5

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

MIGUEL ANGEL BACIGALUPO,

On Habeas Corpus.

S079656
CAPITAL CASE
(Related to S004764, S032738)

Santa Clara County Superior Court No. 93351
The Honorable Thomas Hastings, Judge

BRIEF IN OPPOSITION TO SECOND PETITION FOR WRIT OF HABEAS CORPUS

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Table of Contents

Table of Contents, cont'd

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ORIGINAL

October 10, 2000

The Honorable Robert F. Wandruff, Clerk
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

RE: *In re Bacigalupo* (S079656) – CAPITAL CASE
Page 23 missing from respondent's brief

Dear Mr. Wandruff:

It has come to our attention that page 23 of our Brief In Opposition To Second Petition For Writ Of Habeas Corpus was inadvertently omitted from the filed brief. We are providing copies of the missing page with this letter. Please forward these copies to the Court with our apologies for the error.

Sincerely,

JEFFREY M. LAURENCE
Deputy Attorney General

For BILL LOCKYER
Attorney General

uncle, four cousins, and two other Peruvian individuals who did not specify their relation to petitioner. (Exhs. F & G from petitioner's first state habeas corpus petition.) To the extent that petitioner is now claiming that defense counsel should have presented even more evidence of petitioner's social history and his life growing up to show abuse and neglect, such information was necessarily already known to petitioner at the time he filed the first petition, since he was the one who actually suffered this alleged abuse and neglect. Accordingly, petitioner cannot raise this successive claim in his second habeas corpus petition. (*In re Clark, supra,* 5 Cal.4th at p. 767-768 ["The court has also refused to consider newly presented grounds for relief which were known to the petitioner at the time of a prior collateral attack on the judgment."].)

Claims G, H, and I: Failure to release the transcript of the interview with the confidential informant and alleged prosecutorial misconduct in failing to reveal the confidential informant. Petitioner had previously raised these claims as Claims IX and X in his first petition.

Claim O: California's death penalty scheme fails to meaningfully narrow the class of offenders eligible for the death penalty and allows for imposition of the death penalty in an arbitrary manner. This claim was raised as Claim XVI(b) in the first petition.

Claim P: Petitioner was denied meaningful review by this Court. This claim was raised as Claim XVI(a) in the first petition.

In addition, Claims K through S in the current petition are based on no new evidence and rely on facts that were known to petitioner at the time of his earlier petition and should have been raised in that petition. (*In re Clark, supra,* 5 Cal.4th at pp. 769-770.)

DECLARATION OF SERVICE BY MAIL

Case Name: ***People* v. *Miguel Angel Bacigalupo***
Case No. **S079656**

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 10, 2000, I served the attached

PAGE 23 MISSING FROM RESPONDENT'S BRIEF FILED ON OCTOBER 4, 2000

in the internal mail collection system at the Office of the Attorney General, 455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102, for deposit in the United States Postal Service that same day in the ordinary course of business in a sealed envelope, postage fully prepaid, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on October 4, 2000, at San Francisco, California.

DENISE NEVES
(Typed Name)

(Signature)

Table of Contents, cont'd

Table of Contents, cont'd

Table of Contents, cont'd

Table of Contents, cont'd

Table of Authorities

Table of Authorities, cont'd

Table of Authorities, cont'd

Table of Authorities, cont'd

Table of Authorities, cont'd

Table of Authorities, cont'd

Table of Authorities, cont'd

Table of Authorities, cont'd

Table of Authorities, cont'd

Table of Authorities, cont'd

Table of Authorities, cont'd

Constitutional Provisions

Statutes

Court Rules

Other Authorities

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **MIGUEL ANGEL BACIGALUPO,** On Habeas Corpus.	**S079656** CAPITAL CASE (Related to S004764, S032738)

STATEMENT OF THE CASE

The Santa Clara District Attorney's Office filed an information on April 30, 1984, charging petitioner Miguel Bacigalupo with two counts of murder (Pen. Code § 187), two counts of robbery (Pen. Code § 211), and one count of possession of a concealed firearm (Pen. Code § 12021, subd. (a)). The information further alleged two special circumstances in connection with each of the murders: that petitioner committed multiple murders (Pen. Code § 190.2, subd. (a)(3)) and that the murder was committed while in the commission of a robbery (Pen. Code § 190.2, subd. (a)(17)(i)). Petitioner was alleged to have personally used a firearm in the murders and robberies. (Pen. Code § 12022.5.) The information further charged that petitioner had suffered two prior felony convictions. (CT 184-186.)

An amended information was filed on February 25, 1987, striking the multiple murder special circumstance from the first count of murder. (CT 281-283.) On February 27, 1987, the court denied petitioner's motion to suppress his statements to the police and to suppress evidence. (CT 290-291.) The

court granted petitioner's motion to sever the concealed firearm possession count and to bifurcate the trial on the prior conviction allegations. (CT 291.)

Jury trial commenced on March 2, 1987, and the prosecution gave its opening statement on April 2, 1987. (CT 293, 346.) The jury returned its verdict on the guilt phase on April 9, 1987, finding petitioner guilty on all counts and finding the special circumstances to be true. (CT 338, 357-363.)

The penalty phase commenced on April 15, 1987. (CT 329.) On April 21, 1987, the jury returned a verdict of death. (CT 353-354.) The court entered its judgment of death on June 16, 1987. (CT 531-539.)

This Court affirmed petitioner's conviction on direct appeal on December 9, 1991. (*People v. Bacigalupo* (1991) 1 Cal.4th 103.) On October 5, 1992, the United States Supreme Court granted petitioner's petition for writ of certiorari, vacated the judgment, and remanded the case to this Court to evaluate the constitutional validity of the sentencing factors used in California's death penalty scheme in light of *Stringer v. Black* (1992) 503 U.S. 222. (*Bacigalupo v. California* (1992) 506 U.S. 802.)

On December 7, 1993, this Court found the sentencing factors constitutional under *Stringer v. Black* and reaffirmed its earlier judgment in full. (*People v. Bacigalupo* (1993) 6 Cal.4th 457.)

On May 10, 1993, petitioner filed a petition for writ of habeas corpus in this Court. On May 12, 1994, this Court denied the entire petition as untimely and on the merits. In addition, this Court ruled that allegations VIII, IX, X, XI, and XVI(b)(3) were procedurally barred under *In re Waltreus* (1965) 62 Cal.2d 218, 225, and *In re Clark* (1993) 5 Cal.4th 750, 765, because these claims had already been raised and rejected on appeal. (*In re Miguel Bacigalupo* (May 10, 1993, S032738).)

On August 3, 1994, petitioner filed a pro per request for stay of execution and appointment of counsel in federal district court. The federal district court appointed new counsel to represent petitioner on July 28, 1995. Petitioner filed a federal petition for writ of habeas corpus on October 21, 1997.

Petitioner filed the instant state petition for writ of habeas corpus with this Court on June 11, 1999. On April 27, 2000, pursuant to Rule 60 of the California Rules of Court, this Court requested respondent provide an informal response to the newest petition.

STATEMENT OF FACTS

The following statement of facts is taken verbatim from this Court's opinion in *People v. Bacigalupo* (1991) 1 Cal.4th 103, 118-120.

"A. *Guilt Phase Evidence*

"Orestes Guerrero, a Peruvian immigrant, owned a jewelry store in San Jose. Defendant's mother, Dina Padilla Golden, who is also from Peru, met Orestes through friends in the Peruvian community in early 1983. When defendant's mother learned that defendant was moving from New York to Palo Alto, she asked Guerrero to give him a job in the store and to train him in the jewelry trade.

"In October 1983, defendant moved from New York to California, where he lived with his mother and stepfather in their Palo Alto apartment. He found work as a dishwasher at a restaurant, but soon left for another job. On the morning of December 29, 1983, defendant told his mother and stepfather he had quit this second job.

"Carlos Valdiviezo lived in Orestes Guerrero's jewelry store. He had left Peru and entered the United States illegally with Orestes's brother, Jose

Luis Guerrero. On the morning of December 28, 1983, Valdiviezo saw defendant in the jewelry store with Orestes and Jose Guerrero. Valdiviezo heard Orestes say that defendant was the son of a Peruvian woman and that he had been recommended to work in the jewelry store.[1/]

"The next morning, Valdiviezo and Orestes Guerrero put jewelry into the jewelry cases in the front area of the store. The two men then left the store to pick up some diamonds; they returned shortly before noon. Half an hour later, defendant arrived at the jewelry store; he was given the task of operating a silverthreading machine used in making jewelry. While assisting defendant, who seemed to be having trouble operating the machine, Valdiviezo noticed that defendant was quite nervous. Valdiviezo then left the jewelry store to change the spark plugs in Orestes Guerrero's car.

"When Valdiviezo returned an hour later, defendant pointed a handgun at him and ordered him to lie down. Defendant put the gun next to Valdiviezo's head and tried to shoot, but the gun jammed. Valdiviezo ran and hid in the store's bathroom.

"About 20 minutes later, Valdiviezo left his hiding place after he heard someone leave through the front door of the store. Valdiviezo discovered the dead bodies of Orestes and Jose Guerrero; both had been shot. The jewelry cases at the front of the store were all empty.

"Valdiviezo immediately contacted Orestes Guerrero's wife and told her what had happened. Because of his fear of deportation, he did not talk with the police until several hours after the killings.

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1. Orestes Guerrero called defendant "Miguel Padilla," another name by which defendant was known. During trial, witnesses referred to defendant both as "Miguel Padilla" and as "Miguel Bacigalupo."

"Later that evening, the police arrested defendant at his mother and stepfather's apartment in Palo Alto, just as his stepfather was preparing to take defendant to the airport. Defendant's suitcases contained the jewelry taken from Orestes Guerrero's jewelry store. After advisement and waiver of his constitutional rights, defendant admitted killing the Guerrero brothers, but claimed he had done so under threat of death by the Colombian Mafia.

"Defendant presented no evidence at the guilt phase of the trial.

"B. *Penalty Phase Evidence*

"As evidence of criminal activity by the defendant involving force or violence (§ 190.3, factor (b)) the prosecution presented testimony from two witnesses, Maggie Granell and Dominic DiGregorio, about defendant's 1978 participation in an armed robbery of a grocery store and the subsequent shootout with police in New York. In addition, the prosecution offered evidence that defendant had suffered two prior felony convictions (§ 190.3, factor (c)) for sale of a controlled substance and possession of a firearm in New York.

"In mitigation, the defense presented the testimony of defendant's mother and two other witnesses (a minister and a psychologist), both of whom had met with defendant in jail after his arrest on this case.

"Defendant's mother testified that defendant was the youngest of three children. His parents separated when he was seven years old; shortly thereafter, defendant and his mother moved from Peru to Mexico City. Eventually they came to New York City where defendant's mother worked long hours and left defendant unattended. As a teenager, defendant visited his sister in Spain. After the two had a quarrel, defendant spent one year in a Spanish orphanage until his return to the United States could be arranged. In

1980, when defendant was in prison in New York, his older brother was killed during a robbery.

"Reverend Richard Lyon testified that he had met with defendant about a dozen times since the arrest in this case. He showed the jury some religious drawings that defendant had made for him, and said that defendant was attempting to gain personal insight through religion.

"Based on his examination of defendant, Dr. John Brady, a clinical psychologist, concluded that defendant suffered from chronic depression. He based that conclusion on defendant's conduct, which included attempts at self-mutilation. In his view, younger offenders such as defendant might be rehabilitated through the penal system. On cross-examination, the prosecutor questioned Dr. Brady about defendant's disciplinary problems while in prison in New York. Brady attributed those problems, which included assaultive conduct, to defendant's efforts to protect himself."[2/]

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2. A more detailed statement of facts, with corresponding citations to the record, is laid out in our original respondent's brief filed in petitioner's direct appeal.

APPELLANT'S CONTENTION

1. "Trial counsel unreasonably failed to adequately investigate and present psychiatric, medical and neurological evidence and cultural, family and personal background information that would have supported mental defenses to guilt and significant evidence in mitigation." (Pet. 30.)

2. "Trial counsel unreasonably failed to investigate and present mitigating psychiatric, medical, and family and personal background and cultural evidence at the penalty phase." (Pet. 47.)

3. "Ineffective assistance/conflicts of interest of state-provided counsel." (Pet. 92.)

4. "Ineffective assistance of counsel." (Pet. 115.)

5. "Trial court error in refusing to grant petitioner's motion to suppress his statements and other inadmissible evidence/ state misconduct/ inadequate hearing/ ineffective assistance of counsel." (Pet. 122.)

6. "Competency to stand trial/to waive constitutional rights/ and to be executed." (Pet. 136.)

7. "Prosecutorial misconduct: failure to disclose the names of a confidential informant and other witnesses and their statements which supported a duress defense at the guilt phase or helped to prove the mitigating factor of duress at the penalty phase; presentation of false and misleading testimony/argument." (Pet. 143.)

8. "The trial court and California Supreme Court erred in failing to release a transcript of a hearing regarding a confidential informant." (Pet. 149.)

9. "The prosecution improperly withheld exculpatory information." (Pet. 152.)

10. "Juror bias/juror misconduct." (Pet. 157.)

11. "Violation of the right to consular access." (Pet. 170.)

12. "Violations of international law require that petitioner's convictions and penalty be set aside." (Pet. 179.)

13. "Petitioner was deprived of his constitutional rights on the arbitrary basis of race, nationality, immigration status and socioeconomic status." (Pet. 208.)

14. "Claims that state appellate counsel unreasonably failed to raise." (Pet. 215.)

15. "California's death penalty statute is unconstitutional because it fails to meaningfully narrow the class of offenders eligible for the death penalty, particularly those charged with felony-murder, and permits the imposition of death in a capricious and arbitrary manner." (Pet. 224.)

16. "Petitioner was denied a fair and constitutionally adequate review of his death judgment in the California Supreme Court." (Pet. 257.)

17. "The method of execution contemplated by the sentencing jury is unconstitutional." (Pet. 294.)

18. "The use of lethal injection to execute petitioner is cruel and unusual punishment." (Pet. 299.)

19. "Execution of petitioner after prolonged confinement under sentence of death would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." (Pet. 315.)

20. "Cumulative effect of guilt and penalty phase errors." (Pet. 324.)

21. "Inadequate assistance of state appellate counsel." (Pet. 325.)

RESPONDENT'S ARGUMENT

1. Defense counsel did not render constitutionally ineffective assistance of counsel with respect to investigating and presenting psychiatric, medical, and neurological evidence in support of a guilt phase mental state defense.

2. Defense counsel did not render constitutionally ineffective assistance of counsel with respect to investigating and presenting psychological and medical evidence, or evidence regarding petitioner's family and cultural history in support of a penalty phase mental state defense.

3. Defense counsel did not have a conflict of interest while representing petitioner.

4. Additional allegations of ineffective assistance of counsel.

5. The trial court correctly denied petitioner's motion to suppress his statements to the police after the murders.

6. Petitioner was competent to stand trial and waive his constitutional rights.

7. The prosecution did not commit prosecutorial misconduct and did not impermissibly fail to disclose material witnesses or exculpatory evidence.

8. The trial court and this court properly rejected petitioner's motion to unseal the transcripts of the confidential informant.

9. The prosecution did not withhold exculpatory evidence from petitioner.

10. There was no juror bias or misconduct.

11. Petitioner does not have a constitutional due process right to be informed of the availability of consular assistance.

12. Petitioner's assertion that his death sentence violates international law is not cognizable. Petitioner was not deprived of his constitutional rights on the arbitrary basis of race, nationality, immigration status or socioeconomic status.

13. Petitioner was not deprived of his constitutional rights on the arbitrary basis of race, nationality, immigration status or socioeconomic status.

14. Appellate counsel was not constitutionally ineffective.

15. California's death penalty statute properly narrows the class of offenders eligible for the death penalty within constitutional requirements.

16. This court provides meaningful review within constitutional requirements.

17. Method of execution contemplated by the jury.

18. Execution by lethal injection is not cruel and unusual punishment requiring reversal.

19. Execution after prolonged confinement does not constitute cruel and unusual punishment warranting reversal.

20. No cumulative error is present here.

21. Petitioner received effective assistance of appellate counsel.

THIS PETITION SHOULD BE DISMISSED AS PROCEDURALLY DEFAULTED AND UNTIMELY

Before addressing the merits of petitioner's claims, we must point out that most, if not all, of petitioner's claims are untimely and procedurally defaulted. This Court affirmed petitioner's conviction and sentence on December 9, 1991. (*People v. Bacigalupo* (1991) 1 Cal.4th 103 [*Bacigalupo I*].)[3/] Petitioner filed his first petition for writ of habeas corpus in state court in May 1993, which this Court denied as untimely and on the merits. In addition, this Court ruled that several allegations were procedurally barred as having already been raised and rejected on appeal. (*In re Bacigalupo* (May 12, 1994, S032738); Respondent's Exhs. 3 & 4.)

All of petitioner's claims are procedurally barred as untimely; many rely on nothing outside the record on appeal and should have been brought, if at all, in his initial appeal. Petitioner also has not justified failing to have

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3. As noted above, on October 5, 1992, the U.S. Supreme Court granted certiorari in this case on the limited question of whether the factors set out in Penal Code §190.3 are factors governing *eligibility* for the death penalty or are criteria used for sentence *selection* after finding the defendant death-eligible, and remanded the case to the California Supreme Court for further consideration of this single issue in light of *Stringer v. Black* (1992) 503 U.S. 222. (*Bacigalupo v. California* (1992) 506 U.S. 802.) On December 7, 1993, this Court reaffirmed its earlier ruling on this limited question, in *People v. Bacigalupo* (1993) 6 Cal.4th 457 (*Bacigalupo II*). These proceedings did not otherwise affect the validity of this Court's resolution of the merits of petitioner's other claims in *Bacigalupo I*.

brought the claims in his first habeas petition before this Court. Furthermore, none of his claims raise a prima facie case for relief.

In a capital case the trial is the "main arena" for determining guilt or innocence and whether death is the appropriate punishment, while the appeal "provides the basic and primary means for raising challenges to the fairness of the trial." (*In re Robbins* (1998) 18 Cal.4th 770, 777.) Habeas corpus is thus an "extraordinary" remedy which seeks relief from a presumptively valid and final judgment of conviction. (*In re Clark* (1993) 5 Cal.4th 750, 764.) The petitioner "bears a heavy burden" to both plead and prove sufficient grounds for relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) The petition must state with particularity the facts upon which relief is sought and include all reasonably available documentary evidence, including affidavits or declarations, which support the claims. (*Ibid.*)

"Postconviction habeas corpus attack on the validity of a judgment of conviction is limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension." (*Clark*, at pp. 766-767.) The court reviewing a habeas corpus petition must determine whether the petition states a prima facie case for relief "and also whether the stated claims are for any reason procedurally barred." (*People v. Romero* (1994) 8 Cal.4th 728, 737.)

The instant habeas corpus petition raises 21 claims with multiple subclaims. All of these claims are procedurally defaulted because they are untimely, they have already been raised on appeal, or they could have been raised on appeal or in the first habeas corpus petition. In this section, we set forth the law applicable to these defaults and identify which arguments are subject to the various defaults.

A. Untimeliness

A petition seeking habeas corpus relief "should be filed as promptly as the circumstances of the case allow." (*In re Stankewitz* (1985) 40 Cal.3d 391, 396-397 fn. 1.) This Court has "consistently required that a petitioner explain and justify any substantial delay in presenting a claim." (*Clark, supra*, 5 Cal.4th at p. 783.) "Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." (*Robbins, supra*, 18 Cal.4th at p. 780.) The burden to justify delay is "not met by an assertion of counsel that he or she did not represent the petitioner earlier." (*Clark, supra*, 5 Cal.4th at p. 783.) As the Court explained in *Clark*, any other rule would allow continued delay in presenting habeas claims as new attorneys entered the case and asserted that they had just become aware of the basis for seeking relief. (*Id.*, at p. 765, fn. 6.) Similarly, good cause is not established by prior counsel's "asserted uncertainty about his or her duty to conduct a habeas corpus investigation and to file an appropriate habeas corpus petition." (*Robbins, supra*, 18 Cal.4th at p. 780.)

The general rule is that untimely habeas corpus petitions will be summarily denied unless the petitioner alleges facts which, if proven, would establish that a fundamental miscarriage of justice occurred with respect to the conviction and/or sentence. In order to establish a fundamental miscarriage of justice, it must be demonstrated (1) that error of state constitutional magnitude led to a trial so fundamentally unfair that absent such error no reasonable judge or jury would have convicted petitioner; (2) that petitioner is actually innocent of the crimes for which he was convicted; (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner that absent the alleged error no reasonable judge or jury would

have imposed death; or (4) that petitioner was convicted or sentenced under an invalid statute. (*Clark*, *supra*, 5 Cal.4th at pp. 797-798.)

This petition was filed more than 11 years after the death judgment was pronounced, nearly 8 years after this Court affirmed the judgment on appeal, more than 5 years after this Court denied petitioner's first state habeas corpus petition, and 1½ years after petitioner filed a habeas corpus petition in federal court. Because the petition was filed more than 90 days after the filing of appellant's reply brief on direct appeal (see Supreme Ct. Policies Regarding Cases Arising From Judgments of Death, Policy 3, std. 1-1.1 [Policies]) it is not entitled to a presumption of timeliness. As to *each claim* petitioner is thus required to establish (1) absence of substantial delay, (2) good cause for the delay, or (3) that the claims fall within one of the exceptions to the untimeliness bar. (*Robbins*, *supra*, 18 Cal.4th at p. 780; *In re Gallego* (1998) 18 Cal.4th 825, 831.)

Petitioner provides two grounds as good cause for the delay: that petitioner's first habeas counsel did not know about the facts providing the basis for the issues now raised and that habeas counsel was prevented from timely investigating the claims due to this court's denial of petitioner's request for further investigative funds. (Pet. 17-18.) Neither is sufficient.

To support his first assertion that his previous habeas counsel did not know of the facts supporting the claims now raised for the first time in this petition, petitioner relies on a declaration by that habeas counsel. (Exh. B [Declaration of Cliff Gardner].)[4/] However, Mr. Gardner's declaration

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4. Petitioner was represented by two defense attorneys in his appeal and first petition for writ of habeas corpus, Cliff Gardner and Melissa Johnson. Petitioner does not submit any declaration from Ms. Johnson as to her knowledge of the new claims. Petitioner instead relies on Mr. Gardner's assertions that Ms. Johnson was also not aware of the new claims. Such

contains nothing more than a general allegation of lack of awareness of all of the new claims. This declaration falls far short of meeting petitioner's burden of showing with specificity that prior counsel should not have reasonably known of and raised the claims and an absence of reasonable delay upon discovery of the claims. As this Court explained in *Robbins, supra*:

> "A petitioner does not meet his or her burden simply by alleging in general terms that the claim or subclaim recently was discovered, or by producing a declaration from present or former counsel to that general effect. He or she must allege, with specificity, facts showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time—and he or she bears the burden of establishing, through those specific allegations (which may be supported by relevant exhibits; see post, fn. 16), absence of substantial delay." (*Robbins, supra,* 18 Cal.4th at p. 787.)

Petitioner's justifications, based on counsel's generalized declaration asserting lack of awareness, are particularly deficient with respect to all the claims which rely on no new evidence, namely claims K through S.

Petitioner's second asserted justification for the delay, namely this Court's denial of the confidential request for funds made by petitioner's first habeas counsel, is equally unavailing. This Court recognized in *In re Gallego, supra,* that a petitioner may be able to demonstrate an absence of substantial delay if counsel "reasonably failed to discover earlier the information offered in support of that claim because he or she timely requested but was denied funding to investigate that claim." (*In re Gallego, supra,* 18 Cal.4th at pp. 834-35.) However, in order to succeed in such a claim, petitioner still bears the burden of establishing with specificity when the claims alleged became known and showing that the facts could not have been known or presented

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assertions in Mr. Gardner's declaration are either speculation or hearsay, which cannot support petitioner's claim with respect to Ms. Johnson.

prior to the filing of the present petition. (*Id.* at pp. 836-837.) Again petitioner's petition is devoid of any specific allegations as to when petitioner learned of the triggering facts, when the information became available, and why the information was unknowable earlier.

Moreover, petitioner's claim that he could not have learned of or presented his claims earlier due to this Court's denial of investigation funds is completely undermined by the fact that the federal district court subsequently granted petitioner's request for additional federal funding for investigations on three separate occasions, November 26, 1996, April 9, 1997, and August 25, 1997.[5/] (Pet. 13-14.) However, petitioner did not file the instant petition for nearly three years following the receipt of the first grant of additional funding and nearly two years following the second and third grant of additional funding. Petitioner has completely failed to justify this final two to three year delay, as well as failing to justify the overall delay.

Petitioner generally asserts that "an on-going bona fide investigation to discover information to further support the claims has continued after the authorization of funds in federal court." (Pet. 20-21.) However, once again, this generalized assertion by habeas counsel fails to satisfy petitioner's burden in justifying an untimely petition. (See *In re Gallego, supra,* 18 Cal.4th at p. 837 ["Of course, as explained above, the burden is on petitioner to establish the absence of substantial delay, and he, not respondent, must 'get down to details.'"].) Indeed, petitioner certainly has not established that any ongoing investigation into any of the present claims took place between May 1993, when this Court denied petitioner's final request in state court for funding, and

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5. In fact, petitioner filed his federal habeas petition in federal district court, raising all of these claims on October 29, 1997, nearly two years before filing the instant petition.

July 25, 1995, when petitioner's federal habeas corpus counsel were appointed. Petitioner therefore cannot justify the delay in presenting claims K through S, which rely on no new evidence. (See *id.* at p. 838, fn.13.)

Petitioner next asserts that his case falls within three of the four exceptions to the application of the untimeliness rule, as set out in *In re Clark, supra,* 5 Cal.4th at p. 775. Petitioner alleges, without any factual or legal development, that his trial was fundamentally unfair due to errors of a constitutional magnitude, the jury was given a grossly misleading profile of the petitioner, and petitioner was convicted and sentenced under constitutionally invalid statutory schemes.[6/] For the reasons set out in our discussions of the merits of petitioner's claims below, these exceptions are inapplicable.

Petitioner also claims, again without analysis, that if his claims are found to be untimely, then his previous counsel was ineffective for failing to raise these claims earlier. However, petitioner's cursory assertion does not suffice to meet his burden of demonstrating ineffectiveness. This Court rejected a similar assertion in *Robbins*, observing:

> "One who asserts ineffective representation by counsel must establish both the objectively inadequate performance of that counsel, and prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-696 [trial counsel]; *In re Harris* (1993) 5 Cal.4th 813, 833 ["Similar concepts have been used to measure the performance of appellate counsel."].) The circumstance that present counsel has raised an issue not advanced by prior counsel does not itself establish inadequate performance by prior counsel. As the high court has observed, appellate counsel (and, by analogy, habeas corpus counsel as well) performs properly and competently when he or she exercises discretion and presents only the strongest claims instead of every conceivable claim. (*Jones v. Barnes* (1983) 463 U.S. 745, 752; *Smith v. Murray* (1986) 477 U.S. 527, 536.)" (*In re Robbins, supra,* 18 Cal.4th at p. 810.)

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6. Petitioner does not claim that he is actually innocent.

Finally, petitioner challenges the validity of the California Supreme Court Policies Regarding Cases Arising from Judgments of Death, Standards 1-1.1 to 1-3, which delineate the timeliness requirements for filing petitions for writs of habeas corpus in capital cases. (Pet. 26.) However, this Court reaffirmed the validity of those standards and policies in *In re Clark, supra,* 5 Cal.4th at pp. 782-786, and petitioner is properly bound by them. Accordingly, all of petitioner's claims are untimely and therefore procedurally barred.

B. Issues Previously Raised On Appeal

It is a "now firmly established" rule that habeas corpus may not be used as a substitute for an appeal or as a second appeal. (*In re Harris* (1993) 5 Cal.4th 813, 826.) Unless the petitioner alleges sufficient justification, this rule bars habeas claims which were raised and rejected on appeal. (See *In re Waltreus* (1965) 62 Cal.2d 218, 225; *Harris*, 5 Cal.4th at p. 825.) Courts will presume that the state appellate system was sufficient to allow the petitioner to adequately present any claims for judicial review. (*Harris*, 5 Cal.4th at p. 829.)

This Court has identified "limited situations in which a petitioner may review a claim on habeas corpus despite denial of the claim on direct review." (*Ibid.*) Three of the recognized exceptions involve a lack of fundamental jurisdiction, an act in excess of jurisdiction, or a change in the law affecting the petitioner (*Id.*, at pp. 836-841), none of which apply to this case. A petitioner may also obtain review of an otherwise defaulted claim if the alleged state "constitutional error is both clear and fundamental, and strikes at the heart of the trial process . . . ." (*Id.*, at p. 834.)

Two of petitioner's claims were previously reviewed and rejected by this Court on direct appeal, namely petitioner's claim E(2) – that the trial court erred in ruling that exigent circumstances justified the warrantless entry into petitioner's mother's home (*People v. Bacigalupo, supra,* 1 Cal.4th at pp. 121-123), and claim H – that the trial court erred in denying petitioner's motion to disclose the identity of the confidential informant (*id.* at p. 123).[7/]

Petitioner generally fails to acknowledge that the above claims were even considered on appeal and fails to demonstrate that any of the exceptions to further review apply. The claims are barred.

C. Claims That Could Have Been Raised On Appeal

The "corollary" of the *Waltreus* rule is the prohibition in *In re Dixon* (1953) 41 Cal.2d 756 against raising claims for the first time on habeas corpus that could have been but were not raised on appeal. (*Harris*, *supra*, 5 Cal.4th at p. 829.) Violation of *Dixon* is subject to the same "limited situations" applicable to *Waltreus*. (*Id.*, at p. 825 fn. 3 & 829.) Claims which rely exclusively upon the appellate record were known or reasonably should have been known earlier and should have been presented on direct appeal, if not in a more timely habeas corpus petition. (See *Robbins*, *supra*, 18 Cal.4th at p. 814; *Gallego*, *supra*, 18 Cal.4th at p. 838.)

The following claims could have been raised on appeal:

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7. Petitioner frequently fails to subdivide his claims into logical subparts with subheadings identifying the different legal claims within each main argument section. Respondent attempts to address these undifferentiated subclaims in a logical manner, and numbered subclaims, such as "Claim E(2)," refer to the order of distinct legal subarguments, rather than the paragraph numbering system used by petitioner, which do not appear to accurately reflect the number of different subissues.

Claim D (2)-(5): (ineffective assistance of counsel for failing to ask for a continuance, failing to give opening statements, failing to adequately cross examine three witnesses, and failing to present expert testimony on intoxication);

Claim E (1), (3), (5), (7): (trial court erred in ruling petitioner was properly *Mirandized*, that his confession was voluntary, that the police did not intentionally destroy a portion of the tape-recorded confession; the court failed to provide a proper hearing; ineffective assistance of counsel for failing to object to prejudicial portions of the tape being played);

Claim K: (violation of petitioner's right to consular access);

Claim L: (violations of international law);

Claim M: (violation of petitioner's right based on race, nationality, immigration status, and socio-economic status);

Claim O: (the death penalty statute is unconstitutional because it fails to meaningfully narrow the class of eligible offenders);

Claim P: (this Court does not provide meaningful review);

Claim Q: (the method of execution contemplated by the jury is unconstitutional);

Claim R: (the use of lethal injection is cruel and unusual punishment);

Claim S: (prolonged confinement is cruel and unusual punishment).

The sole excuse proffered by petitioner for failing to raise the claims on appeal is ineffective assistance of appellate counsel. (Claim U.) "The

circumstance that present counsel has raised an issue not advanced by prior counsel does not itself establish inadequate performance by prior counsel." Indeed, the presumption is that appellate counsel only presented the strongest claims. (*Robbins, supra*, 18 Cal.4th at p. 810.) In any event, petitioner cannot demonstrate that any of the claims satisfy the *Harris* exception for fundamental constitutional error. All should be barred on procedural grounds.[8/]

D. Successive State Habeas Corpus Petition – Issues Already Raised And Rejected In Petitioner's Earlier State Petition

Finally, petitioner is barred from raising issues which were raised and rejected in an earlier petition. "It has long been the rule that absent a change in the applicable law or the facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected." (*In re Clark, supra*, 5 Cal.4th at p. 767 and cases cited therein.) Repetitious presentation of claims is an abuse of the writ. (*Id.*, at pp. 769-770.) With the exception of petitions which allege facts demonstrating that a fundamental miscarriage of justice has occurred, e.g., a claim of actual innocence, unjustified piecemeal petitions also will not be considered. (*Id.*, at p. 775.)

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8. Respondent requests that this Court rule on the application of procedural bars. Their purpose to prevent unfairness to the trial judge and adverse party is often recognized. (e.g. *People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) Moreover, interests of comity and federalism lead federal courts to recognize adequate and independent state bars as a component of the independent state rule doctrine which prohibits federal court consideration of a federal issue presented in violation of state rules. Finally, a state court need not fear reaching the merits of a federal claim as an alternative holding so long as the bar is explicitly invoked as an independent basis for decision. (*Harris v. Reed* (1989) 489 U.S. 255, 264, no. 10.) Respondent accordingly requests that this Court independently recognize the procedural bar as a basis for decision.

Piecemeal presentation of claims is not permitted except where the failure to present the claims underlying the new petition in a prior petition has been adequately explained and it has been determined that the explanation justifies the piecemeal presentation of petitioner's claims. (*Id.*, at pp. 767-768, 774-775.) Whether the explanation justifies piecemeal presentation of petitioner's claim will depend on whether petitioner has demonstrated due diligence in pursuing potential claims. (*Id.*, at pp. 775, 779.) The question to be answered is whether the new claim was presented as promptly as reasonably possible. (*Ibid.*) Successive petitions, which reflect nothing more than the ability of present counsel with the benefit of hindsight, additional time and investigative services, or newly retained experts, to demonstrate that a different or better defense could have been mounted, will not be considered. (*Id.*, at p. 780.)

Petitioner has already raised several of the claims now presented in his earlier petition for writ of habeas corpus, which this Court already rejected procedurally and on the merits. Specifically petitioner raised the following claims in his previous petition.

Claim A: Failure to investigate and present evidence relating to petitioner's psychiatric condition, medical condition, and personal background with respect to a possible mental state defense. Petitioner raised this claim as Claims XII, XIII, and XV in his first petition.

Claim B(1): Ineffective assistance of counsel for failing to present additional evidence of petitioner's social history at the penalty phase. This claim was raised as Claim XII in petitioner's first habeas corpus petition in which petitioner alleged that defense counsel should have presented additional evidence of petitioner background of abuse and neglect during childhood. With this claim, petitioner attached affidavits from his father, two aunts, an

uncle, four cousins, and two other Peruvian individuals who did not specify their relation to petitioner. (Exhs. F & G from petitioner's first state habeas corpus petition.) To the extent that petitioner is now claiming that defense counsel should have presented even more evidence of petitioner's social history and his life growing up to show abuse and neglect, such information was necessarily already known to petitioner at the time he filed the first petition, since he was the one who actually suffered this alleged abuse and neglect. Accordingly, petitioner cannot raise this successive claim in his second habeas corpus petition. (*In re Clark, supra,* 5 Cal.4th at p. 767-768 ["The court has also refused to consider newly presented grounds for relief which were known to the petitioner at the time of a prior collateral attack on the judgment."].)

Claims G, H, and I: Failure to release the transcript of the interview with the confidential informant and alleged prosecutorial misconduct in failing to reveal the confidential informant. Petitioner had previously raised these claims as Claims IX and X in his first petition.

Claim O: California's death penalty scheme fails to meaningfully narrow the class of offenders eligible for the death penalty and allows for imposition of the death penalty in an arbitrary manner. This claim was raised as Claim XVI(b) in the first petition.

Claim P: Petitioner was denied meaningful review by this Court. This claim was raised as Claim XVI(a) in the first petition.

In addition, Claims K through S in the current petition are based on no new evidence and rely on facts that were known to petitioner at the time of his earlier petition and should have been raised in that petition. (*In re Clark, supra,* 5 Cal.4th at pp. 769-770.)

Petitioner offers no justification for avoiding application of the bar against presenting the same claims in a successive petition, but he asserts in a footnote that the successive petition bar does not apply to his case because he filed his first petition in May 1993, two months before this Court published *In re Clark*, on July 29, 1993. For support petitioner relies on a footnote in *In re Robbins, supra,* 18 Cal.4th at p. 788, fn.9, in which this Court declined to impose a successive petition bar since the petition was filed prior to *In re Clark*. However, in *Clark* and *Robbins*, this Court did not need to apply the successive petition bar since the petitions were also untimely. This Court did not hold that the bar could not be applied to petitions filed prior to *Clark*. Indeed, this Court made clear in *Clark*,

> "'It is the policy of this court to deny an application for habeas corpus which is based upon grounds urged in a prior petition which has been denied, where there is shown no change in the facts or the law substantially affecting the rights of the petitioner. [Citations.] And as to the presentation of new grounds based on matters known to the petitioner at the time of previous attacks upon the judgment, in *In re Drew* (1922) 188 Cal. 717, 722, it was pointed out that the applicant for habeas corpus "not only had his day in court to attack the validity of this judgment, but ... had several such days, on each of which he could have urged this objection, but did not do so"; it was held that "The petitioner cannot be allowed to present his reasons against the validity of the judgment against him piecemeal by successive proceedings for the same general purpose."' (*In re Horowitz, supra*, 33 Cal.2d 534, 546-547.)" (*In re Clark, supra,* at pp. 769-770.)

Accordingly, the successive petition bar was applied well before *Clark*, albeit with exceptions that were not sufficiently defined before *Clark*.

Moreover, although petitioner's first habeas corpus petition was filed two months before *Clark* was published, petitioner's petition was still pending when *Clark* came down, and was not denied until May 12, 1994, roughly ten months after *Clark* was published. Consequently, petitioner was on notice of

his obligation under *Clark* to present all his claims in the first petition for roughly 10 months before this Court rejected his petition. Accordingly, petitioner had the opportunity to amend his petition to conform with *Clark* once *Clark* issued, yet failed to satisfy the requirements set out in *Clark*. Petitioner's second petition for writ of habeas should therefore be deemed a successive petition under *Clark* and the issues identified above are procedurally barred as having been raised and rejected in a prior petition or because they were known to petitioner and should have been raised in the earlier petition.

ARGUMENT

I.

DEFENSE COUNSEL DID NOT RENDER CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL WITH RESPECT TO INVESTIGATING AND PRESENTING PSYCHIATRIC, MEDICAL, AND NEUROLOGICAL EVIDENCE IN SUPPORT OF A GUILT PHASE MENTAL STATE DEFENSE

Petitioner's first claim is that defense counsel was constitutionally ineffective for failing to adequately investigate psychiatric, medical, and neurological evidence, as well as cultural, familial, and personal background information in support of a possible mental state defense during the guilt phase of trial. (Pet. 30.) Petitioner has not demonstrated a prima facie case. Defense counsel conducted ample investigation and made an informed tactical decision not to pursue a mental state defense.

A. Standard of Review

To prove inadequacy of trial counsel, defendant bears the burden of proving by the preponderance of the evidence that counsel failed to act in a manner expected of a reasonably competent attorney, resulting in error so serious that it effectively violated his right to counsel. Additionally, if ineffective assistance is proved, counsel's deficient performance must have resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Mincey* (1992) 2 Cal.4th 408, 449.)

Judicial scrutiny of counsel's performance must be highly deferential and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. (*Strickland*,

supra, 466 U.S. at 689; see also *Tinsley v. Borg* (9th Cir. 1990) 895 F.2d 520, 531-532.) "Courts must in general exercise deferential scrutiny in reviewing such claims; the reasonableness of defense counsel's conduct must be assessed 'under the circumstances as they stood' at the time of counsel's acts or omissions; 'second-guessing' is to be avoided." (*People v. Mincey*, *supra*, 2 Cal.4th 408, 449, citing *In re Fields* (1991) 51 Cal.3d 1063, 1069-1070 and *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) As this Court noted in *People v. Duncan* (1991) 53 Cal.3d 955, 966:

> "'It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." [Citation.] There are countless ways to provide effective assistance in any given case. Even the best defense attorneys would not defend a particular client in the same way.'"

The performance inquiry "must be whether counsel's assistance was reasonable considering all the circumstances." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 688.) "It is not sufficient to allege merely that the attorney's tactics were poor, or that the case might have been handled more effectively. . . . Rather, the defendant must affirmatively show that the omissions of defense counsel involved a critical issue, and that the omissions cannot be explained on the basis of any knowledgeable choice of tactics."

(*People v. Floyd* (1970) 1 Cal.3d 694, 709, overruled on other grounds, *People v. Wheeler* (1978) 22 Cal.3d 258.)

As to the requirement of prejudice, petitioner must show that it is reasonably probable he would have received a determination more favorable but for counsel's unprofessional error. (*Id.*, at 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra*, 466 U.S. at p. 694; see also *In re Jackson* (1992) 3 Cal.4th 578, 601, disapproved on another ground in *In re Sassounian*, *supra*, 9 Cal.4th at p. 535, fn. 6.) In other words, he must show that the "result of the proceeding was fundamentally unfair or unreliable . . . ." (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 372; see also *In re Harris*, *supra*, 5 Cal.4th at p. 833.) "[T]o be entitled to reversal of a judgment on grounds that counsel did not provide constitutionally adequate assistance, [defendant] must carry his burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." (*People v. Williams* (1988) 44 Cal.3d 883, 937.) "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 693.) He must "affirmatively prove prejudice." (*Ibid.*)

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*In re Alvernaz* (1992) 2 Cal.4th 924, 945.)

B. Defense Counsel Was Not Constitutionally Ineffective

Petitioner complains that defense counsel failed to investigate mental state evidence and was constitutionally deficient for failing to present such evidence in support of a mental state defense. This claim, however, fails because the trial record demonstrates that defense counsel did indeed thoroughly investigate possible mental state issues and defenses, and made a sound tactical decision to present that evidence in the manner that could best benefit petitioner in attempting to avoid the death penalty.

First and foremost, contrary to petitioner's suggestion, defense counsel did investigate petitioner's mental state before trial. Prior to trial, defense counsel had petitioner evaluated by Dr. John Brady, a clinical psychologist with a specialty in criminal and forensic psychology. (RT 3866-3871.) Dr. Brady met with petitioner in August 1986. (RT 3871.) He administered numerous psychological tests and reviewed petitioner's medical history. (RT 3871-3884, 3892.) Dr. Brady explained that he administered the Wechsler Adult Intelligence Scale (WAIS), which provides a system for evaluating brain function independent from any cultural differences in the subjects tested. Dr. Brady also administered the Bender Gestalt Test and the Benton Visual Retention Test which similarly determine whether the subject is suffering from organic brain damage as a result of head trauma or long-term drug usage. (RT 3874.) As Dr. Brady testified at trial during the penalty phase, the results of these tests showed "there was really no evidence of any ongoing brain damage." (RT 3874.) The doctor reported that the results of the tests for organic brain damage or retardation "were negative. In other words, he is not retarded, he didn't have brain damage." (RT 3875; see also 3898 [same].)

Dr. Brady similarly reported that petitioner scored a 94 on the WAIS I.Q. test, "which puts his intellectual functioning within the normal range." (RT 3875.) Dr. Brady noted that additional psychological testing, and his psychiatric interview of petitioner, demonstrated that petitioner was not suffering from any "serious psychopathology" nor any other problems "of that order." (RT 3877.) Rather, he concluded that petitioner only suffered from chronic depression and self-punishment, with some paranoia. (RT 3877-89.) In explaining petitioner's psychological state, Dr. Brady acknowledged that petitioner's mental conditions did not "exculpate" petitioner, but rather, merely provided a way to view petitioner's actions. (RT 3894; see also RT 3929 ["I'm not in any way saying that this is exculpatory, that this in any way reduces his guilt for what he's done, just saying this is one way to explain it."].)

Furthermore, Dr. Brady was familiar with petitioner's background based on his review of interviews with petitioner and petitioner's mother, Iraida Dina Golden, and other materials provided by defense counsel. (RT 3871-3938; Respondent's Exh. 1 [Report of Dr. Brady].)

Petitioner also contends that "[t]rial counsel failed to obtain a complete medical history of petitioner, which would have shown that petitioner suffered a series of head injuries." (Pet. 37.) Specifically, petitioner asserts trial counsel failed to investigate petitioner's head injuries first as a child, and then during his capture and arrest by the New York Police in 1978 and again in the New York prison system in 1980. (Pet. 37.) Petitioner asserts that trial counsel failed to investigate the alleged history and symptoms of head trauma, which documentation petitioner claims was readily available to counsel in petitioner's New York prison medical records. Again petitioner is

incorrect in his claim that counsel failed to conduct such an investigation. (Pet. 37.)

Contrary to petitioner's assertion in his habeas petition, defense counsel did investigate petitioner's medical records from New York, including the incident of petitioner's capture and arrest in 1978, and petitioner's medical records from the New York prison system. In fact, defense counsel demonstrated at trial that he had investigated petitioner's hospital records from 1978 when he referred to petitioner's hospital stay for possible head injuries following his capture and arrest in cross examining Officer Dominic DiGregorio. (RT 3743-46.) Additionally, the hospital records of petitioner's 1978 head injury which petitioner included as Exhibit I in his 1993 state habeas petition, show no brain damage. On page 10 of Exhibit I, the hospital records reflect that petitioner was given neurological testing including an EEG, which showed no evidence of any neurological deficit.

Defense counsel also provided Dr. Brady with the reports detailing petitioner's medical and psychological history from the New York authorities and the New York prison system. (RT 3872 [Dr. Brady noting he reviewed petitioner's "history of psychiatric evaluation and diagnosis" as well as information and reports from correctional facilities in New York]; see also RT 3878 [Dr. Brady referring to reports from New York State prisons]; RT 3884 [referring to reports dating back to when petitioner was 14]; RT 3892, 3929-30, 3933-34 [Dr. Brady studied petitioner's prison records]; RT 3937 [Dr. Brady reviewed prison psychiatric records]; Resp. Exh. 1 [listing information reviewed by Dr. Brady for evaluation].).)

Petitioner asserts that defense counsel failed to investigate medical records of a head trauma allegedly suffered by petitioner when he was in a car

accident at the age of four or five.[9/] However, petitioner fails to demonstrate that any medical records even existed of this incident. The only evidence of the incident identified by petitioner is the recollection of his mother and father. (See exh. 59 at p. 9; exh. 62 at p. 28.) Moreover, there is no evidence that defense counsel was unaware of this incident, or that petitioner or his mother failed to report this incident to defense counsel. Finally, defense counsel cannot be deemed deficient in failing to investigate a 16-year-old alleged head injury because petitioner's own psychological expert conducted testing which showed that petitioner did not suffer from any lingering head trauma or organic brain damage. Given the results of Dr. Brady's testing, defense counsel would have no rational reason to squander time, energy, and resources investigating a 16-year-old head injury.

Petitioner also asserts that defense counsel failed to investigate petitioner's cultural and family history. Petitioner relies on declarations from numerous close and distant relatives in an effort to set out his family's historical roots as far back as the 1500's, when petitioner claims that his ancestors were purportedly subjugated first by the Incas and then by the conquering Spaniards. (Exh. A at 9-11; see also Pet. 33-34 [claiming petitioner's "family history was also significant for *multi-generational* patterns of neglect, as well as physical and emotional abuse." (Emphasis added)].) However, this claim is also without merit. Defense counsel conducted a sufficient investigation of petitioner's own life and his personal background. (Resp. Exh. 1.) Indeed, the defense expert referred to essentially

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9. Petitioner inaccurately suggests that petitioner was temporarily blinded as a result of the *head injury*. (Pet. 37.) In fact, the declarations from petitioner's parents explained that petitioner was temporarily blinded from shards of glass from the windshield that flew into his eyes and injured his corneas. (Exh. 59 at p. 9; exh. 62 at p. 28-29.)

all of the personal history identified in petitioner's brief as significant when he testified at the penalty phase. This evaluation of petitioner's personal life experience was ample to provide petitioner with a sufficiently thorough defense.

Accordingly, petitioner's claim that defense counsel was deficient for failing to investigate petitioner's mental state and alleged head traumas is baseless given that defense counsel did indeed investigate petitioner's mental state and had petitioner evaluated by a forensic psychologist, who found no signs of organic brain damage or significant mental impairment. The fact that petitioner now offers the report of a new psychiatrist who disagrees with the earlier findings does not render trial counsel's investigations incompetent. "Competent representation does not demand that counsel seek repetitive examinations of the defendant until an expert is found who will offer a supportive opinion." (*People v. Payton* (1992) 3 Cal.4th 1050, 1078; see also *People v. Beeler* (1995) 9 Cal.4th 953, 1007-1008 [explaining that trial counsel may reasonably rely on the defense psychological expert's determination that petitioner was not suffering from organic brain damage in concluding that further testing or investigation was not warranted].)

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that made particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." (*Strickland v. Washington, supra*, 466 U.S. at 691.) The courts have recognized that "psychiatrists disagree widely and frequently on what constitutes mental illness." (*Ake v. Oklahoma* (1980) 470 U.S. 68, 81.) Apart from the absence of any certainty or absolute truth in psychiatric or psychological evaluations, the determination of what conditions

will constitute a mental disorder is largely determined by "the morals and conventions of society." (*Harris v. Pulley* (9th Cir. 1988) 885 F.2d 1354, 1382.) In *Harris v. Vasquez* (9th Cir. 1990) 949 F.2d 1497, the Ninth Circuit noted:

> "It was clearly within the 'wide range of professionally competent assistance' for Ryan to choose not to present a psychiatric defense theory that could conflict with his alibi defense and his mitigation based on Harris's alleged remorse and his abusive childhood. It is also acceptable trial strategy to choose not to call psychiatrists to testify when they can be subjected to cross-examination based on equally persuasive psychiatric opinions that reach a different conclusion." (*Id.* at 1525.)

(See also, *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1038.)

Petitioner also asserts in a cursory argument that trial counsel was ineffective for failing to present various mental defenses, including insanity, intoxication, and organic brain damage. (Pet. 46.) However, as explained above, petitioner's own expert forensic psychologist examined petitioner and ruled out the possibility that petitioner was insane or suffered from organic brain damage. Accordingly, trial counsel made a reasonable tactical decision in not pursuing a mental defense.

Similarly, defense counsel made a reasoned tactical decision with respect to drug and alcohol intoxication. Petitioner contends in his petition that he was under the influence of drugs and alcohol at the time of the double murder. Petitioner bases his claim that he was under the influence of drugs at the time of the incident on his statement to the police that on the day of the murders he had taken a liquid substance which petitioner said was something like speed. (RT 3316; see also unredacted taped confession ["[Q]. Speed? A. Something like that."].) However, defense counsel clarified at a sidebar conference that petitioner did not take speed but rather took amyl nitrite, which is not an illegal substance, and which petitioner has never demonstrated is a

significant narcotic.[10/] Indeed, when the police analyzed a sample petitioner's blood taken at the time of his arrest, they found no traces of any standard narcotic substances, including opiates, cocaine, barbiturates, phencyclidine, or amphetamines. (RT 197.) Defense counsel's explanation and the blood test results completely undermine petitioner's claim of drug intoxication. For that very reason, defense counsel made a tactical decision not to present a claim of drug intoxication to the jury, because the claim was so weak and could in fact be harmful to petitioner's case. (See RT 3316-3322 [defense objects to any reference to petitioner's claimed consumption of amyl nitrite on day of murders].)

With respect to alcohol intoxication, trial counsel did in fact present the available evidence of alcohol consumption, namely that when the police tested the blood sample taken from petitioner at around 12:55 a.m. on the night following the murders, his blood alcohol level was .06%. (RT 3446.) This blood alcohol level, present at 12:55 a.m., indicated that at the time of his arrest at 8 p.m., petitioner likely had a blood alcohol level of .16%. (RT 3450.) Petitioner tries to extrapolate even more from this information in his petition. Petitioner points to his statement to the police that he had 10 glasses of wine on the day of the murder, and claims: "Given the reduction of alcohol in his blood stream over time, and the drug usage, he was highly intoxicated at the time of the offenses." (Pet. 43.) However, petitioner overlooks the fact that in his confession, he stated that he had been drinking both before *and after*

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10. In his habeas petition, petitioner also presents no evidence with respect to when he consumed the amyl nitrite, whether it was before or after the murders, or how much amyl nitrite petitioner consumed. In fact, amyl nitrite, also known as "poppers," is only a short term vaso-dilator, producing a rush within 30 seconds, but with a duration of only 3 to 5 minutes. (See *American Hospital Formulary Service* (1996) Amyl Nitrite, p. 1333.)

the murders. Accordingly, contrary to petitioner's claim, it is impossible to determine from the information presented at trial what petitioner's blood alcohol level was at the time of the murders, because the record does not show how much alcohol he may have consumed before the murders and how much he consumed closer to the time of his arrest.[11/]

In addition, witness Carlos Valdiviezo, did not report any signs of intoxication in petitioner when he was working with the jewelry prior to the murders. Also, the police officers who arrested and questioned petitioner similarly reported no signs that petitioner was actually impaired due to consuming the alcohol. (RT 130, 194.) Accordingly, defense counsel cannot be viewed as ineffective for failing to present a claim of intoxication when defense counsel had in fact presented the available evidence of petitioner's blood alcohol level, and when the relevant evidence at trial simply did not support a claim of intoxication affecting petitioner's mental state.

Petitioner counters that counsel should have used the intoxication evidence to bolster petitioner's claim of mental illness and brain damage. However, as explained above defense counsel reasonably concluded based on the defense expert that petitioner did not have a viable claim of mental impairment or brain damage under any circumstances.

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11. Indeed, petitioner's subsequent statements suggest that he was not intoxicated at the time of the murders. Petitioner informed the defense expert in an interview that he merely "drank some vodka" prior to leaving the house for the first that morning to get some clothes from Jack in the Box, which was sometime between 5 a.m. and 7 a.m. (Respondent's Exh. 2 at 10.) This was at least 6 hours before the murders, which occurred around 1:30 p.m. (RT 3144-3146.) Accordingly, petitioner's blood alcohol level, measured at the police station when he was booked, most likely reflected his alcohol consumption *after* he committed the murders.

In sum, petitioner cannot demonstrate a prima facie case supporting either prong of ineffective assistance of counsel. Defense counsel competently investigated the possibility of mental illness and organic brain damage, and reasonably relied on the defense expert's conclusion that petitioner was not mentally impaired or brain damaged, but rather, fell well within the normal range of mental functioning. Moreover, defense counsel made a reasoned tactical decision not to present evidence of petitioner's use of the substance amyl nitrite because this substance would not have supported a claim of drug intoxication. Finally, counsel did in fact present evidence of petitioner's intoxication; however, for the reasons already explained, defense counsel made a competent tactical decision not to pursue any mental illness or brain damage claim in conjunction with the intoxication evidence.

Petitioner also has not made out a prima facie case of prejudice. The reports produced by petitioner's own expert at trial showed that petitioner has a normal intelligence level and does not suffer from any mental illness or organic brain damage. Moreover, the evidence of petitioner's alleged use of amyl nitrite, a short-lived vaso-dilator, several hours before the murders and the equivocal evidence of alcohol intoxication, would not have resulted in a more favorable result in the absence of the alleged incompetence. Petitioner's claims are without merit.

II.

DEFENSE COUNSEL DID NOT RENDER CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL WITH RESPECT TO INVESTIGATING AND PRESENTING PSYCHOLOGICAL AND MEDICAL EVIDENCE, OR EVIDENCE REGARDING PETITIONER'S FAMILY AND CULTURAL HISTORY IN SUPPORT OF A PENALTY PHASE MENTAL STATE DEFENSE

Petitioner next contends that defense counsel was constitutionally ineffective for failing to investigate and present mitigating evidence relating to petitioner's psychological condition or his family, personal, and cultural background at the penalty phase of petitioner's case. (Pet. 47.) However, petitioner fails to state a prima facie case.

A. Psychological Evidence

First, for the reasons explained above, petitioner's claim of ineffective assistance of counsel for failing to investigate and present evidence of petitioner's mental and psychological condition is meritless. Defense counsel did investigate petitioner's mental state and organic functioning, and presented the results of that investigation to the jury at the penalty phase through the testimony of the defense forensic psychologist Dr. Brady. As explained above, defense counsel may reasonably rely on the results of the psychological evaluation performed by the defense expert. (*People v. Payton, supra,* 3 Cal.4th at p. 1078; *People v. Beeler, supra,* 9 Cal.4th at pp. 1007-1008.)

B. Family And Cultural Background

Petitioner's primary focus in his claim of ineffective assistance at the penalty phase is on trial counsel's alleged failure to offer a detailed description of petitioner's genealogical history. Indeed, petitioner devotes a substantial portion of his ineffective assistance argument to a recounting of petitioner's genealogical history, as well as a social history of Peru. Petitioner's argument, however, is unavailing, as most of the new evidence offered is either irrelevant or cumulative of that introduced by defense counsel at trial.

Petitioner spends a great deal of time describing the poverty in rural Peru where petitioner's grandparents' families came from. (Pet. 55-56.) Indeed, petitioner devotes 18 pages of his petition to the lives of his parents, grandparents, and ancestors, covering a time period before petitioner was even born. (Pet. 55-73.) However, none of this information would have been admissible in petitioner's case because this information is simply too remote to be relevant. Events occurring before petitioner was even born into this world, simply have no relevance in relation to the murders committed by petitioner. Defense counsel cannot be deemed incompetent for failing to conduct an in depth investigation of the social and cultural history of petitioner's ancestors, given that such and investigation would not have produced any relevant admissible testimony usable at trial.

As for the information about petitioner's own life, first in Peru, then in Mexico, New York, and Spain, defense counsel conducted a sufficient investigation and presented this evidence in the penalty phase through the testimony of petitioner's mother, Iraida Dina Golden, and petitioner's psychological expert, Dr. Brady. Ms. Golden testified about the various stages of petitioner's life, including their move to Mexico, the move to New York, the various homes in which they lived in the New York area, petitioner's stay

in an orphanage in Spain, petitioner's return to New York, petitioner's subsequent incarceration in Spain, the murder of petitioner's brother, Ms. Golden's move to California, petitioner's deportation to Peru, his return to California via Mexico, and his life in Northern California leading up to the murders. (RT 3805-3862.) Dr. Brady testified about all of the psychological influences on petitioner, including his childhood poverty and abusive upbringing at the hands of his alcoholic father, his history of drug abuse, the negative influences petitioner faced on the streets of New York, his suicidal and self-mutilation tendencies while in prison in New York, and the psychological impact of the murder of petitioner's brother on petitioner. (RT 3872-3938.)

Petitioner now castigates trial counsel for failing to develop a more complete and detailed social and cultural history of petitioner's life by calling as witnesses various aunts, uncles, and cousins to testify about petitioner's difficult life growing up in poverty in Lima, Peru. However, the decision not to call additional witnesses about petitioner's childhood difficulties did not constitute ineffective assistance. The Ninth Circuit case of *Dyer v. Calderon* (9th Cir. 1997) 122 F.3d 720, 735-36, is directly on point. The *Dyer* Court held:

> "We have held defense counsel's performance ineffective where counsel presents absolutely no mitigating evidence in a case where substantial evidence was available. *Mak v. Blodgett*, 970 F.2d 614, 619 (9th Cir.1992), cert. denied, 507 U.S. 951 (1993). However, counsel's decision not to conduct a particular investigation does not render performance defective where the decision is reasonably justifiable. *Strickland*, 466 U.S. at 691. We have never held that counsel has a duty to uncover every aspect of a defendant's past and to present all evidence that might bolster a defendant's mitigation case. Rather, trial counsel's resources are limited and the strategic decision to emphasize certain aspects of a defendant's background at the expense of investigating others is both reasonable and wholly acceptable. *See Waters*, 46 F.3d at 1514.

"Here, [defense counsel] did present substantial evidence of Dyer's psychological and social history. Dr. Hilliard conducted psychological tests, interviewed Dyer three times, and interviewed Dyer's mother and co-workers. Dr. Hilliard, Dyer's mother, and two co-workers all testified during the penalty phase. Dr. Hilliard obtained a complete history in which he traced Dyer's development from birth until the time of the murders. As the district court recognized, the jury heard, among other things, that Dyer was well-behaved, nonviolent, and a peacemaker; that he helped his mother around the house from a very young age and enjoyed skating and boxing; that he stammered, had academic difficulties, and was teased as a child; that his mother was only fifteen when he was born and that she relocated without him on two occasions; that he grew up in overcrowded housing projects with his grandmother and had no father figure; and that he felt remorse about the offense.

"Dyer's newly proffered evidence, largely cumulative of the information that was actually presented to the jury, does not establish [defense counsel's] ineffectiveness. *Schaflander*, 743 F.2d at 718. The prosecution did not challenge any of the background information [defense counsel] presented, and [defense counsel] did not believe that it was necessary to present additional evidence. This was a reasonable tactical decision. See *Hensley*, 67 F.3d at 185; *Mills v. Singletary*, 63 F.3d 999, 1024 (11th Cir.1995) ("counsel is not required indiscriminately to present evidence"), cert. denied, 517 U.S. 1214, 116 S.Ct. 1837, 134 L.Ed.2d 940 (1996)." (*Ibid.*)

In the present case, petitioner fails to demonstrate that counsel's decision not to pursue possible character witnesses in the form of petitioner's relatives from Peru was anything other than a reasonable tactical decision. Indeed, the record on appeal and the affidavits now offered by petitioner demonstrate that defense counsel did investigate friends and relatives who knew petitioner when he lived in New York. (See CT 264 [defense counsel requesting continuance, noting that defense investigator was conducting investigation of possible witnesses in New York; Exh. A-74 [declaration of Maria Andino, noting she was contacted by defense investigators]; Exh A-75 [declaration of Walter Manuel Calderon Levano, same]; Exh. A-76 [declaration of Norma Fuentes, same].)

As a strategic matter, trial counsel rationally could have decided not to call the New York witnesses or to pursue additional family witnesses from Peru out of concern that trying to bring in such witnesses would have squandered the defense's limited resources without providing any benefit to petitioner. Indeed, calling such witnesses to discuss the deprivations suffered by petitioner growing up in poverty in Lima could easily have had a detrimental effect on petitioner's case because the witnesses would have served as examples of people who suffered from almost identical deprivations and harsh poverty in Lima, Peru, but who did not turn to a life of crime, let alone commit multiple murders. Indeed, petitioner's cousin, Walter Manuel Calderon Levano, is a perfect example of someone who followed a nearly identical path as petitioner, growing up in the same poverty and squalor in Lima, moving to Miami to find a better life only to end up broke and without opportunity, then moving to New York and working with petitioner's brother Luis Bacigalupo Jr. and making a living without turning to a life of drug dealing, robbery, and murder. (Exh. A-75.)[12/]

Defense counsel could reasonably conclude that, as a tactical matter, petitioner's social history would be best and most sympathetically presented through petitioner's mother, petitioner's minister, and the forensic psychologist, without running the risk of alienating the jury by presenting

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12. Defense counsel also wisely decided not to call petitioner's father as a witness because petitioner's father, Luis Bacigalupo Begazzo, squarely blames petitioner's mother for petitioner's legal problems. His accusations against petitioner's mother would have only served to lessen the sympathetic impact of petitioner's mother on the jury. (See Exh. A-57.) As for petitioner's sister Yolanda, as petitioner's mother testified at trial, Yolanda and petitioner no longer got along once petitioner became a teenager. Moreover, Yolanda later moved without giving any forwarding information and cut off all ties to her family. Petitioner's family has been unable to locate Yolanda. (RT 3828.) Accordingly, defense counsel cannot be faulted for not calling her as a witness.

petitioner's impoverished Peruvian relatives who, when faced with the same difficult conditions, did not turn to a life of crime and murder.

As in *Dyer v. Calderon*, petitioner has not demonstrated that counsel did not make a reasoned tactical decision in choosing the witnesses presented at the penalty phase of the trial. The two cases petitioner cites for the proposition that defense counsel is essentially required to present background and cultural evidence in the penalty phase, *Mak v. Blodgett* (9th Cir.1992) 970 F.2d 614, 617-619, and *Brewer v. Aiken* (7th Cir. 1991) 935 F.2d 850, 858-859, are not on point. (Pet. 50.) In both cases, defense counsel failed to present any evidence in mitigation as a result of being unprepared for going forward with the penalty phase. In *Mak*, inexperienced defense counsel had been counting on presenting evidence regarding the codefendant's culpability at the penalty phase. When the trial court ruled that evidence inadmissible, counsel was left with no evidence for the penalty phase. (*Mak, supra,* at pp. 617-618.) Similarly, in *Brewer*, defense counsel apparently assumed that he would have time between the guilt phase and the penalty phase to conduct further investigation for the penalty phase. When the court denied counsel's request for a week continuance to obtain witnesses for the penalty phase and proceeded immediately, defense counsel was unable to present any witnesses in mitigation. (*Brewer, supra,* at pp. 851-852.)

Both cases relied on by petitioner involved the complete absence of any character witnesses testifying about the defendant's background or mental state, which absence was not based on any tactical decision, but rather arose from defense counsel's failure to understand and prepare for the proceedings. By contrast, in the present case, defense counsel did present substantial evidence about petitioner's background, history, and mental state through petitioner's mother, minister, and psychologist. The prosecution did not challenge this mitigation evidence put on by the defense, and all of the

relevant, helpful information was placed before the jury. The testimony of the additional witnesses identified by petitioner, detailing petitioner's genealogical history, and the cultural history of Peru, would largely be either irrelevant or cumulative of that information presented. Petitioner has not demonstrated that defense counsel was incompetent for electing to rely on the witnesses presented at trial.

Petitioner also cannot demonstrate prejudice. The crimes were necessarily heinous, murdering two innocent victims during a robbery by shooting them in the back of the head, one of whom was running to escape, and trying to shoot a third victim who survived only because petitioner's gun jammed. The prosecution also presented evidence of petitioner's prior criminal history, in which he robbed another woman at gunpoint and fired numerous shots at the pursuing police officers during a high-speed chase through the crowded streets of New York. Significantly, the jury had already heard testimony on petitioner's difficult childhood, his abusive alcoholic father, his family's poverty in Peru, their lives in New York, petitioner's early drug use, and petitioner's difficulty in assimilating into life in this country. The jury was unmoved by this evidence and found the aggravating factors outweighed this mitigation. The evidence identified by petitioner does not present a new picture of petitioner, but rather merely adds additional testimony on those issues already presented to the jury. Accordingly petitioner cannot demonstrate a reasonable likelihood of a more favorable outcome had defense counsel called petitioner's aunts and uncles from Peru.

III.

DEFENSE COUNSEL DID NOT HAVE A CONFLICT OF INTEREST WHILE REPRESENTING PETITIONER

Petitioner next contends that trial counsel suffered from a conflict of interest when representing petitioner, and identifies several different subclaims of alleged conflict of interest. We disagree with petitioner's claims and will address them seriatim.

A. Standard of Review

Under federal law, appellant must demonstrate "'that an actual conflict of interest adversely affected his lawyer's performance.'" (*People v. Clark* (1993) 5 Cal.4th 950, 994, 994-995; see also *Cuyler v. Sullivan* (1980) 446 U.S. 335, 348.) Under state law, he must show that "the record supports 'an informed speculation' that appellant's right to effective representation was prejudicially affected. Proof of an 'actual conflict' is not required." (*People v. Clark, supra*, 5 Cal.4th at p. 995; see also *People v. Bonin* (1989) 47 Cal.3d 808, 834-835; *People v. Mroczko* (1983) 35 Cal.3d 86, 104.)

Conflicts of interest broadly "'embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by . . . his own interests.'" (*People v. Bonin, supra*, 47 Cal.3d at p. 835.) A conflict exists "'whenever counsel is so situated that the caliber of his services may be substantially diluted.'" (*People v. Hardy* (1992) 2 Cal.4th 86, 136.)

Under both the state and federal formulations, appellant must establish from the record "that the alleged conflict prejudicially affected counsel's representation of the defendant . . . ." (*People v. Clark, supra*, 5 Cal.4th at pp. 995, 1002; *People v. Jones* (1991) 53 Cal.3d 1115, 1137.) This does not mean appellant must show an adverse effect upon the result, but only

that "'counsel "pulled his punches," i.e., failed to represent defendant as vigorously as he might have had there been no conflict.'" (*Clark, supra*, at p. 995; see *People v. Easley* (1988) 46 Cal.3d 712, 725.) Rank speculation will not do: "informed speculation" requires some factual basis, "some 'discernible' grounds to believe that prejudice occurred" (*People v. Rodriguez* (1986) 42 Cal.3d 1005, 1014), "some evidence of ineffective representation." (*People v. Marshall* (1987) 196 Cal.App.3d 1253, 1258.)

"In other words, the '"existence of even a potential conflict of interest must be accompanied by some evidence of ineffective representation before reversal is required."'" (*People v. Dancer* (1996) 45 Cal.App.4th 1677, 1685, disapproved on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1119, 1123, quoting *People v. Clark, supra*, 5 Cal.4th at p. 995.) Petitioner has failed to meet this standard.

B. <u>Alleged Casework Overload</u>

Petitioner notes that he was represented by three different Deputy Public Defenders while awaiting trial. Petitioner was first represented by James Thompson, who conducted the preliminary hearing, until sometime around mid-August 1984, when Michelle Forbes took over petitioner's case. (Compare CT 194 with CT 192, 196.) Ms. Forbes represented petitioner until early 1996, when John Aaron took over the case. (See CT 273.)

Petitioner contends that during the period that Ms. Forbes represented petitioner, she suffered from a conflict of interest due to alleged casework overload. However, petitioner's claims are based on nothing more than sheer speculation and unsupported assertions without any evidentiary foundation.

Specifically, Petitioner asserts without any support that an undefined number of cases ("some or all") of public defender Thompson's caseload was transferred to public defender Forbes, and that the office failed to hire a

qualified attorney to replace Thompson and assume responsibility for petitioner's capital trial. (Pet. 101.) Of course, regardless of whether or not the public defender's office did hire a new attorney, the office would not have transferred a death penalty case to a new attorney, but rather to an experienced defender, which is what happened in this case, when petitioner's case was transferred to Ms. Forbes. Petitioner also claims that Ms. Forbes already had an existing caseload when she received petitioner's case, but carrying a caseload of numerous cases is of course typical of any public defender.

Petitioner also claims that Ms. Forbes was "overburdened" by her caseload, that she had to put petitioner's case on the "back burner," and that she did not conduct any investigation during the 1½ years she represented petitioner. (Pet. 101.) Not only does petitioner provide absolutely no support for this bald assertion, this claim is contrary to the statements made by Ms. Forbes under oath in her continuance requests.

In her declarations filed in support of her continuance requests, Ms. Forbes indicated that the only reason for the requested continuances was the need to conduct further factual investigation and legal preparation in order to best present petitioner's case. (CT 178-179 [time needed to file pretrial motions], 191-192 [conduct investigation], 204-205 [additional time to prepare], 217-218 [additional time needed to file pretrial motions], 223-224 [same], 263-265[additional time needed to complete out of state investigation].) The declarations never suggested that she was unable to work on petitioner's case due to any casework overload, nor that she or her investigators ever put petitioner's case on the back burner. To the contrary, her declaration in support of her last continuance demonstrated that her investigator had been working with other investigators in New York tracking down records and witnesses, which investigation was still ongoing, and which she anticipated would require an additional five months to complete. (CT

264.) Indeed, the affidavits offered by petitioner in support of his claim similarly reflect that defense counsel was conducting an investigation of possible witnesses from New York. (See Exh. A-74 [declaration of Maria Andino, noting she was contacted by defense investigators]; Exh A-75 [declaration of Walter Manuel Calderon Levano, same]; Exh. A-76 [declaration of Norma Fuentes, same].)

Moreover, during this period, Ms. Forbes filed several motions on petitioner's behalf, further demonstrating her diligence in representing petitioner. (CT 228-237 [discovery motion filed Mar. 8, 1985]; 238 [discovery motion filed July 26, 1985]; 240-244 [motion to disclose confidential informant filed Aug. 13, 1985]; see also CT 256-257 [filing subpoena duces tecum for records from New York Department of Corrections, Sept. 19, 1985].) These motions and declarations lead to the inference that defense counsel Forbes was actively and diligently investigating and researching petitioner's case and petitioner offers absolutely no evidence to counter this inference of competence. Accordingly petitioner's claim of conflict of interest must fail. (*People v. Rodriguez, supra*, 42 Cal.3d at p. 1014 [speculation cannot support a claim of conflict of interest]; *People v. Clark, supra,* 5 Cal.4th at p. 995 [same].) Moreover, petitioner cannot demonstrate any discernable prejudice in his representation, because Ms. Forbes did not represent petitioner at trial. Any possible impact on petitioner's representation by defense counsel was obviated by the fact that his case was transferred to another attorney who did not suffer from any conflicts and who competently represented petitioner at trial.

C. Romantic Relationship With Sergeant Ronco

Petitioner next contends that Ms. Forbes suffered from a conflict of interest because she was dating Sergeant Ronco with the San Jose Police

Department, and she eventually married Sergeant Ronco on May 24, 1996, after she was no longer representing petitioner. (Pet. 104-105.) Once again, petitioner's factual claims are not supported by any evidence. Moreover, petitioner has not provided any evidence that Ms. Forbes's representation was prejudicially impacted in any way by her alleged dating relationship with Sergeant Ronco. Indeed, it is apparent from the record that Ms. Forbes ended her representation of appellant *before* her alleged relationship with Sergeant Ronco would have presented any conflict of interest, namely before she would have faced Sergeant Ronco in any sort of adversarial setting.

Petitioner contends that because of her romantic relationship with a San Jose police officer, she did not adequately investigate or develop a defense for petitioner. Petitioner fails to demonstrate any support for this claim. Petitioner asserts that Sergeant Ronco was "a member of the prosecution team and a possible important witness with information that was potentially crucial to the case." (Pet. 106.) However, the record does not support this assertion. Sergeant Ronco did not testify at trial nor does it appear that he was "a member of the prosecution team." Rather, Sergeant Ronco was apparently involved in the initial stages of the investigation, with his name appearing on two police reports, but there is no evidence his involvement extended beyond mid-1984, which was prior to any alleged relationship with defense counsel.

Sergeant Ronco joined Sergeant Kracht in interviewing the victim's wife, Maria Guerrero. (Exh. Q [Police Report from 4/20/84].) Mrs. Guerrero's statements, however, were relevant only for providing background, identifying the jewelry stolen, and for her description of finding the bodies in the shop. Her entire narrative was laid out in the police report, and no additional investigative work by Sergeant Ronco is reflected in the report. The second report identified by petitioner involving Sergeant Ronco was a supplemental police report from May 4, 1984, which apparently was prepared

by Sergeant Kracht, and in which Sergeant Ronco's name appears on the last page. However, this second report does not detail what Sergeant Ronco's investigative role was, nor does it suggest that Sergeant Ronco was a key figure in the investigation of petitioner. (Exh. R at p.3.) Moreover, petitioner provides no evidence suggesting that Sergeant Ronco was an active member of the investigative team working to prosecute petitioner after his involvement in the Summer of 1984, nor that he was still working on petitioner's case when he began any alleged romantic relationship with Ms. Forbes.

Petitioner also asserts that Sergeant Ronco "potentially had access to material exculpatory (Brady) information that the district attorney failed to disclose to Attorney Forbes." (Pet. 106.) This claim is entirely without support and is directly contradicted by the fact that both police reports referring to Sergeant Ronco were turned over to petitioner. Petitioner fails to identify any material exculpatory information available to Sergeant Ronco that was not turned over to the defense.[13/] More importantly, this assertion does not support petitioner's claim that *Ms. Forbes* acted under a conflict of interest or was potentially prejudiced.

Petitioner also asserts that "[i]t is more likely that Forbes obtained confidential information material to petitioner's defense" from Sergeant Ronco. (Pet. 106.) Again this assertion is without factual basis. Moreover, this assertion does not support a claim of a potentially prejudicial conflict of interest. Indeed, if anything, defense counsel learning additional confidential information about his defense could only *benefit* petitioner. Petitioner suggests that defense counsel could have become prejudiced against petitioner after learning such information. (Pet. 106.) However, defense counsel had

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13. To the extent that petitioner is relying on the confidential informant testimony ordered sealed by the trial court, we will address that claim below.

already agreed to represent petitioner knowing that he murdered two men in cold blood by shooting them in the base of the skull, and then robbed their jewelry store. Such facts are hardly overwhelmingly prejudicial for defense attorneys who handle death penalty cases, and petitioner identifies no information discovered by defense counsel that would have been any more prejudicial than the undisputed facts of the two murders already known to counsel.

Lastly, petitioner contends that Ms. Forbes's loyalty was divided between her future husband and her client. However, as explained above, petitioner does not present any evidence suggesting that Sergeant Ronco remained actively involved in petitioner's case after his last police report in mid-1984. Moreover, Ms. Forbes withdrew from petitioner's case prior to any marriage to Sergeant Ronco, thereby avoiding any potential conflict arising from a relationship. Petitioner's claim has no merit.

D. Simultaneous Representation Of Witnesses For The Defense

Petitioner next contends that defense counsel suffered from a conflict of interest because the public defender's office represented two potential defense witnesses as well as petitioner. (Pet. 107-109.) This claims is also without merit.

Petitioner correctly notes that dual representation of a defendant and a witness may give rise to a conflict of interest. (*People v. Bonin* (1989) 47 Cal.3d 808, 835 ["Conflicts may also arise in situations in which an attorney represents a defendant in a criminal matter and currently has or formerly had an attorney-client relationship with a person who is a witness in that matter."]; see also *People v. Pennington* (1991) 228 Cal.App.3d 959, 965.) However, the mere fact that the public defender's office had an attorney-client relationship with a potential witness is not sufficient by itself to demonstrate a conflict.

(*People v. Pennington, supra,* 228 Cal.App.3d at pp. 965-966.) Rather petitioner must demonstrate that the prior or current representation of the witness in some way prejudiced counsel's representation of petitioner. (*Ibid.*) Petitioner cannot meet that burden in this case because there is no evidence that petitioner's three trial counsels ever considered either Ronnie Nance or Steven Price to be an important witness in petitioner's case, nor is there any evidence that the fact the public defender's office at one time represented these men affected defense counsels' strategy or representation in any way.

Petitioner claims that Ronnie Nance was "a witness who had information that the capital offenses were ordered by a major Colombian drug trafficker . . . ." (Pet. 107.) However, the evidence does not support petitioner's claim. The police report referring to Mr. Nance indicates that he had no personal knowledge of this allegation and was merely relaying what he heard from the confidential informant. (Exh. R.) Moreover, as will be discussed in more detail below, this Court already concluded that the confidential informant did not have any material information for the defense.[14/]

Additionally, the exhibits offered by petitioner show that, when represented by the public defender's office, Mr. Nance was not directly represented by any of the three attorneys who represented petitioner. (Exh. S.) The records also reflect that the public defender's office only represented Mr. Nance in 1984, and was not actively representing him at the time of petitioner's trial. Consequently, the fact that the representation had already concluded well before trial further attenuates any possibility that the prior representation had impacted defense counsel's representation of petitioner. More importantly, there is simply no evidence suggesting that any of

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14. Indeed, petitioner has never provided any statement from Mr. Nance that would support his claim that Mr. Nance ever had any relevant, material evidence to support his defense.

petitioner's defense counsel had actual knowledge of any confidential information relating to Mr. Nance that might affect their representation of petitioner, nor even had access to Mr. Nance's files that might contain any confidential information. As the court of appeal explained in *Pennington, supra,* 228 Cal.App.3d at p. 966, the primary evil that can arise from prior representation of a witness is that counsel will avoid questioning the witness about confidential information that counsel learned from the witness during that prior representation. However, no prejudicial conflict arises when defense counsel has not learned any confidential information from the prior witness. (See *People v. Belmontes* (1988) 45 Cal.3d 744, 776 [finding no conflict when defense counsel had no confidential information about witness].)

Petitioner cannot demonstrate that defense counsels' representation was in any way diminished because of the asserted conflict. Petitioner concedes that "[a] note in trial counsel's file indicates that they were aware Mr. Nance was their 'client' . . . ." (Pet. 108.) Given that all three defense attorneys representing petitioner were aware of Mr. Nance from the police files and were also aware that Mr. Nance was at one time represented by the public defender's office, yet none of attorneys reported any potential conflict of interest to the court, confirms that each of petitioner's defense counsel concluded that Mr. Nance was not an important witness for the defense.

Petitioner raises a similar claim with respect to Steven Price, also asserting that Mr. Price had information supporting petitioner's duress defense.[15/] Again petitioner has failed to provide any evidence suggesting that defense counsel "pulled his punches" because of the alleged conflict of interest. The exhibit petitioner offers in support of his conflict claim shows

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15. As with Mr. Nance, petitioner has never provided any statement from Mr. Price that would support his claim that Mr. Price ever had any relevant, material evidence to support his defense.

that Mr. Price was represented by the public defender's office in 1987. (Exh. T.) However, petitioner was represented by the public defender's office for over two years *before* this potential conflict even arose; yet petitioner has not demonstrated any change in approach, strategy or decision-making by counsel on whether to call Mr. Price as a witness from before the asserted conflict arose to after the asserted conflict arose.

Furthermore, as with Mr. Nance, Mr. Price was not represented by any of petitioner's public defenders, and petitioner has not offered any evidence that defense counsel learned of or had access to any confidential information provided by Mr. Price which would have impacted on petitioner's representation. Accordingly, because petitioner has not demonstrated that defense counsel's representation changed to his detriment as a result of this alleged conflict arising in 1987, nor that defense counsel was aware of any confidential information that impact on petitioner's defense, petitioner's claim of prejudicial conflict of interest fails.

Petitioner counters by asserting that "[t]he office of the Public Defender, as a result of their representation of these potential witnesses, suffered from a conflict of interest that prejudiced them against petitioner and undermined trial counsel's responsibility to be a zealous advocate for petitioner." (Pet. 109.) However, this bald assertion is unsupported by the record. There is simply no evidence that any of petitioner's attorneys ever thought either of these individuals would be beneficial witnesses, or that counsels' strategy with regard to these two individuals was in any way affected by the prior or subsequent attorney-client relationship with the public defender's office.

E. Alleged Management And Budgetary Problems At The Public Defender's Office

Petitioner next claims that he was deprived of effective assistance of counsel due to alleged management and budgetary problems at the Santa Clara County Public Defender's Office. For support, petitioner relies entirely on the published opinion in *Portman v. County of Santa Clara* (9th Cir. 1993) 995 F.2d 898, which details the highly political firing of the Santa Clara County Public Defender in 1987, and his subsequent lawsuit against the county for wrongful termination. (Pet. 110-112.) Petitioner's claim lacks merit.

Petitioner relies on the fact that one of the reasons Mr. Portman was fired was because, in a bid to force the county to provide more funding to his office, Mr. Portman claimed at a meeting of the Board of Supervisors that his office faced possible malpractice claims and disciplinary action for taking too many cases. (*Portman, supra.,* 995 F.2d at 901.) In addition, as one of Mr. Portman's claims in challenging his termination and the statutory authority of the Board of Supervisors to fire him, Mr. Portman tried to raise a Sixth Amendment claim, contending that defendants would receive ineffective assistance of counsel. (*Id.* at p. 902.) The Ninth Circuit rejected Mr. Portman's claim as unripe, however, explaining:

> "Here, Portman argues that the at-will statute interferes with his clients' rights to the effective assistance of counsel. However, Portman fails to point to even a single client who has received substandard representation as a result of this statute or whose future representation is threatened in any way. In fact, Portman fails to establish that he was personally representing any clients at the time he was fired, or that had he not been fired, he would be representing clients. Instead, his entire argument about the effect of the at-will statute rests upon hypothetical situations and hypothetical clients." (*Id.* at p. 903.)

Petitioner acknowledges that in *Portman* the Ninth Circuit found no evidence of any ineffective assistance in Santa Clara County as a result of Mr.

Portman's firing (Pet. 112), but he claims that his case is one in which the firing did give rise to such a claim. Petitioner, however, fails to provide any evidence as to how the funding of the Santa Clara County Public Defender's Office affected the representation in his case. Petitioner asserts that his case went to trial two months after Mr. Portman was fired and for those two months "the case was kept on a strict budget with very few expenses incurred." (Pet. 112.) Petitioner, however, ignores the fact that the public defender's office had been representing him for over three years prior to Mr. Portman's firing, and had already conducted extensive interviews and investigation in support of petitioner's defense.

Petitioner also asserts that his case was turned over to an inexperienced attorney, namely John Aaron. (Pet. 112.) However, petitioner provides no evidentiary support for his assertion that John Aaron was not an experienced criminal defense attorney.[16/] (See *People v. Wright* (1990) 52 Cal.3d 367, 412 [lack of capital trial experience does not in and of itself establish incompetency].) Petitioner also points out that Mr. Aaron's license to practice had been suspended from July 1980 to January 1987, due to failure to pay bar dues. (Pet. 113.) However, this suspension was merely due to a technical violation, not due to any incompetence or ethical lapses, as was made clear when Mr. Aaron was reinstated by this Court with no recommendation for any discipline for misconduct. (Exh. P.) His suspension therefore does not demonstrate ineffectiveness. As this Court explained in *People v. Ngo* (1996) 14 Cal.4th 30, 35, "We do not presume that a suspended attorney lacks professional competence. Merely because an attorney has been disciplined for some infraction of the rules by which he must abide is no reason for assuming

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16. By the time of petitioner's trial, Mr. Aaron had been a practicing member of the California Bar for over a decade.

that he is not a qualified and efficient lawyer." (*Ibid.* [quoting *In re Johnson* (1992)1 Cal.4th 689, 699]; see also *People v. Frye* (1998) 18 Cal.4th 894, 995-997 ["A suspension under these circumstances does not constitute a judgment on counsel's professional competence."].)

Petitioner contends, again without support, that Mr. Aaron had insufficient time to investigate his case and relied on Ms. Forbes's investigation. (Pet. 113.) Not so. Mr. Aaron had *10 months* to prepare for and conduct follow-up investigation in petitioner's case before it went to trial. Moreover, petitioner ignores the fact that Ms. Forbes and her predecessor Mr. Thompson, had already been thoroughly investigating petitioner's case for roughly two years before Mr. Aaron took over. Accordingly, Mr. Aaron and petitioner's prior defense counsel and investigators had ample time to investigate petitioner's potential defenses prior to trial.

Petitioner asserts without support that "[n]ot one member of petitioner's defense team traveled out of Santa Clara County to investigate the case . . . ." (Pet. 113.) However, defense counsel Forbes explained to the court in her sworn declaration that defense investigator Alayne Bolster was working with investigators in New York to track down records and witnesses in New York. (CT 264.) Accordingly, investigators acting on behalf of the defense team were working in New York for several months.

Petitioner also suggests glibly that the mental health examiner hired by the defense was not qualified to evaluate petitioner's mental state. (Pet. 114.) However, the voir dire of defense expert's qualifications amply demonstrate that he was fully qualified to examine petitioner's mental state and evaluate whether petitioner suffered from any mental illness or organic brain damage. (See RT 3867-3877.) Petitioner also asserts that defense counsel "failed to interview any or very few witnesses concerning a guilt phase defense . . . ." (Pet. 114.) Once again, this assertion lacks any evidentiary

support. More importantly, petitioner's claim is without merit because there simply were no beneficial witnesses who could support petitioner's claim of duress. The only person whom petitioner identified to the police as being involved in the alleged order from a drug dealer to kill the jewelry store owners, Karlos Tijiboy, testified for the prosecution and credibly denied any involvement. And as explained above, additional funding would not have affected the outcome.

Accordingly, petitioner has not demonstrated any failings of defense counsel, attributable to any budgetary constraints imposed on the public defender's office, nor that defense counsels' representation was in any way impacted by the alleged budgetary issues. Petitioner has not demonstrated any constitutionally deficient performance nor has he shown that he was in any way prejudiced by the alleged incompetence.

IV.

ADDITIONAL ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner next raises a hodge-podge of additional claims of ineffective assistance, including several assertions which merely repeat those already addressed above. (Pet. 115.) None have merit.[17/]

A. Decision Not To Ask For A Continuance

Petitioner takes issue with counsel's decision not to ask for another continuance prior to trial. Petitioner notes that Penal Code section 190.3 requires that the prosecution give defense counsel written notice of the evidence it intends to use in aggravation in the penalty phase, in order to give the defense a reasonable period of time to investigate that evidence. (Pet. 117.) Petitioner observes that the prosecution filed its notice of the circumstances in aggravation on the first day of the guilt phase trial, before the start of in limine motions or jury selection, which was technically late. The trial court asked defense counsel if he wanted a continuance, but defense counsel said no continuance was necessary. (RT 9-10.) Now, petitioner claims that defense counsel was constitutionally ineffective for failing to request a continuance in order to investigate the prosecution's aggravating evidence. (Pet. 118-119.)

Contrary to petitioner's claim, defense counsel's decision not to request a continuance was a perfectly reasonable tactical decision. Defense

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17. Petitioner's first few assertions, namely that defense counsel Aaron was allegedly inexperienced, that his license had been temporarily suspended (but reinstated before trial) for failure to pay bar dues, and that he allegedly had a limited budget and insufficient time (10 months) to prepare for trial (pet. 115-116) have already been addressed above.

counsel explained that, even though the prosecution actually filed the notice *on* the first day of trial, rather than *before* the first day of trial, which was technically tardy, the prosecutor had already served a copy of the notice to defense counsel two days earlier, before the case went to trial. (RT 9-10.) Moreover, defense counsel also noted that the prosecutor had previously discussed with defense counsel which aggravating evidence she planned to introduce, well before trial. Defense counsel pointed out that, even though the notice of the circumstances aggravation stated that the evidence was "in addition to" the oral notice she had previously given defense counsel, the written notice in fact contained nothing more than what was already orally given to defense counsel before the case went to trial. (RT 9-10.)

Given that the prosecution had previously given the defense oral notice of all of the circumstances in aggravation well before trial, and had served defense counsel with the requisite written notice of circumstances in aggravation two days before trial, which did not introduce any new circumstances of which defense counsel was not already aware would be presented, defense counsel had no need to request a continuance. Defense counsel had already fully investigated and prepared for the penalty phase prior to the start of trial based on the information already provided by the prosecution. Accordingly, defense counsel was not ineffective for failing to request a continuance that was entirely unnecessary.

Petitioner also fails to demonstrate prejudice. He does not show how a continuance would have resulted in a more favorable outcome.

B. Decision To Waive Opening Statements In Guilt And Penalty Phase

Petitioner next argues that defense counsel was ineffective for failing to give any opening statement. (Pet. 119.) However, defense counsel's decision was a reasonable tactical decision under the circumstances.

People v. Mitcham (1992) 1 Cal.4th 1027, 1059 is directly on point. In *Mitcham*, this Court rejected a similar unsupported claim, observing:

> "Defendant next complains his counsel was ineffective in electing to present no defense case. Defendant focuses on his counsel's comment, following the prosecutor's opening statement, that he would reserve his opening statement, and counsel's subsequent decision to present no opening statement or evidence.
>
> "The decisions whether to waive opening statement and whether to put on witnesses are matters of trial tactics and strategy which a reviewing court generally may not second-guess. (See *People v. Pangelina* (1984) 153 Cal.App.3d 1, 6-9.) Reasonably competent counsel could have determined to wait to hear the prosecution's case before deciding whether to present a defense. Defendant's counsel could have determined that the defense's strongest argument was that the prosecution had failed to prove its case beyond a reasonable doubt. He in fact took this position during closing argument. . . . In any event, because the record does not reveal why counsel elected not to present a defense, defendant's claim must fail." (*Ibid.*)

Petitioner raises a similar contention as in *Mitcham*, and his claim is similarly unavailing. Petitioner contends that because he admitted the crimes, this was not a case in which it was reasonable for defense counsel to rely on the prosecution failing to prove its case. (Pet. 119.) However, petitioner ignores the fact that the only evidence supporting his assertion of "imperfect duress" were the statements he gave to the police in which he claimed he was threatened and ordered to murder the jewelry store owners by the Colombian or Peruvian mafia, and petitioner's statements were introduced by the prosecution. Accordingly, it was entirely appropriate for defense counsel to

rely on the prosecution to present the relevant evidence and waive his opening statement.

The same is true for the penalty phase. The prosecution's opening statement was very short, covering just over three pages in the Reporter's Transcript. (RT 3716-3719.) Moreover, the only evidence in aggravation put on by the prosecution was two witnesses who testified about the circumstances underlying petitioner's prior conviction in New York in which he robbed a grocery store and shot at police during the escape attempt. Defense counsel could not and did not attempt to refute the evidence of the prior offense put on by the prosecution. Rather defense counsel offered testimony about petitioner's life and psychology in an effort to persuade the jury to vote for leniency rather than death. Indeed, the defense witnesses testified about a wide range of facts that may have been influential in the decision-making process, but which did not (and indeed were not designed to) present a coherent story that would lend itself to a simple, comprehensible opening statement. Defense counsel reasonably elected to proceed directly with the testimony rather than present a potentially rambling, and disjointed opening statement trying to tie all of the disconnected facts to be presented into a single story. Defense counsel's decision to waive the opening statement in the penalty phase was an appropriate tactical decision, which does not give rise to a claim of ineffective assistance of counsel.

Petitioner counters by claiming that defense counsel waived opening statements "because he had not adequately prepared for either stage of the case." (Pet. 119.) However, this claim lacks any support. Indeed, as explained above, trial counsel conducted extensive investigations over the three years that elapsed prior to petitioner's case going to trial. Defense counsel worked with an expert psychologist, who testified at the penalty phase on behalf of petitioner. Defense counsel also demonstrated that he was fully

prepared and capable by his thorough understanding and cross-examination of the prosecution witnesses at both the guilt and penalty phases. Petitioner also has not shown how presenting an opening statement in either phase would have likely improved the outcome.

C. Cross-examination of Carlos Valdiviezo, Maria Guerrero, and Officer DiGregorio

Petitioner next argues that defense counsel failed to adequately cross-examine three prosecution witnesses, Carlos Valdiviezo, Maria Guerrero, and Officer DiGregorio. We disagree.

With respect to Carlos Valdiviezo, petitioner claims generally that defense counsel failed to ask Carlos Valdiviezo about alleged "inconsistencies" in his testimony. Petitioner refers to one alleged inconsistency about whether petitioner pointed the gun at Mr. Valdiviezo's head or his legs. (Pet. 120.) Petitioner is referring to the fact that Officer Caro testified at an earlier hearing that Mr. Valdiviezo said petitioner fired at his feet before trying to shoot him in the head, whereas at trial Mr. Valdiviezo did not say petitioner shot at his feet. (RT 18.) However, contrary to petitioner's assertion, defense counsel did ask Mr. Valdiviezo about this inconsistency, which Mr. Valdiviezo was able to clarify. When defense counsel asked if he told Officer Caro that petitioner fired a round at him, Mr. Valdiviezo explained that he never said petitioner fired at his feet, but rather, he told the officer that when petitioner was trying to unjam the gun, a round was ejected and fell to the ground at his feet. (RT 3178.) This explanation was consistent with the fact that an unexpended round was found on the floor of the jewelry store in addition to the two expended shell casings. Accordingly, defense counsel did in fact ask about the claimed inconsistency and the inquiry proved to be fruitless pursuit in light of Mr. Valdiviezo's explanation.

Petitioner next argues that when cross-examining Officer DiGregorio during the penalty phase, defense counsel failed to lay a proper foundation for the relevancy of the extent of petitioner's head injuries sustained when arrested for the prior offense in New York. (Pet. 120; RT 3745.) Petitioner's claim is inapposite. The information about petitioner's head injuries was not rendered inadmissible due to the any failing by defense counsel with respect to laying a foundation for relevancy with Officer DiGregorio. Rather, Officer DiGregorio simply did not have any personal knowledge of petitioner's head injuries other than that petitioner was transported to Logan Hospital upon his arrest, which defense counsel had the officer testify to on cross-examination. (RT 3745-3746.) In fact, defense counsel elicited all of the relevant information that was within Officer DiGregorio's knowledge about the head injuries. Moreover, defense counsel had no tactical reason for attempting to introduce any specific evidence about whether petitioner suffered any head injuries at that prior arrest in light of the defense expert's opinion that petitioner did not suffer from any organic brain damage. Defense counsel's performance was not deficient.

Thirdly, petitioner criticizes defense counsel for not asking any cross-examination questions of Maria Guerrero, the wife of one of petitioner's victims, Orestes Guerrero. (Pet. 121.) This claim is also without merit. Petitioner fails to identify even a single question that should have been asked that would have been important to the defense. Significantly, Mrs. Guerrero only testified about uncontested issues, including what jewelry was taken, and where she found the bodies of the two victims when she came to the store. Defense counsel had little to gain by cross-examining her since she had nothing beneficial to provide the defense. In addition, defense counsel could reasonably have determined that he would run the risk of alienating the jury by needlessly questioning the wife of petitioner's murder victim, while

building sympathy for her as a victim in the eyes of the jury. Defense counsel made a reasonable tactical decision to forego a useless and potentially detrimental cross-examination of Mrs. Guerrero.

D. Intoxication Evidence

Petitioner next argues that defense counsel was ineffective for failing to introduce evidence about petitioner's intoxication due to drug and alcohol intoxication at the time of the murders, at the time of his confession, and at the time he committed his prior offenses in New York. (Pet. 121.) We disagree.

Contrary to petitioner's claim, defense counsel in fact presented the best evidence available regarding petitioner's alcohol intoxication at the time of the capital murders and his confession. Defense counsel introduced the evidence of petitioner's blood alcohol level, which was taken several hours after his arrest, and counsel had a toxicology expert testify about the level of intoxication at the time of his arrest and the likely impact of such a level of intoxication. (RT 3445-3452.) Petitioner asserts that defense counsel was ineffective for relying on the state's toxicologist and failing to call his own toxicology expert. (Pet. 121.) However, petitioner fails to indicate how or why any other expert, either for the prosecution or the defense, would have given any other response with regard to petitioner's degree of intoxication based on his blood alcohol level. The toxicologist put on by the prosecution was fully capable of discussing the objective facts of petitioner's blood alcohol level, what the affect of the passage of time is on the blood alcohol level, and what affect a particular blood alcohol level has on individuals. Defense counsel properly concluded that an additional expert was simply not necessary and would have been a waste of defense resources.

With respect to petitioner's alleged drug use on the day of the murders, as already explained above, defense counsel reasonably decided not

to pursue a claim of drug intoxication because the drugs petitioner said he took were legal drugs that were not necessarily narcotic in nature. Defense counsel reasonably concluded that presenting that statement by petitioner, would run the risk of alienating the jury without gaining the benefit of showing that petitioner was actually under the influence of a narcotic at the time of the murders.

With respect to the prior New York offense, defense counsel made a tactical decision to introduce evidence of petitioner's prior drug use in New York in the context of the psychological evaluation by Dr. Brady. (See, e.g., RT 3884-3894.) This allowed defense counsel to present the information in a potentially beneficial context rather than as simply another negative trait of the defendant in the eyes of the jury, namely that he used large amounts of cocaine in the 1980s which contributed to his violent, criminal behavior.

Not only were all the decisions by counsel of which petitioner now complains reasonable tactical decisions under the circumstances of petitioner's undisputable guilt, petitioner also fails to demonstrate any prejudice from his claims of incompetence. None of the incidents identified by petitioner would have affected the outcome of his case. Petitioner admitted his guilt to the police. His only asserted justification, namely his claim to the police of threats of future harm to his family by an unspecified group, was internally inconsistent and lacking in credibility, was completely lacking in solid evidentiary support, and was directly contradicted at trial by Karlos Tijiboy. More importantly, imperfect duress simply is not a defense to capital murder. The capital murders were heinous execution-style murders, and his prior New York offense also demonstrated an extreme indifference to human life. None of the alleged failings by defense counsel had any impact on the inevitable outcome of the trial, and indeed petitioner points to nothing to support his

claim otherwise. Petitioner has failed to meet his burden of demonstrating either incompetence or prejudice.

V.

THE TRIAL COURT CORRECTLY DENIED PETITIONER'S MOTION TO SUPPRESS HIS STATEMENTS TO THE POLICE AFTER THE MURDERS

Petitioner next contends that the trial court erred in denying his motion to suppress his statements to the police. (Pet. 122.) Petitioner is incorrect.

A. Valid Miranda Waiver

Petitioner contends that his *Miranda*[18] waiver was not voluntary. (Pet. 125.) Petitioner argues that he was intoxicated at the time and that he was mentally impaired. However, the toxicology report showed that petitioner's blood alcohol level was only .06 percent at around 1 a.m. (RT 197), which indicates that his blood alcohol level was likely only around .16 percent at the time of his arrest. (RT 3450.) The officers who interviewed petitioner reported that petitioner showed no signs of being impaired or under the influence of alcohol. (RT 130, 194.) The toxicology report showed no signs of drug use. (RT 197.) With respect to petitioner's claim of mental impairment, the defense expert reported in the penalty phase that petitioner did not suffer from a serious mental impairment or any organic brain damage, and that petitioner's I.Q. was well within the normal range. (RT 3875.) Most importantly, the trial court had the opportunity to listen to the tape of petitioner's *Miranda* waiver and subsequent confession and make a direct determination of whether or not petitioner was impaired or unable to understand and waive his *Miranda* rights. The court concluded:

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18. *Miranda v. Arizona* (1966) 384 U.S. 436

> "The court finds in this particular case that the defendant, Mr. Bacigalupo, was in fact properly admonished as to his constitutional rights as required by the *Miranda* decision. It appears to the court from listening to the tape that he acknowledged he understood what those rights were, and it's clear to the court that with those rights in mind he made a free and voluntary waiver of those rights, and elected to answer the questions posed to him by Officer Reyes in the subsequent interrogation." (RT 231-232.)

Petitioner's claim is therefore without merit. As this Court noted in *People v. Jackson* (1989) 49 Cal.3d 1170, 1189: "'[the] mere fact of voluntary consumption of alcohol does not establish an impairment of capacity,' and here, as in [*People v. Hendricks* (1987) 43 Cal.3d 584] the evidence showed that defendant was able to comprehend and answer all the questions that were posed to him." (*Ibid.* [citing cases].)

Petitioner also contends that he did not understand his *Miranda* rights "due to the advisement being read only in English, and his unfamiliarity with this country's legal system." (Pet. 126.) Neither claim has merit. Petitioner fully understood English. Indeed, when asked by Officer Reyes at the start of the interview whether he understood English, he informed the officer "that he had no problem with English" and that he had been in this country for approximately 13 years. (RT 47.) Petitioner also demonstrated that he understood English by the fact that he voluntarily dismissed his court-appointed interpreter, and informed he court that he fully understood all of the proceedings in English. (RT 290-291.) Petitioner was also familiar with this country's legal system, having been twice arrested and convicted for committing felonies in New York.[19/]

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19. Petitioner also suggests that because of his "cultural background," and his prior encounters with the police, he feared the police would harm or kill him. (Pet. 126.) However, this claim is based on his own subjective feelings about the police, of which no evidence was ever offered. Accordingly, petitioner's claim that his waiver was not voluntary because due

Moreover, petitioner did in fact testify at the hearing on the suppression motion. (RT 202-204.) Yet, when he testified, petitioner did not claim that he was too intoxicated to understand his *Miranda* rights, nor that he could not understand his *Miranda* rights because of his unfamiliarity with English or with the American criminal justice system. Indeed, petitioner never even suggested that his *Miranda* waiver was involuntary. Accordingly, the trial court properly rejected petitioner's suppression motion.

B. Voluntary Statements

Petitioner next contends that even if his *Miranda* waiver was voluntary, his statements to the police were coerced. Petitioner first relies on his testimony at the suppression motion in which he claimed that the reason he revealed the location of the gun to Officer Reyes was because Officer Reyes threatened to take Mr. and Ms. Golden prisoner if petitioner did not say where the gun was hidden. (RT 202-204.) However, Officer Reyes testified in rebuttal that he never made any such threat (RT 205), and the court found Officer Reyes's testimony to be more credible than petitioner's. (RT 235.)

Petitioner also contends that the police threatened him and coerced him with promises of leniency. Petitioner relies on the officer's statement: "Look, this can be made more difficult or easier." (RT 68.) He also relies on the fact that when he said he was threatened by the mafia, the officer assured him that the police would protect him from the mafia and that the killing was over.[20/] (RT 72.) However, the trial court properly concluded that, when

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to his cultural background and prior encounters he feared the police would harm or kill him is entirely unsupported by any evidence.

20. Strangely, petitioner also tries to rely on his own spontaneous statement that if he wanted, the officer could kill him, and that he did not care if the mafia killed him. (Pet. 127, RT 68, 72.) Of course, petitioner's own

viewed in context, none of these statements constitute threats. The officer was merely assuring petitioner that they would protect him from any attempt by the mafia to kill him or his family and that any mafia orchestrated killings were over. The court explained:

> "As to that issue [of coercion], the court finds in this case that what Officer Reyes did was, in my view, perfectly appropriate and proper in view of the facts and circumstances. The court does not find in this case, from my listening to the tape and reviewing the script, that in fact the officer used any type of psychological coercion or pressure, or express or implied promises of leniency, or threats of severe or greater punishment if in fact the defendant did not answer the questions. Obviously there were investigative and interrogative methods employed by Officer Reyes, and that usually is the case. In fact, most police officers are trained that to conduct an appropriate interview interrogation there are usual and approved techniques that can be employed, and some of those in fact were employed in this particular case. The court does not find that any of those techniques used here were of such a nature as to cause Mr. Bacigalupo to have his free will overcome, so to speak, and to cause him then to be answering involuntarily.
>
> "So the court finds in this case beyond a reasonable doubt, based on the evidence I heard, that these statements that Mr. Bacigalupo made were in fact free and voluntary after a knowing and intelligent waiver of his basic constitutional rights." (RT 233-234.)

C. No Police Misconduct

Petitioner next contends that the police committed misconduct by intentionally "destroying" the portion of the tape that would have recorded the second of the three interviews between Officer Reyes and petitioner.[21/] (Pet.

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statements cannot form the basis for alleged coercion by the police. A review of the transcripts shows that the officer never threatened to kill petitioner, and indeed, when petitioner said "if you want, you can kill me" the officer responded, "No man, hey." (RT 68.)

21. Petitioner also claims the police committed misconduct by "intentionally failing to record" this second interview. (Pet. 128.) However,

128.) However, the trial court made factual findings directly contrary to petitioner's claims, which are fully supported by substantial evidence. The trial court specifically found, based on the testimony, that the reason the tape was silent for several minutes between the first and third interview was because Officer Reyes inadvertently pressed just the play button, rather than the play and record button before conducting the brief second interview. The court held:

> "Now, there's the other issue here as to whether or not the court should consider in some fashion the fact that there is a void in the tape, to wit: that the first phase of the interrogation was taped, there was a break, there was a second brief interrogation which was not taped, and then there was a third interrogation which was in fact taped.
>
> I'm not sure exactly sure what the defendant wants the court to infer from that. I can simply say, as the trier of the fact, based upon my evaluation of the credibility of the witnesses, to wit: Officer Reyes and the defendant, based upon their explanation as to what happened, the court finds in this case that that second interrogation, for whatever period of time it might have lasted, was not taped simply because there might very well have been an oversight or because in fact the officer was not experienced with the particular tape recorder he was using at the time. It was one that was provided to him by the Palo Alto police officer. And he indicated that it was a microcassette type tape recorder, and he was also concerned with whether or not he would have enough tape to actual tape the interrogation, and his recollection was, three years later, that either he didn't push the appropriate button or he was somewhat concerned with trying to conserve some of the tape. But I don't find, based on the evidence, that there was any type of intent to intentionally not record a portion of the interrogation." (RT 234-235.)

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this claim is without merit since the police are under no legal obligation to record any interviews with a defendant. Thus, the failure to record an interview, whether intentional or inadvertent does not give rise to a claim of misconduct. (See, e.g., *United States v. Marashi* (9th Cir. 1990) 913 F.2d 724, 734.) Moreover, the trial court expressly found that the failure to record the interview was not intentional. (RT 234-235.)

(See also RT 237-238 [finding no intentional or negligent destruction of evidence].) The court also found the officer's testimony as to the content of that second interview to be credible, and it rejected petitioner's claim that the officer threatened petitioner's family during the unrecorded interview. (RT 235; see also RT 237-238 [finding second interview not exculpatory].) Accordingly, petitioner's claim of misconduct is unavailing.

D. Alleged Illegal Entry Into Ms. Golden's House

Petitioner next contends that his confession should have been suppressed because the police illegally entered Ms. Golden's house without a warrant. (Pet. 128.) However, this exact claim was already raised on direct appeal and rejected by this Court. (See *People v. Bacigalupo* (1991) 1 Cal.4th 103, 121-123 [rejecting petitioner's appeal of the suppression motion].) Moreover, Fourth Amendment claims in a petition for writ of habeas corpus are not cognizable. (*In re Harris, supra,* 5 Cal.4th at p. 830.)

E. Trial Court Error And Ineffective Assistance of Counsel Claims

Petitioner next argues that the trial court "failed to proved an adequate suppression hearing." (Pet. 130.) However, petitioner fails to identify any alleged failing or inadequacy in the hearing. To the contrary, the court held a full hearing in which witnesses were called and the facts and law were fully briefed and argued. The hearing covers over 260 pages of the reporter's transcript (RT 10-271), and covered three days with four witnesses testifying. The hearing was more than adequate for the suppression motion.

Petitioner also chastises defense counsel for several alleged failings. First, petitioner claims defense counsel erred in failing to challenge the admissibility of portions of petitioner's statements to Officer Reyes as unduly

prejudicial and a violation of petitioner's constitutional rights. (Pet. 131.) However, defense counsel fails to identify what statements were prejudicial and what rights were violated by those statements. Specifically, petitioner fails to identify any portion of petitioner's confession that would not have been admissible, or that would have been unduly prejudicial. Indeed, all of his statements to Officer Reyes were so inextricably bound together that defense counsel could reasonably conclude that he would not likely have been successful in any attempt to redact individual statements from the middle of a long interview between the police and petitioner.

Moreover, defense counsel did attempt to excise certain portions of the tape, which the trial court correctly refused. The court explained:

> "I ruled previously, of course, that the entire tape is admissible because it was very difficult to excise out certain portions and not put the entire statement in context, and Mr. Aaron wanted certain statements to come in. And the court held that colloquy, as I recall, that in order for this to be put in proper context if, in fact, that portion that the defense desires admissible, it would only make sense to allow the entire tape to put it all in context, to wit, that in fact he had previously been in New York, that he had previously in fact been committed to serve a prison term, that he had a connection with the Mexican [sic: Colombian or Peruvian] mafia, in some respect that's how they had occasion to come to him." (RT 3249-3250 [referring to prior ruling on taped interview by Officer Reyes].)

Defense counsel cannot be deemed deficient for failing to make a motion which he did in fact make, and which the court overruled. Also, petitioner cannot show any prejudice since the court rejected the motion.

Petitioner next criticizes defense counsel for failing "to object to Officer Reyes, the People's witness, translating from Spanish to English one of the tape recordings of petitioner's statements for the jury." (Pet. 131.) However, contrary to petitioner's claim, Officer Reyes did not *translate* the tape. Rather he read into the record the English translation of the tape which

had previously been prepared by a certified Spanish court interpreter, and which the parties agreed was a correct interpretation of the tape. (See RT 67, 3216-3217.) Accordingly, the prosecution's use of Officer Reyes to read the previously agreed upon translation into the record simply was not objectionable. Moreover, petitioner cannot demonstrate prejudice because the translation read by Officer Reyes was accurate and having someone else read the translation would not have affected the outcome in the slightest.

Petitioner also claims defense counsel was ineffective for failing "to ensure that the tape recordings played for the jury were recorded by the court reporter." (Pet. 131.) This claim is specious, since the tapes themselves were admitted into evidence, and they are the most accurate account of what they contain.

F. Alleged Failure To Request Redaction Of The Tapes Of Petitioner's Confession

Petitioner next contends that defense counsel was ineffective for failing to move to suppress portions of the tape of petitioner's interrogation at the police station by Sergeants Smith and Wittman. (Pet. 131.) Petitioner is incorrect. The parties agreed, well before the tapes were played, that the tapes should be edited so that the officers' opinions about petitioner's guilt and his prior misconduct would not be presented to the jury. (RT 3247.) Specifically, the prosecution noted that, after talking with defense counsel, both sides agreed to stop the tape after petitioner finished telling his story, but before the officer gave his opinion about petitioner's story. (RT 3247.) Defense counsel also objected to a statement by petitioner that he had previously been busted with a half pound of cocaine and some guns. (RT 3247-52.) The court agreed with the defense to edit out the reference to the cocaine and to edit the last portions of the tape. (RT 3252-53.) Specifically, the parties referred to the

transcript of the tape that they were using, and agreed to edit out the statement about the half pound of cocaine on page 12, and to end the tape when they reach the point at the bottom of page 31 when the officer asks if petitioner knows how much money the jewelry he robbed was worth, and petitioner responds "I have no idea." (RT 3251-52 [editing page 12]; RT 3255 [ending at pg. 31]; Respondent's Exh. 2 at 12, 31-42 [prosecution and defense transcript of the tape].)[22/] Accordingly, defense counsel did successfully object to many of the statements identified by petitioner as allegedly prejudicial. Moreover, by objecting to some but not all of the statements identified by petitioner in his habeas petition, defense counsel plainly made a tactical choice as to which portions of the tape to object.

Specifically, petitioner identifies 19 statements which petitioner claims were prejudicial. (Pet. 132-134.) However, statements 12 through 19 were in the portion of the tape not played to the jury. In addition, statement number 7, in which petitioner told the sergeants that he had been arrested with half a pound of cocaine and some guns and served 5 years for it when he was 16 was also edited out of the tape played for the jury. (RT 3251-3255, 3308, 3316.) Accordingly, petitioner's claims with respect to those statements are baseless. Petitioner's claims with respect to the remaining statements are also without merit.

(1) Petitioner first objects to the taped booking statement in which petitioner states that he has the word "Chino" tattooed on his arm. (Pet. 132.) Petitioner claims that this statement is prejudicial because the jury would believe he was a "prison gang member." However, petitioner provides absolutely no link between the word "Chino" and the leap of reasoning that a

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22. (See RT 3308 [edited tape played]; see also RT 3316 [Defense counsel noting that tape was stopped before the objected to portions were played].)

juror would view that term as referring to a prison gang. Indeed, petitioner provides no evidence that the word is even linked to a prison gang. Absent some connection that would be apparent to the jurors, no possible prejudicial link could have arisen from the tattoo. Accordingly, defense counsel had no reason to move to suppress this statement. Moreover, petitioner cannot demonstrate prejudice because the jurors had already heard in his prior admissions that he was in prison in New York and worked for the Colombian or Peruvian mafia. (RT 3224, 3235, 3238.) Accordingly, even if the jurors identified the tattoo with prison or the mafia, that association would have been harmless because of petitioner's prior admissions which had already been admitted into evidence.

With regard to the remaining statements, defense counsel's decision not to object was a reasonable tactical decision. Statements 2 through 6 make references to petitioner's prior prison commitment in New York and his connection with the mafia. Defense counsel reasonably determined that these statements were necessary to give meaning and context to petitioner's allegation that he was coerced into committing the murders by the mafia. Defense counsel needed to show petitioner's experience with the mafia, both in prison and out, to try to show that petitioner would have been known to the mafia and would have actually believed in the alleged threats. (See RT 3251 [defense counsel acknowledging that he had no objection to the references to petitioner going to prison for drugs because it allowed him to introduce petitioner's statements about his connection with the mafia].) In addition, any objection would have been futile because the court had already indicated that it would deny any attempt to limit this information since petitioner wanted some of the information in as part of his defense. (RT 3249-50 [ruling all of the statements were admissible to give context to petitioner's defense of duress].) Moreover, none of this information could possibly have been

prejudicial to petitioner because petitioner had already admitted he had spent time in prison in New York and had been working for the mafia in his prior interview with Officer Reyes, which the court had already admitted in full over defense objection.

Petitioner also complains about defense counsel's failure to object to four statements (statements 8-11) made by the police during questioning, in which the officers stated that they did not believe petitioner's story. Defense counsel however made a reasonable decision not to attempt to object to these statements because such an objection would have been meritless. The statements occurred during petitioner's interrogation and were a necessary part of the questions being posed to petitioner. The statements of disbelief by the sergeants were fully incorporated into the questions being posed and were necessary and relevant to give meaning to petitioner's responses. Indeed, as noted above, the trial court indicated early on that it would not allow petitioner to pick and choose which statements from the various interviews would be admitted, but rather would allow all of the questioning and answers in that gave meaning and context to petitioner's confession and excuses. (RT 3249-50 ["I ruled previously, of course, that the entire tape is admissible because it was very difficult to excise out certain portions and not put in the entire statement in context, and Mr. Aaron wanted certain statements to come in."].)

Moreover, defense counsel could readily have concluded that having the officers' statements of doubt would have been beneficial because petitioner maintained his story in the face of those expressions of disbelief. Finally, petitioner cannot demonstrate prejudice because the jury obviously would not infer that the police and prosecution believed petitioner's story, given that he was being charged with the death penalty for the two murders.

Accordingly none of petitioner's claims of ineffective assistance of counsel with respect to petitioner's confessions have merit, as petitioner has demonstrated neither incompetence nor prejudice.

VI.

PETITIONER WAS COMPETENT TO STAND TRIAL AND WAIVE HIS CONSTITUTIONAL RIGHTS

Petitioner next contends that he was incompetent to stand trial, waive constitutional rights, and be executed. (Pet. 136.) He also contends that defense counsel was constitutionally ineffective for failing to raise a doubt about petitioner's competency. (Pet. 137.) Petitioner's claim lacks merit; petitioner was fully competent throughout his trial.

This Court has explained: "'A trial court is required to conduct a competence hearing, sua sponte if necessary, whenever there is substantial evidence of mental incompetence. [Citations.] Substantial evidence for these purposes is evidence that raises a reasonable doubt on the issue.' [Citations.] '"The court's duty to conduct a competency hearing arises when such evidence is presented at any time 'prior to judgment.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1110; see also *People v. Howard* (1992) 1 Cal.4th 1132, 1163 [same].)

In the present case, petitioner points to no evidence prior to judgment that would have indicated to the judge or counsel that petitioner was in any way unable to comprehend the proceedings or assist counsel in his defense. The court and defense counsel had ample opportunity to observe petitioner, yet neither indicated they had any doubts about petitioner's competency. Petitioner testified competently and intelligently at the suppression hearing. Moreover, Dr. Brady, the forensic psychologist hired by the defense who evaluated petitioner prior to trial in August 1986, explained that he had considerable experience evaluating the competence of defendants pursuant to Penal Code section 1368, yet even Dr. Brady did not indicate in his report or at trial that petitioner might be incompetent to stand trial or waive his

constitutional rights. To the contrary, Dr. Brady found petitioner to be of average intelligence and not suffering from any serious mental disorders or organic brain damage. Indeed, even the experts retained by petitioner in support of his habeas petition do not suggest that petitioner is or was incompetent to stand trial or waive his constitutional rights. Petitioner also offers no evidence in support of his assertion that petitioner was incompetent during the pendency of his direct appeal or now on habeas. Accordingly, petitioner has failed to demonstrate substantial evidence that he was incompetent due to a mental illness during the proceedings. (*People v. Rodrigues, supra,* 8 Cal.4th at pp. 1107-1112.)

VII.

THE PROSECUTION DID NOT COMMIT PROSECUTORIAL MISCONDUCT AND DID NOT IMPERMISSIBLY FAIL TO DISCLOSE MATERIAL WITNESSES OR EXCULPATORY EVIDENCE

Petitioner contends that the prosecution committed prosecutorial misconduct because it "failed to disclose the names of a confidential informant and other witnesses and their statements . . . ." (Pet. 143.) Although not explicitly identified in petitioner's argument, petitioner is asserting in essence that the prosecution violated *Brady v. Maryland* (1963) 373 U.S. 83, by failing to turn over material exculpatory evidence in the form of the identity of the confidential informant. Petitioner's claim is without merit.

First and foremost, the trial court conducted an in camera review of the information the confidential informant gave to the police, including the tape recording of the informant's interview with the police. (CT 249-251.) After reviewing the relevant information, the trial court concluded that the informant had no material information beneficial for or necessary to the defense. The court ruled: "Based upon the evidence presented, including the tape recording in question, the Court concludes that the informant is not a material witness on the issue of guilt and that there is no reasonable possibility that non-disclosure of the identity of the informant might deprive the defendant of a fair trial." (CT 251.)

On appeal, this Court once again conducted an in camera review of the material reviewed by the trial court, agreed with the trial court and rejected petitioner's claim on appeal. (*People v. Bacigalupo, supra,* 1 Cal.4th at p. 123.) Accordingly, given the trial court's ruling and the ruling by this Court that the information from the confidential informant was not material nor

necessary for a fair trial, petitioner's claim that the prosecution improperly failed to turn over the information is without merit.

Petitioner counters by claiming to know the identity of the confidential informant and by presenting an affidavit from the person asserted to be the confidential informant. (Exhs. A86 & A87 [declarations of "Jane Doe" filed under seal].)[23/] Respondent is not aware of the identity of the confidential informant and therefore is not in a position to state whether the declarant identified in exhibits A86 and A87 (and listed as "Jane Doe") is the confidential informant. However, this Court has the sealed transcripts and tape recording of the police interview of the confidential informant and can make the necessary determination. Yet, even assuming for the sake of argument that Jane Doe is the confidential informant, and assuming that her declarations are accurate (a dubious proposition), petitioner's claim of *Brady* error is without merit, because the trial court still properly rejected petitioner's request to reveal the identity of the confidential informant.

Petitioner now offers a declaration in which Jane Doe claims that she told the authorities about petitioner's involvement with a member of the Colombian mafia. Jane Doe asserts in her declaration that she revealed this information to the authorities. However, she claims she did not report this information to the trial court at the in camera hearing because she was allegedly told by an investigator with the district attorney's office not to mention the possibility that the murders were contract hits ordered by the mafia. (Exh. A86.)

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23. The declarations filed under seal by petitioner actually identify the name of the Jane Doe declarant, but we will conform with petitioner's identification system and refer to the declarant in exhibits A86 and A87 as Jane Doe.

Petitioner attempts to cast doubt on any prior, in camera *testimony* of Jane Doe by relying on her post hoc recantation and her claim that she was instructed by a D.A. investigator to lie to the court at the evidentiary hearing. However, this assertion is completely undermined by the fact that the trial court had, not only the informant's in camera testimony, but also the tape recording of the informant's interview with the police, which was made well prior to the in camera hearing, and which the court reviewed in ruling on the defense motion.[24/] Indeed, the relevant police report shows that the police interview of the confidential informant, which was tape-recorded, occurred in April 1984, well before any in camera hearing was even requested by defense counsel. (Exh. R [police report noting recorded interview of confidential informant]; CT 240-47 [motion for disclosure of informant's name filed on Aug. 13, 1985].) According to Jane Doe's own declaration, any and all of the allegedly exculpatory information she asserts that she initially gave to the authorities should have been on that tape-recorded interview.

Accordingly, the trial court (and this Court on appeal) was able to consider not only any in camera *testimony* from the informant, but also the original tape recording of the police interview with the confidential informant, in which the informant relayed the material allegedly connecting petitioner with the mafia. Even after reviewing that information, the trial court and this

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24. We note parenthetically that it is unclear from the record that the confidential informant ever even testified at the in camera hearing. The clerk's transcript of the hearing refers only to the court considering a police report attached to the defense motion, the tape recording of the informant's police interview, the preliminary hearing transcript and any other reports. (CT 249.) The trial court's order similarly does not refer to any testimony by the confidential informant at the in camera hearing. (CT 250-51.) However, as noted above, respondent has not seen the material from the in camera hearing and therefore is unable to assert definitively whether or not the informant actually testified at the in camera hearing.

Court concluded that the informant was not a material witness and was not necessary to the defense.

Petitioner repeatedly asserts as part of his claim that the failure to turn over the identity of the informant was intentional and in bad faith. However, petitioner has not demonstrated any bad faith. Moreover, whether or not the prosecution acted in bad faith is irrelevant to a claim of prosecutorial misconduct based on a *Brady* violation; the only issue under *Brady* is whether or not the defendant was denied relevant exculpatory admissible evidence. (*Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011, 1015.) Here, looking at the evidence proffered by petitioner, petitioner's claim of *Brady* error is unavailing.

The only remotely relevant, admissible evidence offered in Jane Doe's affidavit is that she saw petitioner in a car with an alleged drug dealer. (Exh. A86.) However, this information was already known to petitioner since petitioner would necessarily have been in the car with Jane Doe and the drug dealer. It is well settled that "'[t]he *Brady* rule does not apply if the evidence in question is available to the defendant from other sources.'" (*United States v. Wilson* (4th Cir. 1990) 901 F.2d 378, 380; see also *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir. 1986), cert. denied, 479 U.S. 852; *United States v. Grossman* (2d Cir. 1988) 843 F.2d 78, 85 (no *Brady* violation when defendant "knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence") (citations omitted); *Lugo v. Munoz* (1st Cir. 1982) 682 F.2d 7, 9-10 (government has no *Brady* burden when facts are available to a diligent defense attorney).

Petitioner also cannot make out a prima facie case for showing the evidence was material. In order to demonstrate a *Brady* claim, petitioner must show that there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. (*United*

States v. Bagley (1985) 473 U.S. 667, 681-682.) As noted above, the only potentially relevant admissible information relayed by Jane Doe was that she saw petitioner in a car with an alleged drug dealer. The two spoke in Spanish so she could not relate what was said between the two. All of her other statements in her declaration are hearsay, speculation, or personal opinion, none of which would have been admissible. There is no possibility that her statements would have affected the outcome of petitioner's case.

Petitioner also contends that the prosecution failed to turn over information on two other witnesses identified by Jane Doe, Ronnie Nance and Steven Price, which petitioner asserts as distinct *Brady* violations. However, contrary to petitioner's claim, the prosecution did turn over the information on Mr. Nance. In the May 5, 1984, police report, which was turned over to the defense, Ronnie Nance was identified as a witnesses possibly connected to the confidential informant and the negative results of his interview with the police were summarized in the police report. Accordingly, Mr. Nance was disclosed. Moreover, petitioner has not identified any material exculpatory information that Mr. Nance would have offered at trial.

With respect to Mr. Price, petitioner offers no evidence that the police ever interviewed Mr. Price in connection with petitioner's case, nor that Mr. Price had any material evidence pertaining to petitioner's defense. Petitioner cannot demonstrate a prima facie case in support of his claim of a *Brady* violation.

Lastly, petitioner contends that the prosecution committed misconduct by presenting the testimony of Karlos Tijiboy, who denied any involvement in the capital offenses, which the prosecution knew was false. (Pet. 147.) The only basis for this assertion is a declaration by Luis Alberto Alabarran-Arnal in which he claims Mr. Tijiboy was involved in drug dealing. (Exh. A85.) However, even assuming for the sake of argument that the

declaration is true (a doubtful proposition), the declaration does not show any involvement by Mr. Tijiboy in the murders.[25/] Moreover, the declaration does not show that the prosecution ever believed Mr. Tijiboy's testimony was false. To the contrary, Mr. Tijiboy's testimony was corroborated by petitioner's own mother, who testified that she first met Mr. Tijiboy, who was working at one of her regular restaurants, and arranged for Mr. Tijiboy to meet and assist petitioner, rather than the mafia arranging for the meeting. (RT 3081-82.)

Accordingly, petitioner's suggestions of prosecutorial misconduct and *Brady* error are without merit.

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25. We note parenthetically that Mr. Albarran-Arnal claims really to be Luis Angel Laureano, who was involved in drug dealing for Jose Angarita. Interestingly, however, his asserted date of birth, September 7, 1951, and nationality, Venezuelan, differ from those listed in the police reports discussing the arrest of Luis Angel Laureano, provided by the defense as exhibit A56, which lists Mr. Laureano's date of birth as May, 17, 1954, and his nationality as Puerto Rican. (Compare Exh. A85 [declaration], with Exh. A56 at p.11 [police report].)

VIII.

THE TRIAL COURT AND THIS COURT PROPERLY REJECTED PETITIONER'S MOTION TO UNSEAL THE TRANSCRIPTS OF THE CONFIDENTIAL INFORMANT

Petitioner next renews his claim that the trial court and this Court improperly rejected his motion to unseal the transcript of the confidential informant. (Pet. 149.) Petitioner already raised this very same claim in his direct appeal, which this Court rejected after reviewing the same information considered by the trial court. (*People v. Bacigalupo, supra,* 1 Cal.4th at p. 123.) Accordingly, petitioner cannot raise this claim again in his habeas petition. Moreover, for the reasons identified in *People v. Bacigalupo*, *supra*, the claim is without merit.

Petitioner also asserts that Jane Doe has now authorized the release of the tapes of her interview with the police. (Exh. A87.) However, even if Jane Doe is the confidential informant, she does not have the authority to waive confidentiality of privileged "official information." Only a public entity may waive the privilege with respect to such information. Evidence Code section 1041, subdivision (c) provides that there is no privilege preventing an informer from disclosing his or her *identity*. However, Evidence Code section 1040 governs the disclosure of privileged *information* "acquired in confidence by a public employee in the course of his or her duty . . . ." Moreover, section 1040 provides that the privilege with regard to "official information," such as the tape recorded interviews with the confidential informant, lies with the public agency that obtained the information, and not with the informant. Accordingly, while a confidential informant is free to reveal his or her identity if he or she wishes, the informant does not have the authority to waive the

privilege with respect to official information obtained by the police from the confidential informant.

IX.

THE PROSECUTION DID NOT WITHHOLD EXCULPATORY EVIDENCE FROM PETITIONER

Petitioner contends that the prosecution improperly withheld material exculpatory evidence from the defense. (Pet. 152.) This claim is merely a repetition and elaboration of the misconduct claim raised previously in Argument G, which we addressed above. For the reasons set out above, petitioner's claim is without merit.

A. Alleged Misconduct

Petitioner first contends that the prosecution withheld material exculpatory evidence allegedly obtained from Ronnie Nance, Steve Price, and Luis Alberto Albarran-Arnal. However, petitioner's claims are without support. As noted above, the evidence offered by petitioner only shows that Ronnie Nance was interviewed by the police, and he reported that any information he had about petitioner's crimes being connection to the mafia came from the confidential informant. (Exh. R.) There is no evidence that Mr. Nance ever gave the authorities any information concerning the murders committed by petitioner. Similarly, there is no evidence that the authorities ever even interviewed Steve Price or Luis Alberto Albarran-Arnal about petitioner's role in the double murder, or that either Price or Albarran-Arnal reported any information concerning the murders. Indeed, in his declaration, Albarran-Arnal expressly states that he refused to cooperate with the authorities or provide them with any information. (Exh. A85.) The prosecution did not withhold any exculpatory evidence

Petitioner also asserts without foundation that the prosecution provided benefits to Carlos Valdiviezo which were never disclosed to the

defense. (Pet. 154.) To the contrary, the only benefit given to Mr. Valdiviezo, was a promise that if he came forward and told his story to the police, they would not report him as an illegal alien and try to have him deported. More importantly, the prosecution never tried to hide this benefit, and the defense was well aware of this promise made to Mr. Valdiviezo to assuage his fears about coming forward. (RT 13-14, 24.) This claim is baseless.

B. Alleged Ineffective Assistance

Lastly, petitioner asserts that defense counsel was ineffective for (1) allegedly making an agreement to "hold off" on the duress defense investigation, (2) failing to investigate Nance, Price, Albarran-Arnal, or Jane Doe, (3) failing to cross-examine Karlos Tijiboy effectively, and (4) failing to object to the prosecutorial misconduct. All of these claims, however, lack any evidentiary support.

Petitioner provides no evidence that defense counsel ever entered into an agreement to hold off on any investigation of the duress defense. Petitioner also shows no evidence that defense counsel did not investigate any of the identified witnesses. Nor can he show any prejudice, because as explained above, petitioner has not shown that these witnesses had any material admissible evidence that could have produced a more favorable outcome for petitioner.

With respect to Mr. Tijiboy, petitioner cannot show either incompetence or prejudice because Mr. Tijiboy was not in fact involved in the murders, as corroborated by petitioner's own mother. Finally, petitioner was not ineffective for failing to object to the alleged prosecutorial misconduct because, as explained above, such claims are meritless. (See Arguments VII and VIII, *supra*.)

X.

THERE WAS NO JUROR BIAS OR MISCONDUCT

Petitioner next raises several claims of juror misconduct. None have merit.

A. Inadmissible Portions of the Juror Affidavits Must Be Stricken

Petitioner bases his claims on affidavits from eight of the jurors who sat on petitioner's trial. (See Exhs. H-O.) However, the vast majority of the statements included in the juror affidavits are improper and inadmissible because they attempt to recount the jurors' mental processes.

Evidence Code section 1150 expressly bars the use of jurors' statements about their thoughts, beliefs, or mental process to demonstrate misconduct. As this Court explained in *In re Stankewitz*:

> "The Legislature has declared that evidence of certain facts is admissible to impeach a verdict: 'Upon an inquiry as to the validity of a verdict, *any otherwise admissible evidence may be received as to statements made*, or conduct, conditions, or events occurring, either within or without the jury room, *of such a character as is likely to have influenced the verdict improperly*.' (Evid. Code, § 1150, subd. (a), italics added.) It is settled that jurors are competent to prove 'objective facts' under this provision. [Citation.] By contrast, the Legislature has declared evidence of certain other facts to be inadmissible for this purpose: 'No evidence is admissible to show the *effect* of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.' (Evid. Code, § 1150, subd. (a), italics added.) Thus, jurors may testify to "overt acts" — that is, such statements, conduct, conditions, or events as are "open to sight, hearing, and the other senses and thus subject to corroboration" — but may not testify to "the subjective reasoning processes of the individual juror . . . ." (*In re Stankewitz* (1985) 40 Cal.3d 391, 397-398.)

This Court further warned that, although evidence of statements concerning objective facts "may be received, it must be admitted with caution. Statements have a greater tendency than nonverbal acts to implicate the reasoning processes of jurors — e.g., what the juror making the statement meant and what the juror hearing it understood. They are therefore more apt to be misused by counsel in an effort to improperly open such processes to scrutiny." (*Ibid.*)

> "The statute may be violated not only by the admission of jurors' testimony describing their own mental processes, but also by permitting testimony concerning statements made by jurors in the course of their deliberations. In rare circumstances a statement by a juror during deliberations may itself be an act of misconduct, in which case evidence of that statement is admissible. [Citation.] But when a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror's mental processes. Consideration of such a statement as evidence of those processes is barred by Evidence Code section 1150." (*People v. Hedgecock* (1990) 51 Cal.3d 395, 418-419; see also *People v. Sanchez* (1998) 62 Cal.App.4th 460, 475 [same]; *People v. Hord* (1993) 15 Cal.App.4th 711, 724-725 [same].)

"This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow juror's mental processes or reasons for assent or dissent." (*People v. Hutchinson* (1969) 71 Cal.2d 342, 350.) Applying this standard for admissibility to the affidavits, only very limited portions of the affidavits offered by petitioner are admissible.

1. Norma Delaplaine

Paragraphs 2, 3, 4 and 7 of Ms. Delaplaine's 7-paragraph affidavit (Exh. H) must be stricken in their entirety as merely reflecting this juror's thought processes. Moreover, only those statements in paragraphs 5 and 6 that reflect objective facts are admissible.

2. Irene Hevener

Ms. Hevener's entire 11-paragraph affidavit (Exh. I) reflects the thought processes or deliberations of herself and the other jurors and must be stricken in its entirety. At the very least, paragraphs 2, 3, 4, 6, 7, 8, 10, and 11, as well as those portions of paragraphs 5 and 9 which reflect juror's mental processes or deliberations must be stricken.

3. Carol Larter

Paragraphs 2, 3, 4, 6, and 7 of Ms. Larter's 7-paragraph affidavit (Exh. J) reflect the jurors' thought processes and therefore must be stricken as violating Evidence Code section 1150.

4. Carole Lusebrink

Paragraphs 2, 5, 6, 7, and 8 of Ms. Lusebrink's 8-paragraph affidavit (Exh. K) reflect the jurors' deliberations and thought processes and therefore must be stricken.

5. Jean Marshall

All of Ms. Marshall's 3-paragraph declaration (Exh. L), save for the single sentence in paragraph 3 noting that the jurors discussed petitioner's demeanor in court during penalty phase deliberations, must be stricken as recounting the mental processes of the jurors.

6. Vera O'Haver

Paragraphs 2, 3, and 5 of Ms. O'Haver's 5-paragraph affidavit (Exh. M) reflect her deliberations and thoughts and therefore must be stricken.

7. Sandra Petro

Paragraphs 2 and 5, and those portions of paragraphs 3 and 4 recounting juror deliberations, of Ms. Petro's 5-paragraph declaration (Exh. N) must be stricken.

8. Alison Staab

The entire 4-paragraph affidavit (Exh. O) of Ms. Staab reflects the thought processes or deliberations of herself and the other jurors and must be stricken in its entirety.

B. Alleged Penalty Phase Juror Misconduct With Regard To Biblical References

Petitioner raises several distinct claims of juror misconduct based on the juror affidavits. First, petitioner contends that the jurors committed misconduct by considering biblical passages supporting the death penalty in their penalty phase deliberations. Specifically, petitioner points to the declarations of two jurors, Ms. Vera O'Haver and Ms. Norma Delaplaine, referring to their consideration of biblical passages in their consideration of the death penalty. (Pet. 159-160.) However, a careful review of the affidavits does not support petitioner's assertion.

It is misconduct for a juror to consider material extraneous to the record. (See e.g., *People v. Holloway* (1990) 50 Cal.3d 1098, 1108; *People v. Williams* (1988) 44 Cal.3d 1127, 1156.) Such conduct creates a presumption of prejudice that may be rebutted by a showing that no prejudice actually occurred. (*People v. Williams, supra*, 44 Cal.3d at p. 1156.) In criminal cases, the presumption of prejudice is rebutted when there is no substantial likelihood that the vote of one or more of the jurors was influenced by exposure to the improper material. (*People v. Marshall* (1990) 50 Cal.3d 907, 950.)

As this Court explained in *People v. Miranda*:

> "The presumption of prejudice 'may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party. . . .' [Citation.] Whether a defendant has been prejudiced by a juror's outside communications depends upon 'whether the jury's impartiality has been adversely affected, whether the prosecution's burden of proof has been lightened and whether any asserted defense has been contradicted.'" (*People v. Miranda* (1987) 44 Cal.3d 57, 117.)

Turning to the present case, any potential presumption of prejudice has been fully rebutted. Ms. Vera O'Haver stated in her declaration that:

> "We deliberated for a short time and then were dismissed early because it was Easter weekend. We were told to return on Monday after the holiday weekend. I thought and prayed a great deal over the weekend and looked toward my faith for help in making this decision. I searched through the scriptures and found some passages I thought addressed our dilemma in deciding whether to give the death penalty. When we deliberated again on Monday, I brought in these scriptures and told the jurors what I had thought about. I told them that my faith taught me that, although God forgave, one still had to accept responsibility for their actions and accept the punishment that followed. It seemed to me that although Mr. Bacigalupo appeared to have found his faith, he still had to accept the severe punishment that came from taking two other lives in the way he did. I think the scriptures were very helpful to me in making my decision. In fact, after the trial I spoke to one of the jurors and she thanked me for what I had said because she said it had helped her a lot in making her decision." (Exh. M.)

Ms. O'Haver added at the end of her declaration: "The scriptures I found relevant were the lines from Romans, 6:23, 'for the wages of sin is death, but the gift of God is eternal life through Jesus Christ.'" (Exh. M.)

Contrary to petitioner's claim, it is apparent from her declaration that Ms. O'Haver did not rely on the scriptures in reaching her decision of whether she should impose the death penalty within the requirements of California law.

Indeed, the biblical passage read by Ms. O'Haver does not purport to authorize imposing the death penalty as a matter of God's will. Rather, the passage refers to the fate of the soul after death, which the quoted scripture says is a matter for God, whereas the fate of the individual before death is left to the legal system. The quoted biblical passage provides only that those individuals who have not accepted Jesus Christ as their savior before their death will receive nothing but death in the hereafter, whereas those who have accepted Jesus Christ will receive eternal life in the hereafter once they die. Ms. O'Haver explained her belief system during the jury voir dire, in which she noted:

> "My religion is very important to me and – but I look on a person unless they have accepted Jesus Christ as their personal savior, they're sinners. This is the way I look at them. And as a person that hasn't accepted Christ, they have in the things they do, and the things they say, do not work against them until they actually accept Jesus, and then I would hope that they – see a change in their life (sic)." (RT 1129.)

She then added that whether or not a person had accepted Christ, or was a sinner for not having done so, would have no impact on the question of the petitioner's guilt or on the decision to impose the death penalty. (RT 1129-1130.)

Thus, the quoted scripture passage simply reaffirmed to Ms. O'Haver the division between the mortal affairs of man, which are governed by the laws of man, and the fate of the soul in the hereafter, which is up to God's judgement. Ms. O'Haver used the scripture to unburdened herself of the responsibility of trying to determine the fate of petitioner's soul following his death and focused solely on the proper task of determining how to apply the

laws of the State of California in petitioner's case.[26] Thus, she explained that regardless of whether God forgave the soul in the afterlife, everyone must face responsibility for their actions under the laws of man while alive. (Exh. M ["I told them that my faith taught me that, although God forgave, one still had to accept responsibility for their actions and accept the punishment that followed. It seemed to me that although Mr. Bacigalupo appeared to have found his faith, he still had to accept the severe punishment that came from taking two other lives in the way he did."].)

Such use of the scripture to *separate* religious judgment from legal judgment is an entirely permissible use of the bible. This Court has explained in a similar context that the prosecution's use of the bible to draw such a distinction in death penalty cases did not constitute misconduct. This Court observed in *People v. Bradford*:

> "'We have generally condemned invocations to a different or higher law than that found in the California Penal Code.' (*People v. Freeman, supra*, 8 Cal.4th at p. 515.) Here, however, we perceive no such invocation in the prosecutor's comments. Rather, in response to defense counsel's religious references, she simply argued that '"imposition of the death penalty was not usurping God's authority but legitimately carrying out California law."' (*People v. Davenport, supra*, 11 Cal.4th at p. 1223; see *People v. Arias* (1996) 13 Cal.4th 92, 180.) Indeed, the prosecutor reminded the jurors that "the law is the thing that lets you decide whether life or death is appropriate." (*People v. Bradford* (1997) 14 Cal.4th 1005.)

(See also *People v. Arias* (1996) 13 Cal.4th 92, 180 ["Thus, the prosecutor merely exhorted jurors who might harbor strong religious views that they must not resort to religious canons to decide the appropriate penalty. He noted that religious laws were in conflict, and, in any event, that secular law must govern

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26. We note that no other juror indicated that Ms. O'Haver brought in a bible or any scripture during deliberations nor did any juror report seeing any biblical passage offered by Ms. O'Haver during deliberations.

over any religious beliefs. This restrained commentary did not invoke 'religious authority as supporting or opposing the death penalty' [citations] and thus did not cross the line between permissible and improper argument."].) Accordingly, Ms. O'Haver did not commit misconduct and the record rebuts any prejudice.

Petitioner's claim with respect to Norma Delaplaine is also unavailing. As noted above, the portion of her declaration that purports to explain the role of the bible on her decision is inadmissible as relating her mental processes. The only admissible portion that may be considered is her statement about reading a passage in the bible over the weekend. Petitioner relies on this portion of Ms. Delaplaine's declaration to assert that she improperly sought out and relied on the bible to make her determination as to whether to impose the death penalty in petitioner's case. Ms. Delaplaine's declaration does not support this claim.

Ms. Delaplaine stated in her declaration that she remembers finding a passage in the bible stating that murderers should be punished by death. However, this statement shows only that Ms. Delaplaine was reading the bible over the Easter weekend and, during the course of that reading, she found a passage pertaining to murderers. Of course, jurors are not barred from practicing their religions outside of deliberations, nor are they barred from reading the bible or other holy text during the holiest periods of their religion, such as reading the bible during the Easter weekend. Practicing her religion by reading the bible over the Easter weekend does not demonstrate that Ms. Delaplaine committed misconduct, even if she did find a passage pertaining to murderers being punished by death during her reading.[27/]

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27. As this Court explained in *People v. Pride* (1992) 3 Cal.4th 195, 267-268: "Defendant incorrectly suggests misconduct occurs whenever the jury, though instructed to consider only the evidence before it, nonetheless discusses

Finally, even viewing the remainder of the declaration does not support petitioner's claim. Ms. Delaplaine's statement demonstrates that she turned to the passage for personal solace to help her cope with the her weighty decision to impose the death penalty as warranted under the laws of California and the facts of this case. (Exh. H ["This [passage] *relieved me* because I felt that giving him the death penalty was morally the best decision." (Emphasis added).].) The record rebuts any possible misconduct. Accordingly, petitioner has not demonstrated a prima facie case of prejudicial misconduct with regard to either Ms. O'Haver's or Ms. Delaplaine's reviewing of a biblical passage.

C. Alleged Misconduct With Regard to Overhearing Portion of Bench Conference In Which Defense Counsel Informed Court of Petitioner's Decision Not To Testify

Petitioner asserts that one of the jurors committed misconduct by failing to report overhearing a bench conference in which defense counsel told the court that he would not be putting petitioner on the stand. Specifically, Juror Lusebrink stated in her affidavit that because of her position in the jury box near the bench, she overheard a conversation between the judge and defense attorney in which the judge asked if the defense would be calling petitioner as a witness, and defense counsel responded that he would not call petitioner because he "could not have Mr. Bacigalupo up on the stand acting like 'John Wayne.'" (Exh. K.) However, this occurrence does not constitute misconduct, because the juror did not receive any improper information.

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speculative, irrelevant, and/or erroneous facts or opinions. Indeed, lay jurors are expected to bring their individual backgrounds and experiences to bear on the deliberative process. 'That they do so is one of the strengths of the jury system. It is also one of its weaknesses . . . . Such a weakness, however, must be tolerated.' [Citations.] Otherwise, few verdicts would stand."

First, the juror's affidavit does not suggest any inappropriate behavior or intentional eavesdropping by the juror. Her affidavit suggests nothing more than her inadvertently overhearing a conversation at the bench due to her location in the jury box, sitting nearest the bench. Moreover, overhearing that conversation between the court and defense counsel did not amount to the receipt of inappropriate information outside of the proceedings. Indeed, the only significant piece of information the juror learned from overhearing the conversation was that petitioner would not be testifying, which, of course, is a fact that all jurors learned prior to deliberations, when the defense rested without petitioner testifying. As for defense counsel's statement that he did not want petitioner acting like "John Wayne," this statement also did not communicate any improper information because this isolated reference to John Wayne lacked any elaboration, and does not carry any inherently prejudicial meaning or damaging connotation by itself.[28/]

Finally, the record rebuts any presumption of prejudice. The incident was brief, isolated, and the jury was properly instructed not to speculate about the petitioner's decision not to testify. (See *People v. Hord* (1993) 15 Cal.App.4th 711, 726-728 [noting brief references during deliberations to defendant's decision not to testify merely reflected juror curiosity and recounted a fact that was obvious to the jurors, and did not rise to the level of prejudicial misconduct].) Accordingly, petitioner has not demonstrated a prima facie case for juror misconduct.

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28. As noted above, the reference by the juror to the effect on her mental process of this statement is inadmissible pursuant to section 1150, as is the comment by juror Delaplaine about her thought process.

D. Alleged Misconduct Over Considering Petitioner's Demeanor

Petitioner next contends that the jurors committed misconduct by considering his demeanor during the trial in deciding whether to impose the death penalty. (Pet. 161.) Petitioner's claim is without merit because jurors may properly consider the demeanor of a non-testifying defendant during the proceedings in their penalty phase deliberations.

This Court rejected a similar challenge in *People v. Heishman,* explaining:

> "Next, defendant objects to the references, in this argument, to the expressions on defendant's face. In criminal trials of guilt, prosecutorial references to a nontestifying defendant's demeanor or behavior in the courtroom have been held improper on three grounds: (1) Demeanor evidence is cognizable and relevant only as it bears on the credibility of a witness. (2) The prosecutorial comment infringes on the defendant's right not to testify. (3) Consideration of the defendant's behavior or demeanor while off the stand violates the rule that criminal conduct cannot be inferred from bad character. [Citations.] But here, the prosecutor's references to defendant's facial demeanor were made at a penalty trial in which defendant had placed his own character in issue as a mitigating factor. Under those circumstances it was proper for the jury to draw inferences on that issue from their observations of defendant in the courtroom and therefore proper for the prosecutor to base a closing argument on such observations. (*People v. Heishman* (1988) 45 Cal.3d 147, 197.)"

(See also *People v. Haskett* (1990) 52 Cal.3d 210, 247 ["Further, insofar as defendant complains of the reference to defendant's demeanor, there was no error. Reference to courtroom demeanor is not improper during the penalty phase."]; *People v. Jackson* (1989) 49 Cal.3d 1170, 1206 [same].) In the present case, petitioner put his character at issue during the penalty phase through the testimony of his mother and pastor, and the defense psychologist testified that petitioner felt remorse. Accordingly, the jury could properly

consider his courtroom demeanor in evaluating this evidence and deciding what penalty was appropriate.

E. Alleged Misconduct With Regard to Considering Petitioner's Right to Appeal and the Nature of Life Without The Possibility of Parole (LWOP)

Petitioner next contends that the jurors committed misconduct by mentioning the possibility that petitioner could be released sometime in the future if given life without the possibility of parole (LWOP), or freed on appeal. Petitioner relies on the affidavits of four jurors who noted that they discussed the possibility of the laws governing LWOP cases could change in the future, opening the possibility of parole. (Exhs. H, J, K, and N.) However, the references to possible changes in the laws in the future did not constitute misconduct. Rather, the statements merely reflected jurors giving opinions on matters of everyday life experience.

People v. Pride (1992) 3 Cal.4th 195, 267-268, is probative on this point. In *Pride*, one of the jurors was a cook at a prison and told the other jurors that inmates sentenced to death are supervised more closely than prisoners given a life sentence, and therefore inmates sentenced to life in prison have a better chance of escaping. (*Id.* at p. 267.) On appeal, this Court rejected the defendant's claim of misconduct. The *Pride* Court held:

> "Defendant incorrectly suggests misconduct occurs whenever the jury, though instructed to consider only the evidence before it, nonetheless discusses speculative, irrelevant, and/or erroneous facts or opinions. Indeed, lay jurors are expected to bring their individual backgrounds and experiences to bear on the deliberative process. 'That they do so is one of the strengths of the jury system. It is also one of its weaknesses . . . . Such a weakness, however, must be tolerated.' (*People v. Marshall* (1990) 50 Cal.3d 907, 950; see *People v. Fauber* (1992) 2 Cal.4th 792, 838-839.) Otherwise, few verdicts would stand." (*Id.* at pp. 267-268.)

This Court's holding in *Pride* is similarly applicable to petitioner's claim of juror misconduct in relation to references to the possibility of the laws changing in the future with respect to LWOP sentences.

Average jurors certainly have everyday experience with the possibility that any laws can change, even those governing the criminal justice system. Indeed, as citizens, they vote on proposed changes in the law. Similarly, average jurors are aware of the fact that every person convicted of a capital murder is entitled to an appeal, which has the potential of changing the outcome of the trial. Such "references come within the ambit of 'knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience,' which jurors necessarily bring to their deliberations because our jury system is 'fundamentally human.'" (*People v. Cox* (1991) 53 Cal.3d 618, 696.) In *Cox*, this Court rejected a claim of juror misconduct based on reference to the fact that capital sentences had not been upheld by the Supreme Court under Chief Justice Rose Bird. The *Cox* Court concluded, "We find no misconduct in a single reference to factual matters of which the entire jury undoubtedly had some independent knowledge." (*Ibid.*; see also *People v. Majors* (1998) 18 Cal.4th 385, 422 [finding comment similar to that made in *Cox* about failure to carry out death penalty in California to be part of background information carried in by jurors, even though Majors's trial was in 1990, well after the retention elections].)

Moreover, there is nothing in the affidavits to suggest that the references to the possibility of parole were anything more than brief and isolated comments made during the extensive deliberations. (See *People v. Majors, supra*, 18 Cal.4th at pp. 429-430 [finding brief and isolated comments on improper subjects harmless]; *People v. Hill* (1992) 3 Cal.App.4th 16 [same], overruled on other grounds in *People v. Nesler* (1997) 16 Cal.4th 561, 582 fn.5.).

Finally, the cases cited by petitioner do not support a finding of misconduct here. (Pet. 163.) This case does not present a situation in which the jurors obtained outside information, as in *In re Carpenter* (1995) 9 Cal.4th 634, 653. Nor is this case like *Simmons v. South Carolina* (1994) 512 U.S. 154, 161-162, in which the trial court effectively misrepresented to the jury whether the defendant would be eligible for parole under the current law of the state by refusing to instruct on the fact that a life sentence was without the possibility of parole. Here the jury was properly instructed on the meaning of LWOP under California law. (RT 4029.) The jurors' comments about the possibility of the law changing in the future, and the availability of the appellate process are simply the kind of common sense observations that "must be tolerated" in our jury system.[29/] No misconduct appears.

F. Alleged Coercion

Petitioner's final misconduct claim is that the jurors improperly coerced juror Hevener to vote for the death penalty. (Pet. 169.) This claim lacks merit.

As noted above, the affidavit of juror Hevener shows nothing more than attempt to recount the thought processes of herself and the other jurors and the deliberative process by which the jurors reached their verdicts. As such, the affidavit is inadmissible under Evidence Code section 1150. Moreover, the actions about which petitioner complains do not constitute misconduct. This Court rejected a similar claim *People v. Cox*, holding:

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29. Petitioner also incorporates his claims on direct appeal that the trial court erred in rejecting a defense instruction not to consider the financial cost of imposing LWOP and that the trial court erroneously limited the testimony of the minister on how the death penalty would affect petitioner's mother, Ms. Golden. This Court already properly rejected these claims on direct appeal. (*People v. Bacigalupo, supra,* 1 Cal.4th at pp. 142-143, 146.)

"Applying these principles [of section 1150], we must reject the allegations of misconduct predicated on the intimidation of nonsmoking jurors and the expressed desire of some jurors to resolve the penalty and avoid prolonged deliberations, to the extent they clearly implicate 'fellow jurors' mental processes or reasons for assent or dissent.' [Citation.]

"In *People v. Orchard* (1971) 17 Cal.App.3d 568, the defense sought a new trial because the foreman had chastised one of the jurors during deliberations, which '"so embarrassed and humiliated [her] in front of the other members of the jury that she voted 'guilty' on the next ballot rather than be subjected to the domination and coercion of the foreman."' (*Id.*, at p. 572, fn. 1.) Discounting those portions of the affidavit recounting the effect of the foreman's conduct, the Court of Appeal concluded the remainder 'simply describe[d] an account of interchange between jurors .... To permit inquiry as to the validity of a verdict based upon the demeanor, eccentricities or personalities of individual jurors would deprive the jury room of its inherent quality of free expression.' (*Id.*, at p. 574.)

"Under similar circumstances here, we are precluded from considering any matters concerning the jurors' ratiocinations. Thus, while the conduct of jurors disregarding an agreement on smoking or complaining about the pace of deliberations may be scrutinized, the effect of this conduct on subsequent votes may not be. When we exclude the latter, the former, standing alone, does not implicate juror misconduct; nor does the record otherwise demonstrate that some members of the jury were prevented from freely expressing their views because of these two circumstances. Accordingly, these allegations would not sustain defendant's motion for a new trial." (*Cox, supra*, 53 Cal.3d at pp. 694-695.)

The same is true for petitioner's claim. Once those portions of the juror's affidavit analyzing the juror's mental processes are removed, the remaining conduct shows a proper, vigorous, deliberative process with each juror freely expressing his or her views. Petitioner asserts that the affidavit shows that the jurors were not following the court's instructions with respect to which factors could be mitigating factors. To the contrary, the affidavit shows only that the majority of the jurors disagreed with Ms. Hevener as to

whether the statutory mitigating factors were *factually* available in this case. Petitioner's claim of juror bias and coercion is unavailing.

In sum, petitioner has not demonstrated a prima facie case that any juror misconduct occurred in any of his separate allegations. Moreover, the record rebuts any presumption of prejudice from petitioner's claims. As this Court admonished in *In re Carpenter, supra,* 9 Cal.4th at pp. 654-655:

> "We emphasize that before a unanimous verdict is set aside, the likelihood of bias under either test must be *substantial*. As indicated in the high court decisions discussed above, the criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. The jury system is fundamentally human, which is both a strength and a weakness. (*People v. Marshall*, *supra*, 50 Cal.3d at p. 950.) Jurors are not automatons. They are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias. To demand theoretical perfection from every juror during the course of a trial is unrealistic.
>
> "If the court concludes it is substantially likely the outside information affected the verdict, or that the juror was *actually biased*, the verdict must be set aside. If not, 'society's interest in the administration of criminal justice' (*Rushen* v. *Spain*, *supra*, 464 U.S. at p. 119) must be vindicated, and the judgment preserved. It is not enough that the juror was 'placed in a potentially compromising situation,' for then 'few trials would be constitutionally acceptable.' (*Smith* v. *Phillips*, *supra*, 455 U.S. at p. 217.) (*Ibid.*)

Given the facts here, petitioner's claims of prejudicial jury misconduct are without merit.

XI.

PETITIONER DOES NOT HAVE A CONSTITUTIONAL DUE PROCESS RIGHT TO BE INFORMED OF THE AVAILABILITY OF CONSULAR ASSISTANCE

Petitioner contends that his right to consular access provided for under the Vienna Convention for Consular Relations was violated by the failure of the police to notify petitioner of his right to consult with the Peruvian Consulate upon his arrest. Petitioner therefore contends that his conviction must be reversed. We disagree.

Petitioner cites to no case which provides that the Vienna Convention on Consular Relations creates a private enforceable right to defendants for a violation. Indeed, the preamble to the Vienna Convention expressly provides "[T]he purpose of such privileges and immunities [as are created by the treaty] is *not to benefit individuals* but to ensure the efficient performance of functions by consular posts." (Preamble to Vienna Convention, 21 U.S.T. 77, 79 [emphasis added]; quoted in *United States v. Li* (1st Cir. 2000) 206 F.3d 56, 62; see also *United States v. Tapia-Mendoza* (D. Utah 1999) 41 F.Supp.2d 1250, 1253 ["No federal court has ruled that the Vienna Convention confers on individuals such a private enforceable right."]; but see *Breard v. Greene* (1998) 523 U.S. 371, 376 [leaving issue open].) Accordingly, the Vienna Convention is properly interpreted as giving rights to the foreign consulates and the governments of the signatory nations, and not to individual foreign nationals.

Moreover, regardless of whether this convention provides an enforceable personal right to individual foreign nationals, a violation does not give rise to any remedy within the criminal context, such as reversal or suppression of evidence.

The First Circuit Court of Appeals in *United States v. Li* (1st Cir. 2000) 206 F.3d 56, recently conducted a cogent examination of the Vienna Convention and rejected a claim that the defendant was entitled to a reversal of his criminal conviction or to the suppression of any evidence due to the asserted violation of his right to consular notification under the convention. The *Li* court observed:

> "Those courts that have faced the issues before us have come to divergent conclusions as to whether the Vienna Convention and the Bilateral Convention bestow any rights upon individuals, as opposed to states. We need not, however, address these issues, for we believe that even if the treaties do confer individual rights, the appellants' claims could only succeed if violations of those rights could be remedied by the suppression of evidence or the dismissal of an indictment. We hold that irrespective of whether or not the treaties create individual rights to consular notification, the appropriate remedies do not include suppression of evidence or dismissal of the indictment." (*Id.* at p. 60.)

The First Circuit explained that there is a presumption against treaties creating privately enforceable rights. The court then noted:

> "Even stronger than the presumption against private rights of action under international treaties is the presumption against the creation of rights enforceable by the suppression of evidence or by the dismissal of an indictment. Historically, such remedies have been available only in cases implicating the most fundamental of rights. This class has heretofore been limited to those paramount protections secured by the Fourth, Fifth, and Sixth Amendments to the United States Constitution.
>
> "Article 36 of the Vienna Convention, and the complementary Article 35 of the Bilateral Convention, do not create--explicitly or otherwise--fundamental rights on par with the right to be free from unreasonable searches, the privilege against self-incrimination, or the right to counsel. [Citations.] Defendants who assert violations of a statute or treaty that does not create fundamental rights are not generally entitled to the suppression of evidence unless that statute or treaty provides for such a remedy. [Citations.]
>
> "Nor are such defendants entitled to the dismissal of an indictment: 'Because the public maintains an abiding interest in the

> administration of criminal justice, dismissing an indictment is an extraordinary step.' [Citations.] Thus, we will infer neither an entitlement to suppression nor an entitlement to dismissal absent express, or undeniably implied, provision for such remedies in a treaty's text. We find no such provision here." (*Id.* at pp. 61-62.)

The First Circuit then conducted a detailed analysis of the text of the Vienna Convention as well as non-textual sources for interpreting the treaty. (*Id.* at pp. 62-66.) The First Circuit concluded that regardless of whether the Vienna Convention or the Bilateral Convention created personal rights to consular notification and access, they did not create any remedies enforceable in a criminal case, such as suppression of evidence or dismissal. (*Ibid.*)

The Ninth Circuit, sitting *En Banc*, recently reached a similar conclusion in *United States v. Lombera-Camorlinga* (9th Cir., 2000) 206 F.3d 882 (*En Banc*). The Ninth Circuit followed the same reasoning as the First Circuit in *Li* and concluded that even if the defendant's right to consular notification and access had been violated, the defendant was not entitled to a remedy such as suppression of his confession. (*Id.* at pp. 886-888; see also *id.* at p. 888 [leaving open the possibility that violations "may be redressable by more common judicial remedies such as damages or equitable relief."].) The Eleventh Circuit likewise held in *United States v. Cordoba-Mosquera* (11th Cir., 2000) 212 F.3d 1194, 1195-96: "Defendants argue that certain evidence should be excluded, the convictions vacated, and/or the indictments dismissed due to the government's noncompliance with Article 36 of the Vienna Convention. Even if Article 36 creates rights enforceable by individuals, other circuits have held that the remedies available for a violation of Article 36 do not include the suppression of evidence or the dismissal of an indictment. [Citations.] We would follow the lead of these circuits."

The same reasoning applies in this case. Even assuming for the sake of argument that the Vienna Convention created an individual right to consular

notification and access for petitioner, the Convention does not provide any basis for the remedy petitioner is seeking, namely reversal of his conviction.

Finally, assuming for the sake of argument that the Vienna Convention creates both a right and a remedy enforceable in the context of a criminal action, petitioner has failed to demonstrate that he is entitled to such a remedy. Specifically, in raising a claim that the defendant's rights to consular notification and access were violated, the defendant must also affirmatively demonstrate that he was prejudiced by the alleged violation. As a threshold matter, in order to establish prejudice, a defendant must show that: (1) he did not know of his right to contact the consulate for assistance; (2) he would have availed himself of the right; and (3) there was a likelihood that the consulate would have assisted defendant. (*United States v. Tapia-Mendoza, supra*, 41 F.Supp.2d at p. 1254.) After satisfying these threshold requirements, the defendant must still show that he suffered cognizable prejudice in his case as a result of the alleged violation. (See *United States v. Rodrigues* (E.D.N.Y. 1999) 68 F.Supp.2d 178, 183 ["As a further preliminary issue, courts have unanimously held that in order for a foreign national to win relief for a Convention violation, he or she must show that the lack of consular notification prejudiced his or her case."]; *Gomez v. United States* (D.S.D. 2000) 100 F.Supp.2d 1038, 1049 ["Courts which have considered the issue have generally held that a criminal defendant cannot obtain relief for a violation of the Vienna Convention without proof that the defendant sustained some kind of cognizable prejudice."].)

Petitioner has failed to demonstrate any of these three requirements, relying instead on the bald assertions of habeas counsel. However, petitioner offers no evidence that he did not know of his right to contact the consulate for assistance, he would have availed himself of the right to speak to the

consulate, or that there was any likelihood that the consulate would have provided petitioner with any assistance.

Moreover, petitioner has not demonstrated any cognizable prejudice to his case. Petitioner asserts that the consulate would have advised petitioner of his constitutional rights, such as the right to remain silent and to an attorney, and would have advised him on the laws of California. (Pet. 177.) However, petitioner was advised of his constitutional rights by the police before questioning, and he was represented by counsel, who was necessarily in a better position to advise petitioner on the penal laws of California as they related to petitioner's case. (See *Breard v. Greene, supra,* 523 U.S. at p. 377 [finding no prejudice, noting defendant was advised by counsel who "were likely far better able to explain the United States legal system to him than any consular official would have been."].) Petitioner also baldly asserts that the consulate would have provided resources to petitioner such as private counsel, official interpreters, mental health experts, and investigators. (Pet. 177.) However, there is no evidence to support any of these claims. Moreover, petitioner already received all of these forms of assistance from his trial counsel, and petitioner presents no evidence to suggest that the outcome would have been any more favorable if he had received such assistance from the consulate. *Gomez v. United States, supra,* 100 F.Supp.2d at p. 1049, is on point. The *Gomez* court rejected a similar unsupported claim, observing: "Gomez does not explain how consultation with the El Salvadoran consulate would have changed the actions he took or altered the outcome of the case in any manner. Gomez's assertions of prejudice are speculative and trumped by the evidence of record and applicable precedent. Finally, had consular notification been given, Gomez would have been able to talk to someone who could do no more (and probably far less) to protect his rights than trial counsel. Therefore, because Gomez has failed to show that he was in any way

prejudiced by the alleged Vienna Convention violation, his claim has no merit and must fail." Petitioner has similarly failed to show any evidence of prejudice and his claim of denial of the right to consular notification and access is meritless.

XII.

PETITIONER'S ASSERTION THAT HIS DEATH SENTENCE VIOLATES INTERNATIONAL LAW IS NOT COGNIZABLE

Petitioner asserts that his death sentence violates international law. Specifically, he asserts that he was denied a right to "a fair trial by an independent tribunal" and his right to the "minimum guarantees for the defense under customary international law as informed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration)." (Pet. 179.) Petitioner's claim is procedurally barred, and in any case states no cognizable cause of action.

First, petitioner has no standing to raise claims that his conviction and sentence resulted from violations of international treaties. Article VI, section 2, of the United States Constitution provides, in pertinent part, that the Constitution, the laws of the United States, and all treaties made under the authority of the United States are the supreme law of the land. Treaties are contracts among independent nations. (*United States v. Zabaneh* (5th Cir. 1988) 837 F.2d 1249, 1261.) Under general principles of international law, individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereign involved. (*Matta-Ballesteros v. Henman* (7th Cir. 1990) 896 F.2d 255, 259; *United States ex rel. Lujan v. Gengler* (2d Cir. 1975) 510 F.2d 62, 67.) Treaties are designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress. (*Matta-Ballesteros v. Henman, supra*; *United States v. Zabaneh, supra.*)

It is only when a treaty is self-executing, that is when it prescribes rules by which private rights may be determined, that it may be relied on for

the enforcement of such rights. (*People v. Ghent* (1987) 43 Cal.3d 739, 779 [a treaty or international declaration or charter has no effect upon domestic law unless it either is implemented by Congress or is self-executing]; *Dreyfus v. Von Finck* (2d Cir. 1976) 534 F.2d 24, 30.) In order for a provision of a treaty to be self-executing without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone would be enforceable in the courts. (*Sei Fujii v. State of California* (1952) 38 Cal.2d 718, 722.)

In determining whether a treaty is self-executing, courts look to the following factors: (1) the language and purpose of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute. (*Frolova v. Union of Soviet Socialist Republics* (7th Cir. 1985) 761 F.2d 370, 373; *American Baptist Churches in the U.S.A. v. Meese* (N.D. Cal. 1989) 712 F.Supp. 756, 771; see also *Sei Fujii v. State of California, supra*, 38 Cal.2d 718, 721.)

Petitioner cites no authority for the proposition that the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), or the American Declaration of the Rights and Duties of Man (American Declaration) are self-executing. Indeed, none of the above are self-executing treaties. The ICCPR treaty is not self executing, as petitioner concedes in his petition. (*Igartua De la Rosa v. United States* (1st Cir. 1994) 32 F.3d 8, 10, fn. 1; see Pet. 196.) The Universal Declaration of Human Rights, adopted by the United Nations in 1948, is "merely a nonbinding resolution, not a treaty. 'It is not and does not purport to be a statement of law or of legal obligation.'" (*Haitian Refugee Center, Inc. v.*

Gracey (1985 D.C.) 600 F.Supp. 1396, 1406.) With respect to the American Declaration of Human Rights, there is no showing that "the United States in [the American Declaration] agreed to provide additional factors for decision or to modify the decisional factors required by the United States Constitution as interpreted by the Supreme Court." (*Celestine v. Butler* (5th Cir. 1987) 823 F.2d 74, 79-80.) Consequently, petitioner has stated no personal cause of action under the foregoing instruments.

Furthermore, courts of the United States do not give retroactive ratification to a treaty. A treaty is effective from the date of the exchange of ratifications by the parties to the treaty and does not apply retroactively to rights vested prior to that date. (*Board of County Comm'rs v. Aerolineas Peruanasa, S.A.* (5th Cir. 1962) 307 F.2d 802, 807, fn. 4.) The ICCPR was ratified on June 8, 1992, and for that additional reason is inapplicable to petitioner's 1987 conviction and sentence. The same holds true for the International Convention Against All Forms of Racial Discrimination, and the International Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, which were ratified on October 20, 1994.

Finally, petitioner has failed to state a cause of action under international law for the simple reason that, as previously demonstrated, his various claims of violations of due process in connection with his prosecution, conviction and sentencing are without merit. Hence, he fails to make any showing that his conviction and sentence violate any international law or treaty.

XIII.

PETITIONER WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHTS ON THE ARBITRARY BASIS OF RACE, NATIONALITY, IMMIGRATION STATUS OR SOCIOECONOMIC STATUS

Petitioner argues that his constitutional rights were violated arbitrarily on the basis of race, nationality, immigration status, and socioeconomic status. None of petitioner's claims have merit.

A. Prosecutorial Charging Discretion

Petitioner first argues that the prosecution utilized arbitrary factors in charging petitioner with capital murder. (Pet. 209.) However, petitioner's unsupported allegations do not demonstrate a prima facie case for relief.

First, petitioner did not raise this claim at trial and cannot raise this claim for the first time in a collateral habeas proceeding. (*People v. Lucas* (1995) 12 Cal.4th 415, 477 ["Further, to the extent defendant is claiming a violation of due process in the charging decision, defendant did not make a motion to dismiss or to strike the special circumstances on this basis, and should not be permitted to raise the matter for the first time here."].)

Petitioner's claim also fails on the merits. As the *Lucas* Court noted, "Absent proof of invidious or vindictive prosecution, as a general matter a defendant who has been duly convicted of a capital crime under a constitutional death penalty statute may not be heard to complain on appeal of the prosecutor's exercise of discretion in charging him with special circumstances and seeking the death penalty." (*Ibid.*) Petitioner has not demonstrated any proof of invidious prosecution, and his conclusory allegations are not sufficient to support his claim.

Petitioner also asserts that the prosecution also arbitrarily decided not to offer petitioner a favorable plea bargain. (Pet. 210.) This claim is also without merit. This Court explained in *People v. Arias*, "absent a showing of arbitrary and invidious discrimination, prosecutors have wide latitude when selecting those eligible cases in which the death penalty will actually be sought. [Citations.] Among the "[m]any circumstances" bearing on that decision [citation], the prosecution may consider that the charges against the accused include other serious violent crimes against different victims." (*People v. Arias* (1996) 13 Cal.4th 92, 132.) Moreover, this Court "must, of course, presume that this decision was '"legitimately founded on the complex considerations necessary for the effective and efficient administration of law enforcement. [Citation.]"'" (*Id.* at p. 133.) Petitioner provides no evidence to show otherwise.

Petitioner next blithely asserts that he was denied his right to a jury drawn from a fair cross-section of the community and that the prosecution intentionally used peremptory challenges to exclude jurors on the basis of race. (Pet. 211.) However, these claims were not raised at trial and are therefore waived. (*People v. Hayes* (1990) 52 Cal.3d 577, 605 [*Wheeler* challenge waived if not raised at trial]; *People v. Turner* (1994) 8 Cal.4th 137, 172 [same]; *People v. Champion* (1995) 9 Cal.4th 879, 906-907 [failure to raise objection to venire at trial waives claim on appeal"].)

Petitioner next asserts that he was denied effective assistance of counsel based on his race, nationality, national origin, and socio-economic status because petitioner was not assigned a defense attorney of the same race as petitioner. However, petitioner provides no legal support for the claim that he has any entitlement to an attorney of the same race as himself. To the contrary, the Constitution provides only for a right to counsel who is competent, without respect to race or national origin.

Petitioner also claims, without any factual citations or legal argument, that defense counsel was incompetent for failing to raise a *Wheeler*[30] challenge to the prosecution's use of peremptory challenges against prospective jurors and for failing to hire a cultural expert. However, petitioner's cursory allegation of ineffective assistance of counsel fails to set forth a valid claim meriting consideration. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn.11 [noting that claims which are "perfunctorily asserted without argument or authorities in support" are not properly raised on appeal].) Moreover, petitioner's claim fails on the merits. Petitioner bears the burden of demonstrating ineffective assistance. Specifically, petitioner has the burden of demonstrating that defense counsel had a legal basis for raising a *Wheeler* challenge and that such a challenge would have been meritorious. However, petitioner provides no evidence to prove his claim. Similarly, petitioner does not offer any evidence as to what evidence a "cultural expert" could have provided, nor does petitioner show that the testimony of a "cultural expert" would have been relevant and admissible at trial. Indeed, asserting "cultural differences" is no defense to capital murder, particularly since petitioner admitted to the police that he knew what he was doing was wrong. Accordingly, petitioner has not demonstrated any evidence to support his claim of ineffective assistance of counsel.

Petitioner next asserts that race and cultural factors "played a role in the breakdown of the relationship between petitioner and his attorney" and "in petitioner's inability to rationally assist his counsel . . . ." (Pet. 213.) However, petitioner has not presented any evidence that there was ever any breakdown between petitioner and his trial counsel, or that he was unable to assist trial counsel in his defense. Petitioner also asserts that "race and cultural

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30. *People v. Wheeler* (1978) 22 Cal.3d 258,

factors played a role" in causing petitioner to appear unconcerned and uninvolved in the proceedings. (Pet. 213.) Again, petitioner's claim is completely unsupported. To the contrary, petitioner's demeanor accurately reflected that he lacked remorse for his crimes, without respect to his race and culture.

Finally petitioner asserts that his race and culture "played a role in trial counsel's failure to recognize that petitioner was incompetent to stand trial." (Pet. 213.) This claim fails because, as we explained above, even petitioner's own expert recognized petitioner was not incompetent. Petitioner's claims are meritless.

XIV.

APPELLATE COUNSEL WAS NOT CONSTITUTIONALLY INEFFECTIVE

Petitioner contends that appellate counsel was constitutionally ineffective. Petitioner identifies two arguments which petitioner contends appellate counsel was deficient for failing to raise. Neither claim has merit.

It is well settled that a defendant has a right to counsel on first appeal and that this appellate counsel must provide effective assistance. (*Jones v. Barnes* (1983) 463 U.S. 745, 751.) As with claims of ineffective assistance of trial counsel, claims of ineffective assistance of counsel on appeal are governed by the standards set out in *Strickland v. Washington, supra,* 466 U.S. at p. 692, which requires a showing of both objectively deficient representation and actual prejudice. (*Smith v. Murray* (1986) 477 U.S. 527, 535-536.) However, the U.S. Supreme Court has made it clear that the Sixth Amendment right to effective assistance of appellate counsel does not require that counsel raise all arguable claims on appeal. (*Jones v. Barnes, supra*, 463 U.S. at p. 751-754.) As the Court explained in *Murray, supra*, 477 U.S. at p. 536, "Th[e] process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." (See also *Burger v. Kemp, supra*, 483 U.S. at p. 784 [same]; *Barnes, supra*, 463 U.S. at pp. 751-753 [same].) This Court similarly observed in *In re Robbins*, *supra*, 18 Cal.4th at p. 810, "appellate counsel (and, by analogy, habeas corpus counsel as well) performs properly and competently when he or she exercises discretion and presents only the strongest claims instead of every conceivable claim."

In the present case, petitioner claims that appellate counsel was deficient for failing to raise two claims on appeal. However, petitioner has not

demonstrated either deficient representation or prejudice with regard to these two claims. On direct appeal, appellate counsel raised 23 issues with numerous subissues in two separate briefs. Appellate counsel's Opening Brief was 232 pages and his Supplemental Reply and Opening Brief was 101 pages. Appellate counsel could have readily concluded that the issues presented in these opening briefs were the strongest issues available and, as a tactical matter, elected to pursue the stronger arguments while winnowing out the weaker arguments, such as the two raised by petitioner. Moreover, petitioner cannot demonstrate either deficient performance or prejudice because the two now raised by petitioner lack merit.

A. The Reasonable Doubt Instructions Were Proper

First, petitioner contends that appellate counsel was deficient for not raising a challenge to the reasonable doubt instructions given to the jury. Specifically, petitioner argues that, because CALJIC No. 2.90 was given in conjunction with CALJIC Nos. 2.01, 2.02, and 8.83.1, the jury would have likely been confused and found petitioner guilty based on inferences that merely "appear" reasonable, although still harboring reasonable doubts. (Pet. 217-219.) However, this Court already rejected this claim in *People v. Freeman* (1994) 8 Cal.4th 450, 506.

In *Freeman*, this Court noted that the U.S. Supreme Court approved of the very same standard CALJIC instruction on reasonable doubt, CALJIC No. 2.90, that was used in petitioner's case. (*Id.* at p. 501.) The *Freeman* Court then rejected the defendant's claim that the addition of CALJIC Nos. 2.01, 2.02, and 8.83.1 diluted the reasonable doubt instruction. This Court explained:

> "Defendant challenges the word 'appears' in the final paragraph of the language quoted above, which is found in several standard

> instructions. (See CALJIC Nos. 2.01, Sufficiency of Circumstantial Evidence—Generally; 2.02, Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State; 8.83, Special Circumstances—Sufficiency of Circumstantial Evidence—Generally; 8.83.1, Special Circumstances—Sufficiency of Circumstantial Evidence to Prove Required Mental State.) We have already rejected a similar challenge. (*People v. Jennings* (1991) 53 Cal.3d 334, 386.) 'The plain meaning of these instructions merely informs the jury to reject unreasonable interpretations of the evidence and to give the defendant the benefit of any reasonable doubt. No reasonable juror would have interpreted these instructions to permit a criminal conviction where the evidence shows defendant was "apparently" guilty, yet not guilty beyond a reasonable doubt.' (*Ibid.*; see also *People v. Wilson* (1992) 3 Cal.4th 926, 942-943.)" (*Id.* at p. 506.)

Accordingly, petitioner cannot demonstrate that appellate counsel was deficient for failing to make a meritorious claim on appeal or that this alleged deficiency was prejudicial, because this Court has already rejected this very claim as lacking merit.

B. Instructions On Aggravating And Mitigating Evidence

For petitioner's second claim he alleges appellate counsel was ineffective for failing to challenge the trial court's rejection of petitioner's proposed instructions concerning aggravating and mitigating factors. This claim is also unavailing.

At trial, defense counsel offered defense instruction number 7 to replace CALJIC No. 8.84.2. (RT 3965; CT 424-425; 468-670.) The trial court concluded that petitioner's proposed instruction was largely duplicative of CALJIC No. 8.84.2, and was not an entirely accurate statement of the law, and therefore rejected the claim. (RT 3965.) Petitioner now claims that appellate counsel was constitutionally ineffective for failing to challenge the trial court's ruling on appeal. However, petitioner cannot demonstrate incompetence or prejudice.

As noted above, petitioner cannot demonstrate that counsel's decision not to raise this claim was not a tactical decision. Indeed, the record suggests otherwise. Appellate counsel specifically raised two separate claims of instructional error for the penalty phase identifying two other proposed defense instructions denied by the court. (AOB at 175-181 [Args. X & XI].) The logical inference to be drawn from the fact that appellate counsel specifically raised two claims of instructional error based on the trial court's denial of petitioner's proposed penalty phase instructions is that counsel was aware of the claim now raised by petitioner and elected as a tactical matter not to pursue it on appeal.

Moreover, petitioner cannot demonstrate a likelihood that he would have been successful on appeal because CALJIC No. 8.84.2 is an accurate statement of the law. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1177 ["We have also squarely held that the CALJIC instructions are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards."].) Indeed, this Court rejected a nearly identical argument in *People v. Hines* (1997) 15 Cal.4th 997, 1070. In *Hines*, the defendant proposed an alternative instruction to CALJIC No. 8.84.2 that was nearly identical to that proposed by petitioner. This Court rejected the claim that the trial court erred in refusing to use the defendant's proposed instruction rather than CALJIC No. 8.84.2, explaining:

> "'Special Instruction No. 13' requested by defendant was a modified version of CALJIC No. 8.84.2 (1986 rev.) given by the trial court. The requested instruction stated that the jury was 'not permitted to consider any factor as aggravating unless it is specified on the list of [aggravating] factors,' but that there was 'no limitation' on what the jury could consider as mitigating. It would have told the jury that it could 'consider pity, sympathy, or mercy for the defendant in deciding on the appropriate penalty.' It also said, 'If a mitigating circumstance or an aspect of the defendant's background or his character, called to your attention by the evidence or your

observations of Gary Hines, arouses sympathy or compassion such as to persuade you that death is not the appropriate penalty, you shall act in response thereto and impose a punishment of life without the possibility of parole . . . .' It further stated that the jury need not impose the death sentence even if it concluded that the factors in aggravation so substantially outweighed those in mitigation that a death sentence was justified.

"Defendant's proposed instruction added nothing of significance to the instruction given, CALJIC No. 8.84.2, and it was less 'balanced' or neutral in tone. We have previously held that a trial court need not instruct the jury that it may impose a sentence of life without the possibility of parole even if the jury has concluded that the circumstances in aggravation outweigh those in mitigation. (*People v. Beeler, supra*, 9 Cal.4th at p. 997; *People v. Edwards* (1991) 54 Cal.3d 787, 842.)" (*Ibid.*)

Accordingly, petitioner's claim fails.

XV.

CALIFORNIA'S DEATH PENALTY STATUTE PROPERLY NARROWS THE CLASS OF OFFENDERS ELIGIBLE FOR THE DEATH PENALTY WITHIN CONSTITUTIONAL REQUIREMENTS

Petitioner next contends that California's death penalty scheme fails to sufficiently narrow the class of eligible offenders. (Pet. 224.) Petitioner attempts to support his claim by relying on a statistical analysis of California capital cases from 1988 to 1992. (Pet. 233.) Petitioner's claim is unavailing.

This Court rejected an identical claim in *People v. Frye*, explaining:

> "Offering a statistical analysis based on an examination of published appeals from murder convictions for the years 1988-1992, defendant claims the California death penalty statute on its face fails to narrow the class of death-eligible defendants in violation of the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution. Defendant acknowledges we have previously held that the 'special circumstances' provisions of our capital sentencing scheme sufficiently narrow the class of death-eligible murderers. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 465-468.) But, he argues, in light of the broad interpretation of the lying-in-wait special circumstance and the expansive sweep of the felony-murder special circumstance, virtually all first degree murders are death eligible, and thus the special circumstances perform no narrowing function at all.
>
> "Defendant's argument notwithstanding, the special circumstances 'are not overinclusive by their number or terms.' (*Arias, supra*, 13 Cal.4th at p. 187.) Nor have they been construed in an overly expansive manner. (*Ibid.*; see also *People v. Morales* (1989) 48 Cal.3d 527, 557-558 [lying-in-wait]; *People v. Marshall* (1990) 50 Cal.3d 907, 946 [felony murder]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [felony murder].) Defendant's statistics do not persuade us to reconsider the validity of these decisions.
>
> "Defendant raises a number of other claims, admittedly for purposes of federal review. He asserts that California's capital sentencing scheme, as written and applied, violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution by its

(1) failure to require written findings by the jury on the aggravating factors, (2) failure to require the jury to find aggravating factors and appropriateness of the death penalty beyond a reasonable doubt, (3) lack of requirement for intercase and intracase proportionality review, (4) creation of an impermissible barrier to consideration of mitigating evidence by use of adjectives such as 'extreme' (§ 190.3, factors (d), (g)) and 'substantial' (id., factor (g)) to describe potential mitigating evidence, (5) failure to perform constitutionally required narrowing function by an overly broad definition of felony murder, and (6) granting of unbounded discretion to the prosecutor.

"We have rejected all of these claims, as defendant acknowledges. Written findings on aggravating factors are not required, nor must the People prove aggravating factors or the appropriateness of the death penalty beyond a reasonable doubt. (*People v. Rodriguez, supra*, 42 Cal.3d at pp. 777-779.) We do not engage in intercase or intracase proportionality review. (*Bacigalupo, supra*, 1 Cal.4th at pp. 151-152.) Instructing the jury in the language of section 190.3, factors (d) and (g) does not create a barrier to consideration of mitigating evidence. (*People v. Turner* (1994) 8 Cal.4th 137, 208-209.) The felony-murder special circumstance provides a meaningful basis for narrowing death eligibility. (See *People v. Marshall, supra,* 50 Cal.3d at p. 946.) The prosecutor's exercise of discretion in choosing to seek the death penalty does not amount per se to a constitutional violation. (*People v. Ashmus* (1991) 54 Cal.3d 932, 980.) Defendant provides no reasons justifying our reconsideration of these decisions." (*People v. Frye* (1998) 18 Cal.4th 894, 1028-1030.)

Petitioner similarly provides no reasons justifying reconsideration of these decisions here.

XVI.

THIS COURT PROVIDES MEANINGFUL REVIEW WITHIN CONSTITUTIONAL REQUIREMENTS

Petitioner next challenges the quality of the review provided by this Court in capital cases. (Pet. 257.) However, petitioner's assertion that this Court fails to perform a meaningful, non-arbitrary, and non-capricious review of capital cases is not a legal argument but a political tirade. Petitioner accuses this Court of disposing of his appellate claims "by resort to intellectual sleight of hand based on an analysis that ignored prejudicial violations of law." (Pet. 258.) Rather than make any showing with respect to the particular facts and issues in his own case, petitioner instead embarks upon a general discussion of affirmance rates, and the change in affirmance rates between this Court under Chief Justice Bird and subsequent affirmance rates. While discerning nothing notable about the 7.8% *affirmance* rate during the Bird era (Pet. 259), he claims that a similar *reversal* rate in later years shows arbitrary and capricious review. He challenges the integrity of former Governor George Deukmejian, alleging that he threatened Supreme Court Justices concerning their death penalty decisions and led "one of the most strident pro death penalty campaigns in the country's history." (Pet. 260.) Petitioner then accuses this Court of abdicating its responsibilities and duties in order to "achieve its political goals" by manipulating, distorting and jettisoning prior precedent to affirm death judgments. (Pet. 268.) He even accuses this Court of manipulating facts to support an affirmance in death cases. (Pet. 270.) Petitioner then misanalyzes several of this Court's precedents and charges this Court with, *inter alia*, turning "a blind eye to the existence of constitutional error." (Pet. 272.)

Petitioner makes no attempt to demonstrate anything in his own case that shows arbitrary or capricious action by this Court, and thus fails to state a prima facie case. Petitioner's brazen and unfounded attacks on this Court merit no further response from this office.

XVII.

METHOD OF EXECUTION CONTEMPLATED BY THE JURY

Petitioner argues that his death sentence is unconstitutional because the method of execution contemplated by the jury at the time of the verdict is allegedly unconstitutional. (Pet. 294.) This Court already rejected this claim in *People v. Welch*, stating:

> "At the time defendant was sentenced to death, the method of execution in this state was by lethal gas. Subsequently, this method of execution was found to be cruel and unusual. (*Fierro v. Gomez* (N.D.Cal. 1994) 865 F.Supp. 1387, affd. by *Fierro v. Gomez* (9th Cir. 1996) 77 F.3d 301, 309.) The United States Supreme Court granted certiorari in *Fierro*, vacated the judgment, and remanded the case to the United States Court of Appeals for the Ninth Circuit 'for further consideration in light of ... [s]ection 3604.' (*Gomez v. Fierro* (1996) 519 U.S. 918.) Section 3604, subdivision (b), as amended in 1996, permits an election by persons sentenced to death to have punishment imposed by either lethal gas or lethal injection. As we have noted, the constitutionality of the method of execution 'bears solely on the legality of the execution of the sentence and not on the validity of the sentence itself.' [Citation.]
>
> Defendant argues nonetheless that the supposed unconstitutionality of the execution by lethal gas directly affected his penalty verdict. As he states: 'Since retribution rather than deterrence appears to be the prevailing justification for modern capital punishment systems, it is unsurprising that a juror's assessment of the harshness of punishment becomes one of the sentencing factors . . . . Thus, some jurors in defendant's trial may have concluded that painful death by gas was a more appropriate punishment than life in prison. But the same jurors could have easily concluded that life in prison was harsher and more appropriate [than] a medically administered injection similar to those contemplated by proponents of state assisted suicide laws . . . . Defendant is entitled to a new sentencing hearing because the method of execution envisioned by defendant's sentencing jury has been found unconstitutional.'

Of course, the argument could be made that it is at least as likely that the adoption of lethal injection as a method of execution has made juries more, rather than less, willing to select a death sentence. In any case, when reviewing a jury verdict, '[w]e presume that jurors comprehend and accept the court's directions.' [Citation.] Defendant's speculation about the jury's decisionmaking process does not serve to dispel that presumption in the present case. We therefore presume that the method of execution did not play a role in the jury's penalty phase deliberations." (*People v. Welch* (1999) 20 Cal.4th 701, 770-771.)

This holding is equally applicable here.

XVIII.

EXECUTION BY LETHAL INJECTION IS NOT CRUEL AND UNUSUAL PUNISHMENT REQUIRING REVERSAL

Petitioner contends that execution by lethal injection is unconstitutional because it constitutes cruel and unusual punishment. Petitioner supports his claim with newspaper stories and anecdotal accounts of executions by lethal injection in other states. (Pet. 299-314.) However, this Court has already rejected this claim. As this Court noted in *People v. Samayoa*:

> "Defendant asserts that death by lethal injection, the alternative to death by lethal gas under section 3604, constitutes cruel and unusual punishment. Defendant, however, neither cites legal authority, nor identifies any portion of the record on appeal, in support of his contention. '"In any event, the claim must be rejected out of hand as a ground for reversal of the judgment of death. It bears solely on the legality of the execution of the sentence and not on the validity of the sentence itself."' (*People v. Bradford* (1997) 14 Cal.4th 1005, 1059, quoting *People v. Berryman, supra*, 6 Cal.4th 1048, 1110.)" (*People v. Samayoa* (1997) 15 Cal.4th 795, 864.)

(See also *People v. Holt* (1997) 15 Cal.4th 619, 702 [anecdotal evidence of the administration of lethal injection in other states does not support a conclusion that this method of execution as administered in California violates the Eighth Amendment]; *Poland v. Stewart* (9th Cir. 1997) 117 F.3d 1094, 1105 [defendant failed to demonstrate that the use of lethal injection as a method of execution violates his constitutional rights]; *Kelly v. Lynaugh* (5th Cir. 1988) 862 F.2d 1126, 1135 [execution by lethal injection not cruel and unusual punishment, following *Woolls v. McCotter* (5th Cir. 1986) 798 F.2d 695, 698].) Petitioner's claim should therefore be rejected.

XIX.

EXECUTION AFTER PROLONGED CONFINEMENT DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT WARRANTING REVERSAL

Petitioner contends that executing him after a prolonged confinement under a sentence of death (which now totals 13 years on death row) would be cruel and unusual punishment. (Pet. 316.) This Court has already rejected this argument as well, in *People v. Frye, supra,* explaining:

> "Defendant claims that the length of time he has been on death row awaiting his first appeal as a matter of right (seven years) has been so excessive as to constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. He claims that the psychological brutality that results from a prolonged wait for execution does not comport with 'evolving standards of decency that mark the progress of a maturing society' from which the Eighth Amendment draws it meaning. (*Trop v. Dulles* (1958) 356 U.S. 86, 101.) In support of his constitutional claim, defendant relies on recent decisions of foreign courts concluding that the government may not carry out the execution of a condemned inmate who has faced the prospect of execution over an extended period of time. (See, e.g., *Pratt v. A-G for Jamaica* (1993 P.C.) 4 Eng.Rep. 769 [in bank].)
>
> "The reasoning of the Ninth Circuit Court of Appeals in *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, and of the Fifth Circuit Court of Appeals in *White v. Johnson* (5th Cir. 1996) 79 F.3d 432, persuades us that prolonged confinement prior to execution does not constitute a violation of the Eighth Amendment. In *McKenzie v. Day, supra*, 57 F.3d 1461, the defendant sought a stay of execution on the ground that he would likely succeed on his claim that over 20 years on death row was cruel and unusual punishment. A majority of the three-judge panel concluded the claim was unlikely to succeed, and denied the stay request. (*Id.* at p. 1463.) The court determined that the cause for the delay in executing the defendant was due to the defendant's having 'availed himself of procedures our law provides to ensure that executions are carried out only in appropriate circumstances.' (*Id.* at p. 1467.) In the court's view, the delay was

thus 'a consequence of our evolving standards of decency, which prompt us to provide death row inmates with ample opportunities to contest their convictions and sentences.' (*Ibid.*) As the court observed, a defendant sentenced to death need not have excessive review prior to execution, but the Constitution requires certain procedural safeguards before execution to prevent arbitrary or erroneous executions. In the court's view, the delays caused by satisfying the Eighth Amendment cannot violate it. (*Id.* at p. 1467.)

"The Fifth Circuit applied similar reasoning in *White v. Johnson, supra*, 79 F.3d 432, to reject the defendant's claim that inordinate delay in carrying out an execution is cruel and unusual punishment under the Eighth Amendment. Recognizing a tension between the state's interest in deterrence and swift execution and its interest in ensuring that those who are executed receive fair trials with constitutionally mandated safeguards, the court found compelling reasons for the length of time between conviction and execution. (*Id.* at p. 439.)

"Defendant's continued incarceration following imposition of the death penalty seven years ago is likewise the result of the need to assure careful review of his conviction and sentence. (*Harrison v. United States* (1968) 392 U.S. 219, 221, fn. 4; see also § 1239 [automatic appeal of death judgment]; cf. *People v. Hill, supra*, 3 Cal.4th at pp. 1014-1016 [rejecting argument that delay inherent in capital appeals process constitutes cruel and unusual punishment]; *People v. Chessman* (1959) 52 Cal.2d 467, 499 [same].) Under these circumstances, we conclude that his confinement on death row pending the outcome of his direct appeal does not constitute cruel and unusual punishment in violation of the Eighth Amendment. [Citations.] As the court in *McKenzie v. Day, supra*, 57 F.3d 1461, aptly observed, '"It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place."' [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 1030-1031.)

XX.

NO CUMULATIVE ERROR IS PRESENT HERE

Petitioner claims that the purported deficiencies discussed in issues 1 through 19, even if not considered prejudicial individually, when considered cumulatively had a substantial and injurious effect in determining the jury's verdict. As discussed above, even if the above issues are not dismissed on procedural grounds and considered on the merits, he has failed to state any claims entitling him to relief. Since he has failed to show any prejudicial error entitling him to relief, his assertion of cumulative error must fail. (*People v. Samayoa*, *supra*, 15 Cal.4th 795, 849; *People v. Carpenter* (1997) 15 Cal.4th 312, 421-422; *People v. Bradford* (1997) 14 Cal.4th 1005, 1057; *People v. Jackson* (1996) 13 Cal.4th 1164, 1245; *People v. Hamilton* (1988) 46 Cal.3d 123, 156; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1236-1237.)

XXI.

PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In a general, catch-all claim, petitioner again complains that he was denied effective assistance of appellate counsel in his direct appeal. He claims that counsel failed to investigate and present numerous claims crucial to his case, including but not limited to the claims which petitioner raises in the instant petition. The claim is untimely and has no merit.

Petitioner has failed to establish a prima facie case of incompetence. The Fourteenth Amendment to the Federal Constitution requires that an indigent accused be afforded competent assistance of counsel on initial appeal. (*Douglas v. California* (1963) 372 U.S. 353, 355-356; *Evitts v. Lucey* (1985) 469 U.S. 387.) Claims that a defendant was denied effective assistance of appellate counsel are reviewed according to the standard set out in *Strickland v. Washington, supra*, *supra*, 466 U.S. at 668. (*Miller v. Keeney* (9th Cir. 1989) 882 F.2d 1428, 1433-1434; *United States v. Birtle* (9th Cir. 1986) 792 F.2d 846, 847; *People v. Harris* (1993) 19 Cal.App.4th 709, 714-715; *In re Harris*, *supra*, 5 Cal.4th at p. 833.) The defendant "must show that counsel's advice fell below an objective standard of reasonableness, *Strickland*, 466 U.S. at 688, and that there is a reasonable probability that, but for counsel's unprofessional errors, [he] would have prevailed on appeal. *See id.* at 694; *Birtle*, 792 F.2d at 849." (*Miller v. Keeney, supra*, 882 F.2d at 1434.) *Miller* went on to explain:

> "These two prongs partially overlap when evaluating the performance of appellate counsel. In many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. [Footnote and citations omitted.] Like

> other mortals, appellate judges have a finite supply of time and trust; every weak issue in an appellate brief or argument detracts from the attention a judge can devote to the stronger issues, and reduces appellate counsel's credibility before the court. For these reasons, a lawyer who throws in every arguable point– 'just in case'– is likely to serve her client less effectively than one who concentrates solely on the strong arguments. [Footnote omitted.]" (*Ibid.*)

"The question of ineffective assistance of appellate counsel must be decided on a case-by-case basis and will depend on whether counsel failed to raise assignments of error that were crucial in the context of the particular circumstances at hand." (*In re Jones* (1994) 27 Cal.App.4th 1032, 1041, citing *In re Smith* (1970) 3 Cal.3d 192, 202-203.)

Petitioner was afforded two experienced attorneys in his direct appeal and his first habeas corpus petition in this Court. Petitioner's generalized complaint falls short of that required. Petitioner has failed to demonstrate any issues entitling him to reversal of his conviction in this proceeding. Hence, he has failed to demonstrate either incompetence or prejudice.

CONCLUSION

Accordingly, respondent respectfully asks that the petition for writ of habeas corpus be denied and the judgment be affirmed.

Dated: September 27, 2000

Respectfully submitted,

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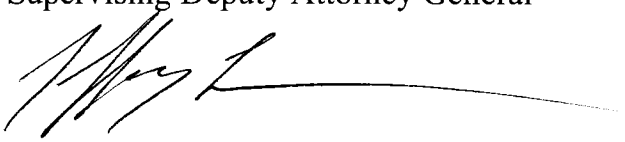

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DECLARATION OF SERVICE BY MAIL

Case Name: ***People* v. *Miguel Angel Bacigalupo***
Case No. **S079656**

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 4, 2000, I served the attached

BRIEF IN OPPOSITION TO SECOND PETITION FOR WRIT OF HABEAS CORPUS

in the internal mail collection system at the Office of the Attorney General, 455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102, for deposit in the United States Postal Service that same day in the ordinary course of business in a sealed envelope, postage fully prepaid, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on October 4, 2000, at San Francisco, California.

DENISE NEVES
(Typed Name)

(Signature)