S084292

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 TWO OF TWO)

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DEATH PENALTY

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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

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[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).

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).

392. Trial counsel's performance at the penalty phase was constitutionally inadequate from beginning to end. Counsel failed to investigate the aggravating evidence; failed to mention it in his opening statement; failed to object to its admission at trial; and once the evidence was admitted, counsel failed adequately to impeach or defend against the evidence or otherwise explain or respond to it. Trial counsel also failed to request instructions on the evidence, and he failed to address the evidence in any way in his closing argument. Counsel's failure to challenge the presentation of the aggravating evidence sent the erroneous message that there was no response possible to these allegations, highlighting and enhancing their impact. While counsel did rouse himself just long enough to put on some evidence in mitigation, he failed to do so in a coherent or internally consistent fashion. The absence of an overall theory resulted in the presentation of irreconcilable portraits of Petitioner that undermined the mitigating impact of the evidence and undoubtedly left the jury confused and suspicious.

393. As a result of this incompetence, trial counsel quite simply failed to submit the State's penalty phase aggravating evidence to any meaningful adversarial test. *Ford v. Wainwright*, 477 U.S. 399, 411

(1986) (plurality opinion); *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring); *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986); *Strickland*, 466 U.S. at 685; *United States v. Cronic*, 466 U.S. 648, 656-62 (1984); *People v. Ledesma*, 43 Cal. 3d at 215. Counsel's performance with regard to the aggravating evidence fell below any "'objective standard of reasonableness . . . under prevailing professional norms.'" *Ledesma*, 43 Cal. 3d at 216 (quoting *Strickland*, 466 U.S. at 693-94).

G. Failure To Conduct An Adequate Penalty Phase Investigation.

1. Background.

394. Trial counsel was appointed to represent Petitioner on February 18, 1987. CTS 950. Shortly thereafter, in February, 1987, he retained Mitchell Rowland's firm, Southwest Investigations, to investigate Petitioner's case. Ex. 11 ¶2 (Rowland Decl.). Mr. Rowland was the only licensed investigator at Southwest, and most of his work was in the area of contested adoptions. *Id.* ¶1. The employee at Southwest primarily responsible for handling the investigation of Petitioner's case was Chuck Feer, a law student working part-time. Ex. 11 ¶¶1, 2 (Rowland Decl.); Ex. 12 ¶¶1, 2 (Feer Decl.). At the time Mr. Feer began work on Petitioner's case, he had worked on only two other death penalty cases. He preferred not to do penalty phase investigations and it was his practice to refer lawyers looking for such expertise to Bakersfield investigator Susan Peninger, who had extensive experience in this area. Ex. 11 ¶¶1-2 (Rowland Decl.); Ex. 12 ¶¶1-3 (Feer Decl.).

395. It was Mr. Feer's understanding that the firm was hired only to prepare for Petitioner's preliminary hearing. Ex. 12 ¶4 (Feer Decl.). At no time did trial counsel ask Mr. Feer or Mr. Rowland to investigate the facts of either of the two homicides with which Petitioner was charged. Ex. 11 ¶3 (Rowland Decl.); Ex. 12 ¶6 (Feer Decl.). Nor were they requested to investigate the Martinez or Butler incidents or interview either Ellen Martinez or Tambri Butler. Ex. 11 ¶3 (Rowland Decl.); Ex. 12 ¶5 (Feer Decl.).

396. Mr. Feer and Mr. Rowland investigated Petitioner's case to prepare for the preliminary hearing in March, 1987, but soon thereafter, in April, 1987, responsibility for the case was shifted to Ms. Susan Peninger. At the time that Ms. Peninger took over the investigation, Mr. Rowland and Mr. Feer had done virtually no investigation applicable to the penalty phase. They had conducted preliminary interviews of Petitioner and his two sons and obtained some of Petitioner's medical and school records. Mr. Feer had also gathered a list of possible penalty phase witnesses, but he had not contacted or interviewed any of them. The only prostitute interviewed was Connie Zambrano. *See* Ex. 11 ¶3 (Rowland Decl.); Ex. 12 ¶¶4, 6, 7 (Feer Decl.).

397. At the time Susan Peninger was retained to work on the penalty phase of Petitioner's case, in April, 1987, she was the most experienced capital case investigator in Kern County. She had been an investigator for 11 years and had worked on over 20 capital cases. Ex. 13 ¶2 (Peninger Decl.).

398. Ms. Peninger's responsibility was investigating and developing mitigation evidence in the event that the trial went into a penalty phase. She was never asked to investigate any aspect of the guilt phase case. She first met with Petitioner on April 27, 1987, and at that time obtained background information from him. She began interviewing friends and family members of Petitioner in July, 1987, and continued those interviews throughout the summer of 1987. *Id.* ¶3.

399. In September 1987, Ms. Peninger stopped working on the investigation (temporarily, she thought), when her presence was required in another capital case for which she had been retained earlier. *Id.* ¶¶5-7. Although she fully intended to resume work on Petitioner's case and finish her investigation before Petitioner's trial began, her last contact with trial counsel was in September 9, 1987. *Id.* ¶7. Ms. Peninger calculates that when she stopped working on the case in September 1987, her investigation for the penalty phase was approximately 40% complete. *Id.* ¶5. She had conducted initial interviews with most, but not all of Petitioner's friends and family members, and she had yet to interview Kern County Sheriff's Department personnel with whom Petitioner had worked and become friends. *Id.* ¶¶3, 4, 8. She had not reached the point in her investigation of formulating a theory of the

defense for the penalty phase, and trial counsel had never articulated such a theory for her. *Id.* ¶4. At the time she stopped working on the case, Ms. Peninger had never been asked to investigate and had not independently investigated any aggravating of the evidence that the prosecution ultimately introduced in the penalty phase of Petitioner's trial. *Id.* ¶8. She conducted no investigation of the allegations of prostitutes Ellen Martinez or Tambri Butler. *Id.*

400. Ms. Peninger was never formally dismissed from the case. Rather, after September 9, 1987, she was never again contacted by trial counsel or anyone else involved in the case. *Id.* ¶¶7, 9. Ms. Peninger does not know whether another investigator was hired to complete the penalty phase investigation that she began. She would have consulted and coordinated with anyone who took over the investigation, but no one ever contacted her. *Id.* ¶9.

401. On October 14, 1987, the Deputy District Attorney filed a Notice of Intention to Introduce Evidence in Aggravation, disclosing that she intended to introduce the allegations of Ms. Martinez and Ms. Butler as aggravating evidence during the penalty phase.[97] CT 360.

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[97]The Notice states that the evidence in aggravation will include:

"1. The nature and circumstances of the present offense, to wit: all crimes committed against the persons of Tracey Johann'a [sic] Clark and Janine Benintinde [sic] and all acts done by the defendant in furtherance of the crimes.

"2. The incident occurring on or about January, 1986 in which the defendant forced Tambri Butler to have anal sex with him, using a handgun and an electric 'taser.'

"3. The incident which occurred sometime in 1982 in which the defendant forced Sheila Bilyeu to engage in sex using a handgun.

"4. The incident in 1987 in which the defendant, wearing Kern County sheriff's uniform and a sidearm, 'arrested' Consuela Zambrano, took her to a deserted area off Lakeview Avenue and took pictures of her.

"5. The incident in 1983 in which the defendant took Ellen Martinez to a cemetery, forced her to dress in flimsy underwear and took pictures of her.

"6. Proof of other criminal activity by the defendant which (continued . . .)

402. In late November, 1987, Mr. Feer received an unexpected telephone call from trial counsel telling him that he was "back on the case." Ex. 12 ¶9 (Feer Decl.). *Mr. Feer did not receive any of the investigative reports or other information developed by Ms. Peninger, and never spoke to her about the work she had done on the case. Id.* This was the only death penalty case he had ever worked on that lacked the "whole life history workup." *Id.* Mr. Feer's work on this case starting in November 1988, consisted primarily of lining up witnesses and serving subpoenas; he characterized his role as that of an "errand runner." *Id.* ¶10. Although Mr. Feer contacted a few sheriff deputies by telephone to determine their availability to testify on Petitioner's behalf at the penalty phase, and Mr. Rowland may have had a brief telephone conversation with Alberta Dougherty, neither Mr. Feer nor Mr. Rowland interviewed any of the penalty phase witnesses. Neither Mr. Feer nor Mr. Rowland conducted any investigation of the aggravating evidence which had been identified in the prosecutor's notice, and neither interviewed or investigated the allegations of Ellen Martinez or Tambri Butler. *Id.*; Ex. 11 ¶3 (Rowland Decl.).

403. In addition, neither trial counsel nor any defense investigator interviewed Petitioner's wife, Jo Rogers, or Petitioner's step-daughter, Carol Truitt Bentrott concerning the aggravating evidence, although both testified in mitigation at the penalty phase. Neither Mrs. Rogers nor Ms. Bentrott even knew that Ms. Butler was going to testify until Ms. Butler took the stand and accused Petitioner of assaulting and raping her. They were not shown the investigation report containing Ms. Butler's statements or interviewed about the details of Ms. Butler's description of her assailant. Ex. 4 ¶¶4, 6 (Bentrott Decl.); Ex. 3 ¶6 (Jo Rogers Decl.). Thus, trial counsel also missed an opportunity to obtain readily available photographic evidence that could have been used to impeach Ms. Butler and her identification of Petitioner as her assailant.

(. . . continued)
involved the use, attempted use or express or implied threat to use force or violence." (CT 360-61)

2. Counsel Did Not Investigate The Aggravating Evidence.

404. As this Court recognized in *In re Jones*, 13 Cal. 4th 552, 581-82 (1996), "[o]ne of the principal tasks of a defense attorney is to attempt to protect his or her client from the admission of evidence that is more prejudicial than probative, and that obligation clearly applies to efforts made by the prosecution to introduce evidence of prior crimes or acts of violence alleged to have been committed by a defendant, when such crimes are unrelated to the charged offense. *See also In re Neely*, 6 Cal. 4th at 901, 919 (1996); *People v. Ledesma*, 43 Cal. 3d at 224; *People v. Nation*, 26 Cal. 3d 169, 179-82 (1980).

405. After receiving the notice of the intended testimony of Ellen Martinez and Tambri Butler in October 1987, there were several basic responses that would have occurred to virtually any reasonably competent lawyer. *First*, counsel should have investigated the factual background of the claim and available evidence. *Second*, counsel should have immediately recognized that neither the Martinez incident nor the Butler incident was admissible as aggravating evidence. *Third*, assuming that the Martinez or Butler evidence was admitted over his timely objection, counsel should have sought to undermine and rebut that evidence through cross-examination with material obtained during pretrial investigation and discovery. *Fourth*, and finally, counsel should have attempted to further reduce the impact of this damaging evidence by requesting appropriate limiting instructions and delivering an effective closing argument. *See* Claim V(N), (S).

406. In this case, trial counsel did not merely fail to make a reasonable investigation of the aggravating evidence introduced by the prosecutor, he failed to conduct *any investigation at all.* He failed to interview pertinent witnesses, use or follow up on documents provided to him in discovery, or obtain potential impeaching evidence readily available from Petitioner's family. Counsel's most egregious omissions consisted in the failure to develop powerful exonerating evidence that Petitioner was not guilty of the aggravating acts about which Ms. Martinez and Ms. Butler testified. Counsel's inexplicable failure to conduct even a minimal investigation into the allegations of Ms. Martinez and Ms. Butler cannot be viewed as a strategic decision.

See Kimmelman v. Morrison, 477 U.S. 365, 385 (1986); *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994); *United States v. Burrows*, 872 F.2d 915, 918 (9th Cir. 1989); *Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir. 1988). It was purely incompetence.

407. Moreover, having neglected to conduct an appropriate investigation, trial counsel then defaulted on Petitioner's right to challenge the improper aggravation evidence by failing to timely object to its admission. These two errors were significant enough, but even after the evidence was erroneously admitted, counsel committed still more errors by not using material available in his own files to cross-examine, by failing to request a single limiting instruction, and by neglecting even to mention the two incidents in his closing. This performance as to both the Martinez and the Butler aggravating incidents step by step—and cumulatively—fell well below the minimum constitutional standard of effective criminal representation. It has long been recognized in the defense community that evidence of other criminal activity by the defendant is the "strongest single factor" causing a jury to return a verdict of death. *People v. McClellan*, 71 Cal. 2d 793, 804 n.2 (1969). Counsel's failure to investigate, develop and present evidence, amounted to a complete abdication of his role as an advocate.

408. It is reasonably probably that but for counsel's failure to investigate as described in this Section, significant evidence pertaining to aggravation and mitigation as described more fully below, and Petitioner would not have been sentenced to death.

H. Failure To Challenge The Admissibility Of The Martinez Evidence.

409. Trial counsel's failure to challenge the admissibility of the testimony given by Ms. Martinez consisted in not one but a series of missed opportunities to raise substantial legal objections. Any one of these would have been a sufficient ground to exclude the evidence altogether and protect Petitioner against its toxic effects on the jury's deliberations. This failure was all the more egregious inasmuch as it resulted in the waiver on appeal of substantial valid legal claims.[98]

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[98]These claims are set forth in detail in Petitioner's Opening Brief on (continued . . .)

1. The Martinez Testimony.

410. Ellen Martinez, a prostitute, testified at Petitioner's penalty trial regarding an encounter she allegedly had with Petitioner in early 1983. She recounted that Petitioner had been one of two uniformed deputy sheriffs who stopped her one evening while she was having sex with a customer in the cemetery outside of Bakersfield.[99] RT 5764-66. The officers questioned Ms. Martinez and her customer, and then the customer was allowed to leave; Ms. Martinez, however, was placed in the back seat of Petitioner's patrol car. RT 5765-67. Ms. Martinez testified that Petitioner was going to drive her downtown, but before doing so, he asked her to undress and then took a photograph of her breasts and another of her vaginal area. RT 5767-68. After Petitioner took the photographs, Ms. Martinez dressed, and Petitioner drove her to a corner near her motel room. RT 5768.

411. Ms. Martinez told no one but her husband about what had occurred until sometime later when she called the police about a customer who had pulled a gun on her. RT 5768-69. When Petitioner turned out to be one of the officers who responded, Ms. Martinez told another of the officers about what had happened with Petitioner earlier. RT 5769.

412. Subsequently, Ms. Martinez was wired with a microphone and a meeting between her and Petitioner was arranged by law enforcement officers. RT 5769. Ms. Martinez initially could not recall whether during that meeting she ever asked Petitioner about the alleged photographs. RT 5770. On cross-examination, Ms. Martinez explained that she was supposed to get Petitioner to admit that he took the lewd photographs of her, but, to her recollection, Petitioner never said anything like that. RT 5776.

(. . . continued)
appeal, and are incorporated by reference as though fully set forth herein. *See* AOB at 305-15 (Section XIII).

[99]Ms. Martinez claimed that before Petitioner arrived, the customer had drawn a switchblade on her during a dispute over his refusal to pay her in advance. RT 5765, 5771, 5774. However, Petitioner's partner, Deputy Roberta Cowan, characterized the stop as "routine" and testified that she did not recall anyone mentioning a dispute about money. RT 5946.

413. Shortly after she related to police the cemetery incident, Ms. Martinez left Bakersfield and "just traveled." RT 5770. On cross-examination she disclosed that she left town because she had a number of warrants on other prostitution cases. RT 5776.[100]

2. There Was No "Criminal Activity" As Required By Section 190.3(b).

414. Subdivision (b) of Section 190.3 provides that the sentencer may consider as an aggravating circumstance "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence of the express or implied threat to use force or violence."

415. The requisite "criminal activity" under Section 190.3(b) must amount to "an actual crime"—that is, conduct which violates a penal statute. *People v. Phillips*, 41 Cal. 3d 29, 72 (1985); *People v. Boyd*, 38 Cal. 3d 762, 776 (1985); *see also People v. Grant*, 45 Cal. 3d 829, 850 (1988). Petitioner's alleged photographing of Ms. Martinez was not criminal activity. Ms. Martinez did not claim that she and Petitioner engaged in an act of prostitution or that Petitioner threatened, assaulted or injured her in any way. Her testimony completely failed to establish the elements of any identifiable criminal statute. Even violent acts or threats of violence are inadmissible under Section 190.3 factor (b) if they do not amount to criminal activity in violation of a penal statute. *People v. Wright*, 52 Cal. 3d 367, 425-26 (1990).

416. Trial counsel should have sought a hearing in limine to determine what if any "crime" was involved and whether there was evidence enough of each element to present the aggravating incident to the jury. In *People v. Phillips*, 41 Cal. 3d 29 (1985), an opinion issued more than two years before counsel received notice that the Martinez and Butler incidents would be introduced at the penalty phase, a plurality of this Court stated:

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[100]When Petitioner and his partner stopped Ms. Martinez, she had already been arrested three or four times for prostitution and was then on probation. RT 5772, 5775.

> "[I]n many cases it may be advisable for the trial court to conduct a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove each element of the other criminal activity .... Once the trial court has determined what evidence is properly admissible as other criminal activity ... whether such other criminal activity has been proven beyond a reasonable doubt is then a question of fact for the jury." (*Id.* at 72 n.25)

417. Had trial counsel litigated this matter it is reasonably probable that the trial court would have ruled that there was insufficient evidence demonstrating the conduct of a crime in violation of a penal statute and ruled that it was inadmissible at trial for the reasons above.[101]

3. There Was No Violent Conduct Or Threat Of Violence As Required By Section 190.3 Factor (b).

418. Section 190.3(b) also expressly forbids the admission of evidence of any uncharged crime that does *not* involve "the use or attempted use of force or violence or the express or implied threat to use force or violence." *People v. Balderas*, 41 Cal. 3d 144, 202 n.29 (1985). "The purpose of the statutory exclusion is to prevent the jury from hearing evidence of conduct which, although criminal, is not of a type which should influence a life or death decision." *People v. Boyd*, 38 Cal. 3d at 776 (emphasis added).

419. The picture-taking incident described by Ms. Martinez—even if it were a crime—falls into the category of non-violent conduct inadmissible at the penalty stage. *See People v. Burton*, 48 Cal. 3d 843,

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[101]We urged in our Opening Brief on the direct appeal that that a jury's consideration of unadjudicated criminal activity during the sentencing phase of trial (such as the Martinez and Butler evidence) undermines the reliability of the penalty phase proceeding by depriving a defendant of the constitutional rights to a fair, impartial and unanimous jury, a speedy trial, effective confrontation of witnesses and a reliable verdict in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, notwithstanding this Court's decision in *People v. Balderas*, 41 Cal. 3d 144 (1985). *See* AOB at 246-52 (Section X(G)), which Petitioner incorporates by reference as if fully set forth herein. Trial counsel's failure to raise this claim was also ineffective and prejudicial. *People v. Fosselman*, 33 Cal. 3d 572, 581-84 (1983) (prejudice may be shown if incompetence waives appealable issue).

862 (1989) (prior convictions for committing lewd act on a child, residential burglary and attempted grand theft not properly admitted under Section 190.3(b) as not necessarily involving any element of violence); *People v. Gallego*, 52 Cal. 3d 115, 196-97 (1990). Likewise, the conduct be characterized as a crime "perpetrated in a violent or threatening manner." *People v. Grant*, 45 Cal. 3d 829, 851 (1988); *see People v. Boyd*, 38 Cal. at 762, 776-77.[102]

420. The activity Martinez described also did not involve a "*threat* to use force or violence." PENAL CODE §190.3(b) (emphasis added). To satisfy this element of Section 190.3(b), the defendant must have exerted physical power against the victim or threatened to physically overpower the will of the victim during the commission of the crime. *People v. Raley*, 2 Cal. 4th 870, 907 (1992) ("the 'force' requisite . . . mean[s] . . . the physical power required in the circumstances to overcome [the victim's] resistance") (citations and internal quotations omitted); *People v. Tuilaepa*, 4 Cal. 4th 569, 590 (1992), *aff'd*, 512 U.S. 967 (1994); *People v. Jennings*, 46 Cal. 3d 963, 983 (1988). Martinez did not describe any threatening gestures or comments, and she specifically mentioned that Petitioner had not used handcuffs or anything else to restrain her. RT 5767. According to Ms. Martinez' own testimony, she complied with each of Petitioner's requests without incident, and she did not state or suggest that he threatened to harm her in any way if she told anyone about the incident.

421. There also was no evidence that Petitioner obtained Martinez' cooperation through the *implied* use of force or violence. Even assuming that Petitioner was bigger or stronger than Ms. Martinez, the superior size of a defendant, by itself, cannot constitute "implied" force sufficient to render that defendant's conduct admissible under Section 190.3(b). *People v. Raley*, 2 Cal. 4th at 908.[103]

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[102]The Attorney General effectively concedes that Petitioner neither employed nor threatened violence. *See* RB at 296-97 n.156 (noting that "the notice [of aggravating evidence] and the testimony were equivocal regarding whether the appellant had employed or threatened violence"). The notice and testimony were more than merely equivocal—they plainly failed to assert any real or threatened violence.

[103]In the Respondent's Brief, the Attorney General offers the (continued . . .)

422. Probably the most persuasive evidence that the picture-taking incident involved no actual or threatened force or violence was Ms. Martinez's own trial testimony. The prosecutor had ample opportunity to question Ms. Martinez regarding force or fear and Ms. Martinez had ample opportunity to describe any threatening or violent behavior that occurred or her subjective fear of the same. Ms. Martinez took the stand and related the encounter, but she mentioned no force or violence and never once stated that she was afraid of Petitioner, that she felt threatened by him or even that she performed the alleged acts against her will. Ms. Martinez may have been more than willing to accommodate Petitioner in order to avoid an arrest or citation. But her response was pragmatic and not the product of force or violence.

423. Quite clearly, the Martinez evidence—neither a crime nor violent—was barred by the specific exclusionary language of Section 190.3(b) (*People v. Boyd*, 38 Cal. 3d at 776-77), and trial counsel was ineffective in failing to object to its omission and ensure that the jury did not hear this highly prejudicial, but inadmissible and legally irrelevant evidence.

4. Alternatively, There Was No Basis For Admitting The Martinez Evidence Under Factor (a).

424. While trial counsel assumed that the evidence was introduced as a prior act of violence under Penal Code Section 190.3 factor (b) (*see* Ex. 14 ¶11(Lorenz Decl.)), the Attorney General has

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(. . . continued)
remarkable argument that the photo-taking incident was an unlawfully violent criminal act under factor (b) because Petitioner was authorized to use reasonable force in arresting Ms. Martinez in the first place. To establish this conclusion, the Attorney General postulates the following: Penal Code Section 835a permits a peace officer to use reasonable force to make a lawful arrest; when Petitioner told Martinez he was taking her downtown he was telling her—and she understood—that she was under arrest; because Petitioner could legally have used reasonable force to make a lawful arrest, Ms. Martinez "knew immediately and unmistakably" that Petitioner was threatening her with force or violence "if she did not submit" to anything else Petitioner requested. *See* RB at 298. Of course, it is sheer speculation that, solely from the uneventful non-arrest that occurred, Ms. Martinez would perceive that Petitioner was threatening unreasonable force at any other point in their interaction.

taken the position that the Martinez testimony was properly admitted rather as a circumstance of the crime to show motive, and was therefore admissible under factor (a). RB at 291.[104]

425. The import of this point is presumably that there was no harm in trial counsel's failure to challenge the evidence under factor (b), since in fact, it came into evidence (although no one knew it at the time) under factor (a). The simple answer to this point is that, had trial counsel bothered to challenge the admissibility of Martinez testimony at all, he would have quickly learned whether it was secretly being offered under factor (a). Counsel would have then been in a position to raise the very substantial objections to admissibility under factor (a) to which we now turn.

426. If the prosecution had been attempting to introduce the testimony of Ms. Martinez as a factor (a) circumstance of the offense—that is, to show Petitioner's motive to kill Tracie Clark—then trial counsel should have argued that the testimony was inadmissible evidence of motive in the penalty phase of trial for the same reasons that it was inadmissible evidence of motive in the guilt phase. *See* AOB at 199-206 (Section VIII), incorporated by reference as if fully set forth herein.

427. Counsel also could have argued that, even if the Martinez incident were relevant at the *guilt* phase to show motive, *additional* testimony regarding the underlying details of this incident was not admissible at the penalty phase. Under the Attorney General's theory of admission, Petitioner's motive for killing Tracie Clark was to prevent

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[104]As the Attorney General acknowledges, the trial court missed this subtlety as well, and considered the Martinez incident as violent conduct in the course of denying the motion for modification of sentence. *See* RT 5994-95; RB at 350, 351 n.173. Likewise, the prosecutor certainly made no effort to disabuse the trial court of her belief that the Martinez evidence was admitted under section (b). *See* RT 5994-95. If the prosecutor and defense counsel who tried the case, as well as the court who presided over the case, all understood that the evidence was introduced as a prior act of force or violence under factor (b), it is reasonable to assume that the jury—unaware by argument or instruction that this incident was introduced solely for the purpose of showing motive—also considered it a prior act or force or violence and improperly treated it as an independent aggravating act.

her from reporting that he shot her, leading to a repetition of the disciplinary process that followed the Martinez accusation. But Ms. Martinez's limited testimony at the guilt phase was more than sufficient to support this prosecutor's theory of motive. RT 5554-57. The details admitted at the penalty phase were nothing but a gratuitous and inadmissible attack on Petitioner's character.

428. In *In re Gay*, 19 Cal. 4th 771 (1998), this Court held that "[e]vidence intended to create a reasonable doubt as to the defendant's guilt is not relevant to the circumstances of the offense . . . ." *Id.* at 814. If the defendant is not permitted to "retry the guilt phase of the trial" at the penalty phase (*id.*), certainly, the prosecutor cannot introduce evidence in further support of the guilt verdict. Allowing evidence of bad acts that are not even tangentially related to the capital crime to be introduced at the penalty phase defies the limits on statutory aggravation and render factor (a) unconstitutionally vague.

429. In short, it is reasonably probable that, had counsel sought to exclude Ms. Martinez' testimony regarding the *details* of her complaint, the trial court would have ruled that such testimony was unnecessary to show motive at the penalty phase.[105]

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[105]The Attorney General argued in the Respondent's Brief that "it is inferable that evidence of the incident itself was not offered at the guilt phase to avoid any possibility of undue prejudice based on the possible consideration of the evidence for propensity." RB at 296 n.156. He then asserts that "propensity (at least to commit violent crimes or felonies) is clearly a proper consideration at the penalty phase, the applicable limitations on evidence being statutory." *Id.* Thus, once the incident was "properly admitted" as evidence of motive for the underlying capital offense, it could then have been considered "for the proper purpose of showing propensity, as material to the penalty decision." *Id.* However, only evidence relevant to one of the factors listed in Penal Code Section 190.3 is admissible in aggravation at the penalty phase. *People v. Boyd*, 38 Cal. 3d 762, 773-75 (1985). The Martinez incident could not be interjected into the penalty phase deliberations as irrelevant evidence of a circumstance of the offense tending to show propensity to commit violent crimes. Moreover, even if the evidence was properly introduced as relevant to factor (a), it could not additionally be considered under factor (b). The prosecution is limited in the penalty phase to presenting evidence related to specific statutory factors. It cannot endeavor to introduce evidence under one factor and then apply it to another. If the jury acted in the manner suggested by Respondent, its death verdict resulted from improper double (continued . . .)

5. The Evidence Was Inadmissible Non-Violent, Consensual Or Involuntary Sexual Conduct.

430. As we argued in the Opening Brief on appeal, the introduction of the Martinez testimony as evidence in the penalty phase also offended the Eighth Amendment of the United States Constitution, which precludes a state from using as an aggravating factor a defendant's sexual history consisting exclusively of non-violent, consensual or involuntary conduct. *See Beam v. Paskett*, 3 F.3d 1301, 1308-09 (9th Cir. 1993), *overruled on other grounds by Lambright v. Stewart*, 191 F.3d 1181 (9th Cir. 1999) (relying on *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)); *Thompson v. Oklahoma*, 487 U.S. 815, 837-38 (1988) (plurality opinion); *Tison v. Arizona*, 481 U.S. 137, 149 (1987); *Enmund v. Florida*, 458 U.S. 782, 798-801 (1982); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976); AOB at 308-09 (Section XIII(A)). Trial counsel failed to object to the admissibility of the Martinez evidence on this federal constitutional ground as well. This failure is a further instance of lawyering that fell below the minimal level of effective assistance as required by law.

431. Trial counsel's failure to object to the admission of the Martinez aggravating evidence constituted a complete abdication of his responsibilities, and one that seriously injured the interest of his client. Moreover, counsel should have been aware that the erroneous admission of aggravating evidence is subject to waiver on appeal unless there was contemporaneous objection made at the penalty phase proceeding. *See People v. Pinholster*, 1 Cal. 4th 865, 960-61 (1992); *People v. Clark*, 50 Cal. 3d 583, 624-25 (1990); *People v. Carrera*, 49 Cal. 3d 291, 341 (1989); *People v. Rodriguez*, 42 Cal. 3d 730, 791 (1986). Without question, Petitioner was prejudiced by these errors of counsel. *People v. Fosselman*, 33 Cal. 3d 572, 581-84 (1983) (prejudice may be shown if incompetence waives appealable issue).

(. . . continued)
counting of aggravating factors and an unfettered and arbitrary sentencing determination in violation of the Eighth and Fourteenth Amendments.

I. Failure To Investigate, Impeach Or Rebut Ms. Martinez's Testimony.

432. The Martinez allegations helped to establish the existence of a pattern of bizarre and improper conduct against prostitutes that severely prejudiced Petitioner in the eyes of the jurors and had a particularly damaging effect on the life-or-death decision that had to be made at the penalty phase of trial. Thus, even if the Martinez evidence were not excluded entirely, competent trial counsel would have tried to show that Ms. Martinez' allegations were false and unreliable. This in turn necessitated a full pre-trial investigation of the incident. Although no such investigation was conducted, trial counsel's files show that he did obtain the record of Kern County Civil Service hearing on the Martinez incident. *See* Ex. 1 ¶6 (Sparer Decl.); Exs. 33-40. The hearing material raises serious doubt that Petitioner committed the acts Ms. Martinez described. Yet counsel never used this material to impeach her at trial. The inference is that counsel had not even read it.

1. The Record From Petitioner's Civil Service Proceeding.

433. The personnel complaint that led to Petitioner's termination was filed by Ms. Martinez on March 1, 1983. *See* Ex. 35 (Kern County Sheriff's Department Personnel Complaint). That complaint was based, in part, upon an interview of Ms. Martinez conducted on February 23, 1983, by Sgt. Paul Kent of the Internal Affairs Division of the Kern County Sheriff's Department, who was accompanied by Sgt. Shuell at the interview. *See* Ex. 34 (Report of Sgt. Paul Kent, File No. 83-0222-002 ("Kent Report")). At the time of Kent's and Shuell's interview, exactly two weeks after event (which occurred on February 9, 1983), Ms. Martinez explained that she had been with a prostitution customer at the cemetery when she was stopped by Petitioner and Deputy Cowan. *Id.* at 2. The customer was placed in Cowan's car and she was placed in Petitioner's. According to Ms. Martinez, Petitioner drove here out of the cemetery, and after a short conversation, asked if she had dropped anything and drove back into the cemetery. She claimed that after returning to the cemetery, Petitioner asked her to take off her top, which she did, and he photographed her with a Polaroid camera. She stated that Petitioner next asked her to take off her pants, and he again

photographed her. He then waited for the photograph to develop and, after stating that the first photograph did not turn out, photographed her again. He then, according to Martinez, had her lay down in the backseat of the car, asked her about venereal disease, and "inspected" her vaginal area for disease. He then photographed her a fourth and final time. Martinez got dressed, and Petitioner questioned her about drug dealers. Petitioner told her he would not cite her or arrest her if she gave him information about drug dealers. She told Petitioner that she had no information and he told her to let him know if she ever heard of anyone dealing drugs. They got back into the car and drove out of the cemetery. They then drove down East 10th Street to the Imperial 400 Motel. *Id.* at 3.[106] According to Martinez, she and Petitioner spent approximately 15 minutes "at the Cemetery at the time the pictures were taken." *Id.* at 4.

434. Based on Martinez' allegations, Petitioner was initially dismissed from his position as a Kern County Deputy Sheriff effective March 22, 1983. *See* Ex. 36 (3/18/83 termination letter). Petitioner appealed his dismissal to the Civil Service Commission on March 23, 1983 (*see* Ex. 37 (3/31/83 letter from Sheriff Larry Kleier to County Counsel)), and the matter came on for hearing before Hearing Officer Bicknell J. Showers on June 22 and June 29, 1983. Petitioner was represented at the hearings by attorney Edward G. Pell.

435. On August 9, 1983, the Civil Service Commission adopted the findings of fact and Proposed Decision of the Hearing Officer in the matter of Petitioner's appeal from dismissal as a Deputy Sheriff and modified Petitioner's dismissal to a fifteen calendar day suspension. *See* Ex. 33 (8/9/83 Civil Service Commission order and attached Proposed Decision, dated 7/11/83 ("Decision")). The most striking aspect of the Decision is its finding that the "*charge that appellant engaged in immoral conduct and conduct unbecoming an employee in the public service with the prostitute was not established.*" *Id.* at 7 (emphasis added). In so concluding, the hearing officer relied in part on the fact

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[106]Sgt. Kent and Sgt. Shuell interviewed Petitioner on March 7, 1983. Petitioner stated that he drove out of the cemetery and dropped Martinez off at the first street, 9th or 10th, at Union, the north side of the Imperial 400 Motel. Ex. 34 at 7 (Kent Report).

that Ms. Martinez had fled from Bakersfield to escape criminal prosecution and was a fugitive at the time of the hearing. *Id.* at 6 ¶¶X, XI. Thus her accusations were unsupported hearsay. As the hearing officer determined, "It would be legally improper and unreasonable to sustain the serious charges made against appellant on the basis of the absent prostitute's untested hearsay statement." *Id.* at 8.

436. The hearing officer also concluded that two items of evidence were inconsistent with Petitioner's guilt. The first related to a response Petitioner had made during the tape-recorded conversation with Martinez secretly planned and conducted by the Sheriff's Department.[107] However, it is the second item that would have substantially undermined Ms. Martinez' testimony at the penalty phase of trial, namely, the hearing officer's conclusion *that it was improbable that the activities that Ms. Martinez described could have occurred in the time frame established by the Sheriff's Department radio log of February 9, 1983.* Ex. 33 at 8 (Decision).

437. The radio log shows that Deputy Dougherty left the cemetery at 22:48 hours (Ex. 38 (Kern County Sheriff's Department radio dispatch log)), or 10:48 p.m. and arrived at Casa Royale coffee shop at 22:52:07 hours, or 10:52 p.m., the trip having taken approximately four minutes. *Id.*; Ex. 33 at 2 ¶IV (Decision). Petitioner arrived at Casa Royale at 23:02 hours, or 11:02 p.m. (Ex. 38 (radio dispatch log)), leaving a period of approximately 14 minutes when Petitioner was alone with Ms. Martinez. It took Deputy Dougherty approximately four minutes to drive from the cemetery to Casa Royale,

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[107]On March 1, 1983, a monitored meeting had been arranged between Petitioner, Ms. Martinez and another prostitute, Sandra Lee Young, as part of the internal affairs investigation into the Martinez allegations. Petitioner was summoned to the meeting on the pretense of receiving narcotics information from Ms. Young. During the monitored conversation Martinez asked Petitioner about "those pictures that you took" and Petitioner replied "yeah." *See* Ex. 34 at 6 (Kent report). This response was offered as evidence that Petitioner in fact had taken lewd photographs of Martinez. When questioned about this point at the civil service hearing, Petitioner explained that this was his standard response to prostitutes asking about photographs taken of them. The hearing officer found this explanation credible inasmuch as it was Department practice to maintain a book of Polaroid mug shots of known prostitutes collected by the Deputies.

and Petitioner also drove Ms. Martinez to her hotel at the intersection of 10th and Union Streets. *See id.* At the very most, then, Petitioner was alone with Ms. Martinez for ten minutes, and probably less.

438. During this period of up to ten minutes, according to Ms. Martinez, Petitioner drove out of the cemetery, returned to the cemetery, had Martinez undress, took two Polaroid photographs of her, waited for them to develop, discovered that one of them had not turned out and took a third photograph, asked Martinez to lie down in the patrol car, "inspected" her vaginal area and took a fourth photograph, had Martinez re-dress, questioned her about drug dealing and sought her cooperation in supplying information, and finally drove her to near the Imperial 400 Motel. Ex. 34 at 2-4 (Kent report). According to the Decision, Ms. Martinez estimated that the time spent *in the cemetery* was fifteen to thirty minutes. *See* Ex. 33 at 4 ¶VI (Decision); Ex. 34 at 4 (Kent report). The hearing officer concluded that the events as described by Ms. Martinez could not have occurred in ten minutes, which is the maximum unaccounted for time-period. As the Decision states in its Determination of Issues:

> "It is suggested that the objectionable conduct occurred during this time period. *The improbability of this theory is striking.* Ten minutes is a remarkably short time period to allow appellant to leave the cemetary [sic] with the prostitute and return, have the prostitute disrobe and rerobe, inspect her for venereal disease, take four flash photographs with a Polaroid camera and then redeliver the prostitute to her territory of operation." (Ex. 33 at 8 (Decision) (emphasis added))

439. In addition to the above questions as to Ms. Martinez's veracity, the hearing officer also found that another prostitute, who sometimes provided information to Sheriff's Officers, told two deputies that Ms. Martinez told her that she had lied about Petitioner to "get even" with him. *Id.* at 6 ¶¶X, XI.

2. Trial Counsel's Failure To Impeach Or Rebut.

440. The findings of the Civil Service Commission were not brought out at trial. Counsel did not question Ms. Martinez about her admission to another prostitute that she had lied about Petitioner. Counsel did not raise the time inconsistencies or argue the improbability

of Martinez' accusations. Counsel not only failed to investigate Ms. Martinez' allegations, he apparently failed to read or use exonerating evidence *provided to him* and sitting in his files, such as the Civil Service Commission appeal record, the Commission's findings, or the patrol logs. This failure to bring out critical evidence is inexcusable, especially in a capital case, in which counsel had five months to prepare for Martinez' testimony.[108]

441. Moreover, effective counsel would have impeached Ms. Martinez' credibility not only with the findings of the Civil Service hearing officer, but also with evidence of past criminal conduct involving moral turpitude. Martinez testified about two acts of prostitution in which she had engaged (RT 5765, 5768-69); she testified that she had been arrested three or four times for prostitution and solicitation (RT 5772); she testified that at the time of her testimony she was on probation in two or three cases (RT 5775); she testified she had a "bunch" of prostitution warrants (RT 5776); and she testified that she had had about 90 to 100 prostitution customers (RT 5777). Trial counsel heard this testimony and he had or should have had documents received in discovery confirming Martinez' convictions and probationary status. *See* Ex. 1 ¶7 (Sparer Decl.).[109] Evidence that a witness participated in a form of prostitution is conduct involving moral turpitude which is admissible for impeachment purposes. *See People v. Wheeler*, 4 Cal. 4th 284, 297 n.7 (1992) (allowing the admission of past criminal conduct involving moral turpitude amounting to a misdemeanor absent a

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[108]While there was testimony at the guilt phase that, despite the initial termination from the Sheriff's department Petitioner was rehired after his appeal, no reason for the reinstatement was elicited (RT 5558 (Kent testimony)), and no attempt was made to clarify for the jury that Petitioner's dismissal had been reversed as a result of a finding in his favor at a civil service hearing.

[109]Ms. Martinez' criminal records are not in the documents obtained from trial counsel. Ex. 1 ¶7 (Sparer Decl.). While the prosecution should have provided the material to trial counsel, even without a request (*see Brady v. Maryland*, 373 U.S. 83, 87-89 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972)), there is no indication that she did so. Of course, trial counsel had an independent, concurrent obligation to obtain this material on his own initiative. *See* Claim V(G), *supra*, which is incorporated by reference as if fully set forth herein.

conviction to impeach the credibility of witnesses and parties);[110] *People v. Alvarez*, 14 Cal. 4th 155, 1201 (1996) (prostitution is a crime of moral turpitude); *see also People v. Hayes*, 3 Cal. App. 4th 1238, 1248 (1992).[111] Trial counsel should have been impeached Martinez with the record of her past criminal conduct, and trial counsel's failure to do so is a further item in his extensive catalogue of substandard efforts.

442. Counsel's failure to defend against the allegations of Ms. Martinez fell below constitutionally accepted standards of competency under circumstances in which it was reasonably probable that—had the jury been aware of the information available—it would have concluded that Petitioner was not involved in the improper conduct alleged by Ms. Martinez.

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[110]In *People v. Wheeler*, 4 Cal. 4th 284 (1992), this Court held that Article I, Section 28, subdivision (d) of the California Constitution supersedes Evidence Code Section 787 insofar as it impliedly renders evidence of prior misdemeanor convictions, or more precisely, evidence of the misconduct underlying such convictions, generally inadmissible for impeachment. "Strictly speaking, evidence of prior misdemeanor convictions themselves is not relevant for impeachment, but rather the misconduct underlying such convictions (*id.* at 299)—and then only if it involves 'moral turpitude'." *People v. Alvarez*, 14 Cal. 4th 155, 201 n.11 (1996). This Court has also recognized that the fact that *Wheeler* had not been decided at the time of Petitioner's trial "is of no consequence. Defendant could surely have argued that it did." *Id.* at 200.

[111]This principle was clearly established by the time of Petitioner's trial. *See People v. Jaimez*, 184 Cal. App. 3d 146, 149-150 (1986), which relied on this Court's decision in *People v. Castro*, 38 Cal. 3d 301 (1985), referring to the annotation in 23 A.L.R. Fed. 480 (1975) entitled, "What Constitutes 'Crime Involving Moral Turpitude' Within Meaning of §§212(a)(9) and 241(a)(4) of Immigration and Nationality Act (8 U.S.C.A. §§1182(a)(9), 1251(a)(4)), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime" and 1 B. WITKIN, CALIFORNIA PROCEDURE, *Attorneys* §195 (2d ed. 1970). 38 Cal. 3d at 316 n.11. The annotation points out that prostitution and related offenses such as pimping and pandering have generally been recognized as crimes involving moral turpitude. 23 A.L.R. Fed. at 565, 566.

J. Failure To Request Jury Instructions On How To Evaluate The Testimony Of Ms. Martinez.

443. Once the Martinez testimony was allowed, it was essential for trial counsel to request the jury instructions required for an appropriate evaluation of that testimony. He did not. The explanation for this failure, which counsel offered for all his jury instruction lapses, was that "in my experience with Judge Davis, he tells you what instructions he is going to give and that is that. I worked under that assumption in Mr. Rogers' case." Ex. 14 ¶8 (Lorenz Decl.). While instructing is the court's obligation, "the duty of counsel to a criminal defendant 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. Sedeno*, 10 Cal. 3d 703, 717 n.7 (1974), *overruled on other grounds by People v. Breverman*, 19 Cal. 4th 142 (1998); *see People v. Wickersham*, 32 Cal. 3d 307, 333 n.11 (1982); *Arrowood v. Clusen*, 732 F.2d 1364, 1371-73 (7th Cir. 1984); *see also United States v. Span*, 75 F.3d 1383, 1389 (9th Cir. 1996); *Harris v. Wood*, 64 F.3d 1432, 1436 (9th Cir. 1995). It was trial counsel's responsibility to see that complete and proper instruction was given on how to view whatever impeaching evidence was disclosed. Trial counsel's misunderstanding of his own legal obligations and his unfounded reliance on the trial court to satisfy those obligations does not amount to a tactical basis for failing to request appropriate instruction, insulating counsel's omissions from review.

1. Reasonable Doubt Instruction.

444. When the prosecution relies upon unadjudicated prior criminal conduct of a defendant as evidence in aggravation under Section 190.3 factor (b), the court must instruct *sua sponte* that the unadjudicated conduct may be considered "only when the commission of such other crimes is proved beyond a reasonable doubt." *People v. Robertson*, 33 Cal. 3d at 53-54;[112] *see also People v. Heishman*, 45 Cal.

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[112] *Robertson* concerned the 1977 death penalty law. In *People v. Miranda*, 44 Cal. 3d 57, 97-98 (1987), this Court "impliedly, but clearly, held that a defendant was entitled to the same instruction under the 1978 death penalty law." *People v. Benson*, 52 Cal. 3d 754, 809 (1990).

3d 147, 181 (1988); *People v. Phillips*, 41 Cal. 3d at 65, 68. Notwithstanding the trial court's *sua sponte* duty to instruct, trial counsel had an obligation to request that the jury be instructed that it must be convinced that each of the elements of the Martinez "crime" had been established beyond a reasonable doubt.

445. As argued in our Opening Brief on appeal the trial court's failure to instruct on reasonable doubt was a violation not only of state law, but also of Petitioner's Eighth and Fourteenth Amendment rights to a reliable sentencing process and the presumption of innocence. *Robertson*, 33 Cal. 3d at 53-54; *Johnson v. Mississippi*, 486 U.S. 578, 584-85 (1988); *see also People v. Balderas*, 41 Cal. 3d 144, 205 n.32 (1985) (reasonable doubt instruction required to ensure that the reliability demanded in capital cases is achieved in the context of unadjudicated criminal activity); *People v. Hamilton*, 48 Cal. 3d 1142, 1179-80 (1989) (Eighth and Fourteenth Amendments to the U.S. Constitution mandate proof "beyond a reasonable doubt" under Section 190.3(b) to ensure the "high degree of reliability [necessary] in any determination that death is the appropriate penalty") (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). *See* AOB at 309-11 (Section XII(A)(2)), which we incorporate by reference as if fully set forth herein.[113]

2. Limiting Instruction.

446. If it is determined that the Martinez testimony was introduced not as a prior act of violence under Penal Code Section 190.3(b), but as a circumstance of the offense—motive—under Penal Code Section 190.3(a), then trial counsel was ineffective in failing to

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[113]In determining whether the failure to provide a reasonable doubt instruction was prejudicial, this Court has considered the prominence of the disputed "other crimes" evidence in comparison to the other evidence offered in aggravation. Where the prosecution relies heavily on the evidence, prejudice has been found. *People v. Phillips*, 41 Cal. 3d at 83; *People v. Davenport*, 41 Cal. 3d 247, 279-81 (1985). In this case, the only aggravating evidence presented during the penalty phase was "other crimes" evidence, and in each instance, the other crimes evidence should not have been admitted.

request an appropriate limiting instruction.[114] Under this theory of admission, Petitioner's motive for killing Tracie Clark was to prevent a *second* prostitute from making a disciplinary claim against him. Ms. Martinez' testimony was relevant as a circumstance of the crime only so far as it shows that she made accusations, and the truth of her testimony would have been irrelevant. Accordingly, the jury should have been instructed that it could not consider Ms. Martinez' testimony for the truth, but only so far as it provided a motive for Petitioner's murder of Ms. Clark. Any other consideration of the evidence would be impermissible nonstatutory aggravating evidence.

447. However, the jury had no way of knowing this without a proper limiting instruction and most certainly considered the testimony for the truth, especially since it received no reasonable doubt instruction. Counsel's failure to request either the reasonable doubt or the limiting instruction insured error on whatever basis the Martinez testimony was admitted.[115]

3. Credibility Instructions.

448. We argued in our Opening Brief that the trial court had a sua sponte duty to give standard instructions on judging the credibility of witnesses (CALJIC Nos. 2.09, 2.13, 2.20, 2.21, 2.22, 2.27). *See* AOB at 291-305 (Section XII(C)), which is incorporated by reference as if fully set forth herein. Notwithstanding the trial court's error in failing to give such instructions *sua sponte*, trial counsel also failed in his obligation to request that such instructions be given. *People v. Sedeno*, 10 Cal. 3d at 717 n.7.

449. Trial counsel's failure to ensure that the jury was probably instructed on the Martinez incident "cannot be justified on any theory of a legitimate choice of trial tactics." *People v. Perez*, 83 Cal. App. 3d

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[114]*See* discussion re: trial counsel's failure to object to the admissibility of the Martinez evidence under factor (a). *See* Claim V(H)(4), *supra*.

[115]The trial court's reading of CALJIC 8.84.1.2 (as modified), without more, did not adequately inform the jury of how properly it could consider the evidence. *See* CT 701.

718, 735 (1978). Ms. Martinez's testimony was uncorroborated, internally inconsistent and contradicted by the testimony of Kern County Deputy Sheriff Roberta Cowan (RT 5946), and was unsupported by the Sheriff's Department time logs. The credibility of Ms. Martinez was highly suspect and many of the factors listed in CALJIC No. 2.20 (1980 Rev.) (credibility of witnesses)[116] applied to her (*e.g.*, existence or non-

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[116]CALJIC No. 2.20 (1980 Rev.) provides:

"Every person who testifies under oath [or affirmation] is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

"In determining the believability of a witness you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following:

"The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness has testified;

"The ability of the witness to remember or to communicate any matter about which the witness has testified;

"The character and quality of that testimony;

"The demeanor and manner of the witness while testifying;

"The existence or nonexistence of a bias, interest, or other motive;

"Evidence of the existence or nonexistence of any fact testified to by the witness;

"The attitude of the witness toward the action in which testimony has been given by the witness or toward the giving of testimony;

"[A statement previously made by the witness that is [consistent] [or] [inconsistent] with the testimony of the witness;]

"[The character of the witness for honesty or truthfulness or their opposites;]

"[An admission by the witness of untruthfulness;]

"[The witness' prior conviction of a felony.]"

It should be noted, however, that the court deleted from this instruction the three paragraphs in italics. CT 617-18; RT 5631. As a result, Petitioner's jury was never instructed to consider in determining the believability of a witness the following highly relevant factors: "The character of the witness

(continued . . .)

existence of bias, intent or motive, prior inconsistent statement, character of witness for honesty or truthfulness or their opposites, evidence of existence or non-existence of a fact testified to). Given the weakness of the evidence, it is "reasonably probable" that a properly instructed jury would not have been satisfied beyond a reasonable doubt that Petitioner engaged in the misconduct alleged by Ms. Martinez.

K. Failure To Investigate And Prepare Re The Butler Incident.

450. Trial counsel received notice of the intended testimony at penalty phase of Tambri Butler on October 14, 1987—five months before she took the stand in Petitioner's penalty phase trial. There was ample opportunity to conduct a pretrial investigation into her allegations. Her testimony against Petitioner would ultimately be so devastating that it was cited by the trial judge as his principal basis for affirming the jury's sentence of death. On its face Ms. Butler's identification of Petitioner was highly suspect, and open to significant impeachment with information easily available to counsel had he conducted even a minimal investigation of the incident

451. As discussed more fully below, Ms. Butler's description of the man who attacked her did not match Petitioner in several critical aspects. The man who attacked her wore a bushy moustache, had thick hair and drove a white truck. At the time of Ms. Butler's assault, Petitioner did not have a moustache, thick hair or a white truck. The circumstances surrounding Ms. Butler's identification also undermined its reliability. She saw the man only at night and only while she was under the influence of heroin, which she had injected shortly before the encounter; she identified Petitioner as her assailant one full year after the assault, while she was in custody and only days after Petitioner had been arrested for killing two prostitutes. To this must be added Petitioner's denial of any knowledge of the incident Ms. Butler described. Ex. 14 ¶12 (Lorenz Decl.)

(. . . continued)
for honesty or truthfulness or their opposites; An admission by the witness of untruthfulness; The witness' prior conviction of a felony."

452. All these factors were known to counsel before Ms. Butler took the stand in the penalty phase of trial. Any one factor should have alerted counsel to the possibility that Ms. Butler had misidentified Petitioner, thereby imposing a duty to conduct at least some investigation into the prospect that Petitioner was not the assailant. As this Court has observed, a criminal defendant can reasonably expect that, before his attorney undertakes to act at all, he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. *People v. Ledesma*, 43 Cal. 3d 171, 215 (1987); *see, e.g., In re Hall*, 30 Cal. 3d 408, 426 (1981); *People v. Frierson*, 25 Cal. 3d 142, 166 (1979).

453. As we have noted in Section V(G), *supra*, Petitioner's counsel failed to conduct even a minimal investigation. Despite the damaging nature of Ms. Butler's potential testimony, no one for the defense investigated Ms. Butler or her allegations (*see* Ex. 13 ¶8 (Peninger Decl.); Ex. 12 ¶¶5-6 (Feer Decl.); Ex. 11 ¶3 (Rowland Decl.); Ex. 15 ¶5 (Bovee Decl). Neither counsel nor anyone else for the defense discussed Ms. Butler's allegations with Petitioner's wife or step-daughter, or questioned either about any of Ms. Butler's statements. Ex. ¶3 ¶¶4, 6 (Jo Rogers Decl.); *see* Ex. 4 ¶¶5, 6 (Bentrott Decl.). Counsel's neglect is indefensible, because the most rudimentary investigation would have uncovered valuable impeachment and cross-examination material. Had counsel simply reviewed already obtained evidence, carefully read the report of Ms. Butler's interview with Senior Deputy J. Soliz, and shared the contents of that interview with Petitioner and his family, he would have realized that Petitioner was not the man Ms. Butler described. And, as discussed in Claim V(G), *supra*, had counsel embarked upon such an investigation he likely would have also come upon an even greater prize—the exonerating evidence which points so strongly to the culpability of Michael Ratzlaff for this incident.

1. White Truck.

454. A major identifying element of Ms. Butler's description of her assailant was his vehicle. Ms. Butler testified that her assailant was driving a white pickup truck. RT 5794; Ex. 39 at 6 (Case Report of Senior Deputy J. Soliz, Case No. KC87-08672 ("Soliz Report").

Ms. Butler described that truck to Deputy Soliz, Detective Lage and Investigator Hodgson in great detail, and her statements to them also indicated that the man who assaulted her had not simply borrowed the truck on one occasion but drove it regularly, since she saw the man in the truck at least four times after the assault. Ex. 39 at 6-7 (Soliz Report).[117]

455. One of defense counsel's most glaring deficiencies in his handling of the aggravating evidence was his complete failure to establish at the penalty phase that Petitioner did not own a white pickup truck at the time that Ms. Butler was attacked in February, 1986. When Ms. Butler testified that the man who picked her up and assaulted her was driving a white Ford pickup, all must have assumed that the assailant was Petitioner in his "light-colored" Ford pickup.[118] That is the vehicle Petitioner drove the night he picked up and shot Tracie Clark, and it was discussed repeatedly at trial. Witnesses described searching the truck and looking for evidence in it and photographs of it had been introduced into evidence. *See, e.g.*, RT 4819-22; 4624; Guilt Phase Trial Exs. 64-68. It was the vehicle associated with Petitioner and his involvement with prostitutes. Plainly, the fact that the man who attacked Ms. Butler was driving a white pickup significantly strengthened her identification of Petitioner as her assailant.

456. Despite the significance of this evidence, counsel failed to bring to the attention of the court or the jury the fact that *Petitioner did not own his light-colored pickup at the time of Ms. Butler's assault.* Counsel's lapse was especially egregious since the evidence was so

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[117]William Weise, Ms. Butler's boyfriend at the time of her assault, remembers not only Ms. Butler's assault but also that in the days following the attack he and Ms. Butler saw the same white pickup truck near their hotel. On at least two occasions Ms. Butler pointed the truck out to Weise. Weise recalls that the truck was a white, full-sized half or three-quarter ton pickup with no camper. Ex. 21 ¶3 (Weise Decl.).

[118]The witnesses described its color in slightly different shades. Ms. Zambrano described it as beige. RT 4642. Petitioner described it as yellow. RT 4674. Detective Lang described it as tan or beige (RT 4755) and Laskowski described it as beige. RT 4819. There also was evidence introduced that Petitioner owned a dark green Datsun pickup. RT 4642 (Connie Zambrano); RT 4822 (criminalist Gregory Laskowski).

damaging. It was also inexcusable since counsel had merely to review the evidence introduced at the guilt phase to discover that Petitioner did not purchase the pickup until sometime *after December 15, 1986.* RT 4667-68 (Toby Coffey). The testimony about this was presented by the prosecution; it was uncontradicted and was supported by Mr. Coffey's auto registration documents which were also introduced into evidence. Those documents reveal that Mr. Coffey was the registered owner of the pick-up in October, 1986 and that on December 15, 1986, he had a smog check done on the vehicle for registration purposes. *See* RT 4667 (introducing Trial Exhibit 78 (Ex. 42)). Petitioner may have been driving his light-colored truck when he picked up Ms. Clark in February, 1987, but he did not own that truck at the time of the Butler attack.[119]

457. The only additional investigation and evidence that trial counsel needed to obtain to close the circle on this factual point was testimony that Petitioner did not own or drive some *other* light-colored pick-up truck prior to his purchase from Coffey. That testimony was

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[119]In the Respondent's Brief on the direct appeal ("RB"), the Attorney General misstates the record when he claims that Katherine Hardie testified that "[Petitioner] had a white pickup truck . . . in approximately January 1986." RB at 305 (citing RT 4914-16, 4918). In the first place, Ms. Hardie never claimed to have seen Petitioner—in or out of a truck. She identified the truck depicted in Exhibits 64, 65 and 66 (Petitioner's truck) as one she had seen before, but she could not remember what the driver looked like. RT 4914-15. She conspicuously *failed* to identify Petitioner as the driver. RT 4915, 4918 (she could not "place" who the man was). Moreover, Ms. Hardie did not testify that she saw the truck in January, 1986. Ms. Hardie testified that she saw the truck sometime *after* August, 1986 — when she was released from jail—and before the day of her testimony, February 25, 1988. RT 4914. She may have seen Petitioner in the truck in January or February of 1987, or someone else in the truck sometime between August and December of 1986, but she did not claim to have seen the truck at all in January of 1986. It may be that the Attorney General based his assertion on a report prepared by Tam Hodgson on February 1, 1988, in which he described an interview with Ms. Hardie. Mr. Hodgson stated that Ms. Hardie told him that a man picked her up in the truck "about a year ago January," which would have been January, *1987.* Ex. 40 at 3 (Kern County District Attorney Bureau of Investigation Report dated 2/1/88 ("Hodgson Report")). Petitioner acknowledges that he owned and drove the truck in January, 1987, but that was nearly one full year *after* Ms. Butler's assault in February, *1986.*

readily available from Petitioner's wife, Jo Rogers. Ex. 3 ¶10 (Jo Rogers Decl.).

458. The fact that Petitioner did not own a white truck at the time Ms. Butler was assaulted was obviously critical defense information; however, the date on which Petitioner purchased his pickup was not something that the jury would otherwise have noted. The testimony regarding Petitioner's purchase of the vehicle was introduced during the guilt phase to establish that Petitioner owned the vehicle driven by the man who picked up Ms. Clark, not to establish that Petitioner had not owned or driven it prior to December, 1986. It was incumbent upon defense counsel to spot this inconsistency and introduce evidence on the point or, at the very least, remind the court and jury of the earlier introduced evidence. Counsel failed to do any of these things. As a result, something that should have be regarded as exculpatory evidence was undoubtedly viewed as corroboration of Petitioner's guilt.

2. Moustache.

459. Ms. Butler was certain that the man who assaulted her wore a moustache. She was looking for a photograph of a man with a moustache when she viewed "Behind the Badge" in October or November of 1986; she told Hodgson about a moustache in February of 1987; and she testified at trial in March, 1988, that she recalled a moustache. She also testified that she was able to identify the assailant in the "Behind the Badge" she viewed in the fall of 1986, because of his moustache. RT 5798-99; *see also* Ex. 39 at 8 (Soliz Report).[120] Given Ms. Butler's insistence on this point, it was essential that counsel obtain evidence establishing that Petitioner did not have a moustache at the time of the Butler assault. It is true that Petitioner's wife, Jo Rogers, testified during the penalty phase that Petitioner had never worn a moustache, but counsel should have recognized that Mrs. Rogers' might

[120]Ms. Butler remains adamant that her assailant had a moustache. In her declaration of November 14, 1999, Ms. Butler states she is certain that the man had a thick bushy moustache that hung over his upper lip. Ex. 16 at 1 ¶4 (Butler-De Harpport Decl.).

have been perceived as a biased witness.[121] Moreover, at the time of trial, Petitioner wore a full beard. RT 5798. Reasonable counsel would have realized that these factors weakened Mrs. Rogers' testimony and taken steps to locate and present evidence to corroborate her testimony. *See Hart v. Gomez,* 174 F.3d 1067, 1069-70 (9th Cir.), *cert. denied,* 120 S. Ct. 326 (1999) (defense counsel ineffective for failing to introduce records corroborating a possibly biased key defense witness's otherwise uncorroborated testimony).

460. Such corroborating evidence would not have been difficult to obtain. Petitioner's stepdaughter, Carol Truitt Bentrott, who testified at the penalty phase, could have confirmed to the jury that Petitioner did not have a moustache in the ten years that she had known him. Ms. Bentrott also possessed photographs of Petitioner which show that he did not have a moustache during the pertinent time frame. *Id.* ¶7 & photos 1-9. She would have provided the photographs to defense counsel had she been asked or had she known of their importance. *Id.* Photographs 5 through 8 attached to Ms. Bentrott's declaration show Petitioner at Christmas, 1985 (5), during the second or third week of January, 1986 (6), during late January, 1986 (7) and at Easter, 1986 (8). In none of those photographs does Petitioner have a moustache, making it virtually impossible for him to have had a moustache in February, 1986, when Ms. Butler was attacked by a man with a moustache.

3. Other Physical Characteristics.

461. Counsel was also ineffective in failing to discover that Petitioner did not have many of the physical characteristics Ms. Butler described so precisely when interviewed about the attack. Ms. Butler told the investigators that her assailant had hair on his chest. Ex. 39 at 5

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[121]It is worth noting that in the Respondent's Brief on the direct appeal, the Attorney General discounts Mrs. Rogers' testimony, stating "The only evidence that [Petitioner] never had a moustache during the relevant time span came from the testimony of his wife, whose bias was apparent from her testimony and her circumstances." RB at 304. While Petitioner does not share Respondent's cynical view that a wife's continued love for her husband is proof of perjury, Petitioner agrees that if corroborating evidence were available, and it was here, it should have been introduced to dispel any doubts the jury might have had about the issue.

(Soliz Report). She explained in some detail the nature of the chest hair (it was not too thick, but "it was spread across the front and around the belly") and that very detail enhanced the reliability of her observations. *Id.* It is not likely that someone would make up this information, or erroneously recall it. Accordingly, one of the first steps of reasonable counsel would have been to determine whether Petitioner had chest hair as Ms. Butler described. Had counsel simply talked to his client and looked at his upper body, counsel would have ascertained that Petitioner did not.

462. An interview on this subject with Petitioner's wife would have disclosed the same information—and the revelation that photographs in the family photo albums introduced into evidence showed Petitioner's hairless bare chest. Ex. 3 ¶8 & photos 1-3 (Jo Rogers Decl.). Jo Rogers states in her declaration that she and Petitioner used to joke that he was "bald chested." *Id.* ¶8. Photographs 1-3, attached to her declaration, are copies of photographs contained in the albums Mrs. Rogers introduced into evidence. They show quite clearly that Petitioner has no visible chest hair. *Id.*; *see also* Penalty Phase Trial Exhibits B, C & D (introduced at RT 5909-14). While the jurors may have looked at those photographs, they could not have looked at them with Ms. Butler's statements regarding her assailant's chest hair in mind, because no one questioned Ms. Butler at trial regarding that aspect of her description. The jurors did not know what Ms. Butler had said about her assailant's chest hair, so Petitioner's bare chest hair had no significance to the jurors, even had they noticed the fact.

463. A view of Petitioner's upper body also would have revealed the fact that Petitioner has a very visible tattoo on his right bicep. *See* Ex. 3 ¶9 & photos 1-3 (Jo Rogers Decl.); Ex. 4 ¶7 & photos 6, 9 (Bentrott Decl.). As photographs of the tattoo show, it can be seen below the sleeve of a T-shirt or short-sleeved shirt. *See* Ex. 4 ¶7 & photos 6-9 (Bentrott Decl.). The detailed description Ms. Butler provided suggests that she certainly would have noticed something as conspicuous as a tattoo had her assailant had one.[122] Ms. Butler

[122]In the report, Soliz states that Ms. Butler said that she had trouble recognizing Petitioner when she saw him in uniform at the jail because "she (continued . . .)

confirms that her assailant took his shirt off and she saw most of his upper body. Ex. 17 ¶2 (Supp. Butler-De Harpport Decl.). She also states that she would have noticed a tattoo. *Id.* Had counsel known of Petitioner's tattoo, he could have obtained this exculpating testimony from Ms. Butler. Trial counsel failed to discover this or to question Ms. Butler about it because he completely failed to investigate the Butler offense.

4. Other Distinguishing Details.

464. Counsel would have been aware of other exculpating details that distinguished Petitioner from the assailant had he reviewed the Soliz report in his possession and conducted even a minimal follow-up investigation. For instance, Ms. Butler said that the man who assaulted her wore a gold watch with a latex band made up of "little pieces." Ex. 39 at 6 (Soliz Report). Petitioner had no such watch. Ex. 3 ¶13 (Jo Rogers Decl.). Ms. Butler told Soliz that the man who attacked her wore boxer shorts. Ex. 39 at 6 (Soliz Report). Petitioner, however, did not own a single pair of boxer shorts during the time that he was married to Jo Rogers. Mrs. Rogers bought her husband's clothing and he was very clear that he only wanted her to buy jockey shorts. He explained to her that he did not like boxer style underwear because his heavy gun belt rubbed over his hip bones and he could not tolerate fabric under that part of his uniform. Mrs. Rogers also knew what shorts her husband wore because she did the family's laundry and would have noticed if Petitioner had any boxer underwear. Ex. 3 ¶12 (Jo Rogers Decl.). She could easily have testified about these matters had she been asked or known the significance of this information. *Id.* ¶¶6, 15.

5. Outside Influences On Ms. Butler's Identification Of Petitioner.

465. Counsel was aware that at the time Petitioner was arrested, Ms. Butler was in custody in the very county jail in which Petitioner had

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(. . . continued)
had only seen the man naked." Ex. 39 at 7 (Soliz Report). Counsel thus should have realized that Ms. Butler would have noticed a tattoo had her assailant had one.

formerly worked as a deputy sheriff. She made her identification of Petitioner only 5 days after he was arrested for the murders of Clark and Benintende. Any competent lawyer would have investigated the possibility that Ms. Butler's identification of Petitioner as her assailant was tainted by her knowledge of Petitioner's arrest. Counsel in this case apparently recognized this possibility, since he asked at trial whether she had seen photographs of Petitioner on television or in the newspaper before talking to the police. RT 5795. What counsel did not do, however, was put any effort into proving that Ms. Butler had indeed seen photographs of Petitioner prior to her identification. As a result, counsel—and the jury—were left with Ms. Butler's response that she had seen no photographs of Petitioner, "none whatsoever." RT 5795.

466. The most basic investigation would have revealed that Ms. Butler's testimony was false. Ms. Butler now acknowledges that shortly before she identified a photograph of Petitioner she had in fact seen him on television. Ex. 16 ¶¶11, 12 (Butler-De Harpport Decl.). Had counsel conducted discovery or interviewed any of Ms. Butler's cellmates, he would have learned this information and been able to impeach Ms. Butler's statement that she had not seen photographs of Petitioner prior to her identification of him. Ms. Butler also states the other women in custody with her were discussing Petitioner's case, a fact that trial counsel tried unsuccessfully to bring out during cross-examination. RT 5803. Interviews with Mr. Butler's cellmates would have also established this point. Ex. 16 ¶16 (Butler-De Harpport Decl.).

6. Tambri Butler's Criminal Record.

467. Competent trial counsel would have obtained documents confirming that at the time of her testimony at Petitioner's trial, Ms. Butler was in custody following a guilty plea to possession *for sale* of heroin in Kern County. Ex. 2 ¶14 & ME 120 (Ermachild Decl.). Counsel either did not obtain these records or did not use them to impeach Ms. Butler.[123] Possession for sale of heroin is an offense

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[123]Ms. Butler's criminal records do not appear in trial counsel's files. Ex. 1 ¶7 (Sparer Decl.). As we have noted elsewhere, the prosecution had a duty to provide such material and trial counsel had an independent and (continued . . .)

involving moral turpitude admissible for impeachment. *People v. Castro*, 38 Cal. 3d 301, 317 (1985).[124]

468. A simple court check of Ms. Butler's Municipal and Superior court records also would have revealed that on April 23, 1985, Ms. Butler was arrested for being under the influence of heroin and for trespassing at a truck stop. Ex. 2 ¶5 & ME 5 (Ermachild Decl.). The records of that arrest show that it was Petitioner who booked Ms. Butler into the jail following that arrest, on April 24, 1985 (*id.*)—a little less than one year before Ms. Butler was assaulted in February, 1986. This was a critical piece of information, as it explains why Ms. Butler recognized Petitioner when she saw him in the jail in 1987. The jurors had to have been asking themselves why Ms. Butler would have recognized Petitioner—unless he was her assailant. Ms. Butler obviously thought she had seen him before[125] and she had no apparent reason to lie about it. She testified that at one point she asked Petitioner if he had ever arrested her before. When he said that he had, in Arvin, she did not believe him because she knew that she had never been arrested there. RT 5791. In fact, he had not arrested her, but booked her into the jail. Ex. 2 ¶5 & ME 5 (Ermachild Decl.). Counsel should have found this critical piece of information and shown Ms. Butler and the jury that there was another, innocent explanation for her recognition of Petitioner.

469. Finally, if trial counsel had undertaken even the limited investigation described here, the Butler identification would have so quickly become unraveled that counsel would inevitably have been led, as appellate counsel were, to Michael Ratzlaff as the actual perpetrator

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(. . . continued)
concurrent obligation to obtain it on his own. *See* note 109, *supra.*

[124]The District Attorney had to have been aware that Ms. Butler falsely testified that she was then in custody for simple possession of heroin. RT 5779. It was not a minor mistake—the difference between possession for sale of heroin and possession of heroin is the difference between an impeachable offense and one that is not. Under such circumstances the prosecutor had a duty to correct the false statement of her witness.

[125]In her declaration Ms. Butler states that she "knew [she] had seen him somewhere before." Ex. 16 ¶6 (Butler-DeHarpport Decl.).

of the Butler attack. As set out in some detail in Claim IV, *supra*, by the time Ms. Butler testified, there was apparently a great deal of information readily available from prostitutes on Union Avenue about the violent history and predilections of the man named "Mike" who had thick brown hair and a mustache, drove a white pickup and carried both a pistol and a stun gun. Claim III(E), Claim IV, *supra*. In addition, local law enforcement also clearly had been tracking Mr. Ratzlaff's activities for some time, and knew a great deal about him.[126] Claim IV, *supra*. Notwithstanding the State's breach of its independent duty to disclose what was known about Mr. Ratzlaff as an obvious alternative suspect in the Butler attack, competent counsel would at the least have specifically demanded discovery of all material concerning assaults on Union Avenue prostitutes during the pertinent time-frame, and compliance with such a specific discovery request would inevitably have led to Michael Ratzlaff.

470. Regardless whether the fault lies with the State or trial counsel, the test is the same, and that test is met. Had trial counsel learned of and presented existing, available information about Michael Ratzlaff during the penalty phase, there is a "a reasonable probability that . . . the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995), *cert denied*, 118 S. Ct. 1827 (1998); *see Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir. 1997) (en banc) (noting that trial counsel's failure to obtain exculpatory information from law enforcement was "clear ineffective assistance of counsel," but did not relieve the State of its own disclosure obligations under *Brady*; in either event, the test for materiality is the same, and "[e]ither way [petitioner] was denied a fair trial").

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[126]We again emphasize 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.

L. Failure To Challenge The Admissibility Of The Butler Evidence.

471. The *only* evidence that Petitioner was the person responsible for the attack on Ms. Butler was her much belated identification and unreliable eyewitness testimony. Had trial counsel litigated this issue, it is reasonably probable that the trial court would have ruled that the prosecution lacked substantial evidence to prove that Petitioner was the man who assaulted Ms. Butler, and that the highly inflammatory evidence would not ever have reached the jury.

472. "Evidence of other criminal activity involving force or violence may be admitted in aggravation only if it can support a finding by a rational trier of fact as to the existence of such activity beyond a reasonable doubt." *People v. Clair*, 2 Cal. 4th 629, 672-73 (1992). The standard of proof for uncharged crimes "necessarily implies that the trial court will not permit the penalty jury to consider an uncharged crime as an aggravating factor unless a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Boyd*, 38 Cal. 3d 762, 778 (1985) (citation omitted). Before criminal activity can be placed before the jury there must be "substantial evidence to prove each element of the other criminal activity." *People v. Phillips*, 41 Cal. 3d 29, 72 n.25 (1985); *accord, People v. Thompson*, 45 Cal. 3d 86, 127 (1988). Substantial evidence is evidence that "reasonably inspires confidence and is of 'solid value.'" *People v. Morris*, 46 Cal. 3d 1, 19 (1988) (quoting *People v. Bassett*, 69 Cal. 2d 122, 139 (1968)); *see also People v. Green*, 27 Cal. 3d 1, 55 (1980); *People v. Rushing*, 209 Cal. App. 3d 618, 621 (1989).

473. Eyewitness testimony, such as formed the sole basis for admission of Ms. Butler's testimony, is notoriously unreliable. *United States v. Wade*, 388 U.S. 218, 228-29 (1967); *People v. McDonald*, 37 Cal. 3d 351, 363-65 (1984) (and authorities cited therein). As one court has observed, "However . . . convincing [the eyewitnesses] were in their identification at trial, we cannot ignore the fact that identification of strangers in violent crime situations is fraught with the hazard of mistake." *Wilson v. Cowan*, 578 F.2d 166, 168 (6th Cir. 1978). At the same time, eyewitness testimony may have a particularly devastating impact on the defense. "'There is a great potential for misidentification

when a witness identifies a stranger based solely upon a single brief observation, and this risk is increased when the observation was made at a time of stress or excitement . . . . [T]his danger is inherent in every identification of this kind' . . . . 'This problem is important because of all the evidence that may be presented to a jury, a witness' in-court statement that "he is the one" is probably the most dramatic and persuasive.'" *People v. McDonald*, 37 Cal. 3d at 363-64 (quoting *United States v. Russell*, 534 F.2d 1063, 1066, 1067 (6th Cir. 1976)).

474. Ms. Butler's identification of Petitioner as the man who assaulted her was patently unreliable. As discussed above, Ms. Butler's description of her assailant is remarkable for how few of the major identifying characteristics she reported matched Petitioner. Petitioner did not have a bushy moustache, thick hair, or the chest hair Ms. Butler described; he also did not drive the vehicle that Ms. Butler described. On the other hand, Petitioner did have a tattoo, which the otherwise highly observant Butler failed to mention. Furthermore, Ms. Butler initially saw her assailant at night and while under the influence of heroin (RT 5785) and then did not identify Petitioner as the assailant until one full year *after* the assault. She also had seen him before, first in his Deputy Sheriff capacity when he had earlier booked her on a prostitution charge, and later on television in the jail identified as a killer of prostitutes just before she picked him out as the person who had attacked her. Both of these contacts also would bear substantially on the reliability of her eye-witness identification.

475. In short, the evidence simply was insufficient to show a violent crime *by Petitioner* beyond a reasonable doubt and the evidence would and should not have been admitted at trial. This Court has indicated in several cases that the erroneous admission of aggravating evidence is subject to "waiver" on appeal unless there was contemporaneous objection made at the penalty phase proceeding. *See People v. Pinholster*, 1 Cal. 4th 865, 960-61 (1992); *People v. Clark*, 50 Cal. 3d 583, 624-25 (1990); *People v. Carrera*, 49 Cal. 3d 291, 341 (1989). Therefore, Petitioner was certainly prejudiced by counsel's inadequate representation in waiving this issue. *People v. Fosselman*, 33 Cal. 3d 572, 581-84 (1983) (prejudice may be shown if incompetence waives appealable issue).

M. Failure To Effectively Impeach Or Rebut The Butler Testimony.

476. The Ninth Circuit has observed, "A lawyer who fails adequately to investigate, *and to introduce into evidence*, records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir.), *cert. denied*, 120 S. Ct 326 (1999) (emphasis added); *see also Sanders v. Ratelle*, 21 F.3d 1446 (9th Cir. 1994). Hart involved counsel's failure to introduce evidence at trial, but the panel noted that its ruling was supported by cases involving a defense counsel's failure to introduce evidence during a sentencing hearing. "In both instances, it is the attorney's failure to introduce evidence central to his client's case that amounts to ineffective assistance." 174 F.3d at 1071 n.8.

1. Factual Evidence Undermining The Eye-Witness Identification.

477. As detailed in Claim V(K), *supra*, there was ample evidence which could have been used successfully to impeach and undermine Ms. Butler's testimony, even if the trial court had overruled a motion to exclude the testimony altogether. The details need not be repeated again. Trial counsel could have impeached Ms. Butler with evidence showing that Petitioner did not own, drive or borrow a light colored or white pick up truck prior to 1987, one year after the alleged attack. Counsel could also have impeached the identification with photographic evidence and testimony that Petitioner did not match the description Ms. Butler gave of her assailant, and that he did have a highly visible tattoo, which Ms. Butler failed to mention.

478. Also available to use in impeachment was the fact that Ms. Butler was attacked at night while under the influence of heroin. Counsel could also have introduced evidence highlighting the fact that she did not identify Petitioner until one year later. Counsel could have shown that Butler had seen Petitioner before she identified him—first when he had booked her for prostitution, and later on television just days before she picked him out as her attacker.

479. In short, there was ample basis to impeach and undermine Ms. Butler's identification, had trial counsel effectively investigated and prepared his case. The failure to subject Ms. Butler to a rigorous and meaningful cross-examination is even more egregious, because the impeaching information was at counsel's fingertips had he only used it and followed up. Counsel had the details Ms. Butler had given in her interview with Inspector Soliz; counsel had the information about the dates of ownership of Petitioner's light-colored pick-up truck; counsel had the photo album showing picture of Petitioner which contradicted the identification, and he had access to Petitioner's wife and stepdaughter who were available to fill in additional information.

2. Expert Witness Testimony.

480. Counsel had the important task of explaining to the jury how Ms. Butler could have been telling the truth about the attack while being mistaken that Petitioner was her assailant. This effort would have been substantially enhanced by expert testimony on the inherent unreliability of eyewitness accounts. Trial counsel also failed to develop and present such testimony.

481. Jurors frequently are unaware of factors, such as interrogation procedures or post-event information or other psychological factors, which can have a significant impact on eyewitness identification. Few lay people know that there is enhanced suggestibility when a long period of time has passed since some critical event occurred or that there is little or no relationship between how confident a witness is and how likely he or she is accurate. Many studies have found "no statistically significant correlation between confidence and accuracy, and in a number of instances the correlation is negative—i.e., the more certain the witness, the more likely he is mistaken." *People v. McDonald*, 37 Cal. 3d at 369 (citing G. Wells & D. Murray, *Eyewitness Confidence*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 159-62 (1984)). Eyewitness accounts based upon a single viewing are known to be unreliable. Impairment in memory occurs not only for items seen immediately prior to the critical incident, but also for items occurring nearly two minutes later. *See* P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 13-14 (1975).

482. The testimony of a psychologist trained in the limitations of eyewitness testimony would have demonstrated how weak Ms. Butler's identification was and would have substantially undermined the prosecution's case in penalty. *See, e.g., United States v. Moore*, 786 F.2d 1308, 1313 (5th Cir. 1986) (en banc) (where eyewitness testimony may make the difference between guilt and innocence, expert eyewitness identification testimony may be critical). Counsel's failure to call an expert was plainly prejudicial. The State had no physical evidence linking Petitioner to the assault and Counsel's failure to call an expert was "crucial, given the absence of any other evidence connecting defendant with the crime . . . An error that impairs the jury's determination of an issue that is both critical and closely balanced will rarely be harmless." *People v. McDonald*, 37 Cal. 3d at 376.

483. In short, counsel's impeachment and rebuttal of Ms. Butler's testimony was wholly ineffective. There can be no question that he intended and wanted to discredit her testimony. Ex. 14 ¶¶12-13 (Lorenz Decl.).[127] Having risked alienating the jury by insinuating that no assault even occurred, it was unfathomable that counsel failed to challenge her eyewitness identification (and further failed to ignore its unreliability in closing).

N. Failure To Address The Butler Incident In Closing Argument.

484. Equally indefensible was counsel's failure to address the Butler accusations at all in his closing argument. As the Supreme Court has recognized, "In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before

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[127]During his cross-examination of Ms. Butler, counsel questioned whether the attack she described had even occurred ("*the person you thought or you say had some type of improper sexual activity with* (RT 5797 (emphasis added)); this incident back in *'85 or '86, if it happened*, were you using a lot of heroin at that time?" (RT 5799-800 (emphasis added))). Counsel also apparently felt it was appropriate to question Ms. Butler about her heroin use and prostitution and even suggested that Ms. Butler may had identified Petition solely in order to obtain early release from custody. RT 5796, 5800-01.

submission of the case to judgment." *Herring v. New York*, 422 U.S. 853, 862 (1975). It is only after all the evidence is in that counsel can "argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions." *Id.*

485. In this case, counsel did not elicit all available impeaching information during his cross-examination of Ms. Butler, but many weaknesses in the prosecution's case had emerged from Ms. Butler's testimony and evidence presented at the guilt phase. Ms. Butler had testified that her assailant wore a moustache (RT 5797-99) and that she had used heroin shortly before making the observations leading to her identification of Petitioner (RT 5785). Ms. Butler testified about her drug and prostitution convictions (RT 5779, 5801), and it was undisputed that her first verified identification of Petitioner was made one year after the attack. Also, Ms. Butler's testimony that she had not viewed any television coverage of Petitioner's arrest prior to her identification of Petitioner strained credulity, and was, in fact, not true.[128] Inexplicably, counsel made no mention of any of these points in his closing argument.

486. Counsel also missed the opportunity to highlight that Petitioner did not own a stun gun, such as was used by Ms. Butler's assailant. This was noteworthy since investigators seized a number of guns from Petitioner—including the murder weapon. RT 4873-74. Yet, no stun gun was found during the searches of Petitioner's home or vehicles. Petitioner would hardly have taken the trouble to hide or dispose of the stun gun if he was ready to keep the murder weapon around.

487. In addition, there was significant exculpatory material in evidence that the jury undoubtedly failed to appreciate as such simply because counsel did not explain its significance. Counsel failed to draw the jurors' attention to the guilt phase testimony showing that Petitioner did not own a light-colored truck until well after the Butler incident.

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[128]Petitioner was the subject of intense media coverage. *See* CT 531-67 (Exhibit A to Petitioner's motion for change of venue). In addition, at the time Petitioner was arrested, Ms. Butler was in custody in the county jail in the county in which Petitioner had been a deputy sheriff.

Likewise counsel failed to direct the jury's attention to the fact that Petitioner did not have a moustache in any of the photographs in the three photograph albums in evidence.

488. In short, counsel's closing argument performed none of the functions that summations are intended to fulfill in a criminal trial. It did not "sharpen and clarify the issues." *Herring v. New York*, 422 U.S. 853, 862 (1975). More critically, it failed to review the evidence and "point out the weaknesses of [the prosecution's case]." *Id.* Given the lack of instruction on how to evaluate Ms. Butler's testimony (see Claim V(O), (T), *supra*), these failures were literally fatal. Trial counsel's closing argument in this case cannot be considered within "an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 688, 687-88 (1984).

489. Moreover, counsel had no tactical basis for failing to scrutinize Ms. Butler's identification during his argument. By conducting a disparaging cross-examination and then failing to demonstrate in closing that such questioning had been done for the legitimate objective of establishing the identification as unreliable, trial counsel could only have antagonized any juror sympathetic to Ms. Butler.[129]

O. Failure To Request Jury Instructions Pertinent To The Butler Testimony.

490. Trial counsel was also constitutionally ineffective in failing to request jury instructions on how to evaluate the testimony of Tambri Butler. We have argued in our Opening Brief on appeal that the trial court had a sua sponte obligation to give CALJIC No. 2.91 (1982 Rev.)

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[129]Furthermore, the questioning that Petitioner submits should have been done and the argument that should have been made, concerned Ms. Butler's identification of Petitioner, not her credibility. Counsel need not have attacked Ms. Butler to establish that she mistakenly identified the wrong man. But while counsel did not have to argue that Ms. Butler's misidentification was through any malevolent design of her own, it was essential that he point out the very real flaws in Ms. Butler's identification of Petitioner as the man who committed the violent attack upon her.

(burden of proving identity based sole on eye witness)[130] and CALJIC No. 2.92 (1984) (factors to consider in proving identity by eye witness testimony)[131] as well as standard instructions on judging the credibility

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[130]CALJIC No. 2.91 (1982 Rev.) provides:

"The burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crime with which [he] [she] is charged.

"If, after considering the circumstances of the identification [and any other evidence in this case], you have a reasonable doubt whether defendant was the person who committed the crimes, you must give the defendant the benefit of that doubt and find [him] [her] not guilty."

[131]CALJIC No. 2.92 (1984) provides:

"Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime[s] charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitnesses as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:

"[The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;]

"[The stress, if any, to which the witness was subjected at the time of the observation;]"

"[The witness' ability, following the observation, to provide a description of the perpetrator of the act;]

"[The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;]

"[The cross-racial or ethnic nature of the identification;]

"[The witness' capacity to make an identification;]

"[Evidence relating to the witness' ability to identify other alleged perpetrators of the criminal act;]

"[Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup;]

"[The period of time between the alleged criminal act and the witness' identification;]

"[Whether the witness had prior contacts with the alleged perpetrator;]

"[The extent to which the witness is either certain or uncertain of

(continued . . .)

of witnesses (CALJIC Nos. 2.09, 2.13, 2.20, 2.21, 2.22, 2.27).[132] *See* Appellant's Opening Brief ("AOB") at 291-305 (Section XII(C)), which is incorporated by reference as if fully set forth herein. Notwithstanding the trial court's error in failing to give such instructions *sua sponte*, trial counsel also failed in his obligation to request that such instructions be given. *People v. Sedeno*, 10 Cal. 3d at 717 n.7.

491. There was no conceivable tactical basis for counsel's failure to ensure that the jury was fully instructed on how to evaluate the testimony of Ms. Butler (and counsel avers that he had none).[133] Her credibility was highly suspect and many of the factors listed in CALJIC No. 2.20 (1980 Rev.) (credibility of witnesses)[134] applied to her.

492. In addition, many of the factors to be considered in evaluating a witness' identification under CALJIC No. 2.92 (1984) "including the witness' ability to provide a description of the perpetrator, the extent to which the defendant fits or does not fit that description, the witness' capacity to make an identification, and the time between the act and the identification" are present in this case and demonstrate a likelihood that Ms. Butler misidentified Petitioner. Without any argument from counsel regarding how to evaluate Ms. Butler's identification, proper instruction was essential.

(. . . continued)
the identification;]

"[Whether the witness' identification is in fact the product of [his] [her] own recollection;]

"[_____, _____, _____, _____, _____, _____.]

"Any other evidence relating to the witness' ability to make an identification."

[132]The court instructed the jury during the guilt phase with verbatim or modified versions of CALJIC Nos. 2.09, 2.13, 2.20, 2.21, 2.22, 2.27. *See* RT 5629-33. The jury was never instructed with CALJIC No. 2.91 or 2.92.

[133]In his declaration, trial counsel Eugene Lorenz states that Ms. Butler's testimony was very damaging and that he would have "done anything to exclude her testimony or to impeach her identification of Mr. Rogers." Ex. 14 ¶12 (Lorenz Decl.).

[134]*See* note 116, *supra* (quoting and discussing deletions from CALJIC 2.20).

In summary, trial counsel's failure to thoroughly impeach Ms. Butler and her identification of Petitioner, to argue the insufficiency of the Butler evidence in his closing argument, and to request instructions on how to evaluate her testimony, individually and collectively, amounted to ineffective assistance of counsel. Given the facts underlying Ms. Butler's identification of Petitioner, it is reasonably probable that a competent performance would have led the jury to discount the Butler incident and to have reached another verdict.

P. Failure To Challenge Admission Of An Automatic Pistol That Was Inadmissible For Any Legitimate Purpose.

493. At the close of its penalty case, the prosecution introduced an Excam brand .25 automatic pistol that was taken from a bag found in the back of Petitioner's pickup truck. RT 5811-12. Inexplicably, trial counsel failed to object. Yet there was no articulated or legitimate basis for the State's introduction of this weapon. There was no suggestion that the weapon had been used in either the Clark or Benintende offense or that it was relevant to any pertinent topic.

494. Although Ms. Butler testified that her assailant had an automatic pistol, she did not identify Petitioner's weapon as the one used in the assault. There also was no evidence regarding how or when Petitioner had purchased the gun or how long he had owned it. Petitioner's mere possession of this weapon, without more, was irrelevant and immaterial. It was also inadmissible under Section 190.3(b), since possession of a gun is neither a crime nor an act of force or violence as required under *People v. Boyd*, 38 Cal. 3d 762, 776 (1985). In addition, Petitioner was given no notice that this item would be introduced in aggravation as required under Section 190.3,[135] and no

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[135]Section 190.3 provides in pertinent part:

> "Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial."

The purpose of the notice provision is to advise an accused of the evidence (continued . . .)

reasonable doubt instruction was given as required by *People v. Robertson*, 33 Cal. 3d 21, 53-54 (1982).[136]

495. Reasonably competent counsel would have moved to exclude the evidence and would have been successful. Instead, trial counsel took no action and the jury was left with additional evidence, improperly admitted, to support the prosecutor's argument that Petitioner was a dangerous man who should be put to death.

Q. The Combined Effect Of Counsel's Failure To Investigate, Challenge And Impeach The Aggravating Evidence Rendered Petitioner's Trial Fundamentally Unfair.

496. The information summarized and referred to above was available to trial counsel had he reviewed documents in his possession, conducted a timely, adequate investigation, requested discovery and consulted with qualified experts, including an expert on eye-witness identification. Reasonably competent counsel would have used such information to challenge the admissibility of the Martinez and Butler evidence, to impeach it, to request appropriate and necessary jury

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(. . . continued)
against him so that he may have a reasonable opportunity to prepare a defense at the penalty trial. *See People v. Miranda*, 44 Cal. 3d 57, 96 (1987).

[136]As with the Martinez evidence, the pistol was introduced without explanation, argument or instruction to the jury that explained its evidentiary purpose. While the Attorney General has provided a post-hoc rationalization for the gun's introduction, corroboration of Ms. Butler's testimony (RB at 307-09) the jury had no reason to limit its consideration of the evidence in such a manner.

In addition, the gun, without more, could not possibly corroborate Ms. Butler's testimony that she was assaulted by Petitioner since she did not identify the gun as the one used against her. *People v. Garceau*, 6 Cal. 4th 140 (1993), cited by the Attorney General in the Respondent's Brief on the direct appeal (RB at 307-08) is inapposite. In that case, the Court held that possession of an "arsenal" of weapons was admissible because it involved the implied threat to use force or violence. *Id.* at 203. The Court also noted that while the weapons may have been properly admitted to corroborate a kidnap victim's testimony that she saw guns at the defendant's residence, any possibility of prejudice from admission of the evidence was precluded by the trial court's giving of limiting instructions. *Id.* at 204. No such instructions were given in this case.

instructions, and to argue effectively the statutory factors and other law relevant to the life or death decision the jury was required to make. It is also reasonably probable that Petitioner would not have been sentenced to death had his jury and trial judge heard and seen available evidence which cast reasonable doubt upon, or strongly mitigated, the prosecution's aggravating evidence.

497. Defense counsel's failure to object to the introduction of the Martinez and Butler evidence or to impeach that evidence on any of the grounds described above cannot be dismissed as a "choice of tactics." *See People v. Lanphear,* 26 Cal. 3d 814, 828-829 (1980) (and cases cited therein). Unlike the failure of counsel to request an instruction setting out the elements of a particular crime which could be explained by counsel's strategic decision to de-emphasize the crime in the minds of the jury (*see People v. Tuilaepa*, 4 Cal. 4th 569, 589 (1992), *aff'd*, 512 U.S. 967 (1994), the failure of defense counsel to seek to exclude or challenge prejudicial and inadmissible evidence from the jury serves no reasonable strategic purpose. Petitioner had everything to gain and nothing to lose by objecting to the evidence. The failure to defend against the evidence at trial can only be explained by ignorance, and "[t]here is nothing strategic or tactical about ignorance . . . ." *Smith v. Lewis*, 13 Cal. 3d 349, 359 (1975).

498. As one of only a few aggravating factors presented to the jury in the penalty phase, the Martinez incident was undoubtedly important to the jury's decision to sentence Petitioner to death.[137] Yet

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[137]This is not a case such as *People v. Burton*, 48 Cal. 3d 843, 859-64 (1989), in which properly admitted evidence of numerous "other crimes" could have negated the prejudicial impact of the inadmissible criminal act. Here, only the Martinez and Butler incidents were introduced in aggravation, and it would have been virtually impossible for the jury to find one of these aggravating incidents without also finding the other, especially in light of the crimes of which the jury had just convicted Petitioner. *Cf. People v. Silva*, 45 Cal. 3d 604, 636 (1988), in which the evidence in question was "so trivial when compared to [defendant's] crimes and the other proper evidence adduced at the penalty phase" that the error was harmless; *People v. Pinholster*, 1 Cal. 4th 865, 963 (1992) (footnote omitted) (in light of "the volume of evidence of prior criminal activity that was properly admitted, there can be no reasonable possibility that any improperly admitted evidence was prejudicial").

evidence of the Martinez incident was not only inadmissible "even under a properly stringent standard of proof" but was also tainted by the trial court's failure to give reasonable doubt and credibility instructions as to the incident.[138] In *People v. Phillips*, this Court reversed the penalty judgment based on the same two significant errors found here the erroneous admission of evidence not amounting to "actual crime[s]," compounded by the trial court's failure to instruct on reasonable doubt. 41 Cal. 3d at 82-83.

499. Moreover, although the Martinez incident did not involve actual or threatened force or violence, her testimony advanced the prosecution's notion that Petitioner was an habitual abuser of prostitutes. Under these circumstances, it would be difficult to conclude that the jury's consideration of the Martinez incident did not weigh heavily in the penalty decision. This is particularly so since the prosecution had argued at the guilt phase that Martinez accusation was Petitioner's motive for murdering Tracie Clark.

500. The admission of the Butler evidence was also manifestly prejudicial to the defense. As the trial court stated:

> "[Petitioner's] 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 this 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 [sic] 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))

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[138]In determining whether the failure to provide a reasonable doubt instruction was prejudicial, this Court has considered the prominence of the disputed "other crimes" evidence in comparison to the other evidence offered in aggravation. Where the prosecution relies heavily on the evidence, prejudice has been found. *People v. Phillips*, 41 Cal. 3d 29, 72 n.25 (1985); *People v. Davenport*, 41 Cal. 3d 247, 279-81 (1985).

Even if counsel's ineffective handling of the Butler evidence were the sole basis for petitioner's Sixth Amendment claim "the right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (citing *United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984)); *Strickland*, 466 U.S. at 693-96. Counsel's failure to challenge the Butler evidence meets this test. The attack Butler described was similar to the crimes of which Petitioner had been convicted, the circumstances of the offense were highly inflammatory and her testimony was the centerpiece of the prosecution's penalty phase case. It is not just reasonably probable, but likely, that had trial counsel prevented introduction of Butler's testimony—or even properly investigated and rebutted that testimony—the jury would have voted for life without possibility of parole instead of death.

501. Most damaging was the cumulative effect of the Martinez and Butler testimony upon the jury's deliberations. Evidence of each incident corroborated and reinforced the other. Standing alone, Ms. Butler's identification of Petitioner as her assailant was weak. Shortly after the incident, she had described a man with a moustache who drove a white pick-up. One year later, after Petitioner had been arrested for killing two prostitutes, she identified Petitioner, a man who did not wear a moustache or own such a vehicle, as the assailant. Such an identification would be given little weight standing on its own. The Martinez evidence, however, supported the view that Petitioner was a habitual abuser of prostitutes—and therefore the jury could conclude that Petitioner must have abused Ms. Butler, based not on the strength of the evidence, but on the jury's determination that Petitioner was the kind of person who did such things. This is precisely the use of "other crimes" evidence that this Court has found has a significant impact on the jury's evaluation of whether a defendant should live or die. *See People v. Phillips*, 41 Cal. 3d at 83 (prosecution's reliance on inadmissible "other crimes" to demonstrate defendant's alleged casual attitude toward killing and readiness to murder in a variety of settings had significant impact on jury's evaluation of whether defendant should live or die).

502. The prosecution's unstated but obvious theory was that the Martinez incident was similar to the Butler incident and both, along with the charged murders, established a continuing and escalating pattern of violence against prostitutes. Such a pattern no doubt suggested future dangerousness and eliminated any lingering doubt the jurors might have had about Petitioner's commission of the Benintende murder.[139]

503. To this manifest harm must be added the immaterial introduction of evidence concerning Petitioner's lawful possession of a weapon, which also unfairly prejudiced him in the eyes of the jury. As the Ninth Circuit Court of Appeals has observed, "[r]ightly or wrongly, many people view weapons, especially guns, with fear and distrust." *United States v. Hitt*, 981 F.2d 422, 424 (9th Cir. 1992). This reference to Petitioner's legal possession of a firearm—in the context of a capital sentencing determination—can only have aroused the fears and prejudices of the jurors and permitted them to impose the death penalty on the basis of legal, irrelevant and constitutionally protected conduct.

504. The errors of defense counsel also prejudiced Petitioner by preventing the jury from considering all mitigating evidence in violation of the Eighth and Fourteenth Amendments. *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978). If evidence of the Martinez and Butler incidents and Petitioner's possession of an automatic pistol had properly been excluded, Petitioner would have been entitled to a supplemental instruction regarding the mitigating significance of the absence of prior violent criminal activity. *People v. Crandell*, 46 Cal. 3d 833, 884-85 (1988). This factor is one that few capital defendants can claim.

505. Finally, admission of the Martinez and Butler evidence undermined the guilt phase mental health testimony that the Clark murder resulted from a sudden explosion of anger. Instead, these two incidents suggested that Petitioner took pleasure in tormenting prostitutes. The Butler and Martinez testimony invited the jury to reject

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[139]Lingering doubt was a likely mitigating factor for, despite the ballistics evidence tying Petitioner to that murder, the case remained a close case. *See People v. Ledesma*, 43 Cal. 3d 171, 226 (1987) (a case "must be considered close" where no eyewitness or physical evidence links the defendant to the crimes); *see also In re Jones*, 13 Cal. 4th 552, 584-85 (1996).

the argument that Petitioner's moral culpability was diminished in part by his mental state at the time of the offenses. Exclusion of that testimony would have preserved factor (h) as a potentially mitigating circumstance.

506. In short, had counsel prevented admission of the testimony of Ms. Martinez and Ms. Butler, or even adequately impeached or mitigated that evidence, virtually the entire case in aggravation would have been defeated and the case in mitigation would have been substantially enhanced.[140] Petitioner would have been presented, then, not as a violent sexual predator, but as a deputy sheriff who had led a productive and valuable life, but had a history of severe physical and sexual abuse, which drove him to lose control under certain very specific and limited circumstances. Petitioner's crimes would thus have been correctly seen as aberrations, rather than part of an accelerating pattern of violence that could be stopped only by Petitioner's execution. There can be no question that counsel's ineffective assertiveness was prejudicial.

R. Failure To Prepare Or Present A Coherent, Complete Or Consistent Defense Theory In Mitigation.

1. Counsel Presented Irreconcilable And Divergent Theories Of Mitigation.

507. Defense counsel's opening statement set forth the divergent and irreconcilable images of Petitioner that the defense would present in mitigation at the penalty phase. Defense counsel stressed in his opening that the penalty phase focused on a defendant's background, and identified the standard for determining penalty as being whether

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[140]This is not a case in which there was a wealth of aggravating evidence introduced through the special circumstances allegations in the guilt phase. *Cf. People v. Avena*, 13 Cal. 4th 394, 436 (1996). On the contrary, the multiple murder special circumstance employed in this case added nothing to the bare facts of the underlying crimes. As this Court has noted: "The multiple-murder special circumstance is perhaps unique among those enumerated in Section 190.2, subdivision (a), in requiring the finding of no facts beyond the bare recognition the jury has returned a verdict of guilty of murder in the first degree and has convicted defendant of at least one additional count of murder in the same proceeding." *People v. Marshall*, 13 Cal. 4th 799, 852 (1996) (footnote omitted).

Petitioner had "human worth." RT 5762. Counsel then depicted Petitioner as an irretrievably lost soul, who was, is and would always be a sexual deviant, dangerous to at least a small percentage of the population—in short, a man of little human worth.

508. True to his promise in the opening statement, defense counsel presented evidence depicting Petitioner as a sexual deviant with no memory of vast portions of his life. The videotape introduced by the defense revealed a man who expressed concern that he was "crazy" (RT 5896), was certain that there had been instances other than the murder of Clark where he could not control himself (RT 5896), and was afraid that he would kill again ("I'm so afraid [of] [d]oing this again." RT 5895-5896). Dr. Bird testified that Petitioner was a man who would not "risk" getting involved again with a prostitute. RT 5903. He testified that Petitioner scored far from "normal" on standardized tests (RT 5903-04) and he described Petitioner as someone who did not even know what normal was, let alone how to become normal. RT 5903.

509. This evidence, alone, suggests ineffective assistance of counsel. Defense counsel painted a picture, indeed, put on a movie, of a dangerous, pathetic man who, as he himself stated for the jury in the videotape, feared he would kill again. None of this evidence was likely to arouse a jury's understanding or empathy—under any circumstances, and certainly not in a case such as this where counsel did nothing to connect Petitioner's aberrant behavior with any statutory mitigation. To the contrary, it undoubtedly provoked the jurors into believing they must put this admittedly dangerous, and irreparably damaged individual to death.

510. Defense counsel clearly had no integrated approach to the penalty phase for, after presenting testimony regarding Petitioner's abnormal background and deviant behavior, counsel proceeded to introduce apparently contradictory and irreconcilable testimony regarding how "normal," indeed, exemplary, Petitioner was in his relationships with his wife, family, friends and co-workers. Counsel even introduced testimony that Petitioner, a man who had never had a yardstick of acceptable behavior (RT 5903), or a normal, functional family, was everything a father was supposed to be to his stepdaughter, Carol Bentrott. RT 5932.

511. As compelling as Ms. Bentrott's testimony may have been, it contradicted everything that Dr. Bird had stated, as well as the guilt phase defense evidence. Petitioner, this "adult child of trauma" who could not discern normal from abnormal because of his brutal upbringing and unloving family was able to teach his stepdaughter how to "have self-worth" and what a family was all about—"no matter what, . . . it's always your family that is love . . . ." RT 5932. These are the very things that Dr. Bird and others said Petitioner was incapable of even recognizing, let alone being or teaching.

512. Counsel may have believed that the testimony from Petitioner's family, friends and co-workers humanized Petitioner and would have been viewed as mitigating by the jury. But there could have been no tactical basis for presenting such apparently antagonistic, irreconcilable images of Petitioner. Counsel offered no explanation for how a man who had never known his own father and had had nothing but abusive, sadistic stepfathers, and who could not control himself while disciplining his own son, could at the same time be the ideal father to his stepchildren; how this sexually deviant man could be a loving, normal husband; or how this rational, cool-headed deputy sheriff could fear that he would lose control and kill again.

513. With no attempt to explain these contradictions, defense counsel abandoned the jury to decide which of these two antithetical viewpoints to accept. More likely, the contradictions undercut the entire presentation, and left the jurors with the impression either that Petitioner was a deceptive manipulator who could fool the experts and his friends and his family, or that the witnesses were simply lying to help Petitioner. Either way, the jurors were undoubtedly left feeling more hostile toward the defense and Petitioner than if nothing at all had been presented.

514. The prosecutor did not fail to capitalize upon the internally inconsistent presentation of the defense. In her discussion of Penal Code Section 190.3 factor (d), whether or not the offense was committed while Petitioner was under the influence of extreme mental or emotional disturbance, the District Attorney belittled the defense claims of mental disturbance by pointing to the testimony of Petitioner's co-workers who described a man cool under pressure and the testimony of his family and friends who said there was nothing abnormal about Petitioner. RT 5952.

"Ask yourself," she told the jurors, "is this a man who snaps when he is called a bastard or queer; or if this is only what the doctor said." RT 5955.

515. When discussing factor (h), whether Petitioner was impaired by a mental disease or defect, the District Attorney noted that the doctors and his therapist had said, "yes." But she reminded the jurors, "you, however, heard his family, his wife, his friends, they told a story of a moral man, a man who knowing right from wrong, a man that, if he had trouble with the law, looked it up in the Penal Code." RT 5955. "This was not the picture painted of a man who could not conform his act to what the law required, but a man who knew it. He could and he did when he chose to." *Id.*

516. The decision to present such irreconcilable evidence in mitigation fell outside the range of reasonable professional assistance, and the conflicting portrait of Petitioner presented undoubtedly affected the jury's penalty determination.

2. Counsel Did Not Present Readily Available Mitigating Evidence.

517. Counsel also failed to support even the mitigating evidence that he did present. Had counsel conducted a reasonably competent investigation, prepared the witnesses to testify and presented such evidence, he could have supported the evidence presented by his mental health experts.

518. In this case the jury was aware of some of the important events in Petitioner's life. The persuasive force of this evidence, however, was undermined substantially by the manner in which it was presented. Virtually all of the important information about Petitioner's life and family came either from Petitioner—while he was under the influence of sodium amytol or indirectly—through the testimony of Dr. Bird in the penalty phase and Drs. Bird and Glaser and Ms. Franz in the guilt phase. There was no corroboration for the underlying facts about Petitioner's life and family background upon which these experts relied. And the District Attorney did not fail to point this out. *See* RT 5226 (the information from defendant about which Glaser testified is hearsay and not admissible for the truth); RT 5286 (anything Glaser

knew about Petitioner's prior life could or could not be true); RT 5323-24 (both the District Attorney and the court state that there is no evidence in this case of abuse). Thus the opinions and conclusions of the experts were rendered suspect along with the underlying facts about Petitioner's life. *See Hendricks v. Calderon*, 704 F.3d 1032, 1044 (9th Cir. 1995) (citing *Hendricks v. Vasquez*, 974 F.2d 1099, 1110 (9th Cir. 1992)). Furthermore, it is doubtful that the jury would have found Petitioner to be a reliable or credible source of information while under the influence of sodium amytol. Thus, the facts the jury was given were not credibly presented, the expert opinions relying on those facts were therefore undermined; and the jury had no guidance from trial counsel about how to connect the facts and expert opinions about Petitioner's life and background and emotional problems to the mitigating factors in the statute that governed the jury's sentencing decision.

519. Trial counsel failed to interview or properly prepare Petitioner's brother, Dale Rogers, for his potentially valuable testimony. Dale had highly relevant testimony, but his examination was very limited, considering the mitigating evidence he might have offered based on the close relationship he had with Petitioner growing up. He is one of the few people who could document the history of abuse that Petitioner and he had suffered as children. Childhood abuse was the basis for the mental health testimony given in the guilt and penalty phases of trial, and it was critical to the Penal Code Section 190.3 factors (d), (h) and (k) which the jury would consider in mitigation. Counsel, however, never presented any direct testimony of such abuse. In the penalty phase, counsel had an excellent opportunity finally to elicit such testimony through Dale Rogers. Counsel completely missed the opportunity, asking only two ineffective questions and obtaining answers of no substance or content:

> Q "You have been aware of some of the problems David has had, at least growing up years?
>
> A "Definitely.
>
> Q. "Did you have some difficulties with some of the stepfather situations you had?
>
> A "I sure did.

Q "There were some situations of physical abuse and that sort of thing, I gather?

A "There was.

Q "You are able to function in your job and do your job and take care of the people that work under you and that sort of thing?

A "Pretty much, yes.

Q "But you yourself feel like you need a few more years of therapy in being able to deal with some of these situations?

A. "I sure do." (RT 5934-5935)

520. This was the sum and total of the direct testimony regarding the childhood abuse that supported the mental health mitigation in the penalty phase. The testimony was, to say the least, brief, and testimony on the effect such abuse had on Petitioner was nonexistent. Any impact the history of abuse may have had on the jury was undoubtedly diminished by counsel's indirect and inadequate method of introducing such evidence.[141] The oblique reference to what happened to Petitioner did little to corroborate the significant and traumatic events in Petitioner's life that were highly relevant to establishing factors in mitigation. To the contrary, by putting Petitioner's brother on the stand and failing to elicit testimony corroborating what the experts had relied upon, counsel undoubtedly misled the jury into believing that Dale could not corroborate that information. That was not the case.

521. Dale's testimony was in stark contrast to what he was able, and prepared, to share with the jury. Had Dale Rogers been reasonably and competently prepared to testify, he could have informed the jury of at least the following powerful mitigation, much of which confirmed the

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[141] *See Stephens v. Kemp*, 846 F.2d 642 (11th Cir. 1988), where the court, in finding prejudice as a result of counsel's errors, noted:

"The only testimony the jury heard at sentencing concerning Petitioner's mental history and condition, including the bizarre behavior he occasionally exhibited, was that which was presented by his mother. As her testimony makes clear, many others could have testified concerning his behavior; the fact that others did not do so undoubtedly diminished the impact on the jury of the facts she described." (*Id.* at 653-54 (footnote omitted))

testimony presented by the defense mental health experts and which had been belittled and undermined by the prosecutor: Dale Rogers declaration (Ex. 5) is sufficiently detailed and compelling by contrast with his testimony that we quote it in substantive part:

> "1. I am the older brother of David Keith Rogers, and the oldest of our mother's four children. I willingly testified at my brother's capital murder sentencing trial, but because his attorney Gene Lorenz only asked me a few short questions about my brother's life, I was unable to testify about my first-hand knowledge of the abuse he suffered as a child. I had expected to be the person in our family who would explain my brother's early life to the jurors. I had talked at length with a defense investigator, Susan Peninger, about my memories of my mother's circumstances when we were young, and about David's life. But Gene Lorenz never phoned me, to tell me to come to Bakersfield for the trial. I finally got a call from my brother's wife, Joyce Rogers, who asked me to come, which I did. In Bakersfield, I talked briefly with Gene Lorenz, at his office, but I was told that I would not be needed to testify after all. Then I was suddenly asked to testify just a few hours before I did so, with so little preparation. Though I wanted to tell about the traumas in my brother's life, Mr. Lorenz asked me no questions about them. I did not believe I could simply volunteer the information.
>
> "2. I was born at my grandfather's farm in Exeter, CA on September 29, 1944 when my mother Juanita Casselman was twenty years old and single. I have been told by my Aunt Della Benevedes that my father was Clifford Dale Molder, a sailor who was killed in World War Two. I learned my father's identity when I was 54 years old, the truth of my paternity having been concealed by my entire family until after my mother's death. For most of my life, I believed that my father was James Ransom Rogers, who is my half-brother David Keith's father.
>
> "3. David's father James Ransom Rogers was a dark-skinned man who appeared to be part African American or Native American. My mother told my brother and me that he was half Native American. His family members were from Louisiana and were perhaps Choctaw people. James Ransom Rogers was a chronic alcoholic who beat my mother and repeatedly abandoned her and her children.
>
> "4. My brother David Keith was born on November 23, 1946 when I was two years and two months old. David was born in West Virginia. The story I heard all my life from my mother and other relatives is that our mother

had gone with James Ransom Rogers to live with his relatives near Shrevesport, LA but that James Ransom Rogers had abandoned her there. She had then taken me, while pregnant with David Keith, to West Monroe, West Virginia to join her sister Ilerene and Ilerene's husband there. Soon after David Keith was born, my mother and newborn brother and I traveled back to Exeter, CA to live on the farm again. Later, James Ransom Rogers came back to live with us at the farm, but he did not maintain regular employment, leaving our mother to support us by doing manual labor on our grandfather's farm and in produce packing plants. James Ransom Rogers was a 'bum' who drank and fought and gambled and never paid any kind of child support to my mother. One of my earliest memories is of a huge fight between my mother and James Ransom Rogers at the farm in Exeter. I recall dishes being thrown and loud yelling. After that, James Ransom Rogers left and we did not see him again until David Keith and I were teenagers.

"5. In late 1951, when I was about six and David Keith was four, our mother married a man named William A. Ellis, called by everyone 'W. A.' or 'Dub' for short. Our mother had met him in a bar in Exeter, CA. He was a large man built like a wrestler who was frequently violent and threatening towards my mother and me and my brother. For the next two years and three months of our lives, my brother and I lived in constant fear of this man's attacks. We moved with him to Hopland, CA where he was to work in the Masonite factory. Dub Ellis was a violent and sadistic alcoholic. Not long after we got to Hopland, while we were still staying in a motel there, before we found housing, I recall an incident when Dub Ellis threatened to kill David Keith. Dub, my mother, David Keith and I were standing at the edge of a creek next to the motel. The creek was muddy and swollen with rushing rainwater. Dub was angry because my brother had wet the bed. Dub picked David Keith up and said he was going to throw him into the creek and drown him if he wet the bed again. I was terrified, because I believed Ellis would do this, because he often beat me and David Keith. I recall that Ellis continuously falsely accused us of wrong-doing and constantly punished us. He often made us go to bed where we would cry ourselves to sleep. Ellis would not allow our mother to come and comfort us. Ellis was extremely strong. He would suddenly grab us and throw or drag us around the house. Ellis once grabbed me, fully dressed, and pulled me into the shower with him. I cannot recall the rest of what happened in that incident. Dub Ellis would frequently come home drunk late at night and wake me and my brother up and

force us to get up and do chores in the middle of the night. For example, he would give us rags and containers of cleanser and force us to wash the walls and woodwork while he threatened to slap and hit us, which he often did.

"6. Dub Ellis hit my mother also. Though she was a big woman, my mother feared Dub Ellis and did not hit him back.

"7. I recall an occasion when, as a punishment, and to humiliate him, Dub Ellis forced my brother David Keith into girl's clothing—a skirt or dress. Ellis also put lipstick and other makeup on David Keith, and forced him to sit outside where the neighbors or passersby could see him, for hours, until it grew dark. I clearly recall David Keith sobbing in fear and humiliation while this went on. This incident terrified me also, because it was so brutal.

"8. On August 17, 1952, when I was seven years and eleven months, and David Keith was five and nine months old, our little brother Steven Ellis was born in Hopland, CA. Dub Ellis soon started spanking and hitting Steven, who was just a little baby.

"9. Soon after Steven was born, we moved to a low-income housing project in Pittsburg, CA. It was in Pittsburg that Ellis woke David Keith and me in the night and forced us to play a 'game' he called 'Turn or Burn.' Ellis stood over us with a belt in his hand, whipping us. He made me and my brother, dressed only in undershorts or naked, hold onto each other with our arms linked. We had to turn, and the terrible thing was, we had to choose whether to take the belt whips ourselves or whether to struggle to turn and make the other one take it. It did not matter what we did, both of us were hit with the belt, because it curled around our bodies and struck the one turned away from Ellis anyway. The belt had some sort of tip, like a silver tip, because I recall having welts in the shape of points on my back, legs and buttocks after these beatings, and so did David. Both of us were blistered and covered with welts after these attacks. I cannot recall how many times Ellis made us do 'Turn or Burn,' but I know it was at least several times.

"10. Finally, when our baby brother Steven was about 18 months old, around the Spring of 1954, our mother escaped from Ellis with me and David Keith. In order to get away, she had to leave Steven with Ellis. I recall a long, freezing cold ride at night in the back of a pickup truck. Later, our mother got Steven back from Ellis. We moved to Ukiah to be near my mother's sister. We never saw Dub Ellis again, but we

later heard that he had died of cirrhosis of the liver when Steven was fourteen years old.

"11. In Ukiah, we moved into a small apartment above a grocery store. Then we moved to a run-down old house on Clay Street which was infested with roaches. Our mother put us on the welfare rolls. She soon met a man named William Thompson in a bar. He moved in with us. She got pregnant almost right away, and they got married. Our mother later told me that this marriage was not legal, because she was not yet divorced from Dub Ellis. I was nine or ten, and David Keith was seven or eight. Thompson, too, was an alcoholic and was frequently drunk. One night the police came and we were told that Thompson had been killed in a car wreck when he had a head-on collision with a truck on the highway while driving drunk. Our mother would not let me or David Keith go to the funeral, because, she told us, Thompson's body was too badly mangled for us to see it. She said his big belt buckle, that he wore because he had been a boxer, was cut in two in the crash. Thompson had been driving our new car that our grandfather had given to our mother, and it was a total loss. When I was ten or soon after, David and I heard or overheard our mother telling someone that Thompson had been in prison and that he was bisexual and that he had frequented a gay bar in Ukiah, and that the man who was killed in the crash with him was a gay lover of his.

"12. Our youngest brother, Billy Thompson, was born several months after his father's death, on April 5, 1955, when David Keith was eight and a half, and I was ten and a half.

"13. All four of us boys then moved briefly with our mother to Ford Street in Ukiah and then to Irving Street in Ukiah for a short time. During this time, I recall my mother dated a truck driver and then an older man, but I cannot recall their names. The truck driver, a man who had two children of his own, moved in with us briefly. We then moved to a rented house on Mendocino Avenue in Ukiah next door to our mother's sister and her husband. Our mother continued to support us with welfare.

"14. Both my brother and I were around many of our mother's boyfriends and male acquaintances, most of whom she met in bars, and many of whom were alcoholics, including William Thompson, who was known to be gay. I believe that my brother may have been molested by one or more of these men, who passed briefly through our home.

"15. I recall my mother was arrested in Ukiah for drunk driving or being intoxicated in a public place and fighting with the police when I was in my early teens.

"16. In 1958, when David was about 12 and I was 14, our brother Steven Ellis and our mother got tuberculosis and left to stay for some months in the hospital in Redding, CA. David Keith and I stayed with our aunt and uncle next door, while our littlest brother Billy went to live with his paternal grandmother. I recall this period as very stressful and lonely for me and for David. We missed our mother and brothers, and we were worried about them.

"17. In 1959, my mother got a job at the Talmadge State hospital, first as a housekeeper, then as a nurse's aide. I know that she dated several men she met at the hospital, some of them staff members, and some of them patients who were released.

"18. I was about Junior High School age when I first realized that our mother was "a party girl." I learned that she often left at night after we were asleep and returned early in the morning. I also realized that she was an alcoholic. She used to drink before she went out, because it was cheaper to drink from the bottle she had at home and then have more to drink at the bar.

"19. David Keith always seemed hyperactive, nervous, and jumpy to me as a child and young teenager. He could not sit still and just watch TV or read a book. Our mother sometimes whipped all four of us with a belt she kept hanging on the door to the refrigerator. David Keith was whipped more than the rest of us.

"20. As a young teen, David Keith began to show signs of sexual disturbance. In about 1959, at the age of about 14, David Keith was caught stealing women's underwear off of a clothesline while he was working on his newspaper route in our neighborhood.

"21. As a young teenager, he was obsessed with pornography, as was I. Both of us had secret caches of Playboy magazine and other sex publications. I had a locked box in which I kept some women's underpants and bras, and David Keith had access to this box. I once found a condom in the house which I suspected was David Keith's, since it was not mine. I know David Keith engaged in sex play as a young teen with our cousin Donna, a girl our age who lived next door. I saw her naked and dancing around with David Keith

in the bedroom, but I do not know what else transpired between them.

"22. I know David Keith was arrested as a juvenile with Craig Saunders, another boy his age who lived in our neighborhood. They were both accused of breaking into the high school gym near our home and defecating on the trampoline. I later learned that Craig Saunders was the one who had actually defecated on the trampoline, not my brother.

"23. Neither my brother David nor I had girlfriends or dated girls in high school. David later had two very troubled early marriages.

"24. I left home at age 18. After I left home, but before David Keith left, our mother met a patient at the Talmadge State hospital, George Sherrard, an alcoholic, and she married him when he was released. Soon after, David Keith also left home. He lived for a short while with his father James Ransom Rogers and his wife Barbara. David Keith then joined the Navy.

"25. Not long before my brother was arrested for murder in 1987, I sank into a serious depression. I was having major problems with my bosses at the grocery store where I was employed and I found myself actually having thoughts of killing them. I took no actions towards carrying out any plan to do so, but I was frightened by having homicidal thoughts. In 1985 or 1986, I sought psychotherapy. I have wondered if I might have done something like what my brother did if I had had a gun in my hand while someone began to call me names, particularly names about being a homosexual. I know that the traumas I experienced as a child have made my life very difficult. For years, I found it a challenge to have a healthy intimate relationship with my wife, and to have good relationships with co-workers, because of the extreme instability in my early life and the repeated, continual exposure I had to drunken, violent, unpredictable men. Especially the trauma of the experience of 'Turn or Burn' scarred me, and left me for years with, at times, an intense hatred of male authority figures. I think my brother has been similarly scarred, but he may have been differently affected. I kept my trauma inside, while he seems to have acted it out. I did not go around carrying a gun, and I did not drink alcohol as he did. I benefited from psychotherapy, which David Keith did not receive until after he was arrested for murder.

"26. Had I testified as I hoped to at my brother's trial, I would have also asked the jury not to sentence my brother to death. I love my brother. I do not believe he premeditated the

murder of Tracie Clark. I know he has problems related to the severe abuse he and I both experienced as we were growing up under very difficult circumstances." (Ex. 5 (Dale Rogers Decl.))

522. There could be no tactical basis for counsel's failure to present a consistent and coherent theory in mitigation supported by available evidence from Petitioners family members. It is reasonably probably that but for counsel's ineffective assistance as described in this Section, Petitioner would not have been sentenced to death.

S. Failure To Deliver An Adequate And Effective Closing Argument.

523. So critical is the role of a summation in "promot[ing] the ultimate objective that the guilty be convicted and the innocent go free," that the Supreme Court has held that prohibiting defense counsel from making a summation at the conclusion of a three-day bench trial deprived the defendant of his Sixth Amendment right to effective assistance of counsel as a matter of law. *Herring v. New York*, 422 U.S. 853, 862 (1975). The Court ruled that reversal was required, regardless of the absence of prejudice to the defense, because the ruling violated the Sixth Amendment right to effective assistance of counsel. The Court observed,

> "It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. [citing *In re Winship*, 397 U.S. 358 (1970)]
>
> "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." (*Id.*)

524. Defense counsel's closing argument in this case performed none of the functions that summations are intended to fulfill in a criminal trial. Rather than "sharpen and clarify the issues" (*Herring*, 422 U.S. at 862), counsel's argument further obscured the issues and complicated the jury's task by confusing the elements of homicide and failing to place the evidence in an appropriate legal framework in order to demonstrate that Petitioner was not guilty as charged. As in *Quartararo v. Fogg*, 679 F. Supp. 212, 246 (E.D.N.Y 1988), *aff'd*, 849 F.2d 1467 (2d Cir. 1988), counsel's "failure to review the evidence and coherently detail the weakness of the case against petitioner must have left the jury as confused as to petitioner's defense as it was when the trial commenced more than six weeks earlier. Such a summation was simply an abdication of his responsibility to petitioner."

1. Counsel Did Not Discuss The Aggravating Evidence.

525. During his closing argument (RT 5956-66), trial counsel simply ignored the fact that the State had introduced aggravating evidence against his client, proceeding as if neither Ms. Butler nor Ms. Martinez had ever testified. Despite his derisive attitude toward Butler and her charge during his cross-examination of her, trial counsel failed to focus the jury on critical weaknesses in her identification during his closing.[142] Counsel could have mentioned that Petitioner did not have a mustache, while Butler insisted that her attacker had worn one; counsel could have reminded the jury that Petitioner did not own a white pickup truck at the time Butler was assaulted by someone driving a white pickup; counsel could have mentioned that Butler saw her assailant only at night and under the influence of heroin. Counsel could have established that Petitioner did not bear many of the physical characteristics Butler described of her assailant, or even that Petitioner did not own a stun gun. Counsel did none of these things.

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[142]In support of this claim, Petitioner incorporates by reference Claim V(N), *supra*, wherein Petitioner in closing explains in greater detail counsel's failure to address Ms. Butler's allegations.

526. Counsel also failed to note the inconsistencies in Butler's testimony, draw attention to her drug use at the time she made her initial identification, or attack her credibility in any way.

527. A reasonably competent attorney would have explained that, despite Ms. Butler's compelling testimony about the assault, there was little solid evidence that Petitioner was the person who committed that assault. Instead, counsel's closing argument left the jury free to accept entirely Butler's damaging, though unreliable, accusation. Counsel's failure to address the Butler evidence amounted to an abdication of his responsibility to petitioner. *See People v. Worthy*, 492 N.Y.S.2d 423, 425 (App. Div. 1986) (summation which, among other things, "failed to focus attention on the weakness of the complainant's identification testimony and the fact that the People indicted three individuals for a crime which, according to the complainant, involved only two perpetrators . . . was the equivalent of no summation at all . . . [and] depriv[ed] defendant of his constitutionally protected right to a closing argument").

528. Defense counsel also failed to say a word about the Martinez evidence. Counsel could have mentioned the presumption of innocence and the requirement that all essential elements of the Martinez "offense" be proved beyond a reasonable doubt. He did not. Counsel did not point out that the Martinez incident was not a crime and did not involve either force or violence; counsel did not show that, based on the time frame in the Sheriff's Department radio logs, it would have been nearly impossible for Petitioner to have done what Martinez described; counsel did not mention her prior statement that she wanted to "get" Petitioner, or her long prostitution record.

529. Counsel's silence as to the Martinez and Butler charges had another prejudicial effect. A primary theme of counsel's closing argument was that Petitioner had no prior convictions: he was "not a person who has lived a life of criminality" and that fact distinguished him from others on Death Row. RT 5956-57. Indeed, counsel stated that "[p]robably the most salient" factor to be considered by the jury in making its sentencing determination was Petitioner's lack of a prior felony record. RT 5957. This otherwise significant factor in mitigation was completely undercut by counsel's conspicuous silence in the face of

the prosecutor's evidence of other criminal activity.[143] As a result, the jury was left with two murders in one year and two other incidents involving prostitutes, one extremely violent and the other merely sick. Cumulatively, this evidence strongly portrayed Petitioner as a sexual deviate who had engaged in a spree of violence against prostitutes, involving at least Benintende, Clark, Martinez and Butler. It suggested that Petitioner had never been punished for any prior criminal acts because he had never been caught.

530. In short, counsel's deafening silence as to the Martinez and Butler incidents had the further effect of converting a mitigating factor (the absence of a criminal record) into just its opposite—a justification for enhancing punishment and thereby holding defendant to account for all his hidden crimes. Counsel's approach might have been understandable if there were nothing to argue. But given the impeachment available, counsel's silence as to the Martinez and Butler incidents is unfathomable.

2. Counsel Did Not Elaborate On The Mitigating Evidence.

531. A capital sentencing proceeding is constitutionally deficient if a "reasonable juror could have failed to understand the meaning and function of mitigating circumstances." *Peek v. Kemp*, 784 F.2d 1479, 1489 (11th Cir. 1986). As the court recognized in *Hendricks v. Calderon*, 864 F. Supp. 929, 945 (N.D. Cal. 1994), *aff'd*, 70 F.3d 1032, 1044-45 (9th Cir. 1995):

> "The aggravating and mitigating factors set forth in the instruction are the criteria that the judge tells the jury to consider when deciding whether a defendant will suffer life imprisonment without possibility of parole or the death penalty. Those factors have to be the cornerstone of preparing for the penalty phase even in a case where trial counsel's strategy is to plead for mercy. A plea for mercy in the abstract will have little effect if trial counsel fails to give an inadequate basis in law and fact upon which the jury could

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[143]Counsel's argument was also undercut by his failure to request an instruction that the absence of prior felony convictions is a significant mitigating circumstance.

express compassion for a defendant by sparing him the penalty of death." (*Id.* at 945 (footnote omitted))

Defense counsel not only failed to point out the weaknesses of the State's case in aggravation, thereby undermining his own primary mitigation factor. Counsel also failed to marshal his other mitigating evidence, or to connect that evidence with the statutory and nonstatutory mitigating factors set forth in the instructions.[144]

532. While counsel argued that Petitioner suffered from "emotional mental problems" (RT 5963), he did not effectively connect the evidence of such problems (the videotape of Petitioner's sodium amytol interview and Dr. Bird's testimony) to any specific statutory or nonstatutory factor: "There are explanations of emotions. Clearly, the factors in mitigation outweigh the factors in aggravation" (RT 5963); "If you think that [evidence of child abuse] is there, and you think that he has had these emotional problems, you think he is an emotionally troubled individual, you differentiate it from the cold, calculating criminal, the person who has led a life of crime, of criminality, crimes against the public, that is not Mr. Rogers" (RT 5960-61); "This is a person who is emotionally disturbed, deeply emotionally disturbed. That is why these things happened. There is no rational explanation. There is no rational reason why Mr. Rogers ever got involved in this." (RT 5963). In light of the jury's rejection of the mental health defense presented at the guilt phase, the somewhat sordid evidence of sexual deviancy presented, and trial counsel's failure to request any special jury instructions (*see* Claim V(T)(4)(a), *infra*).[145] it was particularly

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[144]Counsel referred to the existence of "several" factors in mitigation (RT 5962), but he mentioned only Petitioner's lack of a felony record and Petitioner's age, which, counsel argued, "correlates with a lack of felony record." *Id.*

[145]As Petitioner points out in that claim, reasonable jurors might naturally consider evidence of sexual deviancy such as that presented in this case to be "aggravating." The Ninth Circuit has recognized that, "there is a substantial danger that the sentencer will be swayed by his own moral disapproval of the conduct and will not rationally and impartially consider the relevance of the conduct" for its admissible purpose. *Beam v. Paskett*, 3 F.3d 1301, 1309 (9th Cir. 1993), *overruled on other grounds by Lambright v. Stewart*, 191 F.3d 1181 (9th Cir. 1999).

important that counsel explain to the jury how Petitioner's mental and emotional problems nevertheless qualified as mitigation under statutory and nonstatutory factors. Counsel not only failed to do so, he also at times argued in a fashion that would have led the jury to consider the evidence as aggravating. For example, at one point, counsel stressed the profound and ongoing nature of Petitioner's problems:

> "These are crimes of emotional disturbance and passion. Mr. Rogers has emotional problems. He will always have those emotional problems. They are deep seeded. [sic] The evidence is uncontradicted in that regard. Those are factors you consider." (RT 5959)

533. Since such deep seated, ongoing problems also indicate future dangerousness, and since the jury instructions did not inform the jury that factors (d) and (h) could only be considered in mitigation, it was incumbent upon counsel to clarify the law and the mitigating nature of Petitioner's psychological problems. He did not do so. Counsel mentioned the mental health evidence in relation to the statutory factors only once:

> "If you feel that Mr. Rogers is an individual of an emotional disturbance, he suffers from emotional mental problems, those are factors in mitigation in two of the other areas in the law." (RT 5963)

This is a case of too little, too late, too vague. Even assuming that the jury noted counsel's cryptic reference to "two of the other areas of law" under which the evidence was mitigating, the jury could not know what those other areas were or whether Petitioner's psychological and emotional problems were still mitigating despite the jury's earlier rejection of the mental health defense presented at the guilt phase. The jury needed to be informed *first* that the mental health evidence was mitigating, *and only mitigating*, under Section 190.3 factors (d) and (g).[146] *Second*, the jury needed to be informed that (contrary to the view

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[146]The need for such argument is highlighted by the Attorney General's comments in its response to Petitioner's argument that the trial court misstated the instruction regarding mitigating factor (d). *See* AOB at 287-88 (Section XII(A)). The Attorney General argues that there is no possibility that the jury would have applied the correct version of factor (d) because under the evidence and the guilt verdicts, "it is clear that the jury (continued . . .)

of the Attorney General) the jury's rejection of a mental defense did not preclude it from considering the mental health testimony in support of a mitigating factor. *Third*, the jury needed to be informed that the evidence was also mitigating under factor (k). This point needed particular stress because the jury had earlier rejected the mental health defense and because counsel had not requested that the standard CALJIC instructions be modified to delete the adjective "extreme" from factor (d) or the phrase "at the time of the offense" from factor (h).[147] This Court has held that a jury can consider a mitigating mental condition under factor (k) (other circumstances which extenuate the gravity of the offense) even if that condition does not qualify as "extreme" under factor (d) or did not impair the defendant "at the time of the offense" as

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(. . . continued)
did not believe that appellant had committed the murder of Tracie Clark under any extreme disturbance of any kind." The Attorney General appears to be saying that the jury was precluded from applying factor (d) by virtue of its earlier rejection of a mental health defense. That is, if Petitioner's mental capacity was not so impaired as to constitute a defense to the charge, it is not an "extreme" disturbance that can be considered mitigating under factor (d). *See* RB at 311.

In so arguing, the Attorney General underscores the importance of accurate instruction and argument regarding this applicability of this factor regardless and despite an earlier rejection of a mental health defense. *See Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995), where the court cites both Section 190.3(d) and (h) in ruling that "Evidence of mental problems may be offered to show mitigating factors in the penalty phase, even though it is insufficient to establish a legal defense to conviction in the guilt phase." Were (d) to be interpreted otherwise, it would be an illusory mitigating factor since there could never be a penalty phase unless the jury had already determined that such "extreme" mental or emotional disturbance did not exist.

The Attorney General's argument also bolsters Appellant's arguments that the wording of factors (d) and (g) prevents full consideration of mitigation and that the trial court must clarify to the jury that it may consider an appellant's mental and emotional problems in mitigation under factor (d) even though it had rejected the mental health defense presented at the guilt phase. AOB at 271-73 (Section X(D)(2)).

[147]Petitioner argued in his Appellant's Opening Brief that these modifiers acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. *See* AOB at 242 (Section X(D)(2)), which Petitioner incorporates by reference as if fully set forth herein.

required by factor (h). CALJIC 8.84.1(k) (1986). However, it was imperative that counsel make it clear to the jurors that he wanted them to consider the mental health evidence as mitigation under that factor as well as factors (d) and (h).

3. Counsel Did Not Argue Remorse.

534. Another glaring omission from counsel's closing argument was any reference to Petitioner's undeniable remorse. Remorse is considered to be a universally mitigating factor when found. *People v. Ghent*, 43 Cal. 3d 739, 771 (1987) ("the concept of remorse for past offenses as a mitigating factor sometimes warranting less severe punishment or condemnation is universal"); *People v. Carrera*, 49 Cal. 3d 291, 339 (1989); *People v. Ruiz*, 44 Cal. 3d 589, 622 (1988); *People v. Wharton*, 53 Cal. 3d 522, 592-93 (1991). In this case, Petitioner's remorse was palpable. On the videotape, Petitioner stated that when he was arrested, he wanted to die. RT 5883. He also stated, "I don't want to ever hurt anybody again. I've killed somebody and I don't like that." RT 5896. When Dr. Glaser mentioned that this obviously brought Petitioner great pain, Petitioner, in tears, replied: "you don't know how much pain. I hurt for the girl I killed." *Id.*

535. The need for such argument was pronounced in this case since much of even the defense evidence cast Petitioner into a disfavorable light. Added to that was prosecution testimony regarding Petitioner's demeanor of indifference following his arrest (RT 4928-29); the prosecution's portrayal of the Clark shooting as particularly cold-blooded and motivated by nothing more than Petitioner's desire to avoid the embarrassment of being caught with a prostitute (RT 5955); and the prosecutor's argument that Petitioner's regard for his victims was so little that he could kill two people "and still go about his daily business, his daily job, his interplay with his wife, with his grandchildren and never let on." RT 5951. Petitioner was obviously tormented by what he had done, and a closing argument that highlighted Petitioner's remorsefulness would have humanized him for the jury and dispelled the notion that he was a heartless killer, without feeling or conscience.

4. Counsel Did Not Argue Lingering Doubt As A Mitigating Factor.

536. Counsel also inexplicably failed to mention lingering doubt regarding either the Clark or the Benintende homicides. Lingering doubt is a well-established basis for a sentence less than death. *See Heiney v. Florida*, 469 U.S. 920, 920-24 (1984) (Marshall, J., dissenting from denial of petition to vacate death sentence) (relying upon *Eddings v. Oklahoma*, 455 U.S. 144 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978)); *People v. Sanchez*, 12 Cal. 4th 1, 77 (1995) ("It is true . . . that the jury's consideration of residual doubt is proper; defendant may assert his possible innocence to the jury as a factor in mitigation under section 190.3, factors (a) and (k)"); *see also People v. Terry*, 61 Cal. 2d 137, 146 (1964) ("Judges and juries must time and again reach decisions that are not free from doubt; only the most fatuous would claim the adjudication of guilt to be infallible. The lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment"); *People v. Thompson*, 45 Cal. 3d 86, 134-35 (1988); *People v. Fierro*, 1 Cal. 4th 173, 242 (1991) ("Defendant plainly had the right to argue his possible innocence to the jury as a factor in mitigation"). The lingering doubt mitigation factor arises from the fact that a higher standard of proof than needed to convict may be necessary to impose the death penalty. *See People v. Terry*, 61 Cal. 2d at 145-46 ("a jury which determines both guilt and penalty may properly conclude that the prosecution has discharged its burden of proving defendant's guilt beyond a reasonable doubt but that it may still demand a greater degree of certainty of guilt for the imposition of the death penalty").

537. Lingering doubt may take the form of doubt as to the defendant's innocence, doubt as to the extent of defendant's involvement, or doubt about defendant's mental state at the time of the crime. In this case, the jurors rejected the mental health defense presented in the Clark case, but one or more of them may have had entertained some residual doubt about Petitioner's mental culpability for that offense. Likewise, there was wide latitude for doubt regarding the Benintende murder, a crime which Petitioner could not even recall, and as to which there was no evidence other than a ballistics match by the

prosecution forensics expert. It is quite likely that at least one of the jurors had some lingering doubt as to Petitioner's mental state at the time of such homicide or even whether Petitioner's possession of the murder weapon one year after the offense was sufficient evidence upon which to sentence him to death.[148]

5. Counsel Did Not Argue Lack Of Intent As To The Benintende Homicide As A Mitigating Factor.

538. Just as egregious was trial counsel's failure to argue that the jury should consider in mitigation its earlier finding of Petitioner's lack of intent to kill Benintende. *See People v. Garcia*, 36 Cal. 3d 539, 556 n.12 (1984) ("the issue of intent may arise . . . at the penalty phase where lack of intent would be a mitigating factor"); *People v. Ramos*, 37 Cal. 3d 136, 147 n.1 (1984) (same). Justice Lucas noted the mitigating nature of lack of intent to kill in a number of dissents he filed in cases in which the special circumstances finding and penalty judgment had been set aside based on *Carlos* error. In response to the majority's concern that trial counsel, unaware that *Carlos* applied, would have had no incentive to argue lack of intent to kill, Justice Lucas pointed out that even if intent to kill were not relevant during the guilt phase, "it would have been a strong mitigating factor at the penalty phase of trial." *See People v. Hamilton*, 41 Cal. 3d 408, 438 (1985) (Lucas, J., concurring and dissenting). In his dissent in *Hamilton* Justice Lucas asked: "Can there be any reasonable doubt whatever that defendant would have presented evidence bearing on his lack of intent to kill had there been any such evidence to present?" *Id.* Indeed, in *Hamilton*, Justice Lucas noted that any "tactical" reason for failing to raise potentially mitigating evidence regarding the defendant's lack of intent to kill "would border upon incompetence" given the lack of other significant mitigating evidence in that case. *Id.* at 438 n.1; *see also People v. Fuentes*, 40 Cal. 3d 629, 643 (1985) (Lucas, J., concurring and dissenting) ("lack of an intent to kill

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[148]Indeed, juror Deborah Tegebo has stated under oath that in effect she had lingering doubts about Rogers' conviction, and closing argument had legitimated those doubts as a basis to reject the death penalty. Ex. 7 at 2:8-22 (Tegebo Decl.). It is reasonably likely the lesser sentence would have been imposed.

would have been a strong mitigating factor at the penalty phase of the trial").

539. Despite this court's clear recognition of lack of intent to kill as a mitigating factor, trial counsel did not remind the jury that it had not found intent to kill in the Benintende verdict. Nor did counsel explain that such an absence of intent was a mitigating factor to be considered in reaching a penalty verdict. This omission more than "bordered on" incompetence.

540. In short, counsel's closing argument failed to present the jury with any of the readily available legitimate bases for finding that life without possibility of parole was the appropriate sentence. Having failed to request any penalty phase jury instructions, counsel then proceeded further to "summarize" without reviewing the evidence, without detailing the weakness of the aggravating case against Petitioner, and without explaining the sources of mitigation. No doubt the jury was as confused as to Petitioner's defense at the end as it was when the penalty phase commenced. Counsel's summation was a complete abdication of his responsibility to provide effective representation. *See Matthews v. United States*, 449 F.2d 985, 987-88 (D.C. Cir. 1971) (brief summation that did not review evidence not effective assistance of counsel); *United States v. Hammonds*, 425 F.2d 597, 602-04 (D.C. Cir. 1970) (perfunctory summation in combination with other errors denied defendant effective assistance of counsel). Petitioner was in effect left without an advocate at this critical moment in the trial. It is reasonably probable that but for counsel's ineffective closing argument as described in this Section, Petitioner would not have been sentenced to death.

T. Failure To Request Complete And Accurate Penalty Phase Jury Instructions.

541. Trial counsel also unreasonably failed to object to improper instructions or improper modifications of standard instructions at the penalty phase and unreasonably failed to request necessary jury instructions.[149]

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[149]In support of this claim, Petitioner incorporates by reference Sections X, XI and XII of his Opening Brief (AOB at 253-305) and Claim (continued . . .)

542. As Petitioner has noted above, one of 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); *see, e.g., United States v. Span*, 75 F.3d 1383, 1389 (9th Cir. 1996); *Harris v. Wood*, 64 F.3d 1432, 1436 (9th Cir. 1995). In a capital case, complete, accurate, and appropriate jury instructions are essential to ensure that the jury considers all relevant evidence and can make an individualized sentencing decision in accordance with the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. As the United States Supreme Court has recognized, "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). Instructions must inform the jurors of how they are to consider the mitigating evidence presented to them at the penalty phase of trial. This is never more true than in a case such as this one, in which trial counsel's presentation of the defense case and his closing argument were so flawed that it was near impossible for the jury even to ascertain what was mitigating and what was aggravating, let alone how they were to express their reasoned moral response to such evidence in rendering their sentencing decision.

543. Despite the heightened need for correct and full instruction in this case, trial counsel failed to submit a single proposed instruction, failed to object to or request modification of any of the standard CALJIC instructions or to request clarifying instructions, and failed even to object to the court's misstatements of the standard CALJIC instructions. In fact, the record indicates that there was no hearing at all held on which instructions would be given at the close of the penalty phase. The record shows only that there was a discussion on March 8, 1988, more than one week before the guilt verdict, concerning "procedures for selection of

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(. . . continued)
V(G)-(Q), *supra*, as if fully set forth herein.

jury instructions for the penalty phase." Ex. 26 at No. 54 (Stipulated Settled Statement ("S.S.S."), filed August 24, 1992); *see* RT at 5392. That discussion was never memorialized for the record and could not be reconstructed. There was no subsequent hearing or discussion noted on or off the record about the penalty phase instructions.

544. Counsel's omissions amounted to prejudicially ineffective representation. *See Penry v. Lynaugh*, 492 U.S. 302, 315 (1989) (when nonstatutory mitigation is presented the penalty jury "must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether a defendant should be sentenced to death") (emphasis added); *People v. Edwards*, 54 Cal. 3d 787, 841 (1991) ("If defendant wanted the court to give a fuller explanation [of mitigation] . . . he should have requested it"); *People v. Bell*, 49 Cal. 3d 502, 550 (1989) ("If defendant believed that the instruction was incomplete or needed elaboration, it was his responsibility to request an additional or clarifying instruction").

545. There was no reasoned, tactical basis for counsel's omissions in this case. Counsel states that "in his experience" the trial court's custom was to tell counsel what instructions it was going to give, and "that [was] that." Ex. 14 ¶8 (Lorenz Decl.). Even assuming that counsel's understanding of the trial court's policy was accurate (and there is no indication from the record that it was), the court's mistaken understanding of counsel's duty did not justify counsel's failure to act as a competent and effective advocate by requesting appropriate instructions and objecting to inaccurate and inappropriate instructions. Counsel's failure to act prejudiced Petitioner by making it virtually impossible for the jury to give effect to the mitigating evidence presented at the penalty phase of trial, by leaving the jury without principled guidance as to the meaning and application of the statutory factors and by creating the risk that the jury's death verdict is not a reliable determination that death is the appropriate punishment in this case.

1. Counsel Did Not Object To Or Request Clarifying Instructions To Remedy The Inadequacies Of The Standard CALJIC Instructions.

546. Trial counsel also failed to object to incomplete and misleading general instructions given by the trial court or to request necessary clarifying instructions, as set forth in Section XI of our Opening Brief (AOB at 253-87), which is incorporated by reference as if fully set forth herein. In Section XI(A)-(Q), we argued that the standard CALJIC instructions, which the trial court read to the jury, failed to provide the jury with sufficient guidance to ensure a fair, reliable and constitutionally adequate determination of the appropriate penalty. For all the reasons stated in those arguments, Petitioner submits that the reliance on the standard instructions resulted in constitutional error. Such instructions are reviewable even though no objection was made at trial. PENAL CODE §1259.[150] However, to the extent that any part of this claim may have been waived by counsel at trial, his conduct was also prejudicially ineffective. *People v. Sedeno*, 10 Cal. 3d at 717 n.7. Among the jury instructions trial counsel unreasonably and without justification failed to object to or clarify are the following:

1. The standard instructions' failure to explain which factors on the unitary list of factors supplied the jury are to be considered in mitigation and which are to be considered in aggravation.
2. The standard instructions' failure to provide standards for mitigating factors and the lack of need for unanimity.
3. The standard instructions' failure to inform the jury that the absence of mitigation cannot be used in aggravation.
4. The standard instructions' failure to instruct that the only aggravating factors the jury could consider were those listed in CALJIC No. 8.84.1 (1986 Rev.).

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[150]Penal Code Section 1259 states in relevant part: "The appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

5. The standard instructions' failure to instruct that evidence of factor (d)—extreme mental or emotional disturbance—could be considered in mitigation only.
6. The standard instructions' failure to instruct that background evidence can only be considered in mitigation.
7. The standard instructions' failure to define "mitigation" and "aggravation."
8. The standard instructions' failure to instruct that the circumstances of the Clark and Benintende murders could not be considered in aggravation under both factors (a) and (b).
9. The standard instructions' failure to clarify that the jury could consider appellant's mental and emotional problems in mitigation under factors (d) and (h), even though it rejected the mental health defense presented at the guilt phase.
10. The standard instructions' failure to clarify the meaning of "mental or emotional disturbance" referred to in factor (d).
11. The standard instructions' failure to instruct that the jury has discretion to impose life without possibility of parole even in the absence of mitigating evidence.
12. The standard instructions' failure to instruct that life without parole meant that the appellant would never be considered for parole.
13. The standard instructions' failure to instruct the jury to disregard the guilt phase instruction to reach a verdict "regardless of the consequences."
14. The standard instructions' failure to inform the jury that, if it determined that mitigation outweighed aggravation, it was required to impose life without possibility of parole.
15. The standard instructions' failure to provide a standard for comparing mitigating and aggravating circumstances that was not unconstitutionally vague.
16. The standard instructions' failure to convey to the jury that the central decision at the penalty phase is the determination of the appropriate punishment.

2. Counsel Did Not Object To Or Request Clarifying Instructions To Remedy The Trial Court's Improper Modifications Of Standard CALJIC Instructions.

547. Trial counsel also failed to object to the trial court's modification of the standard CALJIC instructions or to request necessary clarifying instructions, as more fully set forth in our Opening Brief in Section XII(A) and Section XII(B) (AOB at 287-91), which are incorporated by reference as if fully set forth herein. In Sections XII(A) and XII(B), we argued that the trial court improperly deleted portions of CALJIC 8.84.1, factors (f), (g), and (h) and misstated CALJIC 8.84.1 factor (d), in a manner that interfered with the jury's consideration of mitigation. For all the reasons stated in those arguments, Petitioner submits that the trial court's modifications of the standard instructions resulted in constitutional error. The court's actions are reviewable even though no objection was made at trial. PENAL CODE §1259. To the extent that counsel's failure to make these objections at trial may be deemed a waiver, his representation was prejudicially ineffective. *People v. Sedeno*, 10 Cal. 3d at 717 n.7. Among the jury instructions trial counsel unreasonably and without justification failed to object to or clarify are the following:

1. The trial court's misstatement of CALJIC No. 8.84.1, factor (d), which rendered the factor unconstitutionally vague and confusing.
2. The trial court's improper modification of CALJIC No. 8.84.1, factors (f), (g) and (h), in a manner that interfered with the jury's consideration of mitigation.

3. Counsel Did Not Request Necessary General Instructions To Ensure An Individualized And Reliable Determination Of Penalty.

548. Trial counsel also failed to request or otherwise ensure that the trial judge gave the jury general CALJIC instructions necessary for the jury to make an individualized and reliable determination of penalty, as more fully set forth in Section XII(C) of our Opening Brief (AOB at 291-305), which is incorporated by reference as if fully set forth

herein.[151] In Section XII(C), we argued that the trial court improperly failed to give, *sua sponte*, instructions on general principles of the law relevant to the issues raised by the defense and constitutionally necessary to ensure adequate instruction upon the factors to be considered in imposing the death penalty. For all the reasons stated in those arguments, Petitioner submits that the trial court's failure to instruct on general principles of law related to factors to be considered in imposing the death penalty resulted in constitutional error. The court's actions are reviewable even though no objection was made at trial. PENAL CODE §1259. To the extent that counsel's failure to make these objections at trial may have been deemed a waiver, his representation was prejudicially ineffective. *People v. Sedeno*, 10 Cal. 3d at 717 n.7. Among the jury instructions trial counsel prejudicially failed to request are the following:

1. An instruction that the jury was to draw no adverse inferences from Appellant's failure to testify at the penalty phase.
2. CALJIC No. 2.91 (1982 Rev.) on the burden of proving identity based solely on eye witness identification) and CALJIC No. 2.92 (1984) on the factors to be considered in evaluating a witness' identification, or other adequate instruction on evaluating eyewitness identification.
3. Instruction on the presumption of innocence and of the definition of "reasonable doubt" (CALJIC No. 2.90 (1979 Rev.).
4. Instructions on general principles relating to evaluation of evidence, such as CALJIC No. 2.20 (1980 Rev.), on credibility of witnesses; CALJIC No. 2.21 on willfully false witnesses—discrepancies in testimony; CALJIC No. 2.09, on evidence limited as to purpose; CALJIC No. 2.13 (1979 Rev.) on prior inconsistent statements; CALJIC No. 2.22 (1975 Rev.) on weighing conflicting testimony; CALJIC No. 2.27

[151]We have already discussed counsel's failure to request instructions aimed to limit the impact of the Martinez and Butler testimony in Claim V(J), (O), *supra*.

(1986 Rev.) on evaluating testimony of one witness; and CALJIC No. 2.80 on expert witness testimony.152

4. Counsel Did Not Request Necessary Clarifying Instructions To Ensure An Individualized And Reliable Determination Of Penalty.

a. Instruction Informing The Jury That Petitioner's Deviant Sexual History Could Not Be Considered As An Aggravating Factor.

549. As discussed in Claim V(H)(5), the Eighth Amendment precludes a state from using as an aggravating factor a defendant's sexual history consisting exclusively of non-violent, consensual or involuntary conduct. *Beam v. Paskett*, 3 F.3d at 1309 (relying on *Coker v. Georgia*, 433 U.S. 584, 592 (1977)) (plurality opinion); *Thompson v. Oklahoma*, 487 U.S. 815, 837-38 (1988) (plurality opinion); *Tison v. Arizona*, 481 U.S. 137, 149 (1987); *Enmund v. Florida*, 458 U.S. 782, 798-801 (1982); *see* Gregg *v. Georgia*, 428 U.S. 153 (1976). Trial counsel failed to request a jury instruction informing the jury that Petitioner's deviant sexual history could not be considered as an aggravating factor, thereby preventing the jury from rationally and impartially considering all mitigating evidence. A special instruction informing the jury that the evidence of Petitioner's sexual history could not be considered in aggravation was critical in this case, where trial counsel announced in his opening statement that "this man does not have a normal sex life." RT 4493.

550. Throughout the trial, both the defense and the prosecution presented evidence of Petitioner's compulsion for prostitutes and his abnormal sex life. Dr. Bird testified that: Petitioner's solicitation of prostitutes became impulsive coupled with compulsive act (RT 5499); Petitioner was a sexually troubled individual (RT 5471); Petitioner suffered from extreme sexual problems (RT 5481); and Petitioner was

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[152]Trial counsel also failed to object to the California death penalty statute and certain jury instructions related thereto as set forth more fully in Section X of our Opening Brief (AOB at 229-52), which is incorporated by reference as if more specifically set forth herein. To the extent trial counsel may have waived such argument by failing to object at the time, counsel's conduct was ineffective and prejudicial.

never sexually normal (RT 5485). During the guilt phase, defense witnesses revealed that Petitioner had stolen women's underwear and, as a young boy, had developed "compulsive, aberrant sexual behavior." RT 5486. Dr. Bird testified regarding the pornographic materials and boxes of women's clothing found in Petitioner's possession following his arrest. RT 5485. And on direct examination in the guilt phase, Petitioner admitted that he had kept a box of women's panties in his truck and that he had collected them since he was a child. RT 5380.[153]

551. Reasonable jurors would instinctively consider evidence of sexual deviancy to be "aggravating." As the Ninth Circuit stated in *Beam v. Paskett*, " there is a substantial danger that the sentencer will be swayed by his own moral disapproval of the conduct and will not rationally and impartially consider the relevance of the conduct" for its admissible purpose. 3 F.3d at 1309. In a case such as this, in which Petitioner's sexual history was featured, indeed, highlighted as the reason for Petitioner's murder of Clark, Petitioner's aberrant sexual history was certain to be given considerable aggravating weight by the jury. It was inexcusable and prejudicial error for trial counsel to fail to request an instruction informing the jury of the impropriety of utilizing this evidence as a basis for a sentence of death.

b. Instruction Informing The Jury That The Absence Of Prior Felony Convictions Is A Significant Mitigating Circumstance.

552. Counsel's central theme in closing was that Petitioner was different than those who belonged on Death Row because he had no prior criminal convictions. We have argued that this point was undercut by counsel's baffling failure to address the Butler and Martinez evidence at trial or in closing argument. Even more baffling was his failure to fully support the argument with an appropriate jury instruction regarding the importance of this factor. The "presence or absence" language of the factor (c) instruction fails adequately to take this circumstance into

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[153]Defense counsel made it clear that he was relying on Dr. Bird's guilt phase testimony in the penalty phase. While examining Dr. Bird defense counsel stated: "Your previous testimony is before the court and jury in this case . . . ." RT 5898.

account. Defense counsel thus should have requested that the standard instruction be modified or that a supplemental instruction be given informing the jury that Petitioner's lack of a prior felony conviction was a significant mitigating factor. *See People v. Crandell*, 46 Cal. 3d 833, 884 (1988) ("the absence of [a] prior felony conviction [is a] significant mitigating circumstance in a capital case, where the accused frequently has an extensive criminal past"); *People v. Brown*, 40 Cal. 3d 512, 541-42 n.13 (1985) ("Often a person in this situation will have a substantial history of criminal and antisocial behavior"). The Eleventh Circuit has also acknowledged that the fact the defendant had no previous convictions for violent crime is a valid mitigating factor. *Aldridge v. Dugger*, 925 F.2d 1320, 1330 (11th Cir. 1991).

553. In *Woodard v. Sargent*, 806 F.2d 153 (8th Cir. 1986), the Eight Circuit found that defense counsel's failure to request such an instruction fell below the threshold of reasonably competent assistance and undermined confidence in the result of the trial. Although the court did not know why counsel failed to make such a request, it could "conceive of no possible tactical reason for such an omission." *Id.* at 157. The Ninth Circuit has also recognized that failure to request an appropriate jury instruction on this issue may amount to ineffective assistance of counsel. In ordering an evidentiary hearing on a claim of ineffective assistance of counsel, the Ninth Circuit in *Siripongs v. Calderon*, 35 F.3d 1308 (9th Cir. 1994), stated that "[o]f particular relevance may be counsel's failure to request an instruction that the defendant had no prior violent criminal record." *Id.* at 1323.

c. Supplemental Instruction On Lack Of Intent To Kill As A Mitigating Factor.

554. We have already argued that trial counsel should have argued in closing that the verdict of unintentional second degree murder of Janine Benintende could be considered a mitigating factor. *See* Claim (S)(5), *supra*. Likewise, there can be no acceptable basis for his failure to request an instruction informing the jury that it might consider Petitioner's lack of specific intent to kill Benintende as a mitigating factor. Absent such an instruction, the jury would have had no reason to

believe that its murder conviction could be considered in mitigation. In this respect, trial counsel's failure was again prejudicially ineffective.

5. Conclusion.

555. In short, reasonably competent counsel would have submitted penalty phase instructions, objected to inappropriate and unconstitutional instructions and requested clarifying instructions where necessary and appropriate. As a result of counsel's failure to do so in this case, Petitioner's jury was prevented from rationally and impartially considering all mitigating evidence, and Petitioner was sentenced under a death penalty scheme that is arbitrary, unreliable, capricious and fails to narrow the class of convicted defendants eligible for death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 7, 15, 16, 17 of the California Constitution. Counsel's omissions constituted prejudicial ineffective assistance of counsel. *See United States v. Span*, 75 F.3d 1383, 1389-90 (9th Cir. 1996) (trial counsel ineffective in failing to request jury instruction relating to client's defense theory); *Starr v. Lockhart*, 23 F.3d 1280, 1285-86 (8th Cir. 1994) (trial counsel ineffective in failing to object to improper jury instruction relating to special circumstance); *Daniel v. Thigpen*, 742 F. Supp. 1535, 1560 (M.D. Ala. 1990) (trial counsel's "lack of attention to preparation, including research, is nowhere more evidence than in their failure to request appropriate jury charges and their failure to object to the clearly unconstitutional charges given by the trial court").

556. The instructional errors described in this Section and Claim V(J), (O), *supra*, so infected the entire penalty proceeding that the resulting sentence violates due process. Had trial counsel requested appropriate instructions, there is a reasonable probability that the result of the penalty phase would have been different.

U. The Numerous Instances Of Trial Counsel's Ineffective Representation At The Penalty Phase, Whether Considered Individually Or Collectively, Were Prejudicial.

557. As demonstrated throughout this petition, Petitioner's sentence must be reversed and vacated due to trial counsel's failure to

render effective assistance of counsel in the preparation, investigation and presentation of the penalty phase of Petitioner's trial. *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986); *Strickland v. Washington*, 466 U.S. 668, 685 (1984); *People v. Ledesma*, 43 Cal. 3d 171, 215 (1987); *Little v. Superior Court*, 110 Cal. App. 3d 667, 670-71 (1980); *Alvernaz v. Ratelle*, 831 F. Supp. 790, 792-93 (S.D. Cal. 1993). Counsel's performance fell below any "objective standard of reasonableness . . . under prevailing professional norms." *Ledesma*, 43 Cal. 3d at 216 (quoting *Strickland*, 466 U.S. at 693-94).

558. At the time of trial, counsel had available to him significant evidence relevant to impeaching and mitigating the prosecution's case in aggravation. Counsel failed to present it or argue what impeaching evidence was available. Counsel also had access to him mitigating evidence about Petitioner and his background that, at a minimum, was relevant to sentencing factors (a), (b), (c), (g), (h), (i), and (k) of Penal Code Section 190.3, on which the jury was instructed. Such evidence simultaneously had mitigating value and reduced the persuasiveness of the prosecution evidence in aggravation. This evidence, however, was either not presented, not corroborated, or not connected to the applicable statutory and nonstatutory mitigating factors. Trial counsel's opening and closing statements also provided little guidance to the jury about how to evaluate the evidence presented by the defense witnesses as factors in mitigation. Instead, counsel argued and presented an irreconcilable picture of Petitioner as a sick man who was a role model as a husband, father and deputy sheriff. Counsel's performance reflects a fundamental lack of understanding of his penalty phase obligations.

559. Petitioner submits that each of the isolated errors described above was sufficiently prejudicial to result in a Sixth Amendment violation, for "the right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (citing *United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984)); *Strickland*, 466 U.S. at 693-96. However, even if this Court were to conclude that no single error examined in isolation was sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors patently prejudiced Petitioner. *See Cooper v. Fitzharris*,

586 F.2d 1325, 1333 (9th Cir. 1978) (en banc) ("prejudice may result from the cumulative impact of multiple deficiencies"); *Harris v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995) ("By finding cumulative prejudice, we obviate the need to analyze the individual prejudicial effect of each deficiency"); *cf. United States v. Wallace*, 848 F.2d 1464, 1476 (9th Cir. 1988) (where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant).

560. As Justice Mosk stated in his dissent in *In re Avena*, 12 Cal. 4th 694 (1996):

> "When in the course of a trial defense counsel commits not just one but many professional errors, as here, the constitutional guaranty is not satisfied merely because a reviewing court is unable to identify *one* of those errors as being so serious that it is probable that it alone changed the outcome. Rather, if the effect of all counsel's professional errors, taken cumulatively, was to deny his client a fair trial, the defendant has not had the 'assistance' of counsel 'for his defense' as guaranteed by the Constitution. This is so because the purpose of the guaranty is not simply to ensure that counsel commits no single error of prejudicial dimensions; the purpose, more broadly, 'is to ensure that a defendant has the assistance necessary to *justify reliance on the outcome* of the proceeding.'" (*Id.* at 771-72 (Mosk, J., dissenting) (emphasis in original) (footnote omitted))

561. In this case, trial counsel's deficiencies in the penalty phase were substantial and numerous. In addition, the case in aggravation was not so compelling that even absent trial counsel's errors, there was no reasonable probability that the jury would have sentenced Petitioner to life imprisonment rather than death. There is a reasonable probability that, absent the deficiencies whether considered singly or together, the outcome of the trial would have been different. Indeed, "the plethora and gravity of [counsel's] deficiencies rendered the proceeding fundamentally unfair." *Harris v. Wood*, 64 F.3d at 1438.

PART 3: POST-TRIAL PROCEEDINGS.

562. Petitioner realleges and incorporates by reference each and every allegation, whether factual, legal, or otherwise, of Paragraphs1-561, *supra*, and Paragraphs 576-589, *infra*, as if fully set forth herein.

563. 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 during post trial proceedings resulting in substantial prejudice as more fully set forth in this Part 3 of the Fifth Claim for Relief.

564. The acts and omissions constituting ineffective assistance of counsel as described herein 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).

565. Whenever a jury returns a death verdict, California statute mandates that such verdict be subjected to multiple tiers of review. The verdict's appropriateness—or lack thereof—is first reviewed by the trial judge pursuant to Penal Code Section 190.4(e), which provides that a capital defendant automatically shall be deemed to have made an application for modification of every death verdict.[154] In ruling on the modification application, the trial court must independently reweigh the evidence of aggravating and mitigating circumstances, then determine whether, in his independent judgment, the weight of the evidence supports the jury's verdict. The court may consider only that evidence which was before the jury in ruling on the modification application.

566. Petitioner had a state and federal constitutional right to be represented at his capital trial by an attorney who was familiar with and understood how to utilize the laws, rules and procedures governing capital litigation in Kern County in 1987-1988. CAL. CONST. art. I §§1, 7, 15; U.S. CONST., amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980), *aff'd*, 723 F.2d 1077 (1983) (right to counsel "able to invoke the procedural and substantive safeguards that distinguish our system of justice . . ."); *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir.

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[154]Penal Code Section 190.4(e) provides:

"In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to subdivision 7 of section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided buy the aggravating and mitigating circumstances referred to in section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

"The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of section 1239."

1995); *United States v. Green*, 648 F.2d 587, 597 (9th Cir. 1981). Petitioner's counsel, however, was unfamiliar with the law and procedures governing Petitioner's trial and therefore failed to act as an effective advocate for Petitioner or to correct many misconceptions of the trial court.

567. Reasonably competent trial counsel would have investigated, developed and presented the evidence at both phases of trial, requested appropriate jury instructions on the evidence and effectively argued the evidence to establish Petitioner's lesser culpability for the charged crimes and to mitigate the penalty and establish Petitioner's actual innocence of the aggravating evidence as set forth more fully in our First through Fourth Claim for Relief and Parts 1 and 2 of this Fifth Claim for Relief. Had counsel done so in this case, there is a reasonable probability that the judge would have imposed a sentence other than death.

568. Reasonably competent counsel also would have supported Petitioner's automatic motion for reduction of sentence with legal argument and authority, and would have investigated, developed and presented the facts relevant and necessary to persuade the court to grant the motion, as set forth in Section XIV of Petitioner's Opening Brief, which is incorporated by reference as if fully set forth herein.

569. The sentencing court was prohibited under state statutory and decisional law from considering evidence not considered by the jury before ruling on the automatic motion for sentence modification under Penal Code Section 190.4. *People v. Williams*, 45 Cal. 3d 1268, 1329 (1988). In this case, the trial court relied on evidence not considered by the jury, including a post-trial probation report replete with hearsay and opinion. A reasonably competent lawyer would have objected to the court's improper consideration and reliance on such a biased document. Instead, Petitioner's counsel tacitly condoned the court's procedures by stating that he did not "have a lot to say" about the probation report and by noting that the court had heard all the testimony "and also heard evidence that was presented outside of the presence of the jury." RT 5986. As a result of trial counsel's incompetence, Petitioner was deprived of the benefits of state procedural law in which he had a liberty

interest protected by the federal constitution. *See* AOB at 332-35 (Section XIV(A)(1)).

570. The trial court below also heard "victim impact" testimony from Frederick Fredrek, the father of Janine Benintende, one of the murder victims. The prosecutor stated that Mr. Fredrek had "the right" to make a statement and have the court consider it when making its decision. RT 5988. As we argued in our Opening Brief, it was improper for the court to entertain statements by the victim's family that were not presented to the jury. *See* AOB at 335-37 (Section XIV(A)(1)(b)). Counsel should have objected to the court's consideration of such inflammatory evidence, but voiced no objection, and once Mr. Fredrek had spoken, made no attempt to guide or limit the court's consideration of Mr. Fredrek's impassioned—and often inaccurate—testimony. Counsel stated only that he had "no additional comments." RT 5992. *See* AOB at 335-37 (Section XIV(A)(1)(b)).

571. At the hearing on the motion for reduction of sentence, the trial also court made improper multiple use of the underlying crimes to justify Petitioner's death sentence in violation of Petitioner's Eighth and Fourteenth Amendment rights. Counsel should have recognized the court's mistake and objected to the court's unlawful method of weighing aggravating evidence, and the failure to do so was prejudicially ineffective assistance. *See* AOB at 337-40 (Section XIV(A)(2)).

572. At the hearing on the motion for reduction of sentence, the trial court improperly premised its decision on Petitioner's purported future dangerousness in violation of Petitioner's Eighth and Fourteenth Amendment rights. A reasonably competent lawyer would have recognized the court's mistake and objected to the court's inappropriate and unlawful speculation of future dangerousness. Counsel's failure to object also amounted to prejudicially ineffective assistance. *See* AOB at 340-42 (Section XIV(A)(3)).

573. At the hearing on the motion for reduction of sentence, the trial court improperly bolstered its decision with non-existent evidence and an impermissible nonstatutory criterion in violation of state law and the federal constitution. A reasonably competent lawyer would have recognized the court's mistake and objected to the court's unlawful consideration of such information. Counsel's failure to object also

amounted to prejudicially ineffective assistance. *See* AOB at 342-44 (Section XIV(A)(4)).

574. At the hearing on the motion for reduction of sentence, the trial court improperly disregarded the bulk of mitigating evidence presented to the jury in violation of Petitioner's Eighth and Fourteenth Amendment rights. *See* AOB at 344-47 (Section XIV(A)(5)). Counsel should have objected to the court's failure to consider all relevant mitigating evidence for all the reasons stated in Section XIV(A)(5) of Appellant's Opening Brief (*see* AOB at 344-47) and reminded the court of the wealth of evidence in mitigation presented at trial. Trial counsel's failure to adequately present and argue this mitigation to the trial court amounted to prejudicially ineffective assistance. *See* Claim V(R), *supra.*

575. Each of the instances of incompetence by trial counsel alleged above which arose from the guilt phase amounted to a failure to correct an unreliable guilt verdict in a capital case and was therefore prejudicial and requires reversal of the entire judgment. Each of the instances of trial counsel incompetence alleged above which arose from the penalty phase or sentencing proceedings amounted to a failure to correct an unreliable penalty verdict in a capital phase and was therefore prejudicial and requires reversal of the entire judgment. There was no apparent tactical reason for the action and omission described. But for trial counsel's unprofessional errors, there is a reasonable probability that the court would have granted a new trial or reduced Petitioner's sentence to life without possibility of parole.

SIXTH CLAIM FOR RELIEF (CUMULATIVE ERROR)

576. Petitioner realleges and incorporates by reference each and every allegation, whether factual, legal, or otherwise, of Paragraphs1-575, *supra*, and Paragraphs 584-589, *infra*, as if fully set forth herein.

577. 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 as a result of the cumulative effect of the error and constitutional violations described in this Petition.

578. Petitioner's convictions, sentences, and confinement were obtained in violation of Petitioner's fundamental constitutional rights at every phase of this trial. Both phases of the trial were fatally flawed by gross jury misconduct and a biased jury, and through it all, Petitioner's counsel was so ineffectual and incompetent that he consistently provided grossly ineffective representation, and at many critical stages, no representation at all.

579. Justice demands that Petitioner's convictions and sentences, and especially his conviction of capital murder and his sentence of death, must be reversed because the cumulative effect of all the errors and violations alleged in the present petition "was so prejudicial as to strike at the fundamental fairness of the trial." (*United States v. Parker*, 997 F.2d 219, 222 (6th Cir. 1993) (citation omitted); *see United States v. Tory*, 52 F.3d 207, 211 (9th Cir. 1995) (cumulative effect of errors deprived defendant of fair trial).

580. The errors described herein 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.

581. Each of the specific allegations of error and constitutional violation presented in the instant petition, whether or not it justifies reversal or issuance of the writ standing alone, must be considered in the context of all the other such allegations set forth in the petition. "Where, as here, there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." *United States v. Wallace*, 848 F.2d 1464, 1476 (9th Cir. 1988); *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996); *see also United States v. Wallace*, 848 F.2d at 1475; *United States v. Green*, 648 F.2d 597 (9th Cir. 1981) (combination of errors and lack of balancing probative value and prejudicial effect of testimony and lack of limiting instruction required reversal). "In other words, a column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts." *United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993).

582. When all of the errors and constitutional violations are considered together it is clear that Petitioner has been convicted and sentenced to death in violation of his basic human and constitutional right to a fundamentally fair trial.

583. In light of the cumulative effect of all the errors and constitutional violations which occurred over the course of the proceedings in Petitioner's case, the writ should issue to prevent a fundamental miscarriage of justice.

INCORPORATION BY REFERENCE

584. Petitioner's claims in this Petition are based on the allegations contained in the Petition, the declarations and other exhibits contained in the appendices, and the entire record of all the proceedings in the Superior Court in Kern County (Kern County Superior Court Case

No. 33477), and on direct appeal in this Court in the case of *People v. Rogers*, No. S005502.

585. Petitioner realleges and incorporates by reference, as if fully set forth herein, the exhibits appended to this Petition. Petitioner also realleges and incorporates by reference, as if fully set forth herein, each and every paragraph of this Petition in each and every claim presented.

REQUEST FOR DISCOVERY, EVIDENTIARY HEARING, AND LEAVE TO AMEND

586. Should the State dispute any of the facts alleged in this Petition, Petitioner will and hereby does request an evidentiary hearing so that the factual disputes may be resolved. After Petitioner has been afforded discovery and the disclosure of material evidence by the prosecution, the use of this Court's subpoena power and the funds and an opportunity to investigate fully, counsel requests an opportunity to supplement or amend this petition.

REQUEST FOR JUDICIAL NOTICE

587. In addition to the requests for judicial notice tendered above, Petitioner further requests that the Court take judicial notice of the certified record on appeal and all pleadings, briefs, orders, exhibits and other documents filed in *People v. David Keith Rogers*, Case No. S005522, currently pending in this Court. EVID. CODE §§452, 459. Petitioner makes this request because the Court and counsel for Respondent already have a copy of the record, and thus reproducing the record for use in connection with this Petition would be waste of time and money.

THE INSTANT PETITION IS TIMELY AND IS APPROPRIATELY BEFORE THIS COURT

588. No prior petition for a writ of habeas corpus has been filed in this case. This Petition is filed within 90 days after the final due date for Appellant's Reply Brief on direct appeal and is therefore timely filed pursuant to this Court's Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases and Compensation of Counsel In Relation to Such Petitions ("Habeas Guidelines"), adopted by

this Court on June 6, 1989. As such, this Petition is presumed to have been filed without substantial delay.

589. No other petition has been filed by Petitioner or on his behalf in this Court in connection with this judgment. This Petition is necessary because Petitioner has no other plain, speedy or adequate remedy at law for the substantial violations of his constitutional rights as protected by the First, Fourth, Fifth, Sixth, Eighth, Thirteenth and Fourteenth Amendments to the United States Constitution, of Sections 1, 4, 6, 7, 8, 15, 16, 17 and 27 of Article I of the California Constitution, and of Penal Code Section 1473, in that the crucial factual bases for these claims lie outside the record developed on appeal.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that this Court:

1. Consolidate this Petition for consideration with Petitioner's automatic appeal now pending in this Court, *People v. Rogers*, Crim. No. S005502.

2. Take judicial notice of the record on appeal and all pleadings and exhibits in *People v. Rogers*, Crim. No. S005502.

3. Order Respondent to show cause why Petitioner is not entitled to the relief sought;

4. Order the Offices of the Kern County District Attorney, the California Attorney General and all other governmental agencies involved in the prosecution of Petitioner's case to allow inspection, and to turn over complete copies, of all files pertaining to Petitioner's case;

5. Grant Petitioner sufficient funds to secure investigative and expert assistance as necessary to prove the facts alleged in this Petition;

6. Grant Petitioner the authority to obtain subpoenas for witnesses and documents which are not obtainable by other means;

7. Grant Petitioner the right to conduct discovery including the rights to take depositions, request admissions, and propound interrogatories and the means to preserve the testimony of witnesses;

8. Order an evidentiary hearing at which Petitioner will offer the proof herein stated, and further proof of, the factual allegations stated above;

9. Permit Petitioner a reasonable opportunity to supplement the Petition to include claims which become known as the result of further investigation and information which may hereafter come to light;

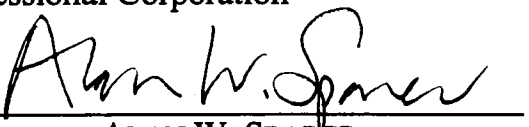
10. After full consideration of the issues raised in this Petition, vacate the judgment and sentence imposed upon Petitioner in the Superior Court of California, Kern County; and

11. Grant Petitioner such further relief as is appropriate in the interest of justice.

DATED: December 13, 1999.

Respectfully,

ALAN W. SPARER
HOWARD, RICE, NEMEROVSKI, CANADY,
FALK & RABKIN
A Professional Corporation

By 
ALAN W. SPARER

Attorneys for Petitioner
David Keith Rogers

Of Counsel:

A.J. KUTCHINS
DENISE ANTON

WD 121399/f-531300/PB8/799782/v1

VERIFICATION

I, Alan W. Sparer, declare as follows:

I am an attorney admitted to practice before the courts of the State of California. I maintain my office in San Francisco County, California. I represent David Keith Rogers, the Petitioner herein, who is confined and restrained of his liberty at San Quentin, California.

I have personally reviewed or caused to be reviewed all of the records on file in Supreme Court Case No. S005502. All facts alleged in the above Petition are directly supported either by the record in that case, or by the declarations and exhibits attached hereto, all of which I have also personally reviewed or caused to be reviewed in the course of preparing the Petition.

I am authorized to file this Petition for writ of habeas corpus on Petitioner's behalf. Because the Petitioner is incarcerated in a county different than the one in which my law office is located, and because he is not in a position to make the necessary verification himself, I make this verification on his behalf. I know the contents of the Petition to be true to the best of my knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of December, 1999, at San Francisco, California.

Alan W. Sparer

ALAN W. SPARER

PROOF OF SERVICE BY MAIL

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is Three Embarcadero Center, 7th Floor, San Francisco, California 94111.

I am readily familiar with the practice for collection and processing of documents for mailing with the United States Postal Service of Howard, Rice, Nemerovski, Canady, Falk & Rabkin, A Professional Corporation, and the practice is that the documents are deposited with the United States Postal Service with postage fully prepaid the same day as the day of collection in the ordinary course of business.

On December 13, 1999, I served the foregoing document(s) described as:

PETITION FOR WRIT OF HABEAS CORPUS; EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (VOLUMES I-VI)

on the persons listed below by placing the document(s) for deposit in the United States Postal Service through the regular mail collection process at the law offices of Howard, Rice, Nemerovski, Canady, Falk & Rabkin, A Professional Corporation, located at Three Embarcadero Center, 7th Floor, San Francisco, California, to be served by mail addressed as follows:

George M. Hedrickson, Esq.
California Attorney General's Office
Post Office Box 944255
Sacramento, CA 94244-2550

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California, on December 13, 1999.

BRYAN JAY GRESHAM