IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **ABELINO MANRIQUEZ,** On Habeas Corpus.	**CAPITAL CASE** S141210

Los Angeles County Superior Court No. VA004848
The Honorable Robert Armstrong, Judge

INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

KEITH H. BORJON
Supervising Deputy Attorney General

SHARLENE A. HONNAKA
Deputy Attorney General
State Bar No. 76811
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2272
Fax: (213) 897-6496
Email: Sharlene.Honnaka@doj.ca.gov

Attorneys for Respondent

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INTRODUCTION

Petitioner was convicted of four murders with a multiple murder special circumstance and sentenced to death. His convictions and the death sentence were affirmed on direct appeal. (*People v. Manriquez* (2005) 37 Cal.4th 547.) On February 17, 2006, counsel for petitioner filed a pleading in this Court labeled "Petition for Writ of Habeas Corpus," which generally alleged his conviction and sentence were obtained in violation of his federal and state constitutional rights, but which contained no specific claims, factual allegations, or legal arguments explaining why his convictions and confinement were illegal. Respondent moved to strike or dismiss this claimless petition under the authority of Penal Code section 1474 and existing case law, and this Court denied the motion on October 25, 2006.

Petitioner filed a "First Amended Petition for Writ of Habeas Corpus" on January 10, 2008. Pursuant to this Court's request of January 23, 2008, respondent makes this Informal Response.

I. APPLICABLE LAW

A habeas corpus petition must be summarily denied unless it states a prima facie case for relief. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1258.) In order to state a prima facie case, a petitioner "must set forth specific facts which, if true, would require issuance of the writ." (*Ibid.*)

A post-conviction habeas corpus attack on the validity of a judgment "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* (1993) 5 Cal.4th 750, 766-767.) Such challenges amount to a collateral attack upon a criminal judgment which, because of societal interest in the finality of judgments, is presumed to be valid. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474-475; *In re Clark, supra,* at p. 764; *People v. Gonzalez, supra*, 51 Cal.3d at p. 1260.) Petitioner thus bears "a heavy burden" to plead sufficient grounds for relief. (*People v. Duvall, supra*; see also *People v. Visciotti* (1996) 14 Cal.4th 325, 351.) To satisfy this burden, petitioner must set forth fully, and with particularity, the facts supporting each claim, along with reasonably available documentary evidence, including affidavits and declarations. (*People v. Duvall, supra.*) Mere conclusory allegations are insufficient, especially when the petition was prepared by counsel. (*Ibid.; People v. Karis* (1988) 46 Cal.3d 612, 656.) The petition will be judged on the factual allegations contained within it, and a petitioner may not reserve the right to supplement his claims with facts to be developed later. (*In re Clark, supra*, at p. 781, fn.16.)

II. RESPONSE TO CLAIMS

A. Claim 1 (Ineffective Assistance Of Counsel At Guilt And Penalty Phases)

Petitioner's first claim alleges his trial counsel provided constitutionally ineffective assistance of counsel at the guilt and penalty phases. In assessing claims of ineffective assistance of trial counsel, this Court considers "whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to

undermine confidence in the outcome."[1/] (*People v. Carter* (2003) 30 Cal.4th 1166, 1211, citing, inter alia, *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 2068, 80 L.Ed.2d 674](*Strickland*).) The same standard applies at both the guilt and penalty phases of trial. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1030-1031.)

Paragraphs 92-101 (Pet. 29-35) appear to provide an overview of the first claim, and are followed by subclaims alleging specific complaints. Respondent will follow petitioner's enumerations in responding to these complaints.

1. (A)(1) (Failure To Make *Wheeler/Batson* Motion)

In paragraphs 102-118 (Pet. 35-44), petitioner alleges that trial counsel was ineffective for failing to object to the prosecutor's use of peremptory challenges against "Hispanic and other minority venire members." (Pet. 35.) Petitioner argues that there was "a strong prima facie case" of improper race-based discrimination in the use of those challenges, based upon *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*), and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), that the prosecutor would not have been able to adequately explain. (Pet. 35, 39-40.)

Petitioner has failed to carry his burden of pleading sufficient facts to justify relief. As to the first prong of reasonable performance, the petition does not include any declaration or statement of trial counsel regarding this issue, or any explanation as to why a declaration or statement could not be obtained from counsel on this point. The petition therefore is conclusory and speculative as to whether counsel performed incompetently, since a satisfactory explanation

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1. If counsel's performance was such that the prosecution's case was not subjected to meaningful adversarial testing, prejudice need not be shown since it is presumed the outcome of the trial was unreliable. (*In re Cudjo* (1999) 20 Cal.4th 673, 687.)

was possible. For example, counsel might have reasonably determined that a *Wheeler/Batson* challenge was meritless and would be denied. (See Pet. 38, ¶109 [alleging that there were two Hispanics who served on petitioner's jury].) Petitioner's failure to include this reasonably available evidence or explain its omission precludes a finding that counsel necessarily performed incompetently under the circumstances, and warrants rejection of this claim. (See *People v. Duvall, supra*, 9 Cal.4th at pp. 474-475 [petitioner's pleading burden includes providing reasonably available documentary evidence in support of claims].)

As to the prejudice prong, petitioner also has failed to plead grounds for relief. The petition notes there were two Hispanics who served on his jury (Pet. 38, ¶109), so plainly the prosecutor was not using his peremptory challenges to exclude every Hispanic from the jury. According to the petition, the prosecutor used only 13 of his 20 challenges, so he could have excluded the two seated Hispanics if his intent was to prevent Hispanics from sitting on petitioner's jury. (See Pet. 37, ¶106; Code of Civ. Proc., § 231, subd. (a) [each party has 20 peremptory challenges in capital case].) Because the prosecutor was never asked to explain his challenges, and might well have provided entirely acceptable race-neutral reasons, petitioner has failed to plead facts showing that a *Wheeler/Batson* motion would have been granted.[2/]

2. (A)(2) (Inadequate Voir Dire)

In paragraphs 119-125 (Pet. 44-47) petitioner makes two claims based on trial counsel's alleged failure to provide constitutionally adequate representation during voir dire. As to each claim, the petition is conclusory and

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2. Petitioner's allegation in paragraph 113 (Pet. 40-41), regarding a personnel matter involving the trial prosecutor, is irrelevant to this claim. There is no assertion that defense counsel was or should have been aware of the matter, so plainly it cannot be a factor in determining if he performed competently.

speculative on whether counsel performed incompetently, for there is no declaration or statement from him addressing the challenged conduct, which might be satisfactorily explained. Petitioner has failed to satisfy his burden of pleading facts warranting relief for that reason, and for the additional reasons listed below.

a. (A)(2)(a) (Attitudes About Mexican Immigrants And "Non-English Speakers")

Petitioner claims his trial counsel was ineffective for failing to question potential jurors regarding their attitudes about Mexican immigrants and "non-English speakers." (Pet. 44-46, ¶¶120-122.) Petitioner has failed to plead facts demonstrating that further questioning would have resulted in a different outcome. As noted in *People v. Mendoza* (2000) 24 Cal.4th 130, 164-165, a defendant fails to establish the required prejudice where an ineffective assistance claim is based on the possibility that further voir dire by trial counsel "might have disclosed bias in the individuals ultimately selected as jurors." Such a claim amounts to "mere speculation that additional questioning might have disclosed a ground for challenge," and is insufficient to warrant relief. (*Id.* at p. 165, citing *People v. Kipp* (1998) 18 Cal.4th 349, 368.)

Petitioner's reference to a statement in a declaration provided by the jury foreperson - that there was an occasional remark during deliberations about petitioner, a non-citizen, coming to this country to kill (Pet. 45-46, ¶ 121) - does not assist his claim. It does not change the speculative nature of whether additional voir dire by trial counsel would have revealed grounds for a challenge as to the individual jurors who sat on his case. The comments did not reflect any bias against immigrants generally, and accurately reflected the evidence presented in this case, that petitioner came into this country from Mexico, killed the four victims in the charged counts, and was involved in three more homicides in Paramount.

b. (A)(2(b) (Attitudes About Defendants Who Choose Not To Testify)

Petitioner asserts that trial counsel was ineffective for failing to question potential jurors about their attitudes regarding defendants who exercise their Fifth Amendment right not to testify. (Pet. 46-47, ¶¶123-125.) As in the immediately preceding claim, this one must be rejected as being merely speculative as to whether additional voir dire "would have identified prospective jurors who would have drawn negative inferences from Petitioner's decision not to testify in his own behalf" (Pet. 46-47, ¶124). (See *People v. Mendoza, supra*, 20 Cal.4th at pp. 164-165.) Petitioner thus has failed to plead facts establishing a reasonable probability that there would have been a different outcome, and is not entitled to relief on this claim that his convictions and sentence were "tainted" by jurors who were biased against defendants who did not testify.

3. (A)(3) (Failure To Exercise Peremptory Challenges For Death Penalty Views)

Petitioner next complains that his trial counsel should have excused two jurors (Juror H. B. and juror W.C.) because they strongly favored the death penalty. (Pet. 47-49, ¶¶126-130.)

As to juror H.B., the record reveals that during oral voir dire, defense counsel probed her views about the death penalty, especially as applicable to multiple murderers. By the time counsel had completed his questioning, juror H.B. had indicated that she would want to hear "the other side of the story" before concluding someone should get the death penalty (2RT 498), and that she would not automatically give a multiple murderer the death penalty, but would consider giving a "second chance" with a life without the possibility of parole sentence (2RT 499).

Similarly, after defense counsel orally questioned juror W.C. about whether this juror would be open to any verdict other than death for multiple murderers, juror W.C. stated that his views were not "concrete"; he would "have to hear the stories and circumstances"; he would look at the factors in mitigation; and he might not give the death penalty if the factors in mitigation were strong enough. (2RT 510.)

Petitioner has failed to plead facts warranting relief. The petition contains no declaration or statement from trial counsel addressing the challenged conduct, and no explanation for this omission. Because counsel could have had a satisfactory reason for not exercising peremptory challenges against these two jurors, petitioner has failed to demonstrate that he necessarily performed incompetently. For example, counsel reasonably could have concluded that evidence of seven murders would make any juror inclined to vote for death rather than life at the penalty phase, and that these two jurors were acceptable given the limited number of peremptory challenges available to the defense. (See *People v. Montiel* (1993) 5 Cal.4th 877, 911 [exercise of peremptory challenges is "inherently subjective and intuitive"].) After counsel's questioning, both jurors ultimately stated they were willing to listen to all the evidence in making their sentencing decision, in contrast to their earlier, unsurprising indications that multiple murderers should get the death penalty.

Moreover, petitioner has failed to plead facts demonstrating a reasonable probability of a different outcome if counsel had exercised his peremptory challenges against these two jurors. Prejudice in this context is necessarily speculative, since it is unknown who would have replaced H.B. and W.C., and because the replacement jurors might, and likely would, have voted for death in view of the insurmountably overwhelming aggravating evidence at the penalty phase.

4. (A)(4) (Misleading Statement That Life Without Parole Could Lead To Release)

Petitioner unfairly accuses his trial counsel of making misleading statements about the finality of a life without parole sentence when he was questioning potential juror J.I. (Pet. 50-53, ¶¶131-136.) Petitioner alleges these statements suggested that such a sentence "could lead to Petitioner's eventual release from prison," and that no reasonably competent counsel would have made them. (Pet. 50, ¶131.)

Petitioner has failed to plead facts demonstrating counsel performed incompetently. Counsel's challenged remarks were not made to suggest petitioner could be released from prison, but to emphasize the exact opposite: that juror J.I. must assume that a life without parole sentence means that is the sentence petitioner will serve, without speculating what might happen in the future. (2RT 419-421.) Counsel made the remarks when he was asking Juror J.I. about her questionnaire responses that the death penalty was too seldom used and "too many criminals are let out early only to repeat the same offense." (2RT 418.) Counsel stated that this case involved only two possible penalties, and juror J.I. must assume it would be carried out. (2RT 419.) When the juror mentioned Charles Manson being considered for parole, counsel replied that Manson had been convicted at a different time; that if he had been convicted today, the jury would decide if he should be executed or sentenced to life without parole; and that there would be no parole hearings because "[p]eople with life without the possibility of parole do not come up for parole hearings." (2RT 420.) Counsel stated that although anything could happen in the future, when juror J.I. made her penalty decision, "you should make it as if either one is going to be carried out." (2RT 421.)

Petitioner's unfair characterization of counsel's statements as suggesting petitioner eventually could be release from prison under a life without parole

sentence is refuted by the record. Petitioner has not demonstrated counsel performed below prevailing professional norms in questioning juror J.I.

Moreover, contrary to petitioner's conclusory assertion of prejudice, there was none, since counsel was properly underscoring the juror's duty to assume that either sentence imposed by the jury would be fully executed. It is not reasonably probable that the outcome of the proceedings would have been any different even if the challenged statements had not been made.

5. (B) (Inadequate Investigation At Guilt Phase)

Paragraph 137 is an introduction to petitioner's individual claims, which are answered below.

a. (B)(1) (Inadequate Investigation Of Count 1 - Las Playas Murder)

1. (B)(1)(a) (Prior Testimony Of Angelica Contreras)

In paragraphs 138-149 (Pet. 54-58), petitioner alleges his trial counsel was constitutionally ineffective for stipulating that Angelica Contreras's videotaped prior testimony at the preliminary hearing could be admitted at trial.

The petition does not include any declaration or statement from trial counsel explaining why he offered to stipulate to this prior testimony. Because there could be a reasonable explanation for counsel's decision, petitioner has failed to sustain his burden of pleading facts demonstrating counsel necessarily performed incompetently.

Reasonably competent counsel need not make an objection that lacks merit (*People v. Marlow* (2004) 34 Cal.4th 131, 144), and even where there is a basis to object, whether to do so is a tactical decision that is accorded great deference (*In re Seaton* (2004) 34 Cal.4th 193, 200, fn. 3). Petitioner's counsel reasonably could have concluded that an objection to the prior testimony lacked merit. At the time Contreras testified at the preliminary hearing, it was

videotaped in anticipation of her possible unavailability because she was not a resident of this country. (4RT 808.) The due diligence testimony of District Attorney Investigator Kevin Sleeth, detailing his efforts to locate Contreras to testify at trial (see 4RT 809-814), was described by the trial court as "satisfactory" in a serious case and "exceptional" for a "run of the mill case." (4RT 815.) A reasonably competent lawyer could have concluded an objection would be futile, since the trial court signaled an inclination to find Contreras was statutorily unavailable, and her preliminary hearing testimony suggested she would not be a willing witness even if she had been located. (See 1CT 19 [Contreras had been told not to say anything if she wanted to avoid problems]; cf.. *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1443 [witness who was in Mexico was unavailable under statute, but prior testimony found inadmissible because witness had been willing to testify at trial if his expenses were paid, and treaty allowed for appearance by cooperative witness].)

Moreover, the record suggests that trial counsel made a tactical decision not to object. Counsel told the court that there "may be a lot more argument about the due diligence situation" on using the preliminary hearing testimony of other witnesses, but as to the prior testimony of Contreras, "this witness I think is a witness that has things to say that are important to *both sides*, and I think has to be put on." (4RT 817-818, emphasis added.) Counsel reasonably could have decided that Contreras's testimony about witnessing an argument between the victim and another customer just prior to the shooting supported a reduction of the charged crime to manslaughter or second degree murder. (See 8RT 1810-1813 [defense counsel's guilt phase argument discussing heat of passion]; 1CT 11-13 [Contreras's preliminary hearing testimony].)

Petitioner also has failed to plead facts demonstrating a reasonable probability of a different outcome if trial counsel had not stipulated to the admissibility of Contreras's prior testimony. As just discussed, the trial court

had signaled its inclination to admit the prior testimony regardless of any stipulation or objection.

2. (B)(1)(b) (Evidence Of Two Alternate Suspects)

In paragraphs 150-161 (Pet. 58-62), petitioner alleges his trial counsel was ineffective in failing to investigate, develop and present evidence of two alternate suspects, Jesus Manzo Andrade and a man identified only as "Rancher."

There being no declaration or statement by trial counsel on this issue, it is speculative to presume that there could be no satisfactory reason for counsel's inaction, or even that he failed to conduct any investigation as alleged. Petitioner has failed to plead sufficient facts to show incompetent performance.

For example, a reasonably competent counsel could have determined no further investigation was required. Petitioner made a statement to the police that he was present at the Las Playas restaurant when Miguel Garcia was shot. Petitioner said Garcia was shot by petitioner's companion Francisco Manzano, and petitioner admitted using a gun "to hold the other patrons at bay while the shooting occurred." (*People v. Manriquez, supra*, 37 Cal.4th at p. 555.) Under petitioner's version of the events, he would still be guilty for aiding and abetting the murder, regardless of the name of his companion.

Further, petitioner alleges no supporting facts to establish that the man he identified as Francisco Manzano was the same man, Jesus Manzo Andrade, referenced in a police report. His claim that Andrade was somehow a viable alternate suspect, despite petitioner's own admission that he aided and abetted the murder, requires reliance on the improbable premise that the names are similar, without any supporting facts to show that Andrade used the name Manzano, or was known to petitioner by that name. In fact, the evidence at trial showed that it was petitioner who used the alias of Francisco Manzano. Andrade's only connection to the case apparently stemmed from the

investigators contacting an unidentified source who reported that the suspects may have had a "bright red Chevrolet Camaro," and Andrade also drove a car of that description. (Pet. 59, ¶151); PE0050 [Exh. 4].) But petitioner has not pleaded any facts demonstrating that it was actually Andrade's car that was seen driving away. Under these circumstances, Petitioner has not pleaded facts that would have caused required a reasonably competent attorney to investigate petitioner's current claim that Francisco Manzano, the companion named by petitioner, might have a different name.

As to "Rancher," petitioner cites statements made to investigators by three people in support of his claim that the victim had an altercation with Rancher two to three weeks before murder. (Pet. 61-62, ¶¶ 157-160.) Two of those witnesses did not identify Rancher as the shooter, and the third witness identifies Rancher based on hearsay accounts contradicted by the actual witness statements made to police. One of these witnesses, Tiffany Valber, apparently did not know and never provided any name or nickname of the person who fought with the victim, although she described a black pickup truck as being involved. (See PE0013-PE0014 [Exh. 1], PE0048 [Exh. 3], PE0064 [Exh. 5].) The second witness reported seeing a black pickup truck driving away after the shooting, but did not provide any information as to who was in the truck, and did not say it was Rancher or even that it was the shooter who was in the truck. (See Pet. 62, ¶159, citing PE0047 [Exh. 1].) As to the third witness, Fernando Morales Bravo, the petition presents his statement through the handwritten notes of an investigating officer. According to these notes, Bravo said the "shooter" had a gray Camaro, but this appeared to be based on hearsay since Bravo's next reported statement was that the "guys" who were with the victim saw the shooter get into a gray Camaro. (Pet. 62, ¶159; PE0041 [Exh. 2].) Bravo also said that Rancher had been in a fight with the victim a few weeks earlier, and that Rancher was the shooter. (*Ibid.*) A reasonably competent

counsel could have concluded that no further investigation was necessary, since Bravo said his information came from the victim's friends, who had provided direct statements to the police (see PE0031-PE0037 [Exh. 2]), and the prior altercation was of minimal relevance in establishing third party culpability in light of petitioner's own inculpatory admissions to the police that he covered the other patrons with his gun while his companion shot the victim. (7RT 1574-1576, 1592.)

Further, petitioner has failed to plead facts showing that the alleged incompetent performance prejudiced him. The petition does not allege what facts trial counsel would have discovered if he had conducted further investigation of the two suspects, and there is no showing that admissible third party culpability evidence would have been uncovered.

3. (B)(1)(c) (Evidence That Victim Garcia Provoked The Shooter)

In paragraphs 162-171 (Pet. 62-65), petitioner - citing witness statements that the victim had been drinking on the night he was killed, taunted his killer, and had been involved in a fight two to three weeks earlier - alleges trial counsel was ineffective for failing to investigate, develop, and present evidence that Garcia had threatened or provoked his killer.

The petition does not include any declaration or statement by trial counsel regarding his efforts and thinking on this issue, or any explanation for the omission. Petitioner has failed to plead facts necessarily establishing incompetent performance, because it is possible that counsel actually conducted an investigation, or reasonably decided not to do so. For example, a decision to forego further investigation would have been reasonable because testimony about the victim's drinking and provocative conduct could be (and was) presented through existing witnesses. John Guardado testified that when he socialized with the victim and another friend before going to Las Playas, "they

had beer and other stuff." (4RT 867.) He said that at Las Playas, the victim spoke to people in other booths, although Guardado did not hear what was said. (4RT 841-847, 868-870.) Laura Lozano testified that she heard petitioner tell the victim to leave him alone, in response to something the victim said that Lozano did not hear. (4RT 905-913.) In the videotaped preliminary hearing testimony of Angelica Contreras, which was played at trial, she said that the victim had argued with another customer. (1CT 11-13; 4RT 822-823.)

Moreover, petitioner has failed to plead facts demonstrating prejudice. There is no showing that counsel could have located the witnesses who provided the statements cited by petitioner, or that they would have been willing to testify. Petitioner has not demonstrated that further investigation would have resulted in any material, non-cumulative evidence such that it was reasonably probable there would have been a different outcome.

4. (B)(1)(d) (Evidence Of Mental Impairments And Illnesses)

In paragraphs 172-175 (Pet. 66-67), petitioner alleges his trial counsel was ineffective for failing to investigate, develop, and present evidence of his mental impairments and illnesses, "which would have raised a reasonable doubt that Petitioner had the mental state required for first degree murder." Petitioner claims the evidence would have shown that he had "responses and behaviors that may be less controlled by cortical outputs and instead dominated by instincts," and that he "was likely in a dissociative state" when he killed, or even if he was not in a completely dissociative state, that he was unable to appreciate the wrongfulness of his act.

The petition does not include any declaration or statements by trial counsel regarding his actions on this issue. In the absence of what appears to be this reasonably available information, petitioner has failed to sustain his burden of pleading facts establishing incompetent performance because it is

possible that counsel did conduct an investigation, or had some reasonable tactical basis for deciding not to pursue such an investigation.[3/]

Petitioner's omission is especially noteworthy because elsewhere in the petition, without citing to any source or providing supporting documentation, he alleges that trial counsel had consulted with a psychiatrist, Dr. Jose Moral, "for a preliminary assessment" in "July 1993," "two months before the penalty phase". (Pet. 179, ¶ 442.) The penalty phase commenced on September 15, 1993 (9RT 1974, 1986), the first day of jury voir dire was a month earlier on August 9, 1993 (see 1RT 167, 170), and the guilt phase opening statements of both parties were delivered on August 23, 1993 (4RT 786, 802). Thus, trial counsel's alleged consultation with Dr. Moral occurred before the start of guilt phase proceedings. The detailed nature of this allegation plainly suggests petitioner possesses some documentation supporting it. Yet, respondent has been unable to locate any supporting documentation in the petition or exhibits about this consultation. Since petitioner's burden of pleading a prima facie includes an obligation to provide reasonably available documentary evidence in support of his claims (*People v. Duvall, supra,* 9 Cal.4th at p. 474), his failure to provide it on this claim warrants its rejection, in that it appears there is at least one possible satisfactory explanation for trial counsel's failure to present evidence of petitioner's alleged mental illnesses and impairments. That is, counsel reasonably decided not to present such evidence after consulting with Dr. Moral.

For example, counsel could have received an indication from Dr. Moral

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3. For example, counsel could have made a reasonable tactical decision not to pursue this as a defense to the Las Playas murder. Counsel could have concluded that it would have shifted the jury's focus from the victim's provocative conduct (see response to claim 1(B)(1)(c), *ante*), and reasonable doubt argument (see 8RT 1880 [counsel's jury argument regarding evidence of actual shooter and existence of premeditation]), to much weaker evidence that petitioner had some mental illness or impairment.

that petitioner was not suffering from any mental illness or impairment that would have affected the defense. (See Pet. Exh. 126, PE 1164, ¶ 38 [Dr. Llorente declaration that "some clinicians may be tempted to readily assign a diagnosis of antisocial personality disorder" to petitioner].) Or, counsel could have concluded that presenting such evidence would have invited a response by the prosecution, including the possibility that petitioner might be ordered to submit to an examination by a court-appointed expert, or even a prosecution mental health expert, with detrimental results for petitioner. (See *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1117[court may employ Evidence Code section 730 to appoint mental health expert to examine a defendant]; *People v. McPeters* (1992) 2 Cal.4th 1148, 1190 [decided the year before the trial commenced in this case, allowing prosecution expert to examine a defendant who presents evidence of his mental condition at the penalty phase].)

Moreover, petitioner has failed to allege facts showing a reasonable probability of a more favorable result if counsel had presented the evidence. When petitioner was first asked about this crime 13 months after it occurred, he denied any involvement to Detective Joe Olmedo, but said he would be willing to talk about this or any other murders if the authorities could show proof that he was involved. (1CT 233.) When the detective contacted petitioner two days later with other investigators, petitioner said the victim had tried to start a fight with him, that petitioner walked away, but the victim again tried to pick a fight with him. Petitioner said he would have shot the victim at that point, but his companion, Francisco Manzano, shot the victim while petitioner used a gun to keep other patrons "at bay." (7RT 1571-1576, 1592.) The alleged effects of the mental impairments and illnesses now claimed by petitioner could not overcome this compelling evidence about the murder from petitioner himself, which showed his deliberate, organized, controlled thinking and action during the murder and in dealing with investigators.

5. (B)(1)(e) (Evidence Of Drug And Alcohol Dependence)

In paragraphs 176-178 (Pet. 67-68), petitioner alleges his trial counsel was ineffective for failing to adequately investigate, develop, and present evidence of his alcohol and cocaine dependency to support a theory that petitioner did not "possess the mental state necessary to commit first degree murder."

The petition does not include any declaration or statements by trial counsel on this issue. Petitioner has failed to sustain his burden of pleading facts establishing incompetent performance because it is possible counsel did conduct such an investigation, or if not, reasonably decided not to do so. For example, counsel reasonably could have concluded that petitioner's testimony would be required to establish a successful intoxication defense, and determined that the risk of a devastating cross-examination was not warranted. Or, counsel reasonably could have concluded petitioner had not been intoxicated when he shot the victim, based upon the evidence known to him. Counsel also reasonably could have believed such drug and alcohol evidence would have diluted the reduced culpability defense petitioner suggested in his statement to the police - that the victim twice tried to fight with petitioner, and that it was petitioner's companion who shot the victim while petitioner held the other patrons at bay - by shifting the jury's focus from the events of the murder to petitioner's mental state and whether his judgment had been impaired by alcohol or cocaine.

Petitioner also has failed to allege facts showing a reasonable probability of a more favorable result if counsel had presented such evidence. It was unlikely that petitioner's alleged alcohol or cocaine dependency would have affected the first degree murder verdict, in that his own statement to the authorities provided compelling evidence of his deliberate, organized,

controlled thinking and actions during the murder and in dealing with the investigators.

6. (B)(1)(f) (Failure To Object To Petitioner Using Francisco Manzano Alias)

In paragraphs 179-181 (Pet. 68-70), petitioner contends his trial counsel was ineffective for failing to object to "unreliable hearsay statements made during Detective John Laurie's testimony," that the reason the detective disbelieved petitioner's account of the Las Playas murder was because petitioner had used the alias of Francisco Manzano "on at least four other arrests."

The petition does not include any declaration or statements by trial counsel on this issue, and petitioner has failed to sustain his burden of pleading facts establishing incompetent performance because it is possible that counsel reasonably decided not to object. For example, counsel could have decided that an objection would have underscored the testimony, or invited a response by the prosecution to prove that petitioner in fact used the alias on four prior occasions.

The petition also fails to allege sufficient facts establishing prejudice. Evidence was presented that a month prior to the Las Playas murder, petitioner identified himself as Francisco Manzano when he was stopped for drunk driving, and later signed that name during the booking process. (7RT 1687-1689.) Accordingly, there was no reasonable probability of a better result for petitioner if his counsel had objected to the challenged testimony.

7. (B)(1)(g) (Failure To Challenge Testimony Of Firearms Expert)

In paragraphs 182-189 (Pet. 70-72), petitioner alleges his trial counsel was incompetent for failing to "rebut the prosecution's ballistics evidence." Petitioner contends that counsel should have consulted with an expert "to investigate the weaknesses of [the prosecution expert's] procedures and conclusions," and thus undermine his credibility.

The petition does not include any declaration or statements by trial counsel on this issue, and petitioner has failed to sustain his burden of pleading facts establishing incompetent performance because counsel may have had a satisfactory explanation for his conduct. For example, petitioner might have told him the gun used in the Las Playas murder was the one found on him when he was arrested several weeks later.

Moreover, the petition is significantly silent on whether further investigation would have shown that the prosecution expert was actually mistaken in his ultimate conclusions. Petitioner's factual allegations are all directed to impeaching the credibility of the expert by challenging his methodology and documentation. But absent facts showing that his conclusions were wrong, petitioner has failed to plead a prima facie case for relief, since the prosecution could have elicited additional rehabilitating testimony from the expert, or confirmed and underscored the correctness of his conclusions by a second analysis. And, if counsel had retained an expert to challenge only the prosecution expert's failure to provide documentation but not his ultimate conclusions, the prosecution could have underscored the inference of their correctness by arguing there was no expert testimony contradicting the conclusions. Petitioner has not demonstrated a reasonable probability of a different result absent counsel's alleged incompetence.

8. (B)(1)(h) (Failure To Object To Circumstances Of Petitioner's Arrest)

In paragraphs 190-193 (Pet. 73-74), petitioner contends his trial counsel was ineffective for failing to object to evidence that petitioner violently resisted his arrest several weeks after the Las Playas murder. When he was arrested, petitioner had the gun used in the Las Playas murder tucked in his waistband. (4RT 915-921, 5RT 1021-1024.)

The petition does not include any declaration or statements by trial counsel on this issue, and petitioner has failed to sustain his burden of pleading facts establishing incompetent performance because counsel may have had a satisfactory explanation for his conduct. For example, he may have concluded that an objection would be futile and overruled since it could be inferred petitioner was exhibiting consciousness of his guilt of the Las Playas murder when he violently resisted arrest, in that he was in possession of the murder weapon.

Because the evidence would have been admissible on a consciousness of guilt theory (see *People v. Farnam* (2002) 28 Cal.4th 107, 163), petitioner has failed to plead a prima facie case that he was prejudiced by counsel's failure to object.

b. (B)(2) (Inadequate Investigation Of Count 2 - Fort Knots Murder)

1. (B)(2)(a) (Failure To Use Eyewitness Identification Expert)

In paragraphs 194-200 (Pet. 73-79), petitioner alleges his trial counsel performed incompetently by failing to employ an expert to undermine the reliability of the eyewitness identifications.

The petition does not include any declaration or statements by trial counsel on this issue, and petitioner has failed to sustain his burden of pleading

facts establishing incompetent performance because counsel may have actually have consulted with an expert, or had a reasonable explanation for not doing so. For example, counsel might have considered retaining such an expert but determined it would have been of little assistance given the number of eyewitnesses and the quality of their testimony. (See *People v. Sanders* (1995) 11 Cal.4th 475, 507-510 [court properly excluded defense-offered eyewitness expert where there was strong identification evidence that had been corroborated by other evidence].) Not all of the eyewitnesses saw the actual shooting, but taken collectively, their testimony clearly established it was petitioner who had been ejected from the Fort Knots bar and returned to shoot the doorman. These witnesses included Fort Knots employees Deneen Baker (5RT 1052-1056), Mario Medel (5RT 1102-1104), and Barbara Quijada (5RT 1207-1209, 1215-1218, 1243-1245), as well as customer Mark Herbert (5RT 1157, 1160). Moreover, Quijada worked with a law enforcement sketch artist to create a composite of the shooter, and its likeness to petitioner led to his photograph being placed in a display from which he was identified as the shooter. (5RT 1201-1204, 6RT 1441, 1450.)

Additionally, in view of this strong identification evidence from a variety of sources, petitioner has failed to plead sufficient facts to demonstrate that if his trial counsel had retained and offered the testimony of an eyewitness identification expert, it was reasonably probable that there would have been a different result.

2. (B)(2)(b) (Failure To Present Witnesses Who Could Not Identify Petitioner)

In paragraphs 201-204 (Pet. 79-81), petitioner alleges his counsel was ineffective for failing to investigate and present evidence that other witnesses had failed to identify petitioner when shown the photo display.

Petitioner has failed to plead a prima facie case warranting relief. As in

the last claim, counsel may have had a satisfactory explanation on this issue. For example, he may reasonably have concluded that it would emphasize the strength of the positive eyewitness identifications if he were to call other witnesses who, in contrast, might be shown not have had the same opportunity or vantage point to view the shooter. As it was, he was able to argue that Quijada said that there were six to ten other witnesses who saw the photo display, but "[n]one of those people testified here. Why didn't they testify here?" (8RT 1846.) Counsel thus was able to raise an inference in support of reasonable doubt that there were other witnesses who did not identify petitioner, without the risk of undermining the non-identifications by reasonable explanations that might have been elicited if these witnesses had testified at trial. (See 8RT 1847.)

Moreover, petitioner has failed to plead facts establishing the identities of any of these other witnesses, much less factually allege what each of them would have said. The pleading is therefor conclusory and speculative as to what results counsel would have obtained if he conducted further investigation as petitioner alleges he should have. This claim must be rejected since it fails to allege sufficient facts showing the prejudice required for relief.

3. (B)(2)(c) (Failure To Investigate Background Of Barbara Quijada)

In paragraphs 205-216 (Pet. 81-84), petitioner alleges his trial counsel was ineffective for failing to investigate eyewitness Barbara Quijada's background and impeach her credibility "with one or more prior felony convictions" based on driving under the influence.

Assuming without conceding that the Ventura County prior felony conviction alleged in the petition belonged to the same Barbara Quijada that testified in this case, petitioner has failed to plead a prima facie case for relief.

On the question of incompetent performance, the petition does not

include any declaration or statements by trial counsel on this point, and counsel may have had a reasonable explanation for not pursuing the issue. For example, he may have concluded that given the number and quality of eyewitnesses, and especially considering that Quijada provided a composite that so closely resembled petitioner that it led to the police placing his photograph in a display (5RT 1201-1204, 6RT 1441, 1450), there would have been little value in impeaching her with any prior convictions.

Petitioner also has failed to plead sufficient facts demonstrating prejudice. Even if counsel offered and been allowed to present the impeaching evidence, a different result was not reasonably probable. Quijada, who was employed as a waitress and dancer at Fort Knots and said she had nothing to drink prior to petitioner shooting the victim (5RT 1184-1185), was unshakably credible on her identification because she had produced the composite sketch of the shooter that so strongly resembled petitioner (6RT 1439-1441, 1450; see also 5RT 1242) and other witnesses provided corroborating identification testimony that petitioner was the shooter.

4. (B)(2)(d) (Failure To Investigate Background Of Deneen Baker)

In paragraphs 217-222 (Pet. 84-85), petitioner alleges his trial counsel was ineffective for failing to impeach Deneen Baker with a prior misdemeanor theft conviction.

Insofar as petitioner is arguing that counsel should have admitted evidence of the prior misdemeanor conviction itself, that evidence was inadmissible, although the conduct underlying the conviction may have been admissible, subject to the trial court's discretion. (See *People v. Wheeler* (1992) 4 Cal.4th 284, 297, fn.7.)

Moreover, as in the last claim, the petition does not include any declaration or statements by trial counsel on this issue, but counsel reasonably could have concluded that any investigation and presentation of evidence that Baker committed a misdemeanor would be of minimal value, given the number and quality of eyewitnesses, and Quijada's composite sketch. Because there could have been a satisfactory explanation for counsel's omission, petitioner has failed to plead sufficient facts demonstrating counsel necessarily performed incompetently.

Petitioner also fails to plead facts to establish prejudice from counsel's alleged incompetent performance. Even if counsel had offered and been allowed to present evidence that Baker had committed a petty theft, there was no reasonable probability of a different result in view of the de minimis relevance of this evidence in impeaching Baker's testimony, which was corroborated by Quijada's composite sketch and the testimony of other witnesses who identified petitioner at trial.

5. (B)(2)(e) (Failure To Object To Inflammatory Testimony)

In paragraphs 223-229 (Pet. 86-88), petitioner contends that trial counsel was ineffective for failing to object to various portions of Barbara Quijada's testimony. Specifically, he complains about Quijada's description of her attempts to provide aid to the dying victim; her recounting of how she felt and what the police told her when they arrived on the scene; and an unsolicited narrative when asked about her level of confidence in identifying petitioner as the shooter.

Petitioner has failed to plead sufficient facts to establish that counsel necessarily performed below professional norms, in that the petition contains no declaration or statements by trial counsel on this issue and there could have been a reasonable explanation for his failure to object. For example, counsel's

failure to object could have been the result of a reasonable tactical decision. By allowing Quijada to engage in her long, narrative answers, counsel was able to find a way to challenge this strong identification witness and her corroborating composite sketch. He characterized her during argument as "a very emotional witness," and "a bit theatrical." (8RT 1851.) He queried whether a "normal" person would have been as traumatized testifying as Quijada was, and said she was a person "who could make a good story better,"and "stretch what the situation is." (8RT 1860.) He pointed to her testimony that witnesses who viewed the photo display spoke among themselves, and suggested that the loquacious Quijada had told others, such as Mario Medel, which photograph number she had selected as depicting the shooter, so as to cast doubt on their identifications. (8RT 1850-1852.) He also was able to argue that Quijada's "very enthusiastic, I-want-to-get-involved" personality would have caused her to create some composite sketch even though she did not get a good look at the shooter. (8RT 1856-1857.)

Petitioner also has failed to plead sufficient facts to establish he was prejudiced by counsel's alleged incompetent performance. Quijada related nothing more than an unsurprising emotional reaction of an eyewitness to a cold-blooded murder. Given her strong testimony identifying petitioner as the shooter, which was corroborated by her composite sketch and the testimony of the other eyewitnesses, there was no reasonable probability of any different result if the trial court had sustained an objection to the challenged testimony.

6. (B)(2)(f) (Failure To Object To Modus Operandi Remark)

In paragraphs 230-231 (Pet. 88-89), petitioner alleges his trial counsel was ineffective for failing to object to a brief remark made by Detective Reynold Verdugo in answering the question of how he came to place petitioner's photograph in the display that was shown to the witnesses.

Petitioner selectively quotes a portion of the detective's response, in which he used the phrase modus operandi, as requiring reversal for counsel's failure to object.

Petitioner has failed to plead a prima facie case for relief. Detective Verdugo explained that often and routinely, there were discussions among the detectives regarding the follow-up of their cases. He said this included "a thing where I might call it an M.O., a modus operandi we may have heard of. Let's say a particular violence or a particular type of atmosphere, a bar, a general area, a general description of a suspect, just kind of clicked or ticked and I asked, you know, what [the detectives investigating count 1] were speaking of." (6RT 1441.) Following more discussion among the detectives, Detective Verdugo said they compared Quijada's composite with a photograph of petitioner that was produced by the detectives working on count 1, "and looking at the picture and the composite," the similarities were "awfully, awfully close." (6RT 1441, 1450.) On "the off chance" that the crimes were committed by the same perpetrator, a photo display was assembled and shown to the witnesses in count 2 approximately a year after the murder. (6RT 1441.)

Considered in context, Detective Verdugo's brief reference to modus operandi plainly was not inviting the jurors to "cross-consider the evidence [of count 1] in finding guilt on Count II." (Petn. 88.) He was not saying that there was any modus operandi that was operating in petitioner's cases, but was providing foundational information as to why all the detectives routinely shared information about their cases in explaining how it was that petitioner's photograph ended up in a photo display that was shown to the witnesses in count 2. Plainly, there are insufficient facts establishing petitioner was prejudiced by the remark, or that at a sustained objection and motion to strike would have resulted in any different result. The innocuous nature of the remark likewise would have justified counsel's failure to object on the grounds that an

objection was unnecessary or would be overruled, and counsel additionally reasonably might have elected not to object so as to avoid underscoring that remark.

Petitioner has failed to plead facts warranting relief on this claim.

7. (B)(2)(g) (Eliciting Hearsay From Deneen Baker)

In paragraphs 232-234 (Pet. 89-90), petitioner alleges his trial counsel was ineffective for eliciting hearsay from Deneen Baker during his cross examination, that she received information from talking to other people that led her to believe the person who had touched her earlier was the one who later shot the victim.

Petitioner has failed to plead a prima facie case for relief on this claim.

Petitioner mischaracterizes this evidence as hearsay, but it was plainly not admitted for the truth of its content - that the person who touched her earlier was the shooter - but rather for the fact that Baker had spoken to others and drawn this conclusion. Although the petition does not include any declaration or statements by counsel about his reasons for eliciting this testimony, one obvious and satisfactory explanation is apparent from the record. Counsel used that evidence to argue that Baker's identification was suspect, in that she had been "jumping to some conclusions based on having talked to other people about finding out what this case is about." (8RT 1853.) The petition fails to allege sufficient facts demonstrating incompetent performance.

Moreover, the petition fails to allege facts establishing petitioner was prejudiced by counsel's alleged incompetent act, in that it is not reasonably probable that there would have been any different result if this brief testimony had not been elicited.

8. (B)(2)(h) (Failure To Object To Blood Collection Evidence)

In paragraphs 235-241 (Pet. 90-93), petitioner alleges his trial counsel was ineffective for failing to object to evidence from the investigating officer that he pointed out numerous bloodstains for collection and comparison to petitioner's blood; that samples were gathered from various stains; and that only two of these samples were submitted for analysis based upon the quantity of blood needed for testing. The testing showed that the two samples were not the blood of petitioner or the victim, but petitioner contends that counsel's incompetence allowed the prosecutor to argue that the untested samples could have been petitioner's blood.

Petitioner has failed to plead facts establishing incompetent performance. The petition does not include any declaration or statements by counsel explaining why he failed to object, but one obvious and satisfactory explanation is that counsel correctly believed that an objection to this plainly proper evidence would have been overruled. The challenged testimony was relevant to show what investigation had been conducted at the scene to identify the killer, and thus was clearly admissible. Counsel also could have had a tactical reason not to object. During argument, counsel stated that investigators had been directed to the fresh blood by Mario Medel, who told them the shooter had hit his head on the planter when he earlier had been thrown out of the bar. (8RT 1860-1861.) Evidence that the investigators had collected all the blood that they could, but only two samples had enough blood to test, supported counsel's argument that there was no blood evidence to connect petitioner to the killing, regardless of how many of the samples had been tested. (8RT 1860-1863.)

The petition also fails to establish prejudice. There is no reasonable probability that an objection by counsel would have been sustained, or if it had,

that there would have been any different result since the jury necessarily relied on the strong identification evidence by the eyewitnesses, including Quijada's composite drawing, in finding petitioner guilty. Excluding evidence that there were untestable blood drops, in addition to two blood drops that proved not be petitioner's or the victim's blood, plainly would have made no difference.

c. (B)(3) (Inadequate Investigation Of Count 3 - Rita Motel Murder)

1. (B)(3)(a) (Failure To Present Self-Defense And Provocation Evidence)

In paragraphs 242-245 (Pet. 94-95), petitioner alleges his trial counsel was ineffective for failing to investigate, develop and present evidence that the victim provoked the shooting and petitioner acted in self-defense.

Petitioner has failed to plead facts warranting relief. He fails to specify what further investigation counsel should have conducted, and what such investigation would have revealed.[4/] Accordingly, this conclusory claim should be rejected.

2. (B)(3)(b) (Evidence Of Mental Impairments And Illnesses)

In paragraphs 246-249 (Pet. 95-96), petitioner alleges his trial counsel was ineffective for failing to investigate, develop and present evidence of his mental impairments or illnesses, because it would have raised a reasonable doubt regarding the mental state required for first degree murder. According to petitioner, if counsel had investigated, he could have presented evidence that petitioner suffered from post-traumatic stress disorder and executive dysfunction disorder, which, combined with his drug and alcohol abuse,

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4. It is unlikely that there would have been any different result if counsel had uncovered and presented anything further regarding self-defense or provocation, given petitioner's statement to the authorities about what happened, and the statements and testimony of witnesses at the scene.

suggested that he was likely in a "dissociative state" that prevented him from appreciating the wrongfulness of his actions and impaired his judgment and insight.

The petition does not contain any declaration or statements by counsel explaining his actions with regard to petitioner's mental health issues. Petitioner's failure to include reasonably available documentary evidence to support his claim is an especially significant omission. Elsewhere in the petition, without citing to any source, petitioner alleges that trial counsel had consulted with a psychiatrist, Dr. Jose Moral, "for a preliminary assessment" in "July 1993," "two months before the penalty phase". (Pet. 179, ¶ 442.) The penalty phase commenced on September 15, 1993 (9RT 1974, 1986), the first day of jury voir dire was a month earlier on August 9, 1993 (see 1RT 167, 170), and the guilt phase opening statements of both parties were delivered on August 23, 1993 (4RT 786, 802). Thus, trial counsel's alleged consultation with Dr. Moral occurred before the start of voir dire and the guilt phase proceedings. The detailed nature of this allegation plainly suggests petitioner possesses some documentation supporting it. Yet, respondent has been unable to locate such documentation in the petition or exhibits about this consultation. Since petitioner's burden of pleading a prima facie includes an obligation to provide reasonably available documentary evidence in support of his claims (*People v. Duvall, supra,* 9 Cal.4th at p. 474), his failure to provide that or any other supporting documentation warrants rejection of this claim, especially since it is possible counsel reasonably may have decided not to present mental health evidence after consulting with Dr. Moral.

For example, counsel could have received an indication from Dr. Moral that petitioner was not suffering from any mental illness or impairment that would have assisted the defense. (See Pet. Exh. 126, PE 1164, ¶ 38 [Dr. Llorente declaration that some clinicians "may be tempted to readily assign a

diagnosis of antisocial personality disorder" to petitioner].) Or, counsel could have concluded that presenting such evidence would have invited a response by the prosecution, including the possibility that petitioner might be ordered to submit to an examination by a court-appointed expert, or even a prosecution mental health expert, with detrimental results for petitioner. (See *Verdin v. Superior Court, supra*, 43 Cal.4th at p. 1117 [court may employ Evidence Code section 730 to appoint mental health expert to examine a defendant]; *People v. McPeters, supra,* 2 Cal.4th at p. 1190 [decided the year before the trial commenced in this case, allowing prosecution expert to examine a defendant who presents evidence of his mental condition at the penalty phase].)

Moreover, counsel relied on the victim's provocative conduct in urging the crime should be reduced from first degree murder to manslaughter (see 8RT 1833-1839), and reasonably could have concluded that mental illness and impairment evidence would have diverted attention away from the victim and focused it upon petitioner, whose conduct and statements were inconsistent with such mental impairment or illness. One witness claimed petitioner had been drinking beer and using cocaine before the shooting (5RT 1261, 1273), but petitioner himself told investigating officers that he had not been drinking or taking drugs that day. (1CT 232.) Petitioner gave a lucid statement to investigating officers in which he admitted arming himself before leaving his motel room to confront the victim in the parking lot, showing planning behavior. Petitioner said he approached the victim only so he could tell him that he could have a woman they were both seeing, because petitioner planned on returning to Mexico. According to petitioner, the victim called him stupid and said he did not want to talk to him, so petitioner pulled out his gun, placed the barrel against the victim's stomach, and pushed him backwards. The gun discharged, apparently unintentionally, but petitioner said he thought about what the victim had said to him, and fired several more times as he fell to the

ground. (1CT 226-228.) According to eyewitness Ramiro Salazar, petitioner emerged from the motel room, called the victim to him, and shot the unarmed victim while the victim was walking or backing away from petitioner. (6RT 1307-1309, 1318-1320, 1323-1324, 1326.)

Considering all the evidence on this count, including the statements of witnesses at the scene and petitioner's statement about how and why he killed the victim, petitioner has failed to plead facts showing a reasonable probability of a different result if mental health evidence had been presented.

3. (B)(3)(c) (Failure To Present Evidence Of Drug And Alcohol Dependency)

In paragraphs 250-252 (Pet. 97-98), petitioner alleges his trial counsel was ineffective for failing to present evidence of his drug and alcohol dependency, to show he did not possess the mental state necessary to commit first degree murder because he was "in a state of intoxication."

Petitioner has failed to plead sufficient facts establishing that counsel's performance fell below professional norms. The petition does not contain any declaration or statements by counsel explaining why he did not present evidence of petitioner's drug or alcohol dependency, but one obvious satisfactory explanation existed. That is, such evidence would have been directly contradictory to petitioner's statement to an investigating officer that he did *not* drink or take any drugs on the day he shot the victim. (1CT 232.) Moreover, counsel reasonably could have concluded that petitioner's testimony would be necessary for a successful intoxication defense, and determined that the risk of a devastating cross-examination was not warranted. Insofar as counsel relied on the victim's provocative conduct in urging the crime should be reduced from first degree murder to manslaughter (see 8RT 1836, 1838-1839), he could have decided this depended on petitioner being able to perceive what was occurring at the time of the shooting, which was inconsistent with evidence that his mind

was addled by intoxication.

Petitioner also has failed to plead sufficient facts demonstrating he was prejudiced by trial counsel's alleged incompetent performance. There was no reasonable probability of any different result if the evidence had been presented, since the witnesses' statements and petitioner's own statements described conduct that showed no signs of debilitating intoxication.

4. (B)(3)(d) (Failure To Object To Cocaine Sale Evidence)

In paragraphs 253-255 (Pet. 98-99), petitioner alleges his trial counsel was ineffective for failing to exclude evidence that "characterized Petitioner as a cocaine dealer." The specific evidence petitioner challenges is the prosecutor's question to witness Nicholas Venegas, about whether petitioner said what he was planning on doing with three bricks of cheese sprinkled with cocaine, and Venegas's answer that petitioner asked if Venegas knew anyone who wanted to buy the "coke".[5/]

Petitioner has failed to plead sufficient facts establishing that counsel's performance fell below professional norms. The petition does not contain any declaration or statements by counsel explaining why he did not object to the question on the ground that it improperly suggested petitioner was a cocaine dealer, and reasonable explanations were possible.

First, the question about what petitioner intended to do with the bricks did not establish he was a cocaine dealer. To the contrary, it showed the exact opposite, in that the bricks were later established to be cheese disguised as cocaine bricks, and Venegas's answer tended to show that petitioner did not

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5. Petitioner does not allege any incompetence in counsel's failure to object to evidence of the bricks, apparently recognizing that it was relevant and admissible since the bricks were found in the motel room petitioner occupied before shooting the victim, and petitioner left his fingerprints on two of them. (7RT 1537-1552.)

know who might want to buy cocaine bricks. (See 7RT 1674-1678; see also 5RT 1255-1259.)

Moreover, counsel reasonably could have believed any objection would have been overruled. The question and answer were relevant to establish petitioner was in the motel room as Venegas testified, in that petitioner left his fingerprints on two of the three cheese bricks found in that room. (5RT 1257-1260.) The evidence also confirmed Ramiro Salazar's testimony that he saw petitioner come out of one of the motel rooms to confront and shoot the victim. (6RT 1306-1309, 1323-1326.) The question and answer were also relevant to show petitioner lied when he told interrogating officers that the cheese bricks were not his (1CT 230-231), given the fingerprint evidence.

Petitioner also failed to plead facts establishing that he was prejudiced, because the question to Venegas and his answer ultimately did not show petitioner was a cocaine dealer, as petitioner alleges. As previously noted, the later testimony of law enforcement officers established that what Venegas thought were bricks of cocaine actually were bricks of cheese sprinkled with cocaine. (7RT 1674-1678.) It is not reasonably probable that there would have been any different result if defense counsel had performed differently as to this minor point, given the other evidence of petitioner's guilt.

d. (B)(4) (Inadequate Investigation Of Count 4 - Mazatlan Murder)

1. (B)(4)(a) (Failure To Present Self Defense And/Or Provocation Evidence)

In paragraphs 256-262 (Pet. 99-100), petitioner alleges his trial counsel was ineffective for failing to contact a potential witness, Jose Campista, before Campista returned to Sinaloa. Petitioner argues that counsel "was aware that Jose Campista had informed Silvia Tinoco that the victim, who was intoxicated, had told [petitioner] to 'go fuck his mother,'" but had failed to contact him

before he left for Sinaloa.

The petition fails to plead a prima facie case for relief. It does not include any declaration or statements by trial counsel, or other factual allegation as to the source for petitioner's claim that trial counsel was aware of Campista's alleged statement to Tinoco, or that trial counsel had failed to contact Campista before Campista left for Sinaloa. This pleading deficiency is fatal, since Campista's statement to Tinoco, as alleged in the petition, does not include any assertion that he was personally present when the victim was killed. His statement could reflect nothing more than something he heard from Beatriz Escamilla, who was present during the shooting and testified on petitioner's behalf as to this count, Escamilla was with Campista when petitioner showed up at Escamilla's house with bullet wounds on February 22, 1990. (6RT 1402-1403.)

Petitioner thus plainly has failed to plead sufficient facts to establish that there was a reasonable probability of a different result if counsel had contacted Campista before he left the country. Adding this to his failure to plead facts showing there could be no reasonable explanation for counsel's alleged failure to contact Campista, such as possibly reasonable but unsuccessful attempts by counsel to locate Campista, or a reasonably based conclusion that Campista had no personal knowledge of what occurred on the night of the murder, this claim should be rejected.

2. (B)(4)(b) (Evidence Of Mental Impairments And Illnesses)

In paragraphs 263-266 (Pet. 101-102), petitioner alleges his trial counsel was ineffective for failing to investigate, develop and present evidence of his mental impairments or illnesses, because it would have raised a reasonable doubt regarding the mental state required for first degree murder. Petitioner alleges that if counsel had investigated, he could have presented evidence that

petitioner suffered from post-traumatic stress disorder and executive dysfunction disorder, which, combined with his drug and alcohol abuse, suggested that he was likely in a "dissociative state" that prevented him from appreciating the wrongfulness of his actions and impaired his judgment and insight.

As noted in the response to similar prior claims (see ¶¶ 172-175, 246-249), the petition does not contain any declaration or statements by counsel explaining his actions with regard to petitioner's mental health issues. Petitioner's failure to include reasonably available documentary evidence to support his claim is especially noteworthy since, elsewhere in the petition, without citing to any source, he alleges that trial counsel had consulted with a psychiatrist (Dr. Jose Moral) "for a preliminary assessment" in "July 1993," "two months before the penalty phase." (Pet. 179, ¶ 442.) The penalty phase commenced on September 15, 1993 (9RT 1974, 1986), the first day of jury voir dire was a month earlier on August 9, 1993 (see 1RT 167, 170), and the guilt phase opening statements of both parties were delivered on August 23, 1993 (4RT 786, 802). Thus, trial counsel's alleged consultation with Dr. Moral occurred before the start of voir dire at the guilt phase. The detailed nature of this allegation plainly suggests petitioner possesses some documentation supporting it. Yet, respondent has been unable to locate any supporting documentation in the petition or exhibits about this consultation. Since petitioner's burden of pleading a prima facie includes an obligation to provide reasonably available documentary evidence in support of his claims (*People v. Duvall, supra,* 9 Cal.4th at p. 474), his failure to provide it warrants rejection of this claim, especially since it is possible counsel reasonably may have decided not to present mental health evidence after consulting with Dr. Moral.

Counsel could have had a satisfactory reason for not presenting mental health evidence, such as an indication from Dr. Moral that petitioner was not

suffering from any mental illness or impairment that would have assisted the defense. (See Pet. Exh. 126, PE 1164, ¶ 38 [Dr. Llorente declaration that "some clinicians may be tempted to readily assign a diagnosis of antisocial personality disorder" to petitioner].). Or, counsel could have concluded that presenting such evidence would have invited a response by the prosecution, including the possibility that petitioner might be ordered to submit to an examination by a court-appointed expert, or even a prosecution mental health expert, with detrimental results for petitioner. (See *Verdin v. Superior Court, supra,* 43 Cal.4th at p. 1117 [court may employ Evidence Code section 730 to appoint mental health expert to examine a defendant]; *People v. McPeters, supra,* 2 Cal.4th at p. 1190 [decided the year before the trial commenced in this case, allowing prosecution expert to examine a defendant who presents evidence of his mental condition at the penalty phase].)

Moreover, petitioner has failed to plead sufficient facts to establish he was prejudiced by counsel's alleged deficient performance. Even if counsel had possessed the information alleged in the petition, he reasonably could have decided not to present it. According to Beatriz Escamilla, petitioner at least twice tried to calm the victim down as the victim hurled insults at him and challenged him to take out his gun and use it. (6RT 1386-1389, 1395-1396, 1415-1416.) According to Adela Lopez Ontiveros, the victim had been asleep at the bar before petitioner shot him. (*People v. Manriquez, supra*, 37 Cal.4th at p. 565 [quoting Lopez Ontivero's testimony that the victim had been leaning against the bar asleep for at least two hours].) Under Escamilla's version, the mental health evidence would have been inconsistent with her description of petitioner behaving patiently and reasonably in trying to calm the victim down before being provoked into shooting him. Under Ontiveros's version, the evidence would have been irrelevant without some evidence of why petitioner decided to shoot a sleeping man, insofar as his alleged mental deficiencies are

portrayed as affecting his judgment and impulse control, but do not appear to address his conduct of committing an unprovoked shooting of an apparent stranger.

This claim should be rejected for petitioner's failure to plead sufficient facts for relief.

3. (B)(4)(c) (Evidence Of Drug And Alcohol Dependence)

In paragraphs 267-269 (Pet. 102-103), petitioner alleges trial counsel was ineffective for failing to adequately investigate, develop, and present evidence of his alcohol and cocaine dependency to support a theory that petitioner did not "possess the mental state necessary to commit first degree murder," and that if he was the shooter, he "was in a state of intoxication such that he did not commit first degree murder."

As noted in the response to similar prior claims (¶¶ 176-178, 250-252), the petition does not include any declaration or statements by trial counsel on this issue, and petitioner has failed to sustain his burden of pleading facts establishing incompetent performance because counsel's omission could have had a satisfactory explanation. For example, counsel reasonably could have concluded that petitioner's testimony would be necessary for a successful intoxication defense, and determined that the risk of a devastating cross-examination was not warranted. Counsel could have determined that petitioner had not been intoxicated when he shot the victim based upon the evidence known to him, such as privileged statements from petitioner himself. Or, counsel reasonably could have believed such intoxication evidence would have diluted the reduced culpability defense suggested by Escamilla's testimony, by shifting the focus from the victim's provocative conduct and petitioner's attempts to calm him down, to whether it was petitioner whose judgment had been impaired by alcohol or cocaine, and the extent to which he was acting

under their influence.

Petitioner also has failed to allege facts showing a reasonable probability of a more favorable result if counsel had presented such evidence. The evidence of petitioner's general dependance on drugs and alcohol, standing alone, does not establish that he was intoxicated at the time he shot the victim, so it is not reasonably probable that there would have been a different result if the trial court found it relevant enough to be admitted at trial. Without additional evidence, such as petitioner's testimony that he was intoxicated when he shot the victim, the jury would be left to evaluate petitioner's mental state from the testimony of the witnesses who were present at the scene, which is what they did at trial. Petitioner has failed to carry his burden of pleading facts showing he was prejudiced by counsel's alleged deficient performance.

4. (B)(4)(d) (Failure To Impeach Detective Arellanes)

In paragraphs 270-276 (Pet. 104-107), petitioner alleges his trial counsel was ineffective for failing to adequately impeach Detective David Arellanes, who interviewed Adela Lopez Ontiveros. In petitioner's view, counsel should have "explored the possibility that Arellanes failed to follow standard and required procedures" in his contacts with Lopez Ontiveros (¶272), and was incompetent in failing to discover that the detective's wife had obtained a temporary restraining order against him based, in part, on threats he allegedly made to his wife (¶¶273-274).

Petitioner has failed to plead facts warranting relief. He does not specify what "standard and required procedures" the detective should have followed, and does not plead facts showing how the failure to follow these unspecified procedures affected the testimony of Lopez Ontiveros. Further, there was no evidence in the testimony of Lopez Ontiveros, Detective Arellanes, or from any other source, that the detective ever threatened her, so the detective's domestic issues plainly were irrelevant to, and would not have undermined, Lopez

Ontiveros's actual testimony that petitioner shot the victim.

As for using the detective's unspecified procedural gaffes and domestic issues to impeach his credibility as a testifying witness, petitioner is not entitled to relief. He failed to specify what standards procedures were violated, making it impossible to gauge the effect of such impeachment on the detective's testimony. Regarding the detective's alleged threats to his wife, there is no allegation that they resulted in any criminal charges, and it is inconceivable that the trial court would have allowed the evidence to be admitted for impeachment under Evidence Code section 352, given its collateral nature, minimum probative value, and potential for undue consumption of time in litigating whether the threats were actually made. Even if the alleged additional impeachment evidence had been admitted, there is no reasonable probability that there would have been any different result since the detective's testimony related to his contacts with Lopez Ontiveros, whose testimony at trial allowed the jury to weigh her credibility directly.

Since petitioner failed to plead sufficient facts showing trial counsel performed incompetently, or that he was prejudiced assuming counsel's deficient performance, this claim must be rejected.

e. (B)(5) (Prejudice From Counsel's Alleged Incompetent Performance)

In paragraph 277 (Pet. 107), petitioner concludes his guilt phase ineffective assistance of counsel arguments by generally alleging he was prejudiced by counsel's incompetence. For the reasons previously stated as to each specific claim, petitioner has failed to plead a prima facie case warranting relief.

6. (C) (Inadequate Penalty Phase Defense Against Prosecution Case)

a.(C)(1) (Paramount Killings)

In paragraphs 278-280 (Pet. 107-109), petitioner summarizes the penalty phase evidence of the three Paramount homicides, and generally alleges that trial counsel "unreasonably and prejudicially failed to defend" him against that evidence. Petitioner has failed to plead sufficient facts to establish a prima facie case for relief, as explained in the following responses to petitioner's specific allegations.

1. (C)(1)(a) (Failure To Challenge Firearms Evidence)

In paragraphs 281-287 (Pet. 109-111), petitioner alleges that trial counsel performed incompetently by failing to cross-examine the prosecution's expert about his "failure to document the steps that led to his conclusions" that the same gun was used in count 4 (Mazatlan murder) and the Paramount killings that occurred a month later. Petitioner also faults counsel for failing to retain a firearms expert to point out the alleged lack of supporting documentation, which petitioner asserts would have undermined the credibility of the prosecution's expert.

Petitioner has failed to plead facts demonstrating that counsel's performance was inadequate. The petition does not include any declaration or statements by counsel regarding his thinking and actions as to the challenged omission, and it is possible that counsel had a satisfactory explanation for not pursuing further investigation. For example, it is possible that he possessed information confirming the prosecution expert's conclusions, such as a privileged statement made to him by petitioner admitting that he used the same gun in both the Mazatlan and Paramount killings.

Petitioner also fails to plead sufficient facts establishing prejudice from counsel's alleged incompetent performance. There is no claim by petitioner that the prosecution expert's ultimate opinions were wrong, just a complaint regarding his documentation of how he arrived at his conclusions. But if counsel had engaged in the cross-examination suggested, the prosecution could have asked the expert to provide documentation for his conclusions, or had the evidence re-examined to confirm the expert's opinions. And, if counsel had retained a defense expert and presented his testimony at the penalty phase as petitioner posits, that is, limited to a challenge regarding documentation but not the ultimate opinion of the prosecution expert, the prosecution not only could have confirmed its expert's conclusions as previously discussed, but could underscore their correctness by pointing out there was no defense expert testimony contradicting them.

2. (C)(1)(b) (Failure To Challenge Robbery Theory)

In paragraphs 288-294 (Pet. 112-114), petitioner alleges his trial counsel was incompetent for failing to challenge the prosecution's felony murder theory as to the Paramount murders, because "there was no reliable evidence to demonstrate that Petitioner had fired a handgun at the scene" (¶290), and because counsel also should have presented evidence that it was the victims and not petitioner who intended to commit a robbery.

The petition fails to include any declaration or statements by trial counsel regarding this claim. Petitioner failed to plead facts warranting relief in view of his failure to include this reasonably available supporting evidence from trial counsel, or to explain why he could not do so, since there could have been adequate explanations for counsel's conduct. For example, it is possible that counsel reasonably concluded that challenging the prosecution's evidence would lead to the production of even more damaging corroborating evidence, based on other reports or information he might have had in his possession,

including privileged communications with petitioner.

Petitioner also has failed to plead facts showing he was prejudiced by counsel's alleged incompetence. His claim that there was insufficient evidence that he fired a handgun is plainly refuted by the penalty phase evidence, which established that the gun he used to kill the victim in count 4 was one of the guns used in the Paramount homicides (*People v. Manriquez, supra*, 37 Cal.4th at pp. 568-569), and a gunshot residue test performed on petitioner on the day of the homicides was consistent with him having fired a gun (9RT 2128-2129). At the guilt phase, there was testimony from Beatriz Escamilla that petitioner showed up at her house wounded after the Paramount murders, and had a gun in his possession. (6RT 1402, 1419.) All of this evidence supported the inference that petitioner fired a gun during the Paramount killlings.

Petitioner failed to plead facts showing he was prejudiced by counsel's failure to present evidence that it was the victims and not petitioner who intended to commit a robbery. At the scene of the Paramount murders, there were four kilo bricks of cheese that contained some cocaine. (*People v. Manriquez, supra*, 37 Cal.4th at p. 568; 9RT 2004, 2119, 2126-2127.) The trial evidence on count 3 established that about three months earlier, petitioner was in possession of three similar cheese bricks that had been sprinkled with cocaine, which he told Nicholas Venegas was "coke," and petitioner asked if Venegas knew anyone who wanted to buy it. (*Manriquez, supra,* at pp. 560, 563-564; 5RT 1258-1260, 1284.) Regardless of whether counsel had presented evidence that the victims had planned to steal cocaine from petitioner, the evidence unmistakably established that petitioner intended to rob the victims of their money, given the reasonable inference that he brought fake kilos of cocaine and a gun to the Paramount meeting.

b. (C)(2) (Rape Of Patricia M.)

In paragraphs 295-298 (Pet. 114-116), petitioner alleges that trial counsel performed incompetently in failing to investigate the circumstances surrounding petitioner's rape of Patricia M., because he would have learned that the residents of the house where the rape occurred would have denied knowing her, and would have contradicted her testimony that she was babysitting for them on the night of the rape.

The petition contains no declaration or statements by trial counsel regarding this claim, or any explanation for the omission. It is possible that counsel might have a reasonable explanation, such as the existence of inconsistent statements made by the residents, other impeaching evidence as to them, or other evidence tending to corroborate Patricia M.'s testimony, such as privileged statements from petitioner admitting he raped her. In any event, because there could be some satisfactory explanation, petitioner has failed to plead a prima facie case for relief as to incompetent performance.

Moreover, petitioner has failed to plead facts showing he was prejudiced by counsel's alleged deficient performance. The jury that determined penalty was the same jury that heard evidence of petitioner's four charged murders, and convicted him of all four. At the penalty phase, other aggravating evidence of petitioner's involvement in the three Paramount killings was unassailably established. In view of the evidence that petitioner participated in seven homicides on five different occasions, it is not reasonable probable that the outcome of the penalty phase would have been any different even if counsel had challenged the rape evidence.

7. (D) (Inadequate Presentation Of Mitigating Evidence)

a. (D)(1) (Overview)

In paragraphs 299-305 (Pet. 116-119), petitioner presents an overview of his claims that his trial counsel performed ineffectively in investigating and

presenting mitigating evidence at the penalty phase. In subsequent paragraphs, petitioner discusses each of his specific claims of incompetence, which respondent answers below.

b. (D)(2) (Failure To Present Testimony Of Witnesses Who Knew Petitioner)

In paragraphs 306-311 (Pet. 119-123), petitioner cites to 39 declarations he obtained from "friends, family members, and acquaintances who knew Petitioner and provided mitigation evidence for this petition" (¶306). Petitioner alleges that counsel's staff only spoke to four of the declarants, did not convey to them "the importance and significance" of their information about petitioner's childhood, and never followed up or presented their testimony at the penalty phase.

The petition contains no declaration or statements by trial counsel regarding this claim, and it is possible that he might have a reasonable explanation, such as a reasoned opinion, based on information uncovered to that point, that he would be able to present mitigating evidence of petitioner's background through other witnesses already interviewed, and that interviewing more family members, friends and acquaintances would yield only cumulative evidence. In any event, because there could be some satisfactory explanation, petitioner has failed to plead a prima facie case for relief as to incompetent performance.

Moreover, petitioner has failed to plead a prima facie case for relief as to prejudice he suffered from counsel's alleged deficient performance. As recounted in this Court's opinion on direct appeal, trial counsel elicited mitigating evidence of petitioner's childhood through the testimony of five of his relatives, which showed his childhood had been "marred by extreme cruelty, vicious beatings, grinding poverty, forced labor, and a lack of care, education, affection, or encouragement by the adults in [petitioner's] life." (*People v.*

Manriquez, supra, 37 Cal.4th at p. 570.) The jury that determined penalty was the same one that convicted petitioner of the four charged murders, and at the penalty phase, heard evidence of petitioner's involvement in three more homicides, the Paramount killings. In view of the evidence that petitioner participated in seven homicides on five different occasions, it is not reasonable probable that the outcome of the penalty phase would have been any different even if counsel sought, and had been allowed, to present additional mitigating evidence of petitioner's childhood and family circumstances.

c. (D)(3) (Abandonment Of Investigative Leads In Mexico)

In paragraph 312 (Pet. 123-124), petitioner provides an introduction to his complaint that counsel was incompetent for failing to follow up investigative leads uncovered by his staff when they visited petitioner's family in Mexico. Subsequent paragraphs set forth petitioner's specific claims, which respondent answers below.

1. (D)(3)(a) (Failure To Present Testimony Of Esperanza Banuelos)

In paragraphs 313-342 (Pet. 124-133), petitioner complains that trial counsel "inexplicably ignored" Esperanza Banuelos after she had been interviewed in Mexico by his staff. (¶ 313.) Petitioner alleges that trial counsel's incompetent performance deprived the jury of hearing from this witness, who would have provided testimony about the chronic and extreme physical and emotional abuses suffered by petitioner during his childhood (¶¶315-326); his mother's instability and abandonment of petitioner and his siblings when she went off with a new man and left her children behind (¶¶327-331); the circumstances of the death of petitioner's younger brother because of the failure to obtain medical treatment for his stomach ailments (¶¶332-333); the poverty in which petitioner was raised in Mexico (¶¶334-339); and

petitioner's exposure as a child to toxic bug killers and dangerous medical practices such as "drinking water boiled with excrement to treat scorpion bites; drinking urine for stomach ailments; and wrapping pieces of bark around the waist to treat urinary problems" (¶¶340-342).

The petition contains no declaration or statements by trial counsel regarding this claim, and it is possible that he might have a reasonable explanation for deciding not to utilize this witness at the penalty phase, such as a reasoned opinion that she would be providing cumulative evidence given the other family members who could and did testify about the hardships suffered by petitioner during his childhood. In any event, because there could be some satisfactory explanation, petitioner has failed to plead a prima facie case for relief as to incompetent performance.

Moreover, petitioner has failed to demonstrate that counsel's alleged incompetence resulted in prejudice warranting relief. As recounted in this Court's opinion on direct appeal, trial counsel elicited mitigating evidence at the penalty phase through the testimony of five relatives, which this court summarized as showing petitioner's childhood "was marred by extreme cruelty, vicious beatings, grinding poverty, forced labor, and a lack of care, education, affection, or encouragement by the adults in [petitioner's] life." (*People v. Manriquez, supra*, 37 Cal.4th at p. 570.) The jury that determined penalty was the same one that convicted petitioner of the four charged murders, and at the penalty phase, heard evidence of petitioner's involvement in three more homicides, the Paramount killings. In view of the evidence that petitioner participated in seven homicides on five different occasions, it is not reasonable probable that the outcome of the penalty phase would have been any different even if counsel had sought and been allowed to present additional mitigating evidence through the testimony of a sixth family member, Esperanza Banuelos.

2. (D)(3)(b) (Failure To Call Three Other Witnesses From Mexico)

In addition to Esperanza Banuelos, petitioner alleges in paragraphs 343-369 (Pet. 133-144) that his trial counsel was ineffective in failing to present the testimony of three other witnesses the defense team had contacted in Mexico prior to the penalty phase. These witnesses, Jesus Banuelos, Teresa Pena, and Feliciana Jacquez, were all relatives of petitioner. Petitioner alleges these witnesses could have provided more testimony regarding petitioner's childhood.

As in the prior claim regarding Esperanza Banuelos, the petition contains no declaration or statements by trial counsel regarding this claim, and it is possible that he might have a satisfactory explanation, such as a reasoned opinion that these witnesses would be providing cumulative evidence given the other family members who could and did testify about the hardships suffered by petitioner during his childhood. In any event, because there could be some satisfactory explanation, petitioner has failed to plead a prima facie case for relief as to incompetent performance.

Moreover, petitioner has failed to demonstrate counsel's alleged incompetence resulted in prejudice warranting relief. To the extent these additional witnesses would have been providing cumulative testimony, it is not reasonably probable there would have been any different verdict on penalty. Even if they could have spoken about petitioner's other experiences in Mexico that were not specifically presented at the penalty phase (e.g., that he suffered head trauma from being pistol-whipped [¶ 352], and was exposed to criminal and negative role models [¶ 359]), there was no reasonable probability of a different result given the mitigating evidence that was presented, and the penalty phase aggravating evidence that showed petitioner participated in three other killings (the Paramount murders) in addition to the four murders of which he was convicted.

3. (D)(3)(c) (No Valid Reason For Failure To Present Mexican Witnesses)

In paragraphs 370-371 (Pet. 144-145), petitioner alleges that his trial counsel had no valid explanation or strategic or tactical reason for failing to call the four Mexican witnesses the defense had contacted prior to trial (previously discussed and answered by respondent in claims (D)(3)(a) and (D)(3)(b), *ante*), and other unspecified Mexican witnesses.

To the extent this claim relies on unspecified witnesses, it fails to plead specific facts entitling petitioner to relief. Further, it is possible that there might have been some satisfactory explanation for counsel's omission, such as a reasoned decision based upon all the information known to him (including any privileged information petitioner may have provided), that these additional witnesses would be providing cumulative or impeachable mitigating testimony. In any event, the petition contains no declaration or statements from counsel explaining his conduct on this issue, and because there might be some reasonable explanation, petitioner has failed to plead a prima facie case of incompetent performance. He also has failed to allege specific facts demonstrating he was prejudiced by counsel's alleged incompetence, given the actual mitigating evidence of petitioner's upbringing that counsel presented and the aggravating evidence that petitioner was involved in the three Paramount killings.

d. (D)(4) (Inadequate Performance As To Mitigation Witnesses Presented)

In paragraphs 372-377 (Pet. 146-147), petitioner provides an overview of his claims that trial counsel performed incompetently as to the mitigation witnesses he presented at the penalty phase. As discussed below as to each specific claim, petitioner has failed to plead a prima facie case for relief.

Insofar as petitioner complains that counsel's opening statement was deficient because it was short, did not explain the concept of mitigation, and "downplayed" the significance of the mitigating evidence of petitioner's childhood and upbringing (¶373), the petition contains no declaration or statements by trial counsel on this issue. However, it appears that there is at least one satisfactory explanation. That is, counsel reasonably could have decided the best course tactically for the defense would be to make a short penalty phase opening statement in recognition of the powerful prosecution penalty phase case that had just been presented to the jury, which showed petitioner participated in the three Paramount killings in addition to the four charged murders. Counsel's opening statement set the tone for the defense, allowing him to present mitigating evidence and then credibly offer a closing argument in favor of a life sentence. During his closing argument, counsel focused on lingering doubt as to the seven homicides. He provided a strong summary of the mitigating aspects of petitioner's childhood and pleaded with jurors to think about "the reason why he is the way he is," and to show him the mercy and compassion he had never received as a child. (10RT 2269-2295.) Because counsel could have had some satisfactory explanation for using this opening statement in trying to convince the jury to return a life sentence notwithstanding petitioner's involvement in seven murders, petitioner has failed to plead a prima facie case of incompetent performance.

Further, in view of the strong case in aggravation presented by the prosecution, it is not reasonably probable that a different penalty phase opening statement would have yielded a more favorable result for petitioner. The lack of prejudice also defeats petitioner's claim of ineffectiveness based upon Dr. Craig Haney's irrelevant opinion regarding trial counsel's performance (¶¶375, 376; Pet. Exh. 130). Petitioner has failed to plead a prima facie case for relief based on counsel's allegedly deficient penalty phase opening statement.

1. (D)(4)(a) (Presentation Of Unreasonably Limited Mitigating Evidence)

In paragraph 378 (Pet.147), petitioner refers to the allegations in prior paragraphs and asserts that trial counsel performed ineffectively by presenting "only" five witnesses, unreasonably limiting the scope of their testimony, and failing to question them about "compelling information."

Although the petition contains no declaration or statements by trial counsel regarding this issue, it is apparent that the additional witnesses either would have provided information about petitioner's childhood, or testimony about its effect on petitioner. In view of the witnesses actually presented by trial counsel at the penalty phase on these issues and his closing argument utilizing their evidence in a plea for mercy and compassion (see 10RT 2269-2295), petitioner has failed to plead a prima facie case for relief. (See *People v. Manriquez, supra*, 37 Cal.4th at p. 570 [defense mitigating evidence at the penalty phase showed petitioner's childhood "was marred by extreme cruelty, vicious beatings, grinding poverty, forced labor, and a lack of care, education, affection, or encouragement by the adults in [petitioner's] life"].) Trial counsel reasonably could have determined that eliciting more information from the witnesses he did call, or presenting additional witnesses, was unnecessary. Since it is possible that counsel had some satisfactory explanation for the challenged conduct, petitioner has failed to plead a prima facie case of ineffective performance.

In view of the overwhelming aggravating evidence, and the mitigating evidence actually presented, petitioner also has failed to plead specific facts establishing a reasonable probability that there would have been any different penalty phase result but for counsel's alleged incompetence.

2. (D)(4)(b) (Presenting Unprepared Witnesses)

In paragraphs 379-383 (Pet. 148-150), petitioner cites declarations from the five witnesses trial counsel presented at the penalty phase and alleges trial counsel failed to adequately prepare them for their testimony.

Petitioner has failed to plead a prima facie case for relief, in that he has failed to plead specific facts showing that if trial counsel or his staff had spent more time preparing these witnesses, counsel would have elicited any materially different testimony at the penalty phase, or these witnesses would have been any less nervous when testifying. Even assuming that more preparation would have caused counsel to elicit some additional evidence from these witnesses, or that they would have been less nervous about testifying, it is not reasonably probable there would have been any different result at the penalty phase in view of the evidence in aggravation and mitigation that was actually presented.

3. (D)(4)(c) (Unreasonable Limitation Of Witnesses' Testimony)

In paragraphs 384-389 (Pet. 150-154), petitioner alleges that trial counsel failed to elicit additional testimony about petitioner's childhood circumstances from the witnesses he called at the penalty phase, and complains again that counsel should have called additional witnesses to testify on that issue.

Even assuming trial counsel had no satisfactory explanation for the alleged incompetent performance, which respondent does not concede because the petition contains no declaration or statements by trial counsel on this claim, petitioner has failed to plead a prima facie case warranting relief. In view of the evidence in aggravation and mitigation that was actually presented, and trial counsel's argument at the penalty phase, it is not reasonably probable that there would have been any different result if the penalty phase had been conducted as petitioner contends.

e. (D)(5) (Different Result It Counsel Had Performed Competently)

Petitioner makes the following claims in alleging there would have been a different result if trial counsel had properly investigated, developed, and presented mitigating evidence of his social history.

1. (D)(5)(a) (Inadequate Presentation Of Mitigating Evidence)

In paragraphs 390-399 (Pet. 154-160), petitioner alleges trial counsel should have presented a more thorough social history, including experts to explain the connection between his childhood deprivations and abuse and "the subsequent troubled path of his life" (¶397), so that the jury would understand the significance of the mitigating evidence. Petitioner alleges that trial counsel "failed to articulate any theory of mitigation" and the purpose of the mitigating evidence was unclear. (Pet. 159-160, ¶398.)

But trial counsel did explain the significance of the mitigating evidence in his closing argument at the penalty phase. After calling five family members to present mitigating evidence that this Court summarized as reflecting a childhood "marred by extreme cruelty, vicious beatings, grinding poverty, forced labor, and a lack of care, education, affection, or encouragement by the adults in [petitioner's] life" (*People v. Manriquez, supra*, 37 Cal.4th at p. 570), trial counsel pointed to this testimony and urged the jury to "[p]lease show my client some compassion, some mercy." (10RT 2294.) Counsel argued that this evidence showed the reason why petitioner was the way he was, and that petitioner did not make a free choice to be who he was because he had not been given love or moral guidance. (10RT 2294.) Counsel concluded with a plea that the jurors give petitioner life without parole rather than death: "But, please, think of that little kid that he was and what he didn't have and show him some compassion." (10RT 2295.)

Contrary to petitioner's allegation, this record demonstrates that trial counsel did explain the significance of the mitigating evidence and reasonably used it to augment his lingering doubt argument for why the jury should return a life sentence rather than death. The presentation of a more thorough social history, or expert opinions regarding the effects of that history, would not have improved petitioner's chances for a different result, given the mitigating evidence of petitioner's childhood that was actually presented and counsel's argument regarding the effect the jury should give to that evidence and considering the powerful aggravating evidence of petitioner's involvement in seven killings committed on five different occasions. Petitioner has failed to plead a prima facie case that it was reasonably probable there would have been a different penalty phase result but for counsel's alleged ineffective performance.

Moreover, as noted in the response to prior claims, the petition contains no declaration or statements by trial counsel on this issue, and he may have had a reasonable explanation for presenting the mitigating case in the manner that he did. In fact, petitioner alleges elsewhere in the petition, without providing any documentary support, that trial counsel "had, at one time, considered using an expert to explain Petitioner's upbringing and socio-cultural background to the jury," and had contacted "a potential mitigation expert." (Pet. 168-169, ¶ 416.) It is possible that counsel reasonably decided, based upon the investigation he conducted and information known to him, that presentation of further evidence regarding petitioner's background was unnecessary. Because a satisfactory explanation is possible, petitioner has not pleaded sufficient facts to establish that his counsel necessarily performed incompetently on this issue.

2. (D)(5)(b)-(g),(i) (Effect On Prosecution's Closing Argument)

In section (D)(5), subclaims (b) through (g) and (i) (Pet. 160-172, ¶¶400-415, 419-425), petitioner alleges that trial counsel's deficient presentation of the case in mitigation allowed the prosecution to argue that petitioner's upbringing was no different than that of others (¶400); that there had been exaggeration by the mitigation witnesses (¶401); that the mitigation witnesses were all relatives of petitioner (¶402); that Crescencia Tamayo's testimony showed she gave petitioner affection (although she also testified that she hit him [9RT 2197-2198], and another witness said she never saw affection being expressed by Tamayo [9RT 2208-2209]) (¶¶403-406); that petitioner chose to kill, since there were other family members who had not been in trouble with the law (¶¶407-410); that there was a "tremendous lack" of mitigating evidence even though the defense had made an effort to present "everything they could" (¶¶411-415); and that petitioner carried guns because he liked to kill (¶¶419-425).

Petitioner has failed to plead a prima facie case for relief because this claim rests on pure speculation that the prosecution would have abandoned any of its arguments if his counsel had produced additional mitigating evidence. The facts of petitioner's upbringing necessarily relied on the testimony of family members, and that circumstance would have provided the evidentiary basis for the prosecution's arguments even if additional witnesses had been called. Because it is also speculative as to what effect these specific prosecution arguments had on the jury's penalty decision, petitioner has failed to plead a reasonable probability that there would have been a different result but for trial counsel's alleged incompetent performance that permitted the arguments.

3. (D)(5)(h) (Failure To Present Expert Who Had Been Contacted)

In paragraphs 416-418 (Pet. 168-169), petitioner alleges that his trial counsel "had, at one time, considered using an expert to explain Petitioner's upbringing and socio-cultural background to the jury," but "unreasonably failed to present such an expert at trial" after contacting "a potential mitigation expert." (¶416.)

The petition cites to no declarations or exhibits in making these factual assertions, even though their specificity plainly suggests that petitioner possesses supporting documentation for them. Having failed to provide reasonably available documentary evidence in support of these allegations, petitioner is not entitled to relief. (See *People v. Duvall, supra*, 9 Cal.4th at p. 474.)

Moreover, the petition contains no statement by trial counsel regarding his thinking or actions on this issue, even though counsel seems to have made an affirmative decision not to pursue the use of a "mitigation expert" after contacting one. Because there could be a satisfactory explanation for such a decision, such as a reasonable determination that the alleged expert's testimony would be inadmissible because it would be relating objectionable hearsay or impermissible opinions (see *People v. Thornton* (2007) 41 Cal.4th 391, 442-444, 448-450), or that it would not materially assist the jury in determining the weight that should be given to the mitigating evidence, petitioner has failed to plead a prima facie case of incompetent performance.

Petitioner also has failed to plead sufficient facts establishing prejudice. Petitioner relies on the declaration of Dr. Craig Haney (Pet., Exh. 130) as to what an expert witness could have added to the defense penalty phase presentation, but in view of the aggravating and mitigating evidence actually presented at the penalty phase, and the arguments of counsel, it is not

reasonably probable that there would have been any different result if trial counsel had presented an expert to testify about how petitioner's upbringing affected him.

4. (D)(5)(i) (Effect On Prosecution's Argument Regarding Guns)

In paragraphs 419-425 (Pet. 169-172), petitioner alleges that if his trial counsel had properly investigated and prepared the case in mitigation, he would have been able to explain or rebut the prosecutor's argument that petitioner carried a gun because he liked to kill.

Even if counsel performed incompetently, which respondent does not concede because the petition does not contain any declaration or statements by counsel relating to this specific subject and a satisfactory explanation is possible, petitioner has failed to plead facts establishing the prejudice required for relief. Assuming additional evidence had been presented, it is not reasonably probable that any defense explanation or rebuttal of this brief remark would have resulted in a different outcome at the penalty phase. It is inconceivable that this one comment in the prosecutor's argument played a significant role in the jury's determination when there was aggravating evidence that petitioner was involved in seven murders committed on five different occasions.

f. (D)(6) (Failure To Present Evidence Of Mental Illnesses And Impairments And Drug And Alcohol Abuse)

In paragraphs 426-446 (Pet. 173-180), which includes subclaims (D)(6)(a) and (D)(6)(b), petitioner alleges his trial counsel was ineffective for failing to adequately investigate, develop, and present mitigating evidence of his neurocognitive impairments, mental illness, and drug and alcohol abuse. Petitioner relies on the declarations of Dr. Pablo Stewart, described as a clinical and forensic psychiatrist (Pet. Exh. 129), and Dr. Antolin Llorente, a clinical

psychologist (Pet. Exh. 126), in asserting that mitigating evidence on these issues could have been presented.

Respondent has answered petitioner's prior guilt phase claims regarding counsel's omissions on this issue, and has discussed why petitioner has not pleaded sufficient facts for relief. (See Pet. 66-68, ¶¶172-178; 95-98, ¶¶246-252; 101-103, ¶¶263-269.) Petitioner similarly has failed to plead grounds for penalty phase relief as to this claim.

Petitioner has not sustained his burden of pleading a prima facie case that counsel performed incompetently. As to the issue of neurocognitive impairments and mental illness, petitioner states in paragraph 442 (Pet. 179) that trial counsel actually did consult with a psychiatrist, Dr. Jose Moral, who "conducted preliminary interviews of petitioner and his sisters living in the United States." Although petitioner complains these interviews occurred "just two months before the penalty phase" (Pet. 179, ¶442), that means the interviews occurred prior to jury selection at the guilt phase, in that the penalty phase commenced on September 15, 1993 (9RT 1983), and voir dire started just over a month earlier on August 9, 1993 (1RT 170).

The petition fails to include any documentary evidence regarding Dr. Moral's conclusions or opinions, such as his reports or declarations, and there is no statement by trial counsel on why he did not present mitigating evidence related to mental impairments or illnesses. There could have been satisfactory explanations for counsel's action, such as his receipt of an unfavorable assessment by Dr. Moral (for example, that petitioner had antisocial personality disorder [see Pet. Exh. 126, PE1164, ¶38 (Dr. Llorente declaration that "some clinicians may be tempted to readily assign a diagnosis of antisocial personality disorder")]), or a concern that offering expert testimony might lead to the prosecution obtaining a court order for petitioner to be examined by a prosecution expert (see *People v. McPeters, supra,* 2 Cal.4th at p. 1190) who

might present a more persuasive different opinion. Because the reason for trial counsel's challenged conduct cannot be determined from the petition, and a reasonable explanation is possible, petitioner has failed to plead facts showing that trial counsel necessarily performed incompetently.

As for petitioner's drug and alcohol usage, the petition alleges trial counsel knew about it but failed to develop mitigating evidence "based on psychological and neurological factors." (Pet. 179, ¶¶441-442.) But counsel could have had a reasonable explanation, such as privileged information from petitioner himself that minimized his cocaine and alcohol use as a mitigation factor. (See Pet. Exh. 126, PE1154 [declaration of Dr. Llorente regarding probation report that petitioner used cocaine weekly since 1987, drank 5-6 cans of beer a week and sometimes 25 beers a day], Exh. 129, PE 1258-1260 [declaration of Dr. Stewart relating petitioner's statements that he generally drank one or two beers daily, sometimes drank five beers, and once every three months would go on a three-day drinking binge; only used cocaine when he was on a drinking binge; and referring to petitioner's statement in a March 7, 1994, probation report that he ingested cocaine and beer "occasionally"].) Since the reason for trial counsel's challenged conduct cannot be determined from the petition, and a satisfactory explanation is possible, petitioner has failed to plead a prima facie case of incompetent performance.

Moreover, petitioner has failed to plead sufficient facts to establish he was prejudiced by counsel's alleged incompetence in failing to present mitigating evidence of his neurocognitive impairments, mental illness, and drug and alcohol use. The same jury that convicted petitioner of four deliberate, premeditated murders committed on four different dates also heard penalty phase aggravating evidence that he was involved in three other killings (the Paramount homicides). In view of the mitigating evidence actually presented on lingering doubt and petitioner's childhood, and trial counsel's arguments to

the jury, it is not reasonably probable that there would have been a different penalty phase result if this additional mitigating evidence had been presented, even in the unlikely event that it went unchallenged by the prosecution.

g. (D)(7) And (D)(8) (Prejudice From Trial Counsel's Alleged Incompetence)

In paragraphs 447-459 (Pet. 180-185), which includes subclaims (D)(7)(a) through (D)(7)(d), and (D)(8), petitioner contends that trial counsel's incompetence in presenting the case in mitigation prejudiced him, because it allowed the prosecution to argue the following: that he liked to kill (¶¶448-450); that there was no evidence he was under the influence of extreme emotional or mental disturbance (¶¶451-453); that there was no evidence that the offenses were committed while he suffered from a mental disease or defect (¶¶454-455); and that there was insufficient evidence that the effects of intoxication caused the acts (¶¶456-457).

Petitioner has failed to plead a prima facie case for relief, because it is entirely speculative that additional mitigating evidence would have "defeated" these prosecution arguments. Plainly, the prosecution still could have argued that petitioner liked to kill, and that there was insufficient or unsubstantial evidence as to mitigating factors. It is equally speculative as to what effect the prosecution's argument had upon the jury, especially considering it had heard and believed the evidence surrounding petitioner's deliberate and premeditated murders of four victims when it convicted him at the guilt phase, and also heard aggravating evidence at the penalty phase that petitioner was involved in three more killings (the Paramount homicides). Petitioner has not demonstrated that it was reasonably probable the prosecution's remarks would have been "defeated," thus resulting in a different penalty outcome, but for trial counsel's incompetent presentation of mitigating evidence.

8. (E) (Failure To Request Jury Instructions)

In paragraph 460 (Pet. 185), petitioner asserts trial counsel was ineffective for failing to request certain jury instructions. The petition discusses the specific instructions in individual subclaims, which are answered below.

a. (E)(1) (Instruction Defining Life Without The Possibility Of Parole)

In paragraphs 461-466 (Pet. 186-187), petitioner alleges his trial counsel performed incompetently by failing to request a jury instruction on the meaning of life without the possibility of parole.

Counsel was not incompetent for failing to request the instruction, because the term is commonly understood by those familiar with the English language and thus is not required to be defined for the jury. (*People v. Ochoa* (1998) 19 Cal.4th 353, 457 [counsel was not ineffective for failing to request instruction defining life without the possibility of parole, since it was "a term that the jurors could readily understand"].)

b. (E)(2) (Instruction To Disregard Race, Nationality, And Immigration Status)

In paragraphs 467-471 (Pet. 188-189), petitioner does not propose any specifically worded instruction that trial counsel should have requested, but instead generally alleges that counsel was incompetent for failing to request "any special instruction at the close of trial to correct for the Prosecutor's inflammatory statements." (¶469.)

Petitioner has failed to plead facts establishing a prima facie case for relief. He fails to articulate any specifically worded instruction that trial counsel should have requested, and the trial court did instruct the jurors at the penalty phase that they must not be influenced by bias or prejudice against petitioner, and must not be swayed by public opinion or sentiment. (10RT 2297; see also 4CT 898.) An instruction that targeted only the prosecution's penalty phase

remarks regarding petitioner's background would have been subject to rejection as being argumentative, in that the defense mitigating evidence of the hardships suffered by petitioner as a child were inextricably tied to his upbringing in Mexico. In view of the instruction actually given, petitioner has failed to sustain his burden of pleading specific facts showing that his trial counsel performed incompetently in failing to request some additional unspecified instruction on race, nationality, and immigration status, and has failed to plead facts showing a reasonable probability of a different penalty phase outcome if such an instruction had been requested and given.

c. (E)(3) (Admonition Regarding Medical Examiner's Testimony)

In paragraphs 472-478 (Pet. 190-191), petitioner alleges his trial counsel performed incompetently by failing to request an instruction that the jury keep the medical examiner's testimony separate as to each of the four victims.

Early in the guilt phase, trial counsel had expressed concern about having one medical examiner testify about the autopsy of all four victims, in that it might affect the jury's ability to resolve each count separately. (4RT 992-998.) The trial court noted that it was an acceptable procedure for an expert other than the one who performed the autopsy to testify about the results (4RT 994), and that there was "absolutely no question" in anyone's mind that there were four separate gunshot victims, with the issue for the jury being whether petitioner was responsible for their deaths. (4RT 997.) When a medical examiner took the stand later during the trial, the prosecutor suggested at a sidebar conference that he might need to call the individual examiners who performed each of the four autopsies, but the trial court determined that was not necessary. (7RT 1605-1606.)

Trial counsel thereafter requested a jury instruction that did not focus on the medical examiner's testimony, but instead generally stated that there was no evidence presented on any one count that could be considered as proof of any other count, and the jury must deliberate on each count separately as though it was the only one to be decided. (4CT 870.) The court refused to give the requested instruction, stating that it was covered by another instruction the court intended to (and did) give. (7RT 1733, 8RT 1953; 4CT 858.)

Petitioner has failed to plead facts showing trial counsel performed incompetently, since counsel did request a special instruction that would have covered all of the evidence presented, including the testimony of the medical examiner. Petitioner also has failed to plead facts showing he was prejudiced by trial counsel's alleged incompetence, in that the trial court surely would have rejected a proposed instruction limited to the medical examiner's testimony on the same basis it rejected trial counsel's requested special instruction.

9. (F) (Failure To Move To Exclude Evidence)

In the subclaims listed in this section, petitioner alleges his trial counsel provided ineffective representation by failing to move to exclude certain evidence.

a. (F)(1) (Failure To Challenge Statements As Violating *Miranda*)

In paragraphs 479-494 (Pet. 192-199), petitioner alleges his trial counsel was ineffective for failing to challenge the admissibility of his statements to the police as having been obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] (*Miranda*). Petitioner has failed to plead facts warranting relief on this claim.

Statements made by petitioner to investigating officers on two different dates were introduced at trial. After the Paramount killings occurred on

February 22, 1990, petitioner went to a hospital to be treated for a gunshot wound. While he was there, he admitted to an investigator, after being advised of his constitutional rights and waiving them, that he shot the victim in count 3 (Rita Motel). (*People v. Manriquez, supra*, 37 Cal.4th at p. 566-567; see also 7RT 1554-1555; 1CT 221-228.) The emergency room physician who treated petitioner on that date testified that he assesses his patients' mental status, and his assessment was that petitioner was in pain but not extreme pain, his mental state appeared to be normal, and there was nothing wrong with his ability to communicate. (7RT 1558-1561.) Petitioner's use of an alias, and his change of story as to where he had been shot after hearing an emergency room nurse state that the investigating agency for a Paramount shooting would send an investigator quicker than the one responsible for Compton shootings (see *Manriquez, supra*, at p. 569) confirmed his mental acuity.

Petitioner's conduct toward the interrogating officer showed he was exercising free will rather than submitting to coercion. He told the officer that he "hurt a little" because of his wound, but was able to talk to him. (1CT 225.) He was asked about his involvement in the murders committed at Las Playas (count 1), Fort Knots (count 2), and Paramount (penalty phase), and he denied committing any of them. (1CT 225, 233, 235.) At first he also denied involvement in the Rita Motel murder, but admitted shooting the victim after the officer told him there were witnesses who saw him commit that killing. (1CT 225-226.) Petitioner minimized his culpability, saying he had only wanted to talk to the victim and suggesting the first shot went off accidentally. (1CT 226-227.) He also denied possession of the three phony cocaine bricks found in the motel room he had been occupying (1CT 231), although later investigation showed that his fingerprints were on two of the three bricks. (*People v. Manriquez, supra*, 37 Cal.4th at pp. 563-564.) He did not change his denial as to the other murders, and said he would talk to investigators about the

other murders if they could show proof he was involved in them. (1CT 233, 235-236.)

Two days later on February 24, 1990, when petitioner was in the county jail, investigators again advised him of his rights, after which petitioner admitted his involvement as to count 1 (Las Playas murder), although he claimed his companion was the one who shot the victim while he used a gun to hold others at bay. (*People v. Manriquez, supra*, 37 Cal.4th at p. 555; see also 7RT 1572-1577.)

Petitioner alleges that prior to investigators obtaining the February 22, 1990, *Mirandized* hospital statement that was introduced at trial, they had interrogated him in the emergency room without warning him of his rights, obtained incriminating statements, and never explained to him that these earlier non-*Mirandized* statements "would be inadmissible against him." (¶ 486-487.)

Petitioner has failed to plead facts showing that his trial counsel performed incompetently. The petition does not contain any statement by trial counsel as to why he did not make a motion to exclude petitioner's statements to the officers on the basis of *Miranda,* and there could be a satisfactory explanation. For example, counsel could have determined that a *Miranda* exclusion motion would be meritless because both of the admitted statements had been immediately preceded by constitutional advisements and valid waivers that dissipated any taint from any prior, unwarned statements. (See *Oregon v. Elstad* (1984) 470 U.S. 298, 314 [105 S.Ct. 1285, 84 L.Ed.2d 222] [prior statement taken in violation of *Miranda* does not preclude admitting a subsequent statement that is preceded by proper advisements and waiver]; *People v. Storm* (2002) 28 Cal.4th 1007, 1028-1029 [discussing and applying *Oregon v. Elstad, supra*].) Insofar as petitioner suggests his statements were involuntary because he was in pain from his gunshot wound (see ¶¶483, 492), such involuntariness must result from state action in order to preclude

admissibility under the Fifth Amendment, and there was no state action that caused the pain petitioner was feeling from being shot by unknown third parties. (See *Colorado v. Connelly* (1986) 479 U.S. 157, 165 [107 S.Ct. 5151, 193 L.Ed.2d 473]; see also *People v. Bradford* (1997) 14 Cal.4th 1005, 1041 [Fifth Amendment is not concerned with pressures to confess emanating from sources other than official coercion].) Trial counsel reasonably could have concluded that a motion to exclude petitioner's statements on this basis would have been rejected.

Because the petition does not include any explanation by trial counsel as to why he did not make a motion to exclude petitioner's statements under *Miranda*, and reasonable explanations are possible, petitioner has failed to plead a prima facie case of incompetent performance. (See *People v. Marlow, supra,* 34 Cal.4th at p. 144 [it is not deficient performance for a trial counsel to omit making a non-meritorious motion].) Moreover, petitioner has not pleaded facts showing counsel's alleged incompetence prejudiced him. Because the trial court properly could have denied a *Miranda* motion to exclude petitioner's statements for the reasons stated above, it is not reasonably probable that there would have been any different result if counsel had made the motion.

b. (F)(2) (Failure To Exclude Prejudicial Evidence)

1. (F)(2)(a) (Witnesses' Testimony About Their Fear)

In paragraphs 495-510 (Pet. 199-205), petitioner alleges his trial counsel was incompetent for failing to make a motion in limine to exclude, object to, or move to strike the testimony of witnesses Laura Lozano, Mario Medel, Deneen Baker, Ramiro Salazar, Nicholas Venegas, Adela Lopez, and Patricia Marin, about being fearful for their safety.

The petition does not include any explanation from counsel as to why he did not challenge this evidence, but there could have been a reasonable basis for

counsel's conduct. "Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible [citations]," and it is also within the trial court's discretion to admit a witness's explanation of the basis for that fear. (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) Trial counsel properly could have concluded that any challenge to the evidence would have been rejected, and he therefore was not incompetent in declining to make such a challenge. (See *People v. Marlow, supra*, 34 Cal.4th at p. 144 [no deficient performance when counsel omits making meritless objection]; see also *In re Seaton, supra,* 34 Cal.4th at p. 200, fn.3 [even where there is basis for objection, whether to object to inadmissible evidence is a tactical decision entitled to substantial deference].)

Petitioner thus has failed to plead a prima facie case that his trial counsel performed incompetently in failing to challenge the admissibility of this evidence. He also has failed to plead facts establishing he was prejudiced by the alleged incompetence, in that even if counsel had tried to exclude the evidence, the trial court properly could have admitted it over objection based on the authorities cited in the preceding paragraph. Petitioner therefore has failed to plead facts demonstrating it was reasonably probable that there would have been a different result if counsel had performed as he contends.

2. (F)(2)(b) (Gruesome Photographs)

In paragraphs 511-516 (Pet. 206-207), petitioner alleges his trial counsel was incompetent for failing to oppose the admission of photographs depicting the dead victims.

It cannot be determined from the petition why trial counsel did not object to these photographs, there being no declaration or statements by counsel on this issue, but there could have been a satisfactory explanation. For example, trial counsel could have reviewed the prosecution's photographs ahead of time and negotiated which ones could be admitted without a defense objection, or

counsel could have determined that the trial court would have admitted these photographs over any objection. Accordingly, petitioner has failed to plead a prima facie case that his trial counsel performed incompetently on this issue.

Petitioner also has failed to plead a prima facie case that he was prejudiced by the alleged incompetence. Photographs showing the manner in which the victim was killed are relevant to the determination of malice, aggravation and penalty, and a trial court's decision to admit them over objection is reviewed under the deferential abuse of discretion standard. (*People v. Burgener, supra,* 29 Cal.4th at p. 872.) Even if trial counsel had sought to exclude the photographs, petitioner has not demonstrated a reasonable probability that the outcome of the proceedings would have been any different, in that the prosecution appropriately sought their admission and the trial court properly could have admitted them over counsel's objection.

10. (G) (Failure To Seek Judicial Relief Based On Jury Foreperson Misconduct)

In paragraphs 517-522 (Pet. 208-209), petitioner alleges his trial counsel was incompetent for failing to seek judicial relief in the trial court after learning, from a post-verdict questionnaire he possessed prior to sentencing, that jury foreperson C.B. had "provided inaccurate responses on material issues on voir dire."

The petition does not include any declaration or statements by trial counsel as to why he did not raise the issue in the trial court, or any explanation of why petitioner was unable to obtain an explanation from trial counsel to include in this petition. Because a satisfactory explanation is possible - for example, that trial counsel contacted C.B. and determined there was no intentional concealment or actual bias in her failure to disclose incidents from her childhood when asked about violent crimes during voir dire, or reasonably concluded that a request for judicial relief would have been denied under the

law - petitioner has failed to plead facts establishing that his trial counsel necessarily performed incompetently in failing to raise the issue.

Further, for the reasons discussed in Claim 2, *post*, discussing the merits of this jury misconduct claim, petitioner has failed to plead facts demonstrating a reasonable probability that there would have been any different result if trial counsel had sought relief in the trial court. Accordingly, petitioner is not entitled to relief on this claim.

11. (H) (Failure To Request Additional Attorney Staffing)

In paragraphs 523–532 (Pet. 209-214), petitioner alleges his trial counsel was incompetent for failing to request additional attorney staffing to assist him in trying the case.

The petition contains no explanation by trial counsel as to why he did not request the assistance of another attorney. It is possible that counsel had a satisfactory explanation, such as a reasonable determination that, with paralegal and investigator assistance, he could provide effective representation without asking for another attorney. Although petitioner relies upon American Bar Association Guidelines in suggesting that the failure to request an additional attorney in a capital case conclusively and necessarily establishes incompetent performance, the relevant question under the federal constitution is whether counsel made objectively reasonable choices notwithstanding the guidelines. (See *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 479 [120 S.Ct. 1029, 145 L.Ed.2d 985].) This Court has never declared that the appointment of second counsel is mandatory in a capital case, and has rejected claims raised in other cases that defense counsel had been ineffective for failing to request the appointment of another lawyer. (See *People v. Alfaro* (2007) 41 Cal.4th 1277, 1304; *People v. Webster* (1991) 54 Cal.3d 411, 437.)

Since it cannot be determined from the petition why trial counsel did not request the assistance of another attorney, and a reasonable explanation is

possible, petitioner has failed to plead a prima facie case of incompetent performance. Petitioner likewise has failed to plead any specific facts demonstrating how he was prejudiced by trial counsel's alleged incompetence, and instead has relied on insufficient conclusory assertions. He is not entitled to relief on this claim.

12. (I) (Cumulative Prejudice)

In paragraph 533 (Pet. 214-215), petitioner alleges that trial counsel's incompetent performance, when considered with other claims raised in the petition, resulted in cumulative prejudice because there would have been a different result but for counsel's errors and omissions. As demonstrated above, petitioner has failed to plead a prima facie case for relief as to any of his claims that trial counsel rendered constitutionally inadequate representation that prejudiced him. It follows that he is not entitled to relief based on cumulative prejudice stemming from trial counsel's performance.

B. Claim 2 (Jury Misconduct)

In paragraphs 534-564 (Pet. 215-229), petitioner alleges he was denied a fair and impartial jury, in that jury foreperson C.B. was untruthful in filling out the juror questionnaire because she concealed material matters, such as the fact that she was a victim of violent crimes (including rape) when she was a child (¶¶535-549); shared "specialized knowledge" about what she had heard about farms in Mexico (¶¶550-552); and was "biased in favor of imposing the death penalty" but never disclosed this bias during voir dire (¶¶553-557). Petitioner also alleges that "[s]everal of the jurors were biased against Hispanic immigrants," resulting in prejudice to him. (¶¶558-563.)

The pretrial voir dire questionnaire in this case included the following question: "Have you or anyone close to you been the victim of a crime, reported or unreported?" (9CT Supp.I 2494.) Juror C.B. responded that her

roommate's home was "robbed" before they started living together. (*Id.* at p. 2495.) She checked "no" to the next three questions, which asked if she had "experienced or been present during a violent act, not necessarily a crime," whether she had ever seen a crime being committed, and whether she had "ever been in a situation where she feared being hurt or being killed as a result of violence of any sort." (*Ibid.*)

Petitioner alleges juror C.B.'s answers to these questions were untruthful because they failed to disclose "several unreported crimes" that are reflected in her post-trial questionnaire (Pet. Exh. 24) and declaration (Pet. Exh. 123). (Pet. 218, ¶539.) Petitioner cites C.B.'s statements in the 1993 post-trial questionnaire that she grew up on a farm where she "was beat, raped, & used for slave labor from the age of 5 thru 17" (Pet. Exh. 24, p. PE0234), and her statements in a 2007 declaration that she was "regularly beaten from age three to age seventeen" when she lived on a farm with a foster mother, "worked hard"on the farm, and was "raped" when she was five by a resident of a home for aged people that was on the farm property (Pet. Exh. 123, p. PE1142, ¶9). In her 2007 declaration, C.B. said that she could not recall if there had been any voir dire questions in this case regarding whether jurors had been the victims of crimes, because she had served as a juror in other cases where the question had been asked. (Pet. Exh. 123, p. PE1141.)

The petition and its attachments are silent as to whether Juror C.B. was directly asked about the discrepancy between her responses in the pretrial voir dire questionnaire and her post-trial statements. Although this Court might find it appropriate to issue an Order to Show Cause and order an evidentiary hearing on this issue, respondent offers the following observations.

This Court has noted that "[t]here is a serious question whether *honest* voir dire mistakes can ever form the basis for impeachment of a verdict." (*In re Hamilton* (1999) 20 Cal.4th 273, 300, original italics; see also *People v.*

Carter (2005) 36 Cal.4th 1114, 1208, fn. 47 [declining to address issue of whether juror's nondisclosure must be intentional].) However, "[w]hat is clear is that an honest mistake on voir dire cannot disturb a judgment in the absence of proof that the juror's wrong or incomplete answer hid the juror's actual bias. Moreover, the juror's good faith when answering voir dire questions is the most significant indicator that there was no bias." (*In re Hamilton, supra.*) This Court has stated that intentional concealment of material information by a potential juror may constitute implied bias, but inadvertent or unintentional failures to disclose require a determination of whether the juror was "sufficiently biased to constitute good cause" for disqualification. (See *People v. San Nicolas* (2004) 34 Cal.4th 614, 644.) Where a potential juror's concealment of material information during voir dire raises a presumption of prejudice, that presumption may be rebutted by "a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party." (*People v. Carter, supra,* at p. 1208.)

Assuming C.B described "several unreported crimes" in her post-trial statements (that she was raised by a foster mother on a farm and was "used for slave labor from the age of 5 thru 17," "regularly beaten from age three to age seventeen"and "raped" by a resident of a home for aged people when she was five), petitioner has failed to plead facts showing that juror C.B. intentionally concealed this information. C.B.'s 2007 declaration, which C.B. "willingly" provided to petitioner's attorneys (see Pet. Exh. 123, p. PE1140, ¶1), does not contain any explanation of why she did not reveal this childhood abuse when the pretrial questionnaire asked if she had been the victim of a crime or a victim of violence. Petitioner's failure to include this reasonably available information from a cooperative declarant is a significant omission as to any claim based upon intentional concealment.

Additionally, C.B.'s 2007 declaration made it clear that her childhood abuse came up in jury deliberation discussions on the weight to be given petitioner's childhood abuse, when other jurors who had "rough childhoods" also mentioned them in discussing the issue. (Pet. Exh. 123, p. PE1142, ¶¶9-10.) Viewed in this context, and also remembering that C.B. had no problem in revealing the undisclosed information to petitioner's trial counsel in a 1993 post-trial questionnaire, and to his habeas counsel in a 2007 declaration, it appears that she was not attempting to conceal the fact that she was a crime victim, but instead viewed her childhood experiences, including the rape, as being part of a "rough childhood" and not as criminal conduct.

Moreover, it is plain from the totality of C.B.'s voir dire answers that she was not attempting to conceal any bias. The pretrial questionnaire that C.B. filled out asked where she was born and raised (9CT Supp.I 2482), but did not ask for a description of her childhood or upbringing, and there was no such inquiry during the oral voir dire (see 2RT 279-281, 321-323). In the questionnaire, she stated that she believed crime had increased in recent years, due in part to the "lack of concern for others" (9CT Supp.I 2436); that she had served as an alternate juror 13 years earlier, was willing to be a juror, and was surprised that it took 13 years to call her to service again (id. at 2497); that she owned a handgun for security at home, "just in case" (id. at 2496); that she thought the death penalty was necessary in some situations and served a deterrent and punitive purpose (*id.* at 2501); and, regarding the concept of "an eye for an eye," that people were responsible for their actions and should be punished if they harmed someone unnecessarily (*id.* at 2505). To the question of what type of things she would want to know about a defendant in making the penalty decision, she wrote, "I am not sure at this time." (*Id.* at 2501.)

During the oral voir dire, petitioner's trial counsel asked C.B. about her uncertain response to the last question, and she stated she did not want to "make

a prejudgment of thinking, so it would depend on that which I heard." (2RT 281.) When counsel asked if she would be able to follow an instruction that told her that she "should look at the person's background or his mental condition or whatever" in determining penalty, she replied, "Absolutely." (2RT 281-282.)

The totality of C.B.'s voir dire responses showed she was not concealing any bias, and certainly not an unrevealed one, in not disclosing her own background. Her written and oral responses clearly signaled that she was not inclined to give a defendant's background much weight on the question of penalty even if she were instructed to consider that evidence, since she did not list a single thing that she would want to know about the defendant in making the penalty determination, and she made it clear that she believed people were responsible for their actions.

The nondisclosure by C.B. obviously did not affect her guilt phase decision, since there was no evidence or issue presented as to petitioner's background. At the penalty phase, C.B. was entitled to view evidence of petitioner's childhood abuse "through the prism of [her] own experiences." (See *People v. Wilson* (2008) 44 Cal.4th 758, 823 [no concealment by juror who was never asked whether he would interpret evidence of abuse "through the prism of his own experiences; indeed, we expect jurors to use their own life experiences when evaluating the evidence"].) She was entitled to give little or no weight to petitioner's childhood abuse as a mitigating factor based upon her own life experience, just as any other juror who suffered a "rough childhood" might have done. (See Pet. Exh. 123, p. PE1142, ¶¶9-10 [when the jury discussed petitioner's childhood abuse, C.B. and other jurors discussed their own "rough childhoods"].) Although there was penalty phase aggravating evidence that petitioner committed a rape, and C.B.'s childhood experiences included a rape, the circumstances were very different in that petitioner's victim

Patricia M. was not a child when he raped her and C.B. considered her own rape to be part of her difficult upbringing.[6/]

These facts and circumstances demonstrate there was no actual bias on the part of C.B., and also are sufficient rebut any implied bias flowing from C.B.'s failure to disclose "several unreported crimes" that occurred during her childhood. Accordingly, petitioner is not entitled to relief based upon C.B.'s alleged concealment of material information during the voir dire process.

As for petitioner's claim that juror C.B. improperly injected "specialized knowledge" about life on Mexican farms into the penalty phase deliberations, he has failed to plead a prima facie case for relief. Taken in context, it is plain that C.B. did not dispute the harsh conditions of such farms, but instead properly shared with the other jurors, "through the prism of [her] own experiences" (see *People v. Wilson, supra*, 44 Cal.4th at p. 823), how she evaluated the weight that should be given to childhood abuse mitigating evidence.

Petitioner's claim that C.B. had concealed a bias in favor of the death penalty likewise fails to state a prima facie case for relief. As summarized above, she made it abundantly clear in her pretrial questionnaire that she supported the death penalty, believed it served deterrent and punitive purposes, and thought that people were responsible for their actions and should be punished if they harmed someone unnecessarily. Petitioner cites to C.B.'s post-trial statements giving the reasons why she voted for death, but these reflect her subjective reasoning process and may not be used to impeach the verdict. (See

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6. Evidence Code section 1150 precludes the use of a juror's mental processes when assessing the validity of a verdict. Respondent therefore does not rely on C.B.'s post-trial questionnaire statements that her guilt phase decision was based upon what the witnesses said (see Pet. Exh. 24, p. PE0230), and that aggravating penalty phase evidence of a prior rape and petitioner's involvement in the three Paramount murders were "very" important to her penalty determination. (Pet. Exh. 24, p. PE0231.)

Evid. Code, § 1150, subd. (a); *People v. Steele* (2002) 27 Cal.4th 1230, 1260-1261.)

Even if these statements could be considered, petitioner's claim must be rejected. C.B.'s post-trial statement that she voted for death because she "cannot allow a man like [petitioner] the remotest possibility of ever being on the street again" (Pet. 225), reflects nothing more than an entirely appropriate opinion reached by this juror after hearing the evidence and convicting petitioner of four separate murders, and then hearing additional penalty phase evidence that he was involved in the three Paramount murders as well. Her post-trial statement that she understood life without parole "meant he would never be paroled, but I also felt that there was always an outside chance that a prisoner would somehow be released or go free" (Pet. 225), likewise reflected no misconduct. As noted in *Steele*, although life without parole means just that, no one can predict the future with certainty and guarantee that a person will not be paroled or otherwise released, and this is a matter of common knowledge. (*People v. Steele, supra,* 27 Cal.4th at pp. 1264-1265.)

Finally, petitioner fails to state a prima facie case for relief on his claim that unidentified jurors were "biased against Hispanic immigrants," based upon juror C.B.'s declaration that during deliberations (apparently at the penalty phase), "there was an occasional comment" that petitioner was "not even a citizen and he comes over here and kills people." (Pet. 227.) This was not misconduct but a simple statement of what the evidence showed, that petitioner came to this country from Mexico, murdered the four victims in the charged counts and additionally was involved in the three Paramount murders. The comments did not demonstrate any juror was biased against immigrants generally.

C. Claim 3 (Improper Use Of Peremptory Challenges)

In paragraphs 565-572 (Pet. 229-231), petitioner seeks relief based on the prosecution's alleged improper race-based use of peremptory challenges. Petitioner failed to raise this objection at trial, and thus has forfeited this issue on habeas corpus. (See *In re Seaton, supra,* 34 Cal.4th at pp. 199-201[failure to object at trial generally forfeits claim both on appeal and habeas]; see also *People v. Anderson* (2001) 25 Cal.4th 543, 568 [failure to raise *Wheeler/Batson* objection at trial forfeits issue on appeal].)

Moreover, as noted in the response to Claim 1(A)(1), *ante*, the record fails to support petitioner's claim that the prosecutor improperly exercised his peremptory challenges. As noted in the response to that claim, there were two Hispanics who served on his jury, so plainly the prosecutor was not using his peremptory challenges to exclude every Hispanic from the jury. According to the petition, the prosecutor used only 13 of his 20 challenges, so he could have excluded the two seated Hispanics if his intent was to prevent Hispanics from sitting on petitioner's jury. (See Pet. 37, ¶106; Code of Civ. Proc., § 231, subd. (a) [each party has 20 peremptory challenges in capital case].) Because the prosecutor was never asked to explain his challenges, and might well have provided entirely acceptable race-neutral reasons, petitioner has failed to plead a prima case that he is entitled to relief on this ground.

D. Claim 4 (Improper Joinder Of Counts)

In paragraphs 573-585 (Pet. 231-238), petitioner alleges he is entitled to relief based upon the improper joinder of the four charged murders. This claim is barred on habeas corpus because petitioner raised the issue on direct appeal, and it was rejected by this Court. (See *People v. Manriquez, supra*, 37 Cal.4th at pp. 571-576; see also *In re Waltreus* (1965) 62 Cal.2d 218, 225 [generally barring habeas claim that was raised and rejected on appeal].) Moreover, petitioner's reliance on two juror declarations does not assist his argument,

since they reflect the inadmissible mental processes of these jurors. (See Evid. Code, § 1150, subd. (a); *People v. Steele, supra,* 27 Cal.4th at pp. 1260-1261.) The claim also fails on its merits, for the reasons stated in the opinion on direct appeal.

E. Claim 5 (Prosecutorial Misconduct During Opening Statement And Final Arguments

In paragraphs 586-596 (Pet. 238-252), petitioner contends the prosecutor committed misconduct in remarks he made to the jury during opening statement and final arguments.

This claim is based on remarks made by the prosecutor that were reported in the reporter's transcript on direct appeal. Insofar as petitioner's complaints could have been raised on direct appeal even without any objection at trial (see *People v. Boyette* (2002) 29 Cal.4th 381, 432 [discussing exceptions to the rule requiring objection to prosecutor's allegedly improper remarks]), this contention should be barred on habeas corpus. (See *In re Dixon* (1953) 41 Cal.2d 756, 759 [generally barring habeas claim that could have been, but was not, raised on direct appeal].)

Moreover, the lack of any trial objection generally forfeits a claim both on direct appeal and on habeas corpus. (*In re Seaton, supra,* 34 Cal.4th at pp. 199-201.) At trial, petitioner failed to object to any of the remarks he now challenges, and thus has forfeited this claim of prosecutorial misconduct on habeas corpus. His conclusory assertion that trial counsel was incompetent for failing to object should be summarily rejected, since the only mention of ineffective assistance is in the argument title (Pet. 238), and there are no factual allegations made in this claim to support a grant of relief on this basis.

The prosecutorial misconduct claim also fails on its merits. The prosecutor's guilt and penalty phase arguments appropriately focused on matters raised by the evidence, and his challenged comments were either proper

or brief and did not constitute a pattern of conduct so egregious that it infected the trial with such fundamental unfairness as to deny petitioner due process; did not involve the use of reprehensible or deceptive methods to persuade the jury; and did not present any likelihood that the jury construed the remarks in an objectionable manner. (See *People v. Prieto* (2003) 30 Cal.4th 226, 260 [discussing when prosecutor's remarks to the jury violate state and federal law].)

F. Claim 6 (Prosecution's Failure To Disclose Material Exculpatory Evidence)

In paragraphs 597-599 (Pet. 252-253), petitioner alleges that the prosecution failed to disclose material exculpatory evidence, in violation of his due process rights under *Brady v. Maryland* (1973) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] (*Brady*). His allegations of specific *Brady* violations follow, and respondent answers them as noted below.

1. (A) (Police Report Of Alternate Suspect In Count 1)

In paragraphs 600-608 (Pet. 254-258), petitioner alleges the prosecution failed to disclose a police report that named an "alternate suspect" as to count 1, Jesus Manzano.[7] (Pet. 257, ¶600.) Petitioner claims that this was exculpatory evidence because petitioner told the police his companion, Francisco Manzano, actually shot Miguel Garcia, and "[t]he names 'Manzo' and 'Manzano' are very similar, and Manzano is possibly a nickname or alias for Manzo." (Pet. 257, ¶607.)

Petitioner fails to plead a prima facie case for relief, in that he has failed to demonstrate this evidence was exculpatory. Insofar as the exculpatory nature of this evidence relies on petitioner's statement to the police that Garcia was shot by petitioner's companion Francisco Manzano, the police report reflects

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7. Petitioner raised this alternate suspect issue in a prior claim that his trial counsel performed incompetently. (Pet. 59-61, ¶¶151-155.)

that the alleged alternate suspect was Jesus Manzo Andrade, a completely dissimilar name. (See Pet. Exh. 4, at p. PE0049.) Moreover, the true name of the shooter was irrelevant because in his statement, petitioner admitted using a gun "to hold the other patrons at bay while the shooting occurred." (*People v. Manriquez, supra*, 37 Cal.4th at p. 555.) Under petitioner's version of the events, he still would be guilty for aiding and abetting the murder, regardless of the name of his companion.

Further, petitioner's pleading is deficient as to materiality, since his allegations fail to demonstrate a reasonable probability that the result of the proceeding would have been different if the evidence had been disclosed. (See *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 7-8 [discussing materiality component of *Brady*].) Petitioner has not pleaded facts showing Andrade was at Las Playas when Garcia was shot, or that a red Camaro that witnesses saw leaving the scene was his red Camaro. Andrade's connection to the murder therefore is speculative under the facts pleaded in the petition, and are insufficient to justify relief. Even if Andrade had been connected to the crime, it is not reasonably probable that there would have been any different result, in that the name of petitioner's companion was immaterial because he still would be liable as an aider and abettor to murder under his version of the events.

2. (B) (Evidence Of Other Suspects In Count 2)

In paragraphs 609-614 (Pet. 258-259), petitioner alleges the prosecution failed to disclose evidence that they had "investigated several suspects in addition to Petitioner" regarding the Fort Knots shooting. Petitioner cites to the preliminary hearing testimony of Deneen Baker that the police brought "some men up to the bar" a few days after the shooting, but she did not identify any of them. (Pet. 258, ¶610.) He claims that the prosecution's failure to provide further information about these other suspects violated the *Brady* disclosure

requirement.

Petitioner has failed to plead facts warranting relief. Absent facts showing that any of these other unnamed suspects was identified as the shooter, the evidence was not exculpatory. Petitioner makes a conclusory claim that the evidence would have shown "the police failed to follow proper procedures in conducting the field show up" (Pet. 259, ¶613), but does not make specific factual allegations identifying these procedures, or how the police violated them. Accordingly, this claim should be rejected.

3. (C) (Persons Who Did Not Identify Petitioner From Photo Display In Count 2)

In paragraphs 615-618 (Pet. 260-261), petitioner alleges the prosecution violated its *Brady* disclosure duty by failing to provide the defense with the names of witnesses who viewed the photographic display as to the Fort Knots murder, but failed to identify him.[8/]

Petitioner has failed to plead facts warranting relief. He has not alleged how the failure of others to identify him would have undermined the identifications of those witnesses who did identify him at trial, and his conclusory assertion to the contrary is devoid of facts necessary to establish the exculpatory nature of this evidence. There is no indication that these unnamed other people stated petitioner was not the shooter, so their inability to identify him did not establish petitioner's innocence or impeach those witnesses who did identify him. For example, the passage of time between the shooting and the photographic display could have resulted in a witness no longer being able to identify anyone as being the shooter, or these other witnesses might not have had the same opportunity or vantage point to view the shooter.

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8. Petitioner made a related claim in arguing his trial counsel performed incompetently. (Pet. 79-81, ¶¶ 201-204.)

Moreover, given the composite drawing of the shooter that witness Barbara Quijada prepared for the police, which looked so similar to petitioner that it resulted in his photograph being placed in the display (5RT 1201-1204, 6RT 1441, 1450), it is not reasonably probable that there would have been any different outcome at trial even if petitioner had attempted to undermine the testifying witnesses' identifications by offering unspecified evidence of others who failed to identify him for unknown reasons.

4. (D) (Impeaching Evidence As To Witnesses In Counts 2 And 4)

Paragraph 619 (Pet. 261) is the introduction to petitioner's claim that the prosecution violated its *Brady* disclosure obligations by failing to provide impeaching evidence of prosecution witnesses.[9/] Petitioner then makes specific allegations as to three prosecution witnesses, as follows:

a. (D)(1) (Barbara Quijada - Count 2)

In paragraphs 620-628 (Pet. 261-263), petitioner alleges that the prosecution failed to disclose a prior felony conviction of Barbara Quijada, the prosecution witness who worked with a police sketch artist to create a composite drawing of the Fort Knots shooter, which led to petitioner's identification and conviction of count 2. Petitioner alleges that in 1990, Quijada was convicted of felony driving under the influence, after admitting that she suffered three prior convictions for driving under the influence.

Assuming without conceding that the Ventura County prior felony conviction alleged in the petition belonged to the same Barbara Quijada who testified in this case, petitioner has failed to plead a prima facie case for relief

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9. Petitioner made related claims as to each of these witnesses in arguing his trial counsel performed incompetently. (Pet. 81-84, ¶¶205-216 [Barbara Quijada]; Pet. 84-85, ¶¶217-222 [Deneen Baker]; Pet. 104-107, ¶¶270-276 [Detective David Arellanes].)

under *Brady*. Even if the prior conviction evidence had been offered and admitted at trial, it is not reasonably probable there would have been any different outcome at trial as required to satisfy *Brady's* materiality requirement. Quijada was employed as a waitress and dancer at Fort Knots, and testified that she had nothing to drink prior to petitioner shooting the victim. (5RT 1184-1185.) Her composite sketch, which was prepared shortly after the shooting (5RT 1201-1204), looked so much like petitioner that it led the police to create a display that included his photograph, which in turn led to his identification by Quijada and other witnesses in count 2. (6RT 1439-1441, 1450; see also 5RT 1242.) Under these circumstances, Quijada's composite sketch of the shooter made her identification of petitioner unassailably credible, especially considering her identification was corroborated by other witnesses who viewed the photo display. Because petitioner failed to sustain his burden of pleading facts establishing the materiality required under *Brady* as to Quijada's undisclosed prior felony conviction, this claim should be rejected.

b. (D)(2) (Deneen Baker - Count 2)

In paragraphs 629-631 (Pet. 263-264), petitioner alleges the prosecution violated its obligation under *Brady* by failing to disclose evidence that Deneen Baker, a prosecution witness in count 2, had been convicted of misdemeanor petty theft.

Insofar as petitioner states that this "prior conviction" would have cast doubt on Baker's credibility (Pet. 264, ¶630), misdemeanor prior convictions themselves are inadmissible to impeach, although the conduct underlying the conviction may be admissible, subject to the trial court's discretion. (See *People v. Wheeler, supra,* 4 Cal.4th at p. 297, fn. 7.)

Even if the evidence had been disclosed, and the trial court allowed petitioner's counsel to present evidence that Baker had committed petty theft, it was not reasonably probable that there would have been any different result

at trial. This impeaching evidence had only the slightest, if any, relevance on the credibility of Baker's testimony, which was corroborated by Quijada's composite sketch and the testimony of other witnesses who identified petitioner at trial. Petitioner failed to sustain his burden of pleading facts that established the required materiality of this undisclosed evidence, and this claim should be rejected.

c. (D)(3) (Detective David Arellanes - Count 4)

In paragraphs 632-636 (Pet. 264-265), petitioner alleges the prosecution committed a *Brady* violation by failing to disclose alleged impeaching evidence as to Detective David Arellanes, whose testimony at trial focused on his contact with prosecution witness Adela Lopez Ontiveros. Petitioner cites a temporary restraining order that the detective's wife obtained, which described his alleged violent threats against her and other "bizarre behavior." Petitioner claims this evidence would have raised doubts "about the integrity of his investigation into the Mazatlan shooting and the propriety of his dealings with witnesses to the shooting," especially Adela Lopez Ontiveros, and also would have "undermined" his testimony that he followed regular police procedures in obtaining statements from her. (Pet. 265, ¶634.)

Petitioner has failed to plead facts warranting relief. There is no showing that the evidence was exculpatory, because the petition at most contains only unsupported speculation that the detective's domestic problems affected his investigation of count 4. To the extent that petitioner claims it would have undermined his credibility by showing he failed to follow regular police procedures, the petition fails to identify what those procedures were, and in what manner the detective failed to follow them. Regarding any alleged impropriety in the detective's contact with Adela Lopez Ontiveros, she never indicated any such impropriety occurred, either at trial or in this habeas proceeding, and the jury was able to weigh her credibility directly since she

testified at trial.

Moreover, this claim should be rejected on the ground that the alleged impeaching evidence was not material within the meaning of *Brady*. It is inconceivable that the trial court would have admitted this evidence for impeachment, given its collateral nature, virtually non-existent probative value, and the potential for undue consumption of time in litigating whether the conduct actually occurred, and if it did, whether it affected the detective's investigation. Even if the evidence had been admitted, there is no reasonable probability that there would have been any different outcome at trial, given the de minimis relevance of this evidence on the issue of the detective's contact with Adele Lopez Ontiveros.

5. (E) (Videotaped Hospital Interviews Of Petitioner)

In paragraphs 637-641 (Pet. 266-267), petitioner alleges that the prosecution violated its *Brady* obligation by suppressing a videotape "showing one or more police interviews of Petitioner in the hospital." (Pet. 266, ¶637.) In support of this claim, petitioner points to the end of a trial exhibit introduced by the prosecution at the penalty phase, a videotape of the Paramount murder scene, which contains a brief image of petitioner in a hospital bed. (Pet. Exh. 73; see 9RT 1996-2000.)

Petitioner fails to state a prima facie case for relief. Although he alleges the prosecution failed to disclose videotapes of him in the hospital, the petition contains no statements by trial counsel or any other member of the defense team regarding whether the defense received such evidence, and no explanation of why there is no supporting documentation on this point. Petitioner's failure to support his factual allegation with this reasonably available evidence warrants rejection of this claim. (See *People v. Duvall, supra*, 9 Cal.4th at pp. 474-475.)

Petitioner also has failed to plead facts establishing what was videotaped, i.e., whether it was just petitioner's physical presence and condition

as depicted in Exhibit 73 of the petition, or whether any interviews of him were also videotaped. For example, the petition includes the declaration of Kathleen Estavillo (Pet. Exh. 125), the emergency room nurse who treated petitioner. Although this declaration describes the arrival of the investigators at the hospital and their questioning of petitioner, it is silent on the issue of whether there had been any videotaping of the questioning.

Even assuming there existed videotapes of petitioner's actual interrogations, petitioner has offered only speculation but no facts showing that they were exculpatory or material or in conflict with investigative reports or the testimony presented at trial about petitioner's hospital statements. His claim that the prosecution committed a *Brady* violation should be rejected for failure to plead specific facts entitling him to relief.

6. (F) (Hospital Records)

In paragraphs 642-646 (Pet. 267-268), petitioner alleges the prosecution "suppressed medical records of Petitioner of his treatment at Charter Suburban Hospital following the Paramount killings." (Pet. 267, ¶642.)

Petitioner fails to plead facts entitling him to relief for this alleged *Brady* violation. Petitioner makes a conclusory assertion that the prosecution suppressed his hospital records, but has not pleaded specific facts showing that it was ever in possession of those records. Moreover, at the time of petitioner's trial in 1993, Health and Safety Code section 1795 et seq. provided him with the right of access to all of his own hospital records.

Even assuming the prosecution possessed the hospital records that were unavailable to petitioner, petitioner has not pleaded facts to show that the records were exculpatory and material within the meaning of *Brady*. Petitioner asserts that if the hospital records had been disclosed, trial counsel would have been able to exclude his statements under *Miranda* on the basis that he was incapable of validly waiving his rights. But, as previously noted in the response

to petitioner's claim that his trial counsel was incompetent for failing to bring a *Miranda* motion (Pet. 192-199, ¶¶479-494), the assessment by the doctor who treated petitioner was that his mental state was normal, there was nothing wrong with his ability to communicate, and although he was in some pain, he was not in extreme pain. (7RT 1558-1561.) Petitioner's conduct in using an alias and changing his story about where he was shot to delay being interviewed by investigators (see *People v. Manriquez, supra*, 37 Cal.4th at p. 569) confirmed his mental acuity. Petitioner's attitude toward the interrogating officers showed he was exercising free will rather than submitting to coercion, in that he said he "hurt a little" but was able to speak to them, denied involvement in any crime until confronted by the fact that there were witnesses who saw him shoot the victim at the Rita Motel, and attempted to minimize his culpability by suggesting the first shot was accidental, and he intended only to talk to the victim. (1CT 225-236.) Petitioner has failed to plead specific facts showing that his possession of the hospital records would have resulted in a different outcome on this record.

Insofar as petitioner suggests he was incapable of waiving his constitutional rights because he was in pain from his gunshot wound (see ¶¶644), which the hospital records could have supported, he has failed to plead facts establishing this would have affected the outcome of a *Miranda* motion. The involuntariness of a statement must result from state action to justify precluding admissibility under the Fifth Amendment, and there was no state action that caused the pain petitioner was feeling from being shot by unknown third parties. (See *Colorado v. Connelly, supra,* 479 U.S. at p. 165; see also *People v. Bradford, supra,*14 Cal.4th at p. 1041 [Fifth Amendment is not concerned with pressures to confess emanating from sources other than official coercion].) Petitioner has not pleaded facts showing he is entitled to relief for a *Brady* violation under this theory.

7. (G) (Forensic Documentation)

In paragraphs 647-653 (Pet. 268-270), petitioner alleges the prosecution violated its *Brady* obligation by suppressing "documentation relating to forensic analyses that could have been used to cross-examine forensic experts presented by the prosecution." (Pet. 268, ¶647.) Although the claim uses the plural in describing forensic "experts," petitioner's specific allegations refer only to the firearms examiner who testified that the firearms evidence recovered in count 1 (Las Playas) showed the bullets were fired from the same gun found on petitioner several weeks later. The same expert testified a different gun had been used both in count 4 (Mazatlan) and the Paramount murders.[10/]

Petitioner has made a conclusory assertion that the prosecution suppressed forensics reports, without alleging any facts to show such reports actually existed. In fact, petitioner seems to acknowledge there may have been no reports to disclose, since he qualifies his claim by using phrases such as "to the extent that any such documentation existed" (Pet. 269, ¶647), and "to the extent it [forensic documentation] existed" (Pet. 270, ¶652).

Even assuming such reports existed, petitioner has failed to allege facts showing that they would have been inconsistent with the expert's trial testimony. Although petitioner cites to a declaration from a defense expert saying that there should have been documentation supporting the prosecution expert's conclusions (Pet. Exh. 128), the declaration does not state that the prosecution expert's ultimate conclusions were erroneous.

This claim should be rejected since petitioner has failed to allege specific facts showing that any documentation existed, or if it did, that it contained exculpatory and material evidence that would have undermined the trial

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10. Petitioner raised similar claims earlier in asserting his trial counsel performed incompetently in failing to rebut this testimony by the prosecution's firearms expert. (See Pet. 70-72, ¶¶182-189; 109-111, ¶¶281-287.)

testimony of the prosecution's expert. Petitioner thus has failed to plead grounds for relief within the meaning of *Brady*.

8. (H) (Ineffective Assistance Of Counsel - *Brady* Claims)

In paragraph 654 (Pet. 270), petitioner alleges his "Trial Counsel and/or Appellate Counsel" were constitutionally ineffective for failing to raise these *Brady* issues. Because petitioner has failed to allege specific facts demonstrating that counsel performed below the standard expected of reasonably competent counsel, and because he suffered no prejudice from any incompetent performance in that he has not pleaded grounds entitling him to relief for any *Brady* violation as individually discussed above, this claim should be rejected.

G. Claim 7 (Ineffective Assistance Of Appellate Counsel - Paramount Videotape)

In paragraphs 655-658 (Pet. 271-272), petitioner alleges his appellate counsel performed incompetently in failing to raise an appellate claim that the trial court erred in admitting a videotape of the Paramount murder scene at the penalty phase. Petitioner argues that trial counsel had objected to the videotape, and there was no valid reason for appellate counsel to omit this issue on appeal.

Petitioner has failed to plead a prima facie case for relief. A claim that appellate counsel was incompetent is analyzed under the same *Strickland* standard applicable to trial counsel. Petitioner must show appellate counsel's performance was objectively unreasonable, and also must demonstrate he suffered prejudice from it, i.e., a reasonable probability that but for counsel's deficient performance, the result of the appeal would have been different. (*Smith v. Robbins* (2000) 528 U.S. 259, 285-286 [120 S.Ct. 746, 145 L.Ed.2d 756]; *People v. Osband* (1996) 13 Cal.4th 622, 664.)

Petitioner failed to plead facts showing that appellate counsel performed incompetently in failing to raise an appellate claim regarding the admissibility of the Paramount crime scene videotape. Appellate counsel "need not (and should not) raise every nonfrivolous claim" on appeal, but may select those that offer the greatest likelihood of success. (*Smith v. Robbins*, *supra*, 528 U.S. at p. 288, citing *Jones v. Barnes* (1983) 463 U.S. 745 [103 S.Ct. 3308, 77 L.Ed.2d 987].) Given the broad discretion of the trial court in ruling on the admissibility of relevant evidence (see *People v. Gurule* (2002) 28 Cal.4th 557, 624), counsel did not perform incompetently by failing to raise this issue on appeal. Moreover, because the trial court was within its discretion in admitting the challenged videotape evidence (see *People v. McDermott* (2002) 28 Cal.4th 946, 998 [finding 18-minute videotape of the crime scene was properly admitted]), petitioner was not prejudiced by appellate counsel's failure to raise this claim since it would have been rejected. Even if the trial court had erred in admitting the videotape because it was cumulative of other evidence of the three Paramount homicides, petitioner would not be entitled to relief since it is not reasonably probable that there would have been any different result on appeal, in that there was no reasonable possibility that exclusion of the videotape would have resulted in any different verdict.

H. Claim 8 (Violation Of Rights In Admitting Petitioner's Statements)

In paragraphs 659-666 (Pet. 273-275), petitioner alleges he is entitled to relief because his due process rights were violated at trial by the admission of his statements to investigators.

This claim should be rejected because petitioner failed to challenge the admissibility of his statements at trial, thus forfeiting this issue for both the direct appeal and habeas corpus. (See *In re Seaton, supra,* 34 Cal.4th at pp. 199-201 [lack of objection at trial generally forfeits claim on appeal and habeas corpus]; *People v. Boyette, supra*, 29 Cal.4th at p. 430 [defendant's failure to

object at trial forfeited claim that trial court's error violated his rights "to due process, to a fair trial by an impartial jury, to a jury trial, to confront the witnesses against him, and to a reliable determination of guilt beyond a reasonable doubt and a reliable, individualized, and non-arbitrary and capricious sentencing determination"]; *People v. Hart* (1999) 20 Cal.4th 546, 627, fn. 27 [failure to object at trial that defendant's statements violated various constitutional rights forfeited claim on appeal].)

Petitioner made an earlier claim in the petition that his trial counsel was ineffective for failing to make a *Miranda* motion to exclude his statements. (Pet. 192-199, ¶¶479-494). He also alleged that the prosecution's alleged suppression of his hospital records deprived trial counsel of information that could have been used to exclude his statements under *Miranda*. (Pet. 267-268, ¶¶642-646). For the reasons stated in the response to those claims, petitioner has failed to plead facts showing that the court would have granted a motion to exclude his statements. Because petitioner has failed to plead sufficient facts showing his statements were improperly admitted, which is a necessary premise for this claim, he is not entitled to relief.

Petitioner's allegation of incompetent performance by trial and appellate counsel in failing to raise this claim (Pet. 275, ¶666) also should be rejected, in that it is not reasonably probable that there would have been any different outcome if this baseless issue had been raised at trial or on appeal.

I. Claim 9 (State Misconduct)

In paragraph 667 (Pet. 275), petitioner sets out the introduction to this claim, alleging that he was denied various constitutional rights because of state misconduct. Respondent answers the specific claims below.

1. (Prior Testimony Of Angelica Contreras - Count 1)

In paragraphs 668-673 (Pet. 275-278), petitioner alleges the prosecution committed misconduct by presenting the videotaped preliminary hearing testimony of Angelica Contreras at trial. Petitioner made a related claim earlier in the petition, alleging his trial counsel was incompetent for stipulating to the admissibility of this witness's videotaped prior testimony. (Pet. 54-58, ¶¶138-149.)

Petitioner has forfeited this claim on appeal and habeas by failing to object to the alleged misconduct at trial, and stipulating to the admissibility of the videotaped prior testimony. (*In re Seaton, supra*, 34 Cal.4th at pp. 199-201.) He also failed to object to the videotape's admission on the basis of the various constitutional provisions he now cites, and has forfeited those claims as well. (See *People v. Boyette, supra*, 29 Cal.4th at p. 430 [defendant's failure to object at trial forfeited claim that trial court's error violated his rights "to due process, to a fair trial by an impartial jury, to a jury trial, to confront the witnesses against him, and to a reliable determination of guilt beyond a reasonable doubt and a reliable, individualized, and non-arbitrary and capricious sentencing determination"].) Moreover, as noted in the response to the earlier claim, petitioner's trial counsel stipulated to admitting this witness's prior testimony because portions of it assisted the defense. (See 4RT 817-818.) Finally, insofar as this claim rests upon the allegation that the prosecution failed to show due diligence in obtaining the personal presence of this witness for trial, the record supported the trial court's finding that there had been a satisfactory showing of due diligence. (See 4RT 815; see also 4RT 809-814.)

Petitioner's conclusory suggestion that appellate counsel was incompetent "[t]o the extent" he was "required and/or permitted" to raise the misconduct issue on appeal (Pet. 277-278, ¶673) should be rejected for failure to plead facts warranting relief. Petitioner has not shown appellate counsel

performed below professional norms in failing to raise this meritless, forfeited claim, and he has failed to plead facts demonstrating that there would have been any different result on appeal if appellate counsel had raised the issue. (See *Smith v. Robbins, supra,* 528 U.S. at pp. 285-286; *People v. Osband, supra,* 13 Cal.4th at p. 664.)

2. (Inflammatory And Prejudicial Evidence)

In paragraphs 674-685 (Pet. 278-282), petitioner alleges the prosecution improperly presented inflammatory and prejudicial evidence, as described in earlier claims of the petition. Specifically, in subdivision (2)(a) (¶¶677-681), petitioner argues it was improper to elicit testimony from six witnesses about "their alleged fear of Petitioner" (Pet. 279, ¶678, citing Pet. Claim 1(F)(2)(a)). In subdivision (2)(b), petitioner alleges the prosecution improperly introduced "several unduly graphic photographs" of the victims (Pet. 281, ¶683), as described in Claim1(F)(2)(b) of the petition.

Although petitioner calls this a state misconduct claim, it is actually a claim challenging the admissibility of evidence admitted at trial. It should be rejected since habeas corpus does not "lie to review questions concerning the admissibility of evidence." (*In re Harris* (1993) 5 Cal.4th 813, 826.)

Moreover, petitioner did not object at trial to the admissibility of the challenged evidence. In fact, the failure to object was the basis for his earlier ineffective assistance of trial counsel claims. (See Pet. Claims 1(F)(2)(a) and 1(F)(2)(b).) Petitioner thus has forfeited this claim on appeal and habeas. (*In re Seaton, supra*, 34 Cal.4th at pp. 199-201 [failure to object at trial generally forfeits claim on appeal and habeas].)

Petitioner also has failed to plead facts to support his claim that there was misconduct. As noted in response to the earlier claims, evidence that a witness is afraid to testify or fears retaliation is relevant to the credibility of that witness and is therefore admissible (see *People v. Burgener, supra,* 29 Cal.4th

at p. 869), and the prosecution appropriately introduced the challenged photographs at trial since they were relevant to the determination of malice, aggravation and penalty (*id.*, at p. 872).

Insofar as petitioner makes the conclusory assertion that appellate counsel was incompetent "[t]o the extent" that he "was required and/or permitted" to raise the issue on appeal (Pet. 280, ¶681; 282, ¶685), petitioner has not pleaded facts establishing that appellate counsel performed below professional norms in failing to raise these meritless, forfeited claims on appeal, or that there would have been any different result on appeal if the claims had been raised. (See *Smith v. Robbins, supra,* 528 U.S. at pp. 285-286; *People v. Osband, supra,* 13 Cal.4th at p. 664.)

3. (Pattern Of Misconduct)

In paragraphs 686-690 (Pet. 282-283), petitioner claims that the prosecution "secured false and/or misleading testimony and evidence" by "coercing, threatening, intimidating, tampering with, frightening, and/or coaching witnesses." (Pet. 282, ¶686.) However, the only facts pleaded in support of this completely baseless assertion relate to one witness, Kathleen Estavillo, and they do not provide any grounds for relief.

Petitioner has submitted a declaration from Estavillo in support of his petition. (Pet. Exh. 125.) This declaration states that investigators appeared to be concerned about her personal safety, and warned her to be careful. It contains nothing whatsoever to indicate they engaged in coercion, threats, intimidation, tampering, frightening, or coaching of Estavilla. More significantly, the declaration contains nothing showing that Estavillo's testimony at trial was untruthful or otherwise affected by the investigators's warnings. The petition alleges that the misconduct resulted in Estavillo failing to provide evidence that she had witnessed petitioner being handcuffed to the hospital bed. (Pet. 283, ¶689.) But neither Estavillo's declaration, nor any

other pleaded facts, support the claim that she intentionally withheld this evidence that she was never asked about at trial, or that she failed to disclose it because of her fear. To the contrary, the transcript of her trial testimony showed no reluctance by her to answer any questions posed on direct and cross examination. (9RT 2070-2077.)

Petitioner plainly has failed to plead facts establishing a pattern of state misconduct; failed to plead facts establishing there was any misconduct as to Estavillo; and failed to plead facts showing that Estavillo's pretrial statements and testimony were affected by the alleged misconduct. Accordingly, this claim should be rejected.

Insofar as petitioner makes the conclusory assertion that trial and appellate counsel were incompetent "[t]o the extent" this Court "concludes that the foregoing challenges were not raised before" (Pet. 283, ¶690), petitioner has not pleaded facts establishing that counsel performed below professional norms in failing to raise these meritless claims at trial or on appeal, or that there would have been any different result if the claims had been raised. (See *Smith v. Robbins, supra,* 528 U.S. at pp. 285-286; *People v. Osband, supra,* 13 Cal.4th at p. 664.)

4. (Conclusion)

Paragraph 691 (Pet. 283-284) alleges that the alleged acts of state misconduct warrant relief. Because they do not, the claims should be rejected as previously noted.

J. Claim 10 (Underrepresentation Of Minorities In Jury Pool)

In paragraphs 692-699 (Pet. 284-286), petitioner alleges that he was denied his right to a jury drawn from a fair cross section of the community, in that Hispanics and African Americans were underrepresented in his jury pool.

Petitioner's failure to raise this claim at trial forfeits it on appeal (*People v. Seaton* (2001) 26 Cal.4th 598, 638) and habeas corpus (*In re Seaton, supra*, 34 Cal.4th at pp. 199-201).

Moreover, petitioner has failed to plead facts warranting relief on the merits of the claim. To sustain a fair cross section challenge, a defendant must show: 1) that the group excluded was a cognizable one in the community; (2) that the representation of this group in jury venires was not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation was due to systematic exclusion of the group in the jury-selection process. (*People v. Horton* (1995) 11 Cal.4th 1068, 1088.) Regarding the third factor, it is not enough for a defendant to show a statistical disparity; "[a] defendant must show, in addition, that the disparity is the result of an improper feature of the jury selection process." (*Ibid.*)

The petition fails to plead any facts regarding the jury selection process itself that allegedly resulted in the unconstitutional underrepresentation. Accordingly, this claim must be rejected.[11/]

Insofar as petitioner makes the conclusory assertion that trial and appellate counsel were incompetent "[t]o the extent" this Court "concludes that Trial Counsel and/or Appellate Counsel failed to challenge the composition of the jury on the foregoing grounds," (Pet. 286, ¶699), petitioner has not pleaded facts establishing that counsel performed below professional norms in failing to raise this claim at trial or on appeal, or that there would have been any different result if the claim had been raised. (See *Smith v. Robbins, supra,* 528 U.S. at pp. 285-286; *People v. Osband, supra,* 13 Cal.4th at p. 664.)

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11. A similar fair cross section challenge to the selection process for Los Angeles County petit juries was rejected in *People v. Horton, supra*, 11 Cal.4th at pp. 1087-1091.

K. Claim 11 (Charging Decision Based On Impermissible Factors)

In paragraphs 700-716 (Pet. 287-294), petitioner alleges that the prosecution used impermissible factors of race, gender, and economic status as criteria in deciding to seek the death penalty in his case.

Petitioner failed to raise this claim at trial, and thus forfeited the issue on appeal and habeas corpus. (*In re Seaton, supra*, 34 Cal.4th at p. 199-201.)

Moreover, petitioner has failed to plead facts warranting relief on the merits of this claim. He makes conclusory assertions of impropriety, but as for factual allegations to support his claim, he relies primarily on statistics showing that persons of petitioner's race, gender, and economic status were disproportionately sentenced to death and executed. Such statistics do not establish a prima facie case for relief on this claim. (See *In re Seaton, supra*, 34 Cal.4th at pp. 201-203 [discussing effect of statistical evidence in establishing prima facie case that prosecutor's charging decision was based on race].) Petitioner asserts that the decision makers in the prosecutor's office were white (Pet. 288-289, ¶704) and male (Pet. 289-290, ¶706), but fails to allege facts establishing the identity of these decision makers, their races, their gender, or how any decision they made in petitioner's case was affected by their race and gender rather than the facts and circumstances of his crimes and any other appropriate criteria, such as the number of murders he committed. He alleges that the trial prosecutor in his case had been reprimanded by the District Attorney's Office "for his use of a racial epithet to describe an African-American colleague" (Pet. 289, ¶705), but fails to allege specific facts showing the trial prosecutor participated in making any charging decision in petitioner's case.

Petitioner also alleges that his trial counsel performed incompetently by "failing to present appropriate challenges to the charging decision." (Pet. 293, ¶715.) Petitioner has failed to plead facts showing that prevailing professional

norms required trial counsel to bring such challenges, and has failed to plead facts demonstrating that it was reasonably probable there would have been any different result if the challenges had been made.

L. Claim 12 (Challenges To Death Penalty Law And Procedures)

In paragraphs 717-754 (Pet. 294-318), petitioner raises a variety of complaints regarding California's death penalty law and procedures. To the extent these claims were raised and rejected on direct appeal (see *People v. Manriquez, supra*, 37 Cal.4th at pp. 588-590), petitioner is barred from raising them in this petition (see *In re Waltreus, supra*, 62 Cal.2d at p. 225). As to any claims he failed to raise on appeal but could have, he is barred from raising them now. (See *In re Dixon, supra,* 41 Cal.2d at p. 759.)

Petitioner also has failed to plead facts warranting relief on the merits of his claim.

In Claim 12(A), petitioner, citing the list of death-qualifying special circumstances in Penal Code section 190.2, alleges that the state's death penalty statute is overbroad and fails to adequately narrow the group of death-eligible murderers. (Pet. 295-306, ¶¶718-732.) This Court has repeatedly rejected this general claim (e.g., see *People v. Snow* (2003) 30 Cal.4th 43, 125-126), and has specifically rejected it as to the multiple murder special circumstance, which applies in petitioner's case (*People v. Loker* (2008) 44 Cal.4th 691, 755). Petitioner also complains that the death penalty is subject to "county-by-county arbitrariness" because there are no statewide standards to guide a prosecutor's charging decision (Pet. 306-307, ¶733), but this challenge also has been rejected by this Court. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 165.) Petitioner's contention that intercase proportionality review is required (Pet. 307-308, ¶¶735-736) was rejected in his appeal, consistent with this Court's long-established authority on this point. (See *People v. Manriquez, supra*, 37 Cal.4th at p. 590.)

In Claim 12(B), petitioner begins by making a conclusory assertion that the aggravating and mitigation factors listed in Penal Code section 190.3 failed to narrow the class of death-eligible murderers (Pet. 309, ¶738), a claim which was raised and rejected on appeal. (See *People v. Manriquez, supra*, 37 Cal.4th at p. 589.) However, the petition thereafter focuses only on subdivision (k) of that statute, which allows the penalty phase jury to consider any mitigating circumstance offered by the defendant to support a sentence less than death. Petitioner claims there was "grave danger" that his jury did not understand that factor in that "most jurors" have "misunderstandings" about the meaning of the statutory sentencing factors and the definition of mitigation. (Pet. 313, ¶745; see also Pet. 312, ¶742.)

Petitioner plainly has failed to state a prima facie case for relief, in that this claim relies on speculation regarding the jurors' mental processes, and Evidence Code section 1150, subdivision (a), precludes an attack on the validity of a verdict based upon such evidence. (See *People v. Steele*, *supra*, 27 Cal.4th at pp. 1260-1261.) Petitioner has not pleaded any admissible facts to impeach his verdict. Insofar as petitioner relies on a "study of actual California jurors who served in capital cases" (Pet. 311, ¶741), the mental processes of the jurors in the study is not only inadmissible under Evidence Code section 1150, but is irrelevant as to how a reasonable juror would understand the instructions. (See *People v. Mickey* (1991) 54 Cal.3d 612, 670 [when error is alleged as to the meaning of an instruction, reviewing courts asks how a hypothetical reasonable juror would have understood it].) Further, as this Court has noted in the past, aggravation and mitigation are commonly understood terms that do not require definition. (See *People v. Wader* (1993) 5 Cal.4th 610, 659.)

In Claim 12(C), petitioner alleges the trial court erred by failing to delete inapplicable sentencing factors when it instructed the jury pursuant to Penal Code section 190.3. (Pet. 314-315, ¶¶746-747.) He fails to plead facts

warranting relief, because the jury in this case was properly told to be guided by the factors listed in the statute, "if applicable." (10RT 2297; see *People v. Maury* (2003) 30 Cal.4th 342, 439-440.) Petitioner also makes other claims that have been rejected by this Court, including that there was some error in the temporal language of subdivisions (d) and (h) (Pet. 315-317, ¶¶748-750; see *People v. Maury, supra*, at p. 439); that the trial court should have instructed affirmatively that the jury should consider all sympathetic statutory and non-statutory mitigation evidence (Pet. 317, ¶751) and sympathy for petitioner and his family (Pet. 317, ¶752; see *People v. Taylor* (2001) 26 Cal.4th 1155, 1180-1181); and that the "no-sympathy" admonition of CALJIC No. 1.00 did not apply at the penalty phase (Pet. 317-318, ¶752; see *People v. Taylor, supra.*) Moreover, the trial court gave a special instruction on mitigation requested by the defense, which told the jury that it could reject the death penalty based on sympathy or compassion alone, that a mitigating factor need not be proven beyond a reasonable doubt, and the law did not require the jury to find the existence of any mitigating factor before choosing life over death. (10RT 2299-2300; 4CT 902.)

Insofar as petitioner alleges that his trial and appellate counsel performed incompetently "[t]o the extent" these claims were not raised before (Pet. 318, ¶754), he failed to plead facts showing that prevailing professional norms required trial or appellate counsel to bring any of these repeatedly rejected challenges, and has failed to plead facts showing it was reasonably probable there would have been a different result if these meritless challenges had been made.

Petitioner has failed to plead a prima facie case entitling him to relief based upon this claim.

M. Claim 13 (Vienna Convention Violation)

In paragraphs 755-784 (Pet. 318-333), petitioner asserts he is entitled to habeas corpus relief because his "right of consular notification" under the Vienna Convention (Pet. 318-319, ¶755) was violated by the failure of detaining authorities to inform him of his right to contact his consulate.

Petitioner failed to raise this issue at trial or on appeal, and thus has forfeited the claim on habeas corpus. (See *In re Seaton, supra*, 34 Cal.4th at p. 199-201.)

Petitioner also has failed to plead facts entitling him to relief on the merits. In *Medellin v. Texas* (2008) _ U.S. _ [128 S.Ct. 1346, 170 L.Ed.2d 190] (*Medellin*), the United States Supreme Court concluded that the provisions of the Vienna Convention cannot be enforced domestically by unilateral action of the judicial or executive branches, but instead requires the joint action of the executive and legislative branches. (*Id.* at pp. 1363, 1368-1370.) The Court rejected the argument that an opinion by the International Court of Justice (ICJ), *Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U.S.*) 2004 I.C.J. 12 (*Avena*), had binding effect on the domestic courts of this country.[12/] (*Id.* at pp. 1363-1367.) The defendant in *Medellin*, like petitioner here, was one of the named Mexican nationals in *Avena*, and argued that the *Avena* opinion should be considered binding as to him because he should be regarded as a party to the judgment. The *Medellin* opinion rejected this argument, too, observing that only nation states may be parties before the ICJ. (*Id.* at pp. 1360-1361.) The opinion observed that "[n]o one disputes" *Avena* created an international law obligation on the part of the United States (*id.* at p. 1356), but

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12. The *Avena* opinion stated that the United States was obligated to provide, by means of its own choosing, review and reconsideration of the convictions and sentences "of the [affected] Mexican nationals," without regard to state procedural default rules for violation of the consular notification provisions of the Vienna Convention. (*Medellin, supra*, 128 S.Ct. at p. 1355.)

that did not mean the judgment in that case had automatic domestic legal effect in state and federal courts (*id.* at pp. 1356-1357).

In addressing the dissenting opinion, the majority in *Medellin* noted that it is the political branches of government, not the courts, that must assume the primary role of deciding when and how international agreements like the Vienna Convention will be enforced. (*Medellin, supra*, 128 S.Ct. at p. 1363.) The concurring opinion suggested that a state is not foreclosed from providing "appropriate action" to enforce the treaty (*id.* at p. 1375), but such action would run afoul of the majority opinion's emphasis that "the terms of a non-self-executing treaty [such as the Vienna Convention] can become domestic law only in the same way as any other law - through the passage of legislation by both Houses of Congress, combined with either the President's signature or a congressional override of a Presidential veto." (*Id.* at p. 1369.) Individual states would be inappropriately creating laws to enforce an international treaty if they were allowed to make their own separate, possibly conflicting decisions as to whether any, and if so, what remedies should be imposed for violating the consular notification provisions of the Vienna Convention.

Moreover, insofar as petitioner claims he suffered prejudice because the lack of timely consular notification resulted in him making statements to investigators that were admitted at his trial (Pet. 327-328, ¶774), the Vienna Convention's requirement that the detaining state notify the detainee's consulate "without delay" has been interpreted by the ICJ to mean within three working days. (*Medellin, supra*, 128 S.Ct. at p. 1355, fn. 1.) Petitioner's statements in this case were made on two different days: February 22, 1990, when he showed up at a hospital with gunshot wounds and was arrested (*People v. Manriquez, supra*, 37 Cal.4th at p. 552; 1CT 221-233; 9RT 2120-2121; see also Pet. 326, ¶769 [stating he was arrested on February 22, 1990]), and February 24, 1990, when he was in county jail (*Manriquez, supra*, at p. 555; 9RT 1571-1577).

Since both sets of statements were obtained before expiration of the three day period allowed by the treaty for consular notification "without delay," there was no violation of the treaty in obtaining the statements prior to consular notification. (See *Medellin, supra*, 128 S.Ct. at p. 1355, fn. 1 [noting Medellin confessed "before there could be a violation of his Vienna Convention right to consular notification"].)

Petitioner has failed to plead facts establishing he was prejudiced in any other way. He admits in the petition that consular notification "was finally given a year after Petitioner's arrest." (Pet. 331, ¶779; see also Pet. Exh. 124, p. PE1147 [affidavit attesting that Mexico "first learned of [petitioner's] incarceration more than a year after his arrest, when defense counsel contacted consular officers"].) Although he alleges that by then it was "too late" to prepare a proper defense, the record shows that jury selection for petitioner's trial commenced on August 9, 1993 (1RT 170; 3CT 758), approximately three-and-a-half years after his arrest in February 1990. Since petitioner acknowledges there had been consular contact a year after his arrest, that means consular notification had been provided two to two-and-a-half years prior to jury selection in his trial. Exhibit 124 of the petition establishes that this notification was provided by petitioner's trial counsel, who contacted the consular officers. (Pet. Exh. 124, p. PE1147.) This refutes petitioner's claim that the notification came too late to assist the defense.

As for petitioner's claim that there could have been more assistance provided by his consulate, such as raising concerns with authorities about unspecified bias (Pet. 328-329, ¶¶775-776), or providing greater assistance in developing penalty phase evidence (Pet. 329-331, ¶¶777-779), he has failed to plead facts showing any alleged deficiencies were attributable to the delay in consular notification. In fact, the only reasonable inference is that the delay did not cause any prejudice, since the two to two-and-a-half years between

notification and trial was a substantial amount of time for the consulate to provide assistance on those matters.

Petitioner makes a conclusory claim that his trial and appellate counsel provided ineffective assistance "[t]o the extent the foregoing challenges were not raised before." (Pet. 333, ¶784.) Petitioner has failed to allege any specific facts establishing counsel performed below prevailing professional norms, and it is not reasonably probable there would have any different result at trial or on appeal if the issue had been raised. There was no consular notification violation as to petitioner's statements to investigators since they were made within three days of his arrest, and his trial counsel was in contact with Mexican consular officials two to two-and-a-half years prior to trial. Petitioner has failed to show how the one year delay in providing consular notification, if raised at trial or on appeal, would have resulted in any different outcome.

For the foregoing reasons, petitioner is not entitled to relief based on the alleged violation of the consular notification provisions of the Vienna Convention.

N. Claim 14 (Sufficiency Of Evidence)

In paragraphs 785-795 (Pet. 333-338), petitioner claims there was insufficient evidence of premeditation and deliberation to support any of the four first degree murder convictions. He also alleges there was insufficient evidence to support the death verdict, given trial counsel's alleged incompetent performance in failing to exclude prosecution evidence and presenting defense evidence.

Petitioner's claim that there was insufficient evidence of premeditation and deliberation was raised and rejected on direct appeal. (See *People v. Manriquez, supra*, 37 Cal.4th at pp. 576-579.) This claim is therefor barred on habeas corpus. (See *In re Waltreus, supra*, 62 Cal.2d at p. 225.) Insofar as petitioner is challenging the weight of the evidence presented to support the

first degree findings and death verdict (e.g., see Pet. 336, ¶¶791-792 [alleging trial counsel failed to impeach prosecution witnesses or present other evidence to undermine prosecution case]), he fails to state a claim that affords any basis for habeas relief. (See *In re Lindley* (1947) 29 Cal.2d 709, 722.)

O. Claim 15 (Execution After Prolonged Confinement Under Death Sentence)

In paragraphs 796-824 (Pet. 338-351), petitioner alleges he is entitled to relief because his execution after his prolonged confinement under a death sentence would amount to cruel and unusual punishment in violation of his state and federal constitutional rights.

Petitioner fails to state a prima facie case for relief, in that this Court has repeatedly rejected similar claims. (See *People v. Salcido* (2008) 44 Cal.4th 93, 166, and cases cited.)

P. Claim 16 (Death Sentence Violates International Law)

In paragraphs 825-887 (Pet. 351-379), petitioner alleges he is entitled to relief because his death sentence violates international law. The petition should be rejected for failure to state grounds for relief in that this Court has repeatedly rejected similar claims, finding no international law violation when a death sentence, such as the one in this case, complies with state, federal, and statutory requirements. (See *People v. Lindberg* (2008) 45 Cal.4th 1, 54; *People v. Riggs* (2008) 44 Cal.4th 248, 330; *People v. Parson* (2008) 44 Cal.4th 332, 372.)

Q. Claim 17 (Mental Illnesses And Impairments Preclude Death Penalty)

In paragraphs 888-895 (Pet. 379-384), petitioner asserts that because he suffers from mental illnesses and impairments, executing his death sentence would violate his state and federal constitutional rights. Petitioner cites *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335] (*Atkins*),

which held that the Eighth Amendment of the federal constitution precluded the death penalty for mentally retarded defendants. Petitioner does not claim he is mentally retarded, but argues that the *Atkins* rationale applies not just to the mentally retarded, but also to those like him who suffer other mental illnesses and impairments. Citing his alleged post traumatic stress disorder, mood disorder, alcohol and cocaine dependency, and "multiple neurocognitive deficits including problems with executive functioning," previously discussed in Claim 1(D)(6)-(7), petitioner states he is ineligible for the death penalty.

Petitioner fails to state grounds for relief. Neither the United States Supreme Court nor this Court has extended the reasoning of *Atkins* to invalidate the death penalty based on mental illnesses and impairments not amounting to retardation. (See *Atkins, supra*, 536 U.S. at p. 320 [defendants who are not mentally retarded "are unprotected by the exemption and continue to face the threat of execution"].) Under Penal Code section 190.3, subdivisions (d) and (h), a penalty phase trier of fact is allowed to consider, as evidence in mitigation, a defendant's mental illnesses and impairments, intoxication, and whether the crime was committed while under extreme mental or emotional disturbance. In other words, mental illnesses and impairments not amounting to retardation could be used to reduce the culpability of a defendant in determining the appropriate sentence at the penalty phase in California, but does not absolutely prohibit a death sentence.

Petitioner has failed to plead facts, as the defendant did in *Atkins*, showing that it would violate the cruel and/or unusual punishment provisions of the state and federal constitutions to execute defendants suffering from his particular mental illnesses and impairments. He has not demonstrated that there is a national consensus or consistent trend to bar such executions, and the rationale of exempting a defendant of reduced mental capacity does not apply to petitioner, who had the mental acuity to elude arrest for his multiple murders

and was caught only after he sought medical aid at a hospital for gunshot wounds sustained during the Paramount killings. Petitioner demonstrated shrewdness in using a false name at the hospital, and cunningly told a deputy sheriff that he was shot in Compton rather than Paramount after the emergency room nurse told him that Compton police officers would take much longer to arrive at the hospital. (See *People v. Manriquez, supra*, 37 Cal.4th at p. 569.) When investigators interviewed him at the hospital, petitioner denied committing any murders until confronted by the fact that there were witnesses to the Rita Motel murder (count 3), after which he attempted to minimize his culpability by claiming the victim earlier had threatened his life, and the first shot went off unintentionally. (*Id.* at pp. 566-567.)

These facts and circumstances demonstrate that the death penalty in not cruel and/or unusual punishment as to petitioner, and the rationale of *Atkins* plainly should not apply to preclude execution of his death sentence under the state or federal constitutions.

R. Claim 18 (Ineffective Assistance Of Counsel)

In paragraphs 896-898 (Pet. 385-386), petitioner incorporates the allegations of 13 of his prior claims and asserts that his trial and appellate counsel performed incompetently in failing to raise them at trial and on appeal. Petitioner has failed to plead facts entitling him to relief as to any of these assertions.

As to Claim 2 (jury misconduct), petitioner alleged in Claim 1(G) that trial counsel was incompetent for failing to raise the issue of misconduct as to jury foreperson C.B. in the trial court, since it was revealed in her statements in a post-verdict questionnaire that counsel possessed prior to the sentencing hearing. (Pet. 208-209, ¶¶ 517-522.) For the reasons stated in the response to Claim 1(G), petitioner is not entitled to relief as to trial counsel's failure to raise the issue of C.B.'s alleged misconduct.

Petitioner also is not entitled to relief on his claim that trial counsel performed incompetently as to Claim 2(D), which alleges, based upon C.B.'s declaration, that other jurors made racist or anti-immigrant comments during deliberations. The petition does not include any declaration or statements by trial counsel regarding this issue, or any explanation why such reasonably available supporting evidence could not be included. Because a satisfactory explanation is possible (for example, counsel formed a reasonable opinion that the alleged comments provided no basis for relief on the merits, for the reasons stated in the response to Claim 2(D)), petitioner has failed to plead facts showing that counsel necessarily performed incompetently in failing to raise the issue. Moreover, because the alleged comments of these jurors failed to establish improper bias but only reflected what the evidence showed, i.e., that petitioner came into this country from Mexico and killed people, it is not reasonably probable that there would have been any different result even if trial counsel had sought judicial relief.

The claim that appellate counsel was ineffective for failing to raise the issues in Claim 2 on appeal must be rejected, because the factual basis for the claim is C.B.'s declaration, which was not in the appellate record.

Regarding Claim 3 (*Batson/Wheeler* violation), petitioner previously alleged that trial counsel was incompetent for failing to raise the issue at trial (see Claim 1(A)(1)), and that appellate counsel was incompetent for failing to raise the issue on appeal (see Claim 3, ¶572). For the reasons stated in the response to those claims, petitioner is not entitled to relief.

As to Claim 5 (prosecutorial misconduct during opening statement and final arguments), petitioner made a conclusory assertion in the title to this claim that trial counsel was ineffective for failing to object to the challenged remarks. The petition does not include any declaration or statements by trial counsel as to why he did not object, or any explanation for why such reasonably available

evidence was not included. No facts are alleged to establish that counsel necessarily performed below prevailing professional standards in failing to object, and petitioner failed to show any objection would have been sustained or there would have been a different outcome of the proceedings. Thus, as noted in the response to Claim 5, petitioner has failed to plead facts entitling him to relief based on the alleged ineffective assistance of trial counsel. Similarly, he has failed to plead facts warranting relief based on the alleged incompetence of his appellate counsel, who was confronted with the unlikelihood of prevailing on the merits given the lack of any trial objection and because the challenged remarks were proper comments based upon the evidence.

In Claim 6 (failure to disclose material exculpatory evidence), petitioner included an allegation that trial and appellate counsel were incompetent for failing to raise the issue. (See Claim 6(H), Pet. 270, ¶654.) For the reasons stated in the response to that allegation, petitioner is not entitled to relief.

In Claim 9 (state misconduct), petitioner alleged several instances of state misconduct as a basis for relief. As to each of these several instances, he made separate claims that trial and appellate counsel were incompetent to the extent that they failed to raise the issue. (See Pet. 277-278, ¶673; 280, ¶681; 282, ¶685; 283, ¶690.) For the reasons stated in the response to those claims of ineffective assistance of counsel, petitioner is not entitled to relief.

In Claim 10 (underrepresentation of minorities in the jury pool), petitioner included an allegation that trial and appellate counsel were incompetent for failing to raise the issue. (Pet. 286, ¶699.) As noted in the response to this claim, petitioner failed to plead facts establishing grounds for relief based on the ineffective assistance of counsel.

In Claim 11 (charging decision based on impermissible factors), petitioner included an allegation that trial counsel performed incompetently by

failing to raise the issue at trial. (Pet. 293, ¶715.) For the reasons stated in the response to that claim, petitioner is not entitled to relief based upon the ineffective assistance of trial counsel. He is also not entitled to relief based upon the alleged ineffective assistance provided by appellate counsel. There was no trial objection and no evidentiary basis to bring this claim on appeal, since it rests upon matters outside the appellate record. Petitioner also failed to establish any right to relief on the merits of the claim, as discussed in the response to Claim 11, and thus is unable to establish a reasonable probability of a different outcome even if appellate counsel had raised the issue.

In Claim 12 (challenges to death penalty law and procedures) and Claim 13 (Vienna Convention violation), petitioner included allegations that his trial and appellate counsel were incompetent for failing to raise these issues. (Pet. 318, ¶754 [Claim 12]; Pet. 333, ¶784 [Claim 13].) For the reasons stated in the response to these allegations, petitioner is not entitled to relief.

As to Claim 14 (sufficiency of evidence), petitioner has failed to plead facts establishing his trial or appellate counsel performed incompetently. Insofar as this claim alleges insufficient evidence of premeditation and deliberation for first degree murder, trial counsel focused his argument to the jury upon these issues (8RT 1785-1881), and appellate counsel raised the issue on appeal, where it was rejected. (*People v. Manriquez, supra*, 37 Cal.4th at pp. 576-579.) Insofar as petitioner alleges his trial and appellate counsel should have done something more to undermine or challenge the evidence presented at the guilt and penalty phases, he has failed to plead facts showing they performed below professional norms, or establishing a reasonable probability of a different outcome.

This Court has repeatedly rejected Claim 15 (violation of rights based upon prolonged confinement under death sentence before execution) and Claim 16 (death sentence violates international law), as discussed in the responses to

those claims. Petitioner thus has failed to plead facts establishing that reasonably competent trial or appellate counsel should have raised these issues at trial or on appeal, or that there was a reasonable probability of a different outcome if they had been raised.

Regarding Claim 17 (mental illnesses and impairments preclude death penalty), petitioner has not pleaded facts entitling him to relief based on the alleged ineffective assistance of his trial and appellate counsel in failing to raise this issue. As discussed in the response to this claim, petitioner's argument relies upon extending the *Atkins* ruling, which precludes the death penalty for mentally retarded defendants, to those who suffer other mental illnesses and impairments. Because petitioner's trial and sentencing occurred years before *Atkins* was decided, at a time when the Eighth Amendment had been held not to preclude the death penalty for the mentally retarded, petitioner has failed to establish his trial counsel performed below professional norms by not raising this claim at trial, and also has failed to demonstrate a reasonable probability of a different outcome if it had been raised. Petitioner is plainly not entitled to relief as to appellate counsel's failure to raise the claim on appeal, since the appellate record contained no evidence of mental illnesses or impairments.

S. Claim 19 (Cumulative Error)

In paragraphs 899-908 (Pet. 386-389), petitioner alleges that the cumulative effect of the errors alleged in his petition requires reversal of both the guilt and penalty phases. Because there were no substantial errors that undermined the verdicts, whether considered individually or cumulatively, petitioner has failed to plead sufficient grounds for relief.

CONCLUSION

For all of the foregoing reasons, respondent respectfully requests that the petition for habeas corpus be denied.

Dated: December 30, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

KEITH H. BORJON
Supervising Deputy Attorney General

SHARLENE A. HONNAKA
Deputy Attorney General

Attorneys for Respondent

SAH:ez
LA2006500617
60368161.wpd

CERTIFICATE OF COMPLIANCE

I certify that the attached **INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS** uses a 13 point Times New Roman font and contains 33,564 words.

Dated: December 30, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

SHARLENE A. HONNAKA
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE

CAPITAL CASE

Case Name: ***In re Abelino Manriquez On Habeas Corpus*** Case No.: **S141210**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. 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 **December 30, 2008**, I served the attached **INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

John R. Reese, Esq.
BINGHAM, McCUTCHEN LLP-
San Francisco
Three Embarcadero Center
San Francisco, CA 94111-4067

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105-3672

Hon. Steve Cooley, District Attorney
Joseph Markus, Deputy District Attorney
LA County District Attorney's Office
210 West Temple Street
Los Angeles, CA 90012

John A. Clarke, Clerk
LA County Superior Court
111 North Hill Street
Los Angeles, CA 90012
Hon. Robert W. Armstrong, Judge

On **December 30, 2008**, I caused ten (10) copies of the above document in this case to be delivered to the California Supreme Court at 350 McAllister Street, San Francisco, CA 94102-4797 by **Courier Service**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **December 30, 2008**, at Los Angeles, California.

Erlinda Zulueta
Declarant

Erlinda T. Zulueta
Signature

SAH:ez
LA2006500617
60369239.wpd