In the Supreme Court of the State of California

In re **In re STEVEN M. BELL,** **On Habeas Corpus**	**CAPITAL CASE** Case No. S151362

San Diego County Superior Court No. CR 133906
The Honorable Richard M. Murphy, Judge

INFORMAL RESPONSE

Edmund G. Brown Jr.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
SCOTT C. TAYLOR
Supervising Deputy Attorney General
LANCE E. WINTERS
Deputy Attorney General
State Bar No. 101090
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2105
Fax: (619) 645-2191
Email: Lance.McCormick@doj.ca.gov
Attorneys for Respondent

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PRELIMINARY STATEMENT

Respondent respectfully submits the following informal response to the petition for writ of habeas corpus filed by condemned inmate Steven M. Bell. Bell killed Joey Anderson, the eleven-year old son of Bell's live-in-girlfriend Deborah Mitchell, by repeatedly and brutally stabbing him with a kitchen knife. Bell killed Joey so that Bell could steal the television set that Joey was watching, sell the television set, and use the proceeds to purchase crack cocaine. In 2007, this Court affirmed Bell's conviction and death sentence. Bell has now filed an amended petition for writ of habeas corpus, and this Court has requested an informal response.

An informal response is designed to perform a "screening function" and assist this Court in its determination of whether any of Bell's thirteen claims for habeas relief in his 252-page amended petition ("Petn.") are procedurally barred, or state a prima facie basis for relief. (*People v. Romero* (1994) 8 Cal.4th 728, 737, 742.) Unless the petition states a prima facie case, that is, presents at least one claim that is not procedurally barred and supported by factual allegations which, if true, would entitle the petitioner to relief under existing law, this Court must summarily deny the petition. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475; *People v. Romero*, *supra*, 8 Cal. 4th at p. 737; *In re Clark* (1993) 5 Cal.4th 750, 781; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260, superseded by statute on other grounds as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.)

Bell thus bears "a heavy burden" to plead sufficient grounds for relief. (*In re Viscotti* (1996) 14 Cal.4th 325, 351; accord, *In re Cudjo* (1999) 20 Cal.4th 673, 687.) To satisfy this burden, Bell is required to plead with particularity the facts supporting each claim and provide reasonably available documentary evidence, such as affidavits or declarations. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.) He "must set forth specific facts which, if true, would require issuance of the writ," and a petition that fails

in this regard must be summarily denied for failure to state a prima facie case for relief. (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1258.) Conclusory or speculative allegations are insufficient, especially when, as here, the petition was prepared by counsel. (*Ibid.*; *People v. Duvall, supra*, 9 Cal.4th at p. 474; *People v. Karis* (1988) 46 Cal.3d 612, 656.)

For every claim in his amended petition, Bell requests an evidentiary hearing to resolve any factual disputes. However, conclusory and speculative allegations of the type made here, made without explanation as to their basis, do not warrant an evidentiary hearing. (*People v. Duvall, supra*, 9 Cal.4th p. 474; see *People v. Karis, supra*, 46 Cal.3d at p. 656 [the petitioner must establish his claims as a "demonstrable reality"].) Bell also requests an opportunity to supplement or amend his petition after he "has been afforded discovery and the disclosure of all material evidence by the prosecution, the use of this Court's subpoena power, and the funds and an opportunity to investigate fully . . ." (e.g., Petn. at p. 25.) Bell's request to supplement his pending petition at a later date has absolutely no effect. (*In re Clark, supra*, 5 Cal.4th at p. 781, fn. 16.) The petition must be reviewed and decided as currently pled, as a court will dispose of a habeas petition based only on the allegations contained in the petition as originally filed and any amended or supplemented petition for which leave to amend has been granted by the court. A petition is judged on the factual allegations contained within it, without reference to the possibility of supplementing the claims with facts to be developed later. (*Ibid.*) It is not the intent of this Court to "authorize or fund 'fishing expeditions' whose purpose is solely to discover if any basis for a collateral attack on a presumptively valid judgment can be found." (*Id.* at p. 783, fn. 19.)

The amended petition reaches this Court after this Court has decided Bell's direct appeal.[1] Matters which could have been, but were not raised on appeal are not cognizable on habeas corpus absent justification for departure from this general rule. (*In re Harris* (1993) 5 Cal.4th 813, 829; *In re Dixon* (1953) 41 Cal.2d 756, 759.) Similarly, issues that were actually raised and litigated on appeal may not be revisited on habeas corpus. (*In re Waltreus* (1965) 62 Cal.2d 218, 225.) In order for such claims to be cognizable on habeas, the petitioner must show: (1) a claimed constitutional error which is both clear and fundamental and strikes at the heart of the trial process; (2) a lack of fundamental jurisdiction; (3) the trial court committed acts in excess of jurisdiction that do not require a redetermination of facts; or (4) a change in the law affecting a defendant after the appeal. (*In re Harris*, *supra*, 5 Cal.4th at pp. 829, 834-843.) Bell does not address these exceptions or allege facts to satisfy any of the exceptions that would permit him to be heard on any of the claims he already raised, or could have raised on appeal. Accordingly, these claims should be procedurally barred as habeas corpus cannot serve as a substitute for appeal. Finally, all of the claims should be rejected on the merits because each fails to state facts supporting a prima facie case entitling Bell to habeas corpus relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

Respondent respectfully requests that this Court expressly deny the amended petition on procedural grounds with express citation to the applicable procedural bar and indication of the specific claims to which the bar is applicable in order to facilitate deference to this Court's application of procedural bars in any subsequent federal habeas corpus litigation in this

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[1] *People v. Bell* (2007) 40 Cal.4th 582, cert. denied, *Bell v. California* (2007) 128 S.Ct. 202.

case as well as other California cases.[2] Additionally, respondent respectfully requests that this Court expressly deny the claims on the merits.[3]

The amended petition should be summarily denied without the issuance of an order to show cause. As explained below, all of the claims fail because they are either: (1) procedurally barred because they should have been raised on appeal but were not, (2) procedurally barred because they have been raised on appeal and habeas corpus does not serve as a "second appeal," and/or (3) do not state facts supporting a prima facie case

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[2] A state's procedural requirements can only be respected by federal courts where the federal court can, in fact, determine that a state court has relied upon procedural bars in denying relief. (See *Harris v. Reed* (1989) 489 U.S. 255, 264, & fn. 12 [109 S.Ct. 1038, 103 L.Ed.2d 308] [simple one-line statement by state court invoking state procedural bar is sufficient].) Also, by applying this state's procedural bars whenever appropriate, the federal courts will know that this Court is regularly and consistently applying its standards, which is a prerequisite to federal courts respecting state procedural bars. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 587 [108 S.Ct. 1981, 100 L.Ed.2d 575] [federal courts will not respect state procedural bar which is not consistently enforced by state courts].)

[3] Section 2254(d) of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, provides for a more deferential standard of review for federal courts considering habeas claims previously denied on the merits by a state court. Specifically, a federal district judge is precluded from reviewing a federal habeas claim collaterally attacking a state conviction or sentence de novo if a state court has denied the claim on the merits, unless the state's denial was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." (28 U.S.C. § 2254(d)(1)(2).) Accordingly, a denial on the merits by this Court, in the alternative to the application of appropriate procedural bars, minimizes the possibility of subsequent federal de novo review.

for relief. Because each of Bell's claims fails on its face for at least one of the reasons stated above, the amended petition should be summarily denied.

PROCEDURAL AND FACTUAL BACKGROUND

I. PROCEDURAL HISTORY

On November 22, 1993, a San Diego County jury convicted Bell of the first degree murder of Joey Anderson (Pen. Code, § 187, subd. (a)) and of first degree robbery (Pen. Code, §§ 211/212.5). The jury found true the allegations that Bell personally inflicted great bodily injury on the victim (Pen. Code, § 12022.7) and that he personally used a deadly and dangerous weapon - a knife (Pen. Code, § 12022.5). The jury further found true the special circumstance allegation that Bell committed the murder during the course of a robbery (Pen. Code, § 190.2, subd. (a)(17)). (42 RT 35-3502; 5 CT 1196-1199.) On December 17, 1993, the jury returned a separate verdict finding that death was the appropriate punishment. (54 RT 4501-4502; 7 CT 1536.) On March 4, 1994, the trial court denied Bell's motion for a new trial and automatic motion to reduce the sentence to life without the possibility of parole. (Pen. Code, § 190.4, subd. (e).) (61 RT 4634, 4650.) That same day, the court sentenced Bell to death on count one and the robbery special circumstance. The court stayed sentence on the remaining charges and enhancement allegations pursuant to Penal Code section 654. (61 RT 4655-4656; 8 CT 1710-1711.)

On February 15, 2007, this Court affirmed the judgment and sentence in its entirety. (*People v. Bell, supra*, 40 Cal.4th at pp. 585, 622.) On March 28, 2007, this Court denied Bell's petition for rehearing. On October 1, 2007, the United States Supreme Court denied certiorari. *Bell v. California, supra*, 128 S.Ct. 202. On March 29, 2007, Bell filed a petition for writ of habeas corpus in this Court raising no claims and seeking to

amend the petition by June 21, 2009. On June 22, 2009, Bell filed the instant amended petition for writ of habeas corpus. On June 23, 2009, pursuant to rule 8.385(b) of the California Rules of Court, this Court requested an informal response to the amended habeas petition from the People.

II. GUILT PHASE EVIDENCE

A. Prosecution Case

In June 1992, Bell, Deborah Mitchell, and Joey Anderson resided at 428 North 28th Street in San Diego, California. (27 RT 1942, 1945, 1947.) On June 4, sometime before 8:00 a.m., Mitchell left the house for work and Joey left for school. (27 RT 1955-1956.) Meanwhile, Bell went to the General Services office to get his welfare check. (29 RT 2142, 2144, 2150-2155.)

The $111.00 check, which Bell obtained at around 12:45 p.m., was not used for food, groceries or other family needs. Instead, Bell promptly cashed the check at a liquor store right across the street from the General Services office. Bell used the cash to buy crack cocaine, which he shared with several friends. (29 RT 2142, 2144-2145, 2151-2152, 2154-2160.)

By around 3:00 p.m., the $111.00 was gone. Desperate for more crack, Bell returned to Mitchell's home, hoping to steal anything he could. (29 RT 2139, 2160.)[4] Wearing a baseball cap belonging to Joey, Bell retrieved a shopping cart from Mitchell's shed, opened the front door with his key and went inside the house. (27 RT 1861-1862, 1944; 28 RT 2055, 2061-2062; 29 RT 2143-2144, 2161.) Assuming that Joey was still in school, Bell entered the master bedroom, where Mitchell kept her television

[4] This was not the first time Bell had stolen from Mitchell. In December 1990, Bell took Mitchell's VCR. (27 RT 1950-1952, 1967.)

set. Much to Bell's chagrin, Joey, who had been sent home from school because of a discipline problem, was on the bed watching the TV. (27 RT 1852-1853, 1956-1957; 29 RT 2223, 2225.) Bell went to the kitchen, retrieved a knife from a drawer, came up behind Joey and stabbed him in the back. (29 RT 2224.) Joey fell to the floor. (29 RT 2225, 2229.) Bell stabbed Joey several more times, then stomped on Joey's face with his foot. (29 RT 2230, 2232.)

As Joey lay lifeless on the floor, Bell unscrewed the television set from the cable box and placed it in the shopping cart. Bell proceeded to Joey's room, took Joey's boom box and placed it in the cart with the television set. Bell retrieved a blue blanket from the master bedroom, covered the cart with the blanket and left the house, waving to one of his neighbors as he passed by. (27 RT 1861-1862, 1872-1873, 1878-1880, 1887-1889; 29 RT 2146-2147, 2161.) Bell wrapped the bloody knife in a plastic bag he had taken from Mitchell's kitchen and, after walking a couple of blocks, dropped the bag near a garbage can. (29 RT 2225-2226, 2230-2231.) Bell returned to his friends, sold the boom box then the television set, and used the proceeds to purchase several more rocks of crack cocaine. (29 RT 2166-2169.) Bell shared the rocks with a prostitute named "Chocolate" who provided him with oral sex. (29 RT 2163, 2170, 2175-2176.)

When Mitchell returned home from work that evening, she looked into the master bedroom and noticed that her television was gone. (27 RT 1958-1959.) The phone in the living room was off the hook. (27 RT 1959.) As Mitchell approached the empty TV stand, she saw Joey lying on the floor. Mitchell screamed, then picked him up and laid him back down. Knowing that Joey was dead, Mitchell ran to the home of her good friends and neighbors, Frances and Winifred Booker. (27 RT 1960.) Mitchell

banged on the Bookers' front door, screaming for help. Mrs. Booker dialed 9-1-1. (27 RT 1914, 1960.)

Several officers and detectives with the San Diego Police Department responded to the 9-1-1 call. (27 RT 1919-1920; 28 RT 1995-1996; 2000-2001, 2003; 2053-2054.) When they arrived at Mitchell's home, Joey was lying on the floor of the master bedroom, near the window by the television stand. He was dead. (27 RT 1916, 1290.) He had multiple stab wounds. (27 RT 1920.) Next to him was a half-eaten piece of bread. There was a bowl of beans on the bedroom floor. (27 RT 1917-1918; 28 RT 2001.) Police found a bloody towel near the top of the bed. (28 RT 2059.) The knife was never recovered. (28 RT 2001.)

At around 10:45 the following morning (June 5), Officer Michael Prutzman was working traffic on Sixth Avenue near Balboa Park. (28 RT 2068-2069.) As Prutzman was completing a traffic citation, Bell approached him from the west sidewalk. (28 RT 2069-2070.) Bell was carrying a newspaper which was folded open to an article captioned, "Boy 11 Stabbed To Death." (28 RT 2070-2071.) Bell handed Prutzman the paper and a California identification card. (28 RT 2071.) Bell told Prutzman he was the one the police were looking for but that he "didn't stab that boy." (28 RT 2072.) Prutzman asked Bell if he wanted to talk to someone about the case. Bell said that he did. Prutzman offered Bell a ride to the police station in his patrol car. Bell accepted. (28 RT 2072.) Prutzman drove Bell to the downtown police station. (28 RT 2073.)

At the station, Bell was interviewed by homicide detectives Jesse Raymond Almos and John Michael Doucette.[5] (28 RT 2081-2083, 2118-

[5] The interview was recorded on audio tape. (28 RT 2084, 2121.) The detectives thought they were also videotaping the interview but later (continued...)

2119.) Bell waived his *Miranda*[6] rights and agreed to talk. (28 RT 2083, 2120-2121.) Bell detailed his activities of the previous day, admitting that he took the TV and boom box so he could sell them and buy more drugs. (29 RT 2139-2172.) However, Bell denied stabbing Joey, claiming that Joey was not home at the time. (29 RT 2139, 2144, 2147, 2174.) Bell told the detectives he was in "shock" and "disbelief" when he read in the morning paper that Joey was dead. (29 RT 2143.)

After Bell was booked and processed, he agreed to speak again about the offense. Bell was interviewed by Paul Allen Redden.[7] (29 RT 2222-2223.) This time, Bell confessed to killing Joey and gave details about the stabbing. (29 RT 2223-2232.) Bell said he "just flipped," as he retrieved the knife from the kitchen door he "ask[ed] for the Lord's help" because "something's pushing me to do this," and that "at that particular moment I just felt so evil for some reason." (29 RT 2224, 2227-2228.) Bell also told Redden that he was wearing the same clothes he had on at the time he stabbed Joey and that he did not get upset about what he had done until the drugs wore off. (29 RT 2231-2232.)

Prutzman, Almos, Doucette and Redden all testified that when they spoke with Bell, he was coherent, acted appropriately, and appeared neither mentally disturbed nor under the influence of alcohol or narcotics. (28 RT 2073, 2079-2080, 2084, 2093-2094, 2121-2122, 2214-2215.)

(...continued)
found out that the video equipment was broken and the intended video tape was blank. (21 RT 2107, 2121.)

[6] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

[7] Redden was a polygraph examiner. However, the Redden interview tape was edited to delete all references to a polygraph test; and the witnesses were instructed not to mention a polygraph at trial. (13 RT 379-381.)

On June 5, 1992, San Diego County Chief Deputy Medical Examiner James Bonnell, M.D., performed an autopsy on Joey's body. (28 RT 2011-2013.) There were three stab wounds to the abdomen, four to the front of the chest and one to the back of the chest. (28 RT 2016-2017.) There were four cutting type wounds in the neck and head. (28 RT 2017.) Joey had defensive wounds on his hands. (28 RT 2027, 2029-2030.) According to Bonnell, the cause of death was multiple stab wounds to the chest and abdomen area; and bruising of the brain and a skull fracture caused by a blunt impact to the head. (28 RT 2015-2016, 2026.) Joey was still alive when he suffered the head injury. (28 RT 2026-2027.) The nature of the wounds, i.e., the fact that only one was severe, indicated that this was not a rage/overkill homicide caused by a loss of control. (28 RT 2024-2026.)

B. Defense Case

The defense admitted that Bell killed Joey, and that Bell stole the television and boom box. The defense assertion was that the crime was a second degree murder, and the special circumstance was untrue, because the stabbing was the result of Bell's extreme intoxication, mental disorders and/or traumatic childhood.

Steven West, director of forensic toxicology at Poison Lab, tested blood and urine samples taken from Bell the day after the offense. (31 RT 2375-2376, 2378-2380, 2384.) Both tested positive for benzoylecgonine, a cocaine metabolite. The urine sample contained more than 6000 nanograms[8] per milliliter and the blood sample contained 99 nanograms per milliliter. (31 RT 2383, 2389, 2392-2394, 2396.) Alex Sevanian, a professor of molecular pharmacology and toxicology at the University of Southern California, explained that over time, cocaine metabolites decrease

[8] A nanogram is one thousand millionth of a gram. (31 RT 2435.)

in the blood and increase in the urine. (31 RT 2446-2447.) According to Sevanian, Bell's blood levels showed more than moderate cocaine use and his urine level demonstrated that he ingested an "enormous amount of cocaine." (31 RT 2452-2453.)

Doctor David E. Smith, M.D., a specialist in addictive and clinical toxicology, explained the effect of crack cocaine on the body. (32 RT 2511, 2514-2515.) Crack is very addictive because when ingested, it goes into the blood stream rapidly, causing a big surge followed by a rapid down. (32 RT 2515, 2521.) The brain then craves more. (32 RT 2517-2518.) External environmental cues, even neutral ones, can trigger drug hunger in a past abuser. (32 RT 2520.) Money is a very powerful stimulus. (32 RT 2522-2523.)

Smith stated that prolonged crack use can cause brief periods of psychosis where the user acts in a violent, irrational manner without conscious awareness of the episode, then quickly returns to normal. (32 RT 2518-2519, 2531-2553.) According to licensed clinical psychologist/marriage and family counselor Richard Levak, Ph.D., Bell had a temporary psychotic break when he stabbed Joey. (33 RT 2682-2683, 2685.) A similar transient psychotic episode occurred in 1981, when Bell, high on PCP and alcohol, stabbed 13-year old Christopher Cap in the back then sodomized him.[9] (32 RT 2557-2560; 33 RT 2683-2685.)

Doctor Levak interviewed Bell, administered the Minnesota Multiphasic Personality Inventory ["MMPI"][10] and reviewed various documents connected with this case and with the 1981 offense. (33 RT

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[9] This crime will be referred to as the 1981 offense. Further details regarding this offense are set forth in the penalty phase evidence, below.

[10] The MMPI has 567 true-false questions and is designed to provide an objective measurement of an individual's personality makeup. (33 RT 2658.)

2956-2957.) Doctor Levak detailed factors he felt mitigated this crime. He diagnosed Bell as having borderline personality disorder. A person with this disorder can function effectively in structured situations but when faced with minor stressors, can have brief and transitory losses of contact with reality. (33 RT 2660-2661.) Bell developed the disorder at a very early age because his mother failed to show him love and affection; his father left home when Bell was six; Bell's step-father drank and alternated between tenderness and abuse; and Bell was teased as a child because he stuttered and because his mother dressed him in a "preppy" way. (33 RT 2664, 2666.) When Bell was nine, he started self-medicating with alcohol. When he was an adolescent, he turned to drugs. (33 RT 2666-2667.)

Levak and Smith both concluded that the murder of Joey was the result of Bell's cocaine intoxication, his borderline personality disorder and his repressed childhood rage. (32 RT 2534-2536, 2563; 33 RT 2681-2683, 2686.) Smith opined that Bell's use of crack precipitated a psychotic decompensation in the form of a dissociative reaction, i.e., when Bell stabbed Joey, Bell felt like he was outside of his body. (32 RT 2536.) This was evidenced by Bell's statement to Redden that "evil forces" came into his head. Bell repressed the stabbing until the next day, when repeatedly confronted by the police. (32 RT 2536.)

C. Prosecution Rebuttal Case

Experts called by the prosecution in rebuttal disputed assertions by defense experts that Bell was severely impaired by his cocaine use, that he had borderline personality disorder and that he lost contact with reality during the stabbing.

Doctor Randall Clint Baselt, a forensic and clinical toxicologist who reviewed the toxicology results and read the transcript of Sevanian's testimony, stated that Sevanian used improper procedures to test Bell's

urine sample. (35 RT 2860-2861.) Furthermore, Bell's blood and alcohol levels were not in the "abuse range," as opined by Smith. (35 RT 2876-2880.) A single "hit" of crack would produce a urine level measurement of 35,000 nanograms per milliliter. (35 RT 2862-2863.)

Doctor Reese Jones, M.D., a psychiatry professor at the University of California, San Francisco who participated in a number of studies concerning the effect of cocaine on blood levels, urine levels and behavior, testified that proper quantitative urine level measurements of cocaine metabolite reveal astronomical amounts, up to 300,000 to 400,000 nanograms per milliliter. (36 RT 2930-2931.) Doctor Jones also explained that the effects of crack are very short-lived. (36 RT 2936-2937, 2940.) When the drug wears off, the user becomes fatigued, lethargic and depressed. (36 RT 2940.) By the time Bell killed Joey, the peak high from his crack ingestion would have been over. (36 RT 2968-2969.) A person can take in a fair amount of crack and show minimal behavior disruption. (36 RT 2935-2936.)

According to Jones, who familiarized himself with the facts of this case, neither Bell's cocaine use, nor the circumstances surrounding its ingestion, caused a temporary psychotic break. (36 RT 2971-2972.) Such disorganization would have lasted hours, even days, not just a few minutes. (36 RT 2971-2972.) In addition, the affected individual would have a history of these episodes. Bell did not. (36 RT 2972.) Jones noted that the only support for the "loss of contact with reality" claim was Bell's own statements to Levak describing what was in his mind at the time of the crime. (36 RT 2947.) A person would not remember a true loss of contact with reality. (36 RT 2947-2948.) The conclusions of Levak and Smith to the contrary were not supported by the facts, particularly Bell's interviews with Almos, Doucette and Redden. (36 RT 2950-2951.) Jones found it

implausible that Bell forgot the stabbing while remembering the rest of the day in detail. (36 RT 2951-2952.)

Doctor Mark J. Mills, a clinical and forensic psychologist, concurred. (37 RT 3047.) Mills reviewed various materials concerning this case.[11] Mills did not agree with the diagnosis of borderline personality disorder made by Smith and Levak. (37 RT 3058-3060.) Mills noted that Bell had no history of suicide attempts, suicide ideation or self-mutilation, characteristics of a person with this disorder. (37 RT 3057-.358.) If Bell had any personality disorder, it was a mixed personality disorder with predominately anti-social features. (37 RT 3059.)

Given a hypothetical mirroring the facts surrounding the offense as Bell related them to Redden, Mills opined that Bell did not lose contact with reality during the short time in which the stabbing occurred. (37 RT 3060-3062.) Mills noted that Bell's other actions were rational and goal-oriented. Bell was highly conscious of his environment and had the presence of mind to go to Mitchell's house, unscrew the cable box from the television, get a plastic bag, hide the knife and cover the stolen items with a blanket. (37 RT 3106-3107.) Additionally, psychotic decompensation is a slow process and a loss of contact with reality would occur within minutes of smoking the crack cocaine. (37 RT 3062-3063, 3107.) Furthermore, records concerning Bell contained no history of dissociative reactions. Moreover, if Bell had such a reaction, he would have mentioned it to Redden. (37 RT 3064-3067.) Bell did not say anything about hallucinations until more than a year after the fact, and then made statements which were self-serving. (37 RT 3067-3068.) Mills noted that

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[11] The court authorized Mills to interview Bell. (37 RT 3051.) However, when Mills went to see Bell at the jail, Bell declined to be interviewed. (37 RT 3052-3053.)

when Bell was interviewed by law enforcement after the 1981 offense, Bell blamed it on the fact that he had just used PCP for the first time. However, Bell told Levak he started using it at age thirteen. (37 RT 3068-3069.)

Mills also disagreed with testimony from defense experts that Bell blocked out the killing after it happened. If he had, when he found out about it, he would have expressed sorrow, horror or grief at the loss of Joey's life. (37 RT 3066-3067.) The interview tapes showed, however, that Bell remained emotionless and flat. (36 RT 2951-2952.)

III. PENALTY PHASE EVIDENCE

A. Prosecution Case

The prosecution penalty phase evidence focused on the circumstances surrounding the 1981 offense; the impact it had on the victim, Christopher Cap; and the impact Joey's death had on his family.

Cap described what he remembered about the 1981 offense. Cap testified that on March 17, 1981, when he was thirteen years old, he and some friends decided to skip school so they could attend the St. Patrick's Day parade. (44 RT 3625-3626.) They watched the parade, drinking beer and smoking marijuana. (44 RT 3626-3627.) Later that night, Cap, Bell, who Cap did not know very well, and two of Cap's friends - Kim and Derrick - went to Cap's apartment. (44 RT 3627-3628, 3636.) Derrick, who was very drunk, got sick. (44 RT 3628-3629.) Cap, Kim and Bell carried Derrick to Lennox Hill hospital, which was a couple of blocks away. Bell kept kicking and hitting Derrick for no reason. (44 RT 3629.)

After they took Derrick to the hospital, Kim, Bell and Cap returned to Cap's apartment. (44 RT 3629-3640.) By this time, it was late at night. The three played games for awhile, then Kim went home. Cap and Bell remained in Cap's bedroom. (44 RT 3630.) As the two were sitting on

Cap's bed talking, Bell told Cap that he had dropped his keys behind the bed and could not reach them. (44 RT 3631-3632.) Bell asked Cap to look for the keys. Cap leaned across the bed, reaching down between the bed and the wall. (44 RT 3632.) Bell stuck a fifteen inch butcher knife in Cap's back. (44 RT 3632-3633.) Cap fell to the floor. (44 RT 3633-3634.) He drifted in and out of consciousness. (44 RT 3634.) He could hear the sounds of the knife as he was trying to breathe. (44 RT 3635.) The next thing Cap remembered was trying to get up and walk. He could not stand. He lay on the floor for a few more hours until he was found and taken to the hospital, where the knife was surgically removed. (44 RT 3635.) Bell was one of the people who visited Cap in the hospital and who signed get well cards. (44 RT 3639-3640.)

In a confession given to law enforcement on March 27, 1981, Bell supplied additional details surrounding the 1981 offense. Bell stated that he retrieved the knife from Cap's kitchen when he told Cap he was getting a drink of water. (37 RT 3092-3093.) When Cap turned away, Bell stabbed Cap in the back, angling the knife until it went all the way through Cap's body. (37 RT 3094-3095, 3102.) After Cap fell to the floor, he asked Bell to take him to the hospital. (37 RT 3095-3096.) Bell ignored Cap's request. Instead, Bell went into Cap's bathroom, retrieved a jar of Vaseline, pulled Cap's pants down to his knees, removed his own pants, put some Vaseline in Cap's rear end and sodomized him. (37 RT 3096-3097.) Bell then got dressed, left Cap's apartment and went home. (37 RT 3096-3097.)

Cap told the jury that after the stabbing, he lost a lot of school time and was not able to catch up. He never graduated from high school. (44 RT 3640.) He was living with his mother in the same apartment they occupied in 1981. (44 RT 3635.) Other than his mother, his sole means of support was SSI. (44 RT 3639.) For several years, Cap was paralyzed

from the waist down. (44 RT 3640.) He recently regained some movement in his legs. (44 RT 3635, 3540-3541.) He still depends on a wheelchair and still has scars on his chest and back. (44 RT 3633, 3640.)

Joey's mother Deborah Mitchell and Mitchell's father Joseph N. Fuller described Joey as a typical, happy eleven-year old boy who liked to talk, ride his bike and play. (44 RT 3618-3619, 3661, 3664-3665.) Since Joey's death, Mitchell has distanced herself from the rest of the family. (44 RT 3621-3622.) Mitchell has been unable to return to her former home on 28th Street and has moved away from San Diego, where she grew up and where many of her relatives still live. (44 RT 3619-3620, 3665-3666.) Mitchell, who took Joey's murder very hard, lives alone in San Francisco and attends therapy twice a week. (44 RT 3620, 3667.)

As part of the prosecution's penalty phase evidence, the jury was shown two additional crime scene photos, and photographs of Joey and Mitchell during a recent trip to San Francisco. (44 RT 3616-3617, 3663-3664.)

B. Defense Case

Defense witnesses discussed Bell's ability to adjust well in an institutionalized setting, contributions he could make if incarcerated, his normally gentle nature, his problems with drug abuse, his psychological difficulties and his dysfunctional family background.

Shirley and Jacqueline Bell, Bell's paternal aunts, Kenneth L. Bishop, Jr., Bell's first cousin, and Lisa Marie Graves, Bell's older sister, told of a family background of physical abuse, sexual abuse and lack of either nurturing or love. When Bell was two years old, he was hospitalized for pneumonia. (46 RT 3757-3758.) His mother visited him on only one occasion. (46 RT 3758-3759.) When Bell was a little older, he began to stutter. (46 RT 3759; 49 RT 4108-4109.) The stuttering annoyed his

mother, who told him to say what he had to say or shut up. (46 RT 3759-3760, 3787; 49 RT 4109.) Bell stopped communicating with his mother and had Lisa speak for him. (49 RT 4109-4110.) In all the years Bell was growing up, his mother never showed him any affection. (46 RT 3760; 48 RT 3990; 49 RT 4108.) He had no toys. (46 RT 3783-3784.) As a result, Bell was not a loving child, was quiet and unhappy, and did not interact with other children. (46 RT 3783-3785, 3791; 48 RT 3990-3991.)

Bell's natural father was drug user who stole from the family. (46 RT 3764; 49 RT 4105-4106, 4110.) After Bell's parents divorced, Bell's mother did not allow him to have contact with his aunts, his cousin, his father or his grandmother, the only nurturing adults in his life. (46 RT 3763-3764, 3780, 3791-3792; 48 RT 3992-3993; 49 RT 4106.)

Bell's mother remarried while he was still a child. (49 RT 4112-4113.) The step-father beat Bell with an electric cord, a belt and his hands. (49 RT 4113-4115, 4122-4123.) The step-father sexually molested Bell's sister Lisa for several years, until Lisa joined the army, leaving Bell alone and afraid. (49 RT 4123-4126.) Bell's mother kept marijuana in the house which Lisa and Bell stole and smoked. (49 RT 4117-4119.) Additionally, in the New York neighborhood where Bell grew up, crack cocaine was prevalent, cheap and easy to obtain. (48 RT 4006-4007.)

Several individuals who worked at or with the Harlem Valley Youth Detention Center, where Bell was incarcerated for the 1981 offense, stated that Bell was a model inmate, never participated in violent incidents while in custody, was shy and quiet, had an excellent work ethic, was intelligent, and showed a talent for poetry, acting and mechanics. (47 RT 3822, 3829-3832, 3838-3839; 48 RT 3916-3917, 3957-3960, 3963, 3982, 4030-4031, 4051-4054, 4068-4072.) Bell was active in Theater Rehabilitation for Youth ["TRY"], a group which gave performances in the facility. (47 RT 3818-3819, 3822-3835.) While in custody, Bell obtained his G.E.D. and

participated in the college program. (48 RT 3917-3918, 4065-4066.) He worked in the kitchen and in the recreation department setting up audio-visual equipment. (48 RT 3918-3919, 4030-4032, 4049, 4065, 4067.) He was given those jobs because he could be trusted. (48 RT 48 RT 3919-3920, 4030-4031.) Bell would continue to do well in a prison setting and would have a contribution to make to other inmates. (48 RT 3924-3925, 3964, 4033-4034.)

James Park, a long time correctional consultant, explained the severe restrictions placed on prisoners who have been sentenced to life without the possibility of parole. (50 RT 4187-4204.) Park also opined that Bell would be an excellent prisoner because he adapts well to incarceration, is willing to learn and has not been involved in any incidents since he was jailed for this crime. (50 RT 4204.) The director of TRY noted that Bell found it very difficult to forgive himself for what he had done to Cap. (47 RT 3829-3831.)

After Bell was released from custody in 1987, he was hired by TRY in their audio-visual department. (48 RT 3968-3970.) He was bright, caring, funny and shy. (47 RT 3840-3841; 48 RT 3968-3972.) He was never violent or argumentative. (49 RT 4157.) However, he often showed up at work "strung out" on drugs. (47 RT 3841.) He was fired after less than a year because he falsely reported his weekly salary check missing, so he could receive a replacement check. (47 RT 3843-3844.) Before he left, he worked an extra week to pay back the money he stole. (47 RT 3844.)

Two years later, Bell received training in electronics with the San Diego Urban League and enrolled in Kelsey-Jenney College. (46 RT 3770-3774, 3797-3798.) He dropped out of Kelsey-Jenney during the second semester, was arrested for violating his parole by leaving New York without permission, and was returned to custody. (46 RT 3799; 49 RT

4130-4131.) In May 1992, shortly after he returned to San Diego, he re-enrolled in Kelsey-Jenney. (46 RT 3801-3802.)

Alexander Caldwell, Ph.D., licensed clinical psychologist, echoed the opinions of Smith and Levak that Bell had a borderline personality disorder. (47 RT 3874-3875.) Caldwell opined that the murder of Joey, and the 1981 offense, resulted from transient psychotic episodes characteristic of this disorder, which in Bell's case was exacerbated by his drug use. (47 RT 3881-3883.) Bell would not engage in similar behavior in prison because it is a highly-structured, authoritarian setting. (47 RT 3884-3885, 3898.)

C. Prosecution Rebuttal Case

Robert A. Ruiz, a San Diego County deputy sheriff assigned as a training officer in the downtown jail, explained that Bell did not currently have much opportunity to interact with other jail inmates because he was in protective custody. (50 RT 4246-4248.) Deputy Probation Officer Bonita Miller, who prepared a pre-sentence report in connection with a conviction Bell sustained in 1991 for forgery, told the jury that she and Bell discussed the 1981 offense. (50 RT 4239-4240.) Bell claimed that he and Cap were smoking PCP, Cap grabbed a butcher knife, but Bell stabbed Cap first. Bell minimized the incident, did not mention the sodomy, said that he and Cap were still friends, and did not express any remorse over what had happened. (50 RT 4240 -4241.)

ARGUMENT

I. BELL FAILS TO STATE A PRIMA FACIE CASE THAT HE WAS DENIED HIS RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY

In Claim I, Bell alleges that he was denied his right to a fair and impartial jury by: (1) the prosecutor's unconstitutional use of peremptory challenges; (2) the trial court's excusal of jurors because of their views regarding the death penalty; (3) trial defense counsels' failure to obtain discovery, and present evidence, of the prosecutor's "discriminatory" practices in jury selection; (4) defense counsels' failure to seek discovery from the jury commissioner about San Diego County jury selection practices; (5) defense counsels' failure to question and peremptorily challenge jurors M.D., W.R., and M.S.; and (6) appellate counsel's failure to raise "the above arguments" on direct appeal. (Petn. at pp. 24-31.) Bell fails to state a prima facie case for relief on this claim.

A. The Prosecutor Did Not Unconstitutionally Exercise His Peremptory Challenges

In Subclaim I(2),[12] Bell argues that the prosecutor in his case, and prosecutors throughout San Diego County, improperly used peremptory challenges to remove jurors on the basis of "race, gender and sexual orientation" in violation of *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] and *People v. Wheeler* (1978) 22 Cal.3d 258. (Petn. at pp. 25-27.) Bell's subclaim is procedurally barred because he raised it on direct appeal, and it was rejected by this Court. (*People v. Bell*,

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[12] The numbering system in the amended petition is extremely confusing. Some of the items labeled as claims and subclaims are simply preliminary statements or statements in conclusion. Respondent is addressing only those subclaims in which substantive issues are raised.

supra, 40 Cal.4th at pp. 594-601; *In re Waltreus*, *supra*, 62 Cal.2d at p. 225.)

Bell also fails to state facts supporting a prima facie case for relief. To evaluate a claim of discriminatory jury selection, courts apply a three step analysis. First, the moving party must raise an inference that the challenged jurors were excluded because of their group association. (*Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129].) Once the moving party has established a prima facie case, the burden shifts to the opposing party to come forward with a group-neutral explanation for the exercise of the peremptory challenges. The trial court must then determine whether the moving party has carried its burden of proving purposeful discrimination. (*Johnson v. California*, *supra*, 545 U.S. at p. 168; *Hernandez v. New York* (1991) 500 U.S. 352, 358-359 [111 S.Ct. 1859, 114 L.Ed.2d 3095].) It is presumed that challenges are exercised in a constitutional manner. (*People v. Crittenden* (1994) 9 Cal.4th 84, 114.) Thus, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1859, 131 L.Ed.2d 395] (per curium).)

In support of his subclaim, Bell incorporates by reference the facts and arguments set forth in pages 63 through 102 of his opening brief on appeal, pages 2 through 33 of his reply brief on appeal, his supplemental letter brief on appeal, and his supplemental letter reply brief on appeal. (Petn. at p. 25.) Respondent refers this Court to the respondent's brief at pages 18-32; respondent's supplemental letter brief on appeal; and this court's opinion in *People v. Bell*, *supra*, 40 Cal.4th at pp. 594-601. This Court held that Bell failed to make a prima facie showing that the prosecutor dismissed any of the six prospective jurors under consideration

for constitutionally impermissible reasons. (*People v. Bell*, *supra*, 40 Cal.4th at pp. 594-601.)

Bell also cites sixteen published and unpublished opinions from California Courts in which the defense alleged discrimination in jury selection by "San Diego County prosecutors." (Petn. at p. 26.) Bell alleges that these cases show that the "San Diego County District Attorney engaged in a pattern and practice of peremptorily challenging jurors on the basis of race, gender, and sexual orientation[.]" Bell did not bring the cases to the trial court's attention and did not allege that prosecutors as a whole engaged in discriminatory practices; therefore, he has forfeited his claim. (See *People v. Howard* (1992) 1 Cal.4th 1132, 1153-1159.) Moreover, in all but one of the sixteen cases, the reviewing courts found *no evidence of discrimination* by the prosecutor. (*People v. Box* (2000) 23 Cal.4th 1153, 1185-1190 [no prima facie case]; *People v. Ayala* (2000) 24 Cal.4th 243, 264-269 [any prima facie case rebutted]; *People v. Jurado* (2006) 38 Cal.4th 72, 102-108 [any prima facie case rebutted]; *People v. Hoyos* (2007) 41 Cal.4th 872, 899-902 [no prima facie case]; *People v. Harvey* (1984) 163 Cal.App.3d 90, 109-112 [no prima facie case]; *People v. Charron* (1987) 193 Cal.App.3d 981, 986-992 [any prima facie case rebutted]; *People v. Yarborough* (1988) 244 Cal.Rptr. 352, 355-359, review denied and ordered depublished [any prima facie case rebutted]; *People v. Christopher* (1991) 1 Cal.App.4th 666, 669-673 [no prima facie case]; *People v. Bernard* (1994) 27 Cal.App.4th 458, 464-469, disapproved, *People v. Box*, *supra*, 23 Cal.4th at p. 1188, fn. 7 [no prima facie case]; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1319- 1330 [no prima facie case as to three prospective jurors and as to fourth, prima facie case rebutted]; *People v. Tritchler* (1996) 55 Cal.Rptr.2d 650, 653 & 670, review denied and ordered depublished [rejecting *Wheeler* claim in unpublished portion of an opinion certified for partial publication];

Mitleider v. Hall (9th Cir. 2004) 391 F.3d 1039, 1040-1051 [upholding California Court of Appeal's finding that prima facie case rebutted]; *People v. Rodriguez*, D035046 (Ct. App. 2001) 2001 WL 1194003 at *1-*4 (unpublished opinion) [prima facie case rebutted]; *People v. Trice*, D035246 (Ct. App. 2001) 2001 WL 1382742 at *9-*10 [no prima facie case].) The sole exception was *People v. Washington* (1987) 234 Cal.Rptr. 204, review denied and ordered depublished. Bell has not met his burden of showing that this one matter, decided nearly seven years before Bell's trial began, constituted a "pattern." (Compare *People v. Howard* (2008) 42 Cal.4th 1000, 1018 ["the challenge of one or two jurors, standing alone, can rarely suggest a pattern of impermissible exclusion"].)

Bell's additional assertion that the San Diego County District Attorney's Office "trained prosecutors to engage in discriminatory and unlawful jury selection practices" (Petn. at p. 26) is conclusory, speculative, and utterly lacking in factual support. Conclusory allegations do not warrant habeas relief. (*People v. Duvall, supra*, 9 Cal.4th at pp. 474-475.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris*, *supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim I(2) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

B. The Death Qualification Process For California Juries Is Constitutional

In Subclaim I(3), Bell complains about the composition of his jury, alleging that prospective jurors were improperly removed because of their views on the death penalty. (Petn. at pp. 27-30.) Bell's subclaim is procedurally barred and fails to state a prima facie case for relief.

Bell claims that empirical studies show that death-qualific ation under *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841], does not guarantee jurors who will fairly consider a life sentenc e or mitigating evidence. (Petn. at pp. 27-28.) However, his factual allegations regarding post-verdict jurors do not show that the jurors in the studies, much less jurors in his case, were not impartial when questioned on voir dire. That post-verdict jurors believed death to be the only appropriate punishment and concluded the proffered mitigation evidence to be insufficient to reach a different result simply describes the jury' s penalty conclusion and says nothing meaningful about the jurors' impartiality.

Moreover, in *Wainwright*, the Court did not set out to provide a guarantee of juror impartiality; it simply clarified the proper standard for a trial court to use in judging a potential juror's bias. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) The Court noted that to disqualify a juror for impartiality, the proponent of the challenge must demonstrate, through questioning, the potential juror's lack of impartiality. (*Id.* at p. 423.)

Bell asserts that his death sentence and the underlying guilty verdicts must be set aside because the voir dire procedure used to death-qualify the jury did not ensure juror impartiality. His claim relies on the written juror questionnaire used by the trial court, the trial court's excusal of fourteen jurors for cause who stated they could not impose the death penalty under any circumstances, empirical studies, and the prosecutor's peremptory challenge of a juror who stated he had reservations about imposing a sentence of death upon any defendant. (Petn. at pp. 28-30.) Bell also argues that the death qualification process is "biased" against defendants, including himself, for whom a death sentence is sought. (Petn. at p. 30.) To the extent that Bell properly preserved this claim in the trial court, Bell is procedurally barred for failing to raise it on direct appeal. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.) To the extent that Bell failed to preserve the

claim in the court below (*People v. Davenport* (1995) 11 Cal.4th 1171, 1205), it is procedurally barred because it is not based on facts that Bell did not know and could not reasonably have known at the time of trial. (*In re Seaton* (2004) 34 Cal.4th 193, 199-200.)

Bell's assertion that death qualification produces conviction-prone jurors (Petn. at pp. 28-29) was rejected by the United States Supreme Court in *Lockhart v. McCree* (1986) 476 U.S. 162 [106 S.Ct. 1758, 90 L.Ed.2d 137]. In *Lockhart*, the Court assumed that death qualification produces juries more conviction-prone than non-death qualified juries, but held the procedure did not violate the right to trial by an impartial jury. (*Lockhart v. McCree*, *supra*, 476 U.S. at pp. 176-184; see also *Buchanan v. Kentucky* (1987) 483 U.S. 402 [107 S.Ct. 2906, 97 L.Ed.2d 336].) *Lockhart* also rejected the related claim that the death qualification process violates the defendant's right to trial by a representative cross section of the community and in general is constitutionally flawed. (*Lockhart v. McCree*, *supra*, 476 U.S. at pp. 176-177; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1198; *People v. Kaurish* (1990) 52 Cal.3d 648, 674.)

Bell argues that "several studies" show that the death qualification process excludes women, minorities and [unspecified] religious groups from capital juries. Bell does not cite a single study nor does he explain how this alleged skewing of jury pools applied to his jury. Such a conclusory allegation without supporting facts does not warrant relief. (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1258.) In Bell's case, four of the sixteen jurors, including one of the alternates, were African-American. (26 RT 1752.) Seven were women. (CT Index 13-14.) In fact, the trial court described the composition of Bell's jury as "particularly fair." (26 RT 1759.)

Relying on the appellate record, Bell complains about the prosecutor's use of a peremptory challenge to dismiss juror prospective juror H.L. which

was based on Mr. L.'s concerns about sentencing a defendant to death. (Petn. at pp. 29-30.) The claim is procedurally barred because Bell could have raised it on direct appeal but did not. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.) Moreover, Bell's claim fails to state facts supporting a prima facie case for relief. A prosecutor may dismiss potential jurors who might have reservations about imposing the death penalty. (*People v. Turner* (1984) 37 Cal.3d 302, 315, overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1115; *People v. Zimmerman* (1984) 36 Cal.3d 154, 161.) H.L. said during voir dire that the death penalty would be justified only in cases where "someone planned to kill someone and stakes it out and does it[.]" (23 RT 1354.) He said he would vote for death only if the defendant had the intent to kill. (23 RT 1376-1378.) When the court denied the prosecutor's challenge for cause (23 RT 1383), the prosecutor used one of his peremptory challenges to excuse H.L. (24 RT 1529.) Bell identifies nothing objectionable about the challenge other than the fact that he would have preferred that H.L. remain on his jury. (Petn. at p. 29.) However, the prosecutor had legitimate concerns that H.L. would be reluctant to recommend a death sentence in a case such as Bell's, which did not involve a premeditated, or "preplanned" murder. (23 RT 1377-1378.) A juror's reluctance to recommend the death penalty, even if insufficient to justify a challenge for cause, is a valid reason for a prosecutor to exercise a peremptory challenge. (*People v. Ledesma* (2006) 39 Cal.4th 641, 671; see *People v. Davis* (2009) 46 Cal.4th 539, 584 ["obvious race-neutral grounds" for peremptory challenge include juror's "strong opposition towards death penalty" or considering life imprisonment more severe penalty than death].)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris*, *supra*, 5 Cal.4th at p. 828.) Accordingly,

Subclaim I(3) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

C. Trial Counsel Was Not Ineffective For Failing To Seek Discovery From The District Attorney's Office

In subclaim I(4), Bell claims that counsel was prejudicially ineffective for failing to seek discovery from the San Diego District Attorney's Office about their "discriminatory practices" in jury selection, and for failing to raise challenges to the death qualification process. (Petn. at pp. 30-31.) Bell fails to state facts supporting a prima facie case for relief as to this subclaim.

When a criminal defendant complains that trial counsel was ineffective, the defendant must first show the legal representation fell below an objective standard of reasonableness. (*Strickland v. Washington* (1984) 466 U.S. 666, 688 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

> The Sixth Amendment . . . relies . . . on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions [citation]. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

(*Strickland v. Washington, supra*, 466 U.S. at p. 688; see *People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

Reviewing courts generally defer to tactical decisions made by trial counsel. These decisions must be viewed through counsel's perspective at the time they were made and will not ordinarily be second-guessed. (*Strickland v. Washington, supra*, 466 U.S. at pp. 689-691.) It must be presumed that counsel exercised reasonable professional judgment. (*Bell v. Cone* (2002) 535 U.S. 685, 698 [122 S.Ct. 1843, 152 L.Ed.2d 9134]; *People v. Holt* (1997) 15 Cal.4th 619, 703.) *Strickland* imposes a "highly

demanding standard upon petitioner to prove gross incompetence." (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 382 [106 S.Ct. 2574, 91 L.Ed.2d 305].) "The fact that [the defendant] was convicted is no evidence that his counsel was incompetent." (*People v. Hartridge* (1955) 134 Cal.App.2d 659, 667.) The same rules apply when counsel's performance is attacked by means of a petition for writ of habeas corpus. A defendant alleging counsel had no tactical reason for a particular act or omission *must present evidence* to support his claim. (*People v. Williams* (1988) 44 Cal.3d 883, 920.)

The defendant must also demonstrate prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217; *People v. Fosselman* (1983) 33 Cal.3d 572, 584.) Prejudice exists only when it is reasonably probable that a result more favorable to the defendant would have occurred absent the challenged act or omission. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217-218.) The defendant must show that counsel's incompetence resulted in a fundamentally unfair proceeding or an unreliable verdict. (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 369-370 [113 S.Ct. 838, 122 L.Ed.2d 180]; *In re Hardy* (2007) 41 Cal.4th 977, 1019.)

> [T]o be entitled to reversal of a judgment on the grounds that counsel did not provide constitutionally adequate assistance, the [defendant] must carry his burden of proving prejudice as a "demonstrable reality," not simply speculation as to the effect of the errors or omissions of counsel [citation].

(*People v. Williams*, *supra*, 44 Cal.3d at p. 937.)

If a defendant fails to show that the challenged acts or omissions were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697; *In re Scott* (2003) 29 Cal.4th 783, 830.)

Bell has not met his pleading burden. Bell does not include declarations from either of his two trial counsel[13] as to the efforts they made in this regard. The omission of any declarations from defense counsel is "significant" and raises the strong implication that the attorneys would have said nothing helpful to Bell's claim.[14] (*People v. Webster* (1991) 54 Cal.3d 411, 457.) Further, Bell has not provided this Court with the discovery he alleges should have been obtained or how it would have changed the outcome of his case. In evaluating a claim of ineffectiveness based on failure to seek discovery, "[t]he focus . . . is not on what information counsel failed to discover, but rather whether a more favorable result would have obtained in the absence of the error." (*In re Avena* (1996) 12 Cal.4th 694, 730; *People v. Bess* (1984) 153 Cal.App.3d 1053, 1058.) As set forth in Argument I(A), *supra*, Bell has presented no evidence that the San Diego County District Attorney's office practiced discrimination in jury selection, and, in fact, the rejection of such a claim in fifteen of the sixteen cases cited by Bell shows the contrary to be true. Thus, Bell fails to show how the discovery, if obtained, would have changed the verdict on either guilt or penalty. (*In re Avena*, *supra*, 12 Cal.4th at p. 730; *People v. Bess*, *supra*, 153 Cal.App.3d at pp. 1058-1059.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify

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[13] Bell was represented at trial by Peter M. Liss and Sharyn M. Leonard of the San Diego County Public Defender's Office.

[14] Attorney Liss is an active member of the California State Bar and is in private practice in Vista, California. (http://members.calbar.ca.gov/search/member_detail.aspx?x=111128.) Attorney Leonard is an active member of the California State Bar and is still employed by the San Diego County Public Defender's Office. (http://members.calbar.ca.gov/search/member_detail.aspx?x=79501.)

habeas relief. (*In re* Harris, *supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim I(4) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

D. Trial Counsel Was Not Ineffective For Failing to Seek Discovery From the Jury Commissioner or For Failing to Challenge the Death Qualification Process For California Juries

In subclaim I(5), Bell claims that trial counsel was prejudicially ineffective for failing to seek discovery from the jury commissioner and was also ineffective for failing to investigate and challenge the death qualification process. (Petn. at pp. 30-31) Bell fails to state a prima facie case for relief as to this subclaim.

Bell provides no declaration from either counsel as to their efforts in this regard, an omission which is "significant." (*People v. Webster*, *supra*, 54 Cal.3d at p. 457.) Despite the fact that habeas counsel has been investigating this case for over three years, none of the four volumes of exhibits Bell has filed with his amended petition include the discovery he now claims counsel should have obtained. Absent such discovery, Bell has not met his burden of pleading either ineffective representation or prejudice. (*In re Avena*, *supra*, 12 Cal.4th at p. 730.)

Indeed, Bell has not shown that San Diego County deviates from the statewide practice of selecting petit jurors from DMV records and lists of voters registered in the county, a method this Court has upheld against challenges by defendants claiming it is unconstitutional or unfair. (*People v. Burgener* (2003) 29 Cal.4th 833, 857; *People v. Sanders* (1990) 51 Cal.3d 471, 476.) Finally, as explained in Argument I(B), *supra*, the death qualification process has been repeatedly upheld. Therefore, any challenge by trial counsel would have been rebuffed by the court. Trial counsel was

not required to make an obviously futile motion. (*People v. Hines* (1997) 15 Cal.4th 997, 1038, fn. 5.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris*, *supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim I(5) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

E. Trial Counsel Did Not Conduct Inadequate Voir Dire and Improperly Fail to Exercise Peremptory Challenges

In subclaim I(6), Bell, relying on the appellate record, claims that trial counsel failed to adequately voir dire jurors M.D., W.R., and M.S., and was prejudicially ineffective for not exercising peremptory challenges against those three jurors. (Petn. at p. 31.) Bell fails to state facts supporting a prima facie case for relief as to this subclaim.

In determining whether voir dire is adequate, a reviewing court considers the voir dire as a whole, including questions asked in any juror questionnaires. (*People v. Stewart* (2004) 33 Cal.4th 425, 457-458.) As this Court has recognized, the decisions of the United States Supreme Court "have made clear that 'the conduct of voir dire is an art, not a science,' so '"[t]here is no single way to voir dire a juror' [citation]" (*People v. Cleveland* (2004) 32 Cal.4th 704, 737, quoting *Mu'Min v. Virginia* (1991) 500 U.S. 415, 451 [111 S.Ct. 1899, 114 L.Ed.2d 493] (dis. opn. of Kennedy, J.).) Content-based questions, "even ones that might be helpful, are not constitutionally required." (*People v. Cleveland*, *supra*, 32 Cal.4th at p. 737, citing *Mu'Min v. Virginia*, *supra*, 500 U.S. at pp. 424, 425.) The United States Constitution only requires that "the defendant be afforded an impartial jury." (*Morgan v. Illinois* (1992) 504 U.S. 719, 729 [112 S.Ct.

2222, 119 L.Ed.2d 492], quoted in *People v. Cleveland*, *supra*, 32 Cal.4th at p. 737.)

Similarly, "the decision whether to accept a jury as constituted is obviously tactical." (*People v. Lucas*, *supra*, 12 Cal.4th at p. 480; accord, *People v. Bolin* (1998) 18 Cal.4th 297, 316.) """Because the use of peremptory challenges is inherently subjective, an appellate record will rarely disclose reversible incompetence in this process."""" (*People v. Hinton* (2006) 37 Cal.4th 839, 860, quoting *People v. Freeman* (1994) 8 Cal.4th 450, 485.)

Applying these principles, Bell has not met his pleading burden as to any of the three jurors in question.

Juror M.D. worked for the Department of Veterans Affairs as an insurance analyst. He was married with one child, a 19 year old daughter. (22 RT 1140; 9 CT 1946.) In the portion of the questionnaire seeking his views on the death penalty, M.D. said he was opposed to it as a young man, but, as he got older, felt it was "appropriate in certain circumstances." (9 CT 1956.) He had "no problem" with a sentence of life without the possibility of parole. (9 CT 1956.) Because he stated on the questionnaire that he went to law school and worked for the FBI (9 CT 1948, 1951), the court asked him several questions about his background. (22 RT 1140-1142.) The court asked him if he could set aside what he learned in law school, not mention it to fellow jurors, and follow the court's instructions. M.D. responded that he could; it had been years since he was in law school and he did not remember much of what he learned. (22 RT 1142.) Asked if he could be a fair and impartial juror, M.D. responded, "Yes, Sir." (22 RT 1143.) Defense counsel Leonard inquired into M.D.'s FBI experience and asked him about the book he was reading. (22 RT 1182.) She obtained his commitment that despite the fact that he was a parent, and the victim in Bell's case was a child, he could be fair. She asked him how he felt about

jury service. He responded that he had never served, but felt very positive about it. (22 RT 1183.) The prosecutor asked M.D. about his V.A. experience, his job history and his wife's job history. (22 RT 1197-1198.) Asked by the prosecutor about his feelings regarding the use of alcohol and cocaine, M.D. said it was a problem and he was not in favor of drug use. (22 RT 1197-1198.) He added, "I haven't really formulated a vehement opinion one way or another[.]" (22 RT 1198.) The prosecutor asked M.D. about his questionnaire response regarding capital punishment. M.D. responded that he was neither opposed nor in favor, he felt the appeal process was burdensome on families and defendants, and he felt there should be a better way to deal with the situation. (22 RT 1199.) Asked if he could set aside those concerns and reach a fair decision if selected to serve on Bell's jury, M.D. responded that he could. (9 RT 1200.) Thus, the record shows that M.D. was thoroughly questioned. His responses showed he would be a fair and impartial juror for both sides.

Juror W.R. was single. She was a teacher and was 29 years old. (9 CT 1931.) She expressed no preference for the death penalty or life in prison without the possibility of parole. (9 CT 1940.) She stated in her juror questionnaire that jury service was an "incredible and sobering responsibility" and that she believed she could be fair. (9 CT 1943.) Because she stated she was a victim of a robbery (9 CT 1938), the trial court asked her to describe that experience. (22 RT 1234.) She explained that someone broke into her house and stole her ATM card from her purse. (22 RT 1234.) The perpetrator pled guilty and W.R. was reimbursed. (22 RT 1235.) In another incident, her van was vandalized. (22 RT 1236.) The trial court also asked her about her work as a teacher, including the ethnic breakdown of her students. (22 RT 1236-1237.) After asking W.R. a few preliminary questions about her preferences in television shows (9 RT 1249-1250), defense counsel Liss asked her about the cases in which

she was a crime victim and about her work as a teacher. (22 RT 1250-1251.) He also asked her about her side job doing personal investing. (22 RT 1251-1252.) The prosecutor asked W.R. about her teaching career. (22 RT 1278.) He asked her whether she had any hesitation about serving as a juror. She said it was a frightening responsibility but she could do it. The prosecutor asked her if she could talk to her fellow jurors and come to the right decision for the right reasons. W.R. responded that she could. (22 RT 1279.) Thus, the record shows that W.R. was thoroughly questioned. Her responses showed she would be a fair and impartial juror for both sides.

Juror M.S. was a supervisor in the student services division of Mira Costa College. He was also a guidance counselor for the school. He was married with three children, ages 9, 11 and 12. His wife was a teacher. (9 CT 1915.) He had degrees in psychology. (9 CT 1916.) In the portion of the questionnaire asking his views about the death penalty, M.S. responded that it was not appropriate for all crimes in all circumstances, but he was not opposed to it if warranted under the court's instructions. He felt life without the possibility of parole was a proper sentence for certain crimes but said he wondered if "without parole is enforced." (9 CT 1925.) He stated he was qualified to serve as a juror, would serve willingly, and would feel honored to serve. (9 CT 1928.) The court asked M.S. about his employment and about his prior jury experience. (23 RT 1439.) M.S. explained that the judge dismissed the case before it reached the jury. (23 RT 1439-1440.) Asked if he would refrain from sharing his experience in psychology with other jurors, M.S. responded that he would. He also said that to the best of his ability, he would be fair in evaluating the testimony of mental health experts. Discussing his role as a guidance counselor, he said he was more a mediator than a judge. (23 RT 1440.) He replied "I think so" to the court's inquiry as to whether he could be fair and impartial. (23 RT 1441.) Defense counsel Leonard asked M.S. about his wife's work as a

teacher. (23 RT 1452-1453.) The prosecutor asked him a series of questions about his employment. (23 RT 1481-1482.) The prosecutor also asked him how, in light of his background, he felt about listening to testimony by psychiatrists and psychologists. His response was that it would be interesting. He agreed with the idea that mental health professionals could have differing opinions. He had no concerns about judging the testimony of such witnesses. (23 RT 1483.) The prosecutor asked him about his earlier request for a hardship excusal. (23 RT 1482-1483.) M.S. said the problem had been resolved and he could give the trial his undivided attention. Asked his feelings about crack cocaine, M.S. stated, "I don't think it's a wise choice, but it doesn't necessarily make them [sic] a bad individual." (23 RT 1483.) He had no personal experiences with the drug which would cause him a lack of objectivity. (23 RT 1483.) He had counseled students who abused substances. (23 RT 1484.) The prosecutor also asked him about his questionnaire response regarding the death penalty. (23 RT 1484.) M.S. said he could vote to impose it if the defendant were convicted of murder with special circumstances, and the aggravating evidence showed it was the appropriate sentence. (23 RT 1484-1485.) Thus, the record shows that M.S. was thoroughly questioned. His responses showed he would be a fair and impartial juror for both sides.

In light of the lengthy questionnaire and the extensive questioning by the court, the prosecutor and defense counsel, Bell "fails to show that additional or different questions would have been more effective in uncovering juror biases." (*People v. Staten* (2000) 24 Cal.4th 434, 452; see *People v. Cunningham* (2001) 25 Cal.4th 926, 1004 [defense counsel sufficiently questioned jurors about whether they harbored racial bias by asking, among other things, "whether they themselves would be comfortable if judged by a juror who had their state of mind"].) Bell's

assertion "that a more extensive voir dire would have achieved more favorable results" is "[n]othing other than pure speculation" (*People v. Lewis* (1990) 50 Cal.3d 262, 291), and (Petn. at p. 31) "is insufficient to establish ineffective representation." (*People v. Mendoza* (2000) 24 Cal.4th 130, 165.) "In not questioning . . . prospective jurors who were later chosen to serve on the jury, defense counsel may well have made a reasonable tactical decision." (*People v. Hernandez* (2003) 30 Cal.4th 835, 856.) For instance, the detailed questionnaire, the court's own inquiries, and follow up questions by the prosecutor were sufficient to ferret out any bias.

Furthermore, Bell fails to state a prima facie case of prejudice. Each of the jurors under consideration said (s)he could be fair. (22 RT 1143, 1279; 23 RT 1441.) Bell "has not shown that there could be no reasonable tactical basis for counsels' decision not to use [their] peremptory challenges to excuse these jurors." (*People v. Staten*, *supra*, 24 Cal.4th at p. 454.) Trial counsel reasonably could have concluded that the present panel was satisfactory and that they did not want to undergo the risk of using up peremptory challenges only to be confronted by jurors who would be undesirable. Because Bell has not provided a declaration from either of his trial counsel, he cannot meet his burden of demonstrating an absence of a valid tactical reason for counsels' actions. Given M.D.'s response that he was at one time an opponent of the death penalty, W.R.'s youth and her occupation as a teacher, and M.S.'s occupation as a teacher and guidance counselor, counsel may well have concluded they would be more inclined to return verdicts more favorable to the defense.

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re* Harris, *supra*, 5 Cal.4th at p. 828.) Accordingly,

Subclaim I(6) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

F. Appellate Counsel Was Not Ineffective

In subclaim I(7), Bell claims that appellate counsel was ineffective for failing to raise subclaims 2 through 6 on his automatic appeal to this Court. (Petn. at p. 31.) Bell fails to state facts supporting a prima facie case for relief as to this subclaim.

The *Strickland* standard (defendant must show both inadequate performance and prejudice) applies to a challenge to counsel's effectiveness on appeal. (*Smith v. Robbins* (2000) 528 U.S. 259, 285-286 [120 S.Ct. 746, 145 L.Ed.2d 746]; *People v. Osband* (1996) 13 Cal.4th 622, 664.) An appellate attorney who files a merits brief has no duty to raise every non-frivolous or colorable issue. (*Jones v. Barnes* (1983) 463 U.S. 745, 750-753 [103 S.Ct. 3308, 77 L.Ed.2d 987].) The mere fact that appellate counsel has not raised every possible or conceivable argument does not establish that appellate counsel was ineffective. (*People v. Abilez* (2007) 41 Cal.4th 472, 537; *In re Robbins* (1998) Cal.4th at 770, 810.)

As stated in Arguments I(A) through I(E), above, Claim 1, and all of the subclaims therein, are totally lacking in merit. Thus, if appellate counsel had raised them on direct appeal, they would have been rejected by this Court. Appellate counsel had no duty to make the arguments simply to avoid the risk of an allegation, like the one here, that he himself was ineffective. (*Turner v. Calderon* (9th Cir. 2002) 281 F.3d 851, 872.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim I(7) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

II. BELL FAILS TO STATE A PRIMA FACIE CASE THAT HE WAS DENIED HIS RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL TRIBUNAL

In Claim Two, Bell claims that his was denied his right to a fair and impartial tribunal because: (1) the trial judge, the Honorable Richard M. Murphy, considered running for political office and in fact ran for political office after the conclusion of Bell's trial; (2) the court committed judicial misconduct by making disparaging remarks to defense counsel; (3) the court made erroneous rulings adverse to the defense; and (4) appellate counsel was ineffective because he failed to raise Subclaim 1 on appeal. Bell's claim is procedurally barred and fails to state a prima facie case for relief.

A. The Trial Judge Was Not Biased

In subclaims II(2) through II(4), Bell alleges that the San Diego County Superior Court judge presiding over his trial, the Honorable Richard M. Murphy, was biased or appeared biased, because of his political aspirations. Bell relies on the appellate record, newspaper articles, campaign contribution lists, and an article in the American Journal of Political Science in which the author opines that judges should be appointed rather than elected. (Petn. at pp. 32-38.)

Bell's subclaim is procedurally barred because he could have raised it on direct appeal but did not. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.) Furthermore, during the trial, Bell did not move to recuse Judge Murphy and did not exercise a peremptory challenge against him. Bell did not raise Judge Murphy's alleged political aspirations until approximately three to four weeks **after** the jury returned its verdict recommending the death penalty. (56 RT 4527.) Because Bell never alleged, during either the guilt

or penalty phase, that Judge Murphy was biased, he has forfeited his claim. (*People v. Wright* (1990) 52 Cal.3d 311, 467.) A claim of judicial bias must be raised at the earliest opportunity or it is waived. (*People v. Lewis* (2006) 39 Cal.4th 970, 994.) Finally, to the extent Bell is claiming error in the denial of his statutory motion to disqualify Judge Murphy, his claim is barred because mandate filed within ten days of any adverse ruling is the exclusive remedy for challenging such orders. (*People v. Cook* (2006) 39 Cal.4th 566, 585.)

Furthermore, Bell fails to state a prima facie case for relief as to this subclaim. On January 18, 1994, in a discussion regarding a possibility of continuing the sentencing date, defense counsel Liss mentioned an article which had appeared the previous December 21st speculating that Judge Murphy might run in the Republican primary election for a Congressional seat. (56 RT 4527.) Liss expressed concern such an intent might give the appearance of bias or cause actual bias. (56 RT 4528-4529.) Liss indicated his desire to file a recusal motion. (56 RT 4529.) Judge Murphy responded that he had not made a decision one way or the other. (56 RT 4529-4530.) He assured counsel, however, that nothing which was happening in his life would affect his objectivity. He told Liss that if the defense disagreed, the defense had the right to have the disqualification motion heard by another judge. (56 RT 4530.) Defense counsel Leonard asked Judge Murphy if she could voir dire him. (56 RT 4530-4531.) Judge Murphy responded that this was not proper; and again assured the defense that he had engaged in no impropriety during the trial. (56 RT 4531.) Leonard continued to complain about the stories in the newspaper regarding Judge Murphy's possible future plans. (56 RT 4532-4533.) Liss said he was afraid that Judge Murphy would not overturn the jury's verdict at the new trial hearing because he would be viewed as "coddling criminals" and consequently,

would not be "electable." (56 RT 4537.) The court continued the matter to allow the parties to submit written briefing. (56 RT 4534.)

On January 25, 1994, Leonard filed a motion requesting permission to voir dire Judge Murphy on his "present intentions regarding declaring his candidacy for U.S. Congress or other elected position" and to recuse him under Code of Civil Procedure section 170.1, subdivision (a)(6).[15] (7 CT 1603-1619.) In the motion, Leonard asserted a "good faith belief" that Judge Murphy had "entertained" the idea of running for Congress. (7 CT 1609.) She proposed asking Judge Murphy three voir dire questions to determine whether he harbored any actual bias: (1) Did he intend to run for elected political office in 1994 or 1995; (2) If so, what office and when; and (3) If not, did he consider running for office. (7 CT 1618-1619.) The motion included a declaration from Leonard in which she stated it was her understanding that Judge Murphy planned to run for Congress, and that if so, his acting as a trial judge in this case created the appearance of impropriety. She speculated that he did not want to grant continuances in Bell's case because of an upcoming election. Additionally, a juror had mentioned that Judge Murphy once served on the San Diego City Council. Judge Murphy had also attended a number of political events during the trial. Leonard also mentioned an article in the San Diego Union Tribune speculating that Judge Murphy would run for Congress in 1994 and said

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[15] That section provides in pertinent part:

> (a) A judge shall be disqualified if any one or more of the following is true:
>
> ¶ . . . ¶
>
> (6) (A) For any reason:
>
> ¶ ¶
>
> (I) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.

she had heard "rumors" about Murphy's political intentions. Leonard expressed her fear that Judge Murphy would deny Bell's automatic motion to reduce the sentence to life because San Diego County voters were "conservative" and wanted their politicians to be tough on crime. (7 CT 1611-1517.) At a hearing held that same day, Judge Murphy took the matter under submission to give the prosecution an opportunity to respond. At that time, Judge Murphy advised counsel he did not intend to run for political office in the year 1994. (57 RT 4552.)

Thereafter, Judge Murphy, represented by County Counsel, submitted a sworn declaration in which he stated that he did not intend to run for political office during the calendar year 1994, did not plan to run for political office in the foreseeable future, and planned to seek re-election to his judicial seat in 1996. He wanted Bell's trial to start before the end of 1993 because he did not know if he would remain in the criminal trials department. On November 23, 1993, the presiding judge transferred him from criminal trials to a general trial department. All of the "political functions" which the defense alleged he attended to further his political career were routine. On January 25, 1994, he told counsel he did not intend to run for Congress. Judge Murphy added that at all times during Bell's trial, he was scrupulously fair to both sides. He would continue to be fair for the remainder of the proceedings. Judge Murphy expressly denied that he was "biased or prejudiced against the defendant or his attorneys." (7 CT 1653-1655.) County Counsel also submitted a memorandum of points and authorities in opposition to the motion. Counsel argued that the motion was untimely, that Judge Murphy would have been automatically disqualified under the California Constitution had he declared his candidacy, that it is presumed Judge Murphy would properly perform his duties and act according to the oath he took as a judge, that Bell had not presented a

scintilla of evidence to rebut this presumption, and that in any event, Judge Murphy was not a candidate for political office. (7 CT 1660-1672.)

On February 1, 1994, with Bell's agreement, the Honorable James R. Milliken assigned the motion to Judge Terry O'Rourke for further proceedings. (58 RT 4559.) Thereafter, on February 4, a lengthy hearing was held before Judge O'Rourke on the merits of the motion. (59 RT 4570-4605.) At the hearing, defense counsel claimed that until December 1993, they had no knowledge that Judge Murphy was considering a run for Congress. Judge O'Rourke responded that the rumors were a matter of common knowledge; they had been in the news for months. (59 RT 4578.) Counsel claimed that if Judge Murphy had told them he was considering a run for Congress, they would have filed a peremptory challenge against him. (59 RT 4596, 4599.) Counsel asked Judge O'Rourke to disqualify Judge Murphy from future proceedings and to void all past proceedings. (59 RT 4577.) Counsel stressed that they did not think Judge Murphy was actually biased; they were concerned about the appearance of bias. (59 RT 4576.) Specifically, they wondered whether he would be more inclined to deny their motion to reduce Bell's sentence because he did not want the voters to see him as "soft on crime." (59 RT 4581-4582, 4584-4589.) Judge O'Rourke responded that life without parole was an extremely harsh sentence, judges also had to worry about re-election, and the defense arguments were based on speculation. (59 RT 4571-4591.) Judge O'Rourke denied the disqualification motion, finding no legal cause for disqualification. He found that Judge Murphy should not be presumed biased simply because he might run for some political office, judges who run for re-election do not let this fact influence their decision-making process, and the public would be aware that a person convicted of murder with special circumstances would receive an extremely severe punishment.

Thus, a reasonable person would not doubt Judge Murphy's partiality. (59 RT 4606-4606.)

In his subclaim, Bell recites in a somewhat confusing manner the procedural and factual background surrounding the hearings on his disqualification motion. (Petn. at pp. 34-37.) Bell then alleges in a conclusory manner that Judge Murphy was "partial" or had the "appearance of partiality." (Petn. at pp. 37, 38.) Bell fails to state facts supporting a prima facie case for relief. As Judge O'Rourke noted in making his ruling, potential bias and prejudice are established by an objective standard. (*People v. Chatman* (2006) 38 Cal.4th 344, 364.) "Courts must apply with restraint statutes authorizing disqualification of a judge due to bias [citation]." (*Ibid.*, internal quotations omitted.) Bell has not pled facts sufficient to show that Judge Murphy was biased simply because he might have considered running for elective office at some point during Bell's trial. (See *People v. Chatman*, *supra*, 38 Cal.4th at p. 363 [judge not disqualified merely because daughter had been victim of knifepoint robbery some years before defendant's trial]; *In re Scott*, *supra*, 29 Cal.4th at pp. 816-817 [fact that defense counsel appeared before trial judge in unrelated capital matter did not disqualify trial judge from acting as referee in current case].) Furthermore, Bell fails to point to a single ruling which would have differed had he known of Judge Murphy's intentions. This Court found that no reversible error during Bell's trial. (*People v. Bell*, *supra*, 40 Cal.4th at pp. 585, 622.) That defense counsel might have asked for a different judge (Petn. at p. 37) is of no consequence since Bell had a jury trial and his trial was fair. (See *People v. Farley* (2009) 46 Cal.4th 1053, 1110 [judicial bias will not warrant overturning judgment unless bias was so prejudicial that it actually deprived defendant of a fair trial].)

As further support for his subclaim, Bell relies upon a newspaper article written after Bell's sentencing in which Judge Murphy said the

murder of children was "unacceptable" and expressed his hope that that such conduct would stop. (Petn. at p. 35; 7 Exhibits at p. 2114.) Even assuming the article is admissible hearsay, it does not establish bias. Moreover, a judge's support of the law does not make him prejudiced or create a conflict of interest. And mere expressions of opinion by a trial judge based on actual observation of the witnesses and evidence in the courtroom do not demonstrate bias. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111-1112.)

Bell also relies upon several newspaper articles and other documents starting in 1999 and ending in 2005 which chronicle Judge Murphy's political career as mayor of San Diego. (Petn. at p. 35-35, 7 Exhibits at pp. 2108, 2118, 2120, 2122, 2124, 2134.) Bell's claim that Judge Murphy was biased because he decided to run for mayor six years after the completion of Bell's trial is sheer speculation. Such speculative allegations do not warrant relief. (*People v. Karis*, *supra*, 46 Cal.3d at p. 656.) Equally unsupportive of Bell's claim is his list of campaign donors for the year 1981. (7 Exhibits at pp. 1880-2101.) Bell provides no explanation as to how contributions from numerous sources relate to a trial which occurred some twelve years later. Thus, he has not met his pleading burden of alleging specific facts entitling him to relief. (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1258.)

Lastly, Bell cites a 2004 article from the American Journal of Political Science in which the author talks about whether judges should be elected or appointed. Bell has not provided a copy of the article and even assuming it exists and is admissible evidence, it is totally irrelevant to Bell's case. Bell has not related it to his case and indeed, Judge Murphy was not up for re-election until 1996 (i.e., three years after Bell's trial). (7 CT 1653.) To the extent Bell is complaining about the judicial selection process in California, his claim is not appropriately before this Court but rather, is one which

must be addressed to the Legislature. (See *Williams v. City of San Joaquin* (1990) 225 Cal.App.3d 1326, 1334.)

In short, Bell has not pled facts showing he was denied his constitutional right to a fair and impartial tribunal. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1112.) Accordingly, Subclaims II (2) through (4) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

B. There Was No Judicial Misconduct

In Subclaim II(5), Bell argues that the trial judge made "disparaging remarks" about defense counsel in front of the jury. Bell bases his subclaim on the appellate record. (Petn. at p. 38.) Bell's subclaim is procedurally barred because he raised it on direct appeal, and it was rejected by this Court. (*People v. Bell*, *supra*, 40 Cal.4th at pp. 601-605; *In re Waltreus*, *supra*, 62 Cal.2d at p. 225.) Furthermore, to the extent Bell is complaining about comments which he did not object to in the trial court, his claim is forfeited for lack of such objection. (*People v. Geier* (2007) 41 Cal.4th 555, 613.)

Bell also fails to state a prima facie case for relief. A trial court commits misconduct if it "persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge [citation]." (*People v. Sturm* (2006) 37 Cal.4th 1218, 1238.) However, the trial judge has the duty to exercise reasonable control over the proceedings, and may take such action necessary as to achieve such ends. (Pen. Code, § 1044; Evid. Code, § 765, subd. (a)). The duties and powers of the court to control the proceedings "are not only statutory but inherent [citations]." (*People v. Burnett* (1993) 12 Cal.App.4th 469, 475.) In evaluating whether there was judicial

misconduct, "[e]ach case must necessarily turn upon the context of the comments and the peculiar circumstances under which the comment is made." (*People v. Flores* (1971) 17 Cal.App.3d 579, 584-585.) Even if improper, brief, isolated comments do not constitute judicial misconduct warranting reversal of a judgment. (*People v. Geier*, *supra*, 41 Cal.4th at p. 614.)

As sole support for his subclaim, Bell incorporates by reference pages 102 through 112 of his opening brief on appeal and pages 33 through 44 of his reply brief on appeal. (Petn. at p. 38.) Respondent refers this Court to the respondent's brief at pages 81 through 89 and this court's opinion, *People v. Bell*, *supra*, 40 Cal.4th at pp. 601-605. This Court held that none of the three challenged remarks constituted judicial misconduct and that consequently, the comments did not infringe upon Bell's constitutional rights. (*People v. Bell*, *supra*, 40 Cal.4th at pp. 601-605.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim II(5) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

C. There Were No Erroneous Rulings By The Trial Court

In Subclaim II(6), Bell, argues that the trial judge committed misconduct by making erroneous rulings throughout the trial. Bell bases his subclaim on the appellate record. (Petn. at p. 38.) To the extent that Bell properly preserved this claim in the trial court, Bell is procedurally barred for failing to raise it on direct appeal. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.) To the extent that Bell failed to preserve the claim in the court below (*People v. Geier*, *supra*, 41 Cal.4th at p. 613), it is procedurally barred because it is not based on facts that Bell did not know and could not

reasonably have known at the time of trial. (*In re Seaton*, *supra*, 34 Cal.4th at pp. 199-200.)

Bell also fails to state a prima facie case for relief. Bell's sole reference is to the errors he alleged in his opening, reply, and supplemental briefs on appeal. (Petn. at p. 38.) This Court found just one error, the trial court's decision to strike a cross-examination question, and determined the error was harmless. (*People v. Bell*, *supra*, 40 Cal.4th at pp. 609, 621.) In any event, adverse rulings, even erroneous ones, do not constitute judicial misconduct or bias. (*People v. Avila* (2009) 46 Cal.4th 680, 696.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim II(6) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

D. Appellate Counsel Was Not Ineffective

In subclaim II(7), Bell claims that appellate counsel was ineffective for failing to raise subclaims 2 through 4 on his automatic appeal to this Court. (Petn. at pp. 38-39.) Bell fails to state a prima facie case for relief as to this subclaim.

A defendant alleging ineffective assistance of counsel on appeal must show constitutionally inadequate performance and prejudice. (*People v. Osband*, *supra*, 13 Cal.4th at p. 664.) Here, as stated in Argument II(A), subclaims 2 through 6, are totally lacking in merit. Thus, if appellate counsel had raised them on direct appeal, they would have been rejected by this Court. Thus, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly,

Subclaim II(6) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

III. BELL FAILS TO STATE A PRIMA FACIE CASE THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL

In Claim Three, Bell claims that he was denied his right to effective assistance of counsel at the guilt phase of his trial because his attorneys: (1) had a caseload in addition to Bell's case; (2) failed to adequately present their motion to suppress Bell's statements to the police; (3) failed to adequately present their opposition to the prosecution's motion to have its expert conduct a mental examination of Bell; (4) failed to investigate and adequately prepare for plea negotiations; (5) failed to prepare for "pretrial proceedings;" (6) introduced evidence of the 1981 offense; (7) failed to present all available evidence regarding Bell's crack cocaine intoxication; (8) failed to present mental health evidence; (9) failed to make various objections during trial; and (10) failed to understand the difference between robbery felony-murder and the robbery special circumstance. (Petn. at pp. 39-85.) Bell's claim fails to state a prima facie case for relief.

In order to establish that he received constitutionally ineffective assistance by trial counsel, the petitioner must show that counsel's performance fell under an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; *In re Cudjo*, *supra*, 20 Cal.4th at p. 687.)

This review is extremely deferential. "[A] court must be careful not to narrow the wide range of conduct acceptable under the Sixth

Amendment[.]" (*Nix v. Whiteside* (1986) 475 U.S. 157, 165 [106 S.Ct. 988, 89 L.Ed.2d 123].)

In demonstrating prejudice, the petitioner must show that as a result of counsel's failings, the verdict was unreliable or the trial was fundamentally unfair. (*In re Hardy*, *supra*, 41 Cal.4th at p. 1019.) The petitioner must prove prejudice, and his failure to do so is fatal to the claim. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 693; *People v. Ledesma*, *supra*, 43 Cal.3d at p. 217.)

If the petitioner makes an inadequate showing of either deficient performance or prejudice, the court considering the claim need not decide the other prong. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.)

A. Counsel Did Not Provide Ineffective Assistance By Representing Other Clients

In Subclaim III(2), Bell, relying on the appellate record, alleges that trial counsel was ineffective because they represented other clients and had other responsibilities at the same time they were representing him. (Petn. at pp. 41-45.) Bell's subclaim fails to state a prima facie case for relief.

The standard for determining whether an attorney is available for appointment to represent a criminal defendant is whether (s)he can be ready in court on the trial date set by the court. (*Williams v. Superior Court* (1996) 46 Cal.App.4th 320, 330; Pen. Code, § 986.05.) In deciding whether counsel will be ready, the court may consider several factors, such as the number and ages of cases an attorney already has, the expected length of the trials on those cases and their scheduled dates, and the dates of related pending motions. (*Williams v. Superior Court*, *supra*, 46 Cal.App.4th at p. 331.) The fact that the attorney has other cases will not render him or her incapable of or unable to accept the appointment. (*Id.* at p. 332.)

In support of his subclaim, Bell relies upon the declarations of his two defense counsel and their investigator which they filed on March 24, 1993 as part of a defense motion for a continuance of the trial date. Bell also relies upon a "Statement of Availability" signed by defense counsel which was filed on May 27, 1993. (Petn. at pp. 41-43.) Bell takes these declarations out of context and ignores the circumstances in which they were made. When the investigator and the two defense attorneys signed their declarations, Bell's trial was scheduled for May 10, 1993. (1 CT 100.) The attorneys stated they needed additional time, and requested a trial date of November 1, 1993. (1 CT 108, 117.) At a hearing on the motion, the court found good cause to continue the matter and gave counsel almost all the time they wanted, setting a new trial date of October 4, 1993. (9 RT 9.) Jury selection began on that date. (17 RT 603.) Bell does not plead any facts showing that an additional three weeks (i.e., from October 4 to November 1) would have made a difference.

Moreover, the declarations and Statement of Availability show that for at least nine months, defense counsel and the investigator had done a substantial amount of work of on Bell's case. The investigator had been working on the case since July 1992. (1 CT 98.) Leonard had met several times with Bell, had begun her investigation and preparation, and had made efforts to resolve the matter by way of plea bargain to avoid the death penalty. (1 CT 103-104, 108.) By the time the Statement of Availability was filed, Liss had planned a two-week trip out of state to conduct further investigation on Bell's case and Leonard had devoted all of her time to Bell's case. (7 Exhibits at pp. 1715-1716.) Bell's bald-faced allegations that counsel and the investigator were "inadequate" causing him to be "prejudiced" (Petn. at p. 45) are conclusory, lack factual support, and do not state a claim for ineffective assistance of counsel. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 334.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim III(2) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

B. Counsel Did Not Provide Ineffective Assistance In Connection With Their Motion to Suppress Evidence

In subclaim III(3), Bell claims that counsel were ineffective in presenting his motion to suppress his statements to Detectives Almos and Doucette. Bell argues that counsel should have presented evidence regarding the level of cocaine in his blood several months after his statements, his ingestion of cocaine before the police interview, his abstinence from cocaine use in the months preceding his crime, his alleged psychological impairments, and his lack of sleep the night before his arrest. (Petn. at p. 45-50.) Bell claims this evidence would have shown that his statements were taken in violation of his *Miranda* rights and were involuntary. Bell also claims that the statements were in fact involuntary. Bell relies upon the appellate record and on various exhibits to the amended petition. (Petn. at pp. 45-50.) Bell's subclaim fails to state a prima facie case for relief.

In *Miranda*, the United States Supreme Court "determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney." (*Edwards v. Arizona* (1981) 451 U.S. 477, 481-482 [101 S.Ct. 1880, 68 L.Ed.2d 378].) "'[A] defendant may waive effectuation' of the rights conveyed in the warnings 'provided the waiver is made voluntarily, knowingly and intelligently' [citation]." (*Moran v.*

Burbine (1986) 475 U.S. 412, 421 [106 S.Ct. 1135, 89 L.Ed.2d 410].) The prosecution must establish the validity of a defendant's waiver by a preponderance of the evidence. (*Colorado v. Connelly* (1986) 479 U.S. 157, 168-169 [107 S.Ct. 515, 93 L.Ed.2d 473]; *People v. Whitson* (1998) 17 Cal.4th 229, 248.)

Before trial, Bell's counsel moved to suppress Bell's statements to Doucette, Almos and Redden. Counsel contended that Bell's confession was unlawfully obtained, Bell's detention was unlawful, Bell's arrest was unlawful, the interview was unduly prolonged and aggressive, there was no probable cause to arrest Bell, and, any evidence seized as a result of the detention and arrest had to be suppressed. (17 CT 3663-3674.) At the hearing on the motion, San Diego Police Officers Laurie Hubbs and Richard Allen, and Detective Doucette, testified to Bell's detention, arrest, and subsequent interviews. (11 RT 23-84.) The court denied the motion, finding that Bell's Fourth Amendment rights were not violated in any way. (11 RT 94-96.) At trial, counsel renewed their motion, contending in addition that the Doucette and Almos violated Bell's *Miranda* rights and that Bell's statements were involuntary. The trial court again denied it. (29 RT 2262.) An objection to the interview with Redden on the same grounds (29 RT 2215-2216) was also overruled. (29 RT 2216.) Bell contends that counsel were ineffective because they failed to present evidence that his statements were involuntary. (Petn. at pp. 45-50.)

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (*In re Andrews* (2002) 28 Cal.4th 1234, 1253; see also *Strickland v. Washington*, *supra*, 466 U.S. at p. 690 [court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's

conduct"].) Applying these principles, Bell fails to state a prima facie case for relief.

The record shows that before speaking to Almos and Doucette, and about seventeen hours after the murder, Bell approached Officer Prutzman and volunteered that he was "the one [they] were looking for." (28 RT 2072.) Bell also said he did not stab Joey. (*Ibid.*) Bell told Prutzman he wanted to talk further and accepted Prutzman's offer of a ride to the police station. (28 RT 2072-2073.) Bell was interviewed by Detectives Almos and Doucette, who promptly advised Bell of his *Miranda* rights. Bell freely and voluntarily waived his rights and agreed to talk. (28 RT 2083, 2120-2121.) Bell continued to deny that he had stabbed Joey. (29 RT 2139, 2143-2144, 2147, 2174.) It was not until sometime later, after Bell was booked and processed, that he admitted to another Detective, Paul Redden, that he committed the crime. (29 RT 2224, 2227-2228.) During the interviews, Bell spoke freely about his drug use and his state of intoxication at the time. (29 RT 2139-2172, 2232-2232.)

Bell nonetheless provides this Court with "additional evidence" he claims counsel should have introduced. Bell presents a blood draw taken the afternoon of June 5, 1992 showing there was still cocaine in system. (9 Exhibits at pp. 2339-2340.) Bell also relies on a declaration by Judith N. Stewart, a forensic toxicologist, signed on June 15, 2009, repeating the results of tests conducted by other toxicologists in November 1992 in which the testers found cocaine metabolite in Bell's bloodstream. (9 Exhibits at pp. 2410-2414.) Bell additionally relies upon Dr. Levak's evaluation (undated) in which Bell told Levak that the day of the offense was the first time he smoked crack cocaine in several months and told Levak he had psychological problems. (7 Exhibits at pp. 1696-1714.) Bell additionally relies upon the portions of his interview with Redden in which he told Redden that the previous night, he slept only two hours. (9 Exhibits

at pp. 2389, 2395.) Finally, Bell relies upon several declarations: a declaration signed on May 4, 2009 by Lorraine Camenzuli, Ph.D., stating that tests she conducted on Bell indicated Bell was impaired in his ability to pay attention, concentrate and solve complex problems (7 Exhibits at 1636-1638); a declaration by defense witness Dr. Smith signed on June 2, 2009, reaffirming the opinions he offered during Bell's trial; and a portion of a lengthy declaration by Laurence A. Miller, Ph.D., signed on June 17, 2009, in which he chronicles Bell's difficult childhood and the difficult childhood experiences of Bell's sister, parents and grandparents. (9 Exhibits at pp. 2540-2562.)

Even with his new expert opinions, Bell has failed to state a prima facie case of either a *Miranda* violation or involuntariness. None of these experts tie their opinions to the confessions made by Bell. Moreover, to find a knowing and intelligent waiver, "[a]ll that is required is that the defendant comprehend 'all of the information that the police are required to convey' by *Miranda*." (*People v. Clark* (1993) 5 Cal.4th 950, 987, disapproved on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, quoting *Moran v. Burbine*, *supra*, 475 U.S. at p. 427.) "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." (*Moran v. Burbine*, *supra*, 475 U.S. at pp. 422-423; accord, *People v. Clark*, *supra*, 5 Cal.4th at p. 987.)

The declarations and reports show at most that at the time of the crime, Bell smoked crack cocaine and that he suffered from longstanding organic brain damage, post-traumatic stress disorder, pre- and postnatal abuse, and other severe mental or emotional impairments, which were exacerbated by substance abuse and addiction. However, this Court has

repeatedly held that drug and alcohol abuse, low intellect, psychological impairments, childhood abuse, and the like, do not vitiate *Miranda* waivers or render confessions involuntary unless the confession itself shows that the defendant was incapable of freely and rationally waiving his rights. (*People v. Smith* (2007) 40 Cal.4th 483, 502; *People v. Frye* (1998) 18 Cal.4th 894, 988, disapproved on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 420; *People v. Mayfield* (1993) 5 Cal.4th 142, 204.) As the United States Supreme Court has explained, the due process clause does not require "sweeping inquiries into the state of mind of a criminal defendant who confessed." (*Colorado v. Connelly*, *supra*, 479 U.S. at p. 167.)

Here, the four officers who spoke with Bell - Prutzman, Almos, Doucette and Redden - all testified that Bell was coherent, acted appropriately, and appeared neither mentally disturbed nor under the influence of alcohol or narcotics. (28 RT 2073, 2079-2080, 2084, 2093-2094, 2121-2222, 2214-2215.) In an attempt to bolster his own credibility, Bell told Prutzman, and Almos and Doucette, that he stole the television and boom box, and was high on drugs, but did not stab Joey. (28 RT 2072; (29 RT 2139, 2143-2144, 2147, 2174.) As this Court has found, such conduct demonstrates that a defendant had the mental capacity to understand his rights and the consequences of his waiver, and that the confession was the product of his own volition and not of official pressure or coercion. (See *People v. Whitson*, *supra*, 17 Cal.4th at pp. 249-250 [defendant's attempt to deceive officers during interview showed he had sufficient intelligence to understand his rights]; *People v. Davis* (1981) 29 Cal.3d 814, 825-826 [confession voluntary where defendant tried to use situation to own advantage by pretending to cooperate].) Bell also had previous experience with the criminal justice system, having been convicted in 1981 of stabbing Christopher Cap and in 1991 for forgery. (50 RT 4239-4241.) As such, Bell was familiar with his legal rights. (See

People v. Mosby (2004) 33 Cal.4th 353, 365 [defendant's prior experience in the criminal justice system indicated he knowingly, intelligently and voluntarily waived his rights].)

Given all these considerations, Bell has not shown a reasonable probability that had counsel presented the new evidence and moved to suppress his statements as involuntary, the motion would have been granted. The Sixth Amendment does not require counsel to file motions lacking in factual support. (*People v. Frye, supra*, 18 Cal.4th at p. 987-988.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim III(3) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

C. Counsel Did Not Provide Ineffective Assistance In Connection With Their Opposition to the Prosecution's Motion For a Mental Examination

In Subclaim III(4), Bell claims that counsel were ineffective in preparing and arguing their opposition to the prosecution's motion to conduct a mental examination of Bell. Bell claims that defense counsel should have cited Penal Code section 1054.1 in opposition to the motion. Bell relies upon the appellate record. Bell's subclaim fails to state facts supporting a prima facie case for relief. (Petn. at pp. 50-54.)

Before trial, the prosecutor filed a motion in limine to allow their mental health expert to evaluate Bell. (1 RT 233-238.) Defense counsel opposed the motion, arguing that it was premature, that granting the request would violate Bell's Fifth and Sixth Amendment rights, that the proposed examination was irrelevant, and that it should be denied under Evidence

Code section 352. (3 CT 696-706.) The court deferred ruling. (13 RT 292-295; 19 RT 868.) After Bell put his mental condition at issue, the court granted the motion, relying on *People v. Danis* (1973) 31 Cal.App.3d 782 and *People v. McPeters* (1992) 2 Cal.4th 1148. (34 RT 2815-2816.) The court denied the defense request to have their psychiatrist, Dr. Mills, attend the examination. (34 RT 2837-2847.) During Dr. Mills' testimony, the parties stipulated that Bell had declined to participate in the examination. (37 RT 3051.) The court instructed the jury that Bell had a right to so refuse. (39 RT 3272; 6 CT 1280.)

In *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1103-1115, this Court held that mental examinations of defendants by prosecution experts pursuant to court order were a form of discovery and that nothing in the discovery statutes allowed the trial court to issue such an order. In reaching its conclusion, this Court overruled *People v. Danis*, *supra*, 31 Cal.App.3d 782; *People v. McPeters*, *supra*, 2 Cal.4th 1148, and *People v. Carpenter* (1997) 15 Cal.4th 312. (*Verdin v. Superior Court*, *supra*, 43 Cal.4th at pp. 1106-1107.)

At the time of Bell's trial, *Danis* and *McPeters* permitted the prosecutor to seek a court order for a mental status exam. The trial court was bound by those decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.) Thus, had counsel based their motion on Penal Code section 1054.1, the trial court still would have denied it. *Verdin* was not decided until nearly fifteen years after Bell's trial. Bell's counsel cannot be faulted for failing to anticipate a change in the law. (*United States v. Fields* (5th Cir. 2009) 565 F.3d 290, 296-297.) In any event, Bell did not submit to the examination and the trial court instructed the jury that Bell acted within his rights in so refusing. (39 RT 3272.) As the jury is presumed to have followed this instruction (*People v. Pinholster* (1992) 1 Cal.4th 865, 919), Bell's subclaim fails for lack of a showing of prejudice.

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim III(4) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

D. Counsel Did Not Provide Ineffective Assistance During Plea Negotiations

In Subclaim III(5), Bell claims that counsel were ineffective for failing to investigate and adequately prepare for plea negotiations. Bell alleges that with adequate investigation, counsel could have presented the prosecution with the "equities" of Bell's case. (Petn. at p. 54.) Bell's subclaim fails to state a prima facie case for relief.

Bell's subclaim is speculative and conclusory. Bell does not state what additional information his counsel should have investigated or presented. A petitioner claiming inadequate investigation must set forth the facts which warranted investigation and must show that a reasonably competent attorney would have investigated them. (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1092-1093.) Bell has not met his pleading burden. Moreover, Bell has not included a declaration from either counsel as to what action they did take in their attempts to resolve the case. The absence of such a declaration is "significant." (*People v. Webster, supra*, 54 Cal.3d at p. 457.) Finally, Bell does not allege any facts showing that with additional investigation, he would have been willing to plead guilty or that the prosecution would have accepted a plea offer. (*In re Alvernaz* (1992) 2 Cal.4th 924, 938.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly,

Subclaim III(5) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

E. Counsel Did Not Provide Ineffective Assistance During The Investigation Stages of the Case

In Subclaim III(6), Bell alleges that in several respects, counsel were ineffective in their pretrial investigation and planning. Bell relies upon the appellate record. (Petn. at pp. 54-60.) Bell's subclaim fails to state a prima facie case for relief.

Bell alleges that counsel spent too long on plea negotiations. (Petn. at pp. 55-56.) Bell does not include a declaration from either counsel as to what occurred in those negotiations, how long they took, or why they proceeded as they did. The absence of these declarations is "significant." (*People v. Webster*, *supra*, 54 Cal.3d at p. 457.) The record shows that on March 26, 1993, the district attorney was still considering the possibility of offering Bell a sentence of life without the possibility of parole in return for a guilty plea. (7 RT 4.) On April 12, the district attorney advised the court that the People were seeking the death penalty. (9 RT 2-3.) At a pretrial hearing on May 28, both parties made a last, unsuccessful attempt to settle the matter. (11 RT 140.) Bell's assertion that trial counsel should not have attempted a negotiated disposition, or should have made fewer attempts (presumably because no disposition was reached), is nothing more than the "distorting effects of hindsight" (*In re Andrews*, *supra*, 28 Cal.4th at p. 1253), which will not establish that counsel was ineffective. Moreover, Bell fails to identify any prejudice whatsoever from counsels' decision to keep the plea dialogue going while they got ready for trial.

Bell alleges that counsel should have sought a continuance past October 4, 1993. (Petn. at pp. 56-58.) At a hearing held on April 12, 1993, the trial court found good cause for a continuance and granted the defense

motion to continue the trial. The court scheduled the trial for October 4, 1993. (9 RT 9.) The court added:

> And I will state it's the court's intention in setting that date to have it treated as a viable trial date and not one to be trifled with in a manner of speaking.
>
> One of the reasons that the court is selecting that date is to seek to provide some assurance that the resolution of this case by trial or otherwise will be held by the end of the calendar year.

(9 RT 9-10.)

It is clear from the court's comments that had defense counsel requested an additional continuance, the court would have denied the request. Counsel is not required to make an obviously futile motion. (*People v. Anzalone* (2006) 141 Cal.App.4th 380, 394.) Moreover, Bell provides no declaration from counsel as to why they decided against requesting even more time, and does not allege facts showing that another continuance would have changed the result of his trial. Thus, Bell has shown neither constitutionally inadequate performance nor prejudice. (*People v. Farnam* (2002) 28 Cal.4th 107, 176, fn. 34.)

Bell alleges that counsel "unreasonably and prejudicially" failed to locate and contact all witnesses, specifically, the following named individuals: Leon Rivers, Susanna Forney, Eric Forney, Bertha Booker, Winifred Booker, Frederick Booker, Jose Castaneda, Louise Payne ("Chocolate"), and the ticket-taker at the all night movie theater where Bell went following the murder. (Petn. at p. 58.) In order to establish ineffective assistance of counsel for failure to investigate witnesses, the defendant must show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates and that counsel's omissions resulted in the withdrawal of a potentially meritorious defense. (*People v. Dyer* (1988) 45 Cal.3d 26, 53.) Bell does not meet his burden of pleading either element. Notably, Bell has not

included a declaration from his counsel. Thus the extent of their efforts to contact these witnesses is unknown. The absence of any declaration is "significant." (*People v. Webster*, *supra*, 54 Cal.3d at p. 457.) Furthermore, Bell does not provide declarations from the witnesses and does not set forth the substance of any testimony they would have given. Some of these witnesses in fact testified at Bell's trial: Susan Forney (27 RT 2869), Leon Rivers (27 RT 1878), Frances Booker (27 RT 1882), and Winifred Booker (27 RT 1909). Bell has offered nothing to show that the remaining witnesses had useful, relevant information which would have been admissible in the guilt phase of his trial. Counsel may reasonably have concluded that they did not. (*People v. Burgener*, *supra*, 29 Cal.4th at pp. 881-882.) Finally, given Bell's failure to provide any information about these individuals or the subject matter of their proposed testimony, Bell has not shown a reasonable probability of a more favorable outcome had counsel spoken to every single witness about whose absence he now complains. (*In re Thomas* (2006) 37 Cal.4th 1246, 1277.)

Bell alleges that counsel "unreasonably and prejudicially" failed to investigate the toxicology (crack cocaine) aspects of his case. He alleges that counsel should have obtained the chain of custody logs from the San Diego Police Department crime laboratory, requested that the lab prepare more detailed reports, and requested an independent analysis of Bell's blood and urine. (Petn. at pp. 58-59.) Bell also alleges an unreasonable and prejudicial failure to investigate and obtain evidence corroborating his claim of cocaine intoxication, specifically, the logs from the police crime lab, complete surveillance recordings from the liquor store where he cashed his welfare check, Joey's school records, and Bell's complete social history records. (Petn. at pp. 59-60.) As Bell does not provide a declaration from either counsel as to what they did obtain, or what investigation they did

conduct in these regards, his claim fails. (See *People v. Webster*, *supra*, 54 Cal.3d at p. 457.)

Moreover, in *Strickland v. Washington*, *supra*, 466 U.S. at p. 691, the Supreme Court stated that defense counsel has a duty to make reasonable investigations or to make a reasonable decision that renders particular investigations unnecessary. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation that makes particular investigations unnecessary." (*Id.* at pp. 690-691.) As this Court has observed, the United States Supreme Court's statements regarding the duty to investigate make it clear that "courts should not equate effective assistance with exhaustive investigation of potential mitigation evidence." (*In re Andrews*, *supra*, 28 Cal.4th at p. 1254.)

Here, Bell's ingestion of crack cocaine before and after he killed Joey was undisputed. (See, e.g., 27 RT 1861-1862, 1872-1873, 1878-1880, 1887-1889; 29 RT 2142-2143, 2144-2147, 2154-2161, 2163, 2170, 2175-2176.) The parties did not disagree about the testing procedures employed by the lab to test Bell's blood and urine specimens or about the fact that the tests were positive for cocaine metabolites. Joey's school records, information about Bell's background, and surveillance recordings of Bell's presence at the liquor store have no relevance to Bell's mental state at the time of the murder. Counsel need not investigate leads that do not appear to be fruitful. (*Berger v. Kemp* (1987) 483 U.S. 776, 795 [107 S.Ct. 3114, 97 L.Ed.2d 638].) Finally, given Bell's lack of specificity and the irrelevance of the information he claims counsel should have uncovered, he has not shown that additional investigation would have changed the outcome of his trial. (*Gallego v. McDaniel* (9th Cir. 1997) 124 F.3d 1065, 1077.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim III(6) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

F. Counsel Were Not Ineffective In Their Decision to Introduce Evidence of a Prior Offense Committed by Petitioner

In Subclaim III(7), Bell, relying on the appellate record, argues that counsel were ineffective for introducing evidence of the 1981 offense during their case-in-chief. (Petn. at pp. 60-64.) Bell's subclaim fails to state a prima facie case for relief.

Before trial, the prosecution filed a motion to introduce evidence of the 1981 offense, arguing that it was admissible under Evidence Code section 1101 and should not be excluded under Evidence Code section 352. (1 CT 214-229.) Defense counsel opposed the motion, arguing that the 1981 offense was irrelevant, was improper character evidence and was more prejudicial than probative. (3 CT 538-547.) The trial court denied the prosecution's motion without prejudice, finding the evidence inadmissible during the People's case-in-chief. (13 RT 266-267.)

When Dr. Smith testified during the defense case, he opined that Bell had personality disorders and addiction problems which led him to kill Joey. (32 RT 2555-2556.) Defense counsel Leonard asked Smith if Bell's past confirmed his diagnosis. (32 RT 2557.) Doctor Smith responded that it did. Doctor Smith described the 1981 offense; and discussed the similarities between that offense and the killing of Joey. (32 RT 2557-2560.) At sidebar, Liss explained that the defense had opposed the prosecution's use of the 1981 offense to show intent. (32 RT 2561.)

However, the defense had made a strategic decision to introduce it to show lack of intent and to show that Bell did not have the mental state necessary to commit first degree murder. (32 RT 2561-2562.)

Bell now claims that counsel's tactical decision was "unreasonable," that counsel should have excluded prejudicial portions of the 1981 incident, and that counsel should have supplemented it with evidence of Bell's childhood difficulties, his head injuries, the abuse he suffered as a child, his negative self-image, and his stunted early development. (Petn. at pp. 62-63.) Review of counsels' decisions is deferential; the reviewing court must make every effort to avoid the distorting effects of hindsight and evaluate counsels' conduct from counsels' perspective at the time. (*People v. Dennis* (1998) 17 Cal.4th 468, 540.) "Tactical errors are generally not deemed reversible, and counsel's decision making must be evaluated in the context of the available facts [citation.]" (*People v. Weaver* (2001) 26 Cal.4th 876, 926 [internal quotations omitted].) Counsel may make sound tactical decisions to elicit testimony which may appear damaging to their client, if it supports the defense theory of the case. (*People v. Cleveland*, *supra*, 32 Cal.4th at pp. 746-747.)

Here, as defense counsel explained, by questioning Dr. Smith about the 1981 offense, the defense sought to demonstrate that Bell had a history of psychotic breaks. Such history would show Bell's lack of intent to kill Joey. (32 RT 2561-2562.) Habeas counsel's assertion that he would have pursued a different strategy (Petn. at p. 64) is merely "the harsh light of hindsight" and does not make trial counsel's conduct ineffective. (*People v. Stanley* (2006) 39 Cal.4th 913, 954.) In addition to the stated tactical reason, trial counsel may well have wanted to bring the information to the jury's attention first; as the prosecutor would certainly have asked Dr. Smith about it on cross-examination. (*People v. Davis*, *supra*, 46 Cal.4th

539, 620 [prosecutor allowed to cross-examine defense expert to explore bases for opinion].)

Bell's assertion that counsel should have provided Dr. Smith with a panoply of additional information (Petn. at p. 63) is baseless. Trial counsel were entitled to rely upon the expertise of the expert as to what information he needed to reach his conclusions. (*Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1038-1039 ["To require an attorney, without interdisciplinary guidance, to provide a psychiatric expert with all the information necessary to reach a mental health diagnosis demands that an attorney already be possessed of the skill and knowledge of the expert"]; accord, *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 945.) Bell fails to show that before trial Dr. Smith specifically asked for the historical information or stated he could not provide a reliable opinion without such information. (See *Murtishaw v. Woodford*, *supra*, 255 F.3d at p. 945 [trial counsel was not constitutionally incompetent for failing to inform doctors of petitioner's family history of mental illness]; *Hendricks v. Calderon*, *supra*, 70 F.3d at p. 1045 ["Absent a request from the experts, counsel had no duty to investigate the social history or any other bases of the expert's psychiatric opinion"].)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim III(7) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

G. Counsel Were Not Ineffective In Their Investigation and Presentation of Evidence Regarding Petitioner's Cocaine Intoxication

In Subclaim III(8), Bell alleges that counsel "unreasonably and prejudicially" failed to investigate and present all evidence regarding Bell's cocaine intoxication. Bell claims that counsel should have: (1) used a forensic toxicologist as an expert instead of Dr. Sevanian; (2) better prepared Dr. Sevanian to testify; (3) introduced "all evidence" regarding the second test of Bell's urine sample; (4) introduced evidence that by the time of the tests, the blood and urine samples were degraded; and (5) consulted an expert to test hair samples taken from Bell when he was arrested. Bell relies upon the appellate record, on the San Diego Police Department evidence processing report, on Judith Stewart's declaration, and on an article co-authored by Dr. Baselt, one of the prosecution witnesses, published on January 3, 1993. Bell asserts that this information would have shown that he was much more intoxicated than the jury thought he was. (Petn. at pp. 64-78.) Bell's subclaim fails to state a prima facie case for relief.

A criminal defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent and conscientious advocate. (*In re Cordero* (1988) 46 Cal.3d 161 180.) "This means that before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation." (*In re Gay* (1998) 19 Cal.4th 771, 789-790; *In re Marquez* (1992) 1 Cal.4th 584, 602.) Those "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 691.) To meet his pleading burden on a theory that he received constitutionally inadequate representation by his trial counsel, Bell must

plead specific facts that establish that his trial counsel's performance did not meet an objective standard of reasonableness under prevailing professional norms and that he suffered prejudice thereby. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; *In re Gay*, *supra*, 19 Cal.4th at p. 790.) Bell can only show prejudice by demonstrating that there is a reasonable probability that, absent the alleged errors of trial counsel, there would have been a different outcome. In the guilt phase, a reasonable probability means something that undermines confidence in the verdict. (*In re Gay*, *supra*, 19 Cal.4th at p. 790; *In re Marquez*, *supra*, 1 Cal.4th 584 at p. 606.)

Bell has not met his pleading burden. As an initial matter, no declaration is included from either defense counsel as to the work they did with Dr. Sevanian or the steps they took to get ready for the toxicology aspects of the case. Thus, this Court cannot determine whether any of his testimony was due to lack of preparation by defense counsel. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1031.) Furthermore, the exhibits referenced by Bell do not support his claim. In his report, Dr. Baselt stated that while cocaine itself degraded over time, ethanol and benzoglecgonine, which are cocaine metabolites, did not. (9 Exhibits at pp. 2563-2564.) Bell fails to explain the relevance of the hair samples, their probative force, or the probable consequence of their introduction at trial. Thus, his complaint about lack of testing of the samples fails. (*People v. Wash* (1993) 6 Cal.4th 215, 269.) Bell's assertion that counsel should have used Stewart as a witness instead of Sevanian does not state a claim of ineffective assistance. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 334 [whether to call expert witness a matter of trial tactics].)

Finally, the record shows that there was ample testimony that Bell was high on crack cocaine when he killed Joey. Forensic analyst Winifred del Rosario testified that blood and urine samples were taken from Bell the

afternoon of June 2, 1992. (28 RT 2044-2045, 2048-2050; see 28 RT 2126.) During his interview with Almos and Doucette, Bell said he smoked crack cocaine throughout the day. (29 RT 2145-2146, 2151-2160, 2165-2170.) Bell agreed with Doucette's suggestion that he was "insanely ripped" when he killed Joey. (29 RT 2161.) During his interview with Redden, Bell said he did not get upset about what he had done until the drugs wore off. (29 RT 2232.) Steven West, the director of forensic psychology at Poison Lab, was called as a defense witness. He testified that on November 17, 1992, he tested Bell's urine sample for the presence of narcotics. (31 RT 2378-2380, 2384.) He tested Bell's blood sample on November 20. (31 RT 2392-2394, 2396.) Both were positive for cocaine metabolites. (31 RT 2381, 2383, 2389, 2395-2396.) Doctor Sevanian testified that Bell's urine metabolites were so high they could not be measured accurately until they were diluted several times. (31 RT 2439-2442.) The urine measurement showed that Bell ingested an "enormous amount of cocaine." (31 RT 2453.) Several hits of crack result in a cumulative effect in the concentration present in the body. (31 RT 2458-2459.)

The defense also called Dr. Smith to explain the effect of crack cocaine on the user. Doctor Smith testified that crack cocaine is very addicting because it gets into the blood stream rapidly, causing a big surge followed by a rapid down. (32 RT 2515, 2521.) The brain then craves more. (32 RT 2517-2518.) The more the individual uses, the more he wants. (32 RT 2522.) Those in dysfunctional families with a history of alcoholism and/or drug addiction are more likely to become addicts. (32 RT 2527.) External environmental cues, even neutral ones, can trigger drug hunger in a past abuser. (32 RT 2520.) Money is a very powerful stimulus. (32 RT 2522-2523.) The craving remains even if the user abstains for a length of time. (32 RT 2523.) Doctor Smith testified that prolonged crack

use can cause mental illness. (32 RT 2518.) It can lead to violence because it increases paranoia and excitation, while decreasing inhibition. (32 RT 2518.) This is called "rage reaction" or "delirium." The user can overreact to an external stimulus. (32 RT 2519, 2531-2533.) Then, the user snaps out of it rapidly. (32 RT 2533.) A person with borderline personality, i.e., serious psychological problems which are under control, especially one from a dysfunctional family, can have a dissociative reaction, where he sees himself doing something as if he is watching someone else. (32 RT 2529-2530.) The addict begins acting out when using cocaine. (32 RT 2530-2531.) Doctor Smith testified that he reviewed the police reports, Bell's confession, psychological reports prepared by experts and the analyses performed by Poison Lab. Doctor Smith also met with and evaluated Bell. Doctor Smith opined that the murder of Joey was a complicated interaction between the cocaine, Bell's personality and the environment. (32 RT 2534-2536, 2563.) The cocaine precipitated psychotic decompensation and a dissociative reaction. (32 RT 2536.) Bell felt like "evil forces" came into his head. He repressed the stabbing until the next day. (32 RT 2536.) With regard to the drug itself, Bell was in the "abuse range." (32 RT 2537-2538.) The psychological reports indicated that Bell had a serious borderline personality disturbance and was prone to decompensation. (32 RT 2555.) Further, Bell had a history of cocaine addiction, and was abstinent from the drug before this relapse. (32 RT 2555-2556.) Finally, something in the environment triggered Bell's hunger for the drug. (32 RT 2556.)

Given the amount of trial time devoted to Bell's drug use, Bell has not demonstrated that counsel lacked a tactical basis for declining to further pursue this issue, and has not shown that had counsel requested more tests or called more witnesses, such action would have made any difference to the outcome of this case. (*People v. Jones* (2003) 29 Cal.4th 1229, 1252.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim III(8) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

H. Counsel Were Not Ineffective In Their Presentation of Psychiatric Evidence

In Subclaim III(9), Bell challenges the psychiatric evidence presented by trial counsel. Bell asserts that counsel should have: (1) introduced testimony about his "brain injury;" (2) supplied all "relevant information" to Drs. Levak and Smith; and (3) supplied this same information to the prosecution experts, Dr. Mills and Dr. Jones. Bell relies on Dr. Camenzuli's May 4, 2009 declaration and upon a declaration signed by Dr. Smith on June 2, 2009. (Petn. at pp. 78-83.) Bell's subclaim fails to state a prima facie case for relief.

Preliminarily, this Court should strike the paragraphs 11 through 16 of Dr. Smith's declaration. In this portion of his declaration, Smith merely repeats information contained in reports by other doctors or provided to him by habeas counsel. While an expert may rely on hearsay in forming his opinion, the expert may not, in the guise of an opinion, repeat the contents of that hearsay information to the trier of fact. (*People v. Carpenter, supra*, 15 Cal.4th at p. 404.) The second hand information in Smith's declaration is inadmissible hearsay and must be stricken. (*People v. Catlin* (2001) 26 Cal.4th 81, 137.) Paragraph 16 of Dr. Camenzuli's declaration should likewise be stricken because it merely repeats self-serving statements made by Bell to the doctor. (See *People v. Bell, supra*, 40 Cal.4th at pp. 607-609 [trial court properly found inadmissible

defendant's statement's to psychiatric expert several months after the crime describing his version of what occurred].)

With or without the hearsay, the declarations do not establish ineffective assistance of counsel based on an alleged "brain injury." According to Dr. Camenzuli, defense counsel Leonard met with her and retained her as a possible expert witness. She spoke to Leonard a number of times and performed a battery of tests on Bell, but the defense elected not to use her testimony at trial. (7 Exhibits at pp. 1635, 1639.) Doctor Camenzuli laments about the fact that counsel did not explain to her why she was not on their witness list. (7 Exhibits at p. 1639.) Absent a declaration from counsel to the contrary (there is no such declaration here), this Court must presume that counsel had a sound tactical basis for their decision not to use her. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1059 [whether to call certain witnesses a matter of trial tactics, unless decision results from unreasonable failure to investigate].)

Doctor Camenzuli states in her declaration that when Bell was a child, he was struck by a car while riding his bicycle, he was in a fist fight, and, he fell from a jungle gym. (7 Exhibits at p. 1638.) Doctor Camenzuli also states that Bell could not perform more complex problem-solving tasks, and that crack cocaine could exacerbate these difficulties. (7 Exhibits at pp. 1635-1639.) Doctor Camenzuli describes many of Bell's impairments as "mild" and "borderline." (7 Exhibits at pp. 1635.) Bell's most serious impairments were his inability to pay attention and to set long term goals. (7 Exhibits at pp. 1637-1638.) Nothing in the declaration ties any of Bell's alleged impairments to his ability to form the necessary intent for either the charged crime or the special circumstance. Moreover, "[t]he value of an expert's opinion depends upon the quality of the material on which the opinion is based and the reasoning used to arrive at the conclusion." (*People v. Marshall* (1997) 15 Cal.4th 1, 31-32; accord, *In re Scott, supra,*

29 Cal.4th at p. 823.) Doctor Camenzuli did not consider anything regarding the charged offense, including the police reports, witness statements, or Bell's statements to law enforcement. (See 7 Exhibits at pp. 1635-1636.) Thus, her opinions about a "brain injury" are virtually useless. Finally, given the overwhelming evidence of Bell's guilt, testimony by Camenzuli would not have affected the jury's verdict. (See *People v. Mayfield*, *supra*, 5 Cal.4th at p. 208 [new "experts could only surmise that [defendant's] mental state was abnormal when he committed the murders; there was strong evidence to the contrary"].)

Bell's complaint about Smith and Levak is that counsel did not provide them with Bell's complete social history, including Camenzuli's findings. (Petn. at p. 81.) It was the experts' responsibility, not counsels,' to determine what information they needed to reach their conclusions. Bell presents no evidence that Smith or Levak asked for this information or that they indicated they could not provide a reliable opinion without it. (See *Murtishaw v. Woodford*, *supra*, 255 F.3d at p. 945 [trial counsel had no duty to inform doctors of petitioner's family history of mental illness]; *Hendricks v. Calderon*, *supra*, 70 F.3d at p. 1045 ["Absent a request from the experts, counsel had no duty to investigate the social history or any other bases of the expert's psychiatric opinion"].) Moreover, Smith's declaration simply repeats his trial testimony and states that the additional information would have further supported that testimony. (7 Exhibits at pp. 1644-1648.) There is no declaration from Levak. Bell therefore fails to allege facts showing he was prejudiced by the purported omissions.[16]

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[16] Bell's related claim that counsel had a duty to give personal information about Bell to the prosecution experts (Petn. at p. 82) is totally lacking in any legal or factual support.

Finally, at trial, Dr. Levak discussed childhood trauma suffered by Bell. Doctor Levak testified that Bell's mother did not like him. Bell had a stutter, which caused his mother to become impatient, angry, and reject him. (33 RT 2662-2663.) His mother also beat him. (33 RT 2666.) When Bell was six years old, he started communicating with his mother through his older sister. (33 RT 2663.) Bell began to distrust the outside world. (33 RT 2663.) Bell's mother remarried when Bell was seven years old. Bell's stepfather drank, abused him and tried to drown him in the bathtub. (33 RT 2663-2664.) When Bell told his mother about the abuse, she did not believe him. (33 RT 2664.) The stepfather alternated between tenderness and abuse. (33 RT 2664-2665.) These incidents caused Bell to suffer severe psychological disturbances. (33 RT 2664.) Bell was confused and connected love with aggression. (33 RT 2665.) Children threw rocks at Bell because his mother dressed him in a "preppy" way in a misguided attempt to be caring; and because he stuttered. (33 RT 2664, 2666.) At age nine, Bell self-medicated with alcohol. As a teenager, he self-medicated with drugs. (33 RT 2666-2667.) The substances gave him a sense of power and of being in charge. (33 RT 2667.) Doctor Levak also testified that Bell identified with his (Bell's) stepfather and was killing a part of himself by killing Joey. (33 RT 2681-2683.) Bell was stressed and had disorganized defenses because of the cocaine. (33 RT 2681.) He had a temporary psychotic break. (33 RT 2682.) He did not want to harm Joey. (33 RT 2683.) He "just snapped." (33 RT 2685.) Given all of this testimony purporting to explain the murder, it is not reasonably probable that evidence of injuries sustained by Bell as a child would have altered the jury's assessment of this case. (*People v. Sapp* (2003) 31 Cal.4th 240, 295.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify

habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim III(9) should be denied on the merits because Bell fails to state a prima facie case for relief. (People v. Duvall, supra, 9 Cal.4th at p. 474.)

I. Counsel Were Not Ineffective in Their Failure to Object to Alleged "Prosecutorial Misconduct"

In Subclaim III(10), Bell alleges that counsel "unreasonably and prejudicially" failed to object to "numerous instances of prosecutorial misconduct" and to testimony by Doucette that during Bell's interrogation, Bell did not show remorse. Bell relies on the appellate record. (Petn. at pp. 83-84.) Bell's subclaim fails to state a prima facie case for relief.

Bell's claim of prosecutorial misconduct, which merely incorporates by reference Claim V of the amended petition (Petn. at pp. 83-84), is addressed in Argument V, *infra*. Respondent incorporates its Argument V by reference as if fully set forth herein. In support of his complaint about lack of an objection to the testimony regarding Bell's remorse, Bell incorporates his opening and reply briefs on appeal. (Petn. at p. 83.) Bell's subclaim is not cognizable here because it encompasses issues which he either raised on direct appeal or could have raised on appeal but did not. (*In re Waltreus*, *supra*, 62 Cal.2d at p. 225; *In re Dixon*, *supra*, 41 Cal.2d at p. 759.) Bell's subclaim is also procedurally barred because claims challenging the admission of evidence are not cognizable on habeas corpus. (*In re Lindley* (1947) 29 Cal.2d 709, 723.)

In any event, the claim lacks merit. Failure to object rarely establishes incompetence. (*People v. Lopez* (2008) 42 Cal.4th 960, 972.) An attorney often chooses to forego an objection for reasons which have no bearing on his competence as counsel. (*In re Seaton*, *supra*, 34 Cal.4th at p. 200.) There are a myriad of legitimate tactical reasons for not objecting, including the risk that whether an objection is sustained or overruled, it will

focus the jury's attention on the allegedly objectionable matter. (*People v. Harris* (2008) 43 Cal.4th 1269, 1290.)

With regard to the testimony on lack of remorse, respondent refers this Court to the respondent's brief on the direct appeal, at pages 34-42, and to this Court's opinion in *People v. Bell, supra*, 40 Cal.4th at pp. 605-607. This Court found that the testimony regarding remorse was relevant and admissible to the central issue of Bell's mental state at the time of the murder, and was not more prejudicial than probative within the meaning of Evidence Code section 352. (*People v. Bell, supra*, 40 Cal.4th at pp. 605-607.) Because the testimony was relevant and admissible, further objection by defense counsel would have lacked merit. Trial counsel has no duty to make groundless objections. (*People v. Jones* (1998) 17 Cal.4th 279, 209.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim III(10) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

J. Counsel Were Not Ineffective During Closing Arguments

In Subclaim III(11), Bell, relying on the appellate record, argues that counsel "incorrectly" argued to the jury that robbery felony-murder and the robbery special circumstance were the same, and "unreasonably" failed to object when the prosecutor made a similar argument. (Petn. at p. 84.) Bell's subclaim fails to state a prima facie case for relief.

As noted above, the decision as to whether to object is inherently tactical. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1121.) Bell has provided no declaration from defense counsel, which defeats his subclaim. (See *People v. Webster, supra*, 51 Cal.3d at p. 457.) In any event, the

record does not support Bell's subclaim. Bell quotes small portions of the arguments and ignores the context in which they were made. Defense counsel Liss' comment "they go hand in hand" was part of his argument that if there was no felony-murder, there could be no special circumstance. (39 RT 3311-3312.) Liss told jurors that to determine the truth of the special circumstance, they had to look at the jury instruction defining it. (39 RT 3312.) He argued, "And frankly, the instruction is better and it's clearer." (39 RT 3312-3313.) Liss displayed the instruction on his closing argument board and went through each of the elements. (39 RT 3313.) Liss argued that since Bell murdered Joey because he had a psychotic break down, not because he wanted to steal something, the special circumstance was not true. (39 RT 3313-3314.) The prosecutor likewise read the special circumstance instruction to the jury and asked the jury to find each of its elements true. (39 RT 3287.) Both counsel correctly stated the law and properly referred the jury to the court's instructions.

Moreover, the court instructed the jury on the elements the prosecution needed to prove in order for the jury to find the special circumstance true. (39 RT 3247-3248; 6 CT 1227.) The court also instructed the jury that the attorneys' arguments were not evidence (39 RT 3259; 6 CT 1251), and that if the attorneys' statements on the law conflicted with the instructions, the jury had to follow the court's instructions. (39 RT 3239; 6 CT 1208.) It is presumed the jury followed these directions by the Court. (*Romano v. Oklahoma* (1994) 512 U.S. 1, 13 [114 S.Ct. 2004, 129 L.Ed.2d 1].) Bell has not alleged facts to overcome the presumption.

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly,

Subclaim III(11) should be denied on the merits because Bell fails to state a prima facie case for relief. (People v. Duvall, supra, 9 Cal.4th at p. 474.)

K. There Was No Cumulative Error

In Subclaim III(12), Bell alleges that counsel's failings "individually and cumulatively" deprived him of a fair and reliable determination of his guilt. (Petn. at pp. 83-84.) Bell's subclaim fails to state a prima facie case for relief. As explained in Arguments III(A) through III(J), *supra*, counsel provided constitutionally effective assistance, and there was no prejudice. Accordingly, Bell's subclaim of cumulative error necessarily fails. (*People v. Gurule* (2002) 28 Cal.4th 557, 662.)

IV. BELL FAILS TO STATE A PRIMA FACIE CASE THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL

In Claim IV, Bell claims his defense attorneys rendered ineffective assistance of counsel at the penalty phase of his trial because they failed to adequately investigate and present mitigating evidence. Specifically, Bell alleges that counsel should have presented Bell's complete social history, which would have included a family history of mental illness, medical problems with psychiatric consequences and substance abuse; evidence of psychological and other abuse; neglect and abandonment and trauma he suffered and their long-lasting effects; evidence of his neurological and other cognitive defects, and evidence of his mental illness and other impairments. Bell further alleges that the mitigating evidence his counsel did present was incomplete and misleading. (Petn. at pp. 85-182.) Bell alleges that counsel's failings deprived him of the benefit of all reasonably available evidence relevant to the jury's determination of sentence and

undermined confidence in the penalty verdict. (Petn. at p. 182.) Bell's claim fails to state a prima facie case for relief.

As discussed previously, in order to succeed on a claim of ineffective assistance of counsel, Bell must show that counsel's performance was deficient and that the deficient performance subjected him to prejudice. (*Strickland v. Washington, supra*, 466 U.S. at p. 687.) Here, Bell fails to allege facts with particularity to show that defense counsel performed deficiently or that there is a reasonable probability that, but for defense counsels' alleged failures and omissions, he would have enjoyed a more favorable outcome in the penalty phase.

Bell's claim consists of his recapitulation of his exhibits, and an extensive social history of Bell, his parents, his stepfather, his grandparents, his sister, his cousins, and other relatives. Much of it concerns events occurring before Bell was born, or events of which he was unaware, or events that occurred to siblings or relatives. Bell attempts to describe a "generational trauma" which would excuse or mitigate his cold-blooded murder of an eleven-year old boy.

Bell's family history is irrelevant unless it had a direct effect on the development of his moral character. (*People v. Rowland* (1992) 4 Cal.4th 238, 279.) Thus, the background of any of the defendant's family is of no consequence in and of itself in the penalty phase of a capital case. (*Ibid.*) This is because under both California law and the United States Constitution, the determination of punishment in a capital case rests on the defendant's personal moral culpability. It is the "defendant's character or record," not his family's, that the "sentencer" considers. (*Ibid.*)

Many declarations relied upon by Bell contain various statements from family members or acquaintances of the family that are used to create a family history that have no relevance to Bell's personal moral culpability. These exhibits that show that members of Bell's biological family may

have suffered from various physical or mental infirmities are utterly irrelevant because they are not linked to an expert opinion stating that Bell inherited a mental disorder. (*People v. Kraft* (2000) 23 Cal.4th 978, 1035 [evidence leading only to speculative inferences is irrelevant].)

Moreover, "investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor [citation]." (*Wiggins v. Smith* (2003) 539 U.S. 510, 522 [123 S.Ct. 2527, 156 L.Ed.2d 471], internal quotations omitted, emphasis in original.) "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." (*In re Andrews*, *supra*, 28 Cal.4th at p. 1254, quoting *Strickland v. Washington*, *supra*, 466 U.S. at pp. 690-991.) Consequently, the United States Supreme Court "has recognized that valid strategic choices are possible even without extensive investigative efforts." (*In re Andrews*, *supra*, 28 Cal.4th at p. 1254.)

Here, Bell fails to provide a declaration from trial counsel or a defense investigator indicating the extent of their investigation into Bell's social history, or even Bell's own declaration as to what types of discussions he had with counsel on this subject. If Bell believed there was more information about his background that trial counsel could have investigated and/or obtained for trial, he should have mentioned it at that time. Defense counsel here were entitled to rely on the information provided by Bell and other family members about Bell's background. As this Court has explained:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on

> information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.

(*In re Andrews*, *supra*, 28 Cal.4th at p. 1255, quoting *Strickland v. Washington*, *supra*, 466 U.S. at p. 691.)

Furthermore, "[a]ny penalty phase strategy must take into account the jury's likely state of mind on having only recently heard an account of the defendant's capital crimes and returned a guilty verdict [citation]." (*In re Andrews*, *supra*, 28 Cal.4th at p. 1259.) Here, the jury had just found Bell guilty of brutally stabbing an innocent eleven-year-old boy in order to get a few dollars to buy crack cocaine. The record shows that counsel presented an integrated strategy during the penalty phase designed to persuade the jury that Bell had much to offer society and whose life was therefore worth sparing. This strategy can be seen in counsel's closing argument during the penalty phase. To that end, counsel argued that Bell was not a sociopathic, violent, evil individual but rather a kind person who had engaged in just two violent episodes in his life (the 1981 offense and the killing of Joey), both of which occurred when Bell was high on drugs. (53 RT 4459-4460, 4460, 4465, 4468.) Counsel argued that these incidents were psychotic breaks which were atypical. (53 RT 4462, 4466.) Counsel argued, "the question isn't what caused it." (53 RT 4468.) Counsel noted that many individuals had testified during the penalty phase about Bell's positive contributions, both within and outside an institutionalized setting. (53 RT 4474-4477, 4487-4488, 4492.)

A large portion of the penalty phase evidence was geared towards this defense strategy. Ken Berman, the director of TRY, testified that his group held workshops at Harlem Valley Detention Center where Bell served time for the 1981 offense. (47 RT 3820-3821.) Berman got to know Bell. (47 RT 3822-3823.) Bell talked about the 1981 offense and said he could not

forgive himself. (47 RT 3829-3831.) Bell wrote a scene for a play about self-forgiving entitled "The Chains Fell." (47 RT 3830.) Michael Carwile, who put the poem to music, testified that Bell's poems were non-violent and sophisticated. (48 RT 3979, 3981.) Of all the residents at Harlem Valley, Bell had the most lasting impact upon him. (49 RT 3982.) Carvile wanted to continue working with Bell to publish Bell's poems. (48 RT 3983-3984.) Lawrence A. Seavers, the recreation leader at Harlem Valley, testified that Bell was allowed to set up audio visual equipment because Bell was a model prisoner. (48 RT 4030.) Bell was friendly, likeable, cooperative, non-violent, easy to get along with and followed orders. (48 RT 4031-4034.) Seavers opined that if given life imprisonment, Bell would be able to positively guide other inmates. If Bell were given the death penalty, it would be a loss to inmates who Bell could otherwise help. (48 RT 4034.) Wendy Cannon, a cook at Harlem Valley, testified that she did not feel nervous when she worked with Bell even though there were knives in the kitchen. (48 RT 4050-4051.) Bell was a good person, like a "little brother" to Cannon. Unlike most of the other inmates, Bell was non-violent. (48 RT 4051-4052.) Even when other inmates tried to fight with Bell, he did not fight back. (48 RT 4052.) Felix Rodriguez, senior youth division counselor at Harlem Valley, testified that counselors identified Bell as a positive inmate. Bell was cooperative, polite and obedient, he had no difficulty with authority, he tutored other inmates, and he could continue to have a positive influence in the prison setting. (48 RT 4068-4072.) Howard A'Brial, a youth division aid at Harlem Valley, and James Clancy, assistant director at Harlem Valley, gave similar testimony. (48 RT 3908-3922, 3955-3962.) A'Brial and Clancy opined that Bell should not be executed because he did well in a prison setting. (48 RT 3924-3925, 3964.) Correctional consultant James Park testified that Bell would be a model prisoner. (50 RT 4203-4204.) He also explained the high level of

restriction on prisoners serving life without the possibility of parole. (50 RT 4191-4202.) Neighbors, friends, family members, and co-workers sung Bell's praises. (46 RT 3770-3772, 3796-3802; 49 RT 4156-4159.) The long list of family history witnesses Bell now proposes would have made no difference.

Furthermore, defense counsel did in fact present evidence regarding the difficulties Bell faced as a child. Bell simply claims, in hindsight, that more such evidence should have been introduced. At the penalty phase, Shirley Bell, one of Bell's paternal aunts, testified that Bell's mother did not visit him in the hospital when he was ill as a toddler, was verbally abusive, and did not show him love or affection. (46 RT 3757-3762.) Bell's father was a drug abuser. (46 RT 3764.) Jacqueline Bell, another paternal aunt, gave similar testimony. (46 RT 3784, 3786-3787.) She also testified that Bell was a quiet and unhappy child who could not show emotion. (46 RT 3783-3784, 3791.) Keith Bishop, Bell's first cousin, testified that Bell's mother and stepfather did not display affection towards him. (48 RT 3990-3991, 3995-3996.) Bell's natural father left his mother. The father was subsequently convicted of various crimes and sent to prison. (48 RT 3991-3992.) Bell's sister Lisa gave extensive testimony about their mother's indifference, their natural father's drug abuse, and their stepfather's physical and sexual abuse. (49 RT 4105-4119, 4122-4126.) Terrence M. Williams, Ph.D., a sociologist, testified about the difficulties Bell faced growing up in the Lexington Avenue projects. (48 RT 4000-4007.) Counsel recounted the testimony about Bell's difficult childhood during their closing argument. (53 RT 4480-4485.)

Contrary to Bell's assertion (Petn. at pp. 99-106), the defense also called expert witnesses to place Bell's behavior into context. Doctor Alexander Caldwell, Ph.D., testified that Bell had borderline personality disorder. (47 RT 3874-3875.) Doctor Caldwell listed eight characteristics

of this disorder. (47 RT 3877-3881.) Additionally, the sufferer has transient psychotic episodes. (47 RT 3875.) Doctor Caldwell opined that both the 1981 offense and the killing of Joey were indicative of such episodes. The violence was exacerbated by drug use. (47 RT 3883.) Notably, and consistent with the defense theme at the penalty phase, Caldwell testified that Bell would adjust well in prison, as he had in the past, because the setting was authoritarian and highly structured. (47 RT 3884-3885, 3898.) In addition to Caldwell, Smith and Levak testified in the guilt phase about Bell's mental problems. The jury was instructed that in deciding the appropriate penalty, jurors were to consider "the evidence received during the entire trial[.]" (52 RT 4382; 7 CT 1531.)

In essence, with the benefit of hindsight, Bell has provided more background information which might have been presented to the jury. However, counsel's decision to balance Bell's benefit to society with his family background, giving attention to both facets, showed a comprehensive and coherent defense strategy which had a sound tactical basis. (See *In re Andrews*, *supra*, 28 Cal.4th at p. 1262, accord, e.g., *Burger v. Kemp* (1987) 483 U.S. 776, 791-794 [107 S.Ct. 3114, 97 L.Ed.2d 638]; *In re Ross* (1995) 10 Cal.4th 184, 206-208.) There was no deficient performance. And, in light of the horrific nature of the crime - the brutal stabbing of an eleven-year-old boy - a more favorable result is not reasonably probable had a different penalty phase strategy been selected. (See *In re Visciotti*, *supra*, 14 Cal.4th at pp. 356-357 [not probable that evidence of defendant's troubled childhood and unbearable family situation, even if introduced at penalty phase, would have outweighed the factors in aggravation].)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly,

Claim IV should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

V. BELL FAILS TO STATE A PRIMA FACIE CASE OF MISCONDUCT BY STATE AUTHORITIES

In Claim V, Bell alleges that state authorities engaged in a pattern of misconduct by: (1) failing to collect, destroying, or failing to preserve evidence; (2) falsifying evidence; (3) introducing false evidence; (4) introducing false and misleading testimony; (5) misstating the law to the jury; and (6) failing to timely disclose all exculpatory evidence. (Petn. at pp. 183-189.) Bell's claim is procedurally barred because he could have raised it on appeal, but did not. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.) Also, claims regarding the admission of evidence are not cognizable on habeas corpus. (*In re Lindley*, *supra*, 29 Cal.2d at p. 723.) Bell's claim also fails to state a prima facie case for relief.

A. The Prosecution Did Not Destroy Evidence

In Subclaim V(2), Bell alleges that the prosecution willfully destroyed or failed to preserve evidence. (Petn. at pp. 184-185.) Bell's subclaim fails to state facts supporting a prima facie case for relief.

Law enforcement agencies have a duty to preserve evidence "that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta* (1984) 467 U.S. 479, 488 [104 S.Ct. 2528, 2534, 81 L.Ed.2d 413]; *People v. Hines*, *supra*, 15 Cal.4th at p. 1042.) To fall within the scope of this duty, the evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*California v. Trombetta*, *supra*, 467 U.S. at p. 489; *People v. Beeler* (1995) 9 Cal.4th

953, 976.) Furthermore, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Arizona v. Youngblood* (1988) 488 U.S. 51, 58 [109 S.Ct. 333, 102 L.Ed.2d 281]; *People v. Beeler*, *supra*, 9 Cal.4th at p. 976.)

Bell complains about the fact that his blood and urine samples were not tested until November 1992. (Petn. at p. 184-185.) Bell alleges that during that time period, the samples were degraded. (Petn. at p. 185.) Bell fails to set forth facts showing bad faith on the part of the police. All he alleges is a delay. Steven West, director of Poison Lab, testified that he tested the samples as soon as law enforcement requested that he do so. (31 RT 2378-2380, 2384, 2392-2394, 2396.) The reason for the delay is unknown. Absent specific facts showing bad faith, Bell fails to state a prima facie case for relief. (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1258.)

Bell claims that after the samples were taken, law enforcement failed to properly preserve them. Bell relies upon Judith Stewart's declaration, in which she states, "it is not clear to me that the samples of Mr. Bell's blood analyzed by Poison Lab were properly preserved prior to testing." (9 Exhibits 2420.) Stewart admits she has no personal knowledge of what happened to the samples, and further acknowledges that the trial testimony indicated they were handled and stored according to proper procedures. (9 Exhibits at pp. 2419-2420.) Bell's allegation to the contrary is conclusory, speculative and lacks factual support. As such, it does not warrant relief. (*People v. Duvall, supra*, 9 Cal.4th at pp. 474-475.)

Bell complains that the police destroyed their notes before reducing them to written reports. (Petn. at p. 185.) Bell does not allege facts showing bad faith, or that the notes contained any information of exculpatory value. (*People v. Beeler, supra*, 9 Cal.4th at p. 976.)

Finally, Bell complains about the destruction of the trial exhibits. (Petn. at p. 185.) Bell incorporates by reference Claim VII. This issue is discussed in Argument VII, *infra*, which respondent incorporates by reference as if fully set forth herein. Bell has not alleged facts showing that the prosecution or its agents were responsible for maintaining the exhibits or that they were destroyed in bad faith. At the record settlement hearing, the prosecutor stated he never received notice of their destruction. (63 RT 4677-4699.) The court explained that the exhibits were destroyed due to an error by the court clerk and no one received notice. (63 RT 4683.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim V(2) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

B. The Prosecution Did Not Falsify Evidence

Subclaim V(3) reads in its entirety:

> The prosecution and law enforcement unconstitutionally engaged in an egregious and pervasive pattern and practice of falsifying notes and reports; coercing, threatening, intimidating tampering with, and/or coaching witnesses; manufacturing false evidence against Mr. Bell; offering undisclosed inducements to witnesses in exchange for testimony; improperly tailoring their investigation; presenting and failing to correct false evidence; and withholding material exculpatory information from the defense.

(Petn. at p. 185.)

These allegations are conclusory, speculative, and devoid of any factual support. Accordingly, they do not state a prima facie case for relief. (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1258; *People v. Duvall, supra*, 9 Cal.4th at p. 474.)

C. The Prosecution Did Not Introduce False Testimony

Subclaim V(4) reads in its entirety:

> The prosecutor and his agents introduced false and/or misleading testimony against Mr. Bell by securing witnesses' agreements to testify in a particular manner, favorable to the prosecution, in exchange for financial or other inducements, which the prosecution failed to disclose, in whole or in part, to the defense.

(Petn. at p. 185.)

These allegations are conclusory, speculative, and devoid of any factual support. Accordingly, they do not state a prima facie case for relief. (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1258; *People v. Duvall, supra*, 9 Cal.4th at p. 474.)

D. The Prosecution Did Not Present Unreliable and Misleading Testimony

In Subclaim V(5), Bell alleges that the prosecution knowingly and intentionally presented false and misleading evidence. Bell's subclaim is procedurally barred because he failed to raise it in the court below. (*People v. Davis*, *supra*, 46 Cal.4th at p. 613.) Bell's subclaim also fails to state a prima facie case for relief.

"That a prosecutor's knowing use of false evidence or argument to obtain a criminal conviction or sentence deprives the defendant of due process is well established." (*People v. Sakarias* (2000) 22 Cal.4th 596, 633; see also *People v. Seaton* (2001) 26 Cal.4th 598, 647.) "It is the role of the judge or jury to determine the facts, not that of the attorney [citation]." (*United States ex rel. Wilcox v. Johnson* (3d Cir. 1977) 555 F.3d 115, 122.) Although attorneys may not present evidence they know to be false or assist in perpetrating known frauds on the court, they may

ethically present evidence that they suspect, but do not personally know, is false." (*People v. Riel* (2000) 22 Cal.4th 1153, 1217.) "Under well-established principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents, even if the evidence was not intentionally submitted." (*People v. Seaton, supra*, 26 Cal.4th at p. 647.) To obtain relief on an alleged violation of the presentation of false evidence, the petitioner must show by a preponderance of the evidence that: (1) the testimony was false, and (2) the evidence was material and affected the outcome of the trial. (*Smith v. Phillips* (1982) 455 U.S. 209, 200, fn. 10 [102 S.Ct. 940, 71 L.Ed.2d 78]; *In re Bell* (2007) 42 Cal.4th 630, 637.) Bell has not alleged facts with particularity that would meet either of these prongs.

Bell alleges that that Detectives Doucette and Almos falsely testified that Bell showed no remorse, and that the prosecutor argued this false testimony to the jury. In support of his claim, Bell relies on testimony by Redden at the preliminary hearing that during the polygraph exam, Bell cried. (Petn. at p. 186.) The detectives were testifying about Bell's demeanor during their interview with him. (28 RT 2103-2104, 2107, 2124.) The fact that Bell had a different attitude at a later point in time, does not render their testimony false. In fact, three of the expert witnesses, Levak, Jones and Mills, who listened to the interview, concurred with the conclusions reached by Almos and Doucette about Bell's demeanor. (33 RT 2746-2747; 36 RT 2951; 37 RT 3066.) Moreover, given the brevity of the testimony by Almos and Doucette, and the fact the jurors heard the interview and could judge Bell's demeanor for themselves, Bell has not pled facts showing that the testimony about lack of remorse affected the outcome of his trial.

Bell's allegation that "[t]he prosecution introduced false, misleading, and unreliable testimony from Susanna Forney" is conclusory and speculative. Bell offers no facts in support of the allegation. As such, it should be rejected summarily. (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1258; *People v. Duvall, supra*, 9 Cal.4th at p. 474.)

Bell alleges that the toxicology results presented to the jury by the prosecution experts were false and unreliable. The allegation lacks factual support. Bell bases it on the fact that the expert retained by habeas counsel, Judith Stewart, disagreed with the conclusions reached by the prosecution experts. (Petn. at pp. 186-188.) Differing opinions do not render the testimony false. (See *Lambert v. Blackwell* (3rd Cir. 2004) 387 F.3d 210, 252; *Workman v. Bell* (6th Cir. 1998) 178 F.3d 759, 766-767.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim V(5) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

E. The Prosecutor Did Not Misstate the Law During Closing Argument

In Subclaim V(6), Bell, relying on the appellate record, alleges that the prosecutor committed misconduct by misstating the law to the jury during closing argument. (Petn. at pp. 187-188.) Bell's subclaim is procedurally barred because he could have raised it on appeal, but did not. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.) To the extent that Bell failed to preserve the subclaim in the court below (*People v. Dykes* (2009) 46 Cal.4th 731, 760), it is procedurally barred because it is not based on facts that Bell did not know and could not reasonably have known at the time of trial. (*In re Seaton*, *supra*, 34 Cal.4th at pp. 199-200.)

Further, Bell fails to state a prima facie case for relief as to this subclaim. The rules governing claims of prosecutorial misconduct are well established. "Improper remarks by a prosecutor can so infect the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 [94 S.Ct. 1868, 40 L.Ed.2d 431].) However, conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial error under state law only if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

A prosecutor is entitled to vigorously argue his case (*People v. Bandhauer* (1967) 66 Cal.2d 524, 529), and is afforded wide latitude in argument (*People v. Milner* (1988) 45 Cal.3d 227, 245). A prosecutor may fully argue his views as to what the evidence shows, discuss the force and effect of the evidence, and argue the inferences and conclusions to be drawn therefrom. (*People v. Szeto* (1981) 29 Cal.3d 20, 34.) "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." (*Boyde v. California* (1990) 494 U.S. 370, 385 [110 S.Ct. 1190, 108 L.Ed.2d 316].)

Bell complains about the prosecutor's statement to the jury, "Once you find the felony-murder, you find the special circumstance to be true." (Petn. at pp. 187-188, referencing 39 RT 3287.) Bell takes the statement out of context. The prosecutor was concluding his remarks about felony-murder and asking the jury to find that charge true. (39 RT 3286-3987.) The prosecutor then, in the same sentence, asked the jury to find the special circumstance true. This is obvious from the prosecutor's next two

sentences, in which, reading from the special circumstance instruction, he told the jury that to return a true finding thereon, jurors must conclude that "the murder was committed to carry out the robbery or to facilitate the escape from the robbery or to avoid detection of the robbery." (39 RT 3287.)

Bell complains about the example the prosecutor used to explain the concept of a robbery which would be incidental to a murder. The prosecutor argued that if Bell "murder[ed] Joey, and he did murder Joey, and after doing so he thinks, 'well, I've killed Joey . . . I might as well take some things with me [,] that's the kind of incidental robbery to a murder[.]" (Petn. at p. 188, referencing 39 RT 3287; see also 40 RT 3353-3354, 3359-3360 [similar examples].) Bell claims, without citation to authority, that the argument was incorrect. (Petn. at p. 188.) Bell is wrong. The argument correctly stated the law. (*People v. Lewis* (2008) 43 Cal.4th 415, 464; *People v. Davis* (2005) 36 Cal.4th 510, 564-565.)

Moreover, the trial court instructed the jury that if the attorneys' statements on the law conflicted with the instructions, the jury had to follow the court's instructions. (39 RT 3239; 6 CT 1208.) Jurors are presumed to have followed the court's instructions. (*Weeks v. Angelone* (2000) 528 U.S. 225, 234 [120 S.Ct. 727, 145 L.Ed.2d 727].) Bell has not alleged facts to overcome this presumption.

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim V(6) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

F. The Prosecution Did Not Fail to Disclose Exculpatory Evidence

In Subclaim V(7), Bell alleges that the prosecution failed to disclose material, exculpatory evidence to the defense. (Petn. at p. 188.) Bell's subclaim is procedurally barred because he could have raised it on appeal, but did not. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.)

In any event, Bell's subclaim fails to state a prima facie case for relief. In *Brady v. Maryland* (1973) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215], the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady v. Maryland*, *supra*, 373 U.S. at p. 87.) The duty to disclose such evidence exists even though there has been no request by the accused (*United States v. Agurs* (1976) 427 U.S. 97, 107 [96 S.Ct. 2392, 49 L.Ed.2d 342]), encompasses impeachment evidence as well as exculpatory evidence (*United States v. Bagley* (1985) 473 U.S. 667, 676 [105 S.Ct. 3375, 87 L.Ed.2d 481]), and extends to evidence known only to police investigators and not to the prosecutor (*Kyles v. Whitley* (1995) 514 U.S. 419, 438 [115 S.Ct. 1555, 131 L.Ed.2d 490]). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*Kyles v. Whitley*, *supra*, 514 U.S. at p. 433, internal quotations omitted.) In order to comply with *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." (*Id.* at p. 437; accord, *In re Brown* (1998) 17 Cal.4th 873, 879.)

A true "*Brady* violation" has three components: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued [citation]." (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043.) To demonstrate prejudice, the defendant "must show a reasonable probability of a different result." (*Banks v. Dretke* (2004) 540 U.S. 668, 699 [124 S.Ct. 1256, 157 L.Ed.2d 1166].)

Bell contends that the prosecution did not send the results of the tests on his blood and urine samples to the defense until a week before trial. (Petn. at p. 188.) Bell does not include a declaration from his counsel as to when they received the results nor does he cite to any exhibits or portion of the appellate record supporting his assertion. Finally, Bell does not allege facts showing he was prejudiced by the purported delay. His complaint should be summarily rejected. (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1258.)

Bell contends that the prosecution did not give defense counsel the chain of custody logs from the San Diego Police Department regarding the samples. Bell relies upon pages 3038 and 3045 of the Reporter's Transcript on appeal. (Petn. at p. 188.) Those pages do not support the allegation. They cover the testimony of criminalist Melvin Kong, a prosecution rebuttal witness. (See 37 RT 3037.) On the first cited page, Kong simply testified that a log was maintained at the lab. (37 RT 3038.) On the second cited page, Kong testified that the lab maintained logs to determine when specimens entered the lab for analysis and when they left the lab. (37 RT 3045.) Nothing was said about the recipients of the logs. Moreover, Bell alleges no prejudice from the fact that counsel did not have the logs. His complaint should be summarily rejected. (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1258.)

Bell contends that the prosecution failed to disclose a study Dr. Baselt conducted in July 1993 about the degradation of cocaine in the blood over time. Bell relies upon the study itself and upon Judith Stewart's declaration in which she states that the study was published in the Journal of Forensic Sciences, a well known publication in the field. (Petn. at p. 188.) Bell has presented no facts to show that the study was not given to defense counsel. Moreover, because the study was a matter of public record, there was no *Brady* error; the defense could have obtained it by exercise of due diligence. (*Johnson v. Bell* (6th Cir. 2008) 525 F.3d 466, 476-477; *United States v. Aichele* (9th Cir. 1991) 941 F.2d 761, 764.) Moreover, Bell alleges no prejudice from the alleged lack of disclosure. His complaint should be summarily rejected. (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1258.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim V(7) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

G. Trial Counsel Was Not Ineffective

In Subclaim V(8), Bell alleges that his trial counsel were ineffective for failing to challenge the State's misconduct on the grounds alleged in Subclaims 2 through 7. (Petn. at p. 188.) As stated above, each of the subclaims lack merit, and fail for absence of a showing of prejudice. Therefore, Bell has not pled facts to meet his burden under either prong of *Strickland v. Washington*, *supra*, 466 U.S. 666. Counsel had no duty to make meritless motions simply because they had "nothing to lose" by doing so. (*Knowles v. Mirzayance* (2009) __ U.S. __ [129 S.Ct. 1411, 1419, 173 L.Ed.2d 251].)

Accordingly, Subclaim V(8) fails to plead facts entitling Bell to habeas relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

H. Appellate Counsel Was Not Ineffective

In subclaim V(9), Bell claims that appellate counsel was ineffective for failing to raise subclaims 2 through 8 on his automatic appeal to this Court. (Petn. at p. 189.) Bell fails to a prima facie case for relief as to this subclaim.

As stated in Arguments V(A) through I(H), above, Claim V, and all of the subclaims therein, are totally lacking in merit. If appellate counsel had raised them on direct appeal, they would have been rejected by this Court. Thus, Bell has shown neither ineffective assistance nor prejudice. (*Smith v. Robbins*, *supra*, 528 U.S. at pp. 285-286; *People v. Osband*, *supra*, 13 Cal.4th at p. 664.)

Accordingly, Subclaim V(8) fails to plead facts entitling Bell to habeas relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

I. There Was No Cumulative Error

In Subclaim V(10), Bell alleges that the State's acts of misconduct "individually and collectively" deprived him of a fair and reliable determination of his guilt. (Petn. at p. 189.) Bell's subclaim fails to state a prima facie case for relief. As explained in Arguments V(A) through V(H), *supra*, Bell does not allege facts showing that there was misconduct or that he was prejudiced thereby. His claim of cumulative error therefore fails. (*People v. Bennett* (2009) 45 Cal.4th 577, 618.)

VI. BELL FAILS TO STATE A PRIMA FACIE CASE OF JUROR MISCONDUCT

In Claim VI, Bell alleges that he was denied his right to a fair trial, due to juror misconduct, because: (1) the trial court denied the defense request to voir dire jurors about their deliberations; (2) juror M.D. was biased; (3) jurors A.K. and M.H. discussed the case outside the deliberation process; (4) jurors rushed to a decision; (5) jurors improperly injected their own personal experiences into the penalty phase deliberations; and (6) two jurors had their automobiles stolen during the trial but did not report the thefts to the court. (Petn. at pp. 183-202.) Bell's first subclaim is procedurally barred because he raised it on direct appeal, and it was rejected by this Court. (*In re Waltreus*, *supra*, 62 Cal.2d at p. 225.) Bell's second subclaim is procedurally barred because he could have raised it on direct appeal but did not. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.) As to subclaims 3,4, 5 and 6, to the extent that Bell properly preserved these subclaims in the trial court, Bell is procedurally barred for failing to raise them on direct appeal. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.) To the extent that Bell failed to preserve the subclaims in the court below (*People v. Stanley*, *supra*, 39 Cal.4th at p. 950), they are procedurally barred because they are not based on facts that Bell did not know and could not reasonably have known at the time of trial (*In re Seaton*, *supra*, 34 Cal.4th at pp. 199-200). Bell's claim also fails to state a prima facie case for relief.

A. The Trial Court Conducted A Thorough Investigation Into Alleged Juror Misconduct

In Subclaims VI(2) through VI(4), Bell contends that the trial court conducted an inadequate investigation into defense allegations of juror misconduct. (Petn. at pp. 190-193.) Bell's subclaims are procedurally

barred because he raised them on direct appeal and they were rejected by this Court. (*People v. Bell*, *supra*, 40 Cal.4th at pp. 612-619; *In re Waltreus*, *supra*, 62 Cal.2d at p. 225.) The subclaims also fail to state a prima facie case for relief.

Respondent refers this Court to the respondent's brief at pages 55-81 and to this court's opinion in *People v. Bell*, *supra*, 40 Cal.4th at pp. 612-619, which respondent incorporates herein by reference. Briefly, the facts surrounding the subclaims are as follows. After about two days of deliberations, the jury sent the court a note indicating it was deadlocked. (40 RT 3378.) Over the objection of the defense, the court gave the jury an admonition, based on this Court's decision in *People v. Rich* (1988) 45 Cal.3d 1036, to continue deliberations and keep an open mind. (40 RT 3383-3384.) A couple of hours later, the court received a note from juror A.G. complaining that she felt "intimidated." (40 RT 3385; 5 CT 1190.) After a discussion with counsel, the court decided to recess deliberations until the following Monday. (40 RT 3393.) Before declaring the recess, the court spoke with A.G. (40 RT 3399-3400.) That afternoon, after an extensive discussion with counsel, the court denied the defense motion for a mistrial. (41 RT 3430, 3443.)

On Monday, the court received a note from A.G. advising the court that she had violated the court's instructions by discussing the case with her husband. She asked the court to excuse her. (44 RT 3447-3551; 5 CT 1190/1-1191/1.) Defense counsel again moved for a mistrial. (42 3454-3456.) The court made an inquiry of A.G., who told the court she could no longer be impartial. (42 RT 3460.) She also said she felt intimidated by jurors M.S. and M.D., but acknowledged she might be overreacting and that most jurors were supportive of her. (42 RT 3473-3477.) She further stated she had a doctor's excuse which would allow her to be relieved from further jury service. (42 RT 3477-3478.) The court discussed the matter

with the presiding juror, M.D. He adamantly denied that anyone was intimidating A.G. He explained that A.G. had personal problems and that while opinions were forcefully expressed, jurors were trying to appease A.G. because she was oversensitive. (42 RT 3478-3480.) The court denied the mistrial motion, finding that only A.G. committed misconduct. (42 RT 3485, 3491.) The court excused A.G. and replaced her with an alternate. (42 RT 3491-2492.) Verdicts were reached later that day. (42 RT 3500-3502; 5 CT 1196-1199.)

On direct appeal, this Court rejected Bell's contention, repeated here, that the court should have conducted an inquiry of all twelve jurors before dismissing A.G. (Petn. at pp. 190-194.) This Court held that the trial court acted within its sound discretion in concluding that any further inquiry would be an unwarranted intrusion into the secrecy of the deliberation process. This Court noted that A.G. admitted that she might have overreacted to comments by the two jurors who were the focus of her complaint. (*People v. Bell, supra*, 40 Cal.4th at p. 618.) This Court stated that given all the circumstances, a more intrusive inquiry would have risked "depriving the jury room of its inherent quality of free expression [citation]." (*Id.* at p. 619, internal quotation omitted.)

In addition to his reliance on the appellate record, Bell has submitted declarations from two jurors, M.R. and M.H. (9 Exhibits at pp. 2422-2430.) Specifically, Bell focuses upon their statements that jurors were heated, loud, forceful, frustrated, "became antsy and tired of going over the evidence," and were "reticent to hold out for life." Bell argues that further inquiry by the trial court would have shed light on how jurors were reaching their conclusions. (Petn. at p. 193.) However, the declarations and statements contained therein are not admissible for this purpose.

(*People v. Steele* (2002) 27 Cal.4th 1230, 1261; Evid. Code, § 1150, subd (a).)[17]

Because this Court has already rejected Subclaims VI(2) through (4), and Bell offers no new admissible evidence in support of these subclaims, they should be rejected. In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaims VI(2) through (4) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

B. The Jury Properly Deliberated At the Guilt Phase

In Subclaim VI(5), Bell contends that the jury failed to properly deliberate during the guilt phase of the trial because, after the court replaced juror A.G. with an alternate, the jury was able to reach its verdict within a couple of hours. (Petn. at p. 194.) Bell's subclaim is procedurally barred because he could have raised it on direct appeal but did not. (*In re Dixon, supra*, 41 Cal.2d at p. 759.)

Furthermore, the subclaim fails to state a prima facie case for relief. Bell relies upon P.R.'s declaration stating that jurors felt "intimidated" by

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[17] This section provides:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

M.D. and that when the alternate arrived, jurors greeted her happily because they knew she would vote for guilt. Bell argues that the declarations show the verdicts were the product of intimidation. (Petn. at p. 194.) The declarations are not admissible for this purpose and therefore cannot support Bell's claim. (*People v. Hutchinson* (1969) 71 Cal.2d 342, 351; Evid. Code, § 1150, subd (a).) When the alternate was seated, the court instructed the jury to start their deliberations over, re-read most of CALJIC 17.40 [Individual Opinion Required - Duty to Deliberate], repeated an admonition it had given earlier to stay away from any publicity about the case, and sent the jurors back to the jury room. (42 RT 3497-3498.) It is presumed that in reaching their verdict, the jurors followed these instructions from the court. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Bell has presented no competent, relevant, admissible evidence to overcome this presumption.

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim VI(5) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

C. Juror M.D. Was Not Biased

In Subclaim VI(6), Bell, relying largely on the appellate record, alleges that he was denied his right to a fair trial because M.D. was biased. (Petn. at pp. 194-196.) Bell's subclaim is procedurally barred because he could have raised it on direct appeal but did not. (*In re Dixon, supra*, 41 Cal.2d at p. 759.)

Furthermore, the subclaim fails to state a prima facie case for relief. A criminal defendant has a constitutional right to a trial by an impartial jury. An impartial jury is a jury in which no member has been improperly

influenced, and every member is capable and willing to decide the case only on the evidence before it. (*Smith v. Phillips* (1982) 455 U.S. 209, 217 [102 S.Ct. 940, 71 L.Ed.2d 78]; *In re Hamilton* (1999) 20 Cal.4th 273, 294-295.) When there is a claim of juror misconduct or bias, the trial court must conduct an inquiry sufficient to determine if the claim has factual support. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 928.) The decision as to whether to investigate the possibility of juror bias, incompetence, or misconduct, as well as the decision to retain or discharge a juror, rests within the sound discretion of the trial court. A hearing is required only where the court possesses information which, if proven true, would constitute good cause to doubt a juror's ability to perform his duties. (*People v. Ramirez* (2006) 39 Cal.4th 398, 461.) A trial court is not required to investigate any and all new information about a juror during trial. A hearing is only required when the court possesses information which, if proven true, would constitute "good cause" to doubt a juror's ability to perform his duties and would justify his removal from the case. (*People v. Ray* (1996) 13 Cal.4th 313, 343.) The reviewing court accepts the trial court's credibility determinations and findings of fact if supported by substantial evidence. (*People v. Schmeck* (2005) 37 Cal.4th 240, 294.) Juror bias will warrant overturning the judgment only if as a result of the bias, the juror was unable to perform his duty. (*People v. Bennett*, *supra*, 45 Cal.4th at p. 623.)

Here, the issue of purported bias by M.D. was thoroughly explored by the trial court. During the hearing on A.G.'s misconduct, M.D., the presiding juror, said there was no intimidation towards A.G. or any other jurors. (42 RT 3478-3479.) He said that at most, positions were forcefully expressed. (42 RT 3479.) During the penalty phase, Liss complained that M.D. smirked when witnesses prejudicial to the defense testified, turned away during defense penalty opening statements, and glared at defense

counsel. Liss also pointed to the circumstances surrounding A.G.'s removal. (48 RT 3948.) Liss expressed concern that M.D. violated his oath as a juror to be fair and impartial, was "incredibly biased," and was hostile. Liss asked for permission to voir dire M.D., and asked the court to either admonish him to honor his responsibilities as a juror or remove him. (48 RT 3948-3949.) Leonard added that when she made her opening statement, M.D. looked towards the door. (48 RT 3949.) She also claimed that M.D. did not pay attention when the defense introduced its penalty phase evidence. (48 RT 3949.) Leonard argued that M.D. could not perform his duties as a juror. (48 RT 3950.) Liss continued to assert that M.D. "smirk[ed]" at the defense. (48 RT 3950-3951.) The prosecutor responded that counsel's assertions were speculative and not supported. (48 RT 3951.)

The court denied the request to voir dire M.D. or remove him. The court stated it had not seen any such conduct, and M.D.'s behavior was simply characteristic of his personality and not directed towards the defense. (48 RT 3951.) The court noted that it paid careful attention to each juror and M.D. never made eye contact with anyone. (48 RT 3951-3952.) When defense counsel continued to complain (48 RT 3952-3953), the court repeated that it found no cause to take action. (48 RT 3953-3954.) The court added that it would continue to observe M.D. closely to see if there was any justification for counsels' concerns. (48 RT 3954.)

A couple of days later, Liss renewed his complaint. He claimed that M.D. was engaging in negative behavior during the testimony of one of the defense penalty phase witnesses. He argued that M.D. was biased. (50 RT 4257.) He also complained that M.D. was talking to another juror. (50 RT 4258.) He asked the court to voir dire M.D. and admonish him. (50 RT 4257-4258.) The prosecutor responded that the defense request for admonishment was inappropriate and argued that M.D. and the other juror

were probably talking about something unrelated to the case. (50 RT 4258.) Leonard claimed the two jurors had talked more than once. (50 RT 4258-4259.) The court denied the defense motion. The court found "no basis for the defense position." The court concluded that based on its personal observations, M.D. "absolutely did nothing wrong at all" and committed "no misconduct." (50 RT 4259.)

In arguing that M.D. was biased, Bell repeats allegations made by defense counsel. (Petn. at p. 195.) However, the trial court already found the allegations to be unfounded. (50 RT 4259.) Substantial evidence supports the court's factual findings. Specifically, the court based its decision on its own observations of M.D. (48 RT 3951-3954; 50 RT 4259.) Bell alleges no new facts which would justify a different conclusion.

Bell purports to supplement his claim with juror P.R.'s declaration. Bell notes that in the declaration, P.R. stated that she felt "intimidated" by M.D. P.R. also stated that M.D. allegedly said, during deliberations, that he "could pull the switch himself." (Petn. at pp. 195-196.) Because Bell offers these statements to explain why and how P.R. reached her verdicts, they are inadmissible. (*People v. Lindberg* (2008) 45 Cal.4th 1, 53; Evid. Code, § 1150, subd (a).) Bell has offered no new admissible evidence in support of his subclaim.

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim VI(6) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

D. There Was No Juror Misconduct; And Any Misconduct Was Not Prejudicial

In Subclaim VI(7), Bell alleges that jurors A.K. and M.H. committed prejudicial misconduct by talking to non-jurors about the case. Bell's subclaim is procedurally barred because he could have raised it on direct appeal but did not. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.) To the extent that Bell failed to preserve the subclaim in the court below (*People v. Stanley*, *supra*, 39 Cal.4th at p. 950), it is procedurally barred because it is not based on facts that Bell did not know and could not reasonably have known at the time of trial. (*In re Seaton*, *supra*, 34 Cal.4th at pp. 199-200.)

Furthermore, the subclaim fails to state a prima facie case for relief. Jury misconduct gives rise to a rebuttable presumption of prejudice. (*People v. Majors* (1998) 18 Cal.4th 385, 417.) This presumption may be rebutted "by a showing that no prejudice actually occurred" (see *People v. Williams*, *supra*, 44 Cal.3d at p. 1156) or "by [the trial] court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party." (*People v. Miranda* (1987) 44 Cal.3d 57, 117.) The strength of the prosecution's case can be considered in determining if any juror misconduct was prejudicial. (*People v. Cochran* (1998) 62 Cal.App.4th 826, 831.)

It is misconduct for a juror to consult outside sources. Such misconduct will create a presumption of prejudice. (*People v. Williams* (2006) 40 Cal.4th 287, 333.) However, the presumption may be dispelled by showing there was in fact no prejudice to the defendant. (*Ibid.*; *People v. Pinholster*, *supra*, 1 Cal.4th at pp. 926-927.)

Bell alleges that during the penalty phase deliberations, juror A.K. discussed the case with his priest. (Petn. at p. 196.) Bell has submitted a declaration from A.K. (9 Exhibits at pp. 2431-2433.) Therein, A.K. states

that he telephoned his priest during deliberations and asked the priest what to do. A.K. should not have contacted his priest. However, the declaration dispels any presumption of prejudice, because according to the declaration, the priest told A.K. to "do whatever [he] thought was right." (9 Exhibits at p. 2432.) The remaining portions of the declaration, i.e., that A.K. was afraid to vote for a death sentence because of God's judgment and that his fear was abated after speaking to the priest, are inadmissible under Evidence Code section 1150, subdivision (a) because they concern the mental processes of the juror.

Bell alleges that the night before the penalty phase verdict was announced, juror M.H. discussed the case with her husband. (Petn. at pp. 196-197.) As an initial matter, respondent notes that in her declaration, M.H. stated that she did not recall any such discussion. (9 Exhibits at p. 2430.) Bell relies upon the declaration of P.R., in which P.R. recounted a conversation with M.H. about a discussion M.H. allegedly had with her husband. (9 Exhibits at p. 2426.) Aside from the hearsay nature of the allegation, neither declaration contains the contents of the statements, if any, M.H. made to her husband. Thus, any presumption of prejudice has been rebutted. The additional assertion by P.R. that M.H. voted for a death sentence because of, or after receiving, advice from her (M.H.'s) husband to do so, is inadmissible under Evidence Code section 1150, subdivision (a). (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 400.)

Bell's final assertion, that the prejudice caused by the misconduct of these two jurors was "patent" and "caused a substantial and or injurious effect and/or influence on the jury's determination of penalty" (Petn. at p. 197), is conclusory, speculative, and unsupported by facts; hence, it will not warrant habeas relief. (*People v. Karis*, *supra*, 46 at p. 656.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify

habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim VI(7) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

E. The Jurors Did Not Rush to a Verdict

In Subclaim VI(8), Bell, relying on the appellate record, alleges that the jurors rushed to a verdict because of juror W.R.'s pending vacation and because of "pressure" by jurors M.D. and M.S. (Petn. at pp. 197-199.) Bell's subclaim is procedurally barred because he could have raised it on direct appeal but did not. (*In re Dixon, supra*, 41 Cal.2d at p. 759.) To the extent that Bell failed to preserve the subclaim in the court below (*People v. Stanley, supra*, 39 Cal.4th at p. 950), it is procedurally barred because it is not based on facts that Bell did not know and could not reasonably have known at the time of trial. (*In re Seaton, supra*, 34 Cal.4th at pp. 199-200.)

Furthermore, the subclaim fails to state a prima facie case for relief. During jury selection, W.R. told the court she was planning a vacation starting December 24. The court told W.R. that the court would be dark that week as well. The court estimated that trial would not proceed past December 17, but added that it would know better as the case proceeded. (24 RT 1554.) On December 6, W.R. wrote the court a note telling the court she could not serve past December 17 because of her vacation, and asking if she could be replaced by an alternate if trial was still ongoing on that date. (7 CT 1474-1475/1.) The court spoke with her alone, asked her to keep the problem to herself, and assured her that she would, indeed, be replaced if need be. (48 RT 4083-4084.) Juror W.R. thanked the court and agreed not to discuss the matter. (48 RT 4084.) On December 17, W.R. submitted another note reminding the court she needed to be excused. Her note continued, "I have not expressed this to the jury, in order to honor your request not to influence the jury in this area or to rush a very important

decision." (7 CT 1528.) It was not necessary to excuse W.R., however, because the jury returned its penalty verdict later that same day. (54 RT 4501-4502; 7 CT 1536; 8 CT 1885.)

These facts do not establish misconduct by W.R. or any other juror. To the contrary, W.R. told the court that she did not want to rush to a decision, and that she had not expressed her concerns to the other jurors. (7 CT 1528.) The court, in turn, alleviated any possible pressure by promising W.R. that she would be replaced by an alternate if deliberations were not completed by December 17. (48 RT 4084.) Bell purports to supplement the appellate record with P.R.'s declaration. However, P.R.'s assertion that the jury returned a verdict more quickly because of W.R.'s upcoming vacation and because the Christmas holidays were around the corner is not admissible to impeach the verdict. (*People v. Steele*, *supra*, 27 Cal.4th at p. 1261.)

Bell alleges that in addition to W.R.'s planned vacation, P.R. changed her vote because she felt pressure by jurors M.D. and M.S. to do so. Bell further alleges that M.H. changed her vote because she talked to her husband about the case. Bell relies upon P.R.'s declaration for support. (Petn. at p. 199.) The declaration is not admissible because it intrudes on the mental processes the jurors used during the deliberation process. (Evid. Code, § 1150, subd (a).) Bell offers no admissible evidence in support of his allegation.

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim VI(8) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

F. Jurors Did Not Inject Their Own Specialized Knowledge Into the Deliberation Process

In Subclaim VI(9), Bell alleges that the juror A.K. committed prejudicial misconduct by injecting his own untested, specialized knowledge into the deliberation process. (Petn. at pp. 199-201.) Bell's subclaim is procedurally barred because he could have raised it on direct appeal but did not. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.) To the extent that Bell failed to preserve the subclaim in the court below (*People v. Stanley*, *supra*, 39 Cal.4th at p. 950), it is procedurally barred because it is not based on facts that Bell did not know and could not reasonably have known at the time of trial. (*In re Seaton*, *supra*, 34 Cal.4th at pp. 199-200.)

Furthermore, the subclaim fails to state a prima facie case for relief. Jurors may properly bring their individual backgrounds and experiences into the deliberative process. (*In re Lucas* (2004) 33 Cal.4th 682, 696.) While a jury's verdict must be based on the evidence presented at trial, jurors my rely on their own experiences in evaluating the testimony of witnesses. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1414.) The fact that a juror has specialized knowledge is not misconduct, as long as the juror refrains from discussing information received from outside sources to support his knowledge. Even then, the presumption of prejudice is rebutted when the information is substantially the same as testimony received at trial. (*In re Malone* (1996) 12 Cal.4th 935, 963-964.)

To support his subclaim, Bell relies upon A.K.'s declaration. (Petn. at p. 200.) Through the declaration, Bell seeks to show that A.K. voted for a death sentence because, as a maintenance worker at Donovan State Prison, he "knew" that if Bell were given a life sentence, he would obtain drugs in prison and would kill again. (9 Exhibits at p. 2424.) This evidence is patently inadmissible under section 1150 of the Evidence Code. Equally inadmissible are A.K.'s statements that "other jurors" voted for death over

a life sentence for the same reasons and/or because of their knowledge of drug abuse. (9 Exhibits at pp. 2424-2425.) Such evidence simply cannot be used to impeach a verdict. (*People v. Spelio* (1970) 6 Cal.App.3d 685, 689 [finding inadmissible an affidavit where juror stated he convinced other jurors to reject defendant's testimony about non- familiarity with marijuana, and hence return a guilty verdict on possession charge, because, according to juror's children, "every high school and college student kn[ows] what marijuana look[s] like"].) The fact that the jurors mentioned their personal experiences with drugs was not prejudicial misconduct justifying habeas relief; the effect of drugs is a matter of common knowledge among laypersons. (*People v. Yeoman* (2003) 31 Cal.4th 93, 162.) As this Court has explained, "Jurors cannot be expected to shed their backgrounds and experiences at the door of the deliberation room." (*People v. Fauber* (1992) 2 Cal.4th 792, 839.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim VI(9) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

G. Jurors Did Not Commit Misconduct by Failing to Report Two Auto Thefts Occurring During the Trial

In Subclaim VI(10), Bell alleges that two jurors committed misconduct because they had their cars stolen during trial but did not report this fact to the court. (Petn. at p. 202.) Bell's subclaim is procedurally barred because he could have raised it on direct appeal but did not. (*In re Dixon, supra*, 41 Cal.2d at p. 759.) To the extent that Bell failed to preserve the subclaim in the court below (*People v. Stanley, supra*, 39 Cal.4th at p. 950), it is procedurally barred because it is not based on facts

that Bell did not know and could not reasonably have known at the time of trial. (*In re Seaton*, *supra*, 34 Cal.4th at pp. 199-200.)

Moreover, Bell's subclaim fails to state a prima facie case for relief. Bell relies on the declaration of M.H. Therein, she states that during the trial, her car was stolen from a "park and ride" in La Mesa. (9 Exhibits at pp. 2428.) M.H. also states that an unidentified juror "from North County" had his car stolen from the courthouse parking lot. (*Ibid.*) Bell fails to allege any facts showing that the thefts affected the outcome of his trial or prejudiced him in any way. Nor does he allege that someone connected with this case was responsible for either crime. Bell has provided no facts about the second theft. As to M.H., she states in her declaration that she did not experience any difficulties after her car was stolen because she was able to borrow her mother's car. (9 Exhibits at 2429.) Bell's additional assertion that the jurors had a "continuing obligation" to report crimes committed against them once they were impaneled for jury duty is completely lacking in factual support.[18]

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Subclaim VI(10) should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

H. There Was No Cumulative Error

In Subclaim VI(11), Bell alleges that the cumulative effect of the juror misconduct deprived him of a fair trial. (Petn. at p. 201.) Bell's subclaim

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[18] Bell relies upon the juror questionnaire (Petn. at p. 201), but the questionnaire simply asked whether the prospective juror had previously been the victim of a crime. (5 CT 964.)

fails to state a prima facie case for relief. As explained in Arguments VI(A) through VI(G), *supra*, there was no juror misconduct and any misconduct caused no prejudice to Bell. Accordingly, there was no error or prejudice to cumulate. (*People v. Craig* (1978) 86 Cal.App.3d 905, 920.)

VII. BELL FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF BASED ON THE INADVERTENT DESTRUCTION OF THE TRIAL EXHIBITS

In Claim VII, Bell alleges that he was denied his constitutional right to a meaningful appeal because the court clerk destroyed the trial exhibits. (Petn. at pp. 201-206.) Bell's claim is procedurally barred because he could have raised it on direct appeal but did not. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.) Moreover, the claim fails to state a prima facie case for relief.

A record correction hearing was held on May 18, 2000. Appellate counsel for Bell and counsel for Respondent were present at the hearing. The trial court stated that the exhibits in this case were destroyed on January 15, 1997. (63 RT 4673, 4685.) The court explained that there was a computer error; the clerk thought this was a non-capital robbery case and had the exhibits destroyed when the statutory time period for preservation of exhibits in non-capital cases elapsed. (63 RT 4674-4676.) Counsel for both sides stated they never received notice of the pending destruction. (63 RT 4677-4681, 4683-4684.) The trial court said there was a clerk's error; no notice was given to anybody. (63 RT 4685.) At a continued record settlement hearing on October 26, 2000, the court stated some notices were sent out and returned. (65 RT 4817-4819.) Both counsel reiterated that they never received the notices. (65 RT 4819-4820.) Through a series of record settlement hearings, the parties were able to recreate most of the

exhibits. They listed the ones which could not be reconstructed. (64 RT 4716-4718; 66 RT 4842-4849; 19 CT 4194-4202.)

Bell now complains about the absence of several of the exhibits which could not be reconstructed, specifically: (1) clothing he was wearing when he turned himself in; (2) a knife; (3) a vial of his urine; (4) vials of his blood; and (5) vials of Joey's blood. Bell claims he needed all these exhibits to pursue a meaningful appeal. Bell is not entitled to relief on this claim. (Petn. at p. 203.)

Under California law, a defendant is entitled to a record adequate to permit him to argue the points raised in his appeal. (*People v. Huggins* (2006) 38 Cal.4th 175, 204-205.) "Federal constitutional requirements are similar. The due process and equal protection clauses of the Fourteenth Amendment require the state to furnish an indigent defendant with a record sufficient to permit adequate and effective appellate review. Similarly, the Eighth Amendment requires reversal only where the record is so deficient as to create a substantial risk the death penalty is being imposed in an arbitrary and capricious manner." (*People v. Rogers* (2006) 39 Cal.4th 826, 857-858.) "No presumption of prejudice arises from the absence of materials from the appellate record [citation]." (*People v. Samayoa* (1997) 15 Cal.4th 795, 802; accord, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 158-159.) Rather, the defendant has the burden of showing the record is inadequate to permit meaningful appellate review. (*People v. Harris*, *supra*, 43 Cal.4th at p. 1280.) The fact that exhibits are lost or destroyed and cannot be reconstructed does not render the appellate record inadequate. (*People v. Perry* (2006) 38 Cal.4th 302, 317; *People v. Hinton*, *supra*, 37 Cal.4th at p. 921.)

Bell does not explain how the destruction of any of the exhibits hampered his ability to obtain review of his conviction, either on appeal or on habeas corpus. Instead, he merely lists the exhibits and states that there

was testimony about them. (Petn. at p. 204-205.) He then states, in conclusory fashion, that if he had the exhibits, he might be able to present some claim related to them. He also alleges that the exhibits would have supported the claims raised in the instant amended petition. (Petn. at p. 205.) Such conclusory, speculative allegations, devoid of factual support, do not warrant habeas relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.) Bell has not alleged facts which, if true, would show that he was denied meaningful appellate review. (See *People v. Osband, supra*, 13 Cal.4th at pp. 662-663 [defendant not denied meaningful appellate review when 80 exhibits were lost, 18 of which could not be reconstructed].)

In a related contention, Bell argues that the destruction of the exhibits was the fault of the prosecutor, trial defense counsel and his appellate counsel. (Petn. at pp. 205-206.) Bell has provided no factual support for these allegations. They are belied by the record, in which the trial court plainly stated that the exhibits were destroyed due to an inadvertent clerical error, of which the parties had no notice. (63 RT 4674-4681, 4683-4685; 65 RT 4819-4820.) The allegation should be summarily rejected.

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Claim VII should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

VIII. BELL FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF BASED ON INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In Claim VIII, Bell alleges that his appellate counsel was ineffective for failing to present additional issues on appeal. (Petn. at pp. 206-215.) Bell fails to state a prima facie case for relief on this claim.

The standard for judging an ineffective assistance of appellate counsel claims is the same as the standard for judging ineffective assistance of trial counsel claims. (*People v. Osband*, *supra*, 13 Cal.4th at p. 664.) A defendant must show that counsel's performance was deficient and that he was prejudiced thereby. (*In re Avena*, *supra*, 12 Cal.4th at p. 721.) To show prejudice, a defendant claiming ineffective assistance of appellate counsel must show a reasonable probability that the result of the appeal would have differed. (*People v. Osband*, *supra*, 13 Cal.4th at p. 664.) Appellate counsel perform properly and competently when they exercise discretion and present only the strongest claims instead of every conceivable claim. (*In re Robbins*, *supra*, 18 Cal.4th at p. 810.)

Here, Bell does not provide a declaration from appointed appellate counsel. This failure to provide "copies of reasonably available documentary evidence" supporting his claim warrants its summary dismissal. (*People v. Duvall, supra*, 9 Cal.4th a p. 474.) Bell lists, seriatim, eight issues which he asserts appellate counsel should have raised: (1) the "disparate and biased" death qualification process of prospective jurors; (2) the trial court's failure to allow sequestered voir dire of individual jurors; (3) the trial court's order permitting the prosecution mental health expert to examine him; (4) the trial court's denial of the defense request for a separate penalty phase jury; (5) CALJIC No. 2.90 [Reasonable Doubt] is an "erroneous" instruction; (6) the trial court's rejection of some of the defense proposed penalty phase instructions; (7) "impermissible victim impact evidence" at the penalty phase; and (8) denial of the defense motion to voir dire Judge Murphy about his political intentions. (Petn. at pp. 207-214.) Bell gives a brief procedural background surrounding each issue, but no facts or legal authority indicating a reasonable probability that if raised, the issue(s) would have led to a reversal of either his conviction or death sentence. A bare

allegation that appellate counsel failed to raise a potentially meritorious claim does not establish ineffective assistance. (*Smith v. Murray* (1986) 477 U.S. 527, 535 [106 S.Ct. 2661, 91 L.Ed.2d 434]; *People v. Abilez*, *supra*, 41 Cal.4th at pp. 579-580.)

Moreover, the substantive claims are completely lacking in merit. As explained in Argument I(B), *supra*, the death qualification process for California juries has been upheld against constitutional challenges. A capital defendant has no right to individual sequestered voir dire. (*People v. Burney* (2009) 47 Cal.4th 203, 240; *People v. Rogers* (2009) 46 Cal.4th 1146, 1150-1151.) As explained in Argument III(C), *supra*, at the time the direct appeal was briefed, argued and decided, existing law allowed for a prosecution expert to conduct a mental health examination. There was no prejudice in any event since Bell declined to submit to the examination and the jury was instructed not to consider the refusal. A capital defendant has no right to a separate jury at the penalty phase. (*Gregg v. Georgia* (1976) 428 U.S. 153, 158-160 [96 S.Ct. 2909, 49 L.Ed.2d 859]; *People v. Davis*, *supra*, 46 Cal.4th at pp. 625-626; Pen. Code, § 190.4, subd. (c).) CALJIC No. 2.90 properly sets forth the concept of reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 16 [114 S.Ct. 1239, 127 L.Ed.2d 583]; *People v. Monterosso* (2004) 34 Cal.4th 743, 766.) A trial court may reject proposed defense penalty phase instructions which are argumentative, incorrectly state the law, or are duplicative of other instructions already given. (*People v. Davis*, *supra*, 46 Cal.4th at pp. 621-624; *People v. Brasure* (2008) 42 Cal.4th 1037, 1068-1070.) Victim impact evidence is admissible at the penalty phase of a capital trial unless it invites a purely irrational response from the jury or is so unduly prejudicial that it renders the defendant's trial fundamentally unfair. (*People v. Burney*, *supra*, 47 Cal.4th p. 258; *People v. Lewis*, *supra*, 39 Cal.4th at pp. 1056-1057.) Bell has alleged nothing which would bring the testimony in his case into either

of these narrow exceptions. Finally, as explained in Argument II(A), there was no basis or legal support for the request to voir dire Judge Murphy. Thus, Bell's claim fails under both prongs of the *Strickland* analysis (ineffective assistance and prejudice).

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Claim VIII should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

IX. BELL'S CLAIM THAT CALIFORNIA'S DEATH PENALTY STATUTE FAILS TO NARROW THE CLASS OF OFFENDERS ELIGIBLE FOR THE DEATH PENALTY FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

In Claim IX, Bell alleges that the California death penalty unconstitutionally and arbitrarily fails to narrow the class of offenders eligible to receive it. Bell alleges the death penalty is also constitutionally defective because: (1) Factor (a), "the circumstances of the crime," is unlimited; (2) there is no intercase proportionality review; (3) prosecutors are afforded discretion as to whether to charge a case as a capital crime; (4) the jury does not have to find the existence of aggravating factors beyond a reasonable doubt; (5) the jury does not have to find, beyond a reasonable doubt, that the aggravating factors outweigh the mitigating factors; (6) no written findings are required; and (7) the jury does not have to unanimously agree on which aggravating factors have been proven. (Petn. at pp. 215-228.) Bell's claim is procedurally barred because it was raised and rejected on his direct appeal. (*People v. Bell, supra*, 40 Cal.4th at pp. 619-621; *In re Waltreus, supra*, 62 Cal.2d at p. 225.)

Further, the claim fails to state a prima facie case for relief, as this Court has repeatedly rejected the claim and all of the subclaims raised therein.

Factor (a) "instructs the jury to consider a relevant subject matter and does so in understandable terms." (*People v. Bennett, supra*, 45 Cal.4th at pp. 630-631, quoting *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750]; accord, *People v. Bell, supra*, 40 Cal.4th at pp. 619-620.)

The felony-murder special circumstance provides for meaningful narrowing. (*People v. Frye, supra*, 18 Cal.4th at pp. 1029-1030.) And Penal Code section 190.3, which sets forth the aggravating and mitigating circumstances, sufficiently narrows the class of death eligible offenders. (*People v. Michaels* (2002) 28 Cal.4th 486, 541.)

The exercise of prosecutorial discretion creates no constitutional defect. (*People v. Williams* (1997) 16 Cal.4th 153, 278.)

California's death penalty law is not "arbitrary and capricious" because it forbids intercase proportionality review. (*People v. Lewis* (2001) 25 Cal.4th 610, 677.)

The trial court need not instruct the jury that in order to recommend a sentence of death, it must find, "beyond a reasonable doubt," that the aggravating factors outweigh the mitigating factors. (*People v. Bell, supra*, 40 Cal.4th at p. 620; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) There is no burden of proof in the penalty phase of the trial. (*People v. Hayes* (1990) 52 Cal.3d 577, 642-643.) The lack of a burden of proof does not deprive the defendant of any constitutional right. (*People v. Bell, supra*, 40 Cal.4th at p. 620; *People v. Jones* (2003) 30 Cal.4th 1084, 1126-1127.)

The jury need not unanimously agree on particular aggravating factors or that those factors outweigh the factors in mitigation, and lack of the requirement of such an agreement does not violate any constitutional right.

(*People v. Bell*, *supra*, 40 Cal.4th at p. 620; *People v. Jones*, *supra*, 30 Cal.4th at pp. 1125-1127.)

California's death penalty law is not unconstitutional for failure to require the jury to provide written findings. (*People v. Bell*, *supra*, 40 Cal.4th at p. 620; *People v. Michaels*, *supra*, 28 Cal.4th at p. 53 1.)

Because these matters are well-settled, Bell fails to meet his "heavy burden" to plead sufficient grounds for relief. (*In re Visciotti*, *supra*, 14 Cal.4th at p. 351.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Claim IX should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

X. BELL'S CLAIM THAT HIS CONVICTION AND SENTENCE VIOLATE INTERNATIONAL LAW FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

In Claim X, Bell contends that his conviction and death sentence violate international law. (Petn. at pp. 228-238.) Bell's claim is procedurally barred because it was raised and rejected on his direct appeal. (*People v. Bell*, *supra*, 40 Cal.4th at p. 621; *In re Waltreus*, *supra*, 62 Cal.2d at p. 225.)

Further, the claim fails to state a prima facie case for relief, as this Court has repeatedly rejected the claim. This Court has rejected the notion that California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency and violates the state and federal Constitutions. This claim was specifically rejected in both *People v. Perry*, *supra*, 38 Cal.4th at p. 322 (discussing the 1978 death-penalty statute and observing that "when the United States ratified the

[International Covenant of Civil and Political Rights], it specifically reserved the right to impose the death penalty on any person, except a pregnant woman, duly convicted under the laws permitting imposition of capital punishment"), and *People v. Ghent* (1987) 43 Cal.3d 739, 778 (discussing the 1977 death penalty statute). Moreover, the use of the death penalty in California does not violate international norms where, as here, the sentence of death is rendered in accordance with state and federal constitutional and statutory requirements. (*People v. Perry*, *supra*, 38 Cal.4th at p. 322 [citing 138 Cong. Rec. S-4718-01, and S4783 (1992)]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; see *People v. Avila* (2006) 38 Cal.4th 491, 614-615; *People v. Boyer* (2006) 38 Cal.4th 412, 489-490; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1164; *People v. Bolden* (2002) 29 Cal.4th 515, 567.) Because this matter is well-settled, Bell fails to meet his "heavy burden" to plead sufficient grounds for relief. (*In re Visciotti*, *supra*, 14 Cal.4th at p. 351.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Claim X should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

XI. BELL'S CLAIM THAT IT WOULD BE CRUEL AND UNUSUAL PUNISHMENT TO EXECUTE HIM AFTER A LONG PERIOD OF CONFINEMENT FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

In Claim XI, Bell contends that his long confinement under a death sentence and his execution following such confinement constitutes cruel and unusual punishment under the state and federal constitutions and under international law. (Petn. at pp. 239-242.) Bell's claim is procedurally

barred because he could have raised it on his direct appeal but did not. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.)

Moreover, the claim fails to state a prima facie case for relief. This Court has repeatedly rejected the notion that a lengthy period of incarceration pending execution constitutes cruel and/or unusual punishment. (*People v. Steele*, *supra*, 27 Cal.4th at p. 1269; *People v. Koontz* (2002) 27 Cal.4th 1041, 1096; *People v. Hughes* (2002) 27 Cal.4th 287, 406; *People v. Taylor* (2001) 26 Cal.4th 1155, 1176; *People v. Frye*, *supra*, 18 Cal.4th at pp. 1030-1031; *People v. Massie* (1998) 19 Cal.4th 550, 574; *People v. Hill* (1992) 3 Cal.4th 959, 1016.) As this Court observed in *Massie*:

> [T]he delay inherent in the automatic appeal process is not a basis for finding that either the death penalty itself or the process leading to it is cruel and unusual punishment . . . [S]ubstantial delay in the execution of a sentence of death is inherent in this state's automatic appeal process, but . . . this delay is a constitutional safeguard, not a constitutional defect. An execution following such delay is not cruel and unusual punishment.

(*People v. Massie*, *supra*, 19 Cal.4th at p. 574, internal quotations omitted; see also *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, 1466 ["It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place"].)

This Court has also rejected Bell's argument that execution after a long delay would no longer serve any legitimate penological purposes. (Petn. at pp. 242-243.) As this Court has explained:

> Both deterrence and retribution are legitimate purposes of punishment [citations]. The delay of which defendant now complains does not prevent the fulfillment of either goal. Insofar as defendant complains of the extreme discomfort he suffers as a result of his uncertainty regarding execution, that

> discomfort would enhance the deterrent effect of the death penalty by increasing the penalty imposed for the commission of capital crimes. By contrast, an announcement by this court that any defendant whose automatic appeal has been pending for many years is exempt from subsequent execution would eviscerate any possible deterrent effect of a death sentence, for it would probably never be imposed. [ ] Similarly, executing defendant, notwithstanding the period that has elapsed since his conviction and sentencing, would further the retributive purpose of capital punishment. Insofar as the "just deserts" theory holds certain murderers do not deserve a fate better than that inflicted on their victims, the passage of time and alteration of circumstances have no bearing on this retributive imperative.

(*People v. Ochoa* (2001) 26 Cal.4th 398, 463, abrogated on other grounds as stated in *People v. Coombs* (2004) 34 Cal.4th 821, 860.)

While Bell makes a passing perfunctory reference to "international human rights law" (Petn. at p. 241), this Court has rejected the argument that execution after a long delay violates international norms or international law. (See *People v. Turner* (2004) 34 Cal.4th 406, 439-440; *People v. Brown* (2004) 33 Cal.4th 382, 403-404; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511.)

Further, it should be noted that Bell's conviction was affirmed by this Court on direct appeal in February 2007. Any continuing litigation by Bell and continued confinement is entirely his own choice. Finally, while Bell laments the "psychologically torturous, degrading, brutalizing and dehumanizing experience of living on death row" (Petn. at p. 241), respondent suggests such concerns pale in comparison to the brutal and violent death suffered by his eleven-year old victim.

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Claim XI should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

XII. EXECUTION OF A DEFENDANT WHO IS NOT MENTALLY RETARDED IS NOT CRUEL AND UNUSUAL PUNISHMENT

In Claim XII, Bell contends that it is unconstitutional to execute him because he suffers from mental impairments which existed at the time of the murder. (Petn. at pp. 243-248.) Bell's claim is procedurally barred because he could have raised it on his direct appeal but did not. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.)

Moreover, the claim fails to state a prima facie case for relief, because Bell does not allege that he was mentally retarded. Execution of a capital defendant who is mentally impaired, but not mentally retarded, is not cruel and unusual punishment.

In *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335] the United States Supreme Court held that the execution of a mentally retarded criminal is cruel and unusual punishment prohibited by the Eighth Amendment. (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 321.) The United States Supreme Court observed that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." (*Id.* at p. 317.) Bell's factual allegations do not show he is "so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." (*Ibid.*)

The Court also stated that proportionality review under the Eighth Amendment should be informed by objective factors to the maximum extent possible and that the clearest and most reliable objective evidence of contemporary values is the enactment of the country's legislatures. (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 312; see also *Roper v. Simmons* (2005) 543 U.S. 551, 564 [125 S.Ct. 1183, 161 L.Ed.2d 1] ["The beginning point is a review of objective indicia of consensus, as expressed in particular by

the enactments of legislatures that have addressed the question"].) Bell points to no State that uses capital punishment, which has barred execution of persons claiming mental impairment short of mental retardation.

Even Bell's allegations about his alleged mental condition (e.g., "co-morbid dissociative tendencies" (Petn. at p. 245), "cognitive dysfunction" (*ibid.*); "psychological trauma" (*ibid.*);"pathological dissociative behaviors and posttraumatic stress reactions" (Petn. at p. 246); and "mental vulnerabilities" (*ibid.*)); do not provide anything other than a vague and nebulous possibility that the alleged impairments had any relevance to his culpability. Moreover, the possibility Bell's actions were impacted by his mental impairments fails to show that the social purposes served by the death penalty- retribution and deterrence - are not served. (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 319.)

In short, Bell has not even shown error, let alone an error of fundamental jurisdictional or constitutional magnitude that could justify habeas relief. (*In re Harris, supra*, 5 Cal.4th at p. 828.) Accordingly, Claim XI should be denied on the merits because Bell fails to state a prima facie case for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

XIII. BELL'S CLAIM OF CUMULATIVE PREJUDICE FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

In Claim XIII, Bell contends that the cumulative effect of the claims presented in his amended petition require that his conviction and sentence be vacated. (Petn. at pp. 248-250.) There is no error to accumulate, as all of Bell's claims are meritless, and some are procedurally barred.

As respondent has demonstrated throughout this response, there was no prejudicial error during either the guilt or penalty phases of Bell's trial. Indeed, whether considered individually or in the aggregate, the alleged errors could not have affected the outcome of Bell's trial or sentence.

(*People v. Seaton*, *supra*, 26 Cal.4th at pp. 675, 691-692; *People v. Ochoa*, supra, 26 Cal.4th at pp. 447, 458; *People v. Catlin*, *supra*, 26 Cal.4th at p. 180.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1009; *People v. Box*, *supra*, 23 Cal.4th at pp. 1214, 1219.) The record shows that Bell received a fair trial. His claim of cumulative error, therefore, does not provide a basis for habeas relief.

CONCLUSION

For the reasons discussed above, respondent respectfully requests that the amended petition be denied on procedural grounds where applicable, and on the merits as to all claims for failure to state a prima facie case for relief, and that any and all other relief be denied.

Dated: October 13, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General

LYNNE G. MCGINNIS
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached INFORMAL RESPONSE uses a 13 point Times New Roman font and contains 38,390 words.

Dated: October 13, 2009

EDMUND G. BROWN JR.
Attorney General of California

LYNNE G. MCGINNIS
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Steven M. Bell on Habeas Corpus**

No.: **S151362**

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. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 15, 2009, I served the attached **INFORMAL RESPONSE** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, CA 94107
Attorneys for Steven M. Bell

The Honorable Richard M. Murphy
Judge
San Diego County Superior Court
County Courthouse
220 West Broadway
San Diego, CA 92101

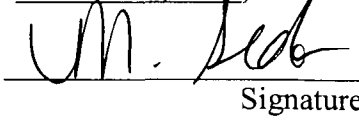
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105-3672

The Honorable Bonnie M. Dumanis
District Attorney
San Diego County District Attorney's Office
330 West Broadway, Suite 1320
San Diego, CA 92101

Clerk of the Court
Fourth Appellate District
Division One
Court of Appeal of the State of California
750 B Street, Suite 300
San Diego, CA 92101

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 October 15, 2009, at San Diego, California.

M. Seda
Declarant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