IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **ROBERT LEWIS, JR.,** On Habeas Corpus.	**CAPITAL CASE** S117235

Related Automatic Appeal No. S020670
Los Angeles County Superior Court No. A027897
The Honorable Elsworth Beam & The Honorable Richard F. Charvat, Judges

INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

On October 27, 1983, petitioner went to the home of Milton Estell, bound and gagged Mr. Estell, and stabbed him in the chest and shot him in the back. Petitioner was apprehended in Mr. Estell's Cadillac five days later. (*People v. Lewis* (1990) 50 Cal.3d 262, 271-273.)

Following a jury trial in the Los Angeles County Superior Court, petitioner was found guilty of the first-degree murder and robbery of Milton Estell. (Pen. Code, §§ 187, subd. (a), 211.) The jury found true the special circumstance, under the 1978 death penalty law, that the murder was committed during the commission or attempted commission of a robbery. (Pen. Code, § 190.2, subd. (a)(17).) (CT[1/] 7-15, 42.) At the conclusion of the penalty phase, the jury fixed the penalty at death. (CT 16-30, 42.) In 1984, the trial court

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1. All references to transcripts refer to the original and supplemental clerk's and reporter's transcripts filed in the concurrent automatic appeal (case no. S020670), unless otherwise specified. Respondent asks this Court to take judicial notice of its records, including all documents filed on behalf of petitioner and respondent in the course of petitioner's automatic appeal and his previous habeas corpus action. (Evid. Code, § 452; see *In re Clark* (1993) 5 Cal.4th 750, 798, fn. 35.)

sentenced petitioner to death in accordance with the jury's verdict. (CT 42-43.)

Petitioner filed a petition for writ of habeas corpus (case no. S005412) with this Court on April 29, 1988. On May 19, 1989, this Court issued an order requesting respondent to file an informal response to the petition. After the parties filed responsive pleadings, this Court denied the petition on the merits on September 7, 1989. The order denying the petition provided, in its entirety, as follows: "The petition for writ of habeas corpus DENIED."[2/]

On March 1, 1990, this Court decided petitioner's automatic appeal. (CT 2-51; see *People v. Lewis* (1990) 50 Cal.3d 262.) The Court affirmed petitioner's 1984 convictions of first-degree murder and first-degree residential robbery and the jury's true finding on the Penal Code section 190.2, subdivision (a)(17), robbery-murder special-circumstance allegation. (CT 7-15, 42; *Lewis*, *supra*, 50 Cal.3d at pp. 274-278, 292.) Further, the Court reviewed and affirmed the penalty phase proceedings, including the jury's affixing the penalty at death. (CT 16-30, 42; *Lewis*, *supra*, 50 Cal.3d at pp. 279-285, 292.) However, this Court found error had occurred in the consideration of the automatic application for modification of verdict (Pen. Code, § 190.4, subd. (e)) and remanded the cause to the trial court with specific limiting language:

> the judgment of death is vacated and the cause is remanded to the trial court for the *limited purpose* of redetermining defendant's application for modification of the verdict in accordance with this opinion. If the trial court, upon application of the appropriate standards, denies the application for modification, it shall reinstate the judgment of death. If it grants the application, it shall enter a judgment of life without the possibility of parole. Any subsequent appeal shall be limited to issues

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2. Respondent also notes that petitioner's first state habeas corpus petition was filed prior to this Court's decision in *In re Clark*, *supra*, 5 Cal.4th 750.

related solely to the modification application.

(*Lewis, supra*, 50 Cal.3d at p. 292; CT 42-43, emphasis added.)

On March 20, 1991, the trial court heard and denied petitioner's motion for modification of the verdict (Pen. Code, § 190.4, subd. (e)). (CT 225.) Petitioner was sentenced to death on count I in accordance with the jury's verdict. (CT 226-232.)

Petitioner filed his opening brief in his automatic appeal on April 16, 2002. The Respondent's Brief was filed on July 15, 2002, and the reply brief was filed on January 6, 2003. The automatic appeal is currently pending awaiting the scheduling of oral argument.

On July 2, 2003, petitioner filed the instant petition for writ of habeas corpus. This Court requested respondent to file an informal response to the petition for writ of habeas corpus pursuant to Rule 60 of the California Rules of Court.

ARGUMENT

I.

PETITIONER'S SUBSTANTIAL DELAY IN THE PRESENTATION OF A MAJORITY OF THE CLAIMS BARS THEIR CONSIDERATION

Petitioner's pending automatic appeal arises *solely* from the limited remand for consideration of the automatic application for modification of verdict. Although petitioner filed this petition within 180 days of his reply brief in the pending automatic appeal, by raising numerous claims relating to his trial, rather than the limited remand proceedings, petitioner returns for a second bite at the "apple" of habeas relief almost 14 years after his first habeas petition was denied by this Court in September 1989. Petitioner recognizes the need to justify his delay, and he devotes his entire *Claim II* argument, consisting of 23 pages of his 307-page petition, to the issue of timeliness. (Petn. 37-59.) However, his justifications are inadequate, and he has not demonstrated that the trial-related claims in the petition fall within the exceptions to the rule barring consideration of untimely habeas corpus petitions.

Both this Court and the United States Supreme Court have long recognized the State's strong and legitimate interest in finality of its judgments and the detriment to society in having mere "tentative judgments." (*In re Harris* (1993) 5 Cal.4th 813, 831; *In re Clark, supra*, 5 Cal.4th at p. 775; see also *Calderon v. Thompson* (1998) 523 U.S. 538, 555-559 [118 S.Ct. 1489, 140 L.Ed.2d 728].) This Court has also demonstrated its awareness of the burden upon the State and the justice system in cases where retrial may be required, especially after a substantial delay caused by the filing of untimely or successive petitions. (*In re Harris, supra*, 5 Cal.4th at p. 831; *In re Clark, supra*, 5 Cal.4th at pp. 770, 774-775, 777, 782, 787-789.) If a petitioner is granted a new trial as a means of habeas relief after significant delay, the "erosion of memory" and

the disappearance of witnesses and evidence prejudice the State and "diminish the chances of a reliable criminal adjudication." (*In re Clark, supra*, 5 Cal.4th at pp. 770, 775, 776.) Indeed, such a delayed adjudication subverts the judicial process. (See *Calderon v. Thompson*, *supra*, 523 U.S. at p. 555.)

Thus, this Court has held that unjustified delay can be a bar to habeas corpus relief. Delay may occur under two circumstances: (1) where there is substantial delay in presenting a claim regardless of the existence of any prior habeas attacks on the judgment (*In re Clark, supra*, 5 Cal.4th at pp. 782-787), and (2) where the petition amounts to a successive petition which raises additional claims that could have been presented in an earlier attack on the judgment (*id.* at pp. 769-770, citing *In re Horowitz* (1949) 33 Cal.2d 534, 546-547). "A successive petition presenting additional claims that could have been raised in an earlier attack on the judgment is, of necessity, a delayed petition." (*Id.* at p. 770.)[3/]

Historically, this Court has required a petitioner to justify *any* substantial delay in presenting claims via habeas corpus petitions. (*In re Wells* (1967) 67 Cal.2d 873, 875; *In re Shipp* (1965) 62 Cal.2d 547, 553; *In re Swain* (1949) 34 Cal.2d 300, 304.) In June 1989 this Court published timeliness standards for habeas corpus petitions filed in capital cases. (See Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3 [hereinafter "Policies"], stds. 1-1.1 to 1-3.) A petitioner's failure to comply with the timeliness policies permits this Court to deny the petition as untimely. (Policies, std. 1-3.) However, this Court has observed, "Even before June 1989, a habeas corpus petitioner who had knowledge that grounds for a habeas corpus

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3. This Court has stated that it will not apply the successive petition bar to cases where prior habeas corpus petitions were filed prior to the decision in *In re Clark*. (*In re Robbins* (1998) 18 Cal.4th 770, 778, fn. 9.) Petitioner's prior habeas petition predates *Clark*. Therefore, respondent does not assert a successive petition bar here.

petition existed was on notice that any substantial delay in filing a petition after the grounds became known had to be justified." (*In re Clark, supra*, 5 Cal.4th at p. 782, citing *In re Stankewitz* (1985) 40 Cal.3d 391, 396, fn. 1 and *People v. Jackson* (1973) 10 Cal.3d 265, 268.)

On May 2, 1994, current counsel received a dual appointment to represent petitioner in his current automatic appeal and any related habeas corpus proceeding. The instant petition was filed on July 2, 2003 – nine years after counsel was appointed. Under this Court's existing precedent, petitioner's presentation of habeas claims arising from the litigation related to the automatic motion for modification of the verdict would appear to be timely since the Policies generally promote contemporaneous filing of appellate and habeas issues. Although petitioner fails to specifically identify these claims, respondent identifies them as *Claims XXII, XXIII, and XXV*.

However, delay in presenting claims relating to events arising from petitioner's *trial*, rather than the new hearing on the motion for modification of verdict, tends to subvert the judicial process since the substantial delay significantly diminishes the probability of a reliable criminal adjudication. This Court should require petitioner to justify his lengthy delay in bringing claims arising from his trial. Petitioner's efforts to excuse his delay in raising these trial issues are addressed below.

A petitioner may establish the absence of substantial delay if the petition alleges *with specificity* facts showing the petition was filed within a reasonable time after petitioner or counsel "(a) knew, or should have known, of facts supporting a claim and (b) became aware, or should have become aware, of the legal basis for the claim." (Policies, Policy 3 std. 1-1.2; see also *In re Robbins, supra*, 18 Cal.4th at p. 780.) As to *each claim and sub-claim*, a petitioner must allege when the information was obtained, known, and reasonably should have been known. (*In re Robbins, supra*, 18 Cal.4th at p.

799, fn. 21; *In re Gallego* (1998) 18 Cal.4th 825, 837, fn. 11; *In re Sanders* (1999) 21 Cal.4th 697, 720, fn. 13.) Without specificity, this Court cannot determine whether the claims presented in the petition were raised in a reasonable period of time. (*In re Clark, supra*, 5 Cal.4th at p. 786.) Here, petitioner fails to make an adequate showing of the absence of substantial delay.

Petitioner argues he did not substantially delay because some claims stated in the petition "are based in whole or in part upon new discovered facts that Petitioner did not know, and could not have known at the time of his first petition." (Petn. 41.)[4/] However, the petition fails to allege with specificity when petitioner or his counsel knew, or should have known, the facts supporting the claims raised in the petition. (Policies, Policy 3, std. 1-1.2; *In re Robbins, supra*, 18 Cal.4th at p. 787; *In re Sanders, supra*, 21 Cal.4th at p. 704.) Further, the petition fails to allege with specificity which claims were discovered as the *result of investigation* after counsel's appointment. As a result, the petition fails to provide sufficient information for respondent or this Court to assess whether any of the claims, *except Claims III, IV, XXII, XXIII, and XXV*, were filed without substantial delay. (*In re Clark, supra*, 5 Cal.4th at p. 786.)

Despite petitioner's failure to categorize the claims in the petition,

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4. Petitioner lists these facts as including (1) materials lost or destroyed by the Los Angeles District Attorney, Long Beach Police, and trial counsel but reconstructed by current habeas counsel; (2) the testimony of Lewis Wong; (3) testimony relating to the business record foundation for the registration card; (4) information concerning petitioner's "life history of trauma"; (5) evidence of petitioner's mental retardation; (6) evidence of petitioner's learning disabilities; (7) evidence of the effects of incarceration; and (8) evidence of petitioner's good acts. (Petn. 41-42.) Most, if not all, of these allegations are clearly not "newly discovered" and, therefore, cannot excuse or justify the extreme delay in presenting the claims raised in the petition. For instance, by "reconstructing" materials lost or destroyed by trial counsel (Petn. 41), current habeas counsel essentially concedes the materials obtained were available to prior counsel and, therefore, were not "newly discovered."

some of the timeliness questions may be resolved by examining the nature of the claim presented. For instance, claims which rely *exclusively* upon the appellate record are claims which should have been known at the time of the first appeal. (*In re Gallego*, 18 Cal.4th at p. 838.) In presenting *Claims V, IX, X, XVII, XIX, XX, and XXIV*, petitioner relies exclusively upon the trial record for factual support of his contentions. Thus, it appears that all the aforementioned claims should have been known to prior counsel before the conclusion of the appellate process in 1990 and should have been known to current counsel well before the instant petition was filed in 2003.

As for *Claims I, V-XII, XIV-XVII, XXIV, and XXVI- XXXII,* petitioner fails to specify the "triggering facts" which could justify further investigation into those claims, or what steps were taken, or when steps were taken to gain information in support of those claims. (*In re Robbins, supra*, 18 Cal.4th at pp. 789-791.) As a result, petitioner again fails to provide sufficient details to permit this Court to assess whether these claims were presented without substantial delay.

Petitioner offers, as an initial general excuse for prior habeas counsel's failure to discover the "newly-discovered" facts listed above, the fact that this Court denied prior habeas counsel's initial request for funds for investigation and consultation of experts. (Petn. 43-44.) However, petitioner fails to tie this excuse to any individual claim and wholly fails to explain how additional funding was necessary to present claims relying exclusively on the appellate record or claims of which prior appellate and habeas counsel were plainly aware. Indeed, prior habeas counsel retained at least three experts (Michael Adelson, Edward Bronson, and Lois Heaney) who submitted declarations on his behalf. Prior habeas counsel personally interviewed trial counsel and examined his file. There is no indication that prior habeas counsel encountered any difficulty in collecting necessary records and documentation, much less the

type of difficulty purportedly experienced by current counsel (see *Claim III*).

Also, petitioner argues that prior appointed habeas counsel did not have an affirmative duty to "exhaustively investigate all of Petitioner's possible habeas corpus claims" and lacked notice that all claims were required to be presented in a single petition. (Petn. 39-40.) Both reasons are insufficient to provide a blanket excuse for the substantial delay in raising claims never previously presented on habeas and additional evidentiary support for other claim previously raised. Even under the Policies there exists no duty to "exhaustively investigate" habeas claims. Rather, "counsel has a duty to investigate potential habeas corpus claims only if counsel has become aware of information that might reasonably lead to actual facts supporting a potentially meritorious claim." Concerning the notice afforded petitioner that delay could bar claims raised in a future petition, "[e]ven before June 1989, a habeas corpus petitioner who had knowledge that grounds for a habeas corpus petition existed was on notice that any substantial delay in filing a petition after the grounds became known had to be justified." (*In re Clark, supra*, 5 Cal.4th at p. 782, citing *In re Stankewitz* (1985) 40 Cal.3d 391, 396, fn. 1 and *People v. Jackson* (1973) 10 Cal.3d 265, 268.) Thus, this excuse fails to justify the delay in presenting the trial-related claims in this petition.

Respondent's review of the petition's claims, except *Claims III, IV, XXII, XXIII, and XXV*, demonstrates the factual and legal grounds for these claims were known, or should reasonably have been known, to petitioner and his counsel no later than his first automatic appeal. For instance, the legal and factual basis for *Claim I* existed in 1988 when prior habeas counsel filed the first petition since the claim is premised upon the length of petitioner's trial and the Supreme Court's 1984 decision in *United States v. Cronic* (1984) 466 U.S. 648 [104 S.Ct. 2039, 80 L.Ed.2d 657]. Claims which rely *exclusively* upon the appellate record are claims which should have been known at the time of the

appeal. (*In re Gallego, supra*, 18 Cal.4th at p. 838.) Thus, this claim should have been known to prior counsel before the conclusion of the appellate process in 1990 and should have been known to current counsel well before the instant petition was filed in 2003. Similarly, all of the allegations within *Claim V* are premised upon either the appellate record or facts reasonably known to prior appellate and habeas counsel.

To the extent petitioner's allegations of "newly discovered" facts might relate more particularly to some of these claims, the petition debunks his assertion he was not aware of the information when he filed his first habeas petition in 1988. For instance, as further discussed in *Claim VI* (Petn. 77-80), prior habeas counsel was aware of the existence of Mr. Wong and included the essential substance of the declaration now provided by Mr. Wong in the prior habeas petition filed in 1988. As a result, Mr. Wong's "testimony" is not newly discovered. As further discussed in *Claim VIII* (Petn. 82-84), petitioner references the trial record and the 1988 declaration of investigator Kristina Kleinbauer (Petn. Exh. 12), which was attached to the 1988 petition, as the only factual support for his claims concerning trial counsel's failure to prepare an "alibi" defense. Clearly, prior habeas counsel was well aware of this information.

As for trial counsel's investigation of mental defenses (*Claim VII*; Petn. 80-82), although petitioner only recently located a psychologist willing to diagnose him as suffering from mental retardation and organic brain damage, the scope and nature of trial counsel's investigation has been well known to petitioner since his prior appeal and habeas petition. He has failed to justify his substantial delay in presenting this claim.

The substance of *Claim IX* (Petn. 85-87) was presented in petitioner 1988 petition and, thus, was clearly known to petitioner well before the instant petition was filed.

Claim X (Petn. 87-93) relies exclusively on the appellate record for its assertion of ineffective assistance. Claims which rely *exclusively* upon the appellate record are claims which should have been known at the time of the appeal. (*In re Gallego, supra*, 18 Cal.4th at p. 838.) Thus, these claims have been reasonably known to petitioner since his trial in 1984. The delay in presenting these claims is substantial.

Claims *XI and XII* (Petn. 93-98, 99-100) were presented in petitioner's first automatic appeal and his first habeas petition (which relied upon the same expert declarations appended to the instant petition), and petitioner fails to allege any new material facts in support of the claim. Nor has he explained his delay of nine years following counsel's appointment to renew these claims.

As for *Claim XIII* (Petn. 101-104), petitioner asserts that he could not have presented this argument in his first habeas petition because the argument relies "in significant part" upon the statistics developed from data provided in 1995 and published in 1997. (Petn. 44.) However, as further discussed below, in *McCleskey v. Kemp* (1987) 481 U.S. 279, 289 [107 S.Ct. 1756, 95 L.Ed.2d 262], the court found statistics "insufficient to show irrationality, arbitrariness and capriciousness under any kind of Eighth Amendment analysis." Petitioner challenged the constitutionality of California's special circumstances in general in 1988 and could have challenged the narrowing function of the robbery special circumstance despite the unavailability of the study in 1988, particularly since Supreme Court precedent existing since 1987 minimizes the value of such statistical data.

Similarly, the so-called evidence of petitioner's "good acts" (*Claim XIV*; Petn. 124) is predicated solely upon exhibits attached to the habeas petition filed in 1988. There is nothing "new" about this information. As for information concerning petitioner's "life history of trauma" (*Claim XIV*); Petn. 104-135) such information was within petitioner's personal knowledge and

petitioner has not alleged facts establishing the information was not known to petitioner at the time of trial, much less the first habeas petition. As for *Claim XV* (Petn. 136-166) *and Claim XVIII* (Petn. 180-182), according to petitioner's expert, evidence suggesting petitioner's mental retardation and learning disabilities was "available" to trial counsel's mental health experts prior to trial but was not properly evaluated by the experts.

Concerning *Claim XVI* (Petn. 167-178), both petitioner and his trial counsel were personally aware of the fact of petitioner's juvenile incarcerations at the time of his trial and when the first petition was filed in 1988. To the extent petitioner now presents an expert opinion founded on these previously known facts to form the basis of his claim that evidence of the effects of incarceration, he has not established that this information was not known to petitioner or his prior habeas counsel and could not reasonably have been known to them in 1988.

Claim XVII (Petn. 178-179), *Claim XXIV* (Petn. 204-210), and *Claim XXVII* (Petn. 222-269) rely exclusively on the appellate record to allege error in the penalty phase instructions. (*In re Gallego, supra*, 18 Cal.4th at p. 838.) Petitioner does not allege that these claims could not have been raised earlier.

As for *Claim XIX* (Petn. 183-186) and *Claim XX* (Petn. 187), petitioner's reliance upon a recent case to argue, by analogy, the application of a legal theory does not create a "new rule of law" stating an exception to the timeliness bar. Challenges to the absence of proportionality review in California's death penalty scheme have been frequently and repeatedly raised prior to the civil case authority referenced by petitioner, and he offers no reason for his failure to do so earlier.

As for the contentions stated in *Claim XXI* (Petn. 187), those claims merely repeat contentions raised elsewhere in the petition in *Claims XXII, XXIII, XXIV, XXV, XXVI, XXIX, and XXX.* These claims are addressed

individually elsewhere in this argument.

As for the contention stated in *Claim XXVI* (Petn. 214-221), the basic assertion of the argument that he death penalty is wrong and should be abolished could have been made at the time of petitioner's first automatic appeal and habeas petition. Petitioner has delayed substantially in presenting this claim.

As for the contention stated in *Claim XXVIII* (Petn. 269-272), challenging the county-based prosecutorial discretion to charge death penalty crimes, petitioner's reliance upon a recent case to argue, by analogy, the application of a legal theory does not create a "new rule of law" which could not have been raised earlier. (Petn. 45.) Such challenges to California's death penalty scheme have been frequently and repeatedly raised prior to the civil case authority referenced by petitioner, and he offers no reason for his failure to do so earlier.

As for the contention stated in *Claim XXIX* (Petn. 272-281), he fails to specify the "triggering facts" which could justify further investigation into those claims, or what steps were taken, or when steps were taken to gain information in support of those claims. (*In re Robbins, supra*, 18 Cal.4th at pp. 789-791.) As a result, petitioner again fails to provide sufficient details to permit this Court to assess whether these claims were presented without substantial delay.

As for the contention stated in *Claim XXX* (Petn. 281-289), petitioner has been in control of the timing of the presentation of these claims following his resentencing in 1991 and the appointment of counsel in 1994. Although the amount of delay inherent in the process has naturally lengthened as time passes, petitioner clearly was aware of the delay and able to present this claim significantly earlier had he chosen to do so.

As for the contention stated in *Claim XXXI* (Petn. 289-232), although

petitioner claims this argument is premised upon legislative enactments which occurred after petitioner's first automatic appeal, he fails to specify the "triggering facts" which could justify further investigation into those claims, or what steps were taken, or when steps were taken to gain information in support of those claims. (*In re Robbins, supra*, 18 Cal.4th at pp. 789-791.) As a result, petitioner again fails to provide sufficient details to permit this Court to assess whether these claims were presented without substantial delay. The same is true for his assertion of cumulative error stated in *Claim XXXII* (Petn. 303-306).

In the absence of an adequate explanation or justification for his failure to raise the claims at issue here in a prior habeas corpus petition or on direct appeal, petitioner's claims will be barred unless he demonstrates one of four exceptions to the untimeliness bar:

> (1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (2) that the petitioner is actually innocent of the crime or crimes of 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 before it that absent the error or omission no reasonable judge or jury would have imposed a sentence of death; or (4) that the petitioner was convicted under an invalid statute.

(*In re Clark, supra*, 5 Cal.4th at pp. 797-798.)

Petitioner bears the burden to make a prima facie showing of the applicability of an exception. (*In re Gallego, supra*, 18 Cal.4th at p. 839, fn. 14; *In re Sanders, supra*, 21 Cal.4th at p. 706.)

As to each claim raised in the petition, petitioner asserts that each claim meets one or more of the four stated exceptions to the bar stated in *Clark* and that to bar consideration of the claims would work a fundamental

miscarriage of justice. (Petn. 47-58.) As discussed further below (see Arg. II, *post*), petitioner has not established a prima facie case for relief on any of his claims. Given petitioner's failure to meet the prima facie standard for relief on the merits of his claims, petitioner *necessarily* cannot meet the more narrow and stringent standards applicable under the timeliness exceptions. Therefore, petitioner has failed to meet his burden of establishing that the claims in this petition fall within an exception to the bar of untimeliness. (*In re Robbins, supra,* 18 Cal.4th at pp. 787-788.) Consequently, all the claims in the petition, except *Claim II* (justification for delay), *Claims III and IV* ("missing" records), and *Claims XXII, XXIII, XXV* should be dismissed as untimely.

II.

THE PETITION FAILS TO STATE A PRIMA FACIE CASE FOR HABEAS RELIEF AND, THEREFORE, SHOULD BE DENIED

In the instant petition, petitioner presents 31 claims which he contends entitle him to habeas corpus relief; respondent excludes *Claim II* from this count because it does not raise substantive grounds for relief. (Petn. 6-46, 72-306.) As explained below, all of the claims fail because they are either: (1) procedurally barred because they were raised and rejected in petitioner's prior habeas petition; (2) procedurally barred because they should have been raised on appeal but were not; (3) procedurally barred on waiver grounds because trial counsel failed to interpose an objection during trial; (4) conclusory and unsupported; or (5) do not state a prima facie case for relief. Because each of petitioner's claims fails on its face for at least one of the reasons stated above, the petition should be denied.

A. Standard Of Review For Habeas Corpus

A habeas corpus proceeding is a collateral attack upon a criminal judgment which, because of societal interest in the finality of judgments, is presumed to be valid. (*People v. Duvall* (1995) 9 Cal.4th 464, 474; *In re Clark* (1993) 5 Cal.4th 750, 764; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260.) Such an attack is limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension. *(In re Clark, supra*, at pp. 766-767.) Petitioner thus bears "a heavy burden" to plead sufficient grounds for relief. (*People v. Visciotti* (1996) 14 Cal.4th 325, 351.) To satisfy this burden, petitioner is required to plead with particularity the facts supporting each claim, along with reasonably available documentary evidence, such as affidavits or declarations. (*Duvall, supra*, and

cases cited therein.) Petitioner "must set forth specific facts which, if true, would require issuance of the writ," and a petition that fails in this regard must be summarily denied for failure to state a prima facie case for relief. (*Gonzalez, supra*, 51 Cal.3d at p. 1258.) Mere conclusory allegations are insufficient, especially when, as here, the petition was prepared by counsel. (*Ibid.; People v. Karis* (1988) 46 Cal.3d 612, 656.)

A petition is judged on the factual allegations contained within it, without reference to the possibility of supplementing the claims with facts to be developed later. (*In re Clark, supra*, 5 Cal.4th at p. 781, fn. 16.) A petitioner's obligation to provide specific factual allegations in the petition itself is not satisfied by generally "incorporating by reference" the facts set forth in the exhibits to the petition. (*In re Gallego* (1998) 18 Cal.4th 825, 837, fn. 12.)

> An appellate court receiving such a petition evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief. [Citations.] If no prima facie case for relief is stated, the court will summarily deny the petition.

(*Duvall, supra*, 9 Cal.4th at pp. 474-475, emphasis in original.)

As for procedural bars in habeas corpus proceedings, this Court has stated that "imposition of procedural bars substantially advances important institutional goals[.]" (*In re Robbins* (1998) 18 Cal.4th 770, 778, fn. 1.) This Court has "recognized and imposed procedural bars *as a means of protecting the integrity of our own appeal and habeas corpus process*." (*Ibid.*, italics in original.) Among the procedural bars which this Court imposes are bars on claims that should have been raised on appeal (*In re Dixon* (1953) 41 Cal.2d 756, 759) and claims that were raised and rejected on appeal (*In re Waltreus* (1965) 62 Cal.2d 218, 225). (*In re Robbins, supra*, 18 Cal.4th at p. 814, fn. 34.)

B. Ineffective Assistance Of Counsel: Pattern Of Conduct In Other Cases (*Claim I*)

When the basis of a challenge to the validity of a judgment is ineffective assistance of trial counsel, a defendant must show that counsel's performance was deficient because his representation fell below an objective standard of reasonableness under prevailing professional norms. He must also show prejudice flowing from counsel's performance. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*In re Avena* (1996) 12 Cal.4th 694, 721; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

In *Claim I*, petitioner contends he received ineffective assistance of trial counsel (Mr. Slick) because counsel: (1) engaged in a pattern of ineffective assistance in other criminal cases (Petn. 28-31) and (2) failed to investigate and present exculpatory evidence at the guilt phase and mitigation evidence at the penalty phase of petitioner's trial. (Petn. 31-36.) To the extent *Claim I* is intended to operate as a separate and independent claim of ineffective assistance of counsel concerning Mr. Slick's representation of petitioner before and during his trial, it wholly fails to provide sufficient factual specifics to establish deficient performance and prejudice as required under *Strickland*. To the extent petitioner alleges that Mr. Slick's representation of eight other criminal defendants[5/] establishes a "pattern" of incompetent representation that excuses

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5. Petitioner identifies the other defendants as Robert Glover, Andre Burton, Robert Paul Wilson, Paul Tuilaepa, Senon Grajeda, Charles Edward Moore, Jr., Oscar Lee Morris, and Donrell Thomas. As factual and evidentiary support for his claims concerning other defendants, petitioner offers three newspaper articles (Petn. Exhs. 1, 2, & 3) and an unpublished judgment entered in the United States District Court for the Central District of California (Petn. Exh. 62). Taking the facts alleged in the petition to be true, six of the eight

petitioner from demonstrating deficient performance and prejudice in this case (Petn. 29-31), petitioner has not made the requisite showing of a total breakdown of the adversarial process to render the verdict presumptively unreliable under the standard of error articulated in *United States v. Cronic, supra*, 466 U.S. 648, which states that a defendant need not show prejudice "when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." (*Id.* at p. 659, fn. 25; see also *In re Viscotti* (1997) 14 Cal.4th 325, 352-353 [noting actual application of *Cronic* standard limited despite breadth of language in opinion].)

In this case, trial counsel hired and consulted a handwriting expert and a fingerprint identification expert (Petn. Exh. 5 [supp decl], p. 2 ¶ 6), a psychiatrist (Petn. Exh. 5, p. 2; Petn. Exh. 13 ¶ 83), and a psychologist (Petn. Exh. 5, p. 3 ¶7) and interviewed petitioner's family. He litigated motions to suppress evidence, suppress statements made to police, and to exclude evidence of prior convictions. (Supp. RT 8-59; I Supp. CT 298-300, 301-310; IV Supp. CT 1072.) Although petitioner disputes the quality of this representation, this Court has previously affirmed petitioner's convictions and rejected various claims of ineffective assistance of counsel. (See *Lewis, supra*, 50 Cal.3d at pp. 288-292; see S005412 [habeas petition denied September 1989].) Clearly, trial counsel was not "absent" from petitioner's trial in the sense connoted in *Cronic*. As a result, petitioner must show deficient performance and prejudice.

Allegations concerning deficient performance in other cases *may*, under certain limited circumstances, be relevant to assess the credibility of counsel at an evidentiary hearing. (See *In re Vargas* (2000) 83 Cal.App.4th 1125, 1136.) However, petitioner fails to provide evidence demonstrating trial counsel rendered ineffective assistance in his representation of defendants Paul

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defendants, excluding Glover and Grajeda, were capital defendants.

Tuilaepa, Senon Grajeda, Oscar Lee Morris, and Donrell Thomas.[6/] Nor do the allegations of ineffective assistance regarding Andre Burton, Robert Wilson, and Robert Glover meet the standards required under *Strickland* to demonstrate that Mr. Slick's performance in this case was deficient or prejudiced petitioner.[7/]

Given the absence of any specific factual allegations that would entitle

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6. To the contrary, the factual support submitted in support of the petition fails to demonstrate any deficiency in Mr. Slick's representation of Senon Grajeda and Oscar Lee Morris. (Petn. Exh. 1 [newspaper article: Grajeda]; Petn. Exh. 3 [newspaper article: Morris]; see also *People v. Morris* (1988) 46 Cal.3d 1 [reversing the robbery-murder special circumstance for insufficient evidence; also finding *Brady* violation for prosecution's failure to disclose benefits given to informant].) Concerning Charles Moore, the United States District Court overturned his conviction based upon a finding Moore's *Faretta* rights had been violated, *not* that attorney Slick denied his client effective assistance of counsel. (See Petn. 31; Petn. Exh. 62.) According to this Court's docket, Moore was subsequently retried and sentenced to death, and his automatic appeal is pending before this Court (*People v. Moore,* S075726). This Court previously affirmed the convictions and death judgment for Paul Tuilaepa. (See *People v. Tuilaepa* (1992) 4 Cal.4th 569.) As for Donrell Thomas, petitioner merely speculates that trial counsel failed in his representation. (Petn. 31.)

7. In 1992, this Court reversed Robert Paul Wilson's convictions based upon a finding that Mr. Slick denied him effective assistance of counsel. (See *In re Wilson* (1992) 3 Cal.4th 945.) This Court's docket reveals that Robert Wilson was subsequently retried and sentenced to death on May 4, 1994, and his automatic appeal has been briefed and is awaiting oral argument. (See *People v. Wilson*, S039632.) This Court affirmed the convictions and death judgment for Andre Burton (see *People v. Burton* (1989) 48 Cal.3d 843), but this Court's docket reveals the Court ordered an evidentiary hearing on the question whether Mr. Slick's representation of Burton denied him effective assistance of counsel. (*In re Burton*, case no. S034725.) Petitioner provides only a newspaper article in support of his allegations concerning Robert Glover. (See Petn. Exh. 1.) However, the on-line docket of the California Court of Appeal indicates that the trial court's grant of a motion for new trial for Robert Glover was affirmed by the California Court of Appeal in case number B040661 on January 28, 1991.

petitioner to relief and the absence of a basis upon which relief may be granted, *Claim I* fails to state a prima facie case and must be denied.

C. Inability To Obtain Copies Of The District Attorney's And Police Department's Files (*Claims III & IV*)

In *Claims III and IV*, petitioner alleges that trial counsel failed to "turn over a complete file" to current habeas counsel and that current habeas counsel has been unable to review the files previously maintained by the Los Angeles County District Attorney's Office and the Long Beach Police Department in order to reconstruct trial counsel's file and examine them for information within the meaning of *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 1196, 10 L.Ed.2d 215], because those files were either misplaced or destroyed. In *Claim III*, petitioner contends his trial counsel's "presumptive incompetence" requires this Court to conclude the failure of the Los Angeles County District Attorney and the Long Beach Police Department to preserve their files constitutes a failure to disclose material evidence and entitles him to habeas relief. (Petn. 65-72.) Counsel further advises the Court of his intention to pursue discovery remedies available under Penal Code section 1054.9. (Petn. 68-71.) In *Claim IV*, petitioner contends the Los Angeles County District Attorney's Office and the Long Beach Police Department have either misplaced or destroyed their files concerning petitioner's crime and the failure to preserve the files "is a per se violation of Petitioner's right to a meaningful Petition for Writ of Habeas Corpus." (Petn. 72-75.) Petitioner has failed to state facts that, if true, would entitle him to habeas corpus relief.

Under *California v. Trombetta* (1984) 467 U.S. 479 [104 S.Ct. 2528, 81 L.Ed.2d 413], the state's duty to preserve evidence is limited to that evidence "that might be expected to play a significant role in the suspect's defense" and whose exculpatory value was apparent before destruction. (*Id.* at p. 488.)

Trombetta is the law in California. (E.g., *People v. Farnam* (2002) 28 Cal.4th 107, 165; *People v. Beeler* (1995) 9 Cal.4th 953, 976; *People v. Johnson* (1989) 47 Cal.3d 1194, 1233-1234.) To fall within the scope of this duty, the evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Trombetta, supra*, 467 U.S. at pp. 488-489.) Where the police fail to preserve potentially useful evidence, a criminal defendant must show bad faith on the part of the police in order to establish denial of due process of law. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 58 [109 S.Ct. 333, 102 L.Ed.2d 281].) Petitioner fails to state a prima facie case for relief under this prevailing precedent by failing to identify what exculpatory evidence of significant value was not preserved.

Initially, petitioner fails to identify a single document or piece of evidence that is "missing" or has been destroyed and has not been previously provided to him or currently available from another source. This Court has repeatedly reaffirmed the general principle that a petitioner must state fully and with particularity the *facts* upon which he seeks relief. (*In re Swain, supra,* 34 Cal.2d 300, 304; reaffirmed by *Duvall, supra*, 9 Cal. 4th at p. 474; *People v. Karis, supra*, 46 Cal.3d at p. 656.) Petitioner has failed to meet this obligation as to the contentions stated in *Claim III and Claim IV*.

Concerning the file maintained by the Long Beach Police Department, petitioner's counsel affirmatively acknowledges possessing 43 crime scene photographs and 52 pages of police reports. (Petn. Exh. 4 ¶ 10.) The petition fails to contain any reasonably available documentary evidence that the "missing" file contained any additional material. (See Petn. Exh. 60, p. 5 & Petn. Exh. 61, p. 2 [52 pages of police reports provided to mental experts consulted for trial].) Thus, the petition fails to establish that the Long Beach

Police Department failed to provide him exculpatory evidence of significant value or failed to preserve evidence that it had an affirmative duty to preserve. More generally, petitioner has failed to allege facts establishing the police file was "missing" at the time the petition was filed since the one and only inquiry (by telephone) made about the whereabouts of the police file was on October 6, 2000, produced merely the representation that the file was "not there." (Petn. Exh. 9 [Decl. of Reggie Stewart].) Almost three years have elapsed during which the file could have been located. Concerning the file maintained by the Los Angeles County District Attorney's Office, the petition fails to include reasonably available documentary support establishing that trial counsel was not provided any document originally in the file maintained by the Los Angeles County District Attorney's Office to which he was or is now entitled.

Petitioner has not alleged specific facts suggesting, much less demonstrating, that he does not have a copy of all items to which he would be entitled that were contained within the original files for his case maintained by the Long Beach Police Department and the Los Angeles County District Attorney's Office. Because petitioner has failed to meet his pleading burden, no reasonable determination can be made concerning what items, if any, originally in the files of trial counsel, the Long Beach Police Department, or the Los Angeles County District Attorney may remain "missing" should petitioner subsequently show that he is entitled to discovery of those items. Speculative and unsupported assertions of "missing" and "destroyed" documentation are wholly insufficient to warrant habeas corpus relief.

D. Ineffective Assistance Of Counsel: Failure To Investigate Pretrial (*Claim V*)

In *Claim V*, petitioner contends he was denied effective assistance of counsel during pretrial proceedings because (1) trial counsel Ron Slick "failed

to competently investigate the charged crimes, including consultation with forensic experts"; (2) failed to make a discovery motion; (3) "failed to establish a foundation for the motel registration card"; (4) "failed to employ experts"; (5) failed "to prepare for and handle jury voir dire"; (6) failed "to ascertain that Robert Lewis, Jr. suffered a traumatic life, his failure to ascertain that Robert Lewis, Jr. suffered from the effects of institutionalization, his failure to determine that Robert Lewis, Jr. was mentally retarded and suffered from learning disabilities"; and (8) "his collective failure to do all of these things." (Petn. 75-77.)

Mere conclusory allegations, without explanation for their basis, do not warrant relief, especially when the petition is prepared by counsel. (*Duvall, supra*, 9 Cal.4th at p. 474; *People v. Karis* (1988) 46 Cal.3d 612, 656.) Petitioner fails to include specific factual allegations in support of the contentions raised in *Claim V.* Petitioner fails to identify with specificity what further "investigation" of the crimes should have been undertaken or what information would have been discovered through additional pretrial investigation and does not identify a single "forensic expert" that trial counsel should have secured, used or consulted, and fails to identify what favorable material information would have been discovered through such consultation. Regarding the absence of a formal discovery motion, petitioner fails to identify what information, if any, would have been provided had a formal motion been pursued and, therefore, has failed to allege he was prejudiced. Regarding the allegation that trial counsel "failed to establish a foundation for the motel registration card," he fails to specify what additional pretrial investigation should have been undertaken but was not undertaken to establish a foundation for the admission of the card, which was actually admitted into evidence at trial. (See also *Arg. II.G, post.*) Petitioner fails to identify what "experts" should have been employed prior to trial or what testimony would have been provided

by the unidentified experts.[8] He fails to describe in any detail whatsoever what additional preparation should have been undertaken for jury voir dire or how counsel's "handling" of voir dire was insufficient. Additionally, a much more detailed claim of ineffective assistance in voir dire was considered and rejected by this Court in its opinion affirming the judgment (*Lewis*, *supra* 50 Cal.3d at pp. 288-292) and in denying his prior habeas petition (see S005412 [Petn. 41-50]).

In the absence of such specific factual allegations, petitioner has failed to plead a prima facie case that trial counsel performed incompetently, or that it was reasonably probable there would have been a different result absent counsel's failings. The contentions stated in *Claim V* should be rejected based on the entirely speculative and conclusory manner in which they are alleged. (*Duvall, supra*, 9 Cal.4th at p. 474.)

E. Ineffective Assistance Of Counsel: Failure To Interview Lewis Wong (*Claim VI*)

In *Claim VI*, petitioner contends he was denied effective assistance of counsel by his trial counsel's failure to contact or interview Lewis Wong. (Petn. 77-80; Petn. Exh. 11.) This claim was previously presented to, and rejected by, this Court in petitioner's first state petition. (See S005412 [Petn. 21-23].) Although petitioner's factual allegations in the petition affirmatively demonstrate that his prior habeas counsel could have contacted Mr. Lewis and obtained a declaration for filing with the prior petition, he fails to provide any justification or excuse for this failure. (Petn. 79 [noting consistency of phone number and address and that "no one related to Petitioner's defense contacted

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8. Moreover, documents filed in support of the petition demonstrate that trial counsel secured and consulted with a fingerprint identification expert, a handwriting expert, a psychiatrist, and a psychologist. (Petn. Exh. 5, p. 2 ¶ 6; Petn. Exh. 13 ¶ 83-87.)

him until April 7, 2003"].) In the instant Petition, petitioner provides a declaration from Mr. Wong and, relying upon the substance of that declaration, claims that Mr. Wong would have corroborated the defense claim that a gold chain worn by petitioner at the preliminary hearing was purchased by petitioner's sister from Mr. Wong's jewelry store and did not belong to the victim by (1) authenticating a receipt from his store, and (2) testifying that he sold chains similar to the one at issue at the time the receipt was issued. Petitioner does not state a prima facie case of ineffective assistance of counsel as to this claim.

The petition fails to allege specific facts establishing that petitioner was prejudiced by counsel's failure to interview Mr. Wong prior to trial.[9/] Trial counsel consulted a jeweler who examined and weighed the chain admitted into evidence and informed counsel that "the receipt which described the chain Ms. Spillman [petitioner's sister] purchased as a 18" '14K Gold V Chain' did not describe the gold chain in question because the chain was not a 'V' chain." (Exh. A, p. 2.) Mr. Wong's declaration fails to contradict this assertion and establish this critical point: that the chain worn by petitioner at the preliminary hearing (Peo. Exh. 8 [chain]) matched the description of one of the two chains itemized on the receipt. Absent such a specific factual allegation and factual support, petitioner cannot show it is reasonably probable he would have received a more favorable verdict had Mr. Wong's testimony, and presumably the receipt, been admitted as evidence. Thus, this claim fails.

Additionally, to the extent petitioner suggests Mr. Wong's testimony was necessary to "authenticate" the receipt, he is mistaken. Ms. Spillman's

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9. Although petitioner's counsel suggests the failure to investigate was attributable to a limitation upon the investigator's hours (Petn. 79), counsel's own exhibit refutes the claim the investigator was limited to 30 hours; indeed, the investigator billed trial counsel for 85 hours. (Petn. Exh. 12, Appendix 1.)

testimony was sufficient to introduce the receipt into evidence, had trial counsel not clearly doubted her veracity. Trial counsel consulted a jewelry expert, who informed him that the value of the necklace introduced in evidence did not correspond to the item described in the receipt. (Exh. A, p. 2; see also S005412 Petn. Exh. 3, p. 3.) Had trial counsel interviewed Mr. Wong and learned that the receipt did not correspond to the necklace in question, he would have been absolutely precluded from presenting any testimony about the necklace on the question since to do otherwise would suborn perjury.

Because petitioner has failed to state a prima facie case as to *Claim VI*, it must br denied.

F. Ineffective Assistance Of Counsel: Whether Mental Defense Available (*Claim VII*)

In his heading to *Claim VII*, petitioner contends his trial counsel denied him effective assistance of counsel because he "failed to adequately investigate and prepare the guilt phase of the trial by determining whether a mental defense was available." (Petn. 80-82.) Initially, respondent observed that petitioner fails to present a declaration from trial counsel concerning the reason for the alleged omission. Without such supporting documentary evidence, petitioner cannot plead a prima facie case because he cannot show counsel's actions were not the result of a reasonable tactical decision. (*Duvall*, *supra*, 9 Cal.4th at pp. 474-475; *People v. Holt* (1997) 15 Cal.4th 619, 704.) In any event, although the petition improperly references an exhibit to the petition (Petn. Exh. 13) as the sole factual support for this claim, the referenced exhibit conclusively demonstrates that trial counsel *did investigate* possible mental defenses by consulting metal health experts who tested and examined petitioner and advised trial counsel that no mental defenses were available. Petitioner fails to make a prima facie case.

Trial counsel retained Dr. Michael Maloney to perform psychological testing (Petn. Exh. 13 ¶ 84-87) and Dr. Kaushal Sharma to undertake an additional psychiatric examination (Petn. Exh. 13 ¶ 83). As recited in the declaration of the current retained psychologist, Dr. Sharma's report to trial counsel stated that he discovered,

> [n]o evidence of psychosis, organic brain disorder, depression, or any other major disorder during the examinations. In the absence of any significant mental illness or other emotional or mental disturbance, I have nothing to suggest any mitigating circumstances for the defendant. In fact, given the defendant's long prison record, antisocial behavior at an early age, lack of mental illness, lack of duress, and lack of intoxication, may suggest that no such mitigating factors exists in this case.

(Petn. Exh. 13 ¶ 83.)

Trial counsel is entitled to rely on the reports of experts who are consulted. (*Summerlin v. Stewart* (9th Cir. 2001) 267 F.2d 926, 943; *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 947 [entitled to rely on expert consulted].) Moreover, trial counsel need not continue shopping for an expert just because an unfavorable opinion has been received. (*Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1038; *Walls v. Bowersox* (8th Cir. 1998) 151 F.3d 827, 835.) Petitioner's current psychological expert, who interviewed and tested petitioner in the course of a single day, simply disagrees with the assessment these experts provided to trial counsel.

Petitioner has failed to plead any facts establishing that trial counsel had any reason to distrust the experts opinions provided by Dr. Sharma and Dr. Maloney or that *trial counsel* was alerted by either of the experts he consulted that there was a need for additional psychological testing, and the petition fails to establish that petitioner's behavior or statements suggested that additional

investigation of a mental defense was necessary or advisable.

The petition fails to make a prima facie case concerning deficient performance as to *Claim VII.*

G. Ineffective Assistance Of Counsel: Failure To "Fully Prepare And Present" Defense Of Alibi (*Claim VIII*)

In *Claim VIII*, petitioner contends his trial counsel denied him effective assistance of counsel because he (1) failed to lay a foundation with the motel manager to introduce a motel registration card as a business record and did not call his investigator, Kristina Kleinbauer, to establish a chain of custody for the card, and (2) did not call petitioner's wife to testify concerning petitioner's "prior use of the vehicle." (Petn. 82-84.) Petitioner fails to present a declaration from trial counsel concerning the reason for the alleged omission. Without such supporting documentary evidence, petitioner cannot plead a prima facie case because he cannot show counsel's actions were not the result of a reasonable tactical decision. (*Duvall*, *supra*, 9 Cal.4th at pp. 474-475; *Holt*, *supra*, 15 Cal.4th at p. 704.)

Concerning the motel registration card, respondent notes that the registration card was introduced into evidence at trial without objection as Defense Exhibit B. (Supp. RT 672, 696.) Thus, petitioner takes issue with *how* trial counsel introduced and admitted the card. Petitioner appears to argue that the introduction of the registration card as a business record and Ms. Kleinbauer's testimony "that she had gone to the hotel and observed the clerk render the card from her records" concerning chain of custody were necessary to dispel juror speculation that the card had "been filled out in the hallway a few moments earlier." (Petn. 84.) Petitioner references the trial record and the 1988 declaration of investigator Kristina Kleinbauer (Petn. Exh. 12) as the only factual support for these claims. The record and the declaration both fail to

provide factual support for petitioner's assertion that either the motel manager could lay the foundation for the registration card as a business record or that Ms. Kleinbauer could testify "that she had gone to the hotel and observed the clerk render the card from her records." (Petn. 84.) Instead, the 1988 declaration states only that Ms. Kleinbauer "tracked down the registration card from the motel's owner in Texas." (Petn. Exh. 12, p. 3 ¶ 9.) Ms. Kleinbauer's declaration fails to establish what "chain of custody" could have been established and, therefore, petitioner has failed to state a prima facie case as to this contention.

In any event, at trial, the motel manager, Nancy Snieh, testified that her handwriting appeared on the motel registration card introduced into evidence (Def. Exh. B) and that her practice was to complete the form *after* the customer completed the name, address, car license, car make, and number of persons fields on the blank form. She further testified the information on the card was completed on October 24, 1987. (Supp. RT 681-688.) The prosecutor's questioning in no way suggested that the information on the card had been placed on it after the fact. (Supp. RT 689.) Nor did the prosecutor's argument claim the information had been placed on the card after the fact. He argued that the admitted source of the information, petitioner's father, was unreliable (Supp. RT 735-737), and that petitioner could have entered the license plate number of the victim's car on the motel registration card before the car was taken as part of an attempt to manufacture an alibi. (Supp. RT 755-757).

Concerning counsel's failure to call petitioner's wife, respondent initially observes that petitioner fails to provide a declaration from her outlining the substance of the wife's proposed testimony. Nor does the 1988 declaration of Ms. Kleinbauer describe her proposed testimony with any specificity. (Petn. Exh. 12, p. 3 ¶ 9.) As a result, he fails to meet his prima facie burden to show

a reasonable probability that he would have received a more favorable outcome at trial had his wife testified concerning petitioner's "prior use of the vehicle."

Because petitioner cannot demonstrate both deficient performance and prejudice, petitioner has not stated a prima facie case for relief on *Claim VIII.*

H. Ineffective Assistance Of Counsel: Conceding Alibi During Argument (*Claim IX*)

In *Claim IX*, petitioner contends his trial counsel denied him effective assistance of counsel by essentially "conceding" petitioner's alibi by arguing to the jury that, if petitioner committed the crime, he may not have acted alone. (Petn. 85-87.) This claim was previously presented to, and rejected by, this Court in the petition filed in case number S005412 (see S005412 [Petn. 23-26]) and by this Court in affirming petitioner's convictions (see *Lewis, supra*, 50 Cal.3d at pp. 291-292). Because petitioner presents no new material facts in support of this claim, it is procedurally defaulted. (*In re Miller* (1941) 17 Cal.2d 734, 735; see *In re Robbins*, *supra*, 18 Cal.4th at p. 778, fn. 1.)

In any event, petitioner offers no different or persuasive reason for this Court to alter its prior assessment of this claim. A criminal defendant has a right to effective assistance during closing argument. (*Bell v. Cone* (2002) 535 U.S. 685, 701-702 [122 S.Ct. 1843, 152 L. Ed. 2d 914].) As this Court observed in its opinion affirming petitioner's convictions:

> The argument about the other fingerprints merely conceded that defendant had been inside the house and did not necessarily undermine defendant's claim that he had bought the car on October 24. Based on defendant's statement that he had never entered the house, there was no way for counsel to explain away the prints of defendant that were found in the house. Counsel's argument would have lost any persuasive force had he not acknowledged the existence

of the fingerprint evidence against defendant. Counsel merely did the best he could in the fact of difficult circumstances. Defendant's argument that counsel gave away his case is premised on wishful thinking about the strength of the evidence against him.

(*Lewis, supra*, 50 Cal.3d at pp. 291-292.)

Petitioner has failed to state a prima facie case as to *Claim IX.*

I. Instructional Errors In The Guilt Phase (*Claim X*)

In *Claim X*, petitioner alleges certain instructional errors, and trial counsel's failure to object or request appropriate instructions, violated his "rights to a fair trial and protection from cruel and/or unusual punishment as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and Article I, Sections 1, 7, 16, 17, and 24 of the California Constitution." (Petn. 87-93.) Specifically, petitioner claims (1) the trial court erred by instructing the jury that CALJIC No. 2.15 applied to the murder charge; (2) the version of CALJIC No. 2.22 given to the jury was unconstitutional because it lessened the prosecution's burden of proof; (3) the trial court failed to sua sponte instruct on the defense theory, proposed during argument, that more than one person was involved in the crime; and (4) the trial court failed to instruct, pursuant to CALJIC No. 8.80, that the jury had to determine whether petitioner was the actual killer or had the intent to kill. (Petn. 87-93.) Apart from the claim of ineffective assistance of counsel, these contentions have been procedurally defaulted because they could have been raised, but were not raised, in petitioner's first automatic appeal which affirmed his convictions. Additionally, except to the extent the claims allege ineffective assistance of counsel, they are waived by counsel's failure to object to the instructions at trial. In any event, as further discussed below, petitioner has failed to state a prima facie case for habeas corpus relief as to each of the

individual claims of instructional error.

1. These Claims Are Procedurally Barred Pursuant To *Dixon*

As a general rule, a criminal defendant may not use habeas corpus to litigate issues which could have been but were not raised on appeal absent "strong justification" explaining the failure to raise the issues on appeal. (*In re Harris, supra*, 5 Cal.4th at p. 829; *In re Clark, supra*, 5 Cal.4th at p. 765; *In re Dixon, supra,* 41 Cal.2d at p. 759.) As this Court has explained,

> [H]abeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors *could have been, but were not*, raised upon a timely appeal from a judgment . . . .

(*In re Harris, supra*, 5 Cal.4th at p. 829, citing *In re Dixon, supra*, 41 Cal.2d at p. 759, italics added.)

Generally, the same four narrow exceptions which would permit consideration of a claim already resolved on appeal also allow consideration of a claim which could and should have been raised on appeal. (*In re Harris, supra*, 5 Cal.4th at p. 825, fn. 3, at pp. 827-841.) The four narrow exceptions to the general rule constitute the following: (1) "the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process" (*In re Harris*, *supra*, 5 Cal.4th at p. 834); (2) the court that issued the underlying judgment lacked "jurisdiction over the person or subject matter" (*id.* at p. 836); (3) the court "acted in excess of jurisdiction" (*id.* at p. 840); and (4) petitioner relies on a new rule of law previously unavailable to him (*id.* at p. 841). Regarding the first *Harris* exception, more is required than a "mere assertion that one has been denied a `fundamental' constitutional right." (*In re Harris,*

supra, 5 Cal.4th at p. 834.)

Each of the claims of instructional error raised in the petition is based solely upon the appellate record in existence at the time of his first automatic appeal. As a result, petitioner could have raised each of these issues in his first automatic appeal. Petitioner makes no effort to justify, much less establish strong justification, for this omission. In *Harris*, this Court observed that only rarely will there be some clear and fundamental constitutional violation striking at the heart of the trial process that should have been raised or was unsuccessfully raised on appeal that cannot be remedied by the ineffective assistance of counsel doctrine. (*Id.* at p. 836.) Petitioner's failure to state a prima facie, as further discussed below, precludes him justifying the omission of these instructional claims under the first *Harris* exception since the claimed errors are neither "clear and fundamental" nor "strike[] at the heart of the trial process." (*In re Harris*, *supra*, 5 Cal.4th at p. 834.) The second and third *Harris* exceptions are facially inapplicable since the alleged errors have no bearing on the trial court's "jurisdiction over the person or subject matter" (*id.* at p. 836) and do not establish that the court "acted in excess of jurisdiction" (*id.* at p. 840).

As for the fourth exception (*id.* at p. 841), petitioner does not rely on a new rule of law in challenging CALJIC No. 2.22 or in arguing that the jury should have been instructed on aider and abettor liability and this exception also is inapplicable. Concerning CALIJC No. 2.15, even if petitioner's reliance on recent case authority has initial superficial appeal, the legal argument endorsed by the new authority was available to petitioner at the time of his first appeal. Thus, this Court should conclude petitioner's challenge to CALJIC No. 2.15 is barred pursuant to *Dixon*.

Because petitioner could have raised these claims in his first automatic appeal but did not do so, they are procedurally barred and should be rejected.

(*In re Dixon, supra,* 41 Cal.2d at p. 759.)

2. Inclusion Of The Murder Count In CALJIC No. 2.15

Petitioner contends the express advisement in CALJIC 2.15 that the instruction applied to the *murder charge* in addition to the robbery charge improperly permitted the jury to draw an inference of guilt as to the murder from the possession of recently stolen property and, therefore, combined with trial counsel's failure to object to the instruction, violated his "rights to a fair trial and protection from cruel and/or unusual punishment as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and Article I, Sections 1, 7, 16, 17, and 24 of the California Constitution." (Petn. 88-89.) This claim is procedurally barred because petitioner could and should have raised this claim in his first automatic appeal. However, in any event, he fails to make a prima facie case for relief concerning CALJIC No. 2.15.

In this case, petitioner was apprehended driving the victim's Cadillac and, when he appeared for the preliminary hearing, wore a gold chain worn identified as belonging to the victim. At petitioner's trial, the trial court instructed the jury as follows:

> The mere fact that a person was in conscious possession of recently stolen property is not enough to justify his conviction of the crime charged in Counts I and II of the information. It is, however, a circumstance to be considered in connection with other evidence. To warrant a finding of guilty, there must be proof of other conduct or circumstances tending of themselves to establish guilt.
>
> In this connection you may consider the defendant's false or contradictory statements, if any, and any other statements he may have made with reference to the property. If a person gives a false account

of how he acquired possession of stolen property this is a circumstance that may tend to show guilt.

(I Supp. CT 342.) Count I of the information charged petitioner with the murder of Milton Estell.

Petitioner relies upon the decision in *People v. Barker* (2001) 91 Cal.App.4th 1166, in which the Fourth District Court of Appeal held the trial court erred in reading the jury a version of CALJIC No. 2.15 that expressly applied to a *murder count* as well as a robbery charge because "[p]roof a defendant was in conscious possession of recently stolen property simply does not lead naturally and logically to the conclusion the defendant committed a murder to obtain the property." (*Id.* at p. 1176; Petn. 88.)[10/] Recently, this Court concluded the reasoning in *Barker* was persuasive and held it was improper for a court to instruct with CALJIC No. 2.15 as applicable to rape and murder charges. (*People v. Prieto* (2003) 30 Cal.4th 226, 248.) In so holding, this Court made the following observations:

> Initially, we reject defendant's contention that the trial court's instruction mandates reversal because it lowered the prosecution's burden of proof. CALJIC No. 2.15 did not directly or indirectly address the burden of proof, and nothing in the instruction absolved the prosecution of its burden of establishing guilt beyond a reasonable doubt. Moreover, other instructions properly instructed the jury on its duty to weigh the evidence, what evidence it may consider, how to weigh that evidence, and the burden of proof. In light of these

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10. Because petitioner was charged with a robbery special circumstance, it appears that CALJIC No. 2.15 also applied to the special circumstance alleged as to the murder, if not to the murder charge itself. (See *People v. Harden* (2003) 110 Cal.App.4th 848, 858-859.) However, the instruction given by the trial court did not inform the jury it could apply the inferences to the special circumstance allegation but not the murder charge itself. (I Supp. CT 342.)

instructions, there is "no possibility" CALJIC No. 2.15 reduced the prosecution's burden of proof in this case. (*Barker, supra*, 91 Cal.App.4th at p. 1177, 111 Cal.Rptr.2d 403.)

(*Prieto, supra*, 30 Cal.4th at p. 248.)

In this case, petitioner's jury was properly informed of the burden of proof (I Supp. CT 355; Supp. RT 772-773; CALJIC No. 2.90 (1979 Rev.)), its responsibility to evaluate the totality of the evidence and how to weigh testimony (I Supp. CT 333, 336, 337, 339, 346; Supp. RT 760, 762-765, 768-769; CALJIC Nos. 1.01 (1979 Rev.), 2.00 (1979 Rev.), 2.01 (1979 Rev.), 2.02 (1980 Rev.), & 2.22 (1975 Rev.).) Reviewing the instructions given at petitioner's trial, there is "no possibility" CALJIC No. 2.15 reduced the prosecution's burden of proof in this case. (*Barker, supra*, 91 Cal.App.4th at p. 1177; *Prieto, supra*, 30 Cal.4th at p. 248.) Thus, this claim fails to state a prima facie case for relief.

3. Wording Of CALJIC No. 2.22

Petitioner contends the inclusion of the term "relative" in the phrase the "relative convincing force of the evidence" in the version of CALJIC No. 2.22 read to his jury misstated the burden of proof and the erroneous instruction, combined with trial counsel's failure to object to the instruction, violated his "rights to a fair trial and protection from cruel and/or unusual punishment as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and Article I, Sections 1, 7, 16, 17, and 24 of the California Constitution." (Petn. 90-91.) This claim is procedurally barred because petitioner could and should have raised this claim in his first automatic appeal.

And, he fails to make a prima facie case for relief concerning CALJIC No. 2.22. At petitioner's trial, the trial court instructed the jury as follows:

> You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. This does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the *relative* convincing force of the evidence.

(I Supp. CT 346, emphasis added.)

This Court has concluded that this wording of CALJIC No. 2.22 is "appropriate and unobjectionable when, as here, it is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof (see CALJIC No. 2.90)." (*People v. Nakahara* (2003) 30 Cal.4th 705, 714.) In this case, the jury was expressly instructed with the burden of proof pursuant to CALJIC No. 2.90 (1979 Rev.). (I Supp. CT 355; Supp. RT 772-773.) The jury was further instructed "to consider all the instructions as a whole and [] to regard each in the light of all the others." (I Supp. CT 333; Supp. RT 760; CALJIC No. 1.01 (1979 Rev.).) Also, the proper burden of proof was repeated in CALJIC No. 2.01 (1979 Rev.), CALJIC No. 2.61 (1979 Rev.), CALJIC No. 2.91 (1982 Rev.), CALJIC No. 4.50 (1979 Rev.), CALJIC No. 8.21, CALJIC No. 8.71, CALJIC No. 8.80 (1981 Rev.), and CALJIC No. 8.83. (I Supp. CT 337, 350, 356, 357, 363, 367, 369, 372; Supp. RT 763, 770, 773, 777, 778, 779-781.) Reviewing the instructions in their entirety, petitioner has not demonstrated a reasonable likelihood that the jurors misapprehended the phrase "the relative convincing force of the

evidence" to usurp the applicable burden of proof. (See *Nakahara, supra*, 30 Cal.4th at p. 714; *People v. Maury* (2003) 30 Cal.4th 342, 429.)

As a result, petitioner's challenge to CALJIC No. 2.22 fails to state a prima facie case for relief.

4. Instruction On Defense (Aider And Abettor) Theory Raised During Argument

Petitioner contends that, after arguing to the jury the possibility of another person being present when the murder was committed, trial counsel's failure to request instructions equivalent to CALJIC No. 8.27 (7th ed. 2003),[11/] and the court's omission of CALJIC No. 3.01 and the intent to kill requirement to impose aider and abettor liability for the special circumstance allegation (CALJIC No. 8.80),[12/] violated his "rights to a fair trial and protection from

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11. CALJIC No. 8.27 provides,

> If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of ____, all persons, who either directly and actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional or accidental.

12. Although petitioner fails to specify the language he claims was improperly omitted from CALJIC No. 8.80 (Petn. 92-93), it appears the omitted language would have read substantially as follows:

> If you find beyond a reasonable doubt that the defendant was an aider or abettor or either the actual killer or an aider or abettor, but you are unable to decide which, then you must also find beyond a reasonable doubt that the defendant with intent to kill aided and abetted an actor in commission of the murder in the first degree, in order to find the special circumstance to be true. On the other hand, if you find beyond a reasonable doubt that the defendant was the actual killer, you need not find that the defendant intended to kill a human being in order to find

cruel and/or unusual punishment as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and Article I, Sections 1, 7, 16, 17, and 24 of the California Constitution." (Petn. 91-93.) Petitioner fails to state a prima facie case as to each of these claims.

A trial court must instruct the jury on general principles of law relevant to the issues raised by the evidence, even absent a request. (*People v. Wilson* (1967) 66 Cal.2d 749, 759.) The "general principles of law" relevant in a particular case are those principles both closely and openly connected with the facts before the court and necessary for the jury's understanding of the case (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.) "It is not error to omit an instruction which is not based upon substantial evidence. [Citation.]" (*People v. Boyd* (1990) 222 Cal.App.3d 541, 557.)

In this case, as this Court previously observed, "The argument about the other fingerprints merely conceded that defendant had been inside the house and did not necessarily undermine defendant's claim that he had bought the car on October 24." (*Lewis, supra*, 50 Cal.3d at pp. 291-292.) Although there was evidence (unidentified fingerprints) upon which trial counsel could reasonably rely to argue reasonable doubt, this evidence was insufficient to warrant jury instructions defining the scope of aider and abettor liability. There was no evidence establishing that the unidentified fingerprints were placed in the victim's residence at the same time petitioner's prints were left inside. Nor was there evidence supporting an inference that the unidentified prints belonged to anyone with a relationship to petitioner. The prosecution's theory was that petitioner was the actual and sole killer; he was not prosecuted as an aider and abettor. In the absence of substantial evidence, instructions on aider and abettor liability were unnecessary, unwarranted, and their omission was, in any event,

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the special circumstance to be true.
(CALJIC No. 8.80 (1981 Rev.); see I Supp. CT 369.)

harmless under any standard. Similarly, absent substantial evidence warranting the instructions petitioner has not shown trial counsel's failure to request instructions on aider and abettor liability constituted deficient performance that prejudiced him.

Petitioner fails to make a prima facie case regarding the absence of aider and abettor instructions.

J. Ineffective Assistance Of Counsel: Failure To Collect Outside Information About Jurors And To Ask Additional Questions (*Claim XI*)

In *Claim XI*, petitioner contends his trial counsel denied him effective assistance of counsel during the voir dire proceedings. He asserts that trial counsel "declined to collect or review any outside information about the prospective jurors, and failed to ask additional questions of prospective jurors Patricia Owens, Mark Norris, Robert Sciacca, and Lillian Cramer, and limited his penalty phase questioning to four closed-ended questions. (Petn. 93-98.) Because identical claims were presented in petitioner's prior habeas petition and prior direct appeal, they are procedurally barred. However, these claims lack merit in any event.

Initially, respondent observes that this claim is procedurally defaulted under two different principles. First, the identical claims, factual allegations, and evidentiary support were presented in petitioner's first habeas corpus petition in case number S005412, which was denied in September 1989. (See S005412 [Petn. 41-50].) Because petitioner presents no new material facts in support of this claim, it is procedurally defaulted. (*In re Miller* (1941) 17 Cal.2d 734, 735; see *In re Robbins*, *supra*, 18 Cal.4th at p. 778, fn. 1.)

Petitioner fails to allege what additional information, if any, concerning jurors Owens, Norris, Sciacca, and Cramer would have been discovered had trial counsel utilized a service to collect "outside information"

about these jurors. Nor does petitioner allege what additional information, if any, would have been discovered had trial counsel engaged in further unspecified questioning of these jurors during the jury selection process. Additionally, this Court addressed an identical claim concerning the questioning of jurors Owens, Norris, Sciacca, and Cramer in affirming petitioner's convictions. (*Lewis, supra*, 50 Cal.3d at pp. 291-292.)[13/] As this Court observed in its opinion affirming petitioner's convictions:

> Defendant's attack on trial counsel's jury selection tactics appears to be premised on the assumption that a more extensive voir dire would have achieved more favorable results. Nothing other than pure speculation supports such an assumption.

(*Id.* at p. 291.) Petitioner offers no new or persuasive reason for this Court to reach a contrary decision on this issue more than 14 years after it was first rejected by this Court.

Because petitioner has failed to state a prima facie case of ineffective assistance of counsel as to *Claim XI*, it must be denied.

K. Ineffective Assistance Of Counsel: Failure To Challenge Jurors For Cause (*Claim XII*)

In *Claim XII*, petitioner contends his trial counsel's failure to move to challenge potential jurors for cause or competently exercise peremptory

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13. Because this Court has stated an exception to the general rule prohibiting the relitigation of issues actually raised on appeal (*In re Clark, supra*, 5 Cal.4th at p. 765; *In re Waltreus, supra*, 62 Cal.2d at p. 225) when the issue presents a claim of ineffective assistance of counsel (*In re Robbins, supra*, 18 Cal.4th at p. 814, fn. 34.), respondent does not assert that *Claim XI* is procedurally defaulted pursuant to the bar stated in *Waltreus*.

challenges denied him effective assistance of counsel. (Petn. 99-100.)[14/] These claims lack merit.

As for the first contention within this claim, the petition fails to state facts that would suggest, much less demonstrate, that the named jurors were reasonably subject to a challenge for cause and, as a result, petitioner has not shown prejudice and, therefore, has not established a prima facie case for relief.

As for the contention concerning the failure to use additional peremptory challenges, petitioner essentially contends that trial counsel should have issued peremptory challenges to nine additional prospective jurors. (Petn. 99-110.) Because petitioner has failed to present reasonably available documentary evidence, in the form of a declaration from trial counsel, addressing his reasons for declining to issue peremptory challenges as to the named jurors, petitioner has failed to state a prima facie case as to this factual contention as well.

L. Cruel And Unusual Punishment: Constitutionality Of Robbery Special Circumstance (*Claim XIII*)

In *Claim XIII*, petitioner contends that the robbery special circumstance provision fails to adequately narrow the class of persons eligible

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14. This claim was previously considered and rejected by this Court in affirming petitioner's convictions, and petitioner offers no new or persuasive reason for this court to deviate from its prior decision on this matter. (See *Lewis, supra*, 50 Cal.3d at pp. 290-291.) Although, as a general rule, a criminal defendant may not use habeas corpus to relitigate issues which were actually raised on appeal (*In re Clark, supra*, 5 Cal.4th at p. 765; *In re Waltreus, supra*, 62 Cal.2d at p. 225) absent "strong justification" or the applicability of at least one of four narrow exceptions (*In re Harris, supra*, 5 Cal.4th at pp. 825-829), this Court has stated an exception to this rule for claims of ineffective assistance of counsel. (*In re Robbins, supra*, 18 Cal.4th at p. 814, fn. 34.) However, respondent notes that petitioner fails to produce any new factual allegations in support of this claim and relies upon the same general constitutional principles in making his challenge.

for the death penalty and, therefore, constitutes cruel and unusual punishment in violation of the "Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15, 16, and 17 of the California constitution." (Petn. 101-104.) Petitioner's argument relies, in large part, upon a declaration authored by Steven F. Shatz summarizing his findings previously stated in a law review article. (Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283; see Petn. 101.) Because petitioner's only authority directed specifically to the robbery special circumstance is Mr. Shatz's declaration and 1997 study, respondent will address this claim as one not premised upon the appellate record as it existed at the time of petitioner's first appeal affirming petitioner's convictions. *Claim XIII* fails to state a prima facie case for relief.

In his declaration, Mr. Shatz claims that only 11.6 percent of those cases he classified as statutorily death-eligible in California resulted in a death sentence (Petn. Exh. 7, p. 19) and only 7% of those cases he classified as death eligible due to a robbery or burglary special circumstance resulted in a death sentence. (Petn. Exh. 7, p. 20.) In contrast, he states the Supreme Court has found a death penalty procedure too arbitrary "where approximately 15-20% of those convicted of capital murder were actually being sentenced to death." (Petn. Exh. 7, p. 2.)

Petitioner's argument based on a statistical analysis is entirely unpersuasive. In *McCleskey v. Kemp, supra*, 481 U.S. at p. 289, the Supreme Court found statistics "insufficient to show irrationality, arbitrariness and capriciousness under any kind of Eighth Amendment analysis." The Court reasoned:

> The very exercise of discretion means that persons exercising discretion may reach different results from exact duplicates. Assuming each result is within the range of discretion, all are correct

> in the eyes of the law. It would not make sense for the system to require the exercise of discretion in order to be facially constitutional, and at the same time hold a system unconstitutional in application where that discretion achieved different results for what appear to be exact duplicates, absent the state showing the reasons for the difference . . . .

(*Id.* at pp. 289-290.)

Looking specifically at petitioner's statistical analysis, Mr. Shatz's declaration (Petn. Exh. 7) provides no basis for relief because it rests on unsound inferences drawn from an incomplete statistical analysis. First, Mr. Shatz bases his conclusion upon his review of a small fraction of first-degree murder cases in California and fails to allege, much less demonstrate, that his sample is statistically representative of the universe of cases in the state. Second, Mr. Shatz's subjective determination that defendants who did not face a special-circumstance allegation were, in reality, "factually" death eligible defendants, overlooks the limiting procedures and factors expressly endorsed by our Supreme Court. Mr. Shatz overlooks that prosecutorial decisions as to whether to file special-circumstance allegations and seek the death penalty "necessarily are individualized and involve infinite factual variations," a necessary procedure that undermines the validity of any statistical comparison. (*McCleskey v. Kemp, supra*, 481 U.S. at p. 295, fn. 15.) Mr. Shatz's subjective selection of "death-eligible" cases overlooks that a particular decision to impose the death penalty is made by a jury, unique in its composition, whose decision rests on "consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense." (*Id.* at p. 294.) Finally, his subjective process disregards the Supreme Court's conclusion that "[t]he Constitution is not offended by inconsistency in results based on the objective circumstances of the crime," and its recognition

that a defendant's sentence may be influenced by numerous legitimate factors not related to guilt, such as sufficiency of the evidence, witness availability and credibility, and the capabilities of the involved law enforcement agency. (*Id.* at p. 307, fn. 28.) Given these legitimate circumstances impacting the number of defendants sentenced to death, an inference drawn from an apparent statistical discrepancy is virtually meaningless as to the death sentence in a specific capital case.

In any event, this Court has continually rejected arguments such as petitioner's that the California scheme for death eligibility fails adequately to narrow the class of murderers exposed to capital punishment. Repeatedly, it has held that the death penalty law, as a whole, adequately narrows the class of death eligible murderers. (*People v. Gurule* (2002) 28 Cal.4th 557, 663-664; *People v. Koontz* (2002) 27 Cal.4th 1041, 1095; *People v. Box* (2000) 23 Cal.4th 1153, 1217; *People v. Coddington* (2000) 23 Cal.4th 529, 656; *People v. Jenkins* (2000) 22 Cal.4th 900, 1050; *People v. Frye* (1998) 18 Cal.4th 894, 1028-1029; *People v. Arias* (1996) 13 Cal.4th 92, 186-187.) The special circumstances are not over-inclusive in number, or the expansiveness of their terms, as construed (*Koontz, supra*, 27 Cal.4th at p. 1095; *Jenkins, supra*, 22 Cal.4th at p. 1050; *Frye, supra*, 18 Cal.4th at p. 1029; *People v. Barnett* (1998) 17 Cal.4th 1044, 1179; *Arias, supra*, 13 Cal.4th at pp. 186-187), despite the asserted breadth of the felony-murder special circumstances (*Gurule, supra*, 28 Cal.4th at p. 663; *Koontz, supra*, 27 Cal.4th at p. 1095; *People v. Ochoa* (2001) 26 Cal.4th 398, 458; *People v. Lewis* (2001) 26 Cal.4th 334, 393-394; *Jenkins, supra*, 22 Cal.4th at p. 1050; *Frye, supra*, 18 Cal.4th at p. 1029).

M. Ineffective Assistance Of Counsel: Failure To Introduce Mitigating Evidence (*Claim XIV*)

In *Claim XIV*, petitioner contends his trial counsel's failure to

introduce mitigating evidence during the penalty phase resulted in an unreliable sentence constituting cruel and/or unusual punishment under the California and federal constitutions. (Petn. 104-135.) Specifically, petitioner contends that trial counsel failed to present mitigating evidence of "a lifetime of trauma, mental retardation and learning disabilities" (Petn. 129-130), failed to present good character evidence (Petn. 130-131), and failed to present evidence that petitioner spent most of his formative years in juvenile institutions and those institutions failed to properly "identify and address [petitioner's] mental health needs" and did not prepare him to find employment once he was released (Petn. 125). The petition fails to establish that his trial counsel either provided deficient performance or prejudiced him by not presenting the evidence of "trauma, mental retardation and learning disabilities" now referenced by petitioner. As a result, this claim must be rejected.

Petitioner identifies his "lifetime of trauma" to consist of him being the "product of a broken home" due to his father's abandonment of the family when petitioner was three and his mother's alcoholism, lack of supervision, and casual relationships with men. In direct contradiction of his abandonment claim, petitioner also alleges that his father "was a perverse and dangerous role model to Petitioner." (Petn. 105.) These allegations appear to derive from a "Institution Program Summary" apparently authored in 1977. (Petn. Exh. 39.) The petition fails to establish petitioner's family members or petitioner himself confirmed any of the information now alleged in the petition when they were interviewed in 1984. As a result, the petition fails to establish deficient performance. Moreover, the allegations in the petition appear to convey minimal mitigating value, in that the petition fails to include more commonly made allegations of incidents of excessive abuse of a physical, emotional or sexual nature or allegations of any drug use.

As discussed in greater detail in the response to *Claim XV*, trial

counsel did not render deficient performance in failing to present evidence of mental retardation or learning disabilities because this evidence did not exist in 1984. Trial counsel had petitioner tested by a court-appointed psychologist and examined by a psychiatrist prior to trial. Both experts expressly informed trial counsel that no mental defenses were available for petitioner. Petitioner has not shown that counsel's performance in 1984 was deficient.

As for mitigating evidence of petitioner's "good character," the only factual support stated in the petition is that petitioner's "family and friends described him as a loving, generous, considerate, respectful and well-behaved person who deeply affected [sic] by his broken-home life and his early prison experiences." (Petn. 124.) During the penalty phase, trial counsel referenced the guilt phase testimony of petitioner's father and sister, Gladys Spillman, and presented additional testimony from his sister Rose Davidson, who testified concerning petitioner's family history and her love for petitioner. (Supp. RT 810-812.) According to his 1989 declaration filed with the informal response to the prior state habeas petition (case no. S005412), Mr. Slick did not present evidence of petitioner's "good character" for the following reasons:

> Although Mr. Lewis' father and two sisters were willing to testify that Mr. Lewis was a good student, participated in track and field at school and was generally a good influence on Rose Davidson's children, I knew Mr. Lewis never completed much less attended high school and that his criminal history began when he was 12 years old and continued until age 32 when the present crime was committed."

(Exh. A.) Petitioner fails to identify any significant evidence of petitioner's good character available to trial counsel in 1984 which he failed to present.

As discussed in greater detail in the response to *Claim XVI*, trial counsel did not render deficient performance in failing to present evidence that petitioner spent most of his formative years in juvenile institutions, evidence

regarding the impact of incarceration upon him, and evidence the failures of those institutions to properly "identify and address [petitioner's] mental health needs" or provide him employable skills. Petitioner has failed to allege, much less establish, that the presentation of such evidence was standard practice for defense counsel in Los Angeles County in 1984. (See *Wiggins v. Smith* (2003) 123 S.Ct. 2527, 2536-2537 [156 L.Ed.2d 471].)

For the reasons stated above, petitioner fails to make a prima case that his trial counsel's representation during the penalty phase resulted in an unreliable sentence. *Claim XIV* must be denied.

N. Ineffective Assistance Of Counsel: Mental Retardation And Learning Disabilities (*Claim XV*)

In *Claim XV*, petitioner contends that his trial counsel's failure to investigate and present mitigating evidence that petitioner was mentally retarded and suffered from learning disabilities denied him effective assistance of counsel. (Petn. 136-166.) The petition establishes that trial counsel had petitioner examined and evaluated by a psychiatrist and a psychologist prior to trial. Petitioner has failed to allege facts establishing trial counsel's performance in 1984 was deficient within the meaning of *Strickland*.

According to the declaration of petitioner's current psychologist, Dr. Natasha Khazanov, trial counsel had petitioner examined by a psychiatrist and tested by a psychologist prior to his trial. (Petn. Exh. 13 ¶ 83-84.) Petitioner does *not* allege that either expert informed trial counsel that petitioner was mentally retarded or suffered from learning disabilities that would qualify as mitigating circumstances. To the contrary, the petition includes factual allegations demonstrating that the retained psychologist, Dr. Michael Maloney, tested petitioner in 1984 and concluded petitioner's full scale IQ was 73 as measured by the WAIS-R. (Petn. Exh. 13 ¶ 84.) Additionally, according to the

1989 declaration of Mr. Slick filed as an exhibit to the informal response to the petition in case number S005412, Dr. Maloney was present during trial counsel's interviews of Denise Walker (petitioner's girlfriend), Robert Lewis, Sr. (his father), Rose Davidson (his sister), and Janiero Lewis (his wife), but was not present during his interview of Gladys Spillman (petitioner's sister). (Exh. A, p. 3.) After the interviews, Dr. Maloney "opined that Mr. Lewis did not appear to have any particular psychological problems." Thereafter, Mr. Slick nevertheless retained Dr. Kaushal Sharma to examine petitioner "indicating that Mr. Lewis had no identifiable psychological problem despite his extensive criminal history." (Exh. A, p. 3.) Dr. Sharma specifically advised trial counsel that he discovered,

> [n]o evidence of psychosis, organic brain disorder, depression, or any other major disorder during the examinations. In the absence of any significant mental illness or other emotional or mental disturbance, I have nothing to suggest any mitigating circumstances for the defendant. In fact, given the defendant's long prison record, antisocial behavior at an early age, lack of mental illness, lack of duress, and lack of intoxication, may suggest that no such mitigating factors exists in this case.

(Petn. Exh. 13 ¶ 83.)

Trial counsel is entitled to rely on the reports of experts who are consulted. (*Summerlin v. Stewart* (9th Cir. 2001) 267 F.2d 926, 943; *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 947 [entitled to rely on expert consulted].) Moreover, trial counsel need not continue shopping for an expert just because an unfavorable opinion has been received. (*Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1038; *Walls v. Bowersox* (8th Cir. 1998) 151 F.3d 827, 835.)

Petitioner has failed to plead any facts establishing that trial counsel

had any reason to believe Dr. Sharma and Dr. Maloney were not well qualified to render the opinions they offered him. Nor has petitioner alleged any facts suggesting that *trial counsel* was alerted by either of the experts he consulted that there was a need for additional psychological testing, and the petition fails to establish that petitioner's behavior or statements suggested that additional investigation of a mental defense was necessary or advisable. Rather, the petition provides facts suggesting that individuals working on petitioner's behalf had made contrary observations. For instance, Kristina Kleinbauer, who was hired as a defense investigator for trial preparation, personally interviewed petitioner on May 23, 1984 at the County Jail and described him as "a very pleasant man who was quite articulate." (Petn. Exh. 12, p. 2 ¶ 6.) Thus, to the extent the petition provides insight into the information available to trial counsel in 1984, it refutes petitioner's claim of ineffective assistance.

As for petitioner's conclusory and speculative suggestion that trial counsel did not obtain and review "all documents available to him" (Petn. 160-161), petitioner wholly fails to provide reasonably available documentary support, such as a declaration from trial counsel, establishing what materials were obtained and reviewed by trial counsel and provided to his retained psychiatrist and a psychologist. Although the petition includes an initial letter forwarded to each expert which outlines 11 questions and identifies certain materials provided at the initial contact (Petn. Exhs. 60, 61), the petition fails to establish whether any additional documents were subsequently obtained by trial counsel and provided to or reviewed by his experts. The petition further fails to demonstrate that the retained experts did not independently obtain and examine the information in existence in 1984 that petitioner now utilizes to make his claims.

For all the foregoing reasons, petitioner fails to make a prima facie case as to *Claim XV*.

O. Ineffective Assistance Of Counsel: Psychological Impact Of Incarceration (*Claim XVI*)

In *Claim XVI*, petitioner contends trial counsel's failure to investigate and present evidence regarding the psychological impact of petitioner's incarceration as a juvenile at a young age and the absence of mental health assessment and treatment during his juvenile and adult incarcerations was ineffective assistance of counsel because such evidence could have rebutted the prosecutor's argument that petitioner "chose" the path to criminality. (Petn. 167-178.)

Petitioner has failed to allege facts that would demonstrate that reasonably competent counsel conducting a death penalty trial in 1984 would have presented the type of evidence now proffered by petitioner. Although the petition establishes that trial counsel consulted both a psychiatrist and a psychologist prior to trial in 1984, there is no showing that either expert advised trial counsel that petitioner's prior incarcerations and, more specifically, the lack of mental health diagnoses and treatment while incarcerated, would qualify as a mitigating circumstance that should be presented to the jury. Again, the petition establishes that Dr. Sharma, a psychiatrist retained by trial counsel to examine petitioner and advise counsel, reviewed records of petitioner's prior incarcerations, recognized a lack of treatment, but advised trial counsel no mitigating circumstances existed. (Petn. Exh. 15 ¶ 34; Petn. Exh. 13 ¶ 83.)

Indeed, the only evidentiary support submitted by petitioner for this claim, the declaration of Dr. Adrienne Davis, suggests that she first advised criminal defense practitioners concerning the impact of prolonged institutionalization in 1997. (Petn. Exh. 15 ¶ 5.) Dr. Davis did not examine petitioner at all, much less examine him prior to his death penalty trial in 1984. Therefore, she merely speculates concerning other diagnoses and more "appropriate" juvenile treatment options than those actually received by

petitioner. She does not and cannot provide an opinion whether different treatment options were actually warranted at the time petitioner was a juvenile, nor does she offer an opinion concerning how different treatment options would have impacted petitioner. As a result, the petition does not establish either deficient performance or prejudice within *Strickland*.

Finally, the presentation of evidence of various purported failures by the correctional institutions that housed petitioner could have opened the door to evidence on rebuttal or on cross-examination elaborating on the factual circumstances of petitioner's prior crimes or concerning his continuing criminal, sometimes, violent behavior while incarcerated that could have undermined the defense by depicting petitioner as aggressive and desensitized to violence.

Petitioner fails to make a prima facie case as to *Claim XVI*.

P. Instructional Error: Meaning Of Life Without Possibility Of Parole (*Claim XVII*)

In *Claim XVII*, petitioner contends the Supreme Court's decision in *Shafer v. South Carolina* (2001) 532 U.S. 36 [121 S.Ct. 1263, 149 L.Ed.2d 178], requires a trial court to "inform the jury that a life sentence *does in fact* carry *no* possibility of parole" and the trial court's failure to give such an instruction in this case violated his right to due process and a fair trial as well as the prohibition against cruel and unusual punishment. Moreover, petitioner contends that his trial counsel's failure to object to the absence of such an instruction denied him effective assistance of counsel. (Petn. 178-179.) In *Shafer*, the high court considered South Carolina's amended death penalty statute and again held that whenever future dangerousness is at issue in a capital sentencing proceeding, due process requires that the jury must be informed that a life sentence carries no possibility of parole. (*Shafer, supra*, 532 U.S. at pp. 48-52; see also *Simmons v. South Carolina* (1994) 512 U.S. 154 [114 S.Ct.

2187, 129 L.Ed.2d 133].)

Petitioner's claim of instructional error is premised solely upon the appellate record before this Court when it affirmed petitioner's convictions. First, because no objection was interposed at trial concerning the issue now raised on appeal, it has been waived. (Supp. RT 804; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1191-1192 [defendant must request clarifying language if believes jury instruction unclear].) Second, as noted above,

> [H]abeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors *could have been, but were not*, raised upon a timely appeal from a judgment . . . .

(*In re Harris, supra*, 5 Cal.4th at p. 829, citing *In re Dixon, supra*, 41 Cal.2d at p. 759, italics added.) Petitioner has failed to provide any justification for this Court to consider this claim, which could and should have been raised in his first appeal to this Court. (*In re Harris, supra*, 5 Cal.4th at p. 825, fn. 3, at pp. 827-841.) To the extent petitioner may suggest he relies upon a new rule of law (*id.* at p. 841), as discussed below, the Supreme Court case he references (*Atkins*) is inapplicable. As such, this Court should conclude this claim is procedurally barred.

In any event, this claim lacks merit. The problem the Court addressed in *Shafer* does not exist here. Petitioner's jury was properly instructed, consistent with CALJIC No. 8.84, that "[i]t is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for *life without the possibility of parole* in any case in which the special circumstance alleged in this case has been specially found true." (Supp. RT 844; I Supp. CT 399, emphasis added.) "Jurors are presumed to be intelligent, capable of understanding instructions and applying

them to the facts of the case. [Citation.]" (*Lewis, supra*, 26 Cal.4th at p. 390.) Hence, petitioner's claim that *Shafer* and/or *Simmons* required a different instruction is untenable. (See *Prieto, supra,* 30 Cal.4th at pp. 269-270 [reiterating the continued constitutionality of CALJIC No. 8.84 after *Simmons* and *Shafer*].)

Claim XVII fails to state a prima facie case for relief.

Q. Cruel And/or Unusual Punishment: Mental Retardation (*Claim XVIII*)

Citing *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335], in *Claim XVIII*, petitioner contends that executing him would constitute cruel and unusual punishment because he is mentally retarded. (Petn. 180-183.) The factual basis for this claim is the declaration of Dr. Natasha Khazanov, a psychologist, who examined him on June 10, 2003 (just 22 days before the filing of the instant petition), and diagnosed him as suffering mild mental retardation. (Petn. Exh. 13 ¶ 11.) As will be demonstrated below, because petitioner has failed to plead facts showing that he meets the *Atkins* definition of "mentally retarded," this claim should be denied in its entirety.

1. Mental Retardation Criteria

In *Atkins,* the United States Supreme Court quoted, with approval, the clinical definition of mental retardation used by the American Association of Mental Retardation (AAMR):

> "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use,

self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992).

(*Atkins, supra,* 536 U.S. at p. 308, fn. 3.) The Court in *Atkins* also observed that the American Psychiatric Association's (APA) definition was similar,[15] and that, according to the APA, "'[m]ild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70." (*Ibid.*)

Interestingly, "[o]f the states that currently prohibit execution of the mentally retarded, the majority define 'mental retardation' in terms of an IQ of 70 or below. [Citations.]" (*State v. Thomas* (2002) 97 Ohio St.3d 309, 328-329 [779 N.E.2d 1017, 1038]; see also *State v. Lott* (2002) 97 Ohio St.3d 303, 305 [779 N.E.2d 1011, 1014] ["Most state statutes prohibiting the execution of the mentally retarded require evidence that the individual has an IQ of 70 or below. [Citations.]"].)[16] However, in addition to IQ test scores, a court should

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15. "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). *(Atkins, supra,* 536 U.S. at p. 308, fn. 3.)

16. "Errors of measurement as well as true changes in performance outcome should be considered in interpreting IQ test results. The concept of standard error of measurement (SEM) is an aid. One SEM is plus or minus a specified number of IQ points. Thus, an IQ of 70 could range from 66 to 74 assuming an SEM of 4. [Citation.]

"In the 2002 AAMR system, the "intellectual functioning" criterion for diagnosis of mental retardation is approximately two standard deviations

consider any evidence that a defendant may have been feigning mental retardation or "may have been motivated to perform poorly" on the tests. (*Thomas, supra,* 779 N.E.2d at pp. 1038-1039 [expert testified defendant "may have been motivated to perform poorly" on IQ test in order "to qualify for disability benefits," and that defendant "would feign sleeping" during some of the test administrations].)

To constitute mental retardation, however, more is required than a showing that the defendant's IQ falls within the range of mental retardation, although IQ test scores are an important objective component of the accepted definition of mental retardation. (*Atkins, supra,* 536 U.S. at p. 308, fn. 3.) The clinical definitions, as recognized by the Supreme Court require three essential components: (1) significantly subaverage intellectual functioning, (2) with concurrent deficits in two or more adaptive skills, (3) that manifested before age 18. (*Atkins, supra,* 536 U.S. at p. 318; see also *Lott, supra,* 779 N.Ed.2d at p. 1014; *Thomas, supra,* 779 N.Ed.2d at p. 1038; *Williams, supra,* 831 So.2d 835 at pp. 853-854 and fns. 22, 23.)

The Court in *Atkins* recognized that while a national consensus has developed that mentally retarded offenders should not be executed, there is serious disagreement over determining which offenders are, in fact, retarded. "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." Thus, the Supreme Court left it up to the states to develop the appropriate way to enforce the constitutional restriction placed upon the execution of mentally retarded offenders. (*Atkins, supra,* 536 U.S. at pp. 347-348.)

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below the mean, considering the SEM for the specific IQ assessment instruments used and the strengths and limitations of the various instruments. [Citation.]" (*State v. Williams* (La 2002) 831 So.2d 835, 853-854, fn. 26.)

To date, California has not established procedures for the implementation of the *Atkins* decision. Consequently, this Court must resolve petitioner's claim of mental retardation in light of *Atkins* and existing state law. Penal Code section 1001.20, subdivision (a), defines "mentally retarded" as: "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." It is consistent with the clinical definitions referenced in *Atkins*. Thus, this Court should apply the generally accepted mental retardation criteria discussed in *Atkins*, together with the definition of mental retardation in Penal Code section 1001.20, subdivision (a), which is consistent with *Atkins*, in order to determine whether petitioner has made a prima facie showing of mental retardation.

2. Application Of Mental Retardation Criteria To Petitioner

The materials referenced by petitioner fail to present a prima facie showing of mental retardation, i.e., reasonable and substantial grounds for this Court to believe he may in fact be mentally retarded. These materials, especially when considered in conjunction with other exhibits petitioner also submitted to the Court but overlooks in the instant petition, confirm this conclusion.

Each of the three essential components to the clinical definition of mental retardation, as discussed above, will be discussed seriatim.

a. Factor (1): Intellectual Functioning

Petitioner, referring to the declaration from Dr. Natasha Khazanov, states that he is mentally retarded, with a full scale IQ score of 67. (Petn. 182.) Nonetheless, there is documentary evidence (Petn. Exhs. 36 and 59)

establishing petitioner's IQ score was 83 when he was 16 years old, a score that falls well outside the range accepted for mental retardation. Thus, other information in the petition absolutely contradicts petitioner's claim that he is mentally retarded.

When petitioner, at age 16, was given the SRA Thurstone Primary Mental Abilities Test by a psychologist at the Southern Reception Center and Clinic, he received an overall full scale IQ score of 83; his total verbal component score was 67; his total non-verbal component score was 99. (Petn. Exh. 59.) Other tests were also performed. Results of the WRAT [Wide Range Achievement Test] placed him at the 2.6 grade level in spelling and 3.6 in arithmetic. In August 1968, results of the GATES Reading survey placed him at 5.6 in reading vocabulary and 3.0 in level of comprehension.

While petitioner was awaiting trial in the present case, he was evaluated by a psychiatrist, Dr. Kaushal Sharma, and a psychologist, Dr. Michael Maloney. Although petitioner conspicuously fails to attach either the report prepared by Dr. Sharma or the notes of the interviews and testing performed by Dr. Maloney – which both constitute reasonably available documentary evidence relevant to this claim – Dr. Khazanov relates that Dr. Maloney evaluated petitioner as having a full scale IQ score of 73. (Petn. Exh. 13 ¶ 84.) Dr. Kahzanov notes that the error measurement for the administered test is plus or minus five points (Petn. Exh. 13 ¶ 84), but she fails to acknowledge that the margin for error inherent in the test could easily mean petioner's actual IQ score when tested in 1984 as high as 78. She also fails to mention Dr. Maloney's assessment, if any, whether petitioner was malingering. Although Dr. Khazanov states that Dr. Maloney "failed to explore" the possibility that petitioner suffered from mental retardation, the petition fails to provided reasonably available documentary evidence, in the form of a declaration from Dr. Maloney, describing the nature of his investigation and

inquiry.

The foregoing clearly demonstrates that petitioner's IQ and intellectual functioning consistently have been above 70 from the age of 16 up through age 32 at his trial. Not until June 10, 2003 (just 22 days before the filing of the instant petition) did anyone diagnose petitioner as being mentally retarded with in IQ below 70. Consequently, petitioner has failed to make a prima facie showing that his IQ and intellectual functioning place him in the mentally retarded range.

b. Factor (2): Adaptive Skills

Petitioner has the burden of demonstrating that he has significant deficits in two or more categories of adaptive behavior skills such as communication, self-care, home living, social/interpersonal skills, self-direction, functional academic skills, work, leisure, health and safety. (*Atkins, supra,* 536 U.S. at p. 308, fn. 3.) Although Dr. Khazanov mentions this factor in her declaration (Petn. Exh. 13 ¶ 129-132), she provides no facts supporting her ultimate conclusion in this area. (Petn. Exh. 13 ¶ 138.) Concerning "self-care," she observed that petitioner "appeared in prison-issued clothing that was neat and clean." (Petn. Exh. 13 ¶ 88.) Her tests assessing motor functioning revealed only "mild to moderate," but not significant, deficits in motor functioning. (Petn. Exh. 13 ¶ 110.) There is also no evidence demonstrating any deficiencies observed in 2003 which were present either at the time of trial or during petitioner's minority. Rather, petitioner's self-report in 1970 that he "plays basketball, runs track and participates in football activities" tend to suggest his motor functioning was more than sufficient to participate in complicated recreational activities. The remainder of the testing, and the declaration, addresses only IQ testing. Dr. Khazanov's substantiated conclusions in this area fail to stated a prima facie case regarding this

component of the mental retardation definition.

It is clear that a defendant may have "mental deficiencies" yet still be "capable of functioning in the community." (See *Thomas, supra,* 779 N.E.2d at p. 1039.) For example, an IQ below 70 "may reflect one who is limited intellectually, but who nevertheless is not mentally retarded." (*Williams, supra,* 831 So.2d at p. 853, fn. 26.) While the petition demonstrates that petitioner's IQ scores on tests administered prior to 2003 consistently were above 70, petitioner also has demonstrated that he is quite capable of functioning within society. Although Dr. Khazanov notes that his "employment history is limited," she fails to recognize that the absence of such a history is due to petitioner's repeated incarcerations rather than a failure to maintain employment outside an institution. (Petn. Exh. 13 ¶ 135.) She also overlooks information that, when he was 20, petitioner informed a probation officer that he had been most recently employed by his father as a brick layer, but previously had held jobs as a gas station attendant for six months and as a car wash attendant for five months between stints in jail. (Petn. Exh. 30, p. 2; see *Ex parte Perkins*, (Ala. 2002) 851 So.2d 453, 456 [noting that the petitioner "maintained a job as an electrician for a short period."].) Petitioner had a common law relationship with Frances Mae Lang for five years and, when not incarcerated, paid half the rent when he was employed. (Petn. Exh. 28; Petn. Exh. 30, p. 2.) Upon his intake at Deuel Vocational Institution in December 1970, petitioner reported using the library twice a week. (Petn. Exh. 32.)

Given the information provided in the petition, petitioner has failed to demonstrate that he is deficient in adaptive functioning skills.

c. Factor (3): Manifestation Of Mental Retardation Before Age 18

Petitioner has not demonstrated that his alleged mental retardation

occurred before age 18. In support of this factor Dr. Khazanov speculates responding to the onset of petitioner's alleged mental retardation: "Unfortunately, the diagnosis of mental retardation was not made until now. I have been provided with enough information about the milieu in which Mr. Lewis was raised to conclude that evidence of retardation *may* well have been present, but not noticed." (Petn. Exh. 13 ¶ 138, emphasis added.) Although petitioner points to his scores on a 1968 SRA test and claims that the IQ score was 61 and his linguistic intelligence score was 58, he misstates one of the scores and overlooks other scores on the test. Petitioner's exhibits demonstrate the Linguistic Score was 68. (Petn. Exh. 59.) However, although petitioner highlights the component "Q Score" of 61, he overlooks the Verbal Total of 67, the Non-Verbal score of 99, and the full scale Beta IQ score of 83. (Petn. Exh. 59.) These latter three scores were the only scores repeated in petitioner's high school transcript record for 1968. (Petn. Exh. 36.) Petitioner's Beta IQ score of 83 also was utilized to assess his intelligence as "dull average" during prison placement screenings conducted in 1973 (Petn. Exh. 28, p. 3) and December 1977 (Petn. Exh. 28).

Thus, petitioner's exhibits demonstrate his IQ test scores while he was 16 years old was 83, well above 70 – the cutoff score for mild mental retardation. (See *Atkins, supra,* 536 U.S. at p. 309, fn. 3 [under the APA's definition, "'mild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70"]; see also *Thomas, supra,* 779 N.E.2d at p. 1038 ["Of the states that currently prohibit execution of the mentally retarded, the majority define 'mental retardation' in terms of an IQ of 70 or below. [Citations.]"].) Also, during the 1968 and 1984 evaluations, no organic brain impairments were found. These findings remained consistent up through the commission of the instant crimes and petitioner's confinement to death row at San Quentin. Accordingly, petitioner has failed to show that the

onset of his mental retardation occurred before he was 18.

3. Conclusion

In light of petitioner's failure to provide any documentary evidence that his IQ prior to age 18 was 70 or below, in addition to his failure to demonstrate that he is deficient in at least two adaptive behavior skills, petitioner has failed to meet his burden of setting forth specific facts that, if true, would require issuance of the writ. (*Gonzalez, supra,* 51 Cal.3d at p. 1258.) Accordingly, this claim should be summarily denied because petitioner has failed to make a prima facie showing that he is mentally retarded.

R. Proportionality Review (*Claim XIX*)

In *Claim XIX*, petitioner contends that substantive due process and the prohibition against cruel and/or unusual punishment require proportionality review of his death sentence. (Petn. 183-186.) In *Claim XX*, petitioner contends that if proportionality review is not required by substantive due process or the prohibition against cruel and unusual punishment, the absence of proportionality review would violate equal protection. (Petn. 187.) Petitioner raised similar claims in his opening brief filed in his concurrent appeal. (AOB 117-123.) He fails to make a prima facie case here as well.

Initially, respondent observes that *Claims XIX and XX* could and should have been presented in petitioner's first automatic appeal. As a general rule, a criminal defendant may not use habeas corpus to litigate issues which could have been but were not raised on appeal absent "strong justification" explaining the failure to raise the issues on appeal. (*In re Harris, supra,* 5 Cal.4th at p. 829; *In re Clark, supra,* 5 Cal.4th at p. 765; *In re Dixon, supra,* 41 Cal.2d at p. 759.) Concerning the four narrow exceptions which would permit consideration of which could and should have been raised on appeal (*In re*

Harris, supra, 5 Cal.4th at p. 825, fn. 3, at pp. 827-841), the failure to state a prima facie case exclude the first exception for clear and fundamental constitutional errors (*Id.* at p. 834), and there is no suggestion that the trial court lacked personal or subject matter jurisdiction (*id.* at pp. 836, 840). Although petitioner relies on recent case authority, he does not rely upon a new "rule of law" (*id.* at p. 841) since those cases apply, if at all, only by analogy. As a result, *Claims XIX and XX* are barred.

In any event, these claims fail to state a prima facie case. As petitioner observes in passing (Petn. 185), in *Pulley v. Harris* (1984) 465 U.S. 37 [104 S.Ct. 871, 79 L.Ed.2d 29], the United States Supreme Court reviewed California's 1977 death penalty law and held that inter-case proportionality review was not required by the federal Constitution. (*Id.* at p. 51, fn. 13.) As observed in the Respondent's Brief filed in the concurrent automatic appeal (RB 61), this Court has previously rejected these claims. (*People v. Anderson* (2001) 25 Cal.4th 543, 602.) Although petitioner adds a new argument that recent cases assessing civil verdicts and penalties suggest that proportionality review should be extended, or will be extended, to death sentences, petitioner fails to point to any existing authority establishing that his suggested review is constitutionally mandated. Petitioner offers no new or convincing rationale for this Court to reconsider its prior findings.

Thus, petitioner fails to make a prima facie case as to *Claims XIX and XX*.

S. General Restatement Of Claims Raised In Opening Brief On Appeal (*Claim XXI*)

In a single paragraph constituting *Claim XXI*, petitioner reasserts each of the claims raised in his opening brief in case number S020670 to which the Attorney General objected as not properly raised in that appeal. (Petn. 187.)

In the appeal, respondent objected to the claims raised in Arguments V-XI (AOB 46-162) because those claims were outside the narrow scope of this Court's 1990 limited remand. Although this form of pleading is wholly insufficient to raise and preserve these claims on habeas corpus (*In re Gallego, supra,* 18 Cal.4th at p. 837, fn. 12), respondent observes that each claim incorporated into this argument is also independently raised in the petition as *Claims XXII, XXIII, XXIV, XXV, XXVI, XXIX, and XXX.* Rather than repeat the arguments made in the Respondent's Brief filed in the pending automatic appeal and elsewhere in the informal response, respondent addresses them individually below. Petitioner fails to make a prima facie case as to each of these claims.

T. Trial Court's Refusal To Consider Additional Evidence In Support Of Motion To Strike The Special Circumstances (*Claim XXII*)

In *Claim XXII*, petitioner contends that the trial court's refusal to consider additional evidence to support a motion to strike the special circumstance finding violated due process and denied him equal protection of the law. (Petn. 188-195.) This claim, which was raised verbatim in the opening brief filed in the concurrent automatic appeal (AOB 46-53 [Arg. V]), should be rejected for the reasons stated in the Respondent's Brief at pages 29 through 36.

U. Trial Court's Refusal To Consider Mitigating Evidence At The Penal Code Section 190.4 Hearing Which Was Not Presented To The Penalty Phase Jury (*Claim XXIII*)

In *Claim XXIII*, petitioner contends that the trial court violated his rights to due process, a fair and reliable sentencing determination, and equal protection of the law by refusing to let him present mitigating evidence at the Penal Code section 190.4 hearing which was not presented to the penalty phase

jury, specifically the testimony of friends and family members about his childhood, the lack of meaningful educational or rehabilitative opportunities while in custody, the psychological impact of his incarcerations, and his post-conviction good behavior and adjustment while in custody. (Petn. 195-204.) This identical claim has been presented to this Court in the concurrent automatic appeal (AOB 53-62 [Arg. VI]) and should be rejected for the reasons stated in the Respondent's Brief at pages 37 through 45.

V. Challenges To Penalty Phase Instructions (*Claim XXIV*)

In *Claim XXIV*, petitioner contends that it is reasonably likely the jury misapplied certain standard penalty-phase jury instructions derived from Penal Code section 190.3 in a manner that violated his rights to due process and equal protection and the prohibition against cruel and unusual punishment. (Petn. 204-210.) Specifically, petitioner argues that the standard instructions derived from Penal Code section 190.3, subdivision (a), are unconstitutionally vague (Petn. 208-209); the jury was permitted to consider uncharged crimes under subdivision (b) without being required to unanimously agree as to the conduct and determine, beyond reasonable doubt, that petitioner committed the uncharged conduct (Petn. 209-210); and the instructions did not adequately clarify which factors could be considered mitigating and which aggravating (Petn. 210).

To the extent petitioner raises new constitutional claims, although trial counsel did request modifications to standard CALJIC No. 8.84.1, he did not object to the instructions read to the jury on the grounds now raised in this petition and did not request that any additional instructions be given on the points raised. (Supp. RT 804.) As a result, these claims have been waived. (*Rodrigues, supra*, 8 Cal.4th at pp. 1191-1192 [defendant must request clarifying language if believes jury instruction unclear].)

Further, these claims are based upon speculation and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *Duvall, supra,* 9 Cal.4th at p. 474; *Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal* (1975) 46 Cal.App.3d 94, 103.)

Finally, concerning the merits of the individual contentions, since *Claim XXIV* largely restates portions of Argument IX.B, Argument IX.C.7, and Argument IX.C.9, as stated in the opening brief filed in the concurrent automatic appeal (AOB 85-93, 123-127 [Arg. IX]), respondent incorporates the appellate answer on point. (RB 55, 62-65.)

Petitioner fails to make a prima facie case as to the contentions raised in *Claim XXIV.*

W. Trial Court's Denial Of Petitioner's Pre-sentence Discovery Request (*Claim XXV*)

In *Claim XXV*, petitioner contends the trial court's denial of his request for pre-sentencing discovery violated his fundamental right to due process. (Petn. 210-213.) Since this identical claim was raised in the opening brief filed in the concurrent automatic appeal (AOB 63-67 [Arg. VII]), respondent incorporates the response given earlier and the appellate answer on point. (RB 46-49). As noted in greater detail in the Respondent's Brief, the trial court lacked jurisdiction to grant discovery because the request was not relevant to the sole proceeding pending before the superior court, and the trial court did not abuse its discretion in denying the discovery request because petitioner was not entitled to present additional mitigating evidence at the hearing on the application for modification of the verdict and the trial court was not authorized to strike the special-circumstance finding.

Petitioner fails to make a prima facie case as to *Claim XXV.*

X. Invitation To Declare The Death Penalty Morally Wrong (*Claim XXVI*)

In *Claim XXVI*, petitioner invites this Court to declare that the death penalty is "wrong." His invitation is premised not upon a specific claim that the death penalty violates the Constitution or statute, but that it is no longer morally "valid." (Petn. 214-221.) Petitioner raised this identical contention in his opening brief filed in his concurrent automatic appeal. (AOB 67-78 [Arg. VIII].)

This Court should decline Petitioner's invitation to declare the death penalty immoral for the reasons stated in the Respondent's Brief at page 50. *Claim XXVI* fails to make a prima facie case for relief.

Y. Challenges To This Court's Interpretation And Application Of California's Death Penalty Statute (*Claim XXVII*)

In *Claim XXVII*, petitioner raises various claims that the version of California's death penalty statute applied at his trial was unconstitutionally overbroad, permitted arbitrary and capricious imposition of the death penalty, lacked sufficient procedural safeguards to avoid arbitrary and capricious sentencing, violated equal protection, and fell short of international standards of humanity and decency and violates the prohibition against cruel and unusual punishment. (Petn. 222-269.) Each of these claims was raised in the opening brief filed in the concurrent automatic appeal. (AOB 78-140 [Arg. IX].) Each claim should be rejected for the reasons stated in the Respondent's Brief at pages 51 through 65.

Z. Claim California's Death Penalty Process Violates Equal Protection (*Claim XXVIII*)

In *Claim XXVIII*, petitioner contends that California's death penalty

process violates equal protection since the death penalty is arbitrarily and capriciously imposed depending upon the county in which the defendant is charged. (Petn. 269-272.) This claim should be denied as barred and untimely since it could have been raised in petitioner's first appeal. (*In re Sanders* (1999) 21 Cal.4th 697, 703; *In re Robbins, supra,* 18 Cal.4th at p. 781; *In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5; see *In re Gay* (1998) 19 Cal.4th 771, 779, fn. 3.) To the extent this claim is considered, this Court has repeatedly held that "prosecutorial discretion to select those eligible cases in which the death penalty would actually be sought does not in and of itself evidence an arbitrary and capricious capital punishment system or offend principles of equal protection, due process, or cruel and/or unusual punishment." (*People v. Keenan* (1988) 46 Cal.3d 478, 505; see also *People v. Lewis* (2001) 25 Cal.4th 610, 677 ["Permitting the district attorney of each county the discretion to decide in which cases to seek the death penalty does not amount, in and of itself, to a constitutional violation."]; *People v. Williams* (1997) 16 Cal.4th 153, 278.)

At any rate, the claim is based on speculations and conclusory opinion. Petitioner presents no specific factual allegations in support of this claim but rather "requests that funds be made available for further investigation, that discovery be permitted, that the court issue subpoenas and process as necessary, and that a full evidentiary hearing be held further to develop the facts supporting this claim." (Petn. 271.) Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1241, fn. 38; *Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) This claim "contains nothing of substance not already in the appellate record." (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.)

Petitioner has not met his habeas burden here, and thus, *Claim XXVIII*

should be denied as in other cases. (*Lewis, supra,* 25 Cal.4th at p. 677, numerous citations omitted.)

AA. Claim That California's Death Penalty Violates International Norms (*Claim XXIX*)

In *Claim XXIX*, petitioner contends that California's death penalty falls short of international norms and violates due process and the prohibition against cruel and unusual punishment. (Petn. 272-281.) A similar argument raising these claims were presented in the opening brief filed in the concurrent automatic appeal. (AOB 141-160 [Arg. X].) Each individual claim should be rejected for the reasons stated in the Respondent's Brief at pages 66 through 69. This Court has repeatedly rejected these arguments, and petitioner offers no legitimate reason to revisit these issues or to deviate from its precedent.

BB. Cruel And/or Unusual Punishment: Delay Inherent In The Automatic Appeal Process (*Claim XXX*)

In *Claim XXX*, petitioner contends the delay between his actual execution and his initial confinement and original death sentence violates international law and the prohibition against cruel and/or unusual punishment under the California and United States constitutions. (Petn. 281-289.) This argument was presented in the opening brief filed in the concurrent automatic appeal. (AOB 161-162 [Arg. XI].) As noted in the Respondent's Brief at pages 70 through 71, this Court has previously and consistently rejected this claim: "delay inherent in the automatic appeal process is not a basis for concluding that either the death penalty itself, or the process leading to its execution, is cruel and unusual punishment. [Citations.]" (*Anderson, supra*, 25 Cal.4th at p. 606; see also *People v. Jones* (2003) 29 Cal.4th 1229, 1267.) Petitioner offers no new or persuasive reason for this Court to depart from its

precedent. Accordingly, petitioner's claim fails.

CC. Cruel And/or Unusual Punishment: Execution By Lethal Injection (*Claim XXXI*)

In *Claim XXXI*, petitioner contends his sentence is illegal and unconstitutional because the method that will be used to execute him, lethal injection, violates the prohibition against cruel and/or unusual punishment under the California and United States constitutions and that the method of execution violates international law. (Petn. at 289-302.) This Court has repeatedly rejected this claim. Because petitioner offers no new or persuasive reason to depart from existing precedent and grant him relief on this contention, it should be rejected.

Petitioner alleges the drugs which will be used in his execution are extremely volatile and "can" cause (unidentified) complications even if administered correctly. (Petn. 292.) Although petitioner lists anecdotes from executions held in other states, he fails to reference a single problem in a prior California execution. Also, petitioner alleges that medical doctors cannot ethically participate in executions and, therefore, "untrained or improperly skilled persons" will be given the task of administering the lethal injection and that said task "may" be accomplished in a manner which "may" cause him pain and suffering. (Petn. 294-295.) But petitioner overlooks the fact that he has no constitutional right to an executioner of any particular education, only one that does not violate the prohibition against cruel and unusual punishment. Also, petitioner is not entitled to a pain-free death, just one which is effected constitutionally. (*Gregg v. Georgia* (1976) 428 U.S. 153, 175 [96 S.Ct. 2909, 49 L.Ed.2d 859]; *Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, 683.) This claim also fails because petitioner does not allege that execution by lethal injection is unconstitutionally "unusual." To the contrary, petitioner alleges that

lethal injection "is authorized to be used in thirty-five states in addition to California" and has been used to carry out executions in "at least" 18 states. (Petn. 291.) Far from demonstrating that lethal injection is an unusual method of execution, petitioner's allegations establish that it is the most common method of execution currently employed in the United States.

Finally, as petitioner acknowledges, the Ninth Circuit has concluded that California has "applied constitutionally" lethal injection as a method of execution. (Petn. 291.) More importantly, this Court has reached the same conclusion, and petitioner provides no good reason to reconsider these authorities. (See, e.g., *People v. Martinez* (2003) 30 Cal.4th 673, 704; *People v. Jones* (2003) 29 Cal.4th 1229, 1267; *Ochoa*, *supra*, 26 Cal.4th at p. 464; *People v. Samayoa* (1997) 15 Cal.4th 795, 864; *People v. Holt, supra*, 15 Cal.4th at p. 702.)

Accordingly, *Claim XXXI* fails to state a prima facie case for relief and should be rejected.

DD. Cumulative Error (*Claim XXXII*)

In *Claim XXXII*, petitioner contends that his convictions and death sentence must be reversed due to the cumulative effects of the errors of which he complains. (Petn. 303-306.) As respondent has explained in conjunction with each of petitioner's foregoing claims, he has failed to state a prima facie case for relief. It necessarily follows that petitioner's vague and derivative allegation of "cumulative impact" likewise fails to state a prima facie case for relief. As a result, *Claim XXXII* must be rejected.

CONCLUSION

For the reasons stated, respondent respectfully asks that the petition for writ of habeas corpus be denied in its entirety. More specifically,

All claims, with the exception of *Claim II* (which does not state a substantive claim for relief) should be denied on the merits.

Separately and independently (see *Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 10), *all claims, except Claim II* (which does not state a substantive claim) and *Claims III, IV, XXII, XXIII, and XXV*, should be denied because petitioner has not adequately stated when he or his counsel became aware of the legal and factual bases for his claims and the claims appear to be based upon information long known, or which should have been long known, to petitioner or his counsel, and petitioner has not explained and justified his failure to present them to this Court without substantial delay and has not alleged facts with regard to these claims demonstrating the occurrence of a fundamental miscarriage of justice to excuse the procedural default (Supreme Court Policies Regarding Cases Arising from Judgment of Death, Policy 3; *In re Robbins, supra*, 18 Cal.4th at p. 770; *In re Clark, supra*, 5 Cal.4th at pp. 782-787, 797-798.)

Separately and independently (see *Harris v. Reed, supra*, 489 U.S. at p. 264, fn. 10), the following claims, except as they allege ineffective assistance of counsel, should be denied because they could and should have been, but were not, raised on appeal and petitioner has not adequately justified his need to substitute habeas corpus for his appellate remedy and has not demonstrated any exception to the rule precluding his using habeas corpus as a substitute for appeal (*In re Harris, supra*, 5 Cal.4th at pp. 825, 827-841 & fn. 3; *In re Dixon, supra*, 41 Cal.2d at p. 759): Claims *X, XVII, XIX, XX, and XXIV, XXVIII.*

Separately and independently (see *Harris v. Reed, supra*, 489 U.S. at p. 264, fn. 10), the following claims, except as they allege ineffective assistance

of counsel, should be denied because petitioner failed to object at trial (see generally, *People v. Saunders* (1993)5 Cal.4th 580, 589-591), as follows: *Claims XVII and XXIV*.

Separately and independently (see *Harris v. Reed, supra*, 489 U.S. at p. 264, fn. 10), the following claims should be denied because they were raised and rejected in his prior 1988 habeas corpus petition and petitioner presents no new material facts in support of these claims (*In re Miller* (1941) 17 Cal.2d 734, 735; see *In re Robbins*, *supra*, 18 Cal.4th at p. 778, fn. 1): *Claims VI, IX, XI*.

Dated: November 6, 2003

Respectfully submitted,

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MEM:mem:ea
LA2003XH0016

EXHIBIT A

DECLARATION OF RONALD SLICK, ESQ.

I, RONALD SLICK, declare as follows:

1. I have been practicing law in California for the past 17 years and have been certified as a criminal law specialist for the past 10 years. I have tried approximately 13 death penalty cases and 48 murder cases to a jury. It has been my experience that the death qualification voir dire process wherein the four Witherspoon questions are presented to prospective jurors favors the prosecution more than the defense. While a prosecutor must ensure that all 12 jurors favor the death penalty, the defense only needs one juror reluctant to impose the death penalty. By limiting the death qualification voir dire to the four standard Witherspoon questions, the prosecution is at a disadvantage in terms of ferreting out jurors who are reluctant to impose the death penalty even though they answer the Witherspoon questions appropriately.

Based on my review of the evidence and interviews with Mr. Lewis, his family and friends, it was my opinion then, and is now, that the prosecution had a very strong case with respect to the guilt of Robert Lewis, Jr. Accordingly, I believed it was strategically advantageous to limit voir dire in this case in the hope that at least one of the 12 jurors ultimately selected would be favorable to the defense and not get peremptorily challenged by the prosecutor.

2. In preparing for trial, I interviewed Mr. Lewis' sister, Gladys Spillman. Ms. Spillman told me that the gold chain which Mr. Lewis was wearing at his preliminary hearing, and which the prosecutor claimed had been taken from the victim, was actually purchased by her and given to Mr. Lewis as a gift. Ms. Spillman showed me a receipt from the "Lewis Jewelry" store which she claimed substantiated her purchase. Thereafter, I contacted Los Angeles jeweler Marion Kluger who personally examined and weighed the gold chain in question. Marion Kluger advised me that the receipt which described the chain Ms. Spillman purchased as an 18" "14K Gold V Chain" did not describe the gold chain in question because that chain was not a "V" chain. Marion Kluger further advised me that the price Ms. Spillman paid for her gold chain, which according to the receipt was $88, was inconsistent with the weight and fair market value of the chain in question. The chain in question was heavier and would have, in the jeweler's opinion, cost Ms. Spillman more than $88. Based on this examination, Marion Kluger advised me that the receipt was either a forgery or related to jewelry other than the gold chain in question. Accordingly, I decided not to introduce at trial the jewelry receipt Ms. Spillman had given me. Since the receipt bore no relation to the gold chain in question, I considered but rejected as futile the idea of calling the shopkeeper as a witness.

3. During the course of preparing for trial, I interviewed Mr. Lewis along with several of his friends and family members including Denise Walker, Robert Lewis, Sr., Rose Davidson, Janiero Lewis and Gladys Spillman. Psychologist Michael Maloney was retained and attended each of these interviews except for the interview with Gladys Spillman. My purpose in having Dr. Maloney present at these interviews was to determine first, whether Mr. Lewis had any psychological problems which could be gleaned from information his family and friends provided. Following these interviews, Dr. Maloney opined that Mr. Lewis did not appear to have any particular psychological problems. I then retained Kaushal Sharma, a psychiatrist, to personally examine Mr. Lewis. Dr. Sharma submitted a written report to me indicating that Mr. Lewis had no identifiable psychological problem despite his extensive criminal history.

Second, I had considered calling Dr. Maloney at trial to fill in the evidentiary gaps regarding Mr. Lewis' background in order to present a positive image of Mr. Lewis to the jury. Although Mr. Lewis' father and two sisters were willing to testify that Mr. Lewis was a good student, participated in track and field at school and was generally a good influence on Rose Davidson's children, I knew Mr. Lewis never completed much less attended high school and that his criminal history began when he was 12 years old and continued until age 32 when the present

crime was committed. Accordingly, I decided not to call either Dr. Maloney, Dr. Sharma or Mr. Lewis' friends at trial because none could provide credible mitigating evidence, psychological or otherwise. Although I did call Mr. Lewis' father and two sisters as witnesses at trial, I did not use them as character witnesses for fear that I would be opening up a "Pandora's Box" for the prosecution to impeach these witnesses with Mr. Lewis' extensive criminal history.

4. In deciding what special jury instructions to request, I considered the evidence which had been presented and determined there was no factual or legal basis for seeking an instruction less than second degree murder. I did request second degree murder instructions and my request was granted.

5. In preparing for trial, I interviewed Mr. Lewis on several occasions and asked him to provide me with a list of potential alibi witnesses. Mr. Lewis was unable to provide me with any names. In my interviews with members of Mr. Lewis' family, I specifically inquired whether any of them were alibi witnesses or knew the names of others who might be. No one I spoke with was willing to provide Mr. Lewis with an alibi nor did they provide me with the names of other potential alibi witnesses.

6. Paragraph 4 of the Declaration I provided to Mr. Lewis' appellate counsel contains a typographical error. In that declaration it states I spent approximately 42 hours of preparation time working on this case. I actually spent approximately 190 hours of preparation time and related this fact to Mr. Lewis' appellate counsel.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 5-30-99

Ronald Slick, Esq.

DECLARATION OF SERVICE

Case Name: IN RE ROBERT LEWIS, JR. On Habeas Corpus
Case No. S117235
Related Case No.: S020670

I declare:

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 18 years of age or older and not a party to the within entitled cause; 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 November 7, 2003, I placed two (2) copies of the attached

INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

SANGER & SWYSEN
ROBERT M. SANGER, ESQ.
CATHERINE J. SWYSEN, ESQ.
233 EAST CARRILLO STREET, SUITE C
SANTA BARBARA, CALIFORNIA 93101

That I caused a copy of the above document to be deposited with the Clerk of the Court from which the appeal was taken, to be by said Clerk delivered to the Judge who presided at the trial of the cause in the lower court; and that I also caused a copy to be delivered to the appropriate District Attorney.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on November 7, 2003, at Los Angeles, California.

Edith C Marroquin

Edith Marroquin-Obeso
Declarant

MEM:ea
LA2003XH0016