.

E. Prosecution Rebuttal.

22. The rebuttal case consisted almost entirely of evidence regarding events in 1983, when Petitioner was briefly removed from the sheriff's department on the basis of accusations made by a prostitute named Ellen Martinez, but was reinstated following an appeal hearing.[5]

F. Guilt Phase Verdicts.

23. On March 1, 1988, at the close of the prosecution's case in chief, trial counsel made a motion pursuant to Section 1118.1 for partial acquittal on Count 2. CT 502 *et seq.* On March 2, 1988, the trial court granted that motion and reduced the charge in Count 2 to second degree murder. CT 584.

24. The jury began deliberations in the guilt phase on March 14, 1988, and on March 16, 1988, the jury found Petitioner guilty of murder in the first degree as to Count 1 and murder in second degree as to Count 2; the jury also found the multiple murder special circumstance and the firearm use enhancements to be true. CT 594, 596-602.

G. The Penalty Phase.

25. Petitioner's penalty trial began on March 23, 1988. CT 681-82. The jury heard evidence on March 23 and March 24, and closing arguments were presented on March 28, 1988. CT 682, 689-92.

---

[5]The content and significance of the evidence concerning Ms. Martinez will be discussed in some detail in context of Petitioner's claims on habeas, *infra*.

26. The evidence presented at the penalty phase of Petitioner's case is fully described in the Opening Brief submitted in his direct appeal (AOB at 213-27), which is incorporated herein by this reference and to which the Court is respectfully referred. Further, specific facts from the trial record will be set forth below in this Petition, as pertinent to Petitioner's claims for relief. For the convenience of the Court, a brief summary of the penalty phase evidence follows:

27. The prosecution presented three matters in aggravation. The first consisted of the details of the incident concerning prostitute Ellen Martinez, who testified that Petitioner, while on duty as a Sheriff's Deputy, had rescued her from an attack by a knife-wielding customer, but had then told her to take off her clothes while he photographed her breasts and vaginal area. The second matter concerned a brutal attack on another prostitute, named Tambri Butler. Ms. Butler identified Petitioner as her attacker, and her testimony formed the centerpiece of the prosecution's case in aggravation. The third matter consisted of evidence that Petitioner had an automatic pistol in his truck at the time he was arrested.

28. All three of these matters will be set out in much fuller detail in the presentation of Petitioner's claims on habeas corpus, *infra.*

29. The defense case consisted of further psychiatric testimony regarding Petitioner's troubled history and mental problems including his inability to conform to the law and function normally, and lack of role models for normal behavior; the viewing of a videotape of Petitioner, discussing the Clark killing while under the influence of a clinically-administered drug known as sodium amytol; the testimony of family members who described Petitioner as a loving father, husband and brother; and the testimony of fellow law enforcement officers who described Petitioner as a conscientious, skilled deputy sheriff who performed his job well and was able to handle emotionally charged work situations.

30. To the extent the defense penalty phase evidence is pertinent to this Petition, it too will be set out in more detail, *infra.*

H. Penalty Phase Verdict.

31. The jurors began deliberations at 10:50 a.m. on March 28, 1988 and on the afternoon of March 29, 1988, they announced a verdict of death. CT 692-94.

I. Post-Trial Proceedings And Sentence.

32. On May 2, 1988, the trial court denied Petitioner's motion for new trial, and conducted an automatic penalty modification hearing pursuant to Section 190.4. CT 729; RT 5986-99. The trial court denied Petitioner's motion for modification and sentenced him to death on Count 1. CT 729. The court also sentenced Petitioner to spend from fifteen years to life in prison on Count 2, plus two years for the use enhancements, to run consecutive to the sentence for Count 1. The sentences on all the non-capital counts were stayed pending execution of the death sentence. CT 729, 735 *et seq.*

J. Automatic Appeal.

33. On January 13, 1989, Alan W. Sparer of Howard, Rice, Nemerovski, Canady, Falk and Rabkin, A Professional Corporation, was appointed to represent Petitioner in post-conviction proceedings and has represented him continuously since that date. Petitioner's automatic direct appeal is currently pending in this Court in *People v. Rogers*, Crim. No. S005502. Petitioner's Opening Brief (hereafter "AOB") was filed on November 4, 1997; Petitioner filed a Supplemental Opening Brief ("Supp. AOB") on November 12, 1998. Respondent's Brief ("RB") was filed on September 30, 1998, and Petitioner's Reply Brief ("ARB") was filed on September 13, 1999.

GROUNDS FOR ISSUANCE OF THE WRIT

I.

FIRST CLAIM FOR RELIEF (JUROR MISCONDUCT).

34. Petitioner realleges and incorporates by reference each and every allegation, whether factual, legal or otherwise, of Paragraphs 1-33, *supra*, and Paragraphs 81-589, *infra*, as if fully set forth herein.

35. The judgment rendered against Petitioner is invalid, and his consequent imprisonment and sentence of death was unlawfully obtained in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1, Sections 1, 7, 13, 15, 16 and 17 of the California Constitution, and related provisions of California law in that Petitioner's trial was tainted by substantial and prejudicial juror misconduct as more fully set forth in this First Claim for Relief.

A. Summary Of Claim.

36. "We begin with the general proposition that one accused of a crime has a constitutional right to a trial by impartial jurors. The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." *In re Hitchings*, 6 Cal. 4th 97, 110 (1993) (citations and internal quotation marks omitted). As this Court recently summarized:

> "a direct violation of the oaths, duties and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on *voir dire*, consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors . . . is called juror misconduct. A sitting juror's involuntary exposure to events outside the trial evidence, even if not 'misconduct' in the pejorative sense, may require similar examination for probable prejudice. Such situations may include attempts by nonjurors to tamper with the jury, as by bribery or intimidation." (*In re Hamilton*, 20 Cal. 4th 273, 295 (1999) (citations omitted))

37. Such misconduct on the part of one or more jurors raises a presumption that the criminal defendant was deprived of this fundamental constitutional guarantee. *Id.* at 296.

38. The instant case is remarkable in that Petitioner's trial was tainted by *each and every* form of misconduct identified in *Hamilton*—and by others as well. One regular juror has admitted regularly and systematically watching the pervasive television coverage of the trial and discussing the case with his wife—with whom he exchanged opinions regarding whether Petitioner should be executed. The same juror has also admitted to harboring firm beliefs about the death penalty (beliefs

apparently shared by his wife) that led him to the conclusion that Petitioner must die—*before the penalty phase of the trial even began.* Ex. 8 at 1:10-20 (Sauer Decl.). And while a candid disclosure of those beliefs certainly would have led to disqualification of service in Petitioner's trial, the juror instead concealed his biases during *voir dire.* RT 3310.

39. That same juror or another violated another of the standard admonitions by visiting the scene of the crime and other locales discussed at trial. This juror also held a private discussion with one of the other jurors regarding his illicit site visits, and other matters pertinent to the case, thereby violating yet another admonition (and provision of the Penal Code). Ex. 6 ¶¶2-4 (Morton Decl.).

40. Other jurors fell victim to the sort of improper outside influences that result in the non-pejorative form of "juror misconduct" mentioned in *Hamilton.* Jury foreman Bruce Wahl reported receiving a flood of calls from the news media at his home just after the guilt phase verdicts were announced, and before penalty consideration began. Ex. 10 ¶3 (Wahl Decl.). Both Jurors Debra Tegebo and Darryl Johnson were subjected to unwanted comments and discussions regarding the case at their places of work while the trial was still occurring. Ex. 7 at 1:16-2:7 (Tegebo Dec.); Ex. 9 ¶5 (Johnson Decl.).

41. Juror Tegebo details the comments she received from co-workers to the effect that she and the other jurors should "get it over with," find Petitioner guilty, and return a death verdict. Ex. 7 at 1:22-2:2 (Tegebo Decl.). Some of Juror Tegebo's co-workers also improperly reported passed on prejudicial "news items" about the case—such as the Sheriff's statement that Petitioner (a Sheriff's deputy at the time of his arrest) should be executed.[6] *Id.* at 2:3-7. As Juror Tegebo freely admits,

---

[6]Not surprisingly, the report received by Juror Tegebo was quite accurate: it appears that what the Sheriff actually said was that he did not care if David Rogers was put to death. RT 5734, 5736; Ex. 50 (KBAK videotape, No. 10 (3/23/88). Of course, what the Sheriff actually said is far less significant than what Ms. Tegebo heard and understood. Moreover, the manner in which the Sheriff's statement was rephrased and the interpretation given to that statement—*i.e.*, "that police . . . stick together, so when the Sheriff called for the death penalty, [her co-workers] thought (continued . . .)

the enormous community pressure that she felt as a result of these conversations, in combination with the ubiquitous local media coverage, made it very difficult for her to vote against death and for a verdict of life without the possibility of parole—although that was the verdict that she favored. *Id.* at 2:8-22.

42. This jury misconduct claim is thus extraordinary in another respect: it does not depend solely on the *presumption* of prejudice arising from the numerous forms of serious juror misconduct that indisputably occurred. Rather, there is incontrovertible proof of *actual* prejudice, including Juror Sauer's admission that he pre-judged the life-or-death penalty determination, and Juror Tegebo's frank complaint that outside pressures compromised her freedom to make that determination according to the dictates of her own conscience.

43. As a consequence of this juror misconduct, Petitioner was deprived of his federal constitutional rights to due process, a fair trial by an impartial jury, and a rational death determination, as well as numerous other constitutional guarantees, and the judgment entered against him cannot stand. *Parker v. Gladden*, 385 U.S. 363, 365-66 (1966); *In re Hitchings*, 6 Cal. 4th at 123.

B. Background.

1. The Declaration Of Juror Edward Sauer.

44. Edward Robert Sauer sat as a regular juror throughout Petitioner's trial, including both the guilt and penalty phases. Ex. 8 at 1:3-5 (Sauer Decl.). On September 23, 1996, Juror Sauer executed a brief declaration under penalty of perjury, in which he averred as follows:

> "I served as a juror in the trial of David Rogers for the crime of murder in 1988. The trial was televised, with cameras in the court room, and I saw some of the coverage on my television set at home. My wife and children were interested in the trial because I was on the jury. Also, my wife knew the

---

(. . . continued)
David Rogers must really be bad"—underscores the fact that the Sheriff's actual statement had the same effect as if he had called for the death penalty outright.

lawyers and sometimes came to watch the trial during her breaks (she worked next door to the courthouse). We would watch the television coverage together. Sometimes I turned it on to see if they showed me. We get three local channels and I flipped back and forth to see the trial coverage. I never saw the jury, but I saw David Rogers and I heard the announcers talk about the case, although I don't remember what they said.

"I believe in the death penalty, and that if you kill someone, you should die. So after David Rogers confessed on the witness stand to killing that woman, I thought there was no point in us (the jury) being there. As my wife put it, it was a waste of the taxpayer's money." (*Id.* at 1:4-20)

2. The Declaration Of (Alternate) Juror Deborah Jane Morton.

45. Deborah Jane Morton served as an alternate juror during Petitioner's trial. Although she of course did not participate in the jury's deliberations, she did attend the entire trial and stayed with the regular jurors during all breaks, including meals. Ex. 6 ¶1 (Morton Decl.).

46. In a brief declaration, executed on October 5, 1999, Ms. Morton stated the following:

"Not long after the trial began, during a break in the guilt phase trial, I overheard two men who were regular jurors talking together. I [heard] one man tell the other that he had gone to the scene of the crime. I heard him say he had gone to the El Don Motel and had seen what room a woman victim involved in the trial had stayed in. The juror went on to say that he had driven out to the Arvin-Edison canal to 'see where he dumped the body at.' I recall he said the words, 'El Don' and 'Arvin-Edison canal' and 'where he dumped the body at.'

"I just kept on walking without looking at the two men or talking to them. I knew none of the jurors were supposed to go inspect the scene of the crime, but I didn't want to confront them or cause trouble.

"The man who said he had driven to the scene was not very tall. He was under six feet, thickly built, with dark hair. I cannot recall his name. He might have been a 'blue-collar' worker of some sort, such as construction." (*Id.* ¶¶2-4)

47. Of the five men who served as regular jurors in this case, Ms. Morton's description of the errant juror most closely resembles Edward Sauer.[7] Ex. 2 ¶26 (Ermachild Decl.).

3. The Declaration Of Juror Debra Tegebo.

48. Juror Debra Tegebo executed a declaration under penalty of perjury on April 4, 1998. In the most pertinent portions of that declaration, Juror Tegebo stated as follows:

> "During the trial, I made every effort to avoid the media coverage about the case. When a story about the case came on television, I would get up and leave the room, and I did not read the newspaper articles about it. The coverage was so extensive, however, that the whole community was discussing the case—including my colleagues at work.
>
> "Every Friday during the trial I would go to back to my place of work, and I also went to [my] office during lunch recesses and after court, late in the day. When I was in the office, my co-workers frequently made comments to me about the case. They knew that I was a juror on the Rogers trial, and several of them commented that David Rogers was guilty and should get the death penalty. They said things like: 'Why don't you just get it over with?,' and some of them talked about hanging David Rogers.
>
> "Through comments from my co-workers, I became aware that the Kern County Sheriff had called for the death penalty for David Rogers. My co-workers remarked that they expected that police would stick together, so when the Sheriff called for the death penalty, they thought David Rogers must really be bad.
>
> "Hearing all of this community opinion made it much easier for me to vote for death, and it would have been very difficult for me to vote for life without possibility of parole, even

---

[7]Juror Sauer admitted to Petitioner's investigator that he did in fact visit the scene, where he said he saw, *inter alia*, the victim's blood on the pavement. Juror Sauer said however, that his site visit did not occur during trial; his recollection was that he waited until the verdicts were in and the jury was released before his went to the scene. Accordingly, Petitioner's investigator did not attach any particular significance to Mr. Sauer's remarks about visiting the crime scene until much later, when she interviewed Alternate Juror Morton, who volunteered the information recounted in the text. Ex. 2 ¶¶25, 26 (Ermachild Decl.).

> though that was the sentence I would have preferred. [¶]. . . . I knew that there was tremendous pressure of public opinion about the case all over Bakersfield, and that any vote for less than a death verdict would subject me to a great deal of community disapproval." (Ex. 7 at 1:16-2:22 (Tegebo Decl.))

4. The Declarations Of Jury Foreman Bruce Wahl And Juror Darryl Johnson.

49. In his declaration, dated April 16, 1998, Jury Foreman Bruce Wahl reported the following: "On the day we reached the guilty verdict in the guilt phase trial, I was no sooner in the door of my house when my phone started ringing with radio, newspaper and television reporters trying to interview me." Ex. 10 ¶3 (Wahl Decl.). And in a declaration executed on that same date, Juror Darryl Johnson stated:

> "The Rogers trial was not in session on Fridays, so I went to work each Friday during the trial. My co-workers knew I was a juror on the Rogers case. Although I told them not to do so, my co-workers repeatedly tried to discuss the case with me.
>
> "On weekends during the trial I saw more Sheriff's cars drive by my car in Oildale than usual, and I assumed it was because I was serving on the Rogers jury." (Ex. 9 ¶¶5, 6 (Johnson Decl.))

C. The Constitutional Violations.

50. Juror misconduct, impinging on the defendant's right to be tried by an impartial jury, violates the jury trial guarantees of the Sixth Amendment to the United States Constitution (*see Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)) as well the due process guarantees of the Fifth and Fourteenth Amendments (*Irvin v. Dowd*, 366 U.S. 717, 722 (1961)), and Article I, Section 16 of the California constitution. *In re Hitchings*, 6 Cal. 4th at 110. In a case such as this, in which the defendant's life hangs in the balance, juror misconduct also violates the Eighth Amendment's prohibition on unreliable, arbitrary and biased penalty determination. *See Johnson v. Mississippi*, 486 U.S. 578, 584-85 (1988); *Zant v. Stephens*, 462 U.S. 862, 885 (1983).[8] While the various forms of

---

[8]Specific forms of misconduct may also implicate other federal and state constitutional and statutory rights, and are noted in connection with (continued . . .)

misconduct can vitiate a fair trial in a number of respects, the inquiry into prejudice always proceeds from the same baseline:

> "It is well settled that a presumption of prejudice arises from *any* juror misconduct. In any early case we said: 'For, when misconduct of jurors is shown, it is presumed to be injurious to defendant, unless the contrary appears.' We have often restated the presumption." (*People v. Honeycutt*, 20 Cal. 3d 150, 156 (1977) (emphasis added) (quoting *People v. Conkling*, 111 Cal. 616, 628 (1896)); *see Remmer v. United States*, 347 U.S. 227, 229 (1954))

1. Receiving News Media Accounts.

51. "It is well settled that it is misconduct for a juror to read newspaper accounts of a case on which he is sitting" (*People v. Honeycutt*, 20 Cal. 3d at 1108 (1990)), and obviously the same applies to viewing television or other coverage of the case. *People v. Zapien*, 4 Cal. 4th 929, 994 (1993); PENAL CODE §1122(a). Yet, by his own admission, Juror Sauer not only heard television coverage of the ongoing trial proceedings but spent his evenings actively seeking out all of the televised reports that he could find, changing channels from one local station to another to make sure he heard it all.[9] Ex. 8 at 1:9-13 (Sauer Decl.).

52. For her part, Juror Tegebo did her best to avoid the pervasive media coverage of the trial, but her co-workers were apparently determined that she learn of it, and told her of things they had heard on the news—most notably, the Sheriff's comments about the case. Ex. 7 at 1:16-2:7 (Tegebo Decl.). Despite her personal good intentions, Juror Tegebo's exposure to "news" about the trial also constituted "serious misconduct . . . regardless of whether the [exposure] was inadvertent or unintentional." *People v. Holloway*, 50 Cal. 3d 1098, 1110 (1990)

(. . . continued)
the discussion below of the several distinct, recognized forms of juror misconduct that infected this case.

[9]The extraordinary nature of Juror Sauer's efforts to violate the trial court's admonition is underscored by the fact that (as he testified on *voir dire*) he did not watch television very often prior to his service on the jury. RT 806.

(citing *People v. Andrews*, 149 Cal. App. 3d 358, 363 (1983)). In addition to the damage such exposure inflicts on the constitutional guarantees of due process and a fair jury trial, it also trenches upon the "rights to confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment." *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995).

53. It follows that prejudice is presumed, and in this case there is no way for the Respondent to meet its burden of rebutting that presumption of prejudice. *See People v. Andrews*, 149 Cal. App. 3d at 363-64. It is not possible now to reconstruct the many news accounts viewed by Juror Sauer—much less to assess the prejudicial, extraneous information contained in those accounts or the effect on that juror. However, even the very limited sampling of trial coverage that we have been able to reconstruct[10] demonstrates that the juror was likely exposed to extraordinarily prejudicial material.

54. To take one example: On February 23, 1988, toward the beginning of the guilt phase proceedings, station KERO aired a lengthy segment featuring the mother of victim Janine Benintende. Ex. 49 (KERO videotape, No. 3 (2/23/88)). The segment begins with a close-up image of a grieving, nearly distraught Rose Benintende; as she talks about her daughter, the story cuts to a vivid videotape of a murky canal, where a group of men are looking down at a mass of litter and garbage swirling in the water; the camera zooms in and the viewer sees that an

---

[10]Television station KGET—one of the three Bakersfield-area stations that regularly covered the Rogers trial—no longer has any record of the reports that it aired. Ex. 25 ¶4 (Bowe Decl.). The other two stations—KERO and KBAK—searched their archives and found the videotapes of *some* of the stories they aired, *without* the written narration by the "anchors" that accompanied those stores. Ex. 23 ¶¶2-4 (Trihey Decl.); Ex. 49 (KERO videotape); Ex. 24 ¶¶2-4 (Rosenfeld Decl.); Ex. 50 (KBAK videotape). In all, Petitioner has obtained some 24 videotape segments from KERO, of which 22 were apparently aired while the jury was empanelled (the remaining two being reports of the final death verdict). Approximately half of those stories contain "sound-over" reporting from a newsperson, while the others are bare videotape. KBAK has supplied some 13 videotape segments, of which only 5 were aired during the time that the jury was empanelled (the others being reports of pre-trial or post-trial proceedings or other events). Ex. 24 ¶¶3, 4 (Rosenfeld Decl.).

unrecognizable and bloated corpse—obviously that of Janine Benintende—is floating in the middle of the swirling garbage. The next image is a photo of a beautiful young woman (again, obviously Janine) standing on a beach while the wind whips her hair. The camera then returns to Rose, and then her husband, talking about Janine; about how they tried to help her with her drug problem; how they knew nothing of her prostitution. The video next returns to the news reporter, who intones:

> "Sometime in the coming weeks the jury inside this courtroom will render a verdict, and Rose Benintende says not only should that verdict be guilty but she says David Keith Rogers deserves the death penalty." (*Id.*)

Rose Benintende is then shown in extreme close-up, sobbing as she says:

> "He took the sunlight out of my daughter's eyes and I'm sorry but he should not be able to see the light either." *Id.*

55. If the outcome of Petitioner's trial had been the subject of a political campaign, it is hard to imagine how the prosecution could have come up with a more inflammatory—or more effective—advertisement for murder conviction and a death verdict. Of course, we do not know how many equally, or more inflammatory, stories were aired; indeed, we do not even know everything that was said in the stories for which we have videotape. We do know that the nauseating video footage of Janine Benintende's rotting corpse, floating in the canal, was used repeatedly. Ex. 49 (KERO videotape, No. 7 (3/1/88), No. 14 (3/29/88)); Ex. 50 (KBAK videotape, No. 1 (2/15/87)). Similarly, several stories featured a close-up of what appeared to be a pool of blood on the curb of the bridge where Tracie Clark was killed. Ex. 49 (KERO videotape, No. 11 (3/14/88), No. 17 (3/8/88)). And Rose Benintende had further opportunities to plead for David Roger's execution. Ex. 49 (KERO videotape, No. 5 (2/22/88)).

56. More subtle—but perhaps equally pernicious—were the stories in which news reporters clearly suggested that the prosecutor had demolished a defense witness on cross-examination (Ex. 49 (KERO videotape, No. 9 (3/7/88), No. 17 (3/8/88)); Ex. 50 (KBAK videotape, No. 8 (3/8/88))); where the prosecutor's most effective arguments were highlighted (Ex. 49 (KERO videotape, No. 10 (3/10/88), No. 23

(3/14/88); Ex. 50 (KBAK videotape, No. 7 (3/22/88))); and where the news reporter emphasized for the benefit of the viewers—including any juror who might be watching—that "in order to avoid the death penalty *the defense must prove there was no evidence of premeditation* in the [Clark] murder." Ex. 50 (KBAK videotape, No. 8 (3/8/88), No. 9 (3/9/88)). Nor would a juror forget the footage of the trial judge and Sheriff laughing as they amiably discussed the Sheriff's statement: "I don't care if he goes to the gas chamber . . . ." Ex. 50 (KBAK videotape, No. 10 (3/23/88)).

57. Moreover, news accounts that *are* in the record (mainly dating from the time before trial commenced) contain an abundance of wildly prejudicial material that, quite properly, was never submitted to the jury—often because it was simply untrue. Those accounts included assertions that a search of Petitioner's home had netted illegal drugs and syringes, leg irons and handcuffs, a "duffel bag of women's panties" and a cache of pornography described by the police as "'X-rated, heavyweight stuff." CT 532-33, 535, 546, 561. Petitioner was (anonymously) painted as a bad cop who regularly "hassled" women and "beat up" suspects, and who (while working in the jail) had beaten an inmate for requesting heart medication. CT 532-33, 539-40. More ominously, the news reports suggested that Petitioner might have killed *other* women besides the two he was charged with murdering (CT 531, 535), and that the prosecutor had evidence of Petitioner's "bizarre sexual rituals with other prostitutes." CT 560. The only reasonable inference is that some of these pejorative slurs—or other, equally damaging extraneous "facts"—were reiterated by the media in the accounts viewed by Juror Sauer during trial.[11]

58. The receipt of any unadmitted, prejudicial "evidence" through such improper means renders the presumption of prejudice conclusive. *People v. Hogan*, 31 Cal. 3d 815, 847 (1982).

---

[11]It bears noting that Juror Sauer claimed during *voir dire* that he had not seen or heard any of the pre-trial media accounts of the case. RT 806-07. Thus anything he heard in the media about the case would have been *during* the trial, when he was sitting as a juror.

59. But there is also at least one verifiable, concrete demonstration of prejudice arising from the jurors' improper acquaintance with media coverage in this case. Juror Tegebo admittedly (and Juror Sauer inferentially) learned of the "news" that "the Kern County Sheriff had called for the death penalty for David Rogers." Ex. 7 at 2:3-5 (Tegebo Decl.). The manifestly prejudicial nature of that information was summed up by Ms. Tegebo's co-workers, who "remarked that they expected that police would stick together, so when the Sheriff called for the death penalty, they thought David Rogers must really be bad." *Id.* at 2:5-7. As Ms. Tegebo explicitly states, this pernicious information necessarily made it easier for her (and other jurors who were exposed) to vote for the death penalty, and harder to vote against it. *Id.* at 2:8-11.

60. It cannot be assumed that the outside influence of the omnipresent media coverage of the case affected only Jurors Tegebo and Sauer. (Indeed, Jury Foreman Wahl has recounted phone calls from all sectors of the news media—and surely he was not the only juror that the reporters called—while Juror Johnson's declaration underscored the pervasiveness of the contemporaneous media coverage.) Once this Court has issued its Order to Show Cause, and Petitioner finally has access to the tools of discovery, we will certainly uncover further leakage and improper influence in this regard. However, the contacts between jurors and news accounts in the popular media which we have already documented are sufficient to demonstrate juror misconduct, giving rise to prejudice both presumed and irrebuttable.

2. Discussions Regarding The Case With Non-Jurors.

61. "Penal Code section 1122 commands that at each adjournment prior to submission the court must admonish the jurors that 'it is their duty not to converse among themselves or with anyone else on any subject connected with the trial . . . .'" *People v. Pierce*, 24 Cal. 3d 199, 207 (1979). "Violation of this duty is serious misconduct." *In re Hitchings*, 6 Cal. 4th 97, 118 (1993). By his own admission, Juror Sauer repeatedly committed precisely this form of misconduct by talking with his wife about the case throughout the pendency of the trial. "This misconduct also raises a presumption of prejudice." *Id.*

62. Again less blameworthy, but equally or more significant, were the (apparently one-sided) conversations between Juror Tegebo and her colleagues at work. As the Supreme Court summarized: "In a criminal case, *any* private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed prejudicial, if not made in pursuance of known rules of the court made during the trial, with full knowledge of the parties." *Remmer v. United States*, 347 U.S. 227, 229 (1954) (emphasis added).

63. The presumption of prejudice is again irrebuttable, and indeed prejudice is conclusively established, with regard to the interactions of both jurors. Juror Tegebo's declaration chronicles the intense pressure she received from her co-workers, which led her to believe that she would be subject to reproach and censure within her immediate environs, and throughout the larger community, were she to vote against the death penalty.[12] Far less was sufficient for the Supreme Court to find conclusive prejudice in *Parker v. Gladden*, 385 U.S. at 365-66 & n.3.

64. It is similarly impossible to minimize the potential effect on Juror Sauer's decision regarding the death penalty of his own wife's stated opinion that "it was a waste of the taxpayer's money" even to continue the trial after Petitioner admitted killing Tracie Clark. Ex. 8 at 1:16-20 (Sauer Decl.). As the Supreme Court said, "'it would be blinking reality not to recognize the extreme prejudice inherent' in such statements . . . ." *Parker v. Gladden*, 385 U.S. at 365 (quoting *Turner v. Louisiana*, 379 U.S. 466, 473 (1965)).

3. Unauthorized Site Visits And Private Conversation Among Jurors.

65. The jurors in this case were explicitly admonished, *inter alia*, that:

---

[12]It follows, *a fortiori*, that Juror Tegebo would have felt little latitude to vote for a guilt-phase verdict—such as second-degree murder in the Clark killing—that would have obviated death penalty consideration.

> "*you must not discuss the case with a fellow juror* until the case is finally submitted to you for your decision and only when all jurors are present in the jury room. You must not make any independent investigation of the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that *you must not on your own visit the scene.*" (CT 610 (CALJIC No. 1.03) (emphasis added))

66. It is clear that at least one of the jurors flagrantly violated this admonition by visiting the crime scene—and indeed several of the scenes mentioned in the evidence. Ex. 6 ¶2 (Morton Decl.). The same juror and another then compounded this misconduct by having a private conversation about the unauthorized site visits during a break in the proceedings. *Id.*

67. As the Court of Appeal summarized:

> "[T]he general rule is that a juror's unauthorized visit to the scene of the crime will constitute misconduct. [¶] Here, the juror was considering and discussing with the other juror 'evidence' other than that which was received at trial. Such 'evidence' cannot be part of the jury's deliberations. Thus we conclude there was juror misconduct." (*People v. Sutter*, 134 Cal. App. 3d 806, 819-20 (1982) (citations omitted))

68. Again, a juror's acquisition of pertinent information outside of trial proceedings offends not only due process and the right to a jury trial, but also trenches upon the "rights to confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment." *Lawson v. Borg*, 60 F.3d at 612. Such "[j]ury misconduct raises a presumption of prejudice and, unless the prosecution rebuts that presumption by proof that no prejudice actually resulted, the defendant is entitled to a new trial." *Id.* at 819 (citing *People v. Pierce*, 24 Cal. 3d at 207).

69. At this point we have only a fragmentary report regarding the improper site visits and the ensuing conversation between jurors—only enough to show that misconduct indeed occurred, and to invoke the presumption of prejudice. Until there is discovery as to what the errant juror saw and (equally or more important) what he *thought* he had discovered on his forays,[13] and until there is discovery of the full extent

---

[13]Mr. Sauer, for one, had good reason to believe that the crime scene (continued . . .)

of the conversation between the two jurors, the Respondent cannot rebut the presumption and establish a lack of prejudice.

70. At a very minimum, the juror's egregious and repeated violations, in conducting unauthorized site visits and in discussing these matters privately with another juror, calls into question his willingness and ability to provide Petitioner the fair and impartial hearing mandated by the Constitution. "'When a person violates his oath as a juror, doubt is cast on that person's ability to otherwise perform his duties.'" *In re Hitchings*, 6 Cal. 4th at 120 (quoting *People v. Cooper*, 53 Cal. 3d 771, 835-36 (1991)); *accord*, *People v. Nesler*, 16 Cal. 4th at 586. This is particularly true when, as in this case, the misconduct included providing the "forbidden information" to other jurors: "A juror's disclosure of extraneous information to other jurors tends to demonstrate that the juror intended the forbidden information to influence the verdict and strengthens the likelihood of bias." *People v. Nesler*, 16 Cal. 4th 561, 587 (1997).

71. This line of reasoning has particular force if—as it appears—the malfeasant juror was again Juror Sauer, for Juror Sauer's prodigious violations of his oath, of the court's admonitions and of California law

---

(. . . continued)
would yield vital information: The television news accounts that he so assiduously followed often pictured that locale—zooming in, for instance, on a pool of blood on the curb, while the reporter solemnly observed: "Exactly what happened at this murder scene is the key to whether David Keith Rogers could face the death penalty." Ex. 49 (KERO videotape, No. 11 (3/14/88)). And in fact, they physical evidence was of decisive importance in this case. The basic factual determination before the jury was: which of Petitioner's two accounts of Tracie Clark's shooting was accurate? (While the version he "confessed" to the police provided the predicate for a first degree murder finding, the account given by Petitioner to the mental health experts, and recapitulated at trial, was at worst consistent with a second-degree murder verdict, and hence inconsistent with death eligibility). As discussed in the briefs on direct appeal, and as will be discussed further in this Petition, physical evidence supporting (or appearing to support) one or the other of those versions could have made all the difference in the case. In that respect, this case is quite different from *People v. Sutter*, 134 Cal. App. 3d at 820-21, and the cases discussed therein, in which an illicit site visit could not possibly have affected jurors' consideration. *See People v. Holloway*, 50 Cal. 3d at 1110 (distinguishing *Sutter)*.

serve to demonstrate what his own statements confirm: that he held a strong bias in favor of convicting and executing David Rogers, based on pre-existing beliefs that he failed to disclose in *voir dire*.

4. Actual Bias And Concealment Of Bias On *Voir Dire*.

72. According to Juror Sauer's sworn declaration, he made his mind up about the outcome of this case before the penalty phase had even begun:

> "I believe in the death penalty, and that if you kill someone, you should die. So after David Rogers confessed on the witness stand to killing that woman, I thought there was no point in us (the jury) being there. As my wife put it, it was a waste of the taxpayer's money." (Ex. 8 at 1:16-20 (Sauer Decl.))

73. Two things are notable about the quoted statement. First, Mr. Sauer has admitted to yet another form of misconduct; second, he has provided conclusive proof that Petitioner was actually and prejudicially deprived of a fair trial and the related rights guaranteed by the United States Constitution. *See In re Hitchings*, 6 Cal. 4th at 121-23.

74. Petitioner never denied killing Tracie Clark. Thus Juror Sauer's stated belief, that "if you kill someone, you should die," absolutely ensured that at least one member of the jury was going to vote for guilt determination that made Petitioner death-eligible, and for the death sentence itself.

75. While of course Juror Sauer was entitled to his pro-death penalty opinions, Petitioner was also entitled to know about those beliefs before Mr. Sauer was selected to serve on the jury. In fact, Mr. Sauer was specifically asked by the trial court, on *voir dire*, whether he held any such pre-existing opinions about the death penalty, and he specifically denied them:

> "[The trial court]: Do you entertain such a conscientious opinion concerning the death penalty that if we ever get to that point you would automatically vote for a verdict of death and under no circumstances ever vote for a verdict of life imprisonment without the possibility of parole?
>
> "[Juror Sauer]: No.

"Q: So, I gather, sir that you are one of those neutral people on the issue of punishment in this case who would want to hear the evidence. You are not inclined to vote one direction or the other right now?

"A: Right, yes.

"Q: And I take it that the issue of the death penalty has not had a high profile in your thinking or in your conversations with people that you have no strong feelings one way or the other?

"A: No." (RT 3310-11)

76. Contrary to what he told the trial court, however, Juror Sauer was *not* one of those "neutral people on the issue of punishment . . . who would want to hear the evidence." He had a strong, pre-existing view about the matter that guaranteed that—if Petitioner confessed to homicide— he would "automatically vote for a verdict of death . . . ."

77. In a word, Juror Sauer was biased. "An impartial juror is someone 'capable and willing to decide the case solely on the evidence' presented at trial." *People v. Nesler*, 16 Cal. 4th at 581 (citations omitted). "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Id.* at 580 (citations and internal quotation marks omitted).

78. There can be no doubt that Mr. Sauer would have been excused from serving on the jury in Petitioner's case if he had honestly stated his views when asked on *voir dire*. His failure to do so constituted misconduct:

"Under California law, if a juror's partiality would have constituted grounds for a challenge for cause during jury selection, or for discharge during trial, but the juror's concealment of such a state of mind is not discovered until after trial and verdict, the juror's actual bias constitutes misconduct that warrants a new trial under Penal Code, section 1181, subdivision 3." (*Id.* at 581)

79. Moreover, the misconduct in this instance transcends any presumption of prejudice, for by its nature it demonstrates the actuality of prejudice. The juror's undisclosed, pre-existing views, which led him ineluctably to the conclusion that the trial was "a waste of the taxpayer's money," can only be described as prejudgment of the central issues in the case. *Id.* at 587-88 (discussing with approval *Province v. Center for*

Women's Health & Family Birth, 20 Cal. App. 4th 1673, 1678-80) (juror's view during trial that "the trial was a waste of time and the decision was clearcut" demonstrated prejudgment, to the prejudice of the plaintiff, requiring a new trial). Where such prejudgment occurs, the defendant is entitled to a new trial. *In re Hitchings*, 6 Cal. 4th at 122-23.

80. The many and egregious instances of juror misconduct and improper influence on jurors in this case, taken individually and cumulatively, were presumptively and irrebuttably prejudicial, and deprived Petitioner of rights guaranteed him under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and cognate provisions of state law, including (but not limited to): the right to effective assistance of counsel; the rights to due process and a fair trial, to testify or remain silent and to present a defense and to present all relevant evidence; the right to cross-examination and confrontation of witnesses; the right to a jury determination of every material fact; the right to compulsory process; the right to a reliable, rational and accurate determination of guilt, death eligibility and death-worthiness, free from any constitutionally unacceptable risk that those determinations were the product of bias, prejudice, arbitrariness or caprice *(Johnson v. Mississippi,* 486 U.S. 578, 584-585 (1988); *Zant v. Stephens*, 462 U.S. 862, 884-885 (1983)); the right to a trial free of intentionally, demonstrably or inferentially false inculpatory evidence, and the right to timely presentation and adjudication of the claims contained in the instant Petition. In addition, the State's actions (and omissions) violated Petitioner's federal due process rights to the proper operation of the procedural mechanisms established by state law to protect individual liberty. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *see also Board of Pardons v. Allen*, 482 U.S. 369, 373-381 (1987); *Vitek v. Jones*, 445 U.S. 480, 488-490 (1980); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Accordingly, the writ of habeas corpus should issue.

II.

SECOND CLAIM FOR RELIEF (UNLAWFUL SHACKLING).

81. Petitioner realleges and incorporates by reference each and every allegation, whether factual, legal, or otherwise, of Paragraphs 1-80, *supra*, and Paragraphs 98-589, *infra*, as if fully set forth herein.

82. The judgment rendered against Petitioner is invalid, and his consequent imprisonment and sentence of death was unlawfully obtained in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1, Sections 1, 7, 13, 15, 16 and 17 of the California Constitution, and related provisions of California law in that Petitioner's being displayed before the jury in shackles resulted in substantial prejudice as more fully set forth in this Second Claim for Relief.

A. Background.

83. When the Kern County authorities initially brought Petitioner to court they left him unshaven and dressed in a jail clothing—a pale blue jumpsuit—and they bound him in shackles and chains that were in obvious and prominent display. CT 11-13; Ex. 7 at 1:9-15 (Tegebo Decl.) Ex. 50 (KBAK videotape, No. 2 (3/3/87), No. 3 (2/18/87)). No prior hearing was held in regard to the dress or shackling of Petitioner, and it appears that no notice was given to defense counsel regarding the manner in which Petitioner would be presented.

84. Because this case received an enormous amount of publicity in Bakersfield and environs (*see* CT 531-68; Ex. 50 (KBAK videotape, No. 6 (3/19/87)) (noting, several months before trial began, that the case had already been "widely covered in the media"), the Kern County authorities' decision resulted in extensive media exposure featuring a slovenly and disoriented Petitioner, dressed as a prisoner, chained like an animal, and surrounded by armed deputies. Ex. 7 at 1:9-15 (Tegebo Decl.); Ex. 50 (KBAK videotape, No. 3 (2/18/87)).

85. Defense counsel promptly obtained an order requiring the authorities to dress Petitioner in civilian clothes for court appearances. *See* CT 11-12. The authorities nonetheless insisted on continuing to

chain and shackle Petitioner during his preliminary hearing. CT 13. On the first day of that hearing, March 16, 1987, defense counsel (citing his concern with media representations of Petitioner) moved,

> "that during the court proceedings that chains and shackles be removed from Mr. Rogers. I don't believe that he is a realistic threat to the community and court personnel or anyone else." (CT 11)

86. The Municipal Court denied the request to unshackle Petitioner, on the ground that the judge had engaged in a previously undisclosed, *ex parte* conversation with the Kern County Sheriff's Department deputy assigned to the court, who had asked that Petitioner remain shackled because "he [*i.e.*, the deputy] believes that the defendant represents a danger to himself and perhaps to others." CT 13.

87. Defense counsel objected and requested a hearing in the matter, at which the deputy, one Kurt Poeschel, was examined. Deputy Poeschel testified that he felt that "Mr. Rogers is a danger to the community." CT 14. When asked: "Do you have some basis for that opinion?," he responded: "No, sir." CT 15. The deputy went on to explain that, "based on my knowledge of the case, that Mr. Rogers might attempt to not only hurt himself, but you or one of my officers . . . ." *Id.* Deputy Poeschel admitted, however, that Petitioner did not appear "upset, agitated, or anything of that nature . . . ." CT 16. It was also established that there were eight armed Sheriff's Deputies providing security in that courtroom. CT 15.

88. The only reason Deputy Poeschel could give for his insistence on shackling Petitioner was that Petitioner had threatened to kill himself, and was on 24-hour suicide watch at the jail. CT 16. There were no reports of any actual suicide attempt, or any threats by Petitioner to kill (or harm) anyone else. CT 20.

89. The Municipal Court nonetheless ordered that Petitioner remain in shackles, pending further hearing on the matter, but ordered that the television camera recording the proceedings be turned off until the matter was resolved. CT 21. The following day, a defense investigator testified (without contradiction) that Petitioner had not engaged in violent behavior in the jail (CT 76), and defense counsel argued that there were less onerous alternatives to shackling. CT 79-80.

90. The court observed that "as a practical matter, I don't have any apprehension that Mr. Rogers is going to cause a disruption or seek to escape or seek to create any injury." CT 80. The court nonetheless denied the "request" to unshackle Petitioner. CT 81. The court also denied a defense request to bar cameras in court so long as Petitioner remained shackled. CT 82. Instead, the judge "directed" that news pictures of Petitioner "avoid focusing on the shackles," and that no pictures of him in shackles be "disseminat[ed]." CT 82. The judge promised to watch the news each night, to make sure there was compliance with his order. *Id.*

91. In the meantime, the damage was done: the first sight that at least one (and possibly several) jurors had of Petitioner was the television image of him, bound and shackled. Ex. 7 at 1:9-13 (Tegebo Decl.). As Juror Tegebo recalls that image: "He looked strange—deranged, almost. It left the impression that he [Petitioner] probably committed the crimes; he looked like he could be guilty."[14] *Id.* at 1:13-15.

---

[14]The extant videotapes of contemporary news coverage more than amply bear out Ms. Tegebo's impression. Ex. 50 (KBAK videotape, No. 2 (3/3/87), No. 3 (2/18/87)). For example, in a story aired on KBAK on February 18, 1997, Petitioner David Rogers is first pictured being led into court, looking wild-eyed, haggard and unshaven, in shackles, irons and a jail jumpsuit. The camera focuses on the armed deputies surrounding him, while the news reporter recounts that Petitioner had refused to eat in jail, and had told his jailer: "I can't, Jess, I killed her and I just can't make it." Ex. 50. (KBAK videotape, No. 3 (2/18/87)). To underscore the impact of the statement, the next image is those same words, highlighted, in the text of the preliminary hearing transcript. The report then shifts to the District Attorney who presents some of the case against Petitioner, followed by excerpts from Petitioner's statement to the police (which formed the crux of the prosecution case, and dramatic commentary (*e.g.*, "Rogers says he physically kicked the wounded girl out of the truck . . ."). The reporter then stages a "you are the camera" style re-enactment at the scene of the Clark killing, concluding with the statement that Petitioner "told the detectives that he intended to kill the women." *Id.* After noting that Petitioner had denied killing Janine Benintende, the reporter adds: "but a stolen gun links him to both crimes." *Id.* The report closes with the image, once again, of Petitioner, looking particularly craven and strange as he sits in court, shackled and chained, amidst his armed guards. Ex. 50 (KBAK videotape, No. 3 (2/18/87)).

B. The Constitutional Violation.

92. Both the federal and state constitutions require that the accused in a criminal case be free of chains, shackles, and all other physical restraints in the courtroom, unless and until there is a showing of manifest need for such restraints. *People v. Fierro*, 1 Cal. 4th 173, 218 (1991); *People v. Duran*, 16 Cal. 3d 282, 290-91 (1976); *People v. Harrington*, 42 Cal. 165, 167-68 (1871). Physical restraints imposed on the accused, without a determination of "manifest need," offend the due process and fair trial guarantees of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution (*see Holbrook v. Flynn*, 475 U.S. 560, 567, 570 (1986); *Illinois v. Allen*, 397 U.S. 337, 344 (1970); *People v. Duran*, 16 Cal. 3d at 290-91), and the correlative provisions of California law. *People v. Fierro*, 1 Cal. 4th at 219; PENAL CODE §688. The unwarranted display of the accused to the jury in identifiable jail attire is similarly offensive to the Fourteenth Amendment. *Estelle v. Williams*, 425 U.S. 501, 512 (1976). Although these rules have usually been invoked in situations that arose during the course of actual jury trials, this Court has recognized that the same principles apply to pretrial proceedings, including preliminary hearings. *People v. Fierro*, 1 Cal. 4th at 219.

93. The "manifest need" required to justify shackling[15] entails two requirements: (1) a prior determination that the defendant poses a credible threat of violence or other "nonconforming conduct"—such as unruliness or a planned escape (*People v. Hawkins*, 10 Cal. 4th 920, 943-44 (1995); *People v. Cox*, 53 Cal. 3d 618, 651 (1991)), and (2) a prior determination that no less onerous alternative could adequately address the demonstrated security problem. *People v. Duran,* 16 Cal. 3d at 290 (citing *Illinois v. Allen*, 397 U.S. 337, 344 (1970)); *accord, Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995) (and cases cited therein).

94. It is obvious that neither of those predicates was met in the instant case: the judge acknowledged that Petitioner had not threatened harm to others or shown any inclination to escape or engage in any other

---

[15]There simply is no justification for bringing a defendant to court in jail clothing, unless he himself has requested that he be so attired. *Estelle v. Williams*, 425 U.S. at 505.

unruly behavior. And there was no showing that the less onerous alternative already being employed—*i.e.*, the presence of eight armed Sheriff's deputies—was in any sense insufficient to meet any threat or disruption that Petitioner might realistically present.

95. Shackling is inherently prejudicial. *Duckett v. Godinez*, 67 F.3d at 748. Although the practice is pernicious for a variety of reasons (*see People v. Fierro*, 1 Cal. 4th at 219-20; *Duckett v. Godinez*, 67 F.3d at 747-48), the chief evil that results from the improper shackling (and other improper display) of defendants in court is the prejudicial effect that it has on jurors. *People v. Duran*, 16 Cal. 3d at 290 (citing *Illinois v. Allen*, 397 U.S. at 344). Conversely, unjustified shackling in pretrial proceedings has often been considered "harmless error" because jurors are not present, and the presumption of innocence and right to an impartial jury are thus unaffected. *Cf. People v. Fierro*, 1 Cal. 4th at 220.

96. In Petitioner's case, however, the ubiquitous nature of the pretrial publicity, including media coverage in the courtroom, ensured that virtually the entire jury pool was exposed to the damning image of Petitioner in jail clothes and shackles. The result was functionally the same as it in cases in which jurors are actually in court when a defendant is so displayed. As the Declaration of Juror Debra Tegebo demonstrates—and as the extant examples of television coverage confirms—the very dramatic and decisive first impression formed by jurors who viewed the pervasive media coverage was that Petitioner was a brutal and dangerous person and was presumptively guilty of any and all crimes ascribed to him.[16] *See* Ex. 7 at 1:13-15 (Tegebo Decl.); Ex. 50 (KBAK videotape, No. 3 (3/18/87)).

---

[16]The corrosive effect on the presumption of innocence was not limited to the question of whether he killed Tracie Clark—a fact freely admitted by Petitioner. Rather, he became presumptively guilty of everything of which he was accused—including premeditation and deliberation in the Clark killing and committing the Benintende killing (as to which the evidence was far less conclusive). Most importantly, the jurors became predisposed to view Petitioner as the sadist who perpetrated the rape and brutalization of Tambri Butler and the other uncharged offenses which formed the basis for the prosecution's case in aggravation, and which (according to the trial judge) led to the verdict of death. *See* RT

(continued . . .)

97. The egregious display of Petitioner in shackles, and in jail attire, in open court, implemented without advance hearing and without any show of manifest need at any time, deprived Petitioner of rights guaranteed him under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and cognate provisions of state law, including (but not limited to): the right to effective assistance of counsel; the rights to due process and a fair trial, to testify or remain silent and to present a defense and to present all relevant evidence; the right to cross-examination and confrontation of witnesses; the right to a jury determination of every material fact; the right to compulsory process; the right to a reliable, rational and accurate determination of guilt, death eligibility and death-worthiness, free from any constitutionally unacceptable risk that those determinations were the product of bias, prejudice, arbitrariness or caprice *(Johnson v. Mississippi,* 486 U.S. 578, 584-585 (1988); *Zant v. Stephens*, 462 U.S. 862, 884-885 (1983); the right to a trial free of intentionally, demonstrably or inferentially false inculpatory evidence, and the right to timely presentation and adjudication of the claims contained in the instant Petition. In addition, the State's actions (and omissions) violated Petitioner's federal due process rights to the proper operation of the procedural mechanisms established by state law to protect individual liberty. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *see also Board of Pardons v. Allen*, 482 U.S. 369, 373-381 (1987); *Vitek v. Jones*, 445 U.S. 480, 488-490 (1980); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Accordingly, the writ of habeas corpus should issue.

(. . . continued)
5995. As more fully discussed in the following sections of this Petition, the evidence regarding those uncharged crimes was far more marginal, for (as newly discovered evidence demonstrates) Petitioner in fact did not commit them.

III.

THIRD CLAIM FOR RELIEF (NEWLY DISCOVERED EVIDENCE AND USE OF FALSE EVIDENCE).

98. Petitioner realleges and incorporates by reference each and every allegation, whether factual, legal, or otherwise, of Paragraphs 1-97, *supra*, and Paragraphs 200-589, *infra*, as if fully set forth herein.

99. The judgment rendered against Petitioner is invalid, and his consequent imprisonment and sentence of death was unlawfully obtained in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1, Sections 1, 7, 13, 15, 16 and 17 of the California Constitution, and related provisions of California law in that Petitioner's conviction was obtained without the benefit of significant exculpatory information, later discovered, which was directly relevant to the central incident presented in aggravation at the penalty phase of the trial resulting in substantial prejudice as more fully set forth in this Third Claim for Relief.

100. The newly discovered evidence and the States use of false evidence deprived Petitioner of rights guaranteed him under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and cognate provisions of state law, including (but not limited to): the right to effective assistance of counsel; the rights to due process and a fair trial, to testify or remain silent and to present a defense and to present all relevant evidence; the right to cross-examination and confrontation of witnesses; the right to a jury determination of every material fact; the right to compulsory process; the right to a reliable, rational and accurate determination of guilt, death eligibility and death-worthiness, free from any constitutionally unacceptable risk that those determinations were the product of bias, prejudice, arbitrariness or caprice *(Johnson v. Mississippi,* 486 U.S. 578, 584-585 (1988); *Zant v. Stephens*, 462 U.S. 862, 884-885 (1983); the right to a trial free of intentionally, demonstrably or inferentially false inculpatory evidence, and the right to timely presentation and adjudication of the claims contained in the instant Petition. In addition, the State's actions (and omissions) violated Petitioner's federal due process rights to the proper operation of the procedural mechanisms established by state law to

protect individual liberty. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *see also Board of Pardons v. Allen*, 482 U.S. 369, 373-381 (1987); *Vitek v. Jones*, 445 U.S. 480, 488-490 (1980); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

A. Summary Of Claim.

101. Prostitute Tambri Butler testified at the penalty phase that she was sadistically raped by a man who forced her to submit by burning her with a stun gun and firing a pistol in front of her face; who proceeded to rape her anally and then compel her to perform fellatio on him; who robbed her and pushed her out of his moving truck; and who finally attempted to run her over before leaving her, wounded and distraught, in the bushes by the side of the road. In court, Ms. Butler identified Petitioner as the man who committed these unspeakable acts.

102. Although the jury had already convicted Petitioner of two murders, Ms. Butler's evidence was of a very different nature than anything they had heard before. Nothing about the two charged killings—as tragic as they were—suggested the sort of cruelty recounted by Tambri Butler. Indeed, Ms. Butler's story surely led the jury to engage in speculation about what *really* happened to Janine Benintende and Tracie Clark. The effect on the jury's penalty determination was summed by the trial judge, when he explained why he was refusing to modify the death sentence imposed on Petitioner:

> "I think that his actions with Tambri Butler shocked me almost more than any other case I have ever heard.
>
> "The use of a cattle prod or the taser or whatever you call it, and the firing of the shot across the bridge of her nose, and requiring her to engage in all of these various and sundry sexual activities, that probably *influenced the jury, in my view, and the court more than any other* because not only has it happened once with Janine Benintende, twice with Tracie Johann Clark; we know that it happened with Angela Martinez; we know that it happened with Tambri Butler.
>
> "How many more times did it happen? But even more importantly, how many more times in the future might it happen?" (RT 5995 (emphasis added))

103. It now appears certain that Petitioner was *not* the man who brutally attacked Tambri Butler. The jury's (and the trial judge's)

determination that Petitioner should be put to death was based on a factual premise that is demonstrably false.

104. Ms. Butler definitely and consistently described her attacker as having a bushy moustache, thick hair on his head and hair on his chest, and as driving a white pickup truck with no camper shell. The man had boasted of his two children (a boy and a girl) and his dog. He used a stun gun. Petitioner had never worn a moustache, and he has virtually no chest hair. He did not have a stun gun, and did not own a light-colored pickup truck until nearly a year *after* the attack on Ms. Butler—and the one he purchased always had a camper shell. Petitioner had no daughter and his two sons were nearly grown. Petitioner does, however, have a prominent tattoo on his right biceps, which was never mentioned by Ms. Butler.[17] Although some of these inconsistencies emerged at trial, Ms. Butler's convincing courtroom identification of Petitioner remained essentially unchallenged.[18]

105. Ms. Butler herself, however, "often worried over the years that I might have testified against the wrong man. I've often questioned how accurate my identification of [David] Rogers was . . . ." Ex. 16 ¶21 (Butler-De Harpport Decl.). Ms. Butler's concerns were well placed.

106. Only a few weeks after Plaintiff's trial, Michael Ratzlaff was arrested for committing a vicious assault on a different Bakersfield prostitute named Lavonda Imperatrice. Ex. 1 ¶¶8, 9 (Sparer Decl.). That assault was remarkably similar to the one perpetrated on Tambri Butler, including the use of a stun gun and a pistol, the enforced demand for anal sex, and the final brutal and menacing abandonment of the victim on a country road—as well as such details as where the victims were picked up and where the perpetrator drove them to commit the assaults.

---

[17]In her recent declaration, Ms. Butler states with certainty that her attacker did *not* have such a tattoo. Ex. 17 ¶2 (Supp. Butler-De Harpport Decl.).

[18]Trial counsel's failure to effectively challenge Ms. Butler's identification of Petitioner on the basis of facts already available to him, and counsel's concomitant failure to investigate the matter further, provide part of the foundation of Petitioner's ineffective assistance of counsel claim (Claim V(G), (K)-(O)), set forth in the text of this Petition, *infra*.

107. Investigation disclosed that—at all times pertinent to this case—Mr. Ratzlaff had a bushy moustache and thick hair on his head, had chest hair (and no tattoo), and drove a white pickup truck that closely resembled the one described by Ms. Butler. Mr. Ratzlaff was the father of two children—a young boy and young girl, and had a dog. In short: Michael Ratzlaff resembled Tambri Butler's description of her assailant in every way that Petitioner did not, and in almost every way that he did.[19]

108. Michael Ratzlaff had been identified as the perpetrator of a string of similar attacks on Bakersfield prostitutes, commencing before and ending after the attack on Tambri Butler. These attacks, and Mr. Ratzlaff's apparent role as their perpetrator, were well known to Kern County law enforcement authorities. Law enforcement's failure to disclose this information to Petitioner and his counsel forms the basis of Petitioner's claim of violation of his federal constitutional rights under the principles enunciated in *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, set out in Claim IV, *infra*.

109. Tambri Butler—now Tambri De Harpport, is no longer a prostitute and has been clean and sober for over a decade. In her appended declaration, Ms. Butler De Harpport reveals facts that she withheld in her testimony at Petitioner's trial: that she had seen Petitioner on television and learned of the other accusations against him before she identified him as the perpetrator; that she had been persuaded by the authorities that Petitioner David Rogers was indeed the man who attacked her; that she had received special treatment after testifying against Petitioner, and had been encouraged to leave the county. Ms. Butler De Harpport now believes that Michael Ratzlaff may have been the man who attacked her in 1986, and is "now more concerned than ever that I wrongly identified David Rogers as the man who attacked me." Ex. 16 ¶23 (Butler-De Harpport Decl.).

---

[19]The only respect in which Petitioner was a closer match was in his height: Ms. Butler thought her attacker was 5''6"-5'8" tall and Petitioner is 5'9" tall, while Michael Ratzlaff is apparently over 6 feet in height. The most logical explanation for the discrepancy is that most of the opportunity that Ms. Butler had to see her attacker came when he was sitting down in his truck, making it difficult to make an accurate estimate of height.

110. This newly discovered evidence renders Petitioner's death sentence fundamentally unfair and incompatible with the jury trial guarantee of the Sixth Amendment, the due process provision of the Fourteenth Amendment and the Eighth Amendment's prohibition on arbitrary and irrational capital punishment—both because the new evidence demonstrates that Petitioner was sentenced to death on the basis of "false testimony that could have effected the judgment of the jury" (*United States v. Young*, 17 F.3d 1201, 1203 (9th Cir. 1994) (quoting *United States v. Agurs*, 427 U.S. 97, 103-04 (1976))), and because the new evidence points unerringly to Petitioner's actual innocence of the uncharged crime used by the prosecution to obtain a death sentence. *Cf. Schlup v. Delo*, 513 U.S. 298, 314-16 & nn.28, 31 & 32 (1995); *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

111. The newly discovered evidence requires that Petitioner receive a new penalty phase trial because it "so clearly changes the balance of aggravation against mitigation that its omission 'more likely than not' altered the outcome." *People v. Gonzalez*, 51 Cal. 3d 1179, 1246 (1990). Similarly, Petitioner is entitled to a new penalty trial because "[f]alse evidence that is substantially material or probative on the issue of . . . punishment was introduced against [him] . . . ." PENAL CODE §1473(b)(1); *In re Hall*, 30 Cal. 3d 408, 424 (1981).

B. The Original Evidence.

1. The Assault On Tambri Butler.

112. Tambri Butler, who was then a prostitute and heroin addict, was walking on Union Avenue one evening in February, 1986, when a man stopped his truck and propositioned her for an act of prostitution. Ms. Butler agreed and got into the truck. RT 5779-81.

113. The man did not want to go to Ms. Butler's room so they eventually drove to a field near Cottonwood Road. RT 5781. Once they reached their destination, Ms. Butler and the man agreed on a "half and half" (oral copulation and intercourse) for $40, and Ms. Butler took off her clothes and performed fellatio on the man. RT 5782-83. They then had intercourse. RT 5783.

114. When after a while the man still had not ejaculated, Ms. Butler told him that he was "going to have to do something" or she

would charge more money. RT 5783-84. The man said "that is not what is going to happen," and insisted that they instead "do some more things." At that point Ms. Butler became "sort of disagreeable." RT 5784.

115. The man responded by pulling a stun gun from under the dash of the truck and firing it into Ms. Butler's neck, burning her and raising blisters. RT 5784-85. At the time of her testimony, two years after the event, Ms. Butler still had five or six scars from the burns. RT 5784.

116. After shooting Ms. Butler with the stun gun, the man demanded further sexual intercourse, but that still did not satisfy him. RT 5785. The man then pulled an automatic pistol from the glove compartment and demanded anal sex. When Ms. Butler would not agree, the man put the gun to her temple. RT 5785-86. Ms. Butler laughed at him and said he was not going to kill her. With that, the man placed the gun in front of her face and fired a shot out the open driver's side window. As it fired, the gun ricocheted back and hit her in the nose. The discharge also blinded her for a short while. RT 5786-88. After that, Ms. Butler did what the man asked: she engaged in anal intercourse and then once orally copulated him. RT 5788.

117. When the sex acts were over, Ms. Butler and the man got back into the truck and drove down White Lane toward Union Avenue. On the way, the man told Ms. Butler to empty her pockets. She had some money and tar heroin, both of which the man took. RT 5788-89. After making her tell him how much she needed the heroin the man gave it back, and then threw $20 of her money at her. RT 5789.[20]

118. Sometime before they reached Union Avenue, the man slowed down, opened the door and pushed Ms. Butler out of the truck. RT 5790. Ms. Butler fell into some weeds and bushes on the side of the road and from there saw the man slow down and put on the brakes. She thought he was about to back up, so she rolled deeper into the bushes. The man backed up, hit something while backing off the road, and then

---

[20]Ms. Butler did not say exactly how much money she had on her person besides the $40 the man had paid her. RT 5782, 5789.

spun out forward. RT 5790-91. Ms. Butler told the police that she knew that the truck would have hit her if she had not moved out of the way. Ex. 39 at 5 (Case report of Senior Deputy J. Soliz, Case No. KC87-08672, dated 2/27/87 ("Soliz Report")).[21]

2. Ms. Butler's Description Of Her Assailant.

119. In her trial testimony, Ms. Butler mentioned that her attacker had a moustache, and thick hair (RT 5798-99), and that he drove a white pickup truck. RT 5794. In an earlier interview with the Sheriff's and the district attorney's investigators, however, Ms. Butler provided considerably more detail about the man who brutalized her. Ex. 39 at 3-6 (Soliz Report).

120. Ms. Butler described her assailant as having brown hair, being between the ages of 45 to 48, around 5'6"-5' 8" tall and weighing 160 to 175 pounds. She said that he had a "thick bushy moustache" that was not too curly but not straight. The man had hair on his chest that was not too thick, but which spread across the front of his torso and around his belly. He wore boxer shorts, a brown belt with a gold buckle, and a gold watch, and he carried a brown leather wallet. He was not wearing a necklace or any rings. *Id.* at 3, 5-6.

121. Ms. Butler described the attacker's vehicle as a plain, white 1960's or 70's model pickup truck with gray interior and a bench seat with gray upholstery. The truck had air conditioning and a radio and there were rubber mats on the floor of the cab; it was not carpeted. The gear shift was on the column, and Ms. Butler recalled seeing a big set of keys in the ignition. Ms. Butler noticed a lot of trash inside the cab, as well as a silver 2-Cell flashlight, a big silver thermos, and a toolbox on

---

[21]The Soliz Report memorialized the interview of Ms Butler, conducted on February 18, 1987 by District Attorney's Investigator Tam Hodgson and Sheriff Department Investigators Mike Lage and J. Soliz. The report was among the documents in trial counsel's files (*see* Ex. 1 ¶6 (Sparer Decl.)) but trial counsel made little use of the information in it that pointed to someone other than Petitioner being the perpetrator of the Butler assault. Trial counsel's dereliction in this regard forms part of the basis for Petitioner's Claim V(G), (K)-(O), (Q), (S), (T), (W), and will be discussed further in that context in the text, *infra*.

the passenger side floorboard. She also remembered seeing a hook or a light behind the left side of the driver's side. In addition, she recalled that the cab had a large back window and that there were grayish sideboards on the truck bed. *Id.* at 6.

122. Ms. Butler told the investigators that while she and her assailant were driving to the remote spot, he mentioned that he was married and had two children, a boy and a girl, and a dog. She could not recall how old he said the children were, except that they were not babies. He also made a comment that one of the children was finishing school or that the other was getting ready for college. *Id.* at 3. The man was obviously drunk. Ms. Butler made a comment about his drinking and mentioned to him that there was a strong odor of alcohol. He told her that he had been to a few bars. *Id.* at 6.

123. Ms. Butler described four different occasions after the assault when she believed the same man was watching her; on at least one of those occasions, he was wearing a gun on his belt. *Id.* at 6.

3. Ms. Butler's Identification Of Petitioner As The Assailant.

124. Shortly after her attack, in February of 1986, Ms. Butler was jailed for being under the influence. RT 5791; *see also* Ex. 2 ¶6 & ME 15 (Ermachild Decl.). She noticed a Sheriff's deputy working in the booking room of the jail, and, sure that she knew him from somewhere, asked if he had ever arrested her. The deputy replied that he had arrested her in the town of Arvin.[22] RT 5791. Ms. Butler had never been arrested in Arvin; it struck her, however, that the deputy was the man who had assaulted her. RT 5791, 5801-02. Ms. Butler testified that she looked at the deputy and said "you son-of-a-bitch." He told her that she had better turn around and keep her mouth shut. RT 5792.

---

[22]Petitioner and Ms. Butler had indeed encountered each other in the law enforcement context: a Kern County Sheriff's Department citation (No. A168419) for drug use and trespassing, issued to Ms. Butler in Bakersfield on April 24, 1985, and signed by Deputy Sheriff David Rogers, is included in the Exhibits to this Petition. Ex. 2 ¶5 & ME 5 (Ermachild Decl.). The citation provides the most plausible explanation for Ms. Butler's belief that she had seen Petitioner before.

125. Later, while Ms. Butler was still in custody, she spoke with Deputy Jeannine Lockhart, a Kern County Sheriff's Deputy working on the women prisoner's deck of the jail, and indicated to Lockhart that she had been raped by a Deputy Sheriff who was then working in the jail. RT 5792, 5799. Deputy Lockhart showed Ms. Butler "Behind the Badge," a book of photographs of all the Sheriff's deputies, to see whether Ms. Butler could identify the deputy. Ms. Butler looked at the book for about an hour but, according to Deputy Lockhart, Ms. Butler told Lockhart that she did *not* see the man in the book. RT 5806; *see* Ex. 46 ("Behind the Badge"). Ms. Butler, however, testified at trial that she told Deputy Lockhart that she had seen "the face" in the book, but did not point the picture out to her. RT 5793, 5797.[23]

126. In early 1987, Ms. Butler was jailed on a new charge. On February 18, 1987—less than a week after Petitioner's arrest, and after Ms. Butler had been in custody on her charge for about a month—Sheriff's Department investigators Mike Lage and J. Soliz and District Attorney Investigator Tam Hodgson interviewed Ms. Butler. RT 5793, 5795, 5802, 5812. Ms. Butler told them what had happened to her, and from a group of six photographs of men, *all without moustaches,* she identified Petitioner as the man with a "moustache" and "thicker hair" who had assaulted her one year earlier. RT 5794, 5798, 5803; Ex. 41 (Trial Ex. 70; *see* RT 4630).

127. At trial, Ms. Butler again identified Petitioner as the man who assaulted her. RT 5780. She denied having seen photographs of Petitioner on television or in the newspapers before she spoke to the investigators about the assault, and first identified Petitioner as her assailant. RT 5795.

---

[23]On cross-examination, Ms. Butler testified that someone in the book looked like the suspect "because he had a moustache and thicker hair." RT 5798. This is confirmed by the Soliz' Report which recounts Ms. Butler's statement to the investigators that a photograph in the "Behind the Badge" volume Deputy Lockhart gave her looked a lot like the man who assaulted her because of the moustache and thicker hair. Ex. 39 at 8 (Soliz Report). Petitioner's photo in "Behind the Badge," however, clearly shows him clean shaven and balding. Ex. 46 at 90.

C. The Declaration Of Tambri Butler De Harpport.

128. At the time of her testimony in March, 1988, Ms. Butler was in custody for possession for sale of heroin, and scheduled to be released in August, 1988. RT 5778, 5801; Ex. 2 ¶14 & ME 120 (Ermachild Decl.). She was instead released on May 2, 1988—the same day that Petitioner was sentenced—and her early release was pursuant to a motion filed by Deputy District Attorney Sara Ryals, the prosecutor in Petitioner's case. *Id.* 15 & ME 117.

129. Ms. Butler was arrested again, later in 1988, for being under the influence of drugs. While she was out on bail, a man from the district attorney's office found her on Union Avenue (a Bakersfield prostitutes' hangout), and warned her that some of the police might hold it against her that she had testified against Petitioner. Ms. Butler recalls that he advised her to "leave California and never come back or I might wind up in a ditch, dead. He said a file would just drop behind a file cabinet and my name would never be mentioned in California again if I left the State." Ex. 16 ¶19 (Butler-De Harpport Decl.).

130. Ms. Butler took the advice and moved to Oregon, where she began a new life. She gave up drugs, got married, and has been clean and sober since 1989. *Id.* ¶20. However, Ms. Butler (now Tambri De Harpport) still bears the scars on her neck from her attacker's stun gun, and vividly remembers the assault she suffered in 1986. *See id.* ¶3; Ex. 17 ¶2 (Supp. Butler-De Harpport Decl.).

131. Ms. Butler De Harpport's current recollection of the assault closely tracks her statements to the police and trial testimony, with a few important additional details. She particularly recalls, her attacker's "thick, bushy moustache that grew long over his upper lip . . . because he wanted to kiss a lot and I found it disgusting." Ex. 16 at 1 ¶4 (Butler-De Harpport Decl.). She recalls seeing "a valise or suitcase with some clothing in it" in the truck. *Id.* at 2 ¶4. She also remembers that her attacker not only spoke of his two children, but showed her photos of a young boy and girl, who was perhaps "a little blond girl." *Id.* at 1 ¶4.

132. More important, however, are the hitherto undisclosed facts—the newly discovered evidence—set out in Ms. Butler-De Harpport's recent declarations, which persuasively impeach her identification of Petitioner at trial:

- Contrary to her trial testimony, Tambri Butler *did* see David Rogers pictured on television as Tracie Clark's killer, *before* she first identified him to the investigators (and later in court) as her attacker.[24] Ex. 16 ¶¶12, 16 (Butler-De Harpport Decl.).
- Tracie Clark was a friend of Ms. Butler's. *Id.* ¶10. Contrary to her trial testimony, Ms. Butler heard other women in the jail talking about David Rogers, and his role in killing Tracie Clark, prior to her testimony. *Compare id.* ¶¶11, 16 *with* RT 5803.
- During Petitioner's trial, but before she testified, Ms. Butler was visited by some men whom she recalls being from the District Attorney's office. While preparing her to testify, "one man told me that David Rogers had killed nine women they knew of, and probably more. They told me that Tracie Clark had been pregnant and her body had been mutilated. When I asked if the baby had been cut out of her, one man said, 'Use your imagination.' They convinced me that Rogers was guilty and that I should testify to put Rogers on death row to protect other women prostitutes." Ex. 16 ¶14 (Butler-De Harpport Decl.).[25]

133. All of these tainting influences had the predictable effect on Ms. Butler: she put aside any misgivings, identified Petitioner at trial, and suppressed the information that would have shown that her identification testimony was indeed tainted.[26]

---

[24]Ms. Butler was asked on cross-examination: "And it's true that you saw photographs of Mr. Rogers on television or in the newspaper before you talked to the police, did you not?" Her answer was: "No sir, none whatsoever." RT 5795.

[25]We note that there is nothing to support any of these inflammatory statements made by the District Attorney's investigators.

[26]As Ms. Butler De Harpport sums it up:

> "When I testified at trial, I was asked whether I had seen Rogers on TV before I identified him in the photo line-up. I knew there were things it wouldn't be good to say if I was going to help put Rogers on death row, so I said I had not seen Rogers on TV and that I had not heard other women discussing the case in the jail, even though that was not true. No one ever asked me to lie, but
> (continued . . .)

134. As noted above, in the intervening years Ms. Butler De Harpport has been in doubt about her identification of David Rogers. *Id.* ¶21. Having learned of the activities of Michael Ratzlaff, and after viewing Mr. Ratzlaff's photo and a picture of his truck (*id.* ¶23), Ms. Butler De Harpport has come to the following conclusion:

> "*I now believe my identification of Rogers was wrong.*" (*Id.* ¶1)

D. Petitioner David Rogers.

135. Petitioner David Rogers was 39 years old at the time of Ms. Butler's assault; he has brown eyes and brown hair, which was already thin and receding in 1986. He is 5'9" tall and weighed approximately 160 pounds prior to his arrest. Petitioner has almost no chest hair, but he has a very visible tattoo on his right bicep.[27] Ex. 3 ¶¶8, 9 & photos 1-4 (Jo Rogers Decl.); Ex. 4 ¶7 & photos 6, 9 (Bentrott Decl.); Ex. 48 (David Rogers personnel records).

136. Petitioner did not have a moustache at the time of Ms. Butler's attack—or at any other time relevant to this case.[28] RT 5909-10; Ex. 3 ¶7 & photos 1-4 (Jo Rogers Decl.); Ex. 4 ¶7 & photos

---

(. . . continued)
the men who interviewed me indicated a lot of things it would not be good to say on the stand." (Ex. 16 ¶16 (Butler-De Harpport Decl.))

[27]In a supplemental declaration, Ms. Butler De Harpport states with certainty that her attacker did *not* have a tattoo:

> "When I was raped and assaulted in 1986, I tried my best to notice and memorize everything I could about the man and his truck, so that I could identify him later. Because of this, I know that I would have noticed if the man had an identifying mark like a tattoo. As I recall, the man took off his shirt, so I saw most of his upper body. I did not see a tattoo anywhere on his body." Ex. 17 ¶2 (Supp. Butler-De Harpport Decl.)

[28]Although Petitioner was wearing a full beard (which he grew in jail) at the time of trial (*see* RT 5798; 5909; Exs. 49, 50 (videotapes)), the uncontroverted evidence is that he did not sport a moustache or other facial hair at all during the period pertinent to this case (i.e., the early- and mid-1980s) except for a two-week vacation when he wore what his wife referred to as "an Abe Lincoln type thing underneath the chin. It was shaved off [at the end of vacation] and he went back to work." RT 5909-10.

1-9 (Bentrott Decl.); Ex. 46 at 90 ("Behind the Badge"). Petitioner wore a simple gold wedding band on his left hand at all times. Ex. 3 ¶13 (Jo Rogers Decl.). He never wore boxer shorts, and did not even own a pair. *Id.* ¶12.

137. At the time of the attack on Tambri Butler, Petitioner's son Harold was 19 years old, and his son David Gene was almost 18. *Id.* ¶14. He had no daughter, and no young children. *Id.*

138. Petitioner has never owned a white pickup truck. Petitioner purchased a tan pickup *with a camper shell* from one Toby Coffey in December, 1987—the year *after* Ms. Butler was attacked. RT 4667-68 (Coffey testimony); RT 4674-75 (David Rogers testimony); Ex. 3 ¶10 (Jo Rogers Decl.). Petitioner did not own or use a white or light-colored pickup truck *prior to* his purchase of the tan pickup in December 1987. Ex. 3 ¶10 (Jo Rogers Decl.).

139. Although Petitioner owned several firearms, there was nothing (apart from the Butler assault) to indicate that Petitioner ever owned or possessed a stun gun, and the evidence shows that he in fact did not. Ex. 3 ¶11 (Jo Rogers Decl.).

E. The Convicted Rapist, Michael Ratzlaff.

140. While the details regarding Petitioner David Rogers are largely inconsistent with Ms. Butler's recollection of her assailant, they are quite consistent with what is known about another man who "dated"—and who violently abused—prostitutes from Union Avenue in Bakersfield.

1. Description Of Michael Ratzlaff, His Truck And His Weapons.

141. At the time of the Butler assault, Michael Ratzlaff was nearly 37 years old. He has brown hair and brown eyes and is 6'3" tall. His wife at that time (Helen Scoville) states that Mr. Ratzlaff had a thick, bushy brown moustache which he wore rather long over his upper lip during the entire time that they were married, from 1975 until they

divorced in 1989.[29] Ex. 20 ¶2 (Scoville Decl.); Ex. 45 at 2 (Kern County Sheriff's Department Incident Report, Case No. KC86-03667, dated 1/29/86 ("Winebrenner Report")). According to Ms. Scoville, Mr. Ratzlaff had a moderate amount of hair on his chest, not so thick that his skin could not be seen through it.[30] Ex. 20 ¶3 (Scoville Decl.).

142. Mr. Ratzlaff has two children, a daughter born in 1979 and a son born in 1982, making them approximately 6 and 4 at the time of Ms. Butler's assault. *Id.* ¶10. In 1986, Mr. Ratzlaff and his family had at least one dog—a German Shepherd. *Id.*

143. Mr. Ratzlaff's former wife also confirms the many similarities between the truck Ms. Butler described and Mr. Ratzlaff's truck and its contents. Mr. Ratzlaff drove a white 1977 Ford pickup, which he purchased new and drove continuously until he was arrested in 1988.[31] *Id.* ¶8. The truck had a radio, no carpeting and a large-sized rear window. *Id.* Ms. Scoville states—and photographs confirm—that the truck had a gray dashboard and that the seat fabric was a gray tweedy fabric. *Id.* ¶8 & photos 8-12 Photographs of Mr. Ratzlaff's truck also show worn grayish wooden side boards, just as Ms. Butler described. *Id.* & photos 8, 9 & 10.[32]

144. Ms. Scoville recalls that Mr. Ratzlaff kept his truck cluttered and left trash in it all the time. *Id.* ¶9. He had a large number of keys,

---

[29]Photographs of Mr. Ratzlaff clearly show that he wore a moustache during the period when Ms. Butler was assaulted (i.e., in February, 1986). Ex. 20 ¶2 & photos 2-3 (Scoville Decl.).

[30]Again, photographs provided by Ms. Scoville confirm this description. Ex. 20 ¶3 & photo 7 (Scoville Decl.).

[31]Kern County Sheriff Incident reports confirm that in January, 1986, one month before Ms. Butler was attacked in February, 1986, Michael Ratzlaff was the registered owned of a 1977 white Ford pickup, license No. 1G04774. Ex. 45 at 1, 3 (Winebrenner Report). He was driving that same white Ford pickup, license no. 1G04774, two years later in May 1988, when he attacked Ms. Imperatrice. Ex. 44 at 1, 3 (Kern County Sheriff's Department Supplemental Report, Case No. KC88-14076, dated 6/20/88 ("Imperatrice Report")).

[32]Ms. Scoville recalls that Ratzlaff had a camper for the truck, but that he rarely left the camper on when he drove to work or around town. He also had wooden slat sides that he sometimes put on the truck bed, but, mostly, he drove the truck with the bed empty. Ex. 20 ¶8 (Scoville Decl.).

many of them issued to him by his employer (the railroad), which he carried on a ring with his truck ignition key. *Id.* ¶5. Ms. Scoville also recalls (consistent with Ms. Butler's description) that Mr. Ratzlaff owned a silver-colored stainless steel Thermos approximately 1 foot tall that he took to work everyday, and that he also carried a toolbox in the interior of the truck. He kept the Thermos, the toolbox and a leather valise in the cab of his truck, on either the floor or behind the front seat.[33] *Id.* ¶9.

145. When the police came to interview Mr. Ratzlaff at his place of work in June 1988, (in connection with the Imperatrice assault), they found that he was carrying a .25 caliber automatic pistol in his right front pants pocket. Ex. 44 at 3 (Imperatrice Report). According to Helen Scoville, Mr. Ratzlaff's former wife, he carried a handgun almost all the time, usually in his pants pocket. Ex. 20 ¶11 (Scoville Decl.).[34] Prostitutes who had the misfortune to make Mr. Ratzlaff's acquaintance throughout the mid-80s all were acquainted with the gun. Ex. 43 at 2-3 (Kern County Sheriff's Department Incident Report, Case No. KC88-14076, dated 5/21/88 ("Imperatrice Incident Report")); Ex. 19 ¶¶5, 6 (Shain Decl.).

146. A police search of Mr. Ratzlaff's pickup yielded a Nova XR500 stun gun, which was found in the glove box. Ex. 44 at 2-4 (Imperatrice Report); Ex. 30 at 115-17 (MRRT).[35] Once again, the

---

[33]As will be seen presently, this description of Mr. Ratzlaff's truck and its contents was also confirmed by several women he attacked during the period from 1985 to 1988, including Lavonda Imperatrice, Jeannie Shain, Deborah Castaneda, and Dealia Winebrenner.

[34]When Ms. Butler saw her assailant watching her a few days after the attack, she noticed that he was wearing a gun on his belt. Ex. 39 at 6 (Soliz Report).

[35]"MRRT" refers to the Reporter's Transcript on Appeal from Michael Ratzlaff's trial on charges stemming from the assault on Lavonda Imperatrice: *People v. Michael Ratzlaff*, No. F011926 (Cal. Ct. App.—5th Dist. March 29, 1990) ("Ratzlaff Court of Appeal Decision"). "MRCT" will refer to the Clerk's Transcript on Appeal from the same proceeding. The Court is hereby requested to take judicial notice of those records, and the Court of Appeal's opinion, pursuant to Evidence Code Sections 452 and 453.

women of the street who had "dated" Mr. Ratzlaff during the preceding years (*i.e.*, the mid-1980s) had specific, and often painful, memories of his stun gun. Ex. 19 ¶5 (Shain Decl.); Ex. 18 ¶3 (Castaneda Decl.); Ex. 43 at 2-3 (Imperatrice Incident Report); Ex. 44 at 5 (Imperatrice Report).

2. Michael Ratzlaff's Assault On Lavonda Imperatrice.

147. On the afternoon of May 21, 1988, Kern County Sheriff's Department Deputy B. Williams responded to a private residence on Porterfield Lane, where he found Lavonda Imperatrice, lying on a couch with dried blood about her lips, face, eyes and wrists. Ms. Imperatrice gave the deputy a detailed account of a vicious sexual assault she said had been committed by a brown-haired, brown-eyed man with a moustache, driving a white 1960s Ford pickup truck with a cluttered interior. Ex. 43 at 2-3 (Imperatrice Incident Report).

148. After an extensive investigation, Michael Ratzlaff was arrested on June 23, 1988, and charged with several felonies—including kidnapping, various forms of aggravated assault (including assault with a stun gun), sexual battery, robbery, attempted murder, and rape with a foreign object—committed in the course of the assault on Lavonda Imperatrice. Ex. 31 at 54 (MRCT). His trial on those charges commenced in Kern County Superior Court on February 7, 1989. *Id.* at 85-94. At that trial, Ms. Imperatrice testified as follows:

149. At approximately 12 noon on May 21, 1988, while she was working as a prostitute on Union Avenue, a man she subsequently identified as Michael Ratzlaff pulled up in a white Ford pickup and requested her services. Ex. 30 at 4, 13 (MRRT). They agreed on "a blow job" for $20. Ms. Imperatrice suggested they go to her room, but Mr. Ratzlaff did not want to go there. *Id.* at 5, 68. He offered her an extra $20 if she would go where he wanted to go, and she agreed. She got in the truck and they drove for 15 to 30 minutes out into the country. *Id.* at 6. Mr. Ratzlaff's breath smelled strongly of alcohol and he had a beer with him while he drove. *Id.* at 7.

150. Once they arrived at their destination, Ms. Imperatrice undressed and began performing oral copulation on Mr. Ratzlaff. *Id.* at 4-8. She did so for close to 15 to 20 minutes, but Mr. Ratzlaff did not

achieve an erection. She finally told him that she had to leave. He said he would pay her an additional $20 if she stayed, and she did. *Id.* at 8.[36]

151. After another 15 to 20 minutes Ratzlaff was still unable to achieve an erection and Ms. Imperatrice told him she had to get back to town. *Id.* at 9. When she said she could not stay longer he pulled out a gun and pointed it at her right temple. Ms. Imperatrice asked if it was real and Ratzlaff pointed the gun at a cup beside her leg on the floor of the truck and fired, blowing up the cup. *Id.* at 10-12.

152. Mr. Ratzlaff then told Ms. Imperatrice to hold out her hands; she did so and he placed plastic cuffs on her. *Id.* at 15. Mr. Ratzlaff told her to lay back, and he placed his fist in her vagina. *Id.* at 16-18. It was painful and Ms. Imperatrice cried out; Mr. Ratzlaff told her that if she kept crying he was going to stick the gun to her stomach and shoot her. *Id.* at 18. He twisted his fist in her vagina for two to three minutes. He then took his fist out and put it half-way up her rectum. *Id.* at 62-63.

153. Mr. Ratzlaff next told Ms. Imperatrice to stand up and try to urinate. *Id.* at 20-22. The gun was still in his hands. Ms. Imperatrice was unable to urinate, so Mr. Ratzlaff said he had something that would help her, and he pulled a stun gun from the top of the dashboard. *Id.* at 21. Ratzlaff told her to lay back against the truck and he placed the stun gun near her solar plexus and fired. *Id.* at 22-24. Ms. Imperatrice screamed in pain and asked him to stop. He told her to shut up; if she did not, he would take the other gun to her. *Id.* at 24-25. She stopped screaming and Ratzlaff told her to spread her legs open. She did so, and he stunned her near her vagina. *Id.* at 26-27.

154. At that point, Ms. Imperatrice started struggling with the plastic handcuffs and was finally able to slip out of them. *Id.* at 27-28. She came up trying to hit Mr. Ratzlaff between his legs. He grabbed her by the hair, called her a bitch and punched her in the mouth with his fist. *Id.* at 28-29. During this time, her assailant stunned Ms. Imperatrice again—five to six times in all. *Id.* at 32-33. He also hit her a number of times, but she continued struggling. *Id.* at 30-31.

---

[36]In the case of Ms. Butler's assault, the man also paid her an initial $20, then offered an additional $20 if she would stay longer than anticipated. Ex. 39 at 3-4 (Soliz Report).

155. Ms. Imperatrice finally gave up and told Mr. Ratzlaff: "If you are going to kill me . . . get it over with and do it now." He said he wasn't going to kill her, "I'm just going to do a few other things, and then I'll let you go." *Id.* at 31. Mr. Ratzlaff then had her sit on the ground and spread her legs open so he could photograph her. He took a Polaroid camera from the truck and took four or five photographs of her in different positions. *Id.*

156. After he finished photographing her, Mr. Ratzlaff handed Ms. Imperatrice her clothes and told her to run. She starting running, and he shot at her four times, then got in the truck and left. *Id.* at 33. Ms. Imperatrice ran to a nearby house and was helped by a man who called the Sheriff's Department. *Id.* at 33-34.

157. As a result of the blows to her face Imperatrice received from Ratzlaff, Ms. Imperatrice lost her front teeth. *Id.* at 39-40. She showed the jury her missing teeth, and marks on both of her wrists from the plastic handcuffs Ratzlaff placed on her. *Id.* at 40-41. Ms. Imperatrice also identified photographs taken on June 24, 1988, of stun gun burns on her stomach and leg she received from Ratzlaff on May 21, 1988. *Id.* at 44-46.

158. On February 14, 1989, the jury found Michael Ratzlaff guilty of false imprisonment with an arming enhancement, assault with a firearm, two counts of assault with a stun gun, sexual battery with a use of a stun gun enhancement, and assault by means of force likely to produce great bodily injury (with an arming enhancement). Ex. 31 at 95-113, 199-216 (MRCT); Ex. 30 at 256-64 (MRRT). On March 23, 1989, the trial court sentenced Mr. Ratzlaff to an unstayed prison term of six years. Ex. 31 at 230-33 (MRCT). On March 29, 1990, in an unpublished opinion, the Court of Appeal for the Fifth Appellate District affirmed the judgment and denied Mr. Ratzlaff's consolidated petition for habeas corpus. Ex. 29 at 6 (Ratzlaff Court of Appeal Decision).

3. Michael Ratzlaff's Other Assaults On Union Avenue Prostitutes.

159. Kern County law enforcement authorities had been watching Mr. Ratzlaff for quite some time, in connection with a string of similar assaults on Union Avenue prostitutes that commenced before the 1986

attack on Tambri Butler. Several of those victims were interviewed by the Sheriff's Department during the course of the Imperatrice investigation, and gave information that pointed unerringly at Mr. Ratzlaff as the author of that whole series of savage crimes.

a. The Assault On Dealia Winebrenner (January 29, 1986).

160. A few weeks before the attack on Tambri Butler—on January 29, 1986, at approximately 10 p.m.—Ms. Winebrenner was picked up by Michael Boyd Ratzlaff while she was soliciting for prostitution at Adams Street and South Union Avenue. Ms. Winebrenner recalls Mr. Ratzlaff as having sandy brown hair and a moustache, and standing about six feet tall. He was driving a white Ford pickup. They agreed upon a price for sex and drove to an area near Cottonwood Road. Ex. 22 ¶1 (Winebrenner Decl.); Ex. 45 at 2 (Winebrenner Report).

161. Ms. Winebrenner had dated Mr. Ratzlaff several times before without incident. On this occasion, however, Mr. Ratzlaff became upset when he was unable to obtain an erection. Ms. Winebrenner grew irritated and got out of the truck to leave. She told him that she had friends waiting for her, which infuriated him. He grabbed her by the throat and began choking her until she lost consciousness, her nose bled and she urinated on herself. Ex. 22 ¶2 (Winebrenner Decl.); Ex. 45 at 2 (Winebrenner Report).

162. When she regained consciousness, Ms. Winebrenner asked Mr. Ratzlaff why he had done that to her. He replied that she reminded him of something distasteful he had experienced in Vietnam. Ms. Winebrenner, afraid, offered him a free blow job if he would return her to Union Avenue. Eventually, he drove her to a convenience store where Ms. Winebrenner told a stranger named Allen Howard that she was having trouble with the man in the pickup. She asked Mr. Howard to take down the pickup license number; he did so and called the police. Ex. 22 ¶3 (Winebrenner Decl.); Ex. 45 at 2-3 (Winebrenner Report).

163. Sheriff's Deputy U. Williams interviewed Ms. Winebrenner at the store, and then radioed in a request for a motor vehicle printout of the license number Mr. Howard had copied. The deputy ascertained that

the 1977 Ford pickup was registered to Michael Boyd Ratzlaff, and then proceeded to Mr. Ratzlaff's home and spoke to him. Mr. Ratzlaff told Deputy Williams that he had picked up a hitchhiker and given her a ride to the 7-11, but Ratzlaff denied spending any time with her, paying her for any acts of prostitution, choking her or causing her any physical pain or damage. Deputy Williams took no further action. Ex. 45 at 3 (Winebrenner Report); *see* Ex. 22 ¶3 (Winebrenner Decl.).

164. When contacted by the police following the Imperatrice assault, Ms. Winebrenner confirmed that she had dated "Mike" in the white pickup several times. Ex. 44 at 5 (Imperatrice Report). He had taken photographs of her and had shown her a stun gun. *Id.* She recounted a story Mike had told her, about an incident when he had been drinking and was with a prostitute: he said that it had taken him too long to ejaculate, so he pulled a gun on the prostitute and "took what he wanted." *Id.* Ms. Winebrenner also told the detectives that Mike liked anal sex; that he dated several prostitutes in the Union Avenue area; and that he only became violent when he had been drinking. *Id.*

b. The Assault On Jeannie Shain (March 1988).

165. In the mid 1980's, Jeannie Shain worked as a prostitute in Bakersfield, first out of her family's home, then on Union Avenue. In 1984, when Shain was twenty years old, she met a man named "Mike" whom she "dated" over the next several years. Ex. 19 ¶1 (Shain Decl.).

166. Ms. Shain dated Mike sixty or more times during that period, and she came to know him well. Mike preferred to take her to a remote area rather than have sex in a motel room. Mike liked anal sex, but Ms. Shain refused to engage in anal sex and Mike never forced her to do so. *Id.* ¶¶1-3.

167. Ms. Shain described Mike as nice-looking, with brown hair and a big thick brown moustache. He was not fat, but he had a beer belly. He had some hair on his chest, but it was not so thick that you could not see his skin through it. Mike told Ms. Shain that he was married and had two children, that he worked for the railroad and that he had been in Vietnam. *Id.* ¶¶3-4.

168. Mike had a white Ford pickup; it was the only vehicle Ms. Shain ever saw him drive. The pickup had wooden side slats on the bed. The interior had a bench seat and there was always a lot of clutter in the truck. Ms. Shain never saw a camper on it. Mike always carried a large silver metal coffee Thermos in the truck, as well as a briefcase-type overnight bag with his clothes for when he was working at his job with the railroad. *Id.* ¶5.

169. Mike carried a stun gun in the truck that Ms. Shain saw many times. He also had a pistol; Ms. Shain and Mike fired it for target practice at least once. Mike kept plastic ties in the truck and he always carried a vial of prescription Valium in the glove box. *Id.*

170. On March 16, 1988, Ms. Shain was seriously attacked and injured by one of her customers. Medical records show that shortly before 9:30 p.m., on March 16, 1988, Ms. Shain was taken by ambulance to the emergency room of Kern Medical Center after she was beaten up and left on the floor of her motel room. Ms. Shain had a fractured jaw, which required surgery to repair, and she remained in the hospital for ten days. *Id.* ¶6; Ex. 47 (Shain medical records).

171. Ms. Shain recalls that, at the time of the attack she was living at the Topper Motel with her friend Rudi Lentz. She had plans to watch the country western music awards one evening with Mr. Lentz, Debra Lilly and another friend. Before that, she saw Mike and got into his truck. That is her last memory of that evening and most of the following ten days. She later learned that Rudi Lentz broke the door down to her room and found her, naked, bloody and injured. Mr. Lentz called an ambulance and the police, and Ms. Shain was taken to the Kern Medical Center. Her jaw was broken and metal plates were inserted on both sides of her jaw, where they remain to this day. Ex. 19 ¶6 (Shain Decl.); Ex. 47 (Shain medical records).

172. When Ms. Shain woke up after the attack, she had no memory of what had happened to her. The police and doctors thought she may have been pistol-whipped. Ms. Shain could not even remember who she had been with before the attack, but Rudi Lentz (among others) reported seeing Mike's truck parked in front of the motel room earlier and seeing Mike leave just before Mr. Lentz broke into Ms. Shain's room. *Id.*

173. Deborah Castaneda (also known as Debra Lilly) was living at the Topper Motel, in a room across from Ms. Shain's. Ex. 18 ¶¶1, 2 (Castaneda Decl.). Ms. Castaneda remembers that one evening Mr. Lentz dropped by and mentioned that Ms. Shain was in her room with "Mike." *Id.* ¶2. Ms. Castaneda looked out her door and saw a large white pickup truck parked outside Ms. Shain's room. She later saw the man Mr. Lentz called "Mike" drive off in the truck. *Id.* After the man drove off, Mr. Lentz went to Ms. Shain's room, and Ms. Castaneda heard him yelling. Mr. Lentz ran back to Ms. Castaneda's room and said that Ms. Shain was hurt. Mr. Lentz called an ambulance and she overhead him give the man's name, which she recalled was Mike "Ratcliff." Ms. Castaneda saw the police and an ambulance arrive, but she did not talk to them about what she had seen. Ms. Castaneda later went into Ms. Shain's room and saw that the bed was torn up; there was also blood all over the wall and a hole in the wall. *Id.*

174. The Bakersfield police officers investigating the case questioned Ms. Shain while she was in the hospital. Ex. 19 ¶7 (Shain Decl.). They told her that they believed that Mike was the man who had assaulted her and showed her a photo line up of men which included a photograph of Mike and a photograph of another customer of hers who worked for the Bakersfield Californian newspaper. *Id.* One of the policemen pointed to the photograph of Mike and told Ms. Shain that he was the one they thought had attacked her, but Ms. Shain told him that she knew Mike and Mike would never try to kill her. The police told Ms. Shain that they knew Mike worked for the railroad and that he had assaulted other women, including women in Fresno. *Id.*

175. The police said they wanted to arrest Mike and went so far as to pay for Ms. Shain to have two sessions with a hypnotist to see if Ms. Shain could remember anything about the attacker. Ms. Shain went for the sessions, but could recall nothing. *Id.*

176. Although Mike had been a regular customer of hers, Ms. Shain did not see him again after the attack. *Id.* Rudi Lentz, however, did encounter him once. Mike was in his truck on Union Avenue and picked up Mr. Lentz. Mike confessed to Mr. Lentz that he was the one who had assaulted Ms. Shain and asked Mr. Lentz to tell Ms. Shain that he was sorry he had hurt her and that he did not know

why he had done it. *Id.* ¶8. This news was distressing to Ms. Shain and she cried all day after hearing it. It then came back to her that her last memory before the attack was of seeing Mike and getting into his truck at the gas station across the street from the Topper Motel. *Id.*

c. The Assault On Deborah Castaneda.

177. In the mid 1980's, Deborah Castaneda was addicted to drugs and worked as a prostitute on Union Avenue in Bakersfield, where she went by the name "Debra Lilly."[37] Ex. 18 ¶1 (Castaneda Decl.). As noted, she lived in the Topper Motel, and was friendly with Jeannie Shain and Rudi Lentz. *Id.* ¶2.

178. Not long after the attack on Jeannie Shain, Ms. Castaneda met a man named Mike who hired her as a prostitute several times. Despite his name, and the fact that he drove a large white pickup, Ms. Castaneda did not at the time associate him with Ms. Shain's attack. *See id.* ¶3.

179. Mike was tall and good-looking and had a thick brown moustache and sandy brown hair. He drove a white pickup that was distinctive in some way—perhaps the back window. *Id.* ¶3.[38] Ms. Castaneda remembers that Mike carried tools in the truck. She also remembers that Mike was always drinking beer when she saw him. Mike told her that he was married. *Id.*

180. On one occasion, Mike picked up Ms. Castaneda in his truck and drove her out of Bakersfield, to a large empty field with a big tree.

---

[37]In 1990, following a series of arrests for prostitution and drug-related offenses, Ms. Castaneda was sentenced to Kern County Alcohol Center's Residential Drug Treatment Program for Women, at the time called Cedar Women's Center. She benefited immensely from that program and has remained clean and sober since then. Ms. Castaneda later became director of the same program to which she had been sentenced. For the past two years Ms. Castaneda has been the director of a 260-man housing unit in the Walden House Substance Abuse Treatment Facility at Corcoran State Prison. Ex. 18 ¶7 (Castaneda Decl.).

[38]Ms. Butler had commented that her assailant's truck had a large back window. Ex. 39 at 6 (Soliz Report).

Mike had been drinking and wanted intercourse and oral sex, but when he was unable to reach climax he demanded anal sex. *Id.* ¶4.

181. When Ms. Castaneda refused, Mike opened the glove box of his truck and showed her a stun gun. He threatened to sting her with it unless she continued to try to make him climax. He also threatened to kill her and hang her from the tree. *Id.* He then put his hands around her neck and choked her. Ms. Castaneda did not lose consciousness, but she was terrified. Mike was extremely agitated and anxious; he got out of the truck and walked back and forth yelling and screaming. Ms. Castaneda tried to calm him down, but it was only after hours of threats that he finally drove her back to Union Avenue. Despite what had happened to her, Ms. Castaneda needed money and so she continued to date Mike. *Id.*

182. Sometime after this, Ms. Castaneda was questioned by Kern County Sheriff Deputies about a man named Mike Ratzlaff who had assaulted another woman. *Id.* ¶6. Two deputies approached Ms. Castaneda on Union Avenue and showed her Polaroid photographs, which they said had been seized from Ratzlaff's truck. The pictures were of women, many of them beaten and bruised. The deputies showed the photographs to other women on Union Avenue, and there was a great deal of talk among women working on the street about the photographs and Mike Ratzlaff. *Id.*

183. Ms. Castaneda told the deputies that she knew the man in a white pickup with a stun gun, but she did not tell them about having also been assaulted by him.[39] *Id.* The deputies were the ones who told Ms. Castaneda Mike's last name. After learning Mr. Ratzlaff's name from the deputies, Ms. Castaneda talked to Rudi Lentz, who confirmed that the "Mike" that had dated Jeannie Shain was Mr. Ratzlaff. At that point, Ms. Castaneda realized that Michael Ratzlaff was the man who had attacked Ms. Shain and that *she* had been dating the same man. Ms. Castaneda never saw Mike Ratzlaff again. *Id.*

---

[39]As Ms. Castaneda recalls, she was addicted to drugs and did not want to get involved with the police. She also had previously tried to get help from the police after she had been attacked, but nothing was done about it. Ex. 18 ¶6 (Castaneda Decl.).

F. The Newly Discovered Evidence Requires That Petitioner Receive A New Penalty Trial.

184. "Fundamental principles of due process require a remedy by which a defendant can bring newly discovered evidence before a court to urge correction of an erroneous judgment." *People v. Martinez*, 36 Cal. 3d 816, 826 (1984). Thus newly discovered evidence is a well-recognized basis for relief on habeas corpus. *In re Clark*, 5 Cal. 4th 750, 790 (1993). However, the standard is high: "a criminal judgment may be collaterally attacked on the basis of 'newly discovered' evidence only if the 'new' evidence casts fundamental doubt on the accuracy and reliability of the proceedings. . . . [N]ew evidence should not disturb a penalty judgment unless the evidence, if true, so clearly changes the balance of aggravation against mitigation that its omission 'more likely than not' altered the outcome." *People v. Gonzalez*, 51 Cal. 3d at 1246 (quoting *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984)).

185. That high standard is readily met by the evidence set forth above.

186. Tambri Butler's testimony was not only the centerpiece of the prosecution's evidence in aggravation—it was, according to the trial judge, *the decisive evidence* presented at the penalty phase. RT 5995. Beyond painting Petitioner as the sadist who had tortured Ms. Butler, her testimony (as the trial court observed) served to suggest to the jury that Petitioner had also inflicted similar, unspeakable cruelties on Janine Benintende and Tracie Clark—and that he had done so to other victims as well. RT 5995. As such, it set him apart from others who take life without justification. The trial judge was surely right in suggesting that Ms. Butler's testimony had a determinative influence on the jury's penalty decision. At the very least, however, we know that it had just such an effect on the trial judge himself, when he denied Petitioner's request for modification of the death verdict. *Id.*

187. The "new evidence" discussed above persuasively demonstrates that Tambri Butler's evidence against Petitioner David Rogers was simply not true: *He was not the man who assaulted, raped and humiliated her.*

188. Using the approach outlined by the Court in *Hall*, we first focus solely on the evidence that was not available to trial counsel, even

if he had acted with reasonable diligence to discover it. *In re Hall*, 30 Cal. 3d at 419-20. Even putting aside the many facts known to trial counsel which he unaccountably failed to use to impeach Ms. Butler's testimony, and the other facts that he likely would have discovered through diligent investigation,[40] there remains more than enough "newly discovered evidence" to raise a doubt about Petitioner's culpability for the Butler attack. *See id.*

189. First, there are the previously undisclosed facts tendered by Ms. Butler De Harpport herself—including the fact that she had indeed seen Petitioner on television, identified as the killer of her friend Tracie Clark, *just the day before* she first picked his photograph from a lineup. To this is added the fact that the law enforcement personnel who prepared Ms. Butler's testimony told her lies about Petitioner—that he mutilated Ms. Clark, that he had killed at least nine other women—which "convinced [Ms. Butler] that Rogers was guilty and that [she] should testify to put Rogers on death row to protect other women prostitutes." Ex. 16 ¶14 (Butler-De Harpport Decl.). The result was a suggestive and unreliable in-court identification that would not have stood up, had the actual facts been known to the jury. *See, e.g., People v. Nation*, 26 Cal. 3d 169, 181-82 (1980).

190. The most dramatic new evidence, however, is the overwhelming evidence that Michael Ratzlaff was the actual perpetrator of the Butler assault. Unlike the Petitioner, Mr. Ratzlaff meets Ms. Butler's description of her assailant in a host of ways that is far too numerous and far too specific to be written off as coincidence: His long brown moustache and thick hair; the hair on his chest (and the lack of a

---

[40]The evidence traced above includes facts that were available to trial counsel, but were not effectively marshaled to impeach Ms. Butler's testimony (*e.g.*, the attacker's hairy chest; his talk of having a daughter; the fact that Petitioner did not own a white truck at the time of the attack), as well as other evidence that was available to trial counsel upon reasonable investigation (such as the proof that Deputy David Rogers—the Petitioner— had written out a citation to Tambri Butler a year before the attack, which would explain why she was sure she knew him). These matters will be explored more fully in the context of Petitioner's final claim, alleging ineffective assistance of counsel in the penalty phase. *See* Claim V(G), (K)-(O), (Q), (S), (T).

tattoo); his talk of a young son and daughter; his big, crowded keychain; his white Ford pickup truck with a big back window, weathered sideboards and gray upholstery; the tool chest, Thermos, and valise, and the cab strewn with litter—and of course, the ubiquitous stun gun and penchant for anal sex.

191. Perhaps the most persuasive new evidence lies in the parallels between the Butler assault and Mr. Ratzlaff's other documented attacks on defenseless women—attacks that began before, and ended after, Ms. Butler's ordeal occurred. Like Ms. Butler, all of the other victims were prostitutes, picked up by Mr. Ratzlaff on Union Avenue in Bakersfield, and taken out to the countryside. Ex. 18 ¶¶3-4 (Castaneda Decl.); Ex. 19 ¶¶1, 2 (Shain Decl.); Ex. 22 ¶1 (Winebrenner Decl.); Ex. 43 at 2 (Imperatrice Incident Report); *cf.* Ex. 39 at 2-3 (Soliz Report). Several of the other victims shared Ms. Butler's experience that their attacker was (in Ms. Butler's words) "as nice as he could be" (Ex. 39 at 3 (Soliz Report)), who talked openly about his family—until he abruptly turned into a violent sadist. Ex. 19 ¶¶2, 3 (Shain Decl.); Ex. 18 ¶3 (Castaneda Decl.).

192. All of the victims reported that their assailant was obsessed with anal sex (Ex. 18 ¶4 (Castaneda Decl.); Ex. 19 ¶3 (Shain Decl.); Ex. 44 at 5 (Imperatrice Report); *cf.* RT 5785-86 (Butler testimony); Ex. 39 at 4 (Soliz Report), and almost every one had unhappy experience with his weapons—the handgun he carried (Ex. 43 at 2-3 (Imperatrice Incident Report); Ex. 19 ¶¶5, 6 (Shain Decl.); Ex. 44 at 5 (Imperatrice Report); *cf.* Ex. 39 at 4 (Soliz Report); RT 5785-86 (Butler testimony)), and stun gun in his truck. Ex. 19 ¶5 (Shain Decl.); Ex. 18 ¶3 (Castaneda Decl.); Ex. 43 at 2-3 (Imperatrice Incident Report); Ex. 44 at 5 (Imperatrice Report); *cf.* Ex. 39 at 4 (Soliz Report). The interplay of those facts, however, goes beyond any possible coincidence. With both Ms. Butler and Ms. Imperatrice, he enforced his demand for sex by using his gun to fire "warning" shots in the close proximity of the reluctant object of his singular desire (RT 5786-88 (Butler Testimony); Ex. 39 at 4 (Soliz Report); Ex. 44 at 7 (Imperatrice Report); Ex. 30 at 10-12 (MRRT)), and with both of them he incorporated the stun gun as an instrument of torture *into the sexual assault itself.* RT 5784-85 (Butler testimony); Ex. 39 at 4 (Soliz Report); Ex. 43 at 3 (Imperatrice Incident

Report); Ex. 44 at 7 (Imperatrice Report); Ex. 30 at 21-27 (MRRT). Both women were then dumped like garbage on a rural road. RT 5788-91 (Butler testimony); Ex. 39 at 4-5 (Soliz Report); Ex. 43 at 3 (Imperatrice Incident Report); Ex. 44 at 7 (Imperatrice Report); Ex. 30 at 33 (MRRT). And in every case the attacker made credible—and gratuitous—threats on the victims' lives at some point before he finally left them alone.[41]

193. It is tempting but unnecessary to assert that the common features of the various assaults (and particularly the points of close resemblance between the attacks on Ms. Imperatrice and Ms. Butler) conclusively prove that Michael Ratzlaff was the true perpetrator of the crimes suffered by Tambri Butler. *See People v. Ewoldt*, 7 Cal. 4th 380, 393-94, 401-03 (1994). It is enough for purposes of this claim that we can confidently say of the newly discovered evidence, as follows:

> "Such evidence is amply sufficient to undermine the entire [penalty phase] case of the prosecution because it eviscerates the key trial testimony against petitioner and clearly implicates a different culprit." (*In re Hall*, 30 Cal. 3d at 421)

194. To reiterate the test articulated by this Court, the new evidence "so clearly changes the balance of aggravation against mitigation that its omission 'more likely than not' [would have] altered the outcome." *People v. Gonzalez*, 51 Cal. 3d at 1246. Ms. Butler's testimony is what made Petitioner appear to be something far worse than even a multiple murderer, and thus made the decisive difference to the trial judge and the jury. If the facts impeaching Ms. Butler's identification of Petitioner *and* the facts pointing to Mr. Ratzlaff as the actual perpetrator of that assault had been known, it is hard to believe that the prosecutor would even have put Ms. Butler on the stand. What is past conjecture, however, is that Tambri Butler De Harpport herself

---

[41]Ms. Butler's attacker seemed to try to run her over before he drove away (Ex. 39 at 5 (Soliz Report)), while Ms. Imperatrice's assailant forced her to run while he fired shots in her direction. Ex. 30 at 33 (MRRT). "Mike" told Ms. Castaneda that he would hang her from a tree (Ex. 18 ¶4 (Castaneda Decl.)), and choked Ms. Winebrenner until she completely lost consciousness. Ex. 22 ¶2 (Winebrenner Decl.). Ms. Shain has no recollection of what was said, but the fact is that she was very nearly beaten to death. *See* Ex. 19 ¶6 (Shain Decl.); Ex. 47 (Shain medical records).

would never again testify that Petitioner David Rogers was the man who assaulted her in 1986. Ex. 16 ¶¶1, 21-23 (Butler-De Harpport Decl.).

195. Petitioner is entitled to a new penalty phase trial on the basis of the newly discovered evidence presented herewith.

G. Petitioner Is Also Entitled To A New Penalty Trial Because The Death Verdict Was Obtained By False Evidence.

196. Petitioner is also, and independently, entitled to a new penalty phase trial on the ground that false evidence, which was material to the issue of punishment, was introduced against him. *In re Hall*, 30 Cal. 3d at 424.

197. Section 1473 of the Penal Code provides, in pertinent part, as follows:

> "A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:
>
> "(1) False evidence that is substantially material or probative on the issue of guilt or punishment was introduced at a person at any hearing or trial relating to his incarceration." (PENAL CODE §1473(b))

198. It is now absolutely clear that Tambri Butler's testimony against Petitioner was "false," within the meaning of the statute. *See In re Hall*, 30 Cal. 3d at 424. It makes no difference that only a portion of that testimony was *knowingly and intentionally* false, nor (conversely) does it matter that Ms. Butler honestly believed at the time that her identification of Petitioner as her assailant was correct. Nor does it matter whether the prosecutor or other law enforcement authorities knew that the evidence was false. "False evidence" need not be perjurious, nor need its falsity be known to the prosecutor, to require a reversal under Section 1473. *People v. Marshall*, 13 Cal. 4th 799, 829-30 (1996); *In re Hall*, 30 Cal. 3d at 324. And, as outlined in the preceding section of this Petitioner, it is clear that the evidence was "material" within the meaning of the statute, for it had a determinative impact on the penalty decisions of both the jury and the trial court. *Id.*

199. Both California law and the mandate of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution require that Petitioner receive a new penalty phase adjudication, free from the

distorting effects of the false evidence submitted at his trial. *Id.*; *see also United States v. Agurs*, 427 U.S. at 105; *United States v. Young*, 17 F.3d at 1203-04.

IV.

FOURTH CLAIM FOR RELIEF (PROSECUTION FAILURE TO DISCLOSE MATERIAL EVIDENCE).

200. Petitioner realleges and incorporates by reference each and every allegation, whether factual, legal, or otherwise, of Paragraphs 1-199, *supra*, and Paragraphs 217-589, *infra*, as if fully set forth herein.

201. The judgment rendered against Petitioner is invalid, and his consequent imprisonment and sentence of death was unlawfully obtained in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1, Sections 1, 7, 13, 15, 16 and 17 of the California Constitution, and related provisions of California law in that the State failed to disclose material, exculpatory evidence which was relevant to Petitioner's penalty phase trial resulting in substantial prejudice as more fully set forth in this Fourth Claim for Relief.

202. As discussed in Claim III, there is an abundance of newly discovered evidence demonstrating that Petitioner was *not* the man who committed the assault on Tambri Butler. However, while that exculpatory evidence is new to the Petitioner, a substantial part of it has been well-known to the State—and indeed the very law enforcement authorities who prosecuted Petitioner—for a dozen years or more.

203. The United States Supreme Court long ago spoke decisively on the prosecutor's duty to disclose exculpatory evidence.

> "'[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.' *Brady v. Maryland*, 373 U.S. 83, 87 (1963);[42] *accord*, *In re Brown*, 17 Cal. 4th 873,

---

[42]Although the Supreme Court suggested in *Brady* that a violation occurred only when the defendant had requested the favorable evidence from the prosecution (*id.*), both the Supreme Court and this Court have since made clear that the prosecution's "well established duty to disclose (continued . . .)

879-80, *cert. denied*, 119 S. Ct. 438 (1998). Under the rule enunciated in *Brady* and its progeny, a judgment must be reversed whenever the prosecution has failed to disclose exculpatory evidence and there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. '[A] "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' *United States v. Bagley*, 473 U.S. at 682. This test does 'not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . .' *Kyles v. Whitley*, 514 U.S. 419, 434 (1999) [emphasis supplied]. Rather, the issue is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" (*Id.* at 435; *see also In re Brown*, 17 Cal. 4th at 886-87)

204. In the preceding claim regarding newly discovered evidence, Petitioner has already shown that the information establishing Michael Ratzlaff as the true perpetrator of the Butler assault was plainly "material" under the foregoing definition.[43] For Petitioner it would likely have made the difference between life and a sentence of death.[44] It is equally plain that (with the effective assistance of trial counsel) Petitioner would have had enough information to undermine Ms. Butler's identification of him as her attacker—if only the

---

(. . . continued)
information materially favorable to the defense [arises], even absent a request therefor." *People v. Gonzalez*, 51 Cal. 3d 1179, 1260-61 (1990) (citations omitted); *accord*, *United States v. Bagley*, 473 U.S. 667, 683 (1985); *In re Brown*, 17 Cal. 4th 873, 879 (1998). In any event, on March 6, 1987, trial counsel in this case filed a motion for discovery requesting that the prosecution turn over all *Brady* material. CTS 930.

[43]For purposes of considering this claim, the facts and allegations set forth in Petitioner's newly discovered evidence claim (Claim III, *infra*) are incorporated by reference as if fully set forth herein.

[44]The test for "materiality" in the *Brady* context is the same one, enunciated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 694 (1984), that governs claims of ineffective assistance of counsel. *Kyles v. Whitley*, 514 U.S. at 827. This is also, apparently, the same standard by which this Court determines whether "newly discovered evidence" warrants a new penalty phase determination in capital cases. *People v. Gonzalez*, 51 Cal. 3d 1179, 1246 (1990) (*citing Strickland*, 466 U.S. at 693-94).

prosecution discharged its constitutional obligation to disclose what the police already knew about Mr. Ratzlaff before the penalty phase commenced and Ms. Butler took the stand.

205. As early as January, 1986—a year before Petitioner's arrest and more than two years before his trial—the Kern County Sheriff's Department had received first-hand information that Michael Ratzlaff—a brown-haired man with a moustache who drove a white pickup truck—had committed a violent assault on (at least one) Union Avenue prostitute. Ex. 22 ¶¶1-3 (Winebrenner Decl.); Ex. 45 at 1-3 (Winebrenner Report). By March 16, 1988, when Jeannie Shain was nearly beaten to death, the Bakersfield authorities were very well aware of Michael Ratzlaff and his predilection for assaulting women he found on Union Avenue. Indeed, Ms. Shain reports that it was the *police* who suggested to *her* that Mr. Ratzlaff was her attacker, and they even sent her to a hypnotist in the hope that she would be able to remember enough of the attack to identify him as such. Ex. 19 ¶7 (Shain Decl.); Ex. 47 (Shain medical records).[45] The authorities of course knew Mr. Ratzlaff's physical description, and his white pickup truck played prominently in their investigation of the Shain attack. Ex. 19 ¶5 (Shain Decl.); Ex. 18 ¶¶2-3 (Castaneda Decl.).

206. One week later—on March 23, 1988—the Kern County District Attorney put Tambri Butler on the stand at Petitioner's penalty phase trial to testify that she had been violently attacked some two years earlier by a brown-haired man with a mustache who drove a white pickup truck. *See* RT 5787. She asserted, without significant challenge, that her attacker was Petitioner David Rogers. Had the authorities disclosed to Petitioner and his counsel the information in their possession regarding the obvious alternative suspect in the Butler assault, there is at the least "a reasonable probability that . . . the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. at 433.

---

[45]Ms. Shain states that the police told her that "they knew Mike worked for the railroad, and that they knew he had assaulted other women. They said he assaulted women in Fresno too." Ex. 19 ¶7 (Shain Decl.).

207. Petitioner would have known, in general terms, that someone closely fitting Ms. Butler's description of her attacker had committed other such assaults on Union Avenue prostitutes. What is more important, any effective advocate would have immediately begun developing more evidence about that other suspect. As an obvious first step, counsel or an investigator would have talked to other Union Avenue prostitutes. Had anyone made such inquiries on Petitioner's behalf, he or she undoubtedly would have learned a great deal more about Michael Ratzlaff and his moustache, white truck, stun gun and violent attacks on prostitutes.

208. According to Ms. Butler, when she was working on the streets in 1986, there was already a lot of talk among the prostitutes of attacks by a man driving a white pickup. Ex. 16 ¶9 (Butler Decl.). By the time the police—in the person of Detective Fidler—began investigating the attack on Lavonda Imperatrice, less than two months after Ms. Butler's testimony (and Petitioner's death sentence) detailed information about Mr. Ratzlaff's activities was readily available. In just one trip to Union Avenue, Detective Fidler met "Debra Lilly" (Debra Castaneda) and another prostitute named Misty Gatewood. The detective told the women only that he was "investigating a case where a subject used a stun gun on a prostitute." Ex. 44 at 4 (Imperatrice Report). Providing no more information than that, Detectives Fidler and his partner learned a wealth of information that would have been enormously helpful to anyone investigating Ms. Butler's assault: that a man named Mike drove a white Ford pickup, liked to take prostitutes to a field in the Oswell and Highway 58 area, kept a stun gun in his truck and liked anal sex. They also learned that Mr. Ratzlaff had boasted of "get[ting] rough" with some "gal" who had "burned" him. *Id.* at 5.

209. Neither Ms. Castaneda nor Ms. Gatewood had any special relationship with law enforcement that would have given the police an advantage in obtaining information from them or would have prevented a private individual from obtaining the same information. Had someone developed that or similar information on Petitioner's behalf, Ms. Butler's testimony against Petitioner would have been neutralized (if it had been presented at all), and the prosecution's case in aggravation would have lost its shocking and powerful core.

210. To be sure, the prosecution could have put Ms. Butler on the stand anyway, and it did have other (if far less potent) aggravation evidence—chiefly Ellen Martinez's testimony that Petitioner took lewd photos of her after he and his partner rescued her from an attacker. "'But the question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same.'" *In re Brown*, 17 Cal. 4th at 890 (*quoting Kyles v. Whitley*, 514 U.S. at 453). Given the documented impact of Ms. Butler's testimony, and the great likelihood that an informed defense counsel would have been able completely to undercut that testimony, there is no reasonable basis for confidence that the jury would have returned a death verdict—or that the trial court would have let such a sentence stand—had the exculpatory information been timely disclosed.

211. In tendering this claim Petitioner need not, and does not, assert that the prosecutor in his case had personal knowledge of the information regarding Michael Ratzlaff; nor do we need to show that it was intentionally withheld by the District Attorney's office at large. "The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Brady v. Maryland*, 373 U.S. at 87; *In re Brown*, 17 Cal. 4th at 882. Thus "'[t]he duty to produce requested evidence falls on the state; there is no suggestion in *Brady* that different "arms" of the government are severable entities. "The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney."'" *Smith v. Secretary of Department of Corrections*, 50 F.3d 801, 824 n.35 (10th Cir. 1995) (*quoting Martinez v. Wainwright*, 621 F.2d 184, 186-87 (5th Cir. 1980) and *Barbee v. Warden*, 331 F.2d 842, 846 (4th Cir. 1964)); *accord, United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir. 1995). It follows that the scope of the State's duty to disclose encompasses not just exculpatory evidence in the prosecutor's possession, but also any such evidence in the possession of investigative agencies to which the prosecutor has reasonable access. *Kyles v. Whitley*, 514 U.S. at 437; *see also In re Brown*, 17 Cal. 4th at 879; *People v. Robinson*, 31 Cal. App. 4th 494, 499 (1995). As reviewed above, it is clear that law enforcement agencies, with whom the Kern County District Attorney's office

maintained intimate contact, had a substantial amount of evidence pointing to an alternative suspect in the Butler assault,[46] and that is sufficient to make out the instant claim.[47]

212. The prosecution's acquisition of exculpatory evidence also continued after Ms. Butler testified—as did its duty to disclose that evidence to Petitioner. "The duty to provide discovery is not limited to the time before trial; discovery is an ongoing responsibility, which extends throughout the duration of the trial and *even after the conviction.*" *People v. Kasim*, 56 Cal. App. 4th 1360, 1383-84 (1997) (emphasis added) (*citing People v. Garcia*, 17 Cal. App. 4th 1169, 1179 (1993) and *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992)); *accord, In re Pratt*, 69 Cal. App. 4th 1294, 1312 (1999). That duty is both a reflection of the prosecutor's own ethical obligations (*see Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976)), and a component of the due process and other constitutional guarantees outlined in *Brady* and its progeny. *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992).

213. Less than two months after Ms. Butler testified—and less than three weeks after Petitioner was sentenced to death—the Kern County Sheriff's Department began investigating Michael Ratzlaff as the likely perpetrator in the attack on Lavonda Imperatrice. *See* Ex. 43 (Imperatrice Incident Report); Ex. 44 (Imperatrice Report). As discussed above, the parallels between the Imperatrice assault and the attack on Tambri Butler were compelling, and Michael Ratzlaff fit almost exactly the description of Ms. Butler's assailant. It is indisputable that all of the pertinent facts were known to the Kern

---

[46]It bears emphasis that, unless and until Petitioner is permitted discovery, further investigation, and a hearing on the merits of this matter, we cannot and do not know just *how much* information regarding Mr. Ratzlaff was in the hands of the Kern County District Attorney, the Sheriff's Department, and the Bakersfield police at the time of Petitioner's penalty phase hearing.

[47]We note, however, that given the pervasive publicity given to this case—the capital murder trial of a man who was himself a Kern County Deputy Sheriff until he was arrested—it cannot reasonably be suggested that the significance of Ms. Butler's testimony went unnoticed by the local law enforcement officers who were keeping track of Michael Ratzlaff.

County District Attorney's office, which went on successfully to prosecute Mr. Ratzlaff for his crimes against Ms. Imperatrice.

214. At that point it should have been absolutely obvious that Michael Ratzlaff was an alternative suspect in the (by then well-publicized) attack on Tambri Butler. In failing to inform Petitioner of this information—which had become overwhelmingly exculpatory—the prosecution once again breached the constitutional obligations set out in *Brady* and its progeny. As a result, Petitioner lost the opportunity to commence his investigation of the matter in 1988 or 1989, when the evidence was still fresh and witnesses more available. Instead, Petitioner has sat on death row for an additional decade, waiting for the investigation to be completed and this issue to be raised on his behalf.

215. Finally, it appears that the prosecution also failed to tender Ms. Butler's criminal record to trial counsel, for use as impeachment evidence. Ex. 1 ¶7 (Sparer Decl.). As a result, Petitioner's counsel did not impeach Ms. Butler with the fact that she was actually in custody for possession of heroin for sale—a crime of moral turpitude, and an offense far more serious than the "simple possession" to which she admitted on the witness stand. For purposes of the Brady rule, the failure to disclose evidence that would impeach the credibility of a key prosecution witness is as thorough a violation of the State's constitutional obligations as any other suppression of exculpatory evidence. *United States v. Bagley*, 473 U.S. at 682; *Giglio v. United States*, 405 U.S. 150, 154 (1972). In this case, the effective impeachment of the prosecution's key penalty phase witness Tambri Butler, when combined with the other suppressed evidence we have described, would have utterly vitiated the prosecution's Butler aggravation evidence.

216. "'As outlined above, this 'favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *In re Brown*, 17 Cal. 4th at 891, *quoting Kyles v. Whitley*, 514 U.S. at 435 (remaining citations omitted). Accordingly, the State's repeated and continuing failures to disclose material, exculpatory evidence in its possession deprived Petitioner of rights guaranteed him under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and cognate provisions of state law, including (but not limited to): the right to effective assistance

of counsel; the rights to due process and a fair trial, to testify or remain silent and to present a defense and to present all relevant evidence; the right to cross-examination and confrontation of witnesses; the right to a jury determination of every material fact; the right to compulsory process; the right to a reliable, rational and accurate determination of guilt, death eligibility and death-worthiness, free from any constitutionally unacceptable risk that those determinations were the product of bias, prejudice, arbitrariness or caprice *(Johnson v. Mississippi,* 486 U.S. 578, 584-585 (1988); *Zant v. Stephens*, 462 U.S. 862, 884-885 (1983)); the right to a trial free of intentionally, demonstrably or inferentially false inculpatory evidence, and the right to timely presentation and adjudication of the claims contained in the instant Petition. In addition, the State's actions (and omissions) violated Petitioner's federal due process rights to the proper operation of the procedural mechanisms established by state law to protect individual liberty. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *see also Board of Pardons v. Allen*, 482 U.S. 369, 373-381 (1987); *Vitek v. Jones*, 445 U.S. 480, 488-490 (1980); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Accordingly, the writ of habeas corpus should issue.

V.

FIFTH CLAIM FOR RELIEF (INEFFECTIVE ASSISTANCE OF COUNSEL).

PART 1: THE GUILT PHASE OF TRIAL

217. Petitioner realleges and incorporates by reference each and every allegation, whether factual, legal, or otherwise, of Paragraphs1-216, *supra*, and Paragraphs 389-589, *infra*, as if fully set forth herein.

218. The judgment rendered against Petitioner is invalid, and his consequent imprisonment and sentence of death was unlawfully obtained in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1, Sections 1, 7, 13, 15, 16 and 17 of the California Constitution, and related provisions of California law in that Petitioner was denied the effective assistance of

counsel at his guilt phase trial resulting in substantial prejudice as more fully set forth in this Part 1 of the Fifth Claim for Relief.

219. The acts and omissions constituting ineffective assistance of counsel as severally described in each section below deprived Petitioner of rights guaranteed him under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and cognate provisions of state law, including (but not limited to): the right to effective assistance of counsel; the rights to due process and a fair trial, to testify or remain silent and to present a defense and to present all relevant evidence; the right to cross-examination and confrontation of witnesses; the right to a jury determination of every material fact; the right to compulsory process; the right to a reliable, rational and accurate determination of guilt, death eligibility and death-worthiness, free from any constitutionally unacceptable risk that those determinations were the product of bias, prejudice, arbitrariness or caprice *(Johnson v. Mississippi,* 486 U.S. 578, 584-585 (1988); *Zant v. Stephens*, 462 U.S. 862, 884-885 (1983)); the right to a trial free of intentionally, demonstrably or inferentially false inculpatory evidence, and the right to timely presentation and adjudication of the claims contained in the instant Petition. In addition, the State's actions (and omissions) violated Petitioner's federal due process rights to the proper operation of the procedural mechanisms established by state law to protect individual liberty. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *see also Board of Pardons v. Allen*, 482 U.S. 369, 373-81 (1987); *Vitek v. Jones*, 445 U.S. 480, 488-90 (1980); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

A. Failure To Move For Severance Of The Murder Counts.

220. In support of this claim Petitioner specifically incorporates by reference as if fully set forth herein, Section V of Petitioner's Opening Brief (AOB at 124-53), and Section VI of Petitioner's Reply Brief (ARB at 104-14).

221. Petitioner was charged in an information filed on April 1, 1987, with two counts of murder in violation of Penal Code Section 187. In Count one, Petitioner was charged with the murder of Tracie Clark on or about February 8, 1987, and in Count two he was charged with the

murder of Janine Benintende sometime between January 1 and February 21, 1986. CT 354.

222. Petitioner admitted that he shot and killed Tracie Clark, a prostitute whom he had picked up one early morning in February, 1987. In a lengthy pretrial confession and later at trial, Petitioner described picking up Ms. Clark on Union Avenue in Bakersfield, driving her to an isolated spot in the country and engaging in sex with her. Petitioner also described shooting Ms. Clark and disposing of her body in the Arvin Edison Canal near Hermosa Road. RT 4673-705 (taped confession); RT 5362-68, 5354-85 (testimony). The sole issue at trial was Petitioner's mental state at the time he shot Clark: Whether he intentionally, premeditatedly shot and killed Ms. Clark in order to prevent her from testifying against him, as he told the officers during his taped confession (RT 4685, 4704-05), or whether, as the defense argued, Petitioner could not and did not form the mental state requisite to render him guilty of first degree murder because of an extreme mental defect or illness resulting from childhood sexual and physical abuse.

223. The issues involved in the Benintende case were very different. Petitioner claimed to have no knowledge at all of the Benintende shooting. The officers who interrogated Petitioner following his arrest for the Clark offense asked Petitioner about possible other murders. Petitioner was initially adamant that he had killed no one else, but after the officers convinced Petitioner that he must have killed Ms. Benintende, and suggested that he may have blocked all memory of the event, Petitioner stated he could not remember anything about the Benintende killing. *See* Defendant's Trial Ex. H (2/14/87 interview with Soliz and Hodgson). At trial, Petitioner testified, "I have no memory of the Benintende homicide." RT 5388.

224. The case against Petitioner rested solely on evidence that bullets from Petitioner's gun purportedly matched those found in Ms. Benintende's body. No other physical evidence linked Petitioner to the crime. There were no witnesses to the Benintende offense; there was no apparent motive for the crime.

225. The extremely weak Benintende case became a certain conviction when the jury in that case was permitted to hear—without limiting admonishment or instruction—all of the evidence concerning

the shooting of Tracie Clark, to which Petitioner had freely confessed. Even the stronger Clark case was prejudiced by the joinder because the evidence of a second killing of a prostitute undermined much of the psychiatric evidence offered to explain the Clark shooting.

226. We have argued in our Opening Brief and Reply Brief that Petitioner's convictions must be reversed because the joinder of the Clark and Benintende offenses rendered his trial so grossly unfair that he was deprived of his constitutional rights to due process and a fair trial. AOB at 124-53; ARB at 104-14. While the statutory requirements for joinder were met in this case, and trial counsel failed to make any sort of timely severance motion in the trial court, and the trial court had no *sua sponte* duty to order severance. Nevertheless, appellate review is appropriate to determine whether an unfairness so gross has occurred as to deprive Petitioner of due process of law. AOB at 125-26.

227. Furthermore, the availability of a post-trial due process review does not detract from the fact that Petitioner's trial counsel rendered ineffective assistance when he failed to make a *pretrial* motion for severance. A competent lawyer would have recognized *before trial began* that joinder of the two murder charges would result in a fundamentally unfair trial. Penal Code Section 954 permits the trial court to order severance of counts where the interests of justice require that the counts be tried separately. "The severance provisions of section 954 reflect 'an apparent legislative recognition that severance may be necessary in some cases to satisfy the overriding constitutional guaranty of due process to ensure defendants a fair trial.'" *People v. Hawkins*, 10 Cal. 4th 920, 940 (1985) (quoting *People v. Bean*, 46 Cal. 3d 919, 935 (1988)).

228. Counsel should have filed a pretrial motion to sever and, if that were denied, attempted to limit the effect of the prejudicial joinder by requesting limiting instructions. *See* Claim V(E)(5)(a). Petitioner's trial counsel did neither, and such omissions clearly fell below the standard of conduct expected of reasonably competent counsel.

229. Had the court granted the motion, and the Benintende case been tried separately, it is reasonably probable that Petitioner would have been acquitted of that murder, if not of criminal responsibility for the Benintende offense altogether. As a result, Petitioner would have

been ineligible for the multiple murder special circumstance. Moreover, had the cases been tried separately, and the Benintende case tried first, there would have been no special circumstance, even if Petitioner were found guilty of second degree murder in the Benintende case and first degree murder in the separate Clark case.[48]

230. The trial court's failure to grant a timely severance motion in this case would have been an abuse of discretion violating Petitioner's right to due process because, as argued more fully in our Opening Brief and Reply Brief, the two offenses were not cross-admissible. Evidence of the Benintende killing would not have been admissible in a separate trial regarding the death of Tracie Clark, since it was not material to any fact "actually in dispute" in that case. There was also no basis upon which evidence of the Clark offense would have been admissible in a separate Benintende trial. Although evidence of other crimes may be admissible to prove intent or identity (*Williams v. Superior Court*, 36 Cal. 3d at 449), and the central issue in the Benintende case was identity (Petitioner denied any knowledge of that earlier killing), evidence of the Clark offense did not establish identity through any legitimate means. It was Petitioner's ownership of the murder weapon, not his use of it in

---

[48]Petitioner's death eligibility was based on the fact that he was alleged to have committed two murders, which gave rise to two possible special circumstances—that of a previous murder conviction (PENAL CODE §190.2(a)(2)), and that of multiple murder (*id.* §190.2(a)(3)). *See* AOB at 145-47. If the Benintende and Clark cases had been tried separately, neither the multiple murder nor the previous murder special circumstance could have been alleged in the first case prosecuted: the multiple murder special could not have been charged if the cases were severed (*see Williams v. Superior Court*, 36 Cal. 3d 441, 454 n.11 (1984)), and the prior murder special applied only to a "defendant [who] was convicted *previously* of murder . . . ." *Id.* at 454 n.12 (quoting Section 190.2(a)(2)) (emphasis added). Thus if the Clark case had been tried first, no special circumstance could have been alleged at that time.

In addition, if the Clark case had been tried first, no special circumstance could have been alleged in the *second* (Benintende) prosecution either, since a special can only be alleged in a proceeding in which the "defendant . . . is found guilty of murder in the first degree"—an impossible verdict in the Benintende case inasmuch as the trial court ruled that Petitioner could not be culpable of more than second degree murder in that killing.

another killing, that tended to prove identity. And Petitioner's ownership of the gun was established *not* by the fact that it was used in the Clark killing one year after the Benintende incident, but by the fact that the gun was found in Petitioner's vehicle and that Petitioner admitted, both at trial and in his pretrial confession, that the gun was his and he had possessed it at the time that Benintende was shot. The gun was clearly admissible—and Petitioner's ownership of it was clearly established—without mention of the Clark killing. *See* AOB at 126-35.

231. In addition, joinder prejudiced Petitioner because of the inflammatory nature of the offenses, because of the evidentiary inequity of the two offenses which resulted in a spill-over of prejudicial, irrelevant evidence, because joinder made this a capital case, and because joinder infringed upon Petitioner's Fifth Amendment rights to testify and remain silent and his Sixth Amendment right to present a defense. Countervailing concerns for judicial economy did not justify joinder despite such prejudice, since public funds and time would not have been unduly wasted if separate trials had been held on the two offenses. *See* AOB at 135-50.

232. In view of these considerations, there could have been no reasonable tactical justification for trial counsel's failure to make a motion to sever the two murder counts. Counsel believed that the evidence against Petitioner with respect to the Benintende charge was weak. Ex. 14 ¶5 (Lorenz Decl.). Reasonably competent counsel would have recognized that the Benintende case was weak in the very area where the Clark case was strong—namely, identity. Hence, joinder could only have strengthened the prosecution's case against Petitioner. A reasonably competent lawyer would have recognized that if the two charges were tried together, the jurors would be allowed to hear testimony that Petitioner shot and killed Ms. Clark and that he had severe sexual problems that would explain how he got involved in the situation with Ms. Clark—and, inferentially, with Ms. Benintende. Such evidence would impermissibly allow the jury to conclude that Petitioner had shot and killed Ms. Benintende on that basis not on admissible evidence of his involvement in that case (there was only the weapon), but on the fact that he had shot and killed Tracie Clark. Any competent

counsel would have recognized that severance was substantially likely to result in a more favorable outcome than would otherwise be expected.

233. Trial counsel's ineffective performance cannot be explained or justified on tactical grounds and rendered the trial fundamentally unfair. It is reasonably probable that had a motion to sever been made, the two cases would have been tried separately, and the outcome of both phases of Petitioner's trial would have been different.

B. Failure To Ensure That Petitioner Was Present During All Critical Stages Of The Criminal Proceedings.

234. Petitioner incorporates by reference as if fully set forth herein, Section VI of Petitioner's Opening Brief (AOB at 153-68 & Appendix I), Section VII of Petitioner's Reply Brief (ARB at 114-17), and the original, supplemental, and second supplemental Stipulated Settled Statements on file with this Court in the direct appeal. Exs. 26-28.

235. During *voir dire* in Petitioner's case, the trial court had the members of each of the ten jury panels fill out questionnaires. The questionnaire responses were reviewed by the court and counsel in-chambers and outside the presence of Petitioner. On the basis of information gleaned from the questionnaires and unreported discussions, 133 of the 467 prospective jurors were excused, with no input from Petitioner. *See* AOB at Appendix I, which Petitioner incorporates herein by reference.

236. The questionnaires of all the prospective jurors excused during the off-the-record proceedings, with the exception of two,[49] bear the notation "stip" or "stipulation," indicating that defense counsel and the prosecutor stipulated that those individuals could be excused from the jury venire. The reasons for those stipulations cannot now be determined: the in-chambers proceedings were not reported, and the

---

[49]Carol Karns' questionnaire bears the notation, "Cause" (Supplemental Clerk's Transcript ("CTS") 1248) and Jeffrey Norwood's reads, "Excused Hardship." The basis for Mr. Norwood's hardship excusal is not clear. In his questionnaire, Mr. Norwood stated that his employer—Pepsi Cola—would pay him for all jury duty. He gave no other indication that he could not serve on Petitioner's jury. CTS 1587.

court and parties were unable adequately to reconstruct what occurred during the proceedings. *See* Ex. 26 at Nos. 16, 21, 22, 25-27, 30, 31, 34 (Stipulated Settled Statement ("S.S.S.") filed August 24, 1992), incorporated herein by reference.[50] It can be determined, however, that the responses to what was labeled a "hardship questionnaire" provided the court and counsel with a great deal of information unrelated to hardship. In addition, we know that the court wrote "Cause" on Ms. Karns questionnaire, indicating that at least she was not excused because of hardship. Supplemental Clerk's Transcript ("CTS") 1248. A review of other questionnaire responses reveals that many of the jury venire were excused for reasons other than hardship.[51] Even under the Attorney General's interpretation of the bases for the prospective juror excusals, sixteen individuals were excused on cause-related grounds. *See* Respondent's Brief ("RB"), Appendix A ("Jurors Excused In In-Chambers Conferences").[52]

---

[50]A separate but related claim resulting from trial counsel's failure to ensure that all critical trial proceedings were recorded in this case is addressed in Claim V(C), *infra*.

[51]For instance, Carol Forsythe Dill wrote in response to the question asking whether there was any other reasons why she would be unable to serve on the case, "my husband, brother, and in-laws were convicted in the Kern County system and I feel I would be perejiduse [sic] against the court system." CTS 1700. In response to that same question, Rebecca Rodriguez wrote, "Due to my Bible trained conscious I will not judge my fellow man whether it be murder robbery or any of such." CTS 1287. Neither asked that she be excused for hardship.

[52]In Appendix A of the Respondent's Brief ("RB"), the Attorney General lists the prospective jurors excused during the in chambers proceedings, with "circumstances disclosed by the questionnaires or from other sources." RB at Appendix A. The list includes:

Arlene Johns	(CTS 1735 [relative in law enforcement; claims bias])
Mary Bittle	(CTS 1245 [has read about the case a lot; friend of originally-assigned deputy district attorney Steve Tauzer])
Dona Coodey	(CTS 1243 [three family members in law enforcement])
Andres Juan Chiapa	(CTS 1365 [friend of several sheriffs deputies])

(continued . . .)

237. We have argued in our Opening Brief and Reply Brief that jury selection is a critical stage of the criminal proceedings and that the trial court committed constitutional error when it failed to ensure Petitioner's presence at the unreported in-chambers proceedings at which prospective juror questionnaire responses were reviewed and more than one-quarter of the potential jurors were excused. Petitioner was not excluded from the jury selection proceedings for any disruptive conduct, and Petitioner at no time waived his constitutional and statutory rights to

---

(. . . continued)

Michael Davis	(CTS 1371 [union laborer; claimed bias])
Dena Rhoades	(CTS 1370 [wife of deputy sheriff involved in [Petitioner's] case])
Lynn Rickard	(CTS 1372 [wife is criminalist in District Attorney's Office])
Arthur Titus	(CTS 1381 [deputy public defender; scheduled vacation])

It should be noted that his vacation was scheduled for December 17, 1987. It is unlikely his vacation would conflict with either the next round of voir dire (death qualification began on January 20, 1988) let alone, the beginning of trial.

Jeffrey Heberle	(CTS 1565 [parole agent; knows [Petitioner]])
Cynthia Young	(CTS 1529 [employee of District Attorney's Office])
Carol Forsythe Dill	(CTS 1700 [family members have been convicted of crimes; claims bias])
Allen Blaylock	(CTS 1623 [personal knowledge of [Petitioner])
Mona Moreno	(CTS 1453 [friend of [Petitioner's] stepdaughter])
Jonie Roll	(CTS 1464 [Sheriff's aide])
Rebecca Rodriguez	(CTS 1287 [sole provider; conscientious objector]).

Respondent also states that Carol Karns was excused because of a scheduled surgery. But, as stated above, the court wrote "Cause" on the top of her questionnaire. CTS 1248.

be present at the proceedings.[53] Petitioner did not execute a written waiver form in compliance with Penal Code Section 977, and nothing else in the record indicates that Petitioner voluntarily elected to absent himself from the jury selection proceedings or that he willingly permitted his counsel to act alone on his behalf. *See* AOB at 153-68; ARB at 114-17.

238. We have also argued that trial counsel did not and could not waive Petitioner's constitutional right to be present at the unreported off-the-record jury selection discussions. *See Turner v. Marshall*, 63 F.3d 807, 815 (9th Cir. 1995), *overruled on other grounds by Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999). To the extent such a waiver may be deemed to have occurred by counsel's failure to object to Petitioner's absence or to request his presence, trial counsel rendered ineffective assistance.

239. Petitioner's "fundamental right to be present at every stage of the trial . . . include[d] the right to be present at the *voir dire* and empaneling of the jury." *Campbell v. Wood*, 18 F.3d 662, 671 (9th Cir. 1994) (citing *Diaz v. United States*, 223 U.S. 442, 455 (1912)); *see also Gomez v. United States*, 490 U.S. 858, 873 (1989) (*voir dire* is a critical stage of the criminal proceedings). A competent lawyer would have ensured that his client was present at all critical stages of the trial, including jury selection proceedings.

---

[53]In his response, the Attorney General argued that Petitioner's "personal expression of neutrality" in the face of trial counsel's suggestion that hardship questionnaires be reviewed in chambers constituted a waiver of Petitioner's presence at those in-chambers proceedings. RB at 153. As Petitioner argued in his reply, Petitioner was never asked whether he agreed that the in-chambers jury selection proceedings could be conducted in his absence. The court asked Petitioner whether he agreed to a procedure whereby hardship excusals were conducted off the record and the results subsequently put on the record. Petitioner responded, "I don't have an opinion sir." RT 16. Neither the question asked of Petitioner, nor his response reflect any understanding that Petitioner was agreeing to absent himself from the off-the-record proceedings. *See* ARB at 115. Moreover, even assuming, *arguendo*, that Petitioner knowingly waived his right to be present during the *in camera* discussions, any such waiver applied to *in camera* discussions *of hardship excusals,* not excusals based on other grounds, such as occurred in this case.

240. Because the jury selection proceedings were conducted in Petitioner's absence, Petitioner was unable to give advice or suggestions to his counsel concerning potential jurors; he was unable to share his impressions of potential jurors; and he was unable object to his counsel's stipulation to the excusal of potential jurors Petitioner wanted on his jury. In short, Petitioner was denied an opportunity to participate in any meaningful way in a critical stage of the selection of the jurors who would determine his guilt or innocence and, possibly, life and death.

241. Had Petitioner been present at the jury selection proceedings, he could have objected to his counsel's stipulation to the excusal of a number of prospective jurors whose questionnaire response indicated a defense orientation, including Allen Blaylock, Jeffrey Herberle, Mona Moreno, Carol Dill, Rebecca Rodriquez and Arthur Titus.[54]

242. Petitioner's counsel also stipulated to the excusal of a number of prospective jurors who were themselves involved in or had friends or family in law enforcement or the legal system. *See* CTS 1735 (Arlene Johns); CTS 1245 (Mary Bittle); CTS 1243 (Dona Coodey); CTS 1365 (Andres Chiapa); CTS 1372 (Mr. Rickard); CTS 1370 (Dena Rhoades); and CTS 1471 (Jonie Roll). While this connection might ordinarily be considered to benefit the prosecution in a criminal case, Petitioner's employment as a deputy sheriff neutralized, if not shifted, this possible bias and required that these individuals at least be questioned on the record about their possible biases and opinions.

243. Trial counsel's ineffective performance in failing to ensure Petitioner's presence at the jury selection proceedings cannot be explained or justified on tactical grounds and rendered the trial fundamentally unfair. Reversal is required because "[c]ounsel's conduct

---

[54]Allen Blaylock's brother-in-law had lived with Petitioner and his wife (CTS 1623), Jeffrey Heberle, a Parole Agent, knew Petitioner through his employment (CTS 1565), and Mona Moreno was a personal friend of Petitioner's stepdaughter (CTS 1453). Carol Forsythe Dill wrote in her questionnaire, "my husband, brother, and in-laws were convicted in the Kern County system and I feel I would be perejiduse [sic] against the court system." CTS 1700. Rebecca Rodriguez wrote, "Due to my Bible trained conscious I will not judge my fellow man whether it be murder robbery or any of such." CTS 1287. Arthur Titus was a deputy Public Defender. CTS 1381.

so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. at 686.

244. It is reasonably probably that but for counsel's failure to insure Petitioner's presence as described in this Section, the result of both phases of the trial would have been different.

C. Failure To Ensure That All Bench Conferences And In Camera Proceedings Were Recorded Or Memorialized For The Record.

245. Petitioner hereby incorporates by reference as if fully set forth herein, Section VII of Petitioner's Opening Brief (AOB at 169-99) and Section V of Petitioner's Reply Brief (ARB at 87-103).

246. The trial court held no fewer than 48 unrecorded bench conferences and in-chambers hearings; there were another seven unreported proceedings prior to the commencement of trial.[55] These

---

[55]The unreported proceedings, as reflected in the Stipulated Settled Statement filed on August 24, 1992 ("S.S.S.") (Ex. 26) and Supplemental Stipulated Settled Statement filed on November 4, 1997 ("Supp. S.S.S.") (Ex. 27) are as follows:

1) an in chambers conference on 11/16/87 (RT Vol IA:3); 2) the playing of portions of a tape of an oral affidavit on 11/16/87 (RT Vol IA:31-32); 3) an in-camera conference on 11/23/87 (RT 19); 4) an in chambers conference on 11/23/87 (RT 82); 5) an off-the-record conference during the luncheon recess on 11/24/87 (RT 164); 6) an off-the-record conference on 11/24/87 (RT 222); 7) an off-the-record conference during the luncheon recess on 11/25/87 (RT 312); 8) an off-the-record bench conference on 11/30/87 (RT 318); 9) an in chambers conference on 11/30/87 (RT 320); 10) an off-the-record conference on 11/30/87 (RT 424); 11) an off-the-record discussion on 12/1/87 (RT 451); 12) an off-the-record discussion on 12/1/87 (RT 508); 13) an off-the-record discussion on 12/1/87 (RT 591); 14) an in chambers conference on 12/2/87 (RT 624-25); 15) an in chambers conference on 12/7/87 (RT 853); 16) two off-the-record discussions on 12/8/87 (RT 993); 17) an off-the-record discussion on 12/8/87 (RT 1006); 18) an in chambers conference on 12/8/87 (RT 1108); 19) an in chambers conference on 12/16/87 (RT 1512); 20) an in chambers conference on 1/5/88 (RT 1821); 21) an off-the-record appearance of prosecution witness Connie Zambrano on 1/5/88 (RT 1935); 22) an off-the-record discussion on 1/5/88 (RT 1986); 23) off-the-record discussions during the luncheon recess and the afternoon court session on 1/5/88 (RT 2017-18); 24) an in chambers conference on 1/7/88 (RT 2203); 25) an in chambers conference on 1/11/88 (RT 2358); 26) an off-the-record discussion on 1/12/88

(continued . . .)

unreported proceedings included critical discussions regarding the jury instructions to be given at both the guilt and penalty phases of trial, discussions, if any, relating to the deliberating jurors' request for additional instruction, as well as eleven in-chambers conferences at which a total of 133 of the 467 prospective jurors were excused without any questioning based on their responses to a juror questionnaire.

247. The proceedings were not reported despite the court's and the parties' recognition of the statutory requirement that all proceedings in a capital case be recorded. *See* PENAL CODE §190.9(a).[56] On the first day of *voir dire*, November 23, 1987, the court and counsel discussed the need to conduct all proceedings at which juror hardship disqualifications were addressed on the record. Defense counsel had proposed giving prospective jurors a "hardship" questionnaire, and suggested that the

---

(. . . continued)
(RT 2678); 27) an in chambers conference on 1/13/88 (RT 2681); 28) an off-the-record discussion on 1/13/88 (RT 2803); 29) an off-the-record discussion on 1/13/88 (RT 2804); 30) an in chambers conference on 1/14/88, after the recorded proceedings had been adjourned for the day (RT 2936); 31) an off-the-record discussion on 1/20/88 (RT 3021); 32) an off-the-record discussion on 1/26/88 (RT 3370); 33) an off-the-record discussion on 1/27/88 (RT 3507); 34) an off-the-record discussion on 2/1/88 (RT 3807); 35) an off-the-record discussion on 2/2/88 (RT 3829); 36) an off-the-record discussion on 2/4/88 (RT 4156); 37) an off-the-record discussion on 2/4/88 (RT 4162); 38) an off-the-record discussion on 2/8/88 (RT 4359); 39) an off-the-record discussion on 2/8/88 (RT 4445); 40) an off-the-record discussion on 2/10/88 (RT 4447); 41) an off-the-record bench conference on 2/10/88 (RT 4458); 42) an off-the-record discussion on 2/10/88 (RT 4463); 43) an off-the-record bench conference on 2/24/88 (RT 4766); 44) an off-the-record bench conference on 2/24/88 (RT 4907); 45) an off-the-record bench conference on 2/25/88 (RT 4925); 46) an off-the-record discussion on 2/25/88 (RT 4935); 47) an in chambers conference on 3/8/88, after the Court had recessed for the day (RT 5392); 48) an off-the-record bench conference on 3/9/88 (RT 5530); and (49) an in chambers conference regarding guilt phase jury instructions on 3/14/88 (RT 5625).

[56]At the time of Petitioner's trial, Penal Code Section 190.9(a) provided, in pertinent part:

> "In any case in which a death sentence may be imposed, all proceedings conducted . . . in the justice, municipal, and superior courts, including proceedings in chambers, shall be conducted on the record with a court reporter present. The court reporter shall prepare and certify a daily transcript of these proceedings."

court and counsel review the completed questionnaires to eliminate obvious hardship cases by stipulation. RT 15-16. The following discussion ensued:

The court:	"Can we do that and not violate Section 190.9 in your view?"
Defense counsel:	"My viewpoint of that section is we can still meet informally and then put the results of our conference on the record."
The court:	"Well, I am not sure about that."
Defense counsel:	"We would simply have whatever conference we have on the record. I don't know that that matters."
The court:	"Any objection to that, Mrs. Ryals?"
The prosecutor:	"As long as it's on the record, I have no objection. . . ."
The court:	"Mr. Rogers, is that procedure all right with you?"
Petitioner:	"I don't have an opinion, sir." (RT 16)

248. Notwithstanding this exchange, the trial court thereafter failed to act in accord with the procedures upon which the parties agreed or to otherwise comply with the requirements of Section 190.9. The court directed the first panel to fill out the questionnaires, then, without the court reporter, retired to chambers with prosecution and defense counsel. After the unreported discussions, the court went on the record and excused ten prospective jurors without comment.[57] RT 19-20. After another unreported, off-the-record proceeding, the court excused two more prospective jurors.[58] RT 82, 83. Shortly thereafter, the court explained for the record that while in chambers, court and counsel had

---

[57]Without further explanation, the court announced "[t]he following people are excused from this trial only," and then read off: Gary Byerly; Roy Valdez; Terry Denesha; Mike Sterling; Juanita Wilkins; Martha Stroud; Debbie Barbee; Dawn Gooding; Leslie Davis; Deborah Duggan. RT 19-20.

[58]Videl Wilkerson and John Evans.

gone over the questionnaires and obtained "stipulations concerning the excusing of the prospective jurors [Wilkerson and Evans] . . . ." RT 84. The court also noted that the original ten had been excused pursuant to stipulation: "Can I have, just for the record, all those people that I initially excused were pursuant to stipulation of counsel?" Counsel agreed that they were. RT 84.

249. This was the procedure that the court had earlier rejected as violating Section 190.9. It was, however, the only record that the court would make for the questionnaire-based hardship excusals. An additional 121 prospective jurors were excused following in-camera proceedings during which the hardship questionnaires were reviewed. None of these proceedings was reported, and the court failed to place anything on the record regarding these 121 individuals or why they had been excused. *See* AOB at Appendix I.

250. The settled statement for the eleven in-chambers conference at which 133 prospective jurors were excused, provides no useful information. It is apparent from the available record that the court and counsel discussed substantive matters and agreed to excuse jurors based on considerations other than hardship during their off-the-record discussions. *See* AOB at 153-68 (Section VI); Claim V(B).

251. All the parties could recall of the juror discussions, however, was that Judge Davis, prosecutor Sara Ryals and defense counsel Eugene Lorenz reviewed prospective jurors' responses to written questionnaires, discussed whether particular individuals should be excused and agreed that those whose names were listed "should be excused for various reasons." *See* Ex. 26 at Nos. 10, 11, 16, 21, 22, 25, 26, 27, 31, 32, and 34 (S.S.S.). The trial court and counsel obviously agreed to excuse jurors, in Petitioner's absence, based on substantive, case-related concerns, in a completely unreviewable fashion.

252. The attempted reconstruction of the jury instruction discussions is equally unsatisfactory.[59] As for the guilt phase

---

[59]As part of the record certification process in Petitioner's direct appeal, Petitioner sought to have the record settled as to all unreported oral proceedings. On August 24, 1992, after receiving the trial court's permission to set forth the unreported proceedings by a settled statement pursuant to (continued . . .)

instructions, it is known that on March 14, 1988, a conference was held in chambers at the end of the lunch recess.[60] Following that conference, which lasted only five to ten minutes, the court noted for the record that defense counsel requested one instruction that the court refused to give and that all parties agreed that two other instructions need not be given. RT 5625. The court made no mention of other instructions discussed, requested, or refused. Nor did it explain why it denied the requested instruction or why the parties' agreed that the identified instructions need not be given. The court's on-the-record summary of the discussion does not provide an explanation for why the court failed to instruct the jury on many lesser included offense supported by the evidence introduced at trial. RT 5625. The participants were unable to provide additional details. Neither prosecutor, defense counsel or trial judge "recalls what subjects were discussed or what was said during the March 14 in chambers conference, apart from that which is stated on the record by Judge Davis at RT 5625." Ex. 27 at No. 2 (Supp. S.S.S.).

253. The court and parties also held on unreported conference on March 8, 1988, to discuss "procedure for selection of jury instructions for penalty phase." RT 5392; Ex. 26 at No. 54 (S.S.S.) The prosecutor, defense counsel and trial judge have no recollection of what was said at this conference. Id. In addition, no one "recalls the content of any

---

(. . . continued)
Rule 7 of the California Rules of Court, Petitioner filed a "Stipulated Settled Statement" setting forth what counsel could recall of the unreported trial proceedings. A supplemental statement was prepared and filed on November 4, 1997 (Ex. 27) which addressed specifically the recollection of the prosecutor, defense counsel and trial judge of conferences pertaining to jury instructions. After Petitioner received the Supplemental Clerk's Transcript and learned for the first time that the deliberating jury had submitted a second note requesting additional instruction, a second supplemental statement (Ex. 28) was prepared in August, 1999, and is scheduled to be filed on or about December 15, 1999.

[60]The minute order for March 14, 1988, reveals that guilt phase jury instruction discussion lasted five minutes: the discussion began at 1:50 p.m., and by 1:55 p.m., the jury was present and the court began instructing them. CT 593-94. The reporter's transcript suggests that the discussion may have run as long as ten minutes. The court and counsel were to meet at 1:30 p.m. so that they could go over jury instructions; the next recorded proceedings were at 1:40 p.m. RT 5623, 5625.

subsequent discussions concerning selection of death penalty instructions or whether a subsequent discussion occurred." Ex. 27 at No. 1 (Supp. SSS). The record shows no other indication that a subsequent conference was held on the penalty phase.

254. There also is no record regarding what, if anything, was done in response to the deliberating jurors' undated note requesting that they be given further instruction on "legal definitions of the crimes charged." CTS 988. There was no discussion of the note on the record, and the court never responded to the request on the record. The record also contains no indication that trial counsel was consulted about the note or even knew of its existence. The prosecutor, defense counsel and trial judge have no present recollection which would fill this significant gap. Ex. 28 at Nos. 1-3 (2d. Supp. S.S.S).

255. We have argued in his opening and reply briefs that the trial court's failure to ensure that all proceedings were reported or otherwise memorialized for the record violated Petitioner's statutory right to a complete record in a capital appeal (PENAL CODE §§190.6-190.9; CAL. R. CT. 39.5) and denied Petitioner meaningful appellate review in violation of his Sixth Amendment right to counsel, Fourteenth Amendment right to due process, and his Eighth Amendment right to heightened reliability in this capital case to ensure that the death penalty was not imposed arbitrarily or irrationally. The Stipulated Settled Statement filed in this case on August 24, 1992, (Ex. 26), the Supplemental Stipulated Settled Statement filed on November 4, 1997 (Ex. 27), and the Second Supplemental Settled Statement ("2d Supp. S.S.S.") (Ex. 28) are completely inadequate substitutes for a verbatim transcript. They were prepared, respectively, nearly five, ten years and twelve years after the proceedings in question, and the court and counsel could not fully reconstruct virtually any of the proceedings.

256. If it is deemed that this claim of error was waived by trial counsel's failure to request that a reporter be present at all proceedings or by counsel's failure to make a record of what occurred during the unreported proceedings, trial counsel rendered ineffective assistance of counsel. There could be no legitimate tactical basis for circumventing the statutory requirement that Petitioner have a complete record for appellate review.

257. As a result of the incomplete record, Petitioner has been prejudiced in his ability to raise and resolve issues on appeal as Petitioner has discussed at length in his Opening Brief and Reply Brief, to which Petitioner respectfully refers the Court. Trial counsel's ineffective assistance in failing to ensure that all proceedings were reported rendered Petitioner's trial and appeal fundamentally unfair.

258. It is reasonably probably that but for counsel's conduct as described in this Section, the result of both phases of the trial would have been different.

D. Failure To Introduce Evidence Corroborating The Testimony Of Mental Health Professionals.

259. Trial counsel rendered ineffective assistance at the guilt phase of trial when he failed to call as a witness Petitioner's brother, Dale Rogers, who could have corroborated and supported the testimony of the mental health experts Dr. David Glaser, Dr. David Bird and psychotherapist Joan Franz. In forming their diagnoses, these mental health experts relied upon hearsay evidence that Petitioner had been the victim of severe physical, verbal and probable sexual abuse during his childhood. *See, e.g.*, Dr. Glaser (RT 5221-22, 5226, 5248, 5249, 5263-65); Dr. Bird (RT 5462-63, 5473-74); Ms. Franz (RT 5421-22, 5435). However, the weight given these experts' diagnoses by the jury in this case was undoubtedly undermined by the absence of independent corroborating testimony about Petitioner's life and family background upon which the experts relied in forming those diagnoses.

260. The District Attorney did not fail to notice this gap in the defense evidence. She established with each of the expert witnesses that no one could truly say whether the underlying abuse had even occurred. *See, e.g.*, RT 5268, 5269-74, 5399, 5442-44. The District Attorney also stressed the absence of corroborating evidence in her closing argument. While acknowledging that "[t]here has never been a time . . . since Mr. Lorenz' opening statement that the People have denied that this man was a victim of child abuse (RT 5614), she stated that "[w]e don't have any reports from social workers, nor do we have reports from his mother, nor do we have reports from his children, nor do we have reports from his wife, nor do we have reports from his stepchildren, nor do we have

reports from anyone including himself from the witness stand as to the extent of the child abuse." *Id.*[61]

261. In this case, as in *Hendricks v. Calderon*, 70 F.3d 1032, 1044 (9th Cir. 1995) "the lack of corroborating evidence combined with the prosecution's devastating cross-examination may have left the jury with the impression that [petitioner's] unfortunate history was all fabrication."

262. While the jury may have (wrongly) concluded that evidence of abuse was fabricated, such a conclusion was unwarranted and entirely avoidable since trial counsel knew that Petitioner's brother Dale Rogers had information to corroborate the experts' testimony, and was anxious to testify on his brother's behalf. In light of the very real danger that the jurors would discount or even reject the expert testimony based on the lack of corroborating evidence, counsel's failure to introduce the testimony of Dale Rogers is both inexplicable and inexcusable. As Dale Rogers states in his attached declaration (Exh. 5), he had expected to testify regarding his brother's early life and was prepared to do so. Dale Rogers was an eyewitness to much of the pain and humiliation Petitioner suffered at the hands of a number of abusive family members and could have provided powerful and persuasive testimony to corroborate the experts' testimony. For reasons unknown to him, he was not called to testify until the penalty phase, and even then, he was not asked about the traumas in Petitioner's early life. Ex. 5 ¶1 (Dale Rogers Decl.).

263. If Dale Rogers had been called as a witness at the guilt phase, he could have testified about Petitioner's father and his

---

[61]The District Attorney also argued:

> "Their [the experts'] entire and complete testimony to you is based on things that they got from someone else, from some other person who did not choose to come into this court, be questioned and be cross-examined. Those people chose not to come in, and you as a jury were denied your right, your were denied your responsibility, and you were denied your duty to determine whether or not what those people had to say was the truth." (RT 5582, 5583)
>
> "Where are they? Where are the people who could come in here and testify as to this man's behavior and these things that supposedly happened to him from the time he was six months old until he was 41 years old?" (RT 5583)

abandonment of Petitioner and his mother at an early age; the family's history of alcoholism; the string of alcoholic and abusive "stepfathers" in the household; the abuse Petitioner suffered at the hands of the violent and sadistic "Dub" Ellis, including "turn and burn," frequent beatings, and humiliating punishments; and the evidence of Petitioner's sexual disturbance at an early age. *See* Ex. 5 (Dale Rogers Decl.).

264. There could be no tactical basis for counsel's failure to call Dale Rogers as a witness at the guilt phase of trial. There is a reasonable probability that but for counsel's failure to introduce direct testimony of Petitioner's life and family background the results of both phases of trial would have been different.

E. Failure To Prepare And Request Standard And Necessary Jury Instructions.

265. Petitioner incorporates by reference as if fully set forth herein, the facts and arguments contained in Sections I, II and III of Petitioner Opening Brief (AOB at 21-110), Petitioner's Supplemental Opening Brief (Supp. AOB at 1-10), Sections I, II, and III of Petitioner's Reply Brief (ARB at 2-78).

266. We argued in the pending appeal that during the guilt phase of trial the trial court committed massive instructional error that deprived Petitioner of his rights to due process of law and a fair trial by jury. The most egregious of the court's errors was its failure to instruct on lesser included offenses that were supported by the evidence and which were essential to the rendering of any defense verdict in this case. Trial counsel's error in failing to request such instructions or object to the court's failure to give them sua sponte was no less egregious. No competent lawyer would permit the jury to begin deliberations without instruction on the defense theory of the case and other lesser-included offenses upon which his defense rested.[62]

---

[62]In raising the following claims regarding counsel's ineffective assistance in failing to request certain jury instructions, we do not mean to suggest that the trial court did not have a *sua sponte* obligation, under the evidence presented and in light of the entire charge to the jury, to instruct the jury as set forth in Sections I, II and III of Petitioner's Opening Brief. Nor do we concede that there could possibly be a valid finding of waiver in (continued . . .)

267. Among the chief responsibilities of competent trial counsel is the duty to prepare and request jury instructions necessary to a fair trial and adequate defense, and to object to instructions that are improper, harmful or inappropriate. *People v. Sedeno*, 10 Cal. 3d 703, 717 n.7 (1974), *overruled on other grounds by People v. Breverman*, 19 Cal. 4th 142 (1998) (Trial counsel's duty "includes careful preparation of and request for all instructions which in his judgment are necessary to explain all of the legal theories upon which his defense rests"); *People v. Wickersham*, 32 Cal. 3d at 335 ("It is the obligation of trial counsel to assist the court in presenting all relevant instructions to the jury"); *see, e.g., United States v. Span,* 75 F.3d 1383, 1389 (9th Cir. 1996); *Harris ex rel. Ramseyer v. Blodgett*, 853 F. Supp. 1239, 1266 (W.D. Wash. 1994), *aff'd*, 64 F.3d 1432 (9th Cir. 1995) ("Counsel's failure to object or propose jury instructions in a capital case fell below the objective standards of reasonableness and amounted to a deficient performance"). In a capital case, accurate and appropriate jury instructions on lesser-included offenses supported by the evidence are essential to ensure a reliable verdict, free of irrelevant considerations. *See Beck v. Alabama,* 447 U.S. 625, 632-33, 640-41 (1980).

(. . . continued)
this case. The serious instructional error in this case clearly "affected" the "substantial rights" of Petitioner making appellate review appropriate even in the absence of an objection at trial. *See* PENAL CODE §1259.

There could be no valid finding of waiver in this case for the additional reason that the jury instruction discussions were never recorded or adequately reconstructed. AOB at 169-99; Claim V(C), *supra*. Without a record of the proceedings, it cannot be ascertained what discussions were had regarding the jury charge. There is nothing in the record to indicate that trial counsel actively opposed giving the instructions we now claim should have been given—much less that trial counsel did so on the basis of an informed tactical decision. RT 5625. Moreover, trial counsel affirmatively states in his sworn declaration that he "did not waive or object to the giving of an instruction on unpremeditated second degree murder or any other instruction." Ex. 14 ¶10 (Lorenz Decl.).

Finally, even the Attorney General acknowledged in the Respondent's Brief that, "in the absence of a record of agreement to the instructions, [Petitioner's] claim[] that the instructions were erroneous are reviewable." RB at 179.

268. Defense counsel in this case failed to request instruction on the defense theory of the case—unpremeditated second degree murder—or on legal principles—such as "mild" provocation and diminished actuality—that would have explained to the jury how the evidence presented at trial could have negated the elements of first degree murder. Counsel also failed to request instruction on other lesser included offenses that were supported by the evidence and could have provided an alternative to a first degree murder conviction: Voluntary manslaughter based on imperfect self-defense, and involuntary manslaughter. And he failed to request instruction on the complete defense of unconsciousness. Trial counsel's failure to prepare and request jury instructions necessary to explain the legal theories upon which his defense rested made it impossible for the jury to find Petitioner guilty of a lesser included non-capital offense.

269. The trial record of this case reflects what little thought trial counsel gave to how the jury should be charged. Counsel for Petitioner submitted not one proposed guilt or penalty phase jury instruction. Ex. 14 ¶¶8, 9 (Lorenz Decl.). The jury instruction discussions were not reported or adequately reconstructed, but the one discussion between court and counsel regarding guilt phase instructions could have been little more than perfunctory. On March 14, 1988, following closing arguments in the guilt phase of trial, the court, defense counsel and the prosecutor met to discuss jury instructions. CT 594. The minute order for that day reveals that this jury instruction discussion lasted no longer than five minutes: the discussion began at 1:50 p.m., and by 1:55 p.m., the jury was present and shortly thereafter the court began instructing them. CT 594. The reporter's transcript suggests that the discussion may have run as long as ten minutes. RT 5623-26.

270. Following the March 14 conference, the court stated on the record that it refused to given an instruction that defense counsel requested and that counsel agreed that two other instructions need not be given. RT 5625. Despite the absence of a record of the brief discussion preceding the court's announcement, both the duration of the conference and counsel's assertions in his current declaration make it quite clear that counsel's participation was minimal. Counsel essentially abdicated all responsibility for instructing the jury to the court. In his declaration

counsel explains that the trial judge in Petitioner's case had presided over other capital cases and believed "that it is the trial judge's job to come up with jury instructions." Ex. 14 ¶8 (Lorenz Decl.). It was counsel's experience that "Judge Davis . . . tells you what instructions he is going to give and that is that. I worked under that assumption in Mr. Rogers' case." *Id.*

271. Notwithstanding counsel's belief about the trial court's preferences regarding jury instruction, the trial court gave no indication that it did not want or would not accept input from counsel regarding how the jury should be instructed, and in fact, the prosecutor submitted a number of proposed instructions. CT 603.

272. Moreover, even if it were true that the trial court did not invite input from trial counsel, the court's mistaken assumption that it was alone responsible for jury instructions did not relieve counsel of his role as an advocate for his client. An effective attorney "must play the role of an active advocate, rather than a mere friend of the court." *Evitts v. Lucey*, 469 U.S. 387, 394 (1985). It remained counsel's obligation to request complete and appropriate instructions and to object on the record to the court's errors in instructing the jury. Even if trial counsel had made a "strategic" decision to forgo complete and accurate instruction rather than oppose the court's policy (which he apparently did not) his performance would have been incompetent. By refraining from participating in jury instruction, counsel left the jury with no instructions pertinent to the only defense presented at trial. As has often been noted, "certain defense strategies or decisions may be 'so ill chosen' as to render counsel's overall representation constitutionally defective." *Willis v. Newsome*, 771 F.2d 1445, 1447 (11th Cir 1985); *accord*, *Quartararo v. Fogg*, 679 F. Supp. 212, 247 (E.D.N.Y. 1988) ("Sound trial strategy cannot contemplate the abdication of a lawyer's responsibility to participate on his client's behalf in the process of charging the jury, especially in case wherein the client faces the death penalty").[63]

---

[63]Although this Court has confirmed that it is never proper for trial courts to fail to instruct on lesser included offenses (*People v. Barton*, 12 Cal. 4th 186, 196-97 (1995)), defense lawyers do at times fail to request (continued . . .)

273. The trial court's understanding of counsel's role regarding jury instruction (at least as it was perceived by defense counsel in this case) was wrong and counsel's silent acceptance of that mistaken understanding, whether tactical or inadvertent, prejudiced Petitioner by denying him viable defenses and making it virtually impossible for the jury to convict Petitioner of anything other than capital murder.

274. The record of the jury deliberations in this case demonstrates that it is reasonably probable that, given the opportunity, the jury would have opted for a verdict other than first degree murder in this case. Petitioner admitted the unlawful killing of Tracie Clark, he presented no evidence at all regarding the only other charged offense (the Benintende killing), and the multiple murder special circumstance depended solely on the jury's verdicts as to both murder counts. The only question the jury had to determine was whether Petitioner was guilty in the Clark charge of first degree murder or some lesser offense. Nevertheless, the jury spent two days deliberating in the guilt phase. In addition, the jury *was* obviously confused about the difference between the two degrees of murder, for it *twice*, specifically requested—but did not receive—further instruction to clarify the distinction. *See* RT 5695-96. There can be no greater prejudice to Petitioner than being sentenced to death when there exists a reasonable probability that, had the jury been properly instructed, it would have found Petitioner guilty of a non-capital offense.

1. Counsel Did Not Request Instructions Regarding The Defense Presented At Trial.

275. The closest to a coherent theory of defense presented at trial was that Petitioner did not premeditate and deliberate before shooting

---

(. . . continued)
such instructions (or even actively oppose them) in the hope of winning the gamble on an "all-or-nothing" verdict. *Id.* Winning such a gamble could not have been counsel's strategy in this case. Counsel never asked that the jury acquit Petitioner, nor could he under the facts. There was never any dispute that Petitioner killed Tracie Clark. As trial counsel acknowledged during his closing argument, "[i]t's not a situation where we are denying responsibility." RT 5599. The only issue was whether the killing was murder in the first degree, as the prosecution argued, or some lesser offense as the defense contended.

Tracie Clark.[64] The shooting was instead an unplanned, spontaneous reaction to Petitioner's struggle with Ms. Clark and Ms. Clark's repeated taunts, verbal provocation and threatening advance. Counsel introduced evidence that Petitioner did not plan the killing, that he had a mental disease or defect that prevented him from premeditating and deliberating, and that Tracie Clark provoked Petitioner so that he could not premeditate and deliberation.

276. Where counsel has elected to present a defense at trial, competent counsel must, at a minimum, be expected to request jury instructions relating to that particular defense. Trial counsel's performance in this case did not rise to this rudimentary level of competence. Notwithstanding the evidence presented and the arguments made, counsel failed to request any instructions on unpremeditated second degree murder or the legal theories that would negate premeditation and deliberation. The jury was thus precluded from reaching a defense verdict. As the court stated in *United States v. Span*, "We have a hard time seeing what kind of strategy, save an ineffective one, would lead a lawyer to deliberately omit his client's only defense, a defense that had a strong likelihood success, and a defense that he specifically stated he had every intention of presenting." 75 F.3d at 1389-90.

a. Instructions On The Lesser Included Offense Of Unpremeditated Second Degree Murder (CALJIC No. 8.30).

277. Petitioner incorporates by reference as if fully set forth herein, Section I(B) of his Opening Brief (AOB at 26-35), his Supplemental Opening Brief (Supp. AOB at 1-10) and Section I(A) of his Reply Brief (ARB at 2-17).

278. We have argued that the trial court committed reversible error when it failed to instruct the jury, *sua sponte*, regarding the lesser included offense of intentional, unpremeditated second degree murder.[65]

---

[64]As Petitioner has alleged in Claim V(F), counsel presented no truly coherent theory supported by evidence and argument.

[65]CALJIC No. 8.30, the standard instruction which defines this (continued . . .)

People v. Breverman, 19 Cal. 4th 142, 155 (1998) ("every lesser included offense, or theory thereof, which is supported by the evidence must be presented to the jury"); *People v. Wickersham*, 32 Cal. 3d 307, 330 (1982), *disapproved on other grounds in People v. Barton*, 12 Cal. 4th 186, 201 (1995); *see* AOB at 26-35; ARB at 2-16. If it is deemed that trial counsel invited the court's error or waived this claim of error by failing to request the instruction or make a contemporaneous objection to the court's failure to give the instruction, counsel rendered ineffective assistance. In addition, notwithstanding the court's *sua sponte* obligations, counsel had an independent duty to prepare and request instructions necessary to explain the legal theories upon which his defense rests. *People v. Sedeno*, 10 Cal. 3d at 717 n.7. Competent counsel would have requested that the jury be instructed with CALJIC No. 8.30.

279. Trial counsel's "primary theory of defense with regard to the Clark charge was that [Petitioner] Rogers lacked premeditation and deliberation and therefore could be found guilty of nothing more than second degree murder." Ex. 14 ¶6 (Lorenz Decl.). In his opening statement counsel stated that the killings "were not crimes of premeditation and deliberation." RT 4490-91. Considerable evidence in support of that defense was presented at trial. Dr. Bird (RT 5521-22, 5500-01), Dr. Glaser (RT 5225, 5260-61) and psychotherapist Joan

---

(. . . continued)
category of second degree murder, was among the proposed jury instructions submitted by the prosecution in this case. CT 603. Although it was ultimately withdrawn, the reason that it was withdrawn cannot be ascertained since the jury instruction discussion was not reported or adequately reconstructed. *See* AOB at 30; Claim V(C). It appears, however, that it may have been mistakenly withdrawn instead of CALJIC No. 8.31, the instruction on implied malice second degree murder, which had no application to this case. This possibility is suggested not only by the fact that CALJIC No. 8.30 defines the type of second degree murder supported by the evidence in this case, but also by the fact the prosecutor apparently believed that the CALJIC No. 8.30 would be read to the jury. In her closing argument she read to the jury the definition of unpremeditated second degree murder contained in CALJIC No. 8.30. RT 5591-92. The absence of a record of the jury instruction conference makes it impossible to determine whether CALJIC No. 8.30 was mistakenly withdrawn. *See* AOB at 169-99; Claim V(C).

Franz (RT 5419, 5450-51, 5363) all concluded that Petitioner neither premeditated nor deliberated over the Clark killing. In his summation, defense counsel stressed the prosecution's burden of proving "premeditation and deliberation beyond a reasonable doubt and to a moral certainty." RT 5598.

280. Notwithstanding the importance of that defense to the case, counsel failed to request a jury instruction which permitted the jury to reach a verdict of unpremeditated second degree murder. This was certainly not an error resulting from "trial strategy." No reasonably competent counsel would fail to request instruction on the verdict he asked the jury to return. "Counsel's errors with the jury instructions were not a strategic decision to forego one defense in favor of another. They were the result of a misunderstanding of the law." *United States v. Span*, 75 F.3d at 1390. Trial counsel's failure to ensure that the jury was instructed with CALJIC 8.30 or its equivalent amounted to ineffective assistance of counsel.

281. The prejudice to Petitioner resulting from counsel's failure to request an instruction on unpremeditated second degree murder is obvious. In the absence of such an instruction the jury could not render a defense verdict and there exists the very real possibility that Petitioner was convicted of an offense of which, in the jury's view, he was factually innocent under the evidence presented at trial.[66] The withdrawal of a unpremeditated second degree murder verdict from the jury's consideration or power undermines confidence in the outcome of the trial. Reversal is required. *Strickland v. Washington,* 466 U.S. at 689.

282. In addition, as a result of the ineffective assistance of counsel, the jury was not given the option of convicting Petitioner of a viable non-capital offense even though the evidence clearly supported such a verdict. Petitioner's conviction and sentence thus violated his

---

[66]As Petitioner explained in his opening brief, no other instruction given informed the jurors that they could find Petitioner guilty of second degree murder if they concluded that he intentionally killed Tracie Clark but they harbored a reasonable doubt as to whether he acted with premeditation and deliberation. *See* AOB at 31-35.

constitutional rights to due process and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution and Article 1, Sections 7, 15, 16, and 17 of the California Constitution. *Schad v. Arizona,* 501 U.S. 624, 642-43 (1991); *Beck v. Alabama*, 447 U.S. at 637-38 & n.13; *Hopper v. Evans*, 456 U.S. 605, 609 (1982).

b. Instructions On The Defense Of Provocation (CALJIC No. 8.7367).

283. Petitioner incorporates by reference as if fully set forth herein, Section I(C)(1) of his Opening Brief (AOB at 35-40), his Supplemental Opening Brief (Supp. AOB at 1-10), Section I(B)(1) of his Reply Brief (ARB at 17-27).

284. The record at trial contained substantial and uncontradicted evidence that Tracie Clark yelled at Petitioner, cursed him, and physically attacked him. Defense counsel argued that Ms. Clark's killing came about as an immediate result of such provocation. In *People v. Johnson* this Court reaffirmed that "a *sua sponte* instruction on provocation and second degree murder must be given 'where the evidence of provocation would justify a jury determination that the accused had formed the intent to kill as a direct response to the provocation and had acted immediately' to carry it out." 6 Cal. 4th 1, 42-43 (1993) (emphasis added) (quoting *People v. Wickersham*, 32 Cal. 3d at 329). The trial court nonetheless failed to instruct, pursuant to CALJIC No. 8.73, that evidence of the victim's provocation could be considered for purposes of determining the degree of murder, "even if that evidence was insufficient to reduce the offense to manslaughter."

---

[67]CALJIC 8.73 (1979 Rev.) provides:

"When the evidence shows the existence of provocation that played a part in inducing the unlawful killing of a human being, but also shows that such provocation was not such as to reduce the homicide to manslaughter, and you find that the killing was murder, you may consider the evidence of provocation for such bearing as it may have on the question of whether the murder was of the first or second degree." (CALJIC No. 8.73 (1979 Rev.))

People v. Johnson, 6 Cal. 4th at 42; *see* CALJIC No. 8.73. Petitioner has argued that either viewed in combination with the court's concomitant failure to instruct regarding unpremeditated second degree murder, or taken by itself, the trial court's failure to instruct on provocation as it related to second degree murder was error and requires that the judgment be vacated.

285. In *People v. Mayfield*, 14 Cal. 4th 668, 778 (1997), this Court stated that CALJIC No. 8.73 is a "pinpoint" instruction that the trial court is not required to give on its own initiative. Petitioner has argued that this position is impossible to reconcile with the prior holdings of this Court. *See* AOB at 38-39. For purposes of this claim, however, it does not matter whether the instruction should have been given *sua sponte* or only upon request of counsel. A competent lawyer would have requested that Petitioner's jury be instructed on provocation as it relates to premeditation and deliberation or stated an objection to the court' failure to give such an instruction. Whether trial counsel's error is characterized as a waiver, invited error or a failure to request a pinpoint instruction on a legal theory upon which his defense rested, the failure to request or object to the court's failure to give CALJIC 8.73 amounted to ineffective assistance of counsel.

286. The evidence at trial supported an instruction on provocation as it relates to the degree of murder. The undisputed evidence at trial was that the shooting of Tracie Clark was precipitated by the victim's own provocative conduct. In both the prosecution's version (*see* RT 4681-83; 4704), and that presented by the defense (*see* RT 5364, 5382-83, 6367), Ms. Clark attacked Petitioner physically and verbally. According to the evidence of the Petitioner and the mental health experts who testified, Ms. Clark's statements and conduct upset Petitioner's extremely unstable mental state and literally triggered the fatal shooting. *E.g.*, RT 5338-39 (Dr. Glaser); RT 5419 (Ms. Franz); RT 5500-01, 5521-22 (Dr. Bird). In her closing argument, the prosecutor acknowledged that Petitioner's first shot at Clark was reflexive, in reaction to their argument: "Now, the first time he shot her in the truck, that was not first degree murder. That was simply a reaction because they were having an argument." RT 5579.

287. The trial court obviously believed that there was significant evidence of provocation presented at trial, for it instructed the jury regarding voluntary manslaughter under a provocation theory. CT 638-42 (CALJIC Nos. 8.40 (1979 Re-rev.), 8.42 and 8.50 (1987 Rev.)). The jurors, however, "were not advised that the existence of provocation which is not 'adequate' to reduce the class of the offense may nevertheless raise a reasonable doubt that the defendant formed the intent to kill upon, and carried it out after, deliberation and premeditation." *People v. Valentine*, 28 Cal. 2d 121, 132 (1946).

288. Counsel's ineffective assistance in failing to request an instruction that evidence of provocation can vitiate premeditation and deliberation, and thus reduce the degree of murder, was clearly prejudicial. It is reasonably probable that but for counsel's failure to request CALJIC 8.73 or its equivalent, the jury would have reached another verdict in this case. There was substantial evidence presented that Petitioner acted—actually and unreasonably—out of provocation when he shot Ms. Clark and it is reasonably probable that the jury would have found Petitioner guilty of only second degree murder of Ms. Clark had that verdict been available to them under the instructions given. Either CALJIC No. 8.30 or 8.73 could have guided them to an appropriate second degree murder verdict, but neither was given. In the absence of the more general instruction covering the same area, CALJIC No. 8.73 was critical and trial counsel certainly should have requested it.

289. Counsel's ineffectiveness in failing to ensure that CALJIC 8.73 was given was also prejudicial because no other instruction given informed the jurors that provocation insufficient to reduce the homicide to manslaughter may nonetheless have a 'bearing . . . on the question of whether the murder was of the first or second degree. CALJIC No. 8.73 (1979 Rev.); *People v. Valentine*, 28 Cal. 2d at 132. To the contrary, the other instructions given in regard to provocation "impliedly precluded [the jury] from considering at all the matter of provocation in determining the degree of murder . . . ." *Id.* As in *Valentine*, the jurors were instructed that evidence of provocation could play a role in their determination as to which sort of homicide occurred—but only if it was "adequate" provocation, in which case it could form the basis for a voluntary manslaughter verdict. *See* CALJIC Nos. 8.42 (1987 Rev.) &

8.50 (1987 Rev.). The inevitable negative inference that any reasonable juror would draw from these directions is that evidence of "inadequate" provocation is wholly irrelevant. This logical, but legally incorrect, inference was cemented by the lack of instruction regarding unpremeditated murder of the second degree, for without such instruction the jury had nothing at all that might even remotely connect "mild" or "inadequate" provocation with the elements of any lesser offense.

290. The error in failing to instruct on provocation and second degree murder, together with the error in failing to instruct with CALJIC 8.30, prevented the jury from finding Petitioner guilty of the offense that was best supported by the defense evidence—intentional second degree murder. Taken as error in its own right, or together with the many other instructional omissions and mistakes made by trial counsel, the failure to request that the court instruct pursuant to CALJIC No. 8.73 deprived the jury of the ability properly to evaluate the evidence, and deprived Petitioner of due process of law and his right to a fair jury trial.

c. Instruction That Petitioner's Mental Disease Or Defect Could Vitiate Premeditation And Deliberation (CALJIC No. 3.36 (1981) (Current CALJIC No. 3.32); CALJIC 3.31.5).

291. Petitioner incorporates by reference as if fully set forth herein, Section I(C)(2) of his Opening Brief (AOB at 40-47), his Supplemental Opening Brief (Supp. AOB at 1-10), and Section I(B)(2) of his Reply Brief (ARB at 27-29), wherein Petitioner argued that the trial court committed reversible error when it failed to instruct Petitioner's jury, *sua sponte*, that it could consider the extensive evidence of Petitioner's disordered mental state in determining whether Petitioner actually premeditated and deliberated before killing Tracie Clark.

292. Well-established legal principle provides that evidence of a mental disease or defect can vitiate premeditation and deliberation, and thus can raise a reasonable doubt as to whether an intentional homicide is murder in the first degree. *E.g.*, *People v. Aguilar*, 218 Cal. App. 3d 1556, 1569-70 (1990); *People v. Jackson*, 152 Cal. App. 3d 961, 968, 970 (1984); *see also* PENAL CODE §28(a); *People v. Saille*, 54 Cal. 3d

1103, 1112 (1991); CALJIC No. 3.32. Petitioner has argued that the trial court committed error when it failed to instruct *sua sponte* with CALJIC No. 3.32[68], and instead instructed Petitioner's jury with a version of CALJIC No. 3.36[69], which failed to inform the jury of the effect of Petitioner's mental disease or defect upon his ability to premeditate and deliberate. The truncated version of CALJIC No. 3.36 read to the jury did not fill the gap left by the omission of No. 3.32. Read in the context of the whole jury charge, the modified CALJIC No. 3.36 could have lead reasonable jurors to believe that they were not even permitted to consider the evidence of Petitioner's mental disease as having anything

---

[68]Current CALJIC No. 3.32 states:

> Evidence has been received regarding a [mental disease] [mental defect] [or] [mental disorder] of the defendant [_____] at the time of the commission of the crime charged [namely, _____] [in Count[s] _____][.] [or a lesser crime thereto, namely _____]. You may consider such evidence solely for the purpose of determining whether the defendant [_____] actually formed [the required specific intent,] [premeditated, deliberated] [or] [harbored malice aforethought] which is an element of the crime charged [in Count[s] _____], to-wit _____[.] [or the lesser crime[s] of _____].

[69]CALJIC No. 3.36, current at the time of Petitioner's trial, provided as follows:

> "Evidence has been received regarding a [mental disease] [mental defect] or [mental disorder] of the defendant [_____] at the time of the offense charged [in Count _____]. You may consider such evidence solely for the purpose of determining whether or not the defendant [_____] actually formed the mental state which is an element of the crime charged [in Count _____], to-wit _____." (CALJIC No. 3.36 (1981) (*see* current CALJIC No. 3.32); see *People v. Aguilar*, 218 Cal. App. 3d at 1569).

The Use Note to CALJIC 3.36 provides that "[j]udge should fill in [the] last blank spaces to spell out [the] specific mental state or intent required in the specific count." The court never filled in the words 'premeditation and deliberation,' or anything else. Instead, he simply put a period in place of the final comma and omitted the words 'to wit'" and everything that might have followed them. CT 644.

whatever to do with the question of whether the Clark killing was premeditated.

293. Petitioner has argued that viewed either in combination with the court's concomitant failure to instruct regarding unpremeditated second degree murder (CALJIC No. 8.30) and on the concurrence of act and mental state (CALJIC 3.31.5), or taken by itself, the trial court's failure to instruct completely and accurately with former CALJIC 3.36 was error and requires that the judgment be vacated.

294. Recent cases suggest that trial courts may no longer have a *sua sponte* duty to instruct regarding the effect of a "diminished capacity" on the accused's ability to premeditate and deliberation. *See People v. Saille*, 54 Cal. 3d 1103, 1119-20 (1991). Petitioner has argued that under the facts and circumstances of this case, *sua sponte* instruction was required even under *Saille.* AOB at 42-47; *see* ARB at 27-29. For purposes of this claim, however, it does not matter whether the instruction should have been given *sua sponte* or only upon request of counsel. An instruction on the effect of Petitioner's mental disease or defect on his ability to premeditate and deliberate was necessary to explain the defense theory presented at trial. Counsel had an independent duty to request appropriate instruction on this legal principle. *People v. Sedeno*, 10 Cal. 3d at 717 n.7. A competent lawyer would have requested that Petitioner's jury be fully instructed; a competent lawyer would have pointed out the court's omission and requested that the court comply with the Use Note mandate and include premeditation and deliberation in the instruction; a competent lawyer would have noted an objection had the trial court refused to fully and accurately instruct the jury. Whether trial counsel's error is characterized as one of waiver, invited error or failure to request a pinpoint instruction on a legal theory upon which his defense rested, counsel failed to render effective assistance.

295. It is reasonably probable that but for trial counsel's ineffective assistance, the verdict in this case would have been different. As discussed above, the jury was never instructed that an unpremeditated homicide could be no more than second degree murder. Moreover, the

trial court in this case did not instruct the jury at all pursuant to CALJIC No. 3.31.5[70], which should have informed the jury that premeditation and deliberation are "mental states" which are "elements" of the crime of first degree murder. *See People v. Jones*, 53 Cal. 3d 1115, 1145 (1991). If the jurors had been so advised, they might have understood that, pursuant to No. 3.36 (1981), they were permitted to consider evidence regarding Petitioner's mental condition in determining whether those elements of the capital offense were proved beyond a reasonable doubt.

296. Instead, the only "concurrence" instruction received by the jury was a modified CALJIC No. 3.31 (1980 Rev.),[71] which described

---

[70]CALJIC No. 3.31.5 provides:

> "In [each of] the crime[s] charged in [Count[s] ___, ___ and ___ of] the information [namely, ___, ___ and ___,] there must exist a union or joint operation of act or conduct and a certain mental state in the mine of the perpetrator and unless such mental state exists the crime to which it relates is not committed.
>
> In the crime of ___, the necessary mental state is ___.
>
> [In the crime of ___, the necessary mental state is ___.]
>
> [In the crime of ___, the necessary mental state is ___.]"

The failure to provide that standard instruction regarding the concurrence of actus reus and the various culpable mental states was, in itself, yet another instructional error in the trial court. *See, e.g., People v. Cleaves*, 229 Cal. App. 3d 367, 381 (1991) (when trial court instructs regarding implied malice it has *sua sponte* duty also to give No. 3.31.5); *People v. McElheny*, 137 Cal. App. 3d 396, 405 (1982). Counsel rendered ineffective assistance in failing to request that the court instruct the jury with CALJIC No. 3.31.5.

CALJIC No. 3.31 (1980 Rev.), as provided to the jury orally and in writing was as follows, with the trial court's handwritten interpolations in italics and stricken words shown as such:

> "In [each of] the crime[s] charged in [Count[s] one, _____, and two of] the information, and in the crime of voluntary manslaughter, [namely,] _____, _____, and _____, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator and unless such specific intent exists the crime to which it relates is not committed.
>
> "[The specific intent required is included in the definition[s] of the crime[s] charged.]

(continued . . .)

only one mental state: "the specific intent unlawfully to kill a human being." This conformed with the truncated version of No. 3.36 delivered by the trial court, which merely indicated that there was "*a mental state* which is *an* element of the crimes charged." CT 644 (emphasis added). And, of course, No. 3.36 (1981) was phrased as a limitation on what use the jury could permissibly make of the tendered evidence regarding Petitioner's mental disorder: It could be considered "solely for the purpose of determining whether or not [Petitioner] actually formed" the pertinent mental state. *Id.*

297. Taken together, an incomplete No. 3.36 and the absence of No. 3.32 and No. 3.31.5 communicated to the jury that there was only one "mental state/element" that could be vitiated by evidence of mental disease or defect, namely, the element of specific intent to kill. Thus the instructions delivered by the trial court in this case did not merely fail to inform the jury that premeditation and deliberation were "mental states" which were "elements" of the crime charged and which could be vitiated by evidence of Petitioner's mental condition; rather, the instructions affirmatively misled the jury into believing that specific intent was the only such "mental state," and that the jury could "consider such evidence *solely* for the purpose of determining whether or not [Petitioner] actually formed" a specific intent to kill Ms. Clark. CT 644. The jury was thus effectively prohibited from considering the mental status evidence on the question of premeditation and deliberation.

(. . . continued)

> [The crime of murder requires the specific intent to unlawfully kill a human being.
>
> "[And the crime of voluntary manslaughter requires the specific intent to unlawfully kill a human being." (CT 629)

It is worth noting that the instruction was not even correct in itself, for the "crime charged in Count two" (i.e., the Benintende killing) had already been reduced to second degree murder, as to which the sole definition given was implied malice murder—a crime which certainly does not require "a specific intent to kill . . . ." *See, e.g., People v. Beeler*, 9 Cal. 4th 953, 983 (1995); *People v. Visciotti*, 2 Cal. 4th 1, 58 (1992); *People v. Murtishaw*, 29 Cal. 3d 733, 764-65 (1981). Thus the jury was given conflicting and confusing instructions on the mental element required for conviction of murder in Count 1.

2. Counsel Did Not Request Instructions Regarding Other Lesser Included Offenses And Defenses.

a. Instruction On The Lesser Included Offense Of "Imperfect Self-Defense"/Voluntary Manslaughter (Flannel Error) (CALJIC Nos. 8.40 (1979 Re-Rev.) & 8.50 (1987 Rev.)).

298. Petitioner hereby incorporates by reference as if fully set forth herein, Section I(E)(1) of his Opening Brief (AOB at 59-66), his Supplemental Opening Brief (Supp. AOB at 1-10), Section I(D)(1) of his Reply Brief (ARB at 37-39).

299. We have argued that there was substantial evidence presented at Petitioner's trial that he acted out of an actual, but irrational, belief that killing Tracie Clark was necessary to defend himself against "imminent peril to life or great bodily injury." *People v. Flannel*, 25 Cal. 3d 668, 674 (1979). AOB at 64; Supp. AOB at 4. Accordingly, the trial court had an absolute duty to instruct, on its own motion, on the lesser included offense of "unreasonable self-defense manslaughter." *People v. Barton*, 12 Cal. 4th 186, 201 (1995). The trial court not only failed to give an unreasonable self-defense instruction (CALJIC No. 5.17 (1987)), but also specifically struck out all references to unreasonable self-defense from the standard instructions on manslaughter (CALJIC Nos. 8.40 (1979 Re-rev.) & 8.50 (1987 Rev.)), which it gave to the jury both orally and in writing.[72] *See* CT 638, 642. *See* AOB at 59-66 (Section I(E)); Supp. AOB at 1-10.

---

[72]The following is the modified voluntary manslaughter instruction given by the trial court, orally and in written form, with the trial court's deletions shown as they appeared to the jury:

> "~~[Defendant is charged in [Count ___ of] the information with the commission of the crime of voluntary manslaughter, a violation of Section 192 of Penal Code].~~
>
> "The crime of voluntary manslaughter is the unlawful killing of a human being without malice aforethought when there is an intent to kill.
>
> "There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion, ~~[or] [in the honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury.]~~
>
> "In order to prove the commission of the crime of voluntary (continued . . .)

300. Petitioner has also argued that the trial court was required under the Fourteenth Amendment of the United States Constitution to instruct on all applicable theories of voluntary manslaughter in order to ensure that the jury properly considered whether the evidence proved, beyond a reasonable doubt, that Petitioner acted with "malice," an essential element of the crime of murder. Supp. AOB at 1-10. The trial court's failure to instruct Petitioner's jury on the lesser included offense of unreasonable self-defense manslaughter violated Petitioner's due process right to fundamental fairness by creating the very real possibility that he was convicted of an offense of which he was factually innocent under the evidence presented at trial.

301. If it is deemed that trial counsel invited the court's error or waived any of these claims by not objecting on the record to the court's failure to give an instruction on imperfect self-defense manslaughter and its deletion of all reference to imperfect self-defense, counsel was ineffective. Notwithstanding the court's *sua sponte* obligations, a competent lawyer would have requested an instruction on imperfect self-defense, as a lesser included offense supported by the defense evidence and theory of the case. *People v. Sedeno*, 10 Cal. 3d at 717 n.7.

302. It is more than reasonably probable, given the testimony presented at trial, that the jury could have found Petitioner actually believed his life was in danger and that he acted in accordance with that unreasonable belief when he shot and killed Tracie Clark. Due to trial counsel's ineffective assistance, however, the jury was not given an option of reaching a verdict of manslaughter under such circumstances. The error in failing to instruct the jury regarding imperfect self-defense manslaughter was aggravated by the fact that the jury was provided with written copies of the jury instructions that had the pertinent theory

---

(. . . continued)
manslaughter, each of the following elements must be proved:

1. That a human being was killed,

2. That the killing was unlawful, and

3. That the killing was done with the intent to kill."

(CT 638 (modifying CALJIC No. 8.40) (1979 Re-rev.)); see also CT 642 (similarly modifying CALJIC No. 8.50 (1987 Rev.)))

visibly deleted from the text. *See* note 72, *supra*. As a result, the jurors were affirmatively misled into believing that this lesser included offense—although available in some cases—was an impermissible verdict for them to reach in the case at bar.[73] Accordingly, counsel's inadequate performance deprived the jury of the opportunity to reach a potentially appropriate verdict.

b. Instruction On The Lesser Included Offense Of Involuntary Manslaughter (CALJIC No. 8.45 (1980 Rev.)).

303. Petitioner incorporates by reference as if fully set forth herein, Section I(F) of his Opening Brief (AOB at 71-77), his Supplemental Opening Brief (Supp. AOB at 1-10), Section I(E) of his Reply Brief (ARB at 40-46).

304. The mental health professionals who examined Petitioner and testified at trial concluded that Petitioner could not and did not intentionally kill Tracie Clark. *See* RT 5529 (testimony of Dr. Bird: at the time of the killing, Petitioner "did not have a rational capacity to . . . kill somebody with malice aforethought"); *see also* RT 5288, RT 5290, RT 5332, RT 5338. The prosecutor acknowledged in her closing argument that "[t]he defense in this case has put on evidence which says that this was not a willful or an intentional act." RT 5570. During his summation, defense counsel framed the issue in the Clark case as one of "specific intent." RT 5601. He stated, "[t]his case was about the specific intent at the time the crime was committed." RT 5602. The crucial question was whether there was "evidence of any type of intent or what was going on in his mind." RT 5613. *See* Claim V(F).

305. "[W]here there is substantial evidence that a defendant was unable to entertain, i.e., did not actually form, an intent to kill, the court has a *sua sponte* duty to instruct on involuntary manslaughter." *People v. Webber*, 228 Cal. App. 3d 1146, 1162 (1991) (discussing *People v. Ray*, 14 Cal. 3d 20, 28-29 (1975); *accord, People v. Saille*, 54 Cal. 3d at

---

[73]It also follows that there is obviously no "Sedeno cure" to be found in other, properly given instructions. *Cf. People v. Sedeno*, 10 Cal. 3d at 721.

1116-17. Despite ample evidence that Petitioner was unable to entertain an intent to kill, the trial court, for reasons that were never explained, specifically elected *not* to instruct on involuntary manslaughter.[74] RT 5625. We have argued that the trial court's failure to instruct, *sua sponte*, on that lesser included offense violated the rights guaranteed Petitioner under the state constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and requires that the judgment on Count 1 be reversed. *See* AOB at 71-77; ARB at 40-46.

306. We also contended that the court had a *sua sponte* duty even though the court indicated on the record that it specifically decided *not* to instruct on involuntary manslaughter, and defense counsel agreed that he need not do so.[75] Trial counsel's assent did not constitute any form of "invited error." As this Court has recognized,

> "[I]f defense counsel suggests or accedes to the erroneous instruction because of neglect or mistake we do not find 'invited error'; only if counsel expresses a deliberate tactical purpose in suggesting, resisting, or acceding to an instruction, do we deem it to nullify the trial court's obligation to instruct in the cause. In this case the defense counsel merely acceded to an erroneous instruction because of neglect or mistake. Defense counsel did not express a deliberate tactical purpose in suggesting, resisting, or acceding to the erroneous instruction." (*People v. Mosher*, 1 Cal. 3d at 393 (citations omitted); *accord*, *People v. Bradford*, 14 Cal. 4th 1005, 1057 (1997), *People v. Bunyard*, 45 Cal. 3d 1189, 1234 (1988); *People v. Wickersham*, 32 Cal. 3d at 332-35)

307. Moreover, the record makes it quite clear that counsel's acquiescence could *only* have been due to error or oversight. Counsel argued to the jury that Petitioner did not act with an intent to kill Ms. Clark. RT 5601, 5602. Defense counsel confirms in his declaration

---

[74]As discussed in Claim V(C), the trial court erroneously failed to record the discussions regarding jury instructions, as well as several dozen other matters.

[75]The court stated that "[defense counsel] also agrees that I need not give any instructions on the lesser included, involuntary manslaughter. . . . [¶] Have all those things I said been essentially correct, Mr. Lorenz?" Trial counsel responded, "[t]rue and accurate, your Honor. Well stated." RT 5625.

that he tried to show that Petitioner "was not acting rationally or intentionally when he shot [Tracie Clark]." Ex. 14 ¶7 (Lorenz Decl.). The only verdict consistent with this defense theory was involuntary manslaughter.

308. To the extent that it still might be deemed that trial counsel invited the error, waived the claimed error by agreeing that the court need not give an instruction on involuntary manslaughter or by not objecting to the court's failure to give the instruction, counsel was ineffective. Petitioner's lack of intent to kill was a theory upon which the defense rested. No competent counsel would present evidence and argue that the jury should return a verdict on a lesser included offense as to which the jury was not instructed. *See* Claim V(F).

309. It is reasonably probably that but for counsel's ineffective assistance the jury would have convicted Petitioner of involuntary manslaughter. If the jurors had even formed a reasonable doubt that Petitioner could not and did not form any intent to kill before he fired the shots that fatally wounded Tracie Clark, they could not properly have returned a verdict greater than involuntary manslaughter. *People v. Saille*, 54 Cal. 3d 1103, 1117 (1991). The jurors were deprived of the opportunity even to consider this issue because of the instructional error.[76]

c. Instruction On The Defense Of Unconsciousness (CALJIC No. 4.30 (1979 Rev.)).

310. Petitioner incorporates by reference as if fully set forth herein, Section III(A) of his Opening Brief (AOB at 88-97) and Section III(A) of his Reply Brief (ARB at 61-65).

311. Substantial evidence was presented at Petitioner's trial that Petitioner was not conscious when he shot either Janine Benintende or

---

[76]Counsel's ineffective assistance was also prejudicial because as Petitioner argued in his opening and reply briefs, the "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." *People v. Sedeno*, 10 Cal. 3d at 721; *accord, People v. Turner*, 50 Cal. 3d 668, 690-91 (1990). *See* AOB at 75-77; ARB at 44-46.

Tracie Clark. With regard to the Clark charge, Petitioner testified at trial that he had no independent memory of the death of Tracie Clark. RT 5388. While he did remember many of the events leading up to the shooting (RT 5360-61, 5364), his independent recollection of the incident ended before the first shot was fired. RT 5381. In addition, three mental health experts testified that, in their opinions, Petitioner had "blacked out" and slipped into a disassociative state at the time of the Clark shooting; the experts also offered a sound psychological explanation for why this had occurred. *See, e.g.*, RT 5249, 5339, 5444-46, 5448, 5501, 5521.

312. The evidence was even stronger that Petitioner was not conscious of shooting Ms. Benintende. During his purported "confession," Petitioner initially denied the killing, and later told the officers that he had no recollection of it. RT 5565; People's Trial Exhibits 3, 79, 80; Defendant's Trial Exhibits D, E (2/13/87 interview); People's Trial Exhibit 109; Defendant's Trial Exhibit H (2/14/87 interview); Defendant's Trial Exhibits F & G (2/16/87 interview). When asked about it at trial, Petitioner stated, plainly and unequivocally, "I have no memory of the Benintende homicide." RT 5388. Nonetheless, the expert testimony introduced by the defense as to the Clark offense, describing Petitioner's tendency to dissociate and history of amnesia episodes, presented a rationale for his absence of all memory which was equally applicable to the Benintende shooting. *See, e.g.*, RT 5249, 5289-90, 5403, 5429, 5474-85, 5498, 5499, 5511.

313. We have argued that the trial court committed reversible error when it failed to instruct, *sua sponte*, on the defense of unconsciousness as it applied to both Counts. *See* AOB at 88-97; and ARB at 61-65. The defense explicitly relied on factual evidence of unconsciousness and the evidence presented at Petitioner's trial was more than sufficient to have supported a finding by the jurors—if they had been instructed on unconsciousness—that the shootings of Ms. Clark and Ms. Benintende were both committed while David Rogers was in a kind of fugue or disassociative state, *i.e.*, in a state in which he acted (and killed) without conscious thought. Under such circumstances, *sua sponte* instruction on unconsciousness was plainly required as to both killings.

314. If it is nonetheless deemed that trial counsel invited the error or waived this claim of error by failing to request or object on the record to the trial court's failure to give CALJIC No. 4.30 (1979 Rev.), counsel was ineffective. The defense theory was that Petitioner shot Ms. Clark in a disassociative state, and the evidence presented established Petitioner's altered state of consciousness at the time of the shooting. Under such circumstances, failure to request instruction on the complete defense of unconsciousness as to both offenses amounted to ineffective assistance of counsel.

315. It is reasonably probable that but for counsel's ineffective assistance in failing to ensure the jury was instructed on unconsciousness, the jury would have concluded that the shootings of Ms. Clark and Ms. Benintende were both committed while Petitioner was in a kind of fugue or disassociative state, *i.e.*, in a state in which he acted (and killed) without conscious thought, and reached another verdict than it did in this case.[77]

---

[77]It cannot fairly be asserted that "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." *People v. Ramkeesoon*, 39 Cal. 3d 346, 352 (1985) (discussing *People v. Sedeno*, 10 Cal. 3d at 721). The only instructions providing an alternative to first degree murder in regard to the Clark killing were CALJIC No. 8.31 (1983 Rev.) (implied malice second degree murder) and the incomplete CALJIC Nos. 8.40 (1979 Re-rev.) and 8.50 (1979 Re-rev.) ("statutory" voluntary manslaughter). None was "properly given." The latter were unsupported by the evidence, and the former was hopelessly garbled and arguably unsupported as well. More important, even if these instructions had been proper, both involve lesser offenses which require a finding that the defendant was conscious, and acting either with the specific intent to kill (*see* CALJIC No. 8.40 (1979 Re-rev.)), or at deliberately, knowledgeably and "wantonly" (*see* CALJIC No. 8.31 (1983 Rev.)). That the jurors rejected a finding regarding one specific conscious mental state in favor of a verdict based on another specific conscious mental state cannot demonstrate that they even considered the possibility that Petitioner was acting unconsciously within the meaning of the law.

3. Counsel Did Not Request Other Needed Instructions Regarding The Nature And Elements Of The Offenses.

a. Instruction Regarding The Concurrence Of Act And Intent Required For Implied Malice Murder.

316. Petitioner incorporates by reference as if fully set forth herein Section II(A) of his Opening Brief (AOB at 77-82), Section II(A) of his Reply Brief (ARB at 46-51).

317. When Petitioner's case went to the jury, Petitioner was charged only with second degree murder in the death of Janine Benintende. CT 584. The court instructed the jury regarding one form of second degree murder: implied malice murder, as set forth in CALJIC Nos. 8.11 (1983 Rev.) and 8.31 (1983 Rev.). The only instruction the court gave regarding the concurrence of act and intent applicable to that statutory offense, however, was an adaptation of CALJIC No. 3.31 (1980 Rev.) (CT 629), which described the "specific intent to unlawfully kill"—or *express malice*.[78] The described state of mind is not just inapplicable to implied malice murder; rather, the two are antithetical. "Implied malice . . . cannot coexist with a specific intent to kill." *People v. Visciotti*, 2 Cal. 4th 1, 58 (1992) (quoting *People v. Murtishaw*, 29 Cal. 3d 733, 764-65 (1981)); *accord*, *People v. Lee*, 43 Cal. 3d 666, 670 (1987). The jury was thus never properly advised regarding the "union or joint operation of act and intent" pertinent to implied malice second degree murder—despite the fact that concurrence is a required element of the crime.

318. Petitioner has argued the trial court had a *sua sponte* duty to give appropriate instruction on the concurrence element of the offense of implied malice second degree murder. Its failure to do so in this case violated Petitioner's rights to due process and a fair jury trial, guaranteed under the United States and California Constitutions. Petitioner has also argued that the court's failure to instruct on an element of the criminal

---

[78]Petitioner has also argued that the court gave an erroneous and misleading instruction regarding intent with regard to the Clark offense. *See* Section I(D)(1) of Petitioner's Opening Brief (AOB at 47-54), Section I(C) of his Reply Brief (ARB at 29-37) and Claim V(E)(1), *supra*.

offense cannot be considered harmless under the circumstances of this case, and thus Petitioner's conviction of Count Two must be reversed. *See* AOB at 77-82; ARB at 46-51.

319. If it is deemed that trial counsel waived this claim of error by failing to request correct instruction, or by failing to object on the record to the trial court's failure to give it, counsel was ineffective.

320. It is reasonably probable that, but for counsel's ineffective assistance in failing to ensure the jury was properly instructed, the jury would not have convicted Petitioner of the second degree murder of Janine Benintende. There was a clear "concurrence issue" in that case. Although Petitioner was, for the most part, capable of forming the thoughts required by the definition of implied malice, there was no evidence presented at trial regarding Petitioner's state of mind at the time that Ms. Benintende was shot. Testimony presented regarding the Clark offense, however, may well have left the jury with reasonable doubt as to whether there was a concurrence of the requisite mental state and the *actus reus* of the Benintende offense. Mental health experts testified that at the time of the Clark killing, Petitioner did not and could not reason or think, and was unable to weigh the consequences of his actions. RT 5261, 5521-22. The experts made clear that the Clark killing was the result of a mental disorder that had affected Petitioner for a very long time—certainly well before the date of Ms. Benintende's death. The notion that Petitioner could have gone into a state, divorced from his normal ability to reason and to realize the consequences of his conduct, gains particular force in connection with a crime that he could not even remember at all. *Cf. People v. Sedeno*, 10 Cal. 3d at 718. As a result, a reasonable juror could believe that Petitioner was acting with conscious disregard of mortal danger up to a certain point in his encounter with Ms. Benintende, yet still harbor a reasonable doubt as to whether Petitioner had a rational mental state when he actually pointed a gun at Ms. Benintende and shot it.

321. None of the remaining instructions provided adequate instruction regarding the concurrence element of implied malice murder. The court misstated the mental state that must accompany a killing in order to give rise to implied malice (*see* AOB at 47-54 (Section I(D)) and Claim V(E)(3)(c), *infra*, incorporated herein by reference). The

implied malice definition given in this case (CALJIC No. 8.31 (1983 Rev.) (CT 636)) contained a confusing and ungrammatical shift in tense, which allows a juror to find a defendant culpable for a fatal act simply because he acted with conscious disregard *after the fact*. *See* AOB at 81; ARB at 47-48.

b. Instruction On The Sufficiency Of Circumstantial Evidence As To The Benintende Count (CALJIC No. 2.01).

322. Petitioner incorporates by reference as if fully set forth herein, Section II(B) of his Opening Brief (AOB at 82-87) and Section II(B) of his Reply Brief (ARB at 51-61).

323. In attempting to prove Petitioner guilty of the murder of Janine Benintende, the prosecution in this case relied totally and completely on circumstantial evidence: (1) The fact that Petitioner possessed the gun with which Ms. Benintende had been fatally shot; and (2) The fact that he committed a killing with certain similarities approximately a year later. The trial court, however, failed to inform the jury of the rule governing the sufficiency of circumstantial evidence, as set forth in CALJIC No. 2.01 (1979 Rev.).[79] That instruction must be

---

[79]The standard instruction, as published at the time of the trial in this case, provided as follows:

> "However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.
>
> "Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.
>
> "Also, if the circumstantial evidence [as to any particular count] is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt that interpretation which points to the defendant's innocence, and reject that interpretation which

(continued . . .)

given sua sponte when the prosecution substantially relies on circumstantial evidence to prove guilt. *People v. Marquez*, 1 Cal. 4th 553, 577 (1992) (citing *People v. Wiley*, 18 Cal. 3d 162, 174 (1976) and *People v. Yrigoyen*, 45 Cal. 2d 46, 49 (1955)); *accord*, *People v. Bender*, 27 Cal. 2d 164, 175 (1945). "CALJIC No. 2.01 clarifies the application of the general doctrine requiring proof beyond a reasonable doubt to a case in which guilt must be inferred from a pattern of incriminating circumstances." *In re Conservatorship of Walker*, 196 Cal. App. 3d 1082, 1095 (1987) (citing *People v. Gould*, 54 Cal. 2d 621, 629 (1960)).

324. Petitioner has argued that the trial court's failure to instruct, *sua sponte,* with CALJIC No. 2.01 was prejudicial, constitutional error. *See* AOB at 82-87; ARB at 51-61. If it is nonetheless deemed that trial counsel waived this issue by failing to object to the trial court's failure to give CALJIC No. 2.01 or by his failure to request that the instruction be given, the Petitioner was denied the effective assistance of counsel.

325. The prosecution case with regard to the Benintende offense was limited. The Benintende case turned solely and completely on whether the prosecution provided the constitutionally mandated quantum of proof beyond a reasonable doubt, and the entirely circumstantial evidence that was presented in this case was susceptible to more than one rational conclusion. It is more than reasonably probable that had the jury been properly instructed, it would have concluded that the prosecution did not meet its standard of proof with regard to the Benintende charge and thus not have found Petitioner guilty of second degree murder.[80]

(. . . continued)
points to his guilt.

"If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable." (CALJIC No. 2.01 (1979 rev.))

[80]The fact that the trial court gave the more general instructions on circumstantial evidence and on reasonable doubt (CT 612 (CALJIC No. 2.00 (1979 Rev.)); CT 630 (CALJIC No. 2.02 (1980 Rev.)), did not fill the breach left by the failure to give the requisite instruction. *People v. Fuentes*, 183 Cal. App. 3d 444, 455-56 (1986). Nor did the court do more (continued . . .)

c. Constitutionally Defective Instruction On Implied Malice Second Degree Murder (CALJIC No. 8.31 (1983 Rev.)).

326. Petitioner incorporates by reference as if fully set forth herein, Section I(D) of his Opening Brief (AOB at 47-59), the Supplemental Brief (Supp. AOB at 1-10), Section I(C) of his Reply Brief (ARB at 29-37).

327. We have argued that the trial court committed reversible error when it gave the jury prejudicially conflicting instructions on "implied malice" second degree murder in regard to the killing of Tracie Clark. The only second degree murder instruction the trial court gave was CALJIC No. 8.31 (1983 Rev.), which does not require a specific intent to kill.[81] CT 636. Yet, the sole instruction read to the jury

---

(. . . continued)
than compound the error when it instructed pursuant to CALJIC No. 2.02, regarding the "sufficiency of circumstantial evidence to prove specific intent or mental state."

As the Use Note to that instruction specifies, it is "designed for use instead of CALJIC 2.01 in a specific intent or mental state case in which the only element of the offense which rests substantially or entirely on circumstantial evidence is the element of specific intent or mental state." *Id.* The jury is presumed to follow the instructions. *Zafiro v. United States*, 506 U.S. 534, 540 (1993). Therefore, we must presume that the jury applied CALJIC No. 2.02 only to the specified (mental) elements.

[81]The court instructed as follows:

> "Murder of the second degree is [also] the unlawful killing of a human being as the direct causal result of an intentional act, [involving a high degree of probability that it will result in death, which act is done for a base, antisocial purpose and with wanton disregard for human life.] [or] [the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for human life.]
>
> "When the killing is the direct result of such an act, it is not necessary to establish that the defendant intended that his act would result in the death of a human being." (CT 636 (setting forth CALJIC No. 8.31 (1983 Rev.)))

In addition, the trial court gave the cognate instruction defining "malice aforethought" in essentially identical terms. CT 632 (setting forth CALJIC No. 8.11 (1983 Rev.)).

regarding the concurrence of act and intent, CALJIC No. 3.31, unequivocally stated that "[t]he crime of *murder requires the specific intent to unlawfully kill* a human being."[82] CT 629. These two instructions are irreconcilable. One states that implied malice murder does not require a specific intent to kill, while the other unequivocally declares that "a specific intent to unlawfully kill a human being" is a required element of murder. In conflating the mens rea for second degree murder with that for first degree murder, the instruction invited the jury to impose guilt randomly rather than on the basis of meaningful distinction between the crimes. *Cf. United States v. Lesina*, 833 F.2d 156, 158-59 (9th Cir. 1987).

328. If it is deemed that trial counsel invited the error or waived the claimed error by failing to object to the trial court's conflicting instructions regarding the element of intent in implied malice second degree murder, counsel was ineffective. The trial court's conflicting instructions regarding the element of intent were improper and harmful, and counsel's failure to object to the court's constitutionally defective instructions amounted to prejudicially ineffective assistance of counsel. *See Gray v. Lynn*, 6 F.3d 265, 269 (5th Cir. 1993).

329. If there was substantial evidence to support a second degree implied malice verdict, the defective instruction regarding its elements

---

[82]The court instructed as follows:

> "In [each of] the crime[s] charged in [Count[s] one, _____ and two of] the information, and in the crime of voluntary manslaughter, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator and unless such specific intent exists the crime to which it relates is not committed."
>
> "[The specific intent required is included in the definitions of the crime[s] charged.]
>
> "[The crime of *murder* requires the specific intent to *unlawfully kill a human being*.]
>
> "[The crime of *voluntary manslaughter* requires the specific intent to *unlawfully kill a human being*.]" (CT 629 (setting out CALJIC No. 3.31 (1980 Rev.)))

The instruction is set out just as it was provided to the jury orally and in writing, with the trial court's handwritten interpolations in italics.

effectively nullified the implied malice charge, and deprived the jury of the opportunity to consider that lesser included offense—thus violating the constitutional requirements set out in *Beck v. Alabama,* 447 U.S. at 633-38. On the other hand, if the evidence was insufficient to sustain the implied malice charge, then the trial court gave an unsupported instruction that could have served only to confuse the jurors and lead them away from their task of deciding the real issues at trial. An unsupported implied malice instruction in the instant case effectively foreclosed jury consideration of the defenses tendered, and of any viable lesser included offense, rendering the verdict that was reached in Count One arbitrary and unfair.

d. Instructions That Impermissibly Diluted Reasonable Doubt (CALJIC Nos. 2.02, 2.21, 2.22, 2.27 & 2.51).

330. Petitioner incorporates by reference as if fully set forth herein, Section III(C) of his Opening Brief (AOB at 103-07) and Section III(C) of his Reply Brief (ARB at 75-78).

331. The trial court gave a series of five (formerly) standard instructions, each of which suggested that the jury should resolve material issues in this case by determining which side had presented relatively stronger evidence on the disputed points. *See* CT 619 (CALJIC No. 2.21); CT 622 (CALJIC No. 2.22 (1975 Rev.)); CT 621 (CALJIC No. 2.27 (1986 Rev.)); CT 622 (CALJIC No. 2.51); CT 630 (CALJIC No. 2.02 (1980 Rev.)).

332. We have argued that such instructions, individually and collectively, conflicted with the most fundamental guarantee of Due Process, which "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. at 364; *accord, Cage v. Louisiana,* 498 U.S. 39 (1990). The court's errors violated Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution in a manner that can never be "harmless," and the judgment in this case must therefore be reversed. *See* AOB at 103-07; ARB at 75-78.

333. If it is deemed that trial counsel waived this issue by failing to object to the challenged instructions, then Petitioner was denied the effective assistance of counsel. It is reasonably probable that but for trial counsel's errors, the jury would have reached another verdict. Each of the disputed instructions in itself, and all of them taken together, served to contradict and impermissibly dilute the constitutionally mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt."

4. Counsel Did Not Request That The Trial Court Respond To The Jury's Specific Requests (PENAL CODE §1138).

334. Petitioner incorporates by reference as if fully set forth herein, Section III(B) of his Opening Brief (AOB at 98-103) and Section III(B) of his Reply Brief (ARB at 66-74).

335. On the second day of their deliberations, the jurors specifically requested additional instruction on, *inter alia,* the "[d]efinitions of the degrees of murder." CTS 986; RT 5695-96. In response, the court told the foreperson that he was "not altogether sure what you want on that." RT 5696. Rather than find out exactly what the jury needed, the trial court provided the jurors with the hand-modified written text of the same defective and incomplete instructions that had already been read to them. RT 5696-97. Defense counsel agreed that the instructions could be sent to the jury. RT 5696.

336. In a separate, undated note (apparently sent after the other note), the jury again conveyed its confusion about the elements of the charged offenses. The jurors asked for the "legal definitions of the crimes being charged." CTS 988. There was no discussion of the note on the record, and the court never responded to that request on the record. The record also contains no indication that trial counsel was ever consulted about the note or even knew of its existence. The court and parties have no recollection of this second note, the events surrounding its receipt or any response made to it. Ex. 28 at Nos. 2-3 (2d Supp. S.S.S.)

337. We have argued that by simply providing the jury with the written instructions that had initially confused them, the trial court failed

to supply the jury with the information it requested and to which it was entitled. The court violated the express terms of Penal Code Section 1138, and its error also deprived Petitioner of his Fifth, Sixth and Fourteenth Amendment rights to be tried by a jury that is adequately informed on the law governing all elements of the offense and thus able to determine each element. In arbitrarily failing to adhere to prescribed procedures, the trial also deprived Petitioner of his Eighth Amendment right to a reliable guilt phase determination, and of his right to due process of law guaranteed by the Constitution to all defendants in state capital proceedings. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Harris v. Vasquez*, 913 F.2d 606, 625 (9th Cir. 1990). The error was plainly prejudicial, and requires that the judgment must be reversed. *See* AOB at 98-103; ARB at 66-74.

338. If it is deemed that trial counsel waived this claim of error or invited the trial court's error by agreeing that the instructions could be sent to the jury (RT 5696), then Petitioner was denied the effective assistance of counsel.[83] A competent lawyer would have done all in his power to ensure that the jurors' request was met and that they were finally given the complete and accurate instructions on lesser included offenses they had previously been denied.

339. It is more than reasonably probable that had the trial court fully and accurately instructed the jurors in response to their request, they would have reached a different verdict in this case. The jury's repeated request for further instruction on the definitions of the crimes charged (as well as the jury's other requests—for the "final conclusions" or "diagnosis" of the mental health experts (CTS 986 ; RT 5695-96); for a readback of Petitioner's testimony (CTS 986; RT 5695); and for Petitioner's taped statement to the police (CTS 990; RT 5653), clearly demonstrates that the jury had focused on and was considering the

---

[83]Given trial counsel's apparent lack of knowledge of the jurors' second request, it could not legitimately be asserted that trial counsel "invited" or waived any claim arising from the trial court's error in regard to that note. *See* Ex. 28 at Nos. 2, 3 (2d Supp. S.S.S.). Trial counsel did not and could not "invite" the court to ignore a request of which counsel had no knowledge; and he cannot "waive" a trial court error of which he is completely unaware.

central issue presented by the defense: whether, and to what extent, did Petitioner's mental disease or defect vitiate any element of the charged crimes? By failing to give any "definition" whatsoever of the "degree of murder" that corresponded to the evidence of unpremeditated second degree murder, the jury had no way to consider Petitioner's primary defense. The omitted instructions regarding provocation and regarding the effect of mental disease would also have illuminated and allowed the jury at least to consider the implications of the mental state evidence upon which it was focused. Furthermore, having given conflicting instructions regarding the only "lesser" form of murder that was mentioned at all—implied malice murder—the trial court had an inescapable duty to the jury to clarify that conflict. Any further "definition of the degrees of murder" could and should have rectified the initial failure to instruct regarding the element of concurrence (dropped from the original implied malice murder definition).

340. There was no tactical or strategic basis for counsel's failure to ensure that the jury's question was answered. There *could* be no tactical advantage to the defense in preventing the court from correcting its and counsel's earlier instructional errors or in denying the jurors the further instruction they requested. Such instruction could only have helped the jury find an alternative to a first degree murder finding and the resulting death verdict. It appears that counsel's concurrence in the Court's action was nothing more than another example of counsel working under the assumption that it was the "trial judge's job to come up with jury instructions." *See* Ex. 14 ¶8 (Lorenz Decl.).

341. Counsel's failure to ensure that the jury was provided with additional instruction deprived the jurors of several alternative verdict options—any one of which, if adopted, would have spared Petitioner the death penalty. Instead, the previous instructional error was compounded when the court gave the jurors the written version of the same incomplete and defective charge that it had already delivered. If anything, this action made matters worse, for—viewing the various interlineations and "cross-outs" on the written forms—the jurors were now *affirmatively* (and erroneously) informed that they were *not* permitted to find that Petitioner committed voluntary manslaughter based on a theory of unreasonable self-defense. CT 638, 642.

5. Counsel Did Not Request That The Court Give Instructions Limiting The Purpose For Which Certain Evidence Could Be Considered.

a. Limiting Instruction To Cure The Prejudicial Effect Of The Joint Trial.

342. Petitioner incorporates by reference as if fully set forth herein, Section V of his Opening Brief (AOB at 124-53), Section VI of his Reply Brief (ARB at 104-14).

343. We have argued that joinder of the Clark and Benintende counts for trial deprived him of due process and the right to a fair trial, and that this case presented "extraordinary circumstances" which imposed upon the trial court a *sua sponte* duty to give a limiting instruction to cure the prejudicial effect of the joint trial. *See* AOB at 142-45. If it is deemed that the instruction need not have been given *sua sponte*, or that trial counsel waived this claim of error by failing to request that a limiting instruction be given, then Petitioner was denied the effective assistance of counsel on this issue.

344. A competent lawyer in a trial such as Petitioner's would have requested that the jury be instructed that evidence relating to one offense cannot be used to establish guilt of the other, and that the jury's finding of guilt of one offense cannot be used as evidence of guilt of the other. The failure to give such instruction was highly prejudicial. The principal issue in dispute in the Benintende case was identity, and without a proper limiting instruction, the jury could and almost certainly did rely upon irrelevant and prejudicial evidence. Without proper instruction, the jurors were free to consider all the evidence supporting the Clark homicide, as well as the mental health evidence presented in Petitioner's defense of the Clark homicide, as evidence that it was Petitioner, and not someone else, who shot Janine Benintende. They were also free to consider their conclusion that Petitioner was guilty of the murder of Tracie Clark as evidence that he was a person predisposed to killing prostitutes—and to find him guilty of the Benintende slaying on that basis. Under these circumstances, it is more than reasonably probable that had counsel requested a limiting instruction it would have been given, and had it been given, the jury would have reached a different verdict in the guilt phase and there would not even have been a penalty phase.

b. Limiting Instruction Regarding How The Jury Could Consider The Martinez Evidence.

345. Petitioner incorporates by reference as if fully set forth herein, Section VIII of his Opening Brief (AOB at 199-206), Section VIII of his Reply Brief (ARB at 117-22).

346. Lieutenant Paul Kent of the Kern County Sheriff's Department testified at Petitioner's trial that in February, 1983, when he was a sergeant assigned to the Internal Affairs Division, Kent investigated a complaint filed against Petitioner by a prostitute named Ellen Martinez. RT 5554-55. Lieutenant Kent also testified that following the investigation of Ms. Martinez' complaint, "disciplinary action" was taken against Petitioner. RT 5556. Lieutenant Kent explained that Petitioner was initially terminated from the Sheriff's Department, but then reinstated following an appeal. RT 5557.

347. We have argued that the court committed constitutional error when it admitted evidence of Ms. Martinez' accusations of unspecified acts of misconduct against her. *See* AOB at 199-206; ARB at 117-22. Petitioner also argued that the court violated Petitioner's right to due process when it failed to give, *sua sponte*, a limiting instruction restricting the purpose for which the jury could consider such prejudicial evidence. *See* AOB at 205. If it is deemed that the court had no *sua sponte* obligation to give a limiting instruction or that trial counsel waived this claim of error by failing to request a limiting instruction (*see* RB at 192-93), then Petitioner was denied the effective assistance of counsel.

348. A competent lawyer would have requested that Petitioner's jury be instructed with a modification of CALJIC No. 2.50 (1987 Rev.), cautioning the jury that the Martinez evidence could not be considered to prove that Petitioner was a person of bad character or that he had a disposition to commit crimes. A competent lawyer also would have requested an instruction informing the jury that the evidence of Ms. Martinez' accusations could not to be considered for the truth of the matter. The Martinez evidence was admitted solely to prove Petitioner's motive to kill Tracie Clark, that is to show that Petitioner killed Ms. Clark to prevent her from reporting him, just as Ellen Martinez had done. This purported motive—to prevent a second prostitute from

making a claim against him—existed solely because an earlier accusation had been made—*not* because the original accusation was true or accurate. Indeed, the truth of Ms. Martinez' accusations was entirely irrelevant to motive.

349. It is also reasonably probable that had the above instructions been given, the jury would have reached another verdict. Without a proper limiting instruction the jury undoubtedly considered the evidence for the truth and assumed that Petitioner had a propensity to harm prostitutes. Evidence suggesting this long-term pattern of misconduct against prostitutes undermined Petitioner's defense in the Clark case and eliminated any reasonable doubt the jury may have had about the Benintende offense—based not on the strength of the evidence, but on the jury's determination that Petitioner was the kind of man predisposed to commit such crimes.

6. The Combined Effect Of Trial Counsel's Instructional Errors Effectively Precluded The Jury From Finding Petitioner Guilty Of Anything Less That Capital Murder.

350. The cumulative effect of counsel's ineffective assistance with regard to jury instructions was that Petitioner's jury was not instructed on applicable lesser included offenses supported by the evidence. The instructional errors virtually guaranteed that the jury would return verdicts making Petitioner eligible for the death penalty. This is constitutionally impermissible under *Beck v. Alabama,* 447 U.S. 625 (1980).

> "When the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction. [¶] Such a risk cannot be tolerated in a case in which the defendant's life is at stake. . . . " (*Id.* at 637-38 (footnote omitted))

351. The "lesser" alternatives that were offered in this case—implied malice murder (as to Count 1) and "statutory" manslaughter (as to both Counts)—did not amount to real alternatives, for they had little

or no relationship to the evidence tendered by either side at trial. *See* Claim V(E)(2), *supra*. The goal of the *Beck* rule is "to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." *Spaziano v. Florida*, 468 U.S. 447, 455-56 (1984) (citations omitted) (concluding that requiring that the jury be instructed on lesser included offenses for which the defendant *may not* be convicted would simply introduce another type of distortion into the factfinding process). The lesser alternatives in this case were so plainly not applicable to the evidence of mental state presented by either side that they were impossible for the jury to adopt, and, if anything, introduced another type of distortion in to the factfinding process.

F. Failure To Provide A Coherent And Effective Defense At The Guilt Phase.

352. Although counsel introduced valuable evidence at Petitioner's trial, he failed to develop that evidence into a coherent or consistent defense theory, supported by the evidence *and* instructions *and* argument. Counsel's argument was a contradictory and sometimes incoherent appeal to the jury, which reveals with alarming clarity how confused he was about the legal elements of murder and manslaughter. Trial counsel's inadequate performance at trial deprived Petitioner of his chance to present a defense, and as a result the jury was left with no choice but to find Petitioner guilty as charged.

1. Ineffective Presentation And Summation On The Clark Court.

a. Counsel Did Not Distinguish Between Premeditation And Deliberation And Intent To Kill.

353. In his opening statement, trial counsel stated that the issue in the Clark case was "premeditation and deliberation. . . ." RT 4490. During trial, counsel introduced expert testimony to prove that Petitioner did not premeditate and deliberate when he shot Ms. Clark. Counsel questioned his experts exclusively about premeditation and deliberation (*see, e.g.*, RT 5225, 5329, 5450-51, 5500, 5521, 5522), and they each testified that Petitioner did not premeditate or deliberate before shooting

Tracie Clark. *See* testimony of Dr. Bird (RT 5500), 5513, 5468, 5521-22); testimony of Dr. Glaser (RT 5225, 5260-61); and testimony of psychotherapist Joan Franz (RT 5419, 5451).

354. Also, Petitioner testified that when he killed Tracie Clark he was *not* making any "cold, calculated judgments" or "weighing anything in a rational sense for and against"—rather, he "only felt fear" as she came toward him; without any further thought he "pulled the trigger on the gun and shot her." RT 5363.

355. Yet, Counsel failed to question any of his witnesses about Petitioner's ability to form an intent to kill Tracie Clark. It was during *cross-examination by the prosecutor* that the defense witnesses mentioned the possibility that Petitioner was incapable of forming an intent to kill Ms. Clark.[84] While questioning Dr. Glaser, the prosecutor stated, "you came to the conclusion that he could not . . . form the specific intent or premeditate to kill. . . ." RT 5283. Dr. Glaser agreed. *Id.* The prosecutor also asked Dr. Glaser about his "opinion that [Petitioner] could not form this intent to kill" (RT 5288), and thereafter, many of her questions were premised on Dr. Glaser's testimony that Petitioner lacked intent to kill. *See* RT 5332 ("are you telling the jury that that is the reason [Petitioner] couldn't form the specific intent to kill anyone?"); RT 5338 (when did Petitioner "cease to be able to form opinions or form thoughts or intents . . . ?"). In response to one of the prosecutor's questions, Dr. Glaser explained that a disassociative state such as Petitioner experienced involved a cutting off of one's thinking state—forming intention—from one's consciousness. RT 5290.

356. Despite counsel's assertion during opening statement that the Clark case involved "issues of premeditation and deliberation" (RT 4490),[85] and despite the evidence counsel introduced in support of this

---

[84]In her closing argument, the prosecutor characterized the defense evidence as showing that Petitioner "did not know what he was doing" (RT 5582), and suffered from an "inability to form the intent to kill . . . ." RT 5587. "The defense in this case has put on evidence which says that this was not a willful or an intentional act." RT 5570.

[85]Counsel also states in his current declaration that his "primary theory of defense with regard to the Clark charge was that Mr. Rogers lacked premeditation and deliberation and therefore could be found guilty of (continued . . .)

defense, counsel failed *even to mention second degree murder* in his closing argument, except to say, in the context of discussing the "Benikdictta [sic] killing" that the court would instruct the jury on "three different degrees, homicide, voluntary manslaughter, second degree murder and first degree murder and tell you what it is." RT 5613. Counsel instead, for the first time, framed the "specific issue" as one of "specific intent." RT 5601. He stated, "[t]his case was about the specific intent at the time the crime was committed." RT 5602.

357. Lest one think that counsel had redefined—rather than misdefined—the issue, he proceeded to use the terms and the concepts of premeditation and deliberation and intent virtually interchangeably.[86] Counsel began his closing argument by stressing that the prosecution bore the burden of proving "premeditation and deliberation beyond a reasonable doubt and to a moral certainty." RT 5598. Later, in analyzing the evidence of specific intent, he argued that "we are talking about manslaughter." RT 5600.

358. Counsel argued at one point that the jury could not find malice as to either count. RT 5601. Counsel did not specifically state it, but if that were the case, Petitioner could be found guilty of nothing greater than involuntary manslaughter. In the next breath, counsel asked the jury to consider, presumably in determining whether malice existed, Petitioner's mental state at the time of the killing, "[w]as it the high level mental state of weighing considerations for and against." *Id.* Counsel's rhetorical question, however, addressed not malice, but premeditation and deliberation. *See* CALJIC No. 8.20.[87] In the very next sentence,

---

(. . . continued)
nothing more than second degree murder." Ex. 14 ¶6 (Lorenz Decl.).

[86]The first evidence of counsel's apparent confusion about the distinction between intent and premeditation and deliberation can be found during counsel's examination of Dr. Bird. Counsel prefaced a question of Dr. Bird by stating, "Let me ask you the specific legal questions regarding *intent and premeditation*." Counsel then read the CALJIC definition of *deliberation*, "'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action,' meaning killing." RT 5521 (reading CALJIC 8.20 (1979 Rev.)); *see* CT 634.

[87]CALJIC No. 8.20 defines deliberate and premeditated murder, and (continued . . .)

counsel introduced yet another concept, asking whether Petitioner was acting under "extreme passion and extreme emotion?" RT 5601. A short while later, counsel returned to premeditation and deliberation, and stated his belief that Petitioner had not planned the killing, "weighed [the] consequences for and against." RT 5603.

359. Further evidence that counsel's argument was based on confusion rather than design is found in the fact that, although counsel argued that Petitioner lacked intent to kill, counsel did not request and the court did not give an instruction on *involuntary manslaughter*, which CALJIC No. 8.45 defines as "the unlawful killing of a human being without malice aforethought and *without an intent to kill.*"[88] (emphasis added). The only manslaughter instruction the jury received was regarding *voluntary* manslaughter, which, the jury was told, "is the unlawful killing of a human being without malice aforethought when *there is an intent to kill.*" CALJIC 8.40 (1979 Re-Rev.) (emphasis added). CT 638. Thus, even if the jurors had accepted counsel's assertion that Petitioner did not form an intent to kill Tracie Clark, without an instruction on involuntary manslaughter, they were unable to reach the appropriate verdict.

360. Counsel's apparent confusion regarding— and his undeniable inability to express the distinctions among— intent, malice, and premeditation and deliberation can also be found in his discussion of Petitioner's "extreme emotional problems." RT 5604. Counsel argued forcefully that Petitioner was not a "real normal human being" (RT 5606-07), but counsel was anything but clear about what that meant in connection with Petitioner's legal culpability. Referring to the language

---

(. . . continued)
states "[t]he word 'deliberate' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action."

[88]For reasons not apparent, the court stated on the record that he would not instruct on involuntary manslaughter, and trial counsel agreed that he need not do so. RT 5625. Petitioner has argued that the court committed error when he failed to instruct, sua sponte, on involuntary manslaughter (AOB at 71-77 (Section I(F)), and that trial counsel rendered ineffective assistance in failing to request such an instruction (*see* Claim V(E)(2)(b).

of CALJIC 3.36 (1981), counsel told the jury that they would be instructed that "if there is evidence of emotional defect, emotional disease, emotional trauma, you are to consider this when you consider whether or not the defendant had the specific intent at the time he committed the crime." RT 5609. Counsel defined the relevant mental state as "specific intent"; thus he was apparently asking the jury to find Petitioner guilty of involuntary manslaughter, an option on which the jury was not instructed.[89] At other times, however, counsel appeared to argue that the evidence of mental disease or defect was relevant to whether Petitioner could premeditate and deliberate. Counsel asserted that Petitioner was not a "normal human being, weighing decisions, being rational, calculating." RT 5605. Because of his problems, Petitioner could not weigh the "consequences for and against." *See* RT 5606. Here, counsel appears to be arguing Petitioner was guilty of unpremeditated second degree murder—another option on which the jury was not instructed. Finally, counsel argued that Petitioner "didn't plan it out" while reminding the jury that the prosecution has the burden of proving specific intent. RT 5607.

361. Counsel concluded his summation by asking:

> "Is there a doubt in your mind that [Petitioner] is an individual who suffers from extreme, emotion problems? . . . .
>
> "Is there a doubt in your mind that he didn't plan the killing of Tracie Clark? He didn't weigh considerations for and against. You know what, I don't think there is even any doubt that this killing was done in a state of extreme emotion, extreme passion. That means something in the law.
>
> "I don't think there is any doubt that this was not a logical, rational, normal human being. It didn't happen that way. It didn't happen that way. And I ask you to bring in an appropriate verdict in this case." (RT 5613-14)

---

[89]As this Court explained in *People v. Saille*, 54 Cal. 3d 1103 (1991):

> "A defendant . . . is still free to show that because of his mental illness or voluntary intoxication, he did not in fact form the intent unlawfully to kill (i.e., did not have malice aforethought). [Citation] In a murder case, if this evidence is believed, the only supportable verdict would be involuntary manslaughter or an acquittal." (*Id.* at 1116-17 (citation omitted))

362. The argument, if not the evidence, unquestionably left the jurors with doubt. The evidence clearly "mean[t] something in the law," but counsel did not articulate *what*—or ensure that the jury was provided with the relevant "law" to find it. There was indeed an appropriate verdict less than what was charged, but counsel did not state it, explain how the jurors could reach it under the evidence presented, or give them the instructions they needed to reach it.

b. Counsel Presented And Argued Contradictory Defenses Of Diminished Actuality And "Heat Of Passion."

363. Trial counsel states in his attached sworn declaration that he tried to show at trial that "Ms. Clark said or did something that provoked [Petitioner] and just set him off, and as a result he was not acting rationally or intentionally when he shot her." Ex. 14 ¶7 (Lorenz Decl.). This assertion illustrates counsel's apparent confusion about the two forms of manslaughter. Counsel's use of the word "provoked" suggests that he was seeking a voluntary manslaughter verdict under a theory of sudden quarrel or heat of passion. *See* CALJIC Nos. 8.40, 8.42. The conclusion counsel draws from the provocation, however, that Petitioner was not acting "intentionally," would reduce the offense to *involuntary* manslaughter, an offense on which the jury was not instructed. However, any danger that counsel might have confused the jury regarding the degrees of manslaughter was rendered moot by the contradictory mental state evidence counsel presented, which foreclosed the possibility of any manslaughter verdict at all.

364. In support of a provocation form of manslaughter, counsel presented evidence that Ms. Clark attacked Petitioner both physically and verbally. *See* RT 5364, 5367, 5382-83. According to the testimony of the defense mental health experts, the shooting of Tracie Clark was precipitated by her own provocative conduct and words. *See* RT 5338-39 (Dr. Glaser); RT 5419 (Ms. Franz); RT 5500-01, 5521-22 (Dr. Bird). Trial counsel argued in closing argument that in the Clark case, "we are talking about manslaughter." RT 5600. "I don't think there is even any doubt that this killing was done in a state of extreme emotion, extreme passion." RT 5613. He stated that the burden was on the state to show

that the killing "was not done in the heat of passion or upon sudden quarrel." RT 5601.

365. Counsel told the jury that "if you feel the killing was done in a state of emotion, we are not talking about first degree murder and we are probably not even talking about murder in this case according to the legal instructions you will get from the judge, according to the law you are going to get this afternoon." RT 5610-11.

366. The manslaughter instructions given in this case described only that form known as "sudden quarrel or heat of passion" voluntary manslaughter. *See* CT 638-40, 642 (modified versions of CALJIC 8.40 (1979 Re-Rev.) (Voluntary manslaughter—defined)); CALJIC 8.42 (1979 Rev.) (Sudden quarrel or heat of passion and provocation explained); CALJIC 8.50 (1987 Rev.) (murder and manslaughter distinguished). The instructions informed the jury that they could convict Petitioner of voluntary manslaughter if they found that, as a result of provocation, Petitioner's "reason . . . was obscured or disturbed by passion to such an extent as would cause *the ordinary reasonable person of average disposition* to act rashly and without deliberation and reflection. . . ." CALJIC No. 8.42 (emphasis added); CT 639.[90] Counsel had to show that "malice [was] lacking because the killing occurred under circumstances of sufficient provocation such as to rouse the reasonable man to heat of passion or sudden quarrel." *People v. Graham*, 71 Cal. 2d 303, 315 n.2 (1969); PENAL CODE §192(a).

367. Trial counsel made no attempt to argue that Petitioner's "heat of passion" was reasonable. To the contrary, at the same time counsel was arguing that Petitioner was guilty of manslaughter based on

---

[90]The court struck from these standard instructions all reference to the other type of voluntary manslaughter known as "unreasonable" or "imperfect" self defense. *See* CT 638, 642. The record does not reveal whether trial counsel requested, objected to or voiced no opinion regarding the modified manslaughter instructions read to the jury. *See* Claim V(C), regarding the lack of a record of the jury instruction discussions. Trial counsel states in his attached declaration, however, that he did not waive or object to the giving of an instruction on unpremeditated second degree murder "or any other instruction." Ex. 14 ¶10 (Lorenz Decl.). He is confident that had he done so, the trial court would have insisted that it be put on the record. *Id.*

heat of passion that an ordinary, reasonable person would experience, trial counsel was also making a diminished actuality argument totally incompatible with this theory of defense. Counsel argued and put on evidence that Petitioner's reaction to Ms. Clark were anything but ordinary and reasonable. Dr. Bird testified that it was "ridiculous" to fear for your life when someone points a finger at you. RT 5521. And counsel acknowledged to the jury that Ms. Clark was not a real threat and Petitioner "was not a real normal human being either." RT 5606-07. "[T]o say that he is a normal human being who had a normal background and who made normal rational decision is an insult to intelligence." RT 5609-10. Trial counsel explained that Petitioner "has never been right, he may never be right." RT 5605. He is not "a normal human being, weighing decision, being rational, calculating." RT 5605. Counsel declared that Petitioner suffered from "extreme emotional distress," "extreme emotional problems . . . over a period of years." RT 5604.

368. A defendant may show that because of his mental illness he did not form "a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." PENAL CODE §28(a). In this case the court instructed the jury, pursuant to a modified version of CALJIC No. 3.36 (1981), that it could consider evidence regarding Petitioner's mental disease, defect or disorder in determining whether Petitioner "actually formed the mental state which is an element of the crimes charged in the information and the crime of voluntary manslaughter." CTS 644; RT 5640.

369. The fundamental problem with this approach theory was that Petitioner's jury was not instructed on the two potential verdicts it could reach if it accepted the defense evidence. If Petitioner's mental disease or defect made it impossible for him to form an intent to kill, he was guilty of no more than involuntary manslaughter—a verdict as to which the jury was not instructed. If Petitioner's mental disease or defect prevented him from premeditating and deliberating, Petitioner was guilty of unpremeditated second degree murder—another verdict as to which the jury was not instructed.

370. This already formidable problem was compounded by the fact that although the evidence of Petitioner's mental disease or defect could not be used by the jury to reach an appropriate verdict, it could be

used to defeat a heat of passion voluntary manslaughter verdict. Trial counsel rendered ineffective assistance in presenting and arguing such incompatible and irreconcilable mental states.

371. No reasonably competent counsel would present a defense of diminished actuality at the same time that he argued and presented evidence of "heat of passion" manslaughter. The concept of sudden quarrel or heat of passion manslaughter had no place in a case where the defense theory was that the defendant could not and did not function as a normal, rational or reasonable human being. Similarly, evidence that Petitioner was not a normal person could only undermine any claim that Petitioner killed under circumstances that "would have aroused the passion of the ordinarily reasonable man faced with the same situation." CT 639 (CALJIC 8.42 (1979 Rev.)).

372. In a comparable situation, Justice Mosk stated that a trial counsel could not,

> "competently [argue] that the victim's 'provocation' was sufficient to rouse a reasonable man to kill, while evidently suggesting that petitioner's violent response was the peculiar product of his own drunkenness. Exceptional subjective conditions, such as intoxication or mental depression, by definition will not be experienced by the ordinarily reasonable man and are therefore plainly incompatible with the statutory defense. [citing *In re Thomas C.*, 183 Cal. App. 3d 786, 798 (1986)]." (*In re Cordero*, 46 Cal. 3d 161, 190-91 (1988) (Mosk, J., concurring))

373. If Petitioner's trial counsel intended to argue the defense of heat of passion, he did so incompetently by emphasizing Petitioner's extreme emotional problems and the absence of sufficient provocation on the part of the victim. If he intended to argue a defense based on Petitioner's mental disease or defect vitiating a required specific intent, premeditation, or malice aforethought under Penal Code Section 28(a), he did so incompetently by failing to articulate the specific mental state absent due to the mental disease or defect *and* by failing to ensure that the jury was instructed on the verdict he sought. *Cf. In re Cordero*, 46 Cal. 3d at 191. In the absence of such instruction, the jury could do nothing with the defense evidence.

2. Ineffective Presentation And Summation On The Benintende Count.

374. Trial counsel presented no evidence regarding the Benintende case and failed to ask any of his witnesses, including Petitioner himself, to comment upon that offense. In closing argument counsel stated that he would not say that someone else killed Ms. Benintende. "I don't know." Counsel went on:

> "This is a situation where in-house sheriff's department ballistics analysis were done, but I certainly think to be honest with you, I certainly think there is a strong possibility, and I think his memory blocks are totally legitimate, the appropriate standard is whether she [the prosecutor] has proven that beyond a reasonable doubt and to a moral certainty." (RT 5612)

375. Counsel told the jurors that the court would instruct them on "three different degrees, homicide, voluntary manslaughter, second degree murder and first degree murder and tell you what it is." RT 5613. Counsel then argued that the,

> "prosecution must prove these mental states beyond a reasonable doubt and to a moral certainty. And I can say this about the Benikdictta (sic) killing is that she has absolutely zero proof of what anybody's state of mind was at the killing. [¶] Manslaughter at worst is an appropriate verdict." (*Id.*)

376. Counsel appeared to resting his entire defense, and his plea for a voluntary manslaughter verdict, upon the prosecution's inability to prove beyond a reasonable doubt the elements of second degree murder, or more specifically, the prosecution's inability to prove malice (although counsel did not state that). Given the unique relationship between murder and voluntary manslaughter in California, this defense was doomed to fail in the absence of any evidence negating malice.

377. As Justice Kennard explained in her dissent in *People v. Breverman*, 19 Cal. 4th 142 (1998), "[g]iven the manner in which California has structured the relationship between murder and voluntary manslaughter, the complete definition of malice is the intent to kill or the intent to do a dangerous act with conscious disregard of its danger *plus the absence of* both heat of passion and unreasonable self-defense." *Id.* at 189 (Kennard, J., dissenting) (emphasis in original). "[V]oluntary manslaughter includes all the elemental facts necessary to support a

conviction for murder *plus* the additional elemental fact of heat of passion." *Id.* at 187 (Kennard, J., dissenting) (emphasis in original).

378. This Court has stated that "voluntary manslaughter, whether it arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of passion, is not a defense but a crime; more precisely, it is a lesser offense included in the crime of murder." *People v. Breverman*, 19 Cal. 4th at 159. At the same time, the Court has acknowledged "ordinarily, it is the defendant who offers evidence" on these theories, and because they operate to reduce murder to the lesser offense of manslaughter, they resemble traditional affirmative defenses. *People v. Barton*, 12 Cal. 4th at 199; *People v. Breverman*, 19 Cal. 4th at 159.

379. Trial counsel in this case offered no evidence that Petitioner killed Ms. Benintende during a sudden quarrel or heat of passion.[91] Indeed, he assiduously avoided questioning any of his witnesses about that event. There was thus no substantial evidence to support a manslaughter verdict. This Court has ruled that under such circumstances, the trial court would not have been required to instruct the jury regarding heat of passion as it applied to the Benintende case.[92] *See People v. Breverman*, 19 Cal. 4th at 162 ("the court is not obliged to instruct on theories that have no [substantial] evidentiary support. Accordingly, we next consider whether there was substantial evidence in this case to support a verdict of manslaughter based on heat of passion").

380. Counsel may have believed that the evidence of Petitioner's mental disabilities would convince the jury that Petitioner was unable to form the mental state necessary to support the Benintende second degree

---

[91]He also failed to present evidence of imperfect self-defense, which also would have negated malice and reduced the offense to voluntary manslaughter. However, since there was no instruction given on imperfect self-defense, the jury could not have returned a verdict of voluntary manslaughter on that theory, even if an argument to that effect had been made and supported by evidence.

[92]But see Supp. AOB at 1-10 (arguing that the court was required to instruct on all applicable theories of voluntary manslaughter to ensure that the jury properly considered whether the evidence proved that Petitioner acted with malice, an element of the crime of murder).

murder charge. (Although none of the expert witnesses directly addressed the Benintende homicide, they all described Petitioner as suffering over an extended period from mental disorders that might have led to the Benintende killing.)[93] However, even if the jury accepted the defense evidence of Petitioner's mental disease or defect, and on its own applied it to the Benintende charge, the evidence would negate malice and reduce the offense to involuntary manslaughter (*People v. Saille*, 54 Cal. 3d 1103, 1112-14 (1991); *cf. People v. Whitfield*, 7 Cal. 4th 437, 453 (1994)), a verdict as to which the jury was not instructed.

381. Counsel did not present evidence of heat of passion that would have negated the malice implied from evidence that Petitioner shot Janine Benintende three to four times, at close range, and then dumped her body into a canal in rural Arvin. Evidence he presented in the Clark case regarding Petitioner's mental disabilities might have served to reduce the offense to voluntary manslaughter, but counsel did not request an instruction on that verdict. Under the circumstances, the jury had no choice but to find Petitioner guilty of the second degree murder of Janine Benintende.

3. Counsel's Ineffective Presentation Of The Guilt Phase Case Was Highly Prejudicial.

382. Trial counsel's presentation of the defense evidence, his handling of jury instructions and his closing argument separately and together reveal that he either did not have even a basic understanding of the mental elements of the different degrees of homicide and the defenses applicable to those offenses. As a consequence, counsel was unable to present a coherent defense or make a persuasive argument that

---

[93]Although the jury was instructed only on implied malice second degree murder, Penal Code Section 28(a) does not preclude the jury's consideration of evidence of mental disease or defect on the issue of whether Petitioner harbored malice aforethought. *Cf. People v. Whitfield*, 7 Cal. 4th 437, 446 (1994) ("The admissibility of evidence of voluntary intoxication to demonstrate whether a defendant charged with murder harbored malice aforethought does not depend upon whether the prosecution seeks a conviction for first or second degree murder, or attempts to prove that the defendant harbored express or implied malice"); *see also id.* at 453.

Petitioner should be found guilty of anything less than first degree murder in the Clark case or second degree murder in the Benintende. Even had the jury somehow divined a coherent defense theory, counsel's failure to request essential jury instructions had left them unable to render an appropriate verdict under the evidence presented.

a. The Jury Was Precluded From Reaching A Verdict Of Anything Less Than First Degree Murder In The Clark Case.

383. Counsel did not dispute that Petitioner unlawfully killed Ms. Clark. *See* RT 4490 ("Mr. Rogers is not contesting the homicide in February of 1987"). Thus, the only issue was whether Petitioner was guilty of some lesser form of homicide. The lesser options were second degree murder, under a theory of implied malice or unpremeditated express malice, voluntary manslaughter or involuntary manslaughter.

(i) Unpremeditated Second Degree Murder.

384. Counsel presented evidence and argued that Petitioner lacked premeditation and deliberation when he shot Ms. Clark. He also presented evidence and argued that Petitioner suffered from a disease or defect which made it impossible for him to premeditate and deliberate, and he argued that Ms. Clark's words and actions somehow provoked Petitioner's response. Counsel, however, did not request instruction on unpremeditated second degree murder. CALJIC No. 8.30. He did not request that the court correctly instruct the jury that evidence of a mental disease defect could be used in deciding whether premeditation and deliberation existed in this case. CALJIC No. 3.36 & Use Note. And he did not request that the jury be instructed that provocation could be considered for purposes of determining the degree of murder. *See* CALJIC No. 8.73 (1979 Rev.). There thus was no intentional unpremeditated second degree murder verdict available to the jury.

(ii) Implied Malice Second Degree Murder.

385. The jury was instructed with CALJIC No. 8.31 (1983 Rev.) regarding implied malice second degree murder. CT 636. Such a verdict, however, was unsupported by any evidence presented at trial and

not argued as a possible option by either the defense or the prosecution.[94] Defense counsel did not argue for *any form* of second degree murder, and the prosecution certainly did not argue or introduce evidence suggesting that Petitioner acted with anything but the specific intent to kill Tracie Clark when he shot her six times. *See* RT 5578-82. Moreover, even if it could be argued that substantial evidence supported a second degree implied murder verdict, the trial court's defective instruction regarding the central element of intent effectively nullified the implied malice charge. *See* AOB at 47-54 (Section I(D)), which Petitioner incorporates herein by reference. Thus, although this verdict was theoretically available to the jury, it was not a real option: under the evidence presented, arguments asserted and erroneous instructions given, the jury could not possibly have returned a verdict of second degree murder under an implied malice theory.

(iii) Voluntary Manslaughter.

386. Voluntary manslaughter arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of passion. There was substantial evidence presented at trial that Petitioner shot Ms. Clark based on an unreasonable but sincere belief in the need to defend himself, but counsel did not argue that theory and the court deleted all reference to imperfect self-defense from the instructions. CT 638 (modifying CALJIC 8.40 (1979 Re-Rev.)); *see also* CT 642 (modifying CALJIC No. 8.50 (1987 Rev.)). Counsel did argue that the jury should find Petitioner guilty of voluntary manslaughter, and the court instructed the jury on voluntary manslaughter, but only on that form known as "sudden quarrel or heat of passion" voluntary manslaughter. CT 638 (modifying CALJIC 8.40 (1979 Re-Rev.)). This

---

[94]It appears that the court simply erred in giving CALJIC No. 8.31 rather than 8.30. CALJIC No. 8.31 was not supported by the evidence or either parties' theory of the case. Moreover, it appears that the prosecutor believed that the court would instruct with CALJIC No. 8.30, for in her argument she told the jury that second degree murder is intentional unpremeditated murder. It "is the unlawful killing of a human being with malice aforethought when there is manifested an intention unlawfully to kill a human being but the evidence is insufficient to establish deliberation and premeditation." RT 5591-92.

form of manslaughter was not merely unsupported by the evidence, it was negated by it. Trial counsel and the defense experts agreed that there was nothing ordinary or reasonable about Petitioner's reaction to Ms. Clark. Voluntary manslaughter was thus not an option.

(iv) Involuntary Manslaughter.

387. Defense expert witnesses testified, and counsel argued that Petitioner could not and did not form an intent to kill before shooting Tracie Clark. If the jury accepted the defense evidence in this regard and had a reasonable doubt regarding Petitioner's intent, the only acceptable verdict was involuntary manslaughter. The jury, however, was not given the opportunity to reach such a verdict because it was not given an instruction on involuntary manslaughter.

b. The Jury Was Precluded From Reaching A Verdict Of Anything Less Than Second Degree Murder In The Benintende Case.

388. In the Benintende case, counsel argued that there was no evidence of Petitioner's mental state, but he failed to negate the evidence of implied malice with evidence of heat of passion, which would have reduced the case to voluntary manslaughter.[95] He also failed to request instruction on involuntary manslaughter, which was an available verdict if the jury believed that Petitioner's mental disease or defect made it impossible for him to form an intent to kill Ms. Benintende. Once again, the jury had no option but to convict Petitioner as charged.

c. There Is A Reasonable Probability That Had The Jurors Been Given The Opportunity, They Would Have Reached Another Verdict.

The prejudice as a result of counsel's inadequate performance is evident. Even in absence of coherent testimony, complete instruction and effective argument, the jurors deliberated for two days, fixed on the central mental state issues presented by the defense, and *twice* requested

---

[95]As noted above, counsel also failed to argue, present evidence of or ensure instruction on imperfect self-defense, which also would have negated malice.

additional instruction that might have allowed them to reach a verdict less than first degree murder.[96] Only after the court refused to give further instruction on the degrees of murder did the jury finally opt for the only verdict possible under the instructions read to them—first degree murder in the Clark case and second degree murder in the Benintende case. Under these circumstances, there is a reasonable probability that, if Petitioner's counsel had presented a coherent and consistent defense, argued Petitioner's case effectively, and requested complete and accurate jury instructions, the result of the trial would have been different.

PART 2: THE PENALTY PHASE OF TRIAL

389. Petitioner realleges and incorporates by reference each and every allegation, whether factual, legal, or otherwise, of Paragraphs1-388, *supra*, and Paragraphs 562-589, *infra*, as if fully set forth herein.

390. The judgment rendered against Petitioner is invalid, and his consequent imprisonment and sentence of death was unlawfully obtained in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1, Sections 1, 7, 13, 15, 16 and 17 of the California Constitution, and related provisions of California law in that Petitioner was denied the effective assistance of counsel at his penalty phase trial resulting in substantial prejudice as more fully set forth in this Part 2 of the Fifth Claim for Relief.

391. The acts and omissions constituting ineffective assistance of counsel as severally described in each section below deprived Petitioner of rights guaranteed him under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and cognate provisions of state law, including (but not limited to): the right to effective assistance of counsel; the rights to due process and a fair trial, to testify or remain silent and to present a defense and to present all relevant evidence; the

---

[96]The jury twice requested further instruction on the definitions of the crimes (RT 5695-96; CTS 986, 988) it also requested the "conclusion or diagnosis" of the mental health experts (RT 5695-96); a readback of Petitioner's testimony (RT 5695); and Petitioner's taped statement to the police (RT 5653).