IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **ROBERT WESLEY COWAN,** Petitioner, On Habeas Corpus.	**CAPITAL CASE** S158073 *Related to People v. Robert Wesley Cowan*, Automatic Appeal No. S055415

Kern County Superior Court Case No. 059675A
The Honorable Lee Phillip Felice, Judge

INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **ROBERT WESLEY COWAN,** Petitioner, On Habeas Corpus.	**CAPITAL CASE** S158073

PRELIMINARY STATEMENT

Petitioner, ROBERT WESLEY COWAN, is lawfully confined and restrained of his liberty at California State Prison at San Quentin, California, by Respondent, Robert L. Ayers, Jr., Warden of San Quentin State Prison, California Department of Corrections and Robert L. Ayers, Jr., Director of the California Department of Corrections. Petitioner is confined pursuant to the judgment of the Kern County Superior Court, case number 059675A. His automatic appeal is currently pending before this Court. (*People v. Cowan*, S055415.)

The current petition was filed on November 9, 2007. Except as herein expressly admitted, respondent denies each and every allegation of the petition and specifically denies that any of petitioner's statutory, regulatory, or constitutional rights are being or have been violated in any way. Furthermore, to the extent petitioner seeks to incorporate every allegation within every other allegation of his petition (see Pet. 2-3), respondent objects on the ground that each claim should recite an individual claim for relief.

Petitioner also requests this Court to take judicial notice of the appellate record in this case. (Pet. 3.) Respondent has no objection. (*In re Clark* (1993) 5 Cal.4th 750, 798, fn. 35.) Regarding petitioner's other exhibits, respondent submits that none of these documents support a prima facie case in any way for any of petitioner's claims. Nor do these documents establish any disputed issues of fact requiring an evidentiary hearing.

A habeas corpus proceeding is a collateral attack upon a criminal judgment which, because of societal interest in finality of judgments, is presumed to be valid. (*People v. Duvall* (1995) 9 Cal.4th 464, 474; *In re Clark, supra,* 5 Cal.4th at p. 764; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260.) Indeed, this Court has recognized the extraordinary nature of habeas corpus relief from a judgment that is presumed valid and has recognized the importance of the finality of state court judgments and the state's interest in the prompt implementation of its laws. (*In re Harris* (1993) 5 Cal.4th 813, 831; *In re Clark, supra,* 5 Cal.4th at p. 764.)

It is the petitioner's burden in a habeas corpus proceeding to allege and prove all facts upon which he relies to overturn the judgment. (*People v. Duvall, supra,* 9 Cal.4th at p. 474; *Ex parte Dixon* (1953) 41 Cal.2d 756, 760; accord *In re Bower* (1985) 38 Cal.3d 865, 872.)

> The petition should both (i) state fully and with particularity the facts on which relief is sought [citation] as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of the trial transcripts and affidavits or declarations.

(*People v. Duvall, supra,* 9 Cal.4th at p. 474; *In re Harris, supra,* 5 Cal.4th at p. 827, fn. 5; *In re Clark, supra,* 5 Cal.4th at p. 781, fn. 16.) "Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing." (*People v. Karis* (1988) 46 Cal.3d 612, 656.) If the petition does not state a prima facie case for relief, it

should be dismissed. (*Griggs v. Superior Court* (1976) 16 Cal.3d 341, 347; *Ex parte Swain* (1949) 34 Cal.2d 300, 303-04.)

> For purposes of collateral attacks, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended.

(*People v. Duvall, supra,* 9 Cal.4th at p. 474, quoting *People v. Gonzalez, supra,* 51 Cal.3d at p. 1260, emphasis in original.)

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

Furthermore, habeas corpus provides an avenue of relief when the ordinary remedy of direct appeal is inadequate. (*In re Sanders* (1999) 21 Cal.4th 697, 703-04.) Habeas corpus is not a substitute for an appeal. Issues that can be raised on appeal must be initially so presented, and not on habeas corpus.[1/] (*In re Harris, supra,* 5 Cal.4th at pp. 826-27; *In re Waltreus* (1965) 62 Cal.2d 218, 225.) Likewise, issues that have been raised on appeal are not subject to being revisited on habeas corpus. (*In re Terry* (1971) 4 Cal.3d 911, 927.) Moreover, if a petitioner attempts to avoid this bar

> by relying on an exhibit (in the form of a declaration or other information) from outside the appellate record, [this Court will] nevertheless apply the bar if the exhibit contains nothing of substance not already in the appellate record.

(*In re Robbins* (1998) 18 Cal.4th 770, 814, fn. 34.)

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1. Claims of ineffective assistance of trial counsel, even if the habeas corpus claim is based solely upon the appellate record, are an exception to this rule. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

> [I]n the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors *could have been, but were not*, raised upon a timely appeal from a judgment.

(*In re Harris, supra,* 5 Cal.4th at p. 829 [emphasis in original]; *Ex parte Dixon, supra,* 41 Cal.2d at p. 759.)

Petitioner's petition should be dismissed. He asserts claims that either were or should have been raised on appeal. Moreover, as will be discussed in addressing each claim, post, petitioner has failed to state fully and with particularity sufficient facts which, if true, entitle him to relief and to provide all reasonably available documentary evidence.[2/]

PROCEDURAL HISTORY

On September 23, 1994, the Kern County District Attorney filed an information charging petitioner with three counts of first degree murder (Pen. Code, § 187, subd. (a)),[3/] each of which was alleged to have occurred between

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2. Respondent respectfully requests this Court expressly deny the pending petition and its various arguments, as well as those argued in appellant's brief, on the procedural grounds respondent sets forth, 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 case, as well as other California cases. (See *Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 12 [simple one-line statement by state court invoking state procedural bar is sufficient].)

3. All further statutory references are to the Penal Code unless otherwise indicated.

August 31, 1984, and September 7, 1984. (3 CT 647-55.)[4/] As to counts 1 and 2, the information alleged that petitioner personally used a firearm (§ 12022.5, subd. (a)) and that a principal was armed with a handgun (§ 12022, subd. (a)(1)). As to count 3, the information alleged that petitioner personally used a knife. (§ 12022, subd. (b).) (3 CT 653.) The information alleged three special circumstances as to all three counts: that petitioner committed multiple murders (§ 190.2, subd. (a)(3)); and that petitioner committed the murders while in the commission or attempted commission of robbery (§§ 212.5, subd. (a); 190.2, subd. (a)(17)(I)) and burglary (§§ 460.1, 190.2, subd. (a)(17)(VII)). (3 CT 649-51, 653.) The information also alleged as to all three counts that petitioner had suffered a prior serious felony conviction (§ 667, subd. (a)), and had served a prior prison term (§ 667.5, subd. (b)). (3 CT 649-50, 652, 654-55.) On September 26, 1994, petitioner pled not guilty and denied all the allegations. (3 CT 663-64.)

On about March 25, 1996, the pretrial hearing of the in limine motions began. (5 CT 1219, 1274-76.) On May 7, 1996, a jury was empaneled to try the case. (5 CT 1321.)

On June 6, 1996, the jury announced that it was hopelessly deadlocked on count 3. (6 CT 1459.) The trial court declared a mistrial as to that count. (6 CT 1459.) After brief additional deliberation, the jury convicted petitioner on counts 1 and 2, found that a principal had been armed with a firearm, and found true as to both counts all of the special circumstances allegations. (6 CT 1459-70.)

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4. "CT" refers to the Clerk's Transcript On Appeal; "Supp. CT" refers to the Supplemental Clerk's Transcript; "RT" refers to the Reporter's Transcript On Appeal; "AOB" refers to Petitioner's Opening Brief; "RB" refers to Respondent's Brief; "ARB" refers to Petitioner's Reply Brief; "Pet." refers to Petitioner's Petition for Writ of Habeas Corpus.

On June 10, 1996, the trial court found the prior serious felony conviction allegation to be true, but found the prior prison term allegation to be untrue. (6 CT 1477-78, 13 RT 2802-05.) The trial court also struck, as to both counts, the allegation that petitioner personally used a firearm, because that allegation had mistakenly not been presented to the jury via the verdict forms. (6 CT 1478; 13 RT 2805.)

On June 11, 1996, the penalty phase began. (6 CT 1479.) On June 14, 1996, the jury found that the sentence on count 2 should be death, and that the sentence on count 1 should be life without the possibility of parole. (6 CT 1574, 1582-83.)

On August 5, 1996, the trial court sentenced petitioner to death on count 2, plus the one-year arming enhancement, plus a consecutive term of life without the possibility of parole on count 1, plus the one-year arming enhancement, plus the five-year enhancement for a prior serious felony conviction. (6 CT 1615, 1644-49.) The trial court granted the prosecutor's motion to dismiss count 3, and the trial court struck the allegations as to that count. (6 CT 1616.)

On September 1, 2004, petitioner filed his opening brief. (AOB.) Respondent's brief was filed on March 29, 2005. (RB.) Petitioner filed his reply brief on October 18, 2005. (ARB.) On November 9, 2007, petitioner filed his petition for a writ of habeas corpus. (Pet.)

Respondent herein files the informal response to petitioner's petition for a writ of habeas corpus.

STATEMENT OF FACTS

By the time of trial in 1996, Margarita Macias had lived on McClean Street in Bakersfield for 31 years, across the street from Clifford and Alma Merck,[5/]

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5. Hereinafter, for simplicity of reference, respondent will use the victims' first names.

an elderly couple, whom Macias knew for twenty years before their death. (6 RT 1481, 1483.) Macias, who talked to the Mercks and waved when she saw them, considered herself to be their friend, even though they were private people who kept their front door locked and were careful whom they let in the house. (6 RT 1484, 1486.) Clifford was blind in one eye and had very thick glasses, so Macias took him to the bank and provided medical attention to Alma when necessary. (6 RT 1483, 1486.)

At approximately 10 a.m. on Saturday, September 1, 1984, during the Labor Day weekend, Macias's son, Victor, and his wife visited Macias with their new baby, and then went over to the Mercks' porch to show them. (6 RT 1482.) Macias also saw Clifford between 1 and 2 p.m., when the mailman delivered the mail. (6 RT 1483.) She never saw the Mercks go into or out of their house at any time after that. (6 RT 1483.)

Robert Johnson, who lived in Fresno, was Alma's son. (6 RT 1492.) Alma had married Clifford Merck about 25 to 30 years earlier. (6 RT 1492.) Johnson and his wife called the Mercks on the Friday before Labor Day 1984 to say that they would come down to visit on Tuesday morning. (6 RT 1493.)

On the Tuesday after Labor Day weekend, Johnson and his wife went to Bakersfield to visit the Mercks. (6 RT 1493.) Johnson walked to the back door and knocked, but no one answered. (6 RT 1493.) Then he went to the front door and knocked, but again no one answered. (6 RT 1493.) He heard a dog barking inside, but he could not see anything through the window. (6 RT 1493.)

Johnson returned to the back door, opened it, and looked into the service porch and laundry area. (6 RT 1493.) The Mercks did not always keep the back door locked, but the front door was always locked. (6 RT 1495, 1497.) Johnson could see items lined up from the back door to the kitchen, so he told his wife that something was wrong. (6 RT 1493.) He went to the south side of

the house and tried to look in the window, but there were a lot of flies, almost like a "swarm of bees," around the window. (6 RT 1493.) He told his wife to go across the street and call the sheriff's office, which she did. (6 RT 1493.) Johnson did not notice any signs of a forced entry. (6 RT 1502.) Later, when the Johnson family cleaned out the house to determine what had been taken, Johnson found that the house was "trashed." (6 RT 1504.) The Mercks' Social Security checks, which the Mercks had received at their house, were missing. (6 RT 1503-05.)

Gregory Laskowski, a criminalist with the Homicide Section of the Kern County Regional Criminalistics Laboratory in Bakersfield, went to the Merck house on September 4, 1984, and was briefed at approximately 11 a.m. (6 RT 1598-1600.) The house looked like it had been searched or ransacked, with large items of furniture overturned, drawers out of place, and items in disarray. (6 RT 1603-06.) In the laundry or utility room, Laskowski saw a large, console television in front of the washing machine, as well as boxes and sacks. (6 RT 1602.) On a shelf by the kitchen window there was a small pocket knife with its blade open. (6 RT 1605.) The power cords on a number of lamps in the house were severed. (6 RT 1606.) Likewise, the wall telephone was missing its receiver and cord. (6 RT 1605.) Laskowski did not notice any indications of a forced entry. (RT 1617-19.)

Laskowski saw Clifford's body lying prone across a bed in one of the bedrooms. (6 RT 1606; People's Exh. 13.) Clifford's legs and hands were bound, and his head was under a pillow. (6 RT 1606.) Clifford's ankles, which had flies on them, were bound with knotted power cords from the lamps. (6 RT 1607.) Clifford's blood had drained onto the wooden floor. (RT 1610; People's Exh. 19.)

An orange throw pillow, which had a bullet hole in it, was near Clifford's abdomen. (RT 1608-09.) Another pillow was over Clifford's head, and also

had a bullet hole through it. (6 RT 1609.) However, no spent cartridges were found in the house. (6 RT 1618.) In Laskowski's training and experience in ballistics and firearms, the purpose of a contact gunshot into pillows is to deaden or muffle the sound of the firearm. (6 RT 1609.)

Quintin Nerida of the Kern County Sheriff's Department (hereinafter "KCSD") Technical Investigation Section, whose primary responsibility was to investigate crime scenes for fingerprints, and to file and compare fingerprints upon request, went to the Merck house on September 4, 1984, with two members of his section, Helen Sparks and Jim Smith. (6 RT 1508-11, 1516.) They briefly walked through the house before beginning their work. (6 RT 1517.) Nerida started processing fingerprints at the back door, which led to the service porch, since that was the suspected point of entry. (6 RT 1517.) Nerida lifted one print (People's Exh. 6) from above the door knob on the inside edge of the back service porch door. (6 RT 1517-18.)

As Nerida worked his way through the portions of the house that he had been assigned to investigate, he came to a bedroom that was used as a sewing room. (6 RT 1519-20.) At the time, Alma had not yet been found. (6 RT 1520.) Nerida processed the wooden sliding doors on the closet for fingerprints and then he slid the doors open. (6 RT 1520.) One of the doors lodged at a certain point, and when Nerida pushed it farther, Alma's body fell onto the floor in front of him. (6 RT 1520.)

Meanwhile, Laskowski saw that the other two bedrooms of the house were in disarray. (RT 1610-12.) He subsequently learned that Alma's body had been found in the closet of one of those bedrooms. (6 RT 1611-12.) A black appliance cord was wrapped around a portion of Alma's body. (6 RT 1607-08.) A telephone cord was wrapped around her neck and mouth, and the receiver was still hanging from the cord. (6 RT 1612; People's Exh. 27.) Alma's hands were bound with a lamp cord. (6 RT 1612.)

Sparks, a crime scene investigator in Kern County who had qualified as an expert in Kern County courts on the lifting of latent prints, took pictures of the scene and attempted to lift prints from the scene. (6 RT 1571-74.) Sparks lifted prints from the bottom of one of the plastic sewing trays from a sewing kit that was on the dining room table. (People's Exh. 7; see also Defendant's Exh. H.; 6 RT 1575.)

A crime scene report listing the photographs taken and the prints lifted from the crime scene was created pursuant to KCSD policy. (6 RT 1540.) It showed that 41 prints were originally lifted from the Merck house, and three additional prints were lifted during further investigation.[6/] (6 RT 1540-42.)

The Autopsy Of The Mercks

On September 5, 1984, Dr. Armand Dollinger, a forensic pathologist with the Kern County Coroner's Office, conducted the post-mortem examinations of Clifford and Alma Merck. (10 RT 2257-59, 2264.) After each body bag was opened, the bodies were photographed, and then Laskowski seized any "trace evidence" on the body or in the body bag. (6 RT 1615; 10 RT 2259-60, 2264.) Laskowski also seized the cords used to bind the bodies, and matched those cords to the lamps and phone in the Merck house. (6 RT 1615-16.) A sharp, single-bladed object had been used to cut the cords. (6 RT 1617.)

Dollinger estimated that Clifford had been dead for several days, based on the body's discoloration and the advanced state of decomposition. (10 RT 2261, 2263.) Clifford's hands had been bound with electrical cord. (10 RT 2261.) Dollinger opined that Clifford died almost instantly from two gunshot

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6. Comparisons of the fingerprints of Rob Lutts and Danney Phinney with prints lifted from the Merck house, pursuant to a December 20, 1984, request from Craig Fraley, the investigating officer, produced negative results. (6 RT 1561-63.)

wounds, one to his head and one that entered at the base of the back of his neck and was found in his spinal canal. (10 RT 2261-64.)

Alma's body was also discolored and in an advanced state of decomposition. (RT 2264, 2266.) Her wrists had been bound with electrical cord behind her back, and her ankles had also been bound. (RT 2264.) A telephone cord, with the handset still attached, was wrapped around her neck. (RT 2264-65.) Dollinger opined that the cause of death was strangulation by the telephone cord, and that death occurred, at most, four to five minutes after the cord was tight enough to restrict blood flow. (RT 2265.)

The Follow-Up Investigation

Clifford's .25 Caliber Colt Automatic Pistol

On October 14, 1984, Bakersfield Police Officer Tam Hodgson and other officers went to the Caravan Inn in Bakersfield on a report of narcotics activity. (10 RT 2297-2300, 2313-14.) Hodgson went into adjoining rooms, numbers 123 and 124, and arrested Robb Lutts (to whom room number 124 was registered), Danny Phinney, Delia Goodrum, and two other people. (10 RT 2300-02.) Hodgson found nine rounds of .25 caliber ammunition in Lutt's pocket. (10 RT 2315.) The officers seized property from the rooms, including a loaded Colt .25-caliber automatic pistol that was in a plastic bag in the trash can in room number 123, as well as property from Phinney's van, including a

.38-caliber revolver with ammunition, a small, beaded white coin purse containing jewelry, a Ford key, scales, and "a significant street amount of methamphetamine" that was packaged for sale. (10 RT 2301-02, 2316-18.) In Hodgson's experience and training, drug dealers often accept stolen property in exchange for drugs.[7] (10 RT 2303-04, 2322-23.)

On October 17, 1984, Laskowski received a request from Deputy Sheriff Del Ray to do a comparison on two .25-caliber bullets removed from the body of Clifford Merck with the .25- caliber Colt (People's Exh. 30) seized from Lutts's room.[8] (9 RT 2186-89; 10 RT 2302.) Laskowski conducted a routine initial examination of the Colt's barrel with a small bore light scope, looking for powder residue and damage, and noted that the rifling "look[ed] good." (9 RT 2191-92, 2215-17.) Laskowski took the grips off the Colt and saw the letters "C" and "M" or "W" carved into the grips. (9 RT 2198.) After Laskowski test-

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7. Also in Hodgson's experience, heroin addicts go through physical withdrawal for 96 hours after stopping heroin use and suffer from "severe" withdrawal symptoms between 48 and 72 hours after not using heroin. (10 RT 2306-2309.) A heroin addict that is arrested and put into jail will want to get back on the streets as soon as possible in order to get more heroin, so he or she will usually cooperate with the police, and will provide good information. (10 RT 2309-11.)

8. The trial court found Laskowski to be an expert in the field of ballistics, based on his extensive experience and training. (9 RT 2174-77.) Laskowski provided detailed testimony on the working of firearms, including the rifling of a firearm barrel that leaves markings on bullets fired from that particular firearm, as well as the methods and equipment used to analyze firearms and bullets. (RT 2177-86.)

fired the Colt and performed the comparisons, he excluded the Colt as having fired the two bullets because of the markings on the bullets.[9] (9 RT 2189.)

Lutts testified at trial that in 1984 he sold methamphetamine to support his heavy methamphetamine habit of about a gram per day, which cost $135 to $150.[10] (6 RT 1627-30, 1638-39.) The drug made Lutts paranoid at times and affected his memory and thinking processes. (6 RT 1638-39.) A large portion of the items that Lutts took in trade for drugs, such as most of the clothing and jewelry seized from his room on October 14, 1984, were stolen. (6 RT 1642-45.)

Lutts, who lived in Bakersfield, met Danny Phinney, a mechanic, in 1984, and gave Phinney drugs in exchange for working on Lutts's car and running errands. (6 RT 1627, 1630.) Lutts also gave food and, occasionally, a place to stay to Phinney and his girlfriend, Delia. (6 RT 1630.) Petitioner and his girlfriend, whom Lutts knew as "Gerry," were both drug customers of Lutts.[11] (RT 1629-30.)

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9. Over a period of time going into 1985, Laskowski received 17 weapons to test in order to determine if they were the murder weapon, and excluded each of the 17 weapons. (10 RT 2190.) After that, a period of time went by when there was no more activity as to the two Merck bullets, and the bullets were returned to the KCSD property department. (RT 2190.)

10. Lutts admitted his lengthy criminal record, including many misdemeanor convictions and felony convictions for robbery and the possession for sale of cocaine and methamphetamine. (RT 1627-28.) But when he reluctantly testified at trial, Lutts had been out of prison for approximately three and a half years, and had no problems with the law during that time. (RT 1628.)

11. At trial, Lutts did not immediately recognize petitioner because he had not seen petitioner in approximately 12 years. (RT 1629, 1636, 1649.) Petitioner was older, had shorter hair, and wore glasses and different clothes at trial than he had previously worn. (RT 1629, 1636, 1649.)

At trial, Lutts remembered the Colt pistol, as well as the other items that the police seized when he was arrested. (6 RT 1630-31, 1636, 1642-47.) Although Lutts had no clear recollection, he believed that: the Colt pistol came from petitioner; Phinney was involved in drugs being traded for the pistol; and Lutts might have obtained the pistol about three weeks to a month before he was arrested. (6 RT 1631, 1635, 1648.)

When shown a series of pictures of the Colt .25-caliber pistol in evidence, Lutts recognized it as the gun because it had the initials "C.M." on the inside of the grips.[12/] (6 RT 1631-33.) Lutts and Phinney noticed the initials on the inside of the grips while the pistol was disassembled for cleaning and tried to file them off. (6 RT 1633-35, 1662-64.) Lutts testified that he did not do anything to the inside of the gun's barrel, nor did he see Phinney do anything to the inside of the barrel. (6 RT 1634.) However, Phinney thought that a larger caliber barrel brush was used on the Colt's barrel, both because they did not have a .25-caliber brush, and in order to hide the rifling of the Colt because they did not know from where it had come. (6 RT 1662.) Lutts believed that several people had possession of the gun at one time or another at the motel, but only he and Phinney took it apart. (6 RT 1643.)

Phinney was a drug addict; for a while he used "just about anything that was out there for the weekend," including barbiturates, amphetamines, acids, and mescaline. (6 RT 1681-90.) By September and October of 1984, Phinney was only using methamphetamine, a habit he had for approximately 17 years; he had begun using intravenously about two years earlier; he was delusional at times; he was under the influence most of the time; and much of his effort was spent on providing for his drug habit. (6 RT 1677-80, 1689, 1713, 1741.) But it was

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12. Clifford was in the habit of marking his property by engraving the initials "C.M." on it. (8 RT 2056-57.) Jerry Jones, whose wife, Terri Jones, was Alma's granddaughter, recalled that his pistol was marked on the inside of the handles or grips. (8 RT 2058.)

"kind of a dry time," because his methamphetamine supply was limited to what he got from Lutts. (6 RT 1741.) Phinney controlled his methamphetamine use because he had to make a living as a mechanic and as a house-sitter for several people, including drug dealers. (6 RT 1686-87, 1689-90.)

While Phinney and Lutts were in jail following their arrest at the Caravan Inn, Lutts showed Phinney an article from the Bakersfield Californian newspaper that referred to the search for information about the killing of the Mercks and sought confidential witnesses. (6 RT 1665-67.) Phinney did not make any mental connections until Lutts reminded him of the initials, and Phinney realized that the initials were those on the Colt.[13/] (6 RT 1666.)

Phinney was in Judge Gary Friedman's chambers for a pretrial hearing when he first said that he wanted to talk to police officers. (6 RT 1667-69.) A representative from the district attorney's office was present, as well as a court reporter and a non-attorney named Glen Nakanishi that Phinney believed was representing his interests. (6 RT 1668.) As a drug addict, his thoughts were "scrambled and a little bit disoriented." (6 RT 1669.) He was in withdrawal and wanted to get out of custody to use drugs. (6 RT 1723-24.) Also, he was in protective custody (and would have done anything to get released from it) because his co-defendants had taken seriously his joke about taking a plea bargain. (6 RT 1721-24.)

On December 21, 1984, Phinney talked to Deputy Sheriffs John Diederich and Craig Fraley, who had been assigned to do the follow-up investigation in the Merck case (7 RT 1841; 9 RT 2161-62), in an upstairs room at the jail. (6

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13. The article offered a $5,000 reward and listed the names and address of the victims, but it did not go into detail about the items that were stolen from the Mercks' house. (6 RT 1725-33, 1738.) The article did not mention a jewelry box, Social Security checks, silver dollars, or Colt pistol with initials carved into the grips, all of which Phinney knew about because he had seen the items at the house of Gerald Cowan, petitioner's brother (as discussed, post). (6 RT 1738-39, 1742-43.)

RT 1667, 1734-36.) Phinney mentioned the initials carved into the Colt's grips; and he told Diedrich about the gun-for-drugs transaction because he was trying to clear himself of anything to do with the pistol, which he believed people were trying to "push off" on him. (6 RT 1660.) He also told Diederich and Fraley that he was confused and could not remember how he had gotten the pistol; but he explained that he was scared because he had handled the pistol and because it might have been involved in the murders of the Mercks.[14/] (6 RT 1737-38.)

Diederich's interview of Phinney on December 21, 1984, was recorded on tape and transcribed. (7 RT 1841, 1843, 1850.) Phinney was nervous, so at first Diederich allowed him to talk. (7 RT 1843.) Phinney initially told a fragmented story, but then settled down and seemed to be fine. (7 RT 1843.) In Diederich's opinion, Phinney was not under the influence of any drugs, nor was he in any type of withdrawal or suffering from delusions during the interview. (7 RT 1843, 1845.) However, Diederich never asked Phinney about drug use, nor did Diederich perform any tests to determine Phinney's sobriety

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14. While Phinney believed he had gotten a plea bargain deal in exchange for the information, he insisted that he told Diedrich the truth. (6 RT 1660.) At another point, however, Phinney said he might have lied to the officer, and he basically told the officers enough to give them something to investigate and to earn a break on the amount of time he was incarcerated. (6 RT 1734-37.) He ultimately pled guilty to possession of methamphetamine for sale, but did not remember pleading to possession of cocaine for sale. (6 RT 1720-21.)

In 1985, about eight months after Phinney was arrested and after his release from jail, he saw petitioner at a mutual friend's house in the area of 35th and M Streets. (6 RT 1671.) Petitioner told Phinney that he (petitioner) had been questioned about some stolen merchandise, and petitioner knew how the information was obtained. (6 RT 1671.) Petitioner said that Phinney had no reason to worry, because they were still friends; they would have no problems so long as Phinney never took the witness stand and testified against him. (6 RT 1671-72.) Phinney promised that he would not take the stand. (6 RT 1672.)

or drug use. (7 RT 1848.) Phinney never asked for a break or to get out of protective custody, nor did Diederich make any such promises to him. (7 RT 1847.) They never discussed the reward in the case. (7 RT 1862.)

Phinney told Diederich that he had read something in the newspaper about the case, and that he was lying on his bunk watching Barnaby Jones on television when something on the show about coins triggered his memory and made him start thinking about the case. (7 RT 1851.) The newspaper article's mention of McClean Street made Phinney afraid, because he remembered the Social Security checks he had seen at the home of Gerald Cowan, petitioner's brother. (7 RT 1857, 1864.) Phinney was afraid that Lutts had already talked to the police; Phinney had thought about what he was going to say and had written things down. (7 RT 1858-59.)

Phinney told Diederich that he saw petitioner during the first week of September 1984 and that he went with petitioner to Gerald Cowan's house on Pearl Street. (7 RT 1844-47.) Phinney told Diederich that he had seen numerous items at Gerald's house, including a bag of coins that contained a 1922 D silver dollar that Phinney thought was valuable; costume jewelry, some of which was "like a grandmother would wear" (including a necklace that had the name "Dolly" or "Dotty" on it);[15/] a 1938 Shafter High School ring; a music box with a mirror upon which a swan would dance; a couple of Social Security checks – totaling about $600 – in a government envelope, in the name of

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15. Diederich was not sure whether at the time, he was aware that a woman named Daisy had lived at the Merck house for a while. (7 RT 1869.) But Betty Turner, Alma's daughter, testified that a woman named "Daisy" lived with the Mercks for a while; she died in about 1983. (9 RT 2171.) At that time, Daisy's property was removed from the Mercks' house except for some jewelry and other items Daisy had given to Alma. (9 RT 2172.) Terri Jones, Alma's granddaughter, also testified that an elderly woman named Daisy Hampton lived with the Mercks for a number of years. (8 RT 2062.) The only turquoise jewelry that belonged to Daisy was what she wore. (8 RT 2062.)

"Merck" at a three-digit address on McClean Street; and a man's worn billfold with some carving on it and several cards inside, including a driver's license for a man about six feet three inches tall, weighing about 147 pounds, and born in 1911 or 1914; Blue Cross and Blue Shield cards; and a Social Security card. (7 RT 1844-47, 1852-54, 1863-69.)

Phinney also mentioned the Colt pistol; he connected it with the case as a result of reading the article and remembering the initials in the Colt's grips (which he said Lutts had tried to file off). (7 RT 1855-58, 1865, 1869.) Phinney had heard that petitioner had sold such a gun to Lutts, and petitioner had warned Phinney not to get caught with the Colt. (7 RT 1867-68, 1870.) Phinney thought the petitioner had been committing robberies with the gun, and he did not think about the gun being used to murder someone until he read the newspaper article. (7 RT 1871.) Diederich showed the Colt to Phinney during the interview and the grips were removed to reveal the initials. (7 RT 1859-60.) But Phinney never indicated that either he or Lutts put things down the barrel of the Colt to change the appearance of the barrel's rifling. (7 RT 1861-62, 1869.)

On August 23, 1994, at the time of petitioner's preliminary hearing, Deputy Christopherson talked with Phinney in the office of Cindy Zimmer, a deputy district attorney. (7 RT 1894, 1902.) Phinney said that he had gotten the Colt from petitioner for Lutts in a trade for drugs. (7 RT 1894.) Lutts took the Colt apart when petitioner was not present, and Phinney and Lutts saw the initials "C.M." on the inside of the Colt's grips. (7 RT 1902.) Phinney also told Christopherson that Lutts had put things down the Colt's barrel to alter the rifling because Phinney and Lutts were afraid the Colt had been used in a murder. (7 RT 1894, 1902-04.)

At trial, Phinney testified that petitioner had traded the .25-caliber Colt pistol for drugs, with Phinney acting as a middle man for Lutts one day while

they were at the Bakersfield Inn. (6 RT 1660-61, 1663.) Petitioner told Phinney not to get caught with the gun: "Eat it, or throw it away, but don't get caught with it." (6 RT 1662.)

Quentin Watts, Clifford's son-in-law, visited Clifford approximately once a month. (7 RT 1881-82.) He saw Clifford with a handgun and a shotgun in 1977 or 1978. (RT 1882-84; see also 6 RT 1500-01 [Robert Johnson, Alma's son, also saw Clifford's revolver, which had white grips].) On January 30, 1985, Quentin told Detective Fraley that Clifford might have used one of the pocket knives from his collection to carve his initials on the Colt's grips. (7 RT 1885-86.) At trial, Quentin testified that People's Exhibit 30 looked like Clifford's pistol; Quentin identified Clifford's initials on the Colt's grips; and Clifford had an engraving tool that he used to put initials on things. (7 RT 1882-83.)

On or a little before April 15, 1996, Deputy Christopherson talked to Laskowski at a weekly homicide investigator's meeting and told him that the barrel of the Colt pistol (that Laskowksi had earlier examined) might have been damaged. (7 RT 1904-06; 9 RT 2190-91, 2218.) Laskowski knew that the Colt's barrel could have been damaged by someone inserting various items into it, including metal objects, a brush, or a screwdriver, which would make it impossible to match the Merck bullets to the Colt using traditional methods. (9 RT 2191.) However, Laskowski was aware of methods to match, or attempt to match, a damaged barrel with bullets. (9 RT 2191.) Christopherson followed Laskowski's request and re-submitted the Colt and the two bullets that had been recovered from Clifford's body for further examination. (7 RT 1904-05; 9 RT 2191.)

When Laskowski received the Colt from the KCSD Property Room, he reexamined the weapon, paying close attention to the interior of the barrel. (9 RT 2191.) He used a stereo-zoom microscope, which can magnify from half

power to forty power, and noticed damage, particularly in the crown area of the barrel. (9 RT 2192.) Laskowski photographed the damage, and then used Mikrosil, a silicone rubber compound, to make a mold of the barrel. (9 RT 2193-98, 2220-26, 2233.)

Even though the Colt's barrel was less than two inches in length, Mikrosil is easier to work with when sliced into sections, so Laskowski used a scalpel to slice the mold into sections. (9 RT 2196.) He then placed the sections onto the universal forensic light microscope for comparison with the evidence bullets, and concluded that the evidence bullets had been fired from the Colt. (9 RT 2196-97.) While the evidence bullets were damaged as a result of penetrating Clifford's skull, and were corroded as a result of having been in that tissue for a period of time, the bullets still bore enough markings in enough areas to allow Laskowski to make the match. (9 RT 2198.) Also, on April 23, 1996, Laskowski again test-fired the Colt, and he matched a test-fired bullet to a bullet that had been test-fired from the Colt on October 18, 1994. (9 RT 2201.)

Once Laskowski reached the conclusion that the bullets were fired from the Colt, he contacted Colt to determine whether the barrel damage was something that could have occurred during the manufacturing process. (9 RT 2200-01, 2209-13, 2234.) Colt informed him that the damage was not reflective of their manufacturing process and would not have occurred at the factory. (9 RT 2200-01, 2209-13, 2234.)

Petitioner's Fingerprints

Jerry Roper, a seven-year KCSD crime scene investigator who had qualified as an expert in the Kern County courts on the comparison of latent and known

prints, was asked in November of 1984 to compare the latent prints from the Merck house with many known prints, including those of petitioner. (6 RT 1587-94.) Roper compared petitioner's rolled prints with the latent prints, but never found any print matches. (6 RT 1590, 1594-95.)

Roper admitted that, even with his expertise, he made mistakes in print comparisons. (6 RT 1597-98.) Usually another person would do a follow-up comparison, but he did not remember if that was done in the instant action. (6 RT 1590.) Roper left the Technical Investigation Section in 1987 because his eyesight was getting too bad to do comparisons and because he was under a lot of stress. (6 RT 1589.)

Thomas Jones first received training on fingerprints in 1955, began working in the KCSD Technical Investigation Section in 1980, and became the senior member of the section in 1984. (8 RT 1990-92, 2004.) At one point the section policy was that negative comparisons did not have to be verified, but instead were entered into a log. (9 RT 2103.) But eventually everyone knew that the policy changed to require that every fingerprint comparison be double-checked. (8 RT 1997.) Positive matches were "worked up[:]" (1) the latent print was photographed and enlarged; (2) a new rolled print was done; (3) the two were compared a second time; and, (4) the positive match was verified by a more experienced person. (9 RT 2104-06.) Apparently not everyone obeyed the policy, because Jones knew that Roper did not add the name of anyone to the Merck fingerprint comparison request to verify his conclusion, and no one signed the request. (8 RT 1998, 2023.)

"Way before 1984," Jones came to believe that Roper was "incompetent in the area of latent print examination." (8 RT 1999, 2008, 2010.) But Roper's incompetence was not a matter of wrongdoing, such as stating that a negative was actually a positive match, which would have led Jones to report the situation to his superiors. (8 RT 2007-09, 2021.) Instead, it was a matter of not

being able to properly identify a positive match, which allowed guilty people to go free. (8 RT 2007-09, 2021.) Based on a request by Acting Lieutenant Jerry Grimes, who supervised the KCSD Technical Investigation Section in 1984, Jones checked a number of files that Roper had worked on in the previous two to three years and, while he never found a misidentification, he "continue[d] to find these problems." (8 RT 1999, 2006, 2014, 2024; 9 RT 2088-89, 2099.) Jones reported his evaluation of Roper to several superiors over the course of time, the problems were discussed, and Roper was eventually fired or left the Technical Investigation Section. (8 RT 2009-13; 9 RT 2101-03.)

In 1994, a few months before Deputy Christopherson was assigned to the KCSD Robbery-Homicide Section, he got permission to take another look at the Merck case, which was "in limbo" at the time. (7 RT 1899-90.) He re-read all of the original reports of the murders, as well as the reports of the officers who had worked on the case in the interim. (7 RT 1891-92, 1897.) As a result, he served as the chief investigating officer when the investigation was re-opened. (7 RT 1892, 1896.) Christopherson personally went to the fingerprint section on May 12, 1994, and spoke to the supervisor, Tom Jones, as well as to Sharon Pierce, and asked that the fingerprints lifted from the Mercks' house be re-checked.[16] (7 RT 1892, 1901.)

Pierce compared the Merck latent prints with the prints of petitioner, his brother Gerald, and several other people, taken from KCSD's fingerprint files. (8 RT 1946-47, 1949, 1955-56.) Latent Lifted Print No. 10 matched petitioner's left thumb, and Latent Lifted Print No. 44 matched petitioner's left middle finger. (RT 1957-59; People's Exhs. 6 [lifted from the inside edge of the Mercks' service porch back door] and 7 [lifted from the plastic sewing tray

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16. Jones became the senior latent print examiner in 1989 or 1990. (8 RT 1991, 2005.)

from the dining area].) None of the other prints matched any of the other fingers on petitioner's left hand. (8 RT 1965-67.) Jones subsequently verified Pierce's conclusions and signed the report. (8 RT 1960, 1994-95, 2003-04.)

On August 8, 1994, Deputy Christopherson and Detective Fiddler interviewed petitioner at KCSD, after the officers *Mirandized*[17] him. (7 RT 1892, 1906.) Petitioner repeatedly said that he was not involved with the murder of the Mercks; he had never been to the house at 713 McClean Street; and he did not know how his fingerprints could have gotten there. (7 RT 1893, 1906-07.) When Deputy Christopherson took petitioner to the house to point out the fingerprints, petitioner repeated that he had never been to the house. (7 RT 1894.)

On September 11, 1994, Jones took all of the latent prints in the instant action and petitioner's rolled prints to Sacramento for comparison by the Department of Justice. (8 RT 2001-02, 2015-16.) He delivered the prints to Martin Collins, the Latent Print Supervisor of the California Department of Justice Forensic Services Section, and told Collins that a comparison in 1984 was negative, but that he recently verified a match made by Pierce. (8 RT 2016-17, 2026-48.) Jones waited for the results, which took less than two hours. (8 RT 2016-17, 2034.)

Collins took approximately five minutes to compare each print. (8 RT 2029.) The lift card that was People's Exhibit 6 contained two prints (Latent Lifted Print Nos. 9 and 10); one was a palm print that Collins did not match (Latent Lifted Print No. 9), and the other print Collins matched with petitioner (Latent Lifted Print No. 10). (8 RT 2036.) People's Exhibit 7 only contained Latent Lifted Print No. 44, which Collins matched to petitioner. (8 RT 2036-37.) There was another usable print, but Collins was not able to match it to petitioner. (8 RT 2037.) Collins had another person in his section verify his

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

conclusions. (8 RT 2031.) By the end of the analysis, Collins was "absolutely positive" that the latent prints taken from the Mercks' house belonged to petitioner. (8 RT 2031.)

Alma's Turquoise Ring

Although Phinney's recollection at trial was not clear, he told the truth to the KCSD investigators about seeing petitioner during the first week of September 1984 and about his connection to petitioner.[18] (6 RT 1652-54.) By the time of trial, Phinney had known petitioner for 12 to 15 years, and in 1984, he saw petitioner on a regular basis. (6 RT 1652, 1714.) The week after Labor Day 1984, Phinney saw petitioner at the Chief Auto Parts store on Niles Street. (6 RT 1652-53.) Phinney talked with petitioner about a problem that petitioner was having with his car, and Phinney also recalled that petitioner owed him money. (6 RT 1654.)

As a result of the conversation, Phinney went to Gerald Cowan's house in East Bakersfield near Flower Street. (6 RT 1654-55.) While Phinney, petitioner, and Gerry Tags, petitioner's girlfriend, were talking, Tags showed Phinney two jewelry boxes, one large and one small. (6 RT 1655, 1742.) One

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18. At trial, Phinney admitted that he had a lengthy criminal record, most of which involved his addiction to drugs and alcohol; but he had never been to prison, instead spending time in the county jail. (6 RT 1651-52.) He had never killed anyone, and he insisted that stealing was one thing that he would not do. (6 RT 1660, 1690, 1739.) His testimony was true in spite of his being scared. (6 RT 1669.) He had not been threatened, but a woman whom he did not know, and who was not connected to petitioner, told him on the Saturday night before his testimony that it would do no good. (6 RT 1669-71.) He was not a good liar, and he did not know what else to do but testify. (6 RT 1669.) Phinney suffered from bipolar disorder, which sometimes jumbled his thoughts. (6 RT 1672-75.) He would always be addicted to drugs and alcohol; he still used "speed" and alcohol from time to time. (6 RT 1676.) He received Social Security disability payments for his bipolar disorder and drug addiction at the time of trial. (6 RT 1676.)

of the boxes had a wind-up music box and a figurine that danced around a mirror with a magnet under it. (6 RT 1655.) The three of them went through a large amount of "junk" jewelry, including moose or elk pins, lapel pins, tie tacks, and a Wasco or Taft high school senior ring. (6 RT 1655, 1658.) Phinney said that there was a lot of jewelry of the style that an older woman would wear, including fake pearls. (6 RT 1742.)

Petitioner showed Phinney an old leather wallet that had a design tooled into it. (6 RT 1655-57.) Phinney recalled that the wallet contained a driver's license, with a birth date from the early 1900's, that belonged to someone named "Mirck" or "Merck," because he had a neighbor named "Mirck" and he remembered the similar spelling of the name on the driver's license. (6 RT 1657.) Phinney, petitioner, and Tags also looked at some coins, one of which Phinney specifically remembered was a 1992 S silver dollar, because his uncle had given him such a coin when he was young. (6 RT 1658, 1717.) Petitioner had a lot of coins that he rarely showed to people. (6 RT 1717.) There were also two Social Security retirement checks, both of which were in the name of "Merck."[19/] (6 RT 1658-59.)

Betty Turner was Alma's daughter. (9 RT 2168-69.) Turner did not live in Bakersfield, so when she visited the Mercks she usually stayed all day or overnight. (9 RT 2168-69.) Clifford kept his driver's license in his single-fold wallet, which was hand-tooled with figures or designs and the initials "C.M." (9 RT 2169-70.) Turner had also seen, in Alma's bedroom, the jewelry boxes that held Alma's costume jewelry collection. (9 RT 2170-71.) One of the boxes

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19. Phinney would not have been able to remember these events if it had not been for seeing a copy of the declaration that he gave to the police in 1984 or 1985, but everything in the declaration was true. (6 RT 1657.) Also, Phinney was not delusional when he saw the wallet or the Social Security checks. (6 RT 1740.) His usual delusions were paranoid, e.g., he would think that trash cans were police officers that were after him. (6 RT 1678-80, 1740.)

had a ballerina standing on a round mirror, and when it was wound up the ballerina and the mirror would turn. (9 RT 2170, 2173.) Alma had one ring that was silver and turquoise. (9 RT 2171.)

Deputy Fraley investigated the murders of the Mercks from December 12, 1984, to September of 1987. (9 RT 2161-62.) During that time, Deputy Fraley received information that a woman named Catherine Glass had a particular ring. (9 RT 2161-62.) In 1985, Fraley talked to Glass at her house, and she told him that she was petitioner's sister and that she had purchased from petitioner a turquoise ring made of silver or white metal. (9 RT 2161-63 [People's Exh. 39]; see also 8 RT 1940-42 [testimony of Glass].) However, Glass told Deputy Fraley that her husband was wearing the ring at that time. (9 RT 2163; see also 8 RT 1942.) Deputy Fraley left Glass's house, but returned when she contacted him a few hours later. (9 RT 2163.) Glass then gave the ring to Deputy Fraley. (RT 2163; see also 8 RT 1940, 1943.)

Mary Watts, Alma's daughter, testified that the Mercks had a ring made of white metal with a turquoise stone. (7 RT 1872.) During the investigation, Watts was shown a ring that the police had seized, and she recognized the ring. (7 RT 1872-73 [People's Exhs. 36-39].) At trial, Watts identified pictures of Alma wearing the ring and identified the ring itself, saying that it looked like the ring her mother had purchased in New Mexico. (7 RT 1873, 1879-80.) Watts testified that her mother "used to wear it all the time." (7 RT 1874.) There appeared to be a letter "M" and what appeared to be the letter "X" marked into the ring.[20] (7 RT 1873, 1876 [Defendant's Exh. 38].)

Terri Jones, Alma's granddaughter, spent much time in the Mercks' house as she grew up, and over the years she had conversations with Alma in Alma's

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20. Clifford had a habit of marking things with an electric needle. (7 RT 1873-74.) Watts never personally saw him mark things, but everything that he had had initials on it, and Alma told her that Clifford marked things. (7 RT 1875.)

bedroom. (8 RT 2059-60.) Alma had mostly costume-type jewelry, including a diamond watch, a pearl bracelet, and some earrings, but only one ring of a turquoise and silver type. (8 RT 2060-61.) People's Exhibit 39 looked like the ring that Alma used to wear. (8 RT 2060.) Terri remembered that, in January of 1985, Fraley showed her a ring or a picture of a ring, but she was not familiar with the ring, or did not think it was her grandmother's ring. (8 RT 2062-63.)

Clifford's Cigarette Lighter

As part of the investigation into the Merck murders, Deputy Fraley met with Ronnie Woodin, a friend of petitioner's since childhood, about a cigarette lighter. (9 RT 2164 [Defendant's Exh. AA(1)].) Woodin showed Deputy Fraley a cigarette lighter cover that he said he had bought from petitioner around the middle of September of 1984. (8 RT 1926, 1938; 9 RT 2164.) Deputy Fraley seized the lighter cover. (8 RT 1925-26.)

As Woodin explained at trial, petitioner showed him a bag of things that he was trying to sell. (8 RT 1924-27.) Woodin liked a cigarette lighter cover in the bag and paid petitioner five dollars for it. (8 RT 1925-26.) Woodin did not pay much attention to the other items in the bag, but he believed that there may have been beads or pearls in the bag. (8 RT 1926-27.)

At trial, Woodin believed that he told Deputy Fraley that he did not know where petitioner had obtained the lighter cover. (8 RT 1927-28.) But Woodin also seemed to remember telling Deputy Fraley that, when he asked petitioner

where petitioner had obtained the lighter, petitioner told him "never mind" or words to that effect.[21] (8 RT 1927-28.)

On January 30, 1985, Fraley took the lighter to Jerry Jones, whose wife, Terri Jones, was Alma's granddaughter. (8 RT 2052-53; 9 RT 2165.) Jerry told Deputy Fraley that he had seen the lighter on a table in the Mercks' house many times. (9 RT 2166; see also 6 RT 1499 [Robert Johnson, Alma's son, testified that Clifford used a lighter to smoke].) Often Jerry and Clifford used the lighter when they snuck into the back yard to smoke. (9 RT 2165.)

At trial, Jerry could not tell, due to the passage of years, whether the lighter in evidence was Clifford's lighter. (8 RT 2054 [Defendant's Exh. AA(1)].) But he was "absolutely sure" that it was his grandfather-in-law's lighter when he said that to Deputy Fraley. (8 RT 2054.)

Other Evidence

Testimony Of Mitzi Culbertson Cowan

In September of 1984, Mitzi Cowan (nee Culbertson) was dating and living with petitioner's brother, Gerald, whom she subsequently married. (11 RT 2425-26.) In 1984, Mitzi used methamphetamine, at times with Gerald and tried cocaine with Gerald, who used it heavily at the time. (11 RT 2443-45.) Mitzi had also used drugs with Gerry Tags, petitioner's girlfriend. (11 RT 2444.)

Sometime between September 1, 1984, and September 5, 1984, petitioner and Tags visited Mitzi and Gerald. (11 RT 2426.) Petitioner walked in carrying a box of things, including clothing and jewelry. (11 RT 2427.) Mitzi

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21. Woodin believed that he had smoked marijuana basically on a daily basis from the time he bought the lighter until the interview, and admitted that he was "probably" a little high during the interview. (8 RT 1936-37.) But he told the truth when he talked to Deputy Fraley. (8 RT 1927-28, 1937.)

remembered an older silver wrist watch and a heart-shaped silver necklace watch. (11 RT 2427-28, 2446-48.) Gerald put the necklace watch into his pocket, but later, as they were driving to his mother's house, he threw the necklace watch into a vacant, overgrown field. (11 RT 2427-29.)

Mitzi was the daughter of Jewell Francis Russell, nicknamed "Shafter Bobby." (11 RT 2429.) On September 7, 1984, Shafter Police Officer Paul Petersen was dispatched to a house in Shafter where he found Russell's body lying under a bed. (8 RT 2074-85.) Russell's throat had been slit, his face was bruised, possibly from the stock of a nearby shotgun, and his pockets were turned inside out. (8 RT 2085.)

Mitzi talked to several law enforcement agencies over the course of time, including the Shafter Police Department, the KCSD, and the prosecutor's office. (11 RT 2447.) In October of 1984, an investigator talked to Mitzi, but the investigator only asked questions about her father's death, so Mitzi was not sure that she mentioned the necklace watch. (11 RT 2449.) In July of 1986, Kern County Investigator Chris Hillis questioned Mitzi only about her father's death; she did not tell him about the necklace watch. (11 RT 2450.) On another occasion, Hillis taped an interview with her, but she did not think that she mentioned the necklace watch. (11 RT 2451.)

In January of 1990, Mitzi was interviewed by Shafter Police Department Detectives Porter and Buoni, but she did not believe that she mentioned the necklace watch. (11 RT 2451.) Likewise at the preliminary hearing, Mitzi never mentioned, and she was not asked about, the necklace watch. (11 RT 2452.) She mentioned the necklace watch to Gerald's detective, and his lawyer, and she told the prosecutor about the necklace watch about a week before she testified at trial. (11 RT 2453, 2464.) Mitzi had never seen petitioner with any property belonging to her father, nor did he ever indicate to her that he had anything to do with her father's death. (11 RT 2455-56.)

Testimony Of Emma Davidson (Nee Foreman)

In 1984, Emma Davidson (nee Foreman) lived on Edison Highway, and had known petitioner for about two years. (9 RT 2242-43.) Her daughter, Gerry Lynn Tags, lived with petitioner before 1984, and was living with him between August and October of 1984. (9 RT 2243-44.) Foreman sold Tags a car for $40, and occasionally Tags and petitioner lived in that car, in various locations, including near Foreman's apartment. (9 RT 2243.)

Foreman on at least one occasion heard Tags and petitioner arguing because petitioner wanted Tags to prostitute herself, as she had done before. (9 RT 2245-46.) In addition, Foreman once heard petitioner say something to Tags about harming some elderly people, and petitioner told Tags that if she did not do what he wanted, he would "cut her mother-fucking throat" and "I'll do you like I did mother fucking Bobby." (9 RT 2246-47.)

On one occasion, Tags went to her car to get some clothes. (9 RT 2247.) At the same time, Foreman went to the mailbox. (9 RT 2247.) As Foreman walked by the car, she saw in the trunk a jewelry box, another black box, and bloody clothes. (9 RT 2247-48.) However, at the time she did not pay much attention to the bloody clothes because petitioner had been working on the car and had hurt his hands. (9 RT 2248.)

Detective John Porter interviewed Foreman in January of 1992. (10 RT 2324, 2391.) She said that when she had asked petitioner about killing an elderly couple in Bakersfield, he told her that he had found them in a bedroom, and that he had beaten them to death. (10 RT 2392.)

Previous Testimony Of Gerry Tags

By the time of trial, Gerry Tags, petitioner's girlfriend in 1984, had died of cancer. (9 RT 2244; 5 CT 1267 [death certificate].) Her testimony, from petitioner's preliminary hearing in September of 1994, was read into the record. (10 RT 2330-03.)

Tags and petitioner lived together for about three to four years, until 1986. (10 RT 2331-32.) In 1984, petitioner used "quite a bit" of methamphetamine daily. (10 RT 2332-33.) He did not have a regular job; instead, he used Tags as a prostitute at truck stops and on Union Avenue to make money. (10 RT 2333-34, 2359.)

Tags, who used drugs for twelve years until she began cancer treatment, testified that her heaviest drug use occurred during the time that she lived with petitioner. (10 RT 2333, 2351-55, 2375-80.) She primarily used methamphetamine, but she also used any other drug that she could get. (10 RT 2351-52.) She was high most of the time, to the point that it made her do things that she did not really want to do, such as being a prostitute. (10 RT 2352-53.) Not long after Russell's funeral, Tags, petitioner, and Gerald left California for Oklahoma, and went as far as Florida. (10 RT 2347-49.) Tags wondered why they were leaving California; it seemed as if petitioner and Gerald were "running from something." (10 RT 2361.) Tags supplied most of the money for the trip by working as a prostitute during the trip. (10 RT 2359-60, 2378-79.)

During the trip, they did not talk about what happened to Russell or the elderly couple that had been killed, because neither petitioner nor Gerald wanted to talk about it. (10 RT 2349.) Tags never saw petitioner kill anyone. (10 RT 2360-61.) But, while they were at the house of Tags's sister in Oklahoma, Tags asked petitioner if he had killed Russell. (10 RT 2349, 2362.) He replied, "Yeah bitch, and if you say anything, I'll cut your throat, just like

I did his." (10 RT 2349, 2362.) At the time, petitioner had been drinking.[22/] (10 RT 2364-66.)

Eventually, after perhaps two or three weeks, the trio returned to California. (10 RT 2356-57, 2383-84, 2386.) Mitzi, Russell's daughter, told Tags that Russell had been beaten and his throat slit. (10 RT 2335, 2355-57.) When Tags again asked petitioner about the murder, he told her that if she said anything he would cut her throat, so she never brought it up again. (10 RT 2385-86.) But at another point Tags testified that she had once asked petitioner if he had killed the elderly couple on McClean Street, and he had told her that he had not. (10 RT 2403.)

At the time of the preliminary hearing, Tags hated petitioner because he had beaten her, because he had made her a prostitute, and because of the things that she believed he had done, including the murders. (10 RT 2372, 2385.) She began to hate him when she saw that he "had a different person inside." (10 RT 2372.)

Defense

Ruth and Robert Scott worked for companies in the Indian jewelry business in Albuquerque, New Mexico, from 1971 to 1981, and then from 1983 to 1994. (11 RT 2472-74.) The companies made and sold on a wholesale basis all of the components for Indian jewelry. (RT 2473-74.) From 1971 to 1974, the Scotts

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22. Hillis, from the prosecutor's office, talked to Tags, and she told him what petitioner had said. (10 RT 2362-65.) When asked about Hillis's report at the preliminary hearing, Tags did not remember having asked petitioner about the murder the morning after he had threatened to cut her throat while he was drinking; nor did she remember telling Hillis that, that morning, petitioner said that he would not do something like that (murdering someone), and that he had been drunk the night before. (10 RT 2365-68.)

also had their own Indian jewelry business and attended some jewelry shows. (11 RT 2475-76.)

Ruth Scott recognized the lighter (Defense Exh. AA) as a very popular type of lighter case. (11 RT 2476-79.) Najhae, the company for which the Scotts worked, made approximately 50,000, which were sold in Arizona and California. (11 RT 2477-78.) One or two competitors in Albuquerque also made the same type of lighter case. (11 RT 2477.)

Ruth Scott recognized Alma's turquoise ring as a low-cost "tourist item." (11 RT 2481-84 [presumably People's Exh. 39, referred to as "Item 10"].) She believed that the markings on the back of the ring indicated a wholesale cost of $3. (11 RT 2481-84.) But Ruth Scott did not know what happened to the lighter cases, or to the components of the rings once they left the company where she worked, nor did she know the Mercks. (11 RT 2484-86.)

Damon Taylor opened The Cigarette Store, selling cigarettes and other items needed for s smoking cigarettes, in February of 1984. (11 RT 2508-09.) The Indian cigarette lighter case was "common;" he ordered about 50 to 100 of the cases each week between February and September of 1984, and sold them for about $1 to $1.50. (11 RT 2510.) The lighter cases could be bought "at practically any store that sold cigarettes in Bakersfield," as well as jewelry stores in the mall. (11 RT 2511.)

Christopher Hillis, then an investigator for the Kern County District Attorney's Office, interviewed Tags on June 18, 1986. (11 RT 2490-93.) Tags told Hillis about petitioner's response to her question of whether he had murdered Russell, including his threat to cut her throat if she said anything. (11 RT 2496.) Tags told Hillis she repeated her question to petitioner the next morning, and petitioner said that he would not have done something like that, and that he had made the statement the previous night because he was "drunk." (11 RT 2497.) But Tags also told Hillis that, when she repeated the question

after they had returned to California, petitioner repeated his original response, including the threat. (11 RT 2499-2500.)

Bakersfield Police Officer Kevin Clerico was part of the team of officers who arrested Phinney at the Caravan Inn on October 14, 1984. (11 RT 2500-01.) When asked, Phinney said that the pistols, including the Colt, belonged to Lutts, and that most of the property that Lutts dealt with was stolen. (11 RT 2501-02.) Phinney could not provide any more information about the pistols or the property found in the room. (11 RT 2502.)

Deputy Fraley conducted a taped interview of Emma Foreman (aka Davidson) on February 14, 1985, in the presence of Johnnie Davidson. (11 RT 2512-13.) Foreman said of petitioner, "I hate the guy with a purple passion." (11 RT 2514.) Deputy Fraley did not recall Foreman saying that petitioner had told her that he had found an elderly couple in their bedroom and had beaten them to death, nor did he recall her stating that Cowan indicated he had killed Russell. (11 RT 2515-16.)

Detective Porter interviewed Emma Davidson (nee Foreman) in January of 1990. (11 RT 2489.) She told him that, about a month either before or after the murder of Russell, petitioner had made some statements about an elderly couple. (11 RT 2490.)

On October 10, 1986, Deputy Fraley came into contact for the first time with Roy Davidson in Kern County Jail, where he conducted a taped interview with Davidson. (11 RT 2516-17.) Near the beginning of the interview, Davidson said that if he could get out of jail, he could get information from Tags and another person–that he (Davidson) could get Tags and the other person to "talk." (11 RT 2517.) Deputy Fraley knew at the time that Davidson abused drugs. (11 RT 2518.)

David Bird, Ph.D., a clinical psychologist had training and experience on drug abuse, including working in various positions in the prison system. (11

RT 2518-21.) According to Dr. Bird, methamphetamine produces a sense of euphoria, and "general increased sensitivity to everything that is going on around" the user. (11 RT 2521.) However, continued use of methamphetamine causes damage to the user's language comprehension, memory, and accuracy of perception, as well as loss of visual motor control. (11 RT 2521-22.) Over the course of years, methamphetamine will dull the user's perception and comprehension, to the point that the user will lose track of "hours, days, or even weeks at a time . . ." and either have no recall of that time period or "they will have a fragment of recall . . .." (11 RT 2522.) The user will also steadily withdraw from their usual work, family, and social activities, and will instead spend more time trying to find more of the drug. (11 RT 2522.) The user become confused between what he or she actually experienced and what he or she read or heard. (11 RT 2523.)

According to Dr. Bird, methamphetamine allows or causes a user to stay awake for days at a time, but with "greatly reduced" abilities; such a person will be in a "psychotic" or "quasi-psychotic" state, in that the person experiences perceptions that are like hallucinations, some of which are recorded in the memory. (11 RT 2524-25.) In such a condition, the user is "over-amped" because the liver cannot process the drug quickly enough. (11 RT 2526.) As a result, the brain's cortex, the source of rational thinking that translates sensory experiences into language expressions, is damaged, which causes problems with perception and comprehension. (11 RT 2526.) When some users come down from such a high, they cannot tell what is real in their memories. (11 RT 2525.) However, Dr. Bird doubted that two people would have identical delusions. (11 RT 2541.)

Dr. Bird opined that Tags was a methamphetamine addict based on his review of the transcript of her preliminary hearing testimony. (11 RT 2525-26, 2543.) She had difficulty understanding some of the questions; she repeated

some questions to herself; she asked the questioner to repeat some of the questions; and she appeared to confuse facts. (11 RT 2527, 2542.) Dr. Bird believed that, given the fact that Tags said at the preliminary hearing that she had not used methamphetamine for six to seven months, Tags was "displaying an acute brain damage syndrome" which would last for six months to a year before there would be some, but not total, recovery. (11 RT 2528-29.)

The Penalty Phase

The Prosecution's Evidence

Shelley Cox, Alma's granddaughter, saw Alma often when she was growing up, and about once or twice a year after Cox had moved away from Bakersfield. (13 RT 2844.) Cox and her husband were in bed, and their 18-month-old son was in his crib, when Cox's parents came to their house and told them that the Mercks had been murdered. (13 RT 2845.) It was "very difficult to put into words the emotion that we have all experienced." (13 RT 2845.) It was "extremely difficult" for Cox and her husband to help clean out the Mercks' house. (13 RT 2845.) She said, "I will never forget the smell in the house, the smell of death and blood was everywhere." (13 RT 2845.) Alma had been suffering from Parkinson's disease. (13 RT 2845.) Cox imagined what her grandmother's last few minutes of life were like, the fear and terror, pleading for her life, and perhaps hearing her husband being murdered. (13 RT 2845-46.) She could not understand why anyone would "brutally murder" her grandparents, because they could not hear or see well and were "defenseless." (13 RT 2846.) It affected her whole family, as well as their friends. (13 RT 2846.) The family wanted the jury to impose the death penalty, so that petitioner could suffer the consequences of the choice that he made to kill the Mercks. (13 RT 2847.)

Betty Turner was the youngest of Alma's four children. (13 RT 2848.) Alma married Clifford later, after she had her children. (13 RT 2848.) But Clifford and Alma had been married for nearly 33 years; Clifford was regarded as part of the family rather than as a step-relative. (13 RT 2849.) Turner remembered that Clifford "love[d] to tell stories from when he was growing up." (13 RT 2849.) Clifford and Alma were "loving people, very quiet and [they] stayed to themselves." (13 RT 2849.) Turner would never forget the day they were murdered; she did not understand why their lives were taken. (13 RT 2849.) She believed that Clifford and Alma "must have gone through pure hell;" she had "no sympathy" for anyone who takes an innocent life. (RT 2850.) She hoped that her family could begin to move on. (13 RT 2850.)

Terri Jones, another of Alma's granddaughters, spent a lot of time with the Mercks, who baby-sat her when she was growing up. (13 RT 2851.) She continued this close relationship as she grew up. (13 RT 2851.) Jones visited the Mercks once a week to run errands for them and, in later years, she drove the Mercks to the family Christmas celebration. (13 RT 2851-52.) She would never forget the pain of losing them. (13 RT 2851.) The last time they talked, Alma was crying because she was recovering from a broken hip. (13 RT 2851.) Jones "went into shock" when she heard about the murders; she could not attend the funeral; she thought about it every day; and the loss was "very hard" on her mother. (13 RT 2852.) Jones waited until her children were older before she told them the details of what had happened to their great-grandparents. (13 RT 2852.) Her children were "shocked," and it was "horrible." (13 RT 2853.)

On October 24, 1985, at noon, James Foster Jr., who worked for Halliburton Services, came home to his apartment on Olive Street to change his dirty clothes. (13 RT 2853-54.) Jesse Cruz, Foster's driver, waited outside. (RT 2855.) Just as Foster noticed indications that someone else was in the

apartment, petitioner came out of the closet, pointed a blue steel revolver at Foster's head, and told him not to move. (13 RT 2855-56.)

Petitioner had Foster call Cruz inside, and, at gunpoint, had both Cruz and Foster lie face-down on the floor, where he bound their hands and feet. (13 RT 2856.) Foster heard petitioner going through the room; he also heard petitioner pull out the telephone cord, and cock and un-cock the revolver while he told them he was going to kill them. (13 RT 2857.) After approximately 15 minutes, petitioner left through a sliding glass door in the apartment.[23/] (13 RT 2857.)

Betty Jean Abney lived on Hudson Drive in Greenfield, next door to petitioner, who lived with Brenda Hunt. (13 RT 2864, 2921.) On April 9, 1993, Abney vistited her friend, Linday Bryson, who lived across the street. (13 RT 1864.) Abney and Bryson saw petitioner lift Robert, Hunt's child, up by his hair and throw him onto the ground. (13 RT 2864-68.) Abney told Bryson to call the police; then Abney went outside, yelled at petitioner to stop it, and told him that she was going to call the police. (13 RT 2867.) When the police arrived, they briefly talked with Robert, as well as with Michael, a younger boy who lived with petitioner and Hunt, outside of Abney's hearing range. (13 RT 2868.) Then the police arrested petitioner. (13 RT 2868.) As the police took petitioner away, Hunt came out of their house. (13 RT 2868.)

Abney once saw petitioner grab Hunt by the hair and jerk her head as they argued while walking down the street. (13 RT 2869.) Another time, when petitioner was cleaning up his yard with Michael, who apparently did not do what he was supposed to do. (13 RT 2869.) Petitioner grabbed Michael and

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23. The parties stipulated that petitioner committed the crimes as to Foster and Cruz. (RT 2874-75.)

threw him. (13 RT 2869.) Then petitioner "calmly" came over to the fence, asked Abney and their son how they were doing, and told Michael to go into the house. (13 RT 2869.)

Petitioner's Mitigation Evidence

Petitioner was Selma Yates's nephew. (13 RT 2887-89.) Yates married Leroy and had four children. (13 RT 2887-89, 2892.) Betty, Yates' younger sister and petitioner's mother, married Wes, Leroy's brother, and had eight children. (13 RT 2887-89, 2892.) In 1952, before his youngest son was born, Leroy was killed in a motorcycle accident that involved drinking. (13 RT 2891, 2894.)

Wes was a "very good guy" when he was sober. (13 RT 2889.) But he drank a lot, and when he drank he "always want[ed] to fight." (13 RT 2889.) According to Yates, all of Wes's brothers behaved the same way, and their father, George (petitioner's grandfather), was a violent man even when he was not drinking. (13 RT 2889.) George broke his wife's arm and leg, and she was "constantly black and blue." (13 RT 2890.)

Yates and Leroy lived near Wes and Betty when petitioner was born. (13 RT 2890.) When petitioner was about two years old, Wes started beating him "[f]or no reason at all." (13 RT 2891.) Sometimes Yates would have Betty's family come to her house so that they would not be around Wes when he was drinking, which was every weekend, sometimes all weekend. (13 RT 2894.) Wes sometimes spent all of his family's money while he was gone on the weekend, forcing Yates and Betty to pool their food to feed everyone; sometimes there was not enough, and the children went hungry. (13 RT 2895.)

Once, Betty and her children came over to Yates' house for Christmas. (13 RT 2892-93.) Wes had been gone, drinking, for two days. (13 RT RT 2892-93.) On Christmas Eve, while the children were playing, Wes broke into the

house and began beating Betty. (13 RT 2892-93.) Yates' older daughter gathered all of the children into a back bedroom, but petitioner and Yates' son, Leroy, grabbed Wes' leg and tried to stop him. (13 RT 2893.) Yates used her rolling pin to knock out Wes, and then called the police. (13 RT 2893.) The police arrived and, as Wes began to regain consciousness, he started cursing and said that he was going to kill them all when he was released from jail. (13 RT 2893-94.) The police took Wes away, and told Yates that he would not bother them for the rest of the night, or on Christmas Day. (13 RT 2893-94.)

Betty and her children lived in Bakersfield when Betty was pregnant with her youngest son. (13 RT 2896.) Yates, who lived in Richmond at the time, took her children out of school and went to Bakersfield to be with Betty. (13 RT 2896.) Petitioner had been having behavioral problems at school, but his performance improved so dramatically while his cousin Leroy went to school with him that the teachers wanted Leroy to stay there. (13 RT 2896.) But Yates did not allow Leroy to stay because she knew that Wes drank and beat the children. (13 RT 2896-97.) Yates read the Bible to her children; they were good children. (13 RT 2896-97.) She wished she would have brought petitioner to Richmond but, with no support other than Leroy's Social Security, she did not have enough money. (13 RT 2896-97.)

Yates moved her family a few times because her youngest son was very sick. (13 RT 2897-98.) When Leroy was 12 (petitioner would have been 14 or 15), Yates moved her family to Idaho. (13 RT 2898.) At the time, Wes still beat petitioner. (13 RT 2898.) Yates and Betty kept in touch. (13 RT 2898-99.) Betty told Yates that Wes was "taking [petitioner] to bars and getting him to drink," as petitioner's grandfather had done with Wes. (13 RT 2898.) But Yates never contacted the welfare department to report that petitioner was being beaten, because the welfare department would not do anything about it in those days. (13 RT 2900.)

From Yates' knowledge of petitioner, she did not think that he was the kind of man who would kill two people. (13 RT 2899.) She only believed in the death penalty for someone like Ted Bundy, or the "Green River" killer. (13 RT 2899.)

Leroy Cowan, Yates' son and petitioner's cousin, had ownership interests in publishing and distribution companies that relate to education and literacy. (13 RT 2901-02.) His two brothers, as well as his sister, also did well. (13 RT 2903.)

Leroy remembered spending time with petitioner and petitioner's family before Leroy and his family moved to Idaho. (13 RT 2904, 2912-13.) Leroy testified that, when his family moved to Idaho, it was like they were "in a whole new world" and he lost touch with petitioner. (13 RT 2904, 2907, 2912-13, 2918.)

Leroy's father died when he was two, so he had no memories of his own father, but Leroy had memories of Wes, petitioner's father, who did not die until 1969. (13 RT 2904.) Wes was a good man when he was sober, but he was drunk much of the time. (13 RT 2905, 2914.)

Once, when Leroy was young, he went to visit petitioner's family, who were living in a World War II barracks building that had been refurbished into apartments for the poor.[24/] (13 RT 2904.) There were holes in the walls, as well as mice and rats. (13 RT 2905.) All of the boys slept in one bedroom, and the girls and women slept in the other bedroom. (13 RT 2905.)

Wes was gone on a drinking binge during Leroy's visit. (13 RT 2905.) In the middle of the night, Leroy woke up when Wes jerked him out of bed and began hitting him with a belt. (13 RT 2906.) Then Wes noticed that he had

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24. Leroy recalled that this was the first place that the boys had stolen anything; they stole some food from a little store, because all they had to eat was plain oatmeal (their mothers ate a single piece of toast). (13 RT 2917-18.)

grabbed Leroy; he threw Leroy aside and began beating petitioner instead. (13 RT 2906.) Petitioner held up his hands and the belt wrapped around his arm so that Wes could no longer swing it. (13 RT 2906.) Petitioner told Wes to stop, and asked Wes what he had done. (13 RT 2906.) Wes began beating petitioner with his fists. (13 RT 2906.) When the women were unable to get Wes to stop beating petitioner, one of them ran to the pay phone on the corner and called the police. (13 RT 2906.) The police came, arrested Wes, and took him away. (13 RT 2906.) Wes was released when he became sober. (13 RT 2906.) The same scenario happened five or six times when Leroy's family visited petitioner's family at various places where petitioner's family lived. (13 RT 2907, 2913.) If Wes came home drunk when Leroy's family was visiting petitioner's family, they left – they hid or "stayed in the trees" until Wes fell asleep or left. (13 RT 2913.)

Sometimes when Wes came home he beat Betty instead of Leroy or petitioner. (13 RT 2908.) Leroy remembered the Christmas beating at his family's house about which Yates testified, and the time that he went to school with petitioner (during which time petitioner got the highest grades he had ever received). (13 RT 2908-10.) When petitioner thought that Leroy was going to be able to go to school with him, petitioner smiled and seemed happy, but when petitioner found out Leroy was not staying, he was depressed "as if a light had went [sic] out." (13 RT 2911.) Leroy thought that petitioner was smart; petitioner was "always faster in the thought process." (13 RT 2911.)

Sometimes Leroy, petitioner, and petitioner's older half-brother carried lumber for Wes on Wes's carpenter job sites. (13 RT 2914-16.) On one such occasion, petitioner's older half-brother left the site early. (13 RT 2915.) On the way home in the early afternoon, Wes locked Leroy and petitioner in his panel wagon while he went into a bar to drink. (13 RT 2915.) It was dark when Wes returned, and he was drunk enough that the boys were able to get

away from him. (13 RT 2915-16.) But that night, while the boys were sleeping, Wes came into the room and beat them (Leroy first, until he realized it was Leroy, and then petitioner) until they were able to get away, when Betty and Yates struggled with petitioner. (13 RT 2914, 2916.)

Between 1962, when Leroy moved to Idaho, and the time of trial, Leroy only saw petitioner once, at a 1976 family reunion. (13 RT 2916.) Nonetheless, Leroy believed that petitioner would have had to have been in "some mind altering state to be able to do something like that." (13 RT 2916-17.) He did not believe that petitioner received a "fair shake" in life, and he believed that the death penalty would not be just for petitioner. (13 RT 2917.) Testifying was difficult for Leroy because he had tried not to remember some of the events of his childhood. (13 RT 2918.)

Brenda Hunt met petitioner in 1993 and became his girlfriend. (13 RT 2920.) They lived together with her five children on Hudson Drive in Greenfield for approximately eight months. (13 RT 2921, 2928.) Their relationship was a "little" stormy at first; they both used drugs at the time. (13 RT 2921.) Petitioner suggested that they stop using drugs, and that they stop the many drug-related visitors that they had, although they later started "messing around" again. (13 RT 2922.) Petitioner contributed his "SSI" check to the household, and they paid the bills and took care of the children before "messing around." (13 RT 2923.) But they decided that even the "messing around" had to stop. (13 RT 2922.) Since that time, Hunt attended a drug rehabilitation program, started attending church with her children, and got a job. (13 RT 2922.) When she testified, she had been clean of drugs for almost a year. (13 RT 2923.)

Hunt's sons got into the habit of chasing and jumping onto the backs of moving cars and an ice cream truck. (13 RT 2923-24.) One of her sons, Robert, fell off and "got skinned up really bad." (13 RT 2924.) On the date of

the incident in April 1993 described by Abney, Hunt heard that her children were chasing cars. (13 RT 2924.) She went onto the porch and called them, but they laughed and ran. (13 RT 2924.) She asked petitioner, who was in the living room, to get the boys. (13 RT 2924.) He went after the boys, and she may have gone inside. (13 RT 2924.) She heard Abney hollering and, when she went outside, Hunt said that it was "okay" when Abney said that the police had been called. (13 RT 2924.) Petitioner did not do what Abney had testified to; her son did not have any bruises or scrapes and he was upset that petitioner was arrested and taken away. (13 RT 2925.)

Hunt testified that petitioner never hurt her; he was kind to her children; he played the guitar and sang to her children; he took her children places; and he treated her children as if they were his own children. (13 RT 2925-26.) Petitioner was "real comfortable being a family person," and he changed as a result of acting like a father to her children. (13 RT 2926-27.) She did not think that petitioner should die, because he was loved by her, her children, and his family. (13 RT 2927.) She would visit him in prison, and her children wanted to see him. (13 RT 2927.) She would be "devastated" if he were sentenced to death. (13 RT 2928.)

Robert Hunt, Brenda's 12-year-old son, knew petitioner as his mother's boyfriend. (13 RT 2929-31.) Petitioner treated him with respect, and in return Robert called petitioner "Dad." (13 RT 2929-31.) Petitioner took care of him, helped him with his schoolwork, took him camping and fishing one time, sang to him almost every day, and taught him how to play the guitar. (13 RT 2932-35.) Petitioner treated the other children the same way. (13 RT 2933, 2935.) Petitioner did not beat Robert, but petitioner spanked him because Robert "got in a lot of trouble." (13 RT 2933.) According to Robert, in April of 1993 he ran and tripped over a tree stump; petitioner picked him up by his hand, grabbed his chin, and said something to him. (13 RT 2933-34.) Robert did not

remember whether petitioner picked him up by his hair, but petitioner did not hurt him. (13 RT 2934.) Robert also got into trouble for chasing moving cars. (13 RT 2934.) He missed petitioner; he loved petitioner; he would visit and write to petitioner in prison. (13 RT 2936.)

Michael Hunt, Brenda's ten-year-old son, testified that he and all of his siblings called petitioner "Dad." (13 RT 2938-40.) Petitioner treated him with respect, took him places, such as fishing, camping, and the fair, and sang and taught him how to play the guitar. (13 RT 2940-43.) Petitioner was in the process of making a guitar for him when he was arrested. (13 RT 2942.) Petitioner did not hurt him, but sometimes petitioner spanked him on the bottom for failing to respect his mother. (13 RT 2941-42.) Michael loved petitioner; he would visit and write to petitioner in prison. (13 RT 2944.)

Melody Hunt, Brenda's seven-year-old daughter, sometimes called petitioner "Robert" and sometimes "Dad." (13 RT 2945-48.) Petitioner was "good" to her and her older brother, Wendy; sometimes he liked to tell stories. (13 RT 2948.) He bought her presents, sang her songs, and once he gave her and Wendy a ride on his motorcycle. (13 RT 2948-49.) He did not hurt her, and she never saw him hurt any of her family members. (13 RT 2949.) She and her family liked petitioner; she would want to visit him if he were sent away. (13 RT 2949-50.)

Rebuttal

At about 1 p.m. on April 9, 1993, Senior Deputy Sheriff Michael Rascoe responded to Abney's call at 850 Hudson Drive. (13 RT 2951-52.) Deputy Rascoe talked to Abney; then he talked to a boy named Robert out by his patrol car. (13 RT 2952, 2958.) Robert was "very scared;" it looked as if he had been crying; and he had been told he would be taken out of the home if he talked to Rascoe. (13 RT 2953, 2956.) Rascoe told Robert that this was not true. (13

RT 2953.) Robert said that he, his brother, and some other children had been playing in the front yard, and they had been told to stay off a van that was parked in front of the house. (13 RT 2953.) Robert told his brother and the other children to get off the van or they would get in trouble. (13 RT 2954.) Petitioner came outside and was mad because he thought that Robert had been playing on the van. (13 RT 2954.) Petitioner grabbed Robert by his hair, shook him, and then threw or pushed him to the ground. (13 RT 2954.) Robert said that his brother Michael saw what happened. (13 RT 2957-58.)

Robert indicated to Rascoe that his neck and the top of his head hurt. (13 RT 2956-57.) Brenda Hunt told Rascoe that she would have a doctor examine Robert. (13 RT 2957.)

Rascoe also talked to Michael, Robert's younger brother. (13 RT 2954-56.) Michael said that petitioner grabbed Robert by his hair, picked him up off the ground, and threw Robert backwards, which caused Robert to fall on his back. (13 RT 2955.)

ARGUMENT

I.

NO CONFLICT OF INTEREST AROSE FROM TRIAL COUNSEL'S PROSECUTION OF PETITIONER FOR ROBBERY OVER TWENTY YEARS BEFORE THE TRIAL IN THE PRESENT CASE

Petitioner claims that his lead trial counsel was ineffective because of a conflict of interest arising from counsel's previous prosecution of petitioner for a robbery in 1970. (Pet. 15.) The robbery was charged in the information as a sentencing enhancement and was later introduced as a circumstance in aggravation in the penalty phase. (Pet. 15; 3 CT 649-50, 652, 654-55; 13 RT 2984-85.) Petitioner is incorrect. No conflict arose from counsel's role as a prosecutor over twenty years before the present trial because petitioner cannot show an informed speculation that this adversely affected counsel's performance. Moreover, even assuming, arguendo, a conflict existed, petitioner cannot show a reasonable probability that this affected his conviction for murder or the jury's subsequent imposition of the death penalty.

A. Background

According to the exhibits submitted by petitioner, he was charged on January 6, 1970, by criminal complaint with one count of robbery occurring on January 2, 1970. (Petitioner's Exh. B, p. 6.) Petitioner ultimately pled guilty to first degree robbery, and an allegation of great bodily injury was stricken. (Petitioner's Exh. B, p. 20.)

In the pre-trial appearances for the 1970 case, several deputy district attorneys represented the People, including Oliver Rostain; Robert VanderNoor, who conducted the preliminary hearing; and Richard W. Bradshaw. (Petitioner's Exh. B, pp. 7-8, 10.) In connection with the 1970 case, petitioner's trial counsel in the present trial, Michael Sprague, then a deputy

district attorney, signed two requests for removal of prisoners, dated March 3, 1970, on the grounds that the prisoners were material witnesses. (Petitioner's Exh. B, pp. 12-13, 16-17.)

According to the declaration of Robert B. VanderNoor, a deputy district attorney at the Kern County District Attorney's office in 1970, Sprague was assigned to the felony trial team of the Kern County District Attorney's Office at that time. (Petitioner's Exh. A, p. 2.) VanderNoor asserts, "Michael Sprague's filing of the requests for removal of prisoners indicates to me that he was the deputy district attorney assigned to prepare and conduct the trial" in petitioner's case. (Petitioner's Exh. A, p. 3.)

The information in the present case, filed on September 23, 1994, alleged, inter alia, as to all counts that petitioner was previously convicted of robbery (§ 211), a serious felony (§ 667, subd. (a)) on March 27, 1970, and previously served a prison term in connection with that conviction (§ 667.5, subd. (b)). (3 CT 649-50, 652, 654-56.)

Sprague was appointed as petitioner's counsel of record on August 10, 1994, at the arraignment on the complaint. (1 CT 18.) Sprague was not actually present at that time; Gerald Cowan's counsel, Torres, made a special appearance on behalf of Sprague at the request of the court for purposes of the arraignment. (August 10, 1994, RT 8.) On August 24, 1994, Sprague appeared on behalf of petitioner. (August 24, 1994, RT 3-6.) On September 26, 1994, at arraignment on the information, the trial court appointed Sprague as counsel for petitioner. (September 26, 1994, RT 2-3.)

On June 10, 1996, the prosecution introduced evidence of petitioner's prior offenses, as People's Exhibit 69. (13 RT 2802-04.) Sprague argued that there was no evidence of a qualifying offense between 1978 and 1983. (13 RT 2803.) The trial court found the section 667.5, subdivision (b), allegation to be not true, but found true the allegation under section 667, subdivision (a), that

petitioner was convicted of a serious felony on or about March 27, 1970. (13 RT 2804-05.)

During the penalty phase, the prosecution introduced the evidence of petitioner's prior conviction (People's Exh. 69). (13 RT 2871.) Sprague objected to petitioner's incarceration history being included with the exhibit, and the prosecutor agreed that the portion objected to could be removed. (13 RT 2872.) Sprague stated that the existence of the prior conviction was not an issue. (13 RT 2873.)

At argument in the penalty phase, the prosecutor reminded the jury of the circumstances of the Mercks' murder and the circumstances of petitioner's robbery of Foster and Cruz, and reminded the jury that petitioner threw Robert Hunt down by the hair. (13 RT 2977-83.) The prosecutor suggested that petitioner had no respect for anyone and harmed people who could not help themselves, argued that petitioner's prior felony was a circumstance in aggravation, argued why certain circumstances in mitigation were not applicable, argued that petitioner's childhood did not excuse his responsibilities as an adult. (13 RT 2983-89.) The prosecutor argued that the proper sentence in petitioner's case was the death penalty. (13 RT 2989-90.) The jury returned a verdict of death on count 2. (6 CT 1574.) On August 5, 1996, the trial court imposed the enhancement pursuant to section 667, subdivision (a), on count 1 for a period of five years. (6 CT 1615.)

B. No Conflict Arose From Trial Counsel's Role As A Prosecutor Over Twenty Years Before The Present Trial

The right to effective assistance of counsel includes the right to representation free from conflicts of interest. (*People v. Cox* (2003) 30 Cal.4th 916, 948.) Under federal constitutional law, a defendant who fails to object at trial "must establish that an actual conflict of interest adversely affected his lawyer's performance." (*Ibid.*, quoting *Cuyler v. Sullivan* (1980) 446 U.S. 335,

350.) "'[T]he possibility of conflict is insufficient to impugn a criminal conviction.'" (*Ibid.*)

However, under the California Constitution,

> a defendant need only demonstrate a potential conflict, so long as the record supports an "informed speculation" that the asserted conflict adversely affected counsel's performance.

(*People v. Cox, supra*, 30 Cal.4th at p. 948.) However, such an "informed speculation" must be "grounded on a factual basis that can be found in the record." (*Ibid.*)

To determine whether counsel's performance was adversely affected, the reviewing court inquires as to whether counsel "pulled his punches," i.e., failed to represent the defendant as vigorously as he might have, had there been no conflict. (*People v. Cox, supra*, 30 Cal.4th at pp. 948-49.) When a conflict of interest causes an attorney not to do something, the record may not reflect such an omission. (*Id.* at p. 949.) Thus, the reviewing court examines the record to determine

> (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission.

(*Ibid.*)

In *People v. Clark* (1993) 5 Cal.4th 950, 996-999, a capital case, this Court found that the personal representation of a defendant by a public defender, Massini, seeking election as a district attorney did not adversely affect the defendant's representation. This Court noted that co-counsel, who did not suffer from any alleged conflict of interest, "was in a unique position to observe whether Massini's representation of defendant was adversely affected as a result

of her campaign." (*Id.* at p. 997.) Co-counsel's silence regarding any deficiencies in Massini's performance "reinforces our conclusion . . . that Massini's representation of defendant was not adversely affected by her personal interest in winning the election." (*Ibid.*)

Here, there is no factual basis to support an informed speculation that counsel did not represent petitioner as vigorously as he might have. Specifically, although petitioner proffers the records of his 1970 conviction as an exhibit in his petition (Petitioner's Exh. B), petitioner has cited nothing from that record of conviction that indicates his sentence was invalid, nor does he cite anything from that record of conviction, or any other part of the record now before this Court, that might have caused reasonable trial counsel to investigate the validity of his 1970 conviction, or to contest the validity of that conviction at trial. Although petitioner has submitted a declaration from co-counsel Sorena, that declaration is silent as to Sprague's representation of petitioner concerning the 1970 conviction. (Petitioner's Exh. C.) Thus, petitioner has not shown that "arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest[.]" (*People v. Cox, supra,* 30 Cal.4th at p. 949.) Therefore, petitioner's claim of denial of effective assistance of counsel based on a conflict of interest must fail.

Petitioner cites various other examples of purported substandard representation by counsel unrelated to the 1970 conviction, and asserts,

> it is reasonable to infer that this sub-standard representation emanated from the conflicting position in which Mr. Sprague found himself but failed to disclose either to his client or to the trial court.

(Pet. 19.) Respondent respectfully disagrees.

Although some conflicts are so basic that they completely undermine counsel's ability to provide effective representation, there are other conflicts whose potential impact is extremely focused. (*People v. Dancer* (1996) 45 Cal.App.4th 1677, 1686-87 [overruled on other grounds in *People v. Hammon*

(1997) 15 Cal.4th 1117, 1123].) In *Dancer*, the Sixth District Court of Appeals determined that a trial counsel's prior representation of the defendant in a matter resulting in a prior conviction could not have affected counsel's representation of the defendant outside the issue of contesting the validity of the prior conviction. (*Id.* at pp. 1685-86.)

Here, similarly, Sprague's prosecution of petitioner twenty years previously could not have affected his later representation of petitioner outside the narrow issue of the validity of his 1970 conviction. Thus, any conflict of interest arising out of Sprague's prior role as a deputy district attorney could not have affected petitioner's conviction or any part of the penalty phase of the trial outside the use of the prior conviction as an aggravating circumstance. Since, as discussed, post, any error in so using the prior conviction was harmless, petitioner is not entitled to reversal of his conviction or death penalty.

C. Even Assuming, Arguendo, A Conflict Existed, It Was Harmless

In order to show ineffective assistance of counsel, a defendant must show a reasonable probability that the outcome of his trial would have been different, absent the ineffective assistance. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; see also *People v. Clark, supra*, 5 Cal.4th at p. 997, fn. 22 [any error in failing to ensure that defendant was represented by two conflict-free counsel (§ 987, subd. (d)) harmless under *Watson*[25] standard].) Here, outside the imposition of the enhancement, petitioner can make no such showing. The validity of petitioner's 1970 conviction cannot have affected his conviction for the murder of the Mercks.

Respondent submits that, similarly, the validity of the 1970 conviction could not have affected the jury's determination that petitioner should receive the death penalty. Although the prosecutor introduced evidence of the conviction

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25. *People v. Watson* (1956) 46 Cal.2d 818, 836.

(13 RT 2871) and later argued that this was a circumstance in aggravation (13 RT 2984), this represented only a small part of the evidence presented at the penalty phase. Regardless of any challenge Sprague might have made to petitioner's 1970 conviction, the jury would still have heard, for example, the compelling evidence that petitioner robbed and bound Foster and Cruz at gunpoint. (13 RT 2853-57, 2874-75.) Moreover, the prosecutor spent much more time arguing that the other circumstances in aggravation, including the robbery of Foster and Cruz and the brutality of the murder of the Mercks, justified the death penalty in petitioner's case. (13 RT 2979-90.) Because of the other evidence properly presented at the guilt and penalty phases of the trial, it is not reasonably probable that, even if conflict-free counsel successfully challenged petitioner's 1970 conviction, this would have led to a different outcome in petitioner's conviction or in the jury's imposition of the death penalty. Thus, petitioner is not entitled to reversal on that basis.

II.

JUROR NO. 045882'S INCORRECT ANSWERS DID NOT PREJUDICE PETITIONER

Petitioner argues that his right to an impartial jury was violated "because Juror No. 045882 intentionally concealed that he previously had been arrested for a criminal offense and was then on probation." (Pet. 20.) Petitioner is incorrect. The record rebuts any presumption of prejudice that arose from Juror No. 045882's inaccurate answers.

A. Background

Juror No. 045882 pled guilty on February 6, 1995, to one count of violating section 415(1), fighting or challenging another person to fight in a public place, a misdemeanor, and was placed on probation for three years. (Petitioner's Exh. G, pp. 66, 68-69.) Records submitted by petitioner indicate the following

occurred: On January 14, 1995, Juror No. 045882 and another person engaged in a fist fight in a mall. (Petitioner's Exh. G, p. 76.) A Bakersfield police officer ultimately cited and released Juror No. 045882, and arrested the other person on charges of violating section 415(1) and section 12020.1 (illegal possession of a knife). (Petitioner's Exh. G, pp. 75-77.)

For voir dire in the instant trial, Juror No. 045882 completed a twenty-page questionnaire that asked, inter alia, whether he had ever been arrested, whether he had ever known anyone who was falsely accused of a crime, and whether he had ever been in a courtroom for any reason other than jury service. Juror No. 045882 answered that he had been arrested in 1991 for assault and battery, and the charges had later been dropped; that his brother had been falsely accused of a crime: "my brother was partly wrong but still had to serve 6 month [sic][;]" and that he himself had been in court for "tickets." (Petitioner's Exh. E, pp. 43, 47-48.)

Juror No. 045882 answered negatively the question

> Have you or your family members or close friends ever had any contact with law enforcement or the criminal justice system other than that previously mentioned in this questionnaire?

(Petitioner's Exh. E, p. 48) and left blank the final question on the questionnaire, which stated,

> If there is anything you would like to bring to our attention or you feel would bear on your ability to act as a juror, and it was not previously covered, please use the space below to indicate.

(Petitioner's Exh. E, p. 53.)

Juror No. 045882's other answers to this questionnaire indicated the following: He was a "utilities clerk[;]" was single and lived with his parents; had a five-month old child; believed he could be a fair and impartial juror; and had family members who owned firearms. (Petitioner's Exh. E, pp. 36-41.)

Juror No. 045882 felt that "some laws can change" when asked how he felt about the criminal justice system (Petitioner's Exh. E, p. 41); he stated about the

death penalty, "If Guilty why not" (Petitioner's Exh. E, p. 48); he believed the death penalty was imposed "too seldom" (Petitioner's Exh. E, p. 49); he did not belong to any organization opposing or favoring the death penalty; and he had no trouble imposing the death penalty in an appropriate case. (Petitioner's Exh. E, p. 50.) His next door neighbor had law enforcement training, and his uncle worked for the San Francisco County Sheriff's Department. (Petitioner's Exh. E, pp. 41, 46.)

Juror No. 045882's brother had been arrested; a close friend or relative had a problem with drugs or alcohol; a close friend or relative had been a victim of a burglary; and no type of crime particularly upset him. (Petitioner's Exh. E, pp. 43-45.) Juror No. 045885 had been a witness to a crime and had reported it to law enforcement but had not had to testify or identify anyone, and he had regular contact with members of law enforcement agencies. (Petitioner's Exh. E, pp. 45-47.)

During voir dire, Juror No. 045882 stated that his uncle was a sheriff in San Francisco, and his neighbors, to whom he talked "almost every day[,]" were local sheriff's deputies. (5 RT 1377.) Juror No. 045882 did not belong to any organizations that promoted or were interested in the criminal justice system, and he had never been a victim of crime. (5 RT 1378.)

Juror No. 045882 agreed that people who use drugs are more likely to commit crimes than those who do not use drugs, although he stated that people who did not take drugs also committed crimes. (5 RT 1376.) He promised that he would not convict a person based on that person's drug use where the circumstantial evidence was susceptible of more than one reasonable interpretation. (5 RT 1376-77.)

Juror No. 045882 understood that being charged did not necessarily mean that a person was guilty of a crime, and that just because one person had been murdered did not mean that another person must pay for that crime. (5 RT

1381-82 [agreeing with answers of another juror].) He understood that his role was to determine whether the defendant was guilty, not to "go out looking" for the guilty person. (5 RT 1382.) He would be satisfied with a juror in his state of mind sitting in judgment of him if he were a defendant. (5 RT 1379.)

When asked whether he or a close relative had been the victim of a crime, Juror No. 045882 responded, "My brother was just in here not too long for assault and battery." (4 RT 1040.) Juror No. 045882 further explained, "And me, it was about three years back – well, I didn't come to court, my brother went through. I didn't get convicted or nothing; dropped charges against me." (4 RT 1041.)

Juror No. 045882 believed that his brother had received too severe a sentence after, according to the juror, the purported victim in his brother's case used a knife to try to stab his brother and instead stabbed himself during the altercation. (4 RT 1042-43.) Juror No. 045882 promised not to hold the outcome of his brother's case against the prosecutor in the instant case. (4 RT 1043.)

B. Because There Is No Reasonable Probability That Juror No. 045882 Was Biased Against The Defendant, No Prejudice Arose From Juror No 045882's Incorrect Answers

"A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct." (*In re Hitchings* (1993) 6 Cal.4th 97, 111.) A juror's false answers on voir dire can prevent the parties from intelligently exercising their right to challenge a juror for cause and can "eviscerate a party's statutory right to exercise a peremptory challenge and remove a prospective juror the party believes cannot be fair and impartial." (*Ibid.*)

As a general rule, juror misconduct "raises a presumption of prejudice that may be rebutted by proof that no prejudice actually resulted." (*People v.*

Majors (1998) 18 Cal.4th 385, 417.) Whether prejudice arose from juror misconduct is a mixed question of law and fact subject to an appellate court's independent review. (*Ibid.*)

> Any presumption of prejudice is rebutted
>
> if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., *no substantial likelihood* that one or more jurors were actually biased against the defendant.

(*In re Hamilton* (1999) 20 Cal.4th 273, 296, emphasis in original.) This standard is a pragmatic one, based on the realities of courtroom life and on society's "strong competing interest in the stability of criminal verdicts[.]" (*Ibid.*) "'[Jurors] are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias.' [Citation.]" (*Ibid.*)

In *Hamilton*, the defendant made a number of juror misconduct claims relating to one juror, Gholston, including a claim that Gholston, read, clipped, and saved newspaper articles about the trial, contrary to admonitions. (*In re Hamilton, supra,* 20 Cal.4th at p. 301, n. 21.) This Court found that even if there were misconduct, any presumption of prejudice was rebutted, since the newspaper clippings contained neutral and evenhanded accounts of the trial that did not report material information not presented in the trial itself and thus were not inherently biasing. (*Ibid.*) Moreover, no inference of bias arose because a juror failed to resist the temptation to read news articles about the events, and there was no evidence that Gholston discussed the articles with other jurors or employed them in her deliberations. (*Ibid.*) Finally, the strong evidence of the petitioner's "brutal crimes minimizes any concern that any extraneous information in the articles was a significant influence on Gholston's guilt or penalty deliberations." (*Ibid.*)

In *People v. Carter* (2005) 36 Cal.4th 1114, 1205-1210, this Court rejected a claim of juror misconduct based on the juror's response to a questionnaire. In *Carter*, the juror answered "No" to Question 61, which asked, "Have you ever been in a situation where you feared being hurt or being killed as a result of violence of any sort?" (*Id.* at p. 1205.) In response to other questions on the questionnaire, the juror stated that she had been a victim of burglaries in San Jose, Pasadena, and West Los Angeles; and she stated, "[E]veryone has feares [sic] + you don't know what will happen in the next minute." (*Id.* at p. 1207.)

The juror, who was 31 years old when she completed the questionnaire, was questioned at a motion for new trial. (*People v. Carter, supra,* 36 Cal.4th at p. 1206 and n. 46.) She revealed that when she first lived on her own in an apartment, at age 18 or 19, she slept with a knife one night because she could not sleep, and feared being raped and murdered. (*Id.* at p. 1206, n. 46.)

This Court held that the juror had not committed misconduct, and that her voir dire clearly established her qualifications as a juror. (*People v. Carter, supra,* 36 Cal.4th at p. 1208.) This Court continued,

> Moreover, even if we were to assume Juror K.'s answer to Question No. 61 was inaccurate, evasive, and material, the circumstance that as a teenager living alone for the first time, Juror K. was "paranoid for a short period of someone breaking in," leading her to keep a kitchen knife in close proximity overnight, does not provide any basis for concluding that she harbored undisclosed juror *bias.* Accordingly, the presumption of prejudice was rebutted.

(*Id.* at p. 1209, emphasis in original; fn. omitted.)

Here, a similar result obtains. Because of Juror No. 045882's answers to the questionnaires, the parties knew, despite the juror's omission of his recent conviction, that he had previously been charged with a crime, that he had a relative and a neighbor who were both associated with law enforcement, and that he believed his brother had been wrongfully convicted of a crime. (Petitioner's Exh. E, pp. 41, 43, 46-47.) These answers provided the parties

ample opportunity to voir dire Juror No. 045882 and probe for bias, as in fact they did. In response to the questions of both parties, Juror No. 045882 promised that he would not convict a person merely because he was a drug user (5 RT 1376), that he would not "go out looking" to find someone guilty merely because a heinous crime had been committed (5 RT 1382), and that he would not hold the perceived wrongful conviction of his brother against the prosecutor in the instant case. (4 RT 1043.) These answers, plus Juror No. 045882's answers to the other questions in the questionnaires, established his qualifications as a juror and his lack of bias.

Juror No. 045882's recent misdemeanor conviction and current probation did not indicate bias against petitioner, any more than the fact that the juror in *Carter* slept with a knife one night indicated bias against the defendant in that case. This, and the fact that the parties were able to conduct effective voir dire based on the answers Juror No. 045882 gave in the questionnaires, dispel any presumption of prejudice that arose from his omission of his recent misdemeanor conviction and then-current probation.[26/] Thus, petitioner has not made out a prima facie case of prejudicial juror misconduct, and his claim accordingly fails.

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26. To the extent petitioner specifically complains that Juror No. 045882 was deliberately untruthful in his answer to Question 34 (Pet. 21-22), respondent respectfully disagrees. The question asked whether the juror had ever been arrested. (Petitioner's Exh. E, p. 43.) Respondent submits that Juror No. 045882 may not have seen his citation and release by the police officer (Petitioner's Exh. G, p. 75) as an "arrest" requiring a positive response to this question.

III.

PETITIONER'S TRIAL COUNSEL WAS NOT INEFFECTIVE IN THE GUILT PHASE OF THE TRIAL

Petitioner makes various claims that his trial counsel acted ineffectively during the guilt phase of his trial. (Pet. 24-63.) As discussed post, these claims fail.

A. Because Criminalist Greg Laskowski's Use Of Mikrosil Was Not A New Scientific Technique, Petitioner's Counsel Was Not Ineffective For Not Presenting Expert Evidence To The Contrary

Petitioner, citing a declaration from Jim Norris, a former director of the San Francisco Police Department Forensic Services Division and currently a forensic science consultant, asserts that trial counsel was ineffective for failing to present expert testimony to challenge the admissibility of Laskowski's firearm identification based on the Mikrosil casting technique. (Pet. 27-30.) Petitioner asserts that had testimony been presented from a qualified expert, it is reasonably probable that the trial court would have excluded Laskowski's testimony that the bullets recovered from the Mercks were fired by the handgun petitioner "allegedly gave to Lutts and Phinney." (Pet. 31.)

Petitioner is incorrect. First, Laskowski's use of Mikrosil casting did not constitute a new scientific technique subject to analysis under *Kelly*,[27] meaning that it was not reasonably probable the trial court would have excluded the evidence, even had an expert testified similarly to the assertions in Norris's declaration. Second, petitioner has not shown there was no tactical reason for counsel's decision not to call an expert to the stand. Finally, admission of the evidence did not prejudice appellant.

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27. *People v. Kelly* (1976) 17 Cal.3d 24, 30.

1. Background

On April 15, 1996, during jury selection, but outside the presence of any prospective jurors, Laskowski testified to the following: After he originally excluded the .25-caliber Colt as the murder weapon, he learned, on April 11, 1996, that the gun might have been damaged. (2 RT 433-36.) Subsequently he examined the gun, finding damage to the barrel. (2 RT 436-37.) He then used Mikrosil to make a cast of the barrel. (2 RT 438.) Laskowski opined that the gun fired the bullets that were recovered from Clifford Merck (2 RT 439) and stated he was certain of his opinion. (2 RT 453.)

Laskowski informed the prosecutor of this development on Friday, April 12, 1996. (2 RT 440.) However, the defense did not learn about the casting comparison until Laskowski's April 15, 1996, testimony. (2 RT 472.)

At the time of this testimony, Laskowski was completing a written report on his findings, and was also contacting other criminalists to see if there was a history of using casts to make bullet identifications. (2 RT 453-54.) Laskowski stated that this process had been done before, but he did not know of any person testifying in court as to this. (2 RT 457.) In training he learned to make casts of firearm barrels to discriminate between them without test firing. (2 RT 457.)

Defense counsel stated that the gun was "extremely important" because Phinney's testimony would put the gun "in the immediate presence or in the actual possession of the defendant shortly after the killings . . .." (2 RT 467.) Counsel stated that both defense counsel were fully occupied with this case, asked that the new evidence be excluded on discovery grounds, or, in the alternative, that a reasonable continuance be granted to prepare for this evidence. (2 RT 473.)

The court estimated that it would be three weeks before there were peremptory challenges, and approximately a month or more before this evidence would be presented to the trier of fact. (2 RT 476-77.) The trial court

ultimately denied the motion for a continuance without prejudice. (2 RT 485.) The trial court stated that any potential *Kelly-Frye*[28] issue would be dealt with as the need arose. (2 RT 487.)

At the Evidence Code section 402 hearing, Laskowski testified as to his qualifications, including his advanced training in firearms and tool marks, and membership in various professional organizations, to some of which Laskowski had presented published work. (9 RT 2128-29.) He met with other professionals on a regular basis to discuss firearms and tool mark related matters. (9 RT 2129.)

Before April 15, 1996, Laskowski test-fired bullets from the Colt .25, and concluded that it did not fire the bullets recovered from Clifford Merck. (9 RT 2130.) Later, Laskowski received information that the barrel of the gun had been altered. (9 RT 2130-31.) Laskowski reexamined the gun and found there were disturbances in the land impressions near the muzzle end of the barrel. (9 RT 2131.) These disturbances made it impossible to match test bullets fired from the gun with bullets fired before the barrel was altered. (9 RT 2132.)

In forensic training, Laskowski learned to make molds of the barrels to show that each firearm has a unique signature. (9 RT 2133.) Laskowski had previously used Mikrosil, a silicone casting material highly regarded by firearms and tool marks examiners, to cast firearms barrels and tool marks. (9 RT 2134.)

In the present case, Laskowski used Mikrosil according to the manufacturer's directions and according to a paper in a professional journal, to make a cast of the barrel of the firearm, which he then removed from the barrel, "much like pulling a cork from a wine bottle." (9 RT 2134.)

The mold showed the damage to the barrel. (9 RT 2135.) Laskowski realized that the markings on the mold from the interior of the barrel resembled markings on the surface of a bullet, particularly the land and groove

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28. *Frye v. United States* (D.C. Cir 1923) 293 F. 1013.

impressions. (9 RT 2136.) Laskowski determined that the bullets recovered from Clifford Merck were fired from the Colt .25 caliber pistol. (9 RT 2136-37.)

Laskowski opined that his technique was scientific "in that the outcomes are as expected" but that "[i]t is by no means a new scientific procedure." (9 RT 2137.) Laskowski had never used this process for bullet comparison in court. (9 RT 2142.) Laskowski could not find an instance in California in which someone had testified to this process in a California court. (9 RT 2142-44.)

Laskowski talked to a dozen or more people about this technique. (9 RT 2153.) Although experts Laskowski talked to had not testified in court as to a comparison between a Mikrosil casting of a barrel and a bullet (9 RT 2137-40), they encouraged him to use this technique and to let them know the outcome. (9 RT 2150.) They saw nothing inherently wrong with the technique, and "thought that it was an excellent technique due to the fact that the alternative would be some form of destruction to the evidence." (9 RT 2152-53.) No one Laskowski spoke to thought that it was not an acceptable technique. (9 RT 2153.) Petitioner's expert did not tell Laskowski that the technique was not acceptable. (9 RT 2153.)

Lead casts of barrels were used in the past to determine the measurement of lands and grooves in firearms barrels, but that was less common as of the time of trial because of the introduction of Mikrosil and other casting materials. (9 RT 2140.)

Laskowski first learned of using Mikrosil to cast barrels in 1985. (9 RT 2144.) He first heard of ballistics comparisons of bullets by using Mikrosil casting through a paper given at a 1995 meeting of the Association of Firearms and Tool Marks Examiners. (9 RT 2144.) Dr. Levine, the person who presented this paper, was from a laboratory in Pittsburgh and probably had never testified in court on this process. (9 RT 2144-45.)

One variety of Mikrosil had problems with light absorption (9 RT 2148-49), but Laskowski did not use this brand of Mikrosil. (9 RT 2153.) The type of Mikrosil he used was opaque and allowed light reflection similar to that of a bullet made of lead or coated in copper or brass. (9 RT 2154.)

Air bubbles could also be a "technique-oriented problem" with Mikrosil. (9 RT 2149.) Mikrosil also can shrink one percent or two percent. (9 RT 2149.) Some research indicated that this was not significant; other research indicated that it might be significant. (9 RT 2149.) Laskowski observed some shrinkage on the Mikrosil mold that he made in the present case, but it did not affect his comparison. (9 RT 2154.)

Because Mikrosil is not rigid, some distortion can occur in longer casts of the material. (9 RT 2155.) However, Laskowski cut the mold of the barrel into a number of short pieces to accommodate the working area of the microscope that he used. (9 RT 2156.)

Sometimes when Mikrosil is not mixed properly with its hardening agent, some parts will not harden, creating voids in the cast. (9 RT 2156-57.) However, if this occurs, it is simple to perform another cast. (9 RT 2157.)

Laskowski opined that the technique of comparing bullets using Mikrosil was not experimental. (9 RT 2151.) Recording tool marks with an elastomeric material was previously done, and firearms examination was essentially a tool mark type of examination. (9 RT 2152.) Laskowski regarded ballistics examination as a scientific technique. (9 RT 2152.)

Petitioner presented no witnesses at the hearing. (9 RT 2157.)

The prosecutor argued that there was no testimony that this was not an acceptable technique, and that under *Kelly*, even if this were a new scientific technique, it only had to be acceptable to the scientific community. (9 RT 2158.)

Petitioner, through counsel, cited this Court's opinion in *People v. Leahy* (1994) 8 Cal.4th 587 for the proposition that "if it is not routinely done in a laboratory or new to science, the application or the technology is new, it comes under *Kelly-Frye*." (9 RT 2159.) The court ruled,

> What we're dealing with here is simply – is an old procedure that has been employed for years in terms of identifying . . . a firearm as being that which fired a slug, that has been with us for years and a little bit different technique, possibly, but the basic science, if you will, is the same, it is not a new technique and new process.

(9 RT 2159-60.) The trial court overruled petitioner's objection to the evidence. (9 RT 2160.)

2. Laskowski's Use Of Mikrosil Casting Was Not A New Scientific Technique

In *Kelly*, this Court set forth a three-part test for determining the admissibility of expert evidence based on a new scientific technique: 1) the reliability of the method must be established, usually by expert testimony; 2) the witness furnishing the testimony must be properly qualified as an expert to give an opinion on the subject; and, 3) the proponent of the evidence must demonstrate that the correct scientific procedures were followed in the particular case.

> The *Kelly* test is intended to forestall the jury's uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate.

(*People v. Venegas* (1998) 18 Cal.4th 47, 80.)

However, where a procedure isolates physical evidence whose existence, appearance, nature, and meaning are obvious to the senses of the layperson, "'the reliability of the process in producing that result is equally apparent and need not be debated under the standards of *Kelly*.'" (*People v. Ayala* (2000) 24 Cal.4th 243, 281, quoting *People v. Webb* (1993) 6 Cal.4th 494, 524.) "'[A]bsent some special feature which effectively blindsides the jury, expert

opinion testimony is not subject to *Kelly/Frye*.'" (*People v. Rowland* (1992) 4 Cal.4th 238, 266, quoting *People v. Stoll* (1989) 49 Cal.3d 1136, 1157.) A trial court's decision on the admissibility of evidence is reviewed for abuse of discretion, but the reviewing court independently determines whether a particular legal principle, such as the *Kelly-Frye* rule, is applicable to a particular factual scenario. (*People v. Rowland, supra*, 4 Cal.4th at p. 266.)

In *Ayala*, this Court held that *Kelly* was inapplicable to a procedure in which a victim was x-rayed with bullets of a known size taped to his skin, so that the size of a bullet still lodged in his body could be determined. (*People v. Ayala, supra,* 24 Cal.4th at pp. 280-81.) This Court reasoned 1) the testifying expert, a radiologist could testify that the relative sizes of the bullets were not distorted by the x-rays, and 2) the procedure was not an experiment, meaning that the *Kelly* test was not applicable. (*Id.* at pp. 281-82.)

Similarly, in *Rowland*, this Court determined that *Kelly* was inapplicable to a doctor's testimony that a lack of physical trauma was not inconsistent with non-consensual intercourse. (*People v. Rowland, supra,* 4 Cal.4th at p. 266.) This Court reasoned that the testimony implicated no new scientific technique, since it was based fundamentally on physical examination by the testifying doctor and other doctors, and since the testimony exhibited no special feature that effectively blindsided the jury. (*Ibid.*)

Ballistics comparisons of bullets to identify a firearm used in a shooting is a well-established method that does not implicate *Kelly-Frye* analysis, and petitioner does not contend to the contrary. Laskowski's testimony also established that Mikrosil casting is used to aid identification of tool marks (9 RT 2134), and even to distinguish gun barrels from one another (2 RT 457), again, something neither petitioner nor Norris's declaration disputes. Thus, petitioner's claim that Laskowski's use of Mikrosil to identify the firearm as the murder weapon constituted a new scientific technique is premised on the idea

that Mikrosil casting of barrels to identify the firearm from which a bullet is fired is a fundamentally different technique both from ordinary ballistics analysis *and* from toolmark analysis. Moreover, it also depends on there being some special feature to the process that would effectively blindside the jury in its determination of the facts.

Respondent submits that petitioner has made no such showing. Laskowski testified that firearms analysis was a type of toolmark analysis (9 RT 2151-52), and Norris does not contradict this testimony in his declaration. Since Laskowski used Mikrosil in his analysis of the gun barrel to make a casting in the same way Mikrosil was generally used to make casts in tool mark analysis, Laskowski's technique was not a new scientific technique subject to *Kelly*.

Moreover, petitioner has not shown that Laskowski's technique had any special aspect that blindsided the trier of fact. True, Norris's declaration describes potential flaws with Laskowski's technique, such as the fact that features on a barrel and Mikrosil cast might not look the same as the marks on a bullet, and the fact that residue on the barrel might affect the quality of the Mikrosil cast. (Petitioner's Exh. H, pp. 82-83.) However, these were matters that could be pointed out to the trier of fact, through cross-examination, presentation of defense expert testimony, and argument. They are not matters that are so esoteric as to be beyond the understanding of the average juror, if properly explained. Norris's declaration does not show to the contrary. Thus, Laskowski's technique was not subject to *Kelly* analysis, and the trial court properly admitted Laskowski's testimony.

3. Petitioner Has Not Shown There Was No Tactical Reason For Not Calling An Expert To The Stand

A defendant bears the burden of affirmatively showing by a preponderance of the evidence that he is entitled to relief on a claim of ineffective assistance of counsel. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

> The benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.

(*Strickland v. Washington, supra* 466 U.S. at p. 686.) Appellant must prove that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, appellant would have received a more favorable result. (*Id.* at pp. 688, 696; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance. (*Strickland v. Washington, supra*, 466 U.S. at p. 689.)

No ineffective assistance may be found where the record contains no explanation for the alleged failure unless counsel was asked for an explanation and failed to give one, or unless there could be no satisfactory explanation. (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.) The record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission. (*People v. Ray* (1996) 13 Cal.4th 313, 349.)

Here, petitioner's lead counsel passed away on July 26, 2001 (Petitioner's Exh. C, p. 24), and petitioner has not offered any explanation for counsel's decision not to call an expert at the *Kelly/Frye* hearing. Petitioner offers a declaration from co-counsel James Sorena as an exhibit. (Petitioner's Exh. C.) However, that declaration does not discuss any tactical reasons behind the decision not to call an expert at the *Kelly/Frye* hearing, although it does contain a very general statement that

> As lead counsel, Mr. Sprague was responsible for all trial decisions, including what defenses to pursue, what motions to file, which witnesses to call, and what legal objections to make.

(Petitioner's Exh. C, p. 24.) Thus, we simply have no way of knowing, on this record, why counsel did not call an expert at the *Kelly/Frye* hearing, and,

therefore, unless there could be no rational explanation for the omission, petitioner's claim of ineffective assistance of counsel must fail. In fact, there are potential tactical reasons why Sprague may have chosen not to call an expert at the Evidence Code section 402 hearing.

It is possible, for example, that Sprague talked to one or more experts who opined that Laskowski's method was a viable method of identifying from which firearm a spent bullet was fired. Norris's declaration does not foreclose such a result. Although the declaration states that experts in the field, including Norris, discussed Mikrosil casting and reached a consensus that it should not be used (Petitioner's Exh. H, p. 82), it does not state that all experts in the field of firearm identification reached this opinion, nor does it even name any of the experts, other than Norris himself, who held this opinion.

It is also possible that the expert or experts Sprague consulted, although opining that the Mikrosil method was unreliable, also opined, for reasons unstated on this record, that Laskowski's ultimate conclusion as to the identity of the gun that fired the bullets was correct. Again, Norris's declaration does not foreclose this result. Although Norris opines that Laskowski's identification was unreliable (Petitioner's Exh. H, p. 83), he does not state definitively that the identification was incorrect, or even that it was impossible to match the bullets from Clifford Merck to the gun.

Under either of these possibilities, reasonable counsel may have concluded that it was better to proceed in the *Kelly/Frye* hearing by way of vigorous cross-examination and argument, as in fact, Sprague did, rather than risk the revelation of undesirable evidence, by way of discovery, direct examination, or cross-examination. Thus, petitioner cannot show ineffective assistance of counsel based on the fact that counsel did not call an expert at the *Kelly/Frye* hearing to rebut Laskowski's testimony.

4. Petitioner Cannot Show Prejudice From The Alleged Omission To Call An Expert

A defendant claiming ineffective assistance of counsel must show there is a "reasonable probability" that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Strickland v. Washington, supra,* 466 U.S. at p. 694.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Ibid.*)

Here, petitioner cannot show a reasonable probability that the outcome of the trial would have been different, even had Laskowski not been allowed to opine that the .25-caliber pistol recovered from the hotel room fired the bullets that killed Clifford Merck. The pistol was the same caliber as the murder weapon (9 RT 2186-89; 10 RT 2301-02), and there was strong evidence that it was Clifford Merck's pistol. (9 RT 2198 [initials carved into grips]; 7 RT 1882-83 [Watts states gun resembles one owned by Clifford; also testifies to Clifford's habit of marking items with his initials].) Moreover, petitioner's fingerprints matched fingerprints found in the Merck house (8 RT 1957-59), and he was linked with other property from the Merck home. (6 RT 1655-58 [Phinney's testimony]; 7 RT 1872-73; 9 RT 2161-63 [turquoise ring purchased by Catherine Glass from petitioner].)

Given this evidence, there is no reasonable probability that the jury would have reached a different conclusion, even without hearing the ballistics testimony about which petitioner now complains. Thus, petitioner's claim of ineffective assistance of counsel based on Sprague's decision not to call an expert at the Evidence Code section 402 hearing must fail.

B. Counsel Was Not Ineffective For Not Presenting Evidence That The Match Between The Latent Prints At The Merck Residence And Petitioner's Known Prints Was Unreliable

Petitioner contends his trial counsel was ineffective for not presenting evidence "that would have established the unreliability of the fingerprint identifications made by the prosecution witnesses." (Pet. 35.) According to petitioner, evidence showing that fingerprint identification was not a valid science . . . was well known at the time of petitioner's trial. (Pet. 35.)

In support of this contention, petitioner submits a declaration from Simon Cole, a professor of criminology at the University of California, Irvine, who specializes in "the historical and sociological study of the interaction between science, technology, law, and criminal justice." (Petitioner's Exh. I, p. 86.) The declaration asserts that fingerprint analysis is subjective, and that the certainty of an examiner "is not scientifically absolute and quantifiable by error rates." (Petitioner's Exh. I, p. 99.) Thus, according to Cole,

> So strong a conclusion as that offered by a fingerprint examiner that the latent prints and the suspect's prints definitively belong to one and the same person is not warranted by what is known about either the variability of human friction ridges or the accuracy of forensic fingerprint identification.

(Petitioner's Exh. I, p. 99.)

However, Cole's declaration does not state that the asserted unproved reliability of fingerprint analysis was so widely known in 1996 that any competent examiner with whom trial counsel consulted would have been aware of it. Indeed, Cole's declaration gives the opposite impression:

> The general public and *latent print examiners* often assume that forensic fingerprint identification is reliable because of the "fact" that no two fingerprints are exactly alike . . ..

(Petitioner's Exh. I, p. 94, emphasis added.) Respondent notes that many of the sources Cole cites in his declaration were published after 1996, and thus would have been unavailable to trial counsel and to any expert with whom counsel

might have consulted. (Petitioner's Exh. I, n. 1 [1998, 1999], n. 2 [2005 through 2007], n. 3 [2001], n. 4 [2001], n. 5 [2002], n. 7 [2003], n. 8 [2002], n. 9 [2001], n. 10 [2006], n. 11 [2001], n. 12 [2003], n. 13 [2002], n. 14 [2000], n. 17 [2004], n. 18 [2006], n. 19 [2006], n. 22 [2005], n. 23 [2006].)

Thus, neither Cole's declaration nor anything else submitted by petitioner to this Court indicates that the purported unreliability of fingerprint evidence was so widely known among either the defense bar or fingerprint experts in 1996 that any competent counsel would have attempted to present evidence thereon. Nor has petitioner shown that there was an expert witness in 1996 available to petitioner's counsel who was ready, willing, and able to testify as to the unreliability of fingerprint evidence. By way of example, Cole's early articles on fingerprint identification appear to have been published in 1998 and 1999, and his Ph.D. dissertation was published in 2001, implying that Cole himself may not have been entirely versed on the topic before 1998. (Petitioner's Exh. I, p. 87.)

Even assuming petitioner's trial counsel knew of the asserted unreliability of fingerprint evidence and had an available expert witness who could testify thereon at the time of petitioner's trial, petitioner has not shown that counsel had no tactical reason for refusing to present this evidence. It is possible that counsel decided such evidence would be too esoteric and unconvincing to be likely to produce a favorable result for petitioner, and instead reached a reasoned decision to attack, through cross-examination, the apparent weaknesses of the fingerprint identification in petitioner's particular case and the possible errors in obtaining latent prints that might produce an erroneous fingerprint identification. Respondent notes, for example, that counsel, during his cross-examination of Roper, emphasized that Roper's work had been reviewed a number of times before 1984 and he had continued to work in the fingerprint section (6 RT 1596-97); cross-examined Pierce on the frequency of

certain characteristics of fingerprints and on the effects of manual labor on a person's fingerprints (8 RT 1967-74); vigorously cross-examined Jones on Roper's continued presence in the fingerprint section after Jones held the opinion that Roper was incompetent (8 RT 2007-15); and cross-examined Martin Collins on the factors that can affect the lifting of fingerprints and on the fact that fingerprint experts occasionally disagree. (8 RT 2026, 2042-45.) Counsel's choice to proceed thus through cross-examination does not render his representation incompetent.

It is notable that Cole does not specifically state the identification of petitioner's fingerprints was erroneous, instead pointing out 1) the inconsistency between the examiners in the present case is illustrative of the inconsistency that sometimes arises between latent print examiners (Petitioner's Exh. I, p. 92); 2) examiners are typically given prints that another examiner has already identified as a match (Petitioner's Exh. I, p. 96); and, 3) it is highly misleading for an examiner to state that a particular latent print was made by a defendant's finger in light of the subjective nature of fingerprint examination and the fact that the certainty of the examiner is not quantifiable by error rates. (Petitioner's Exh. I, p. 99.) Counsel may have reached a reasoned decision that the absence of an ultimate conclusion that the fingerprint identification in the present case was either erroneous or entirely without basis would render testimony such as that found in Cole's declaration unconvincing to a jury. Such a decision is not outside the wide range of latitude accorded to trial counsel on review.

Nor can petitioner show prejudice from the lack of testimony about the asserted unreliability of fingerprint evidence in general. As stated above, nothing in Cole's declaration indicates that the latent fingerprints found in this case were *inconsistent* with petitioner's known fingerprints, or that the fingerprint identification made in this case was otherwise *erroneous*. Without such evidence, and with evidence from three qualified experts (8 RT 1957-59

[Pierce] 1994-95 [Jones], 2029-31 [Collins]) that petitioner was indeed the source of two fingerprints found in the Merck residence, it is not reasonably probable that evidence along the lines of the statements in the Cole declaration would have led to a more favorable outcome for petitioner at trial. Although Cole's declaration points to the inconsistency of the identification in the present case, respondent notes that only Roper, of all the people to compare the prints found at the Merck residence with petitioner's prints, excluded petitioner as the source of those prints. It is noteworthy that Roper himself admitted to suffering failing eyesight and to being under stress when he left the identification section in 1987. (6 RT 1589.)

The lack of prejudice is particularly apparent given the other evidence at trial that petitioner possessed items of property from the Merck residence (6 RT 1655-58 [Phinney's testimony]; 7 RT 1872-73; 9 RT 2161-63 [turquoise ring purchased by Glass from petitioner]); and that the .25-caliber Colt associated with petitioner was Clifford's gun and was used to commit the murders (7 RT 1872-73, 1882-83; 9 RT 2186-89, 2198; 10 RT 2301-02). Because petitioner cannot show prejudice, his claim of ineffective assistance of counsel due to the omission of testimony as to the unreliability of fingerprint evidence must fail.

C. Appellant's Trial Counsel Was Not Ineffective For Not Objecting To Emma Foreman's Testimony On Constitutional Grounds

At trial, petitioner objected to admission of certain statements by Emma Foreman to Shafter Police Officer John Porter to the effect that petitioner told her he had killed an old couple in Bakersfield, on the ground that the statements did not meet the requirements of Evidence Code section 1235. (Pet. 35-36; 10 RT 2389-92.) Petitioner now asserts that trial counsel was ineffective for not objecting to the statements on Confrontation Clause and due process grounds. (Pet. 35; Petitioner's Exh. J.) Petitioner is incorrect. Any objection on

Confrontation Clause grounds would have been futile, and petitioner has waived any separate due process claim because he has offered no reasoned argument or authority on appeal or in the instant petition showing that his right to due process was violated by admission of the statement.

Counsel is not ineffective for failing to make futile motions. (*People v. Price* (1991) 1 Cal.4th 324, 387.) The Confrontation Clause does not bar admission of a statement so long as the declarant is available at trial to defend or explain it. (*Crawford v. Washington* (2004) 541 U.S. 36, 59, n. 9; see also *United States v. Owens* (1988) 484 U.S. 554, 559 [Confrontation Clause "guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish'"].) Here, Emma Foreman testified and was cross-examined at trial. (9 RT 2242-50.) Moreover, she was subject to recall. (10 RT 2391.) Petitioner's Confrontation Clause claim accordingly fails, and any objection by trial counsel would have been futile.

Petitioner also claims that the statements violated his right to due process, and trial counsel was ineffective for not objecting on that ground. (Pet. 36-37; Petitioner's Exh. J, p. 105 [AOB 156].) However, to the extent this claim is independent of petitioner's Confrontation Clause claim, petitioner offers no authority or reasoned argument in support of this proposition. (Pet. 36-37; Petitioner's Exh. J, p. 105 [AOB 156].) Accordingly appellant has forfeited this claim. (*People v. Callegri* (1984) 154 Cal.App.3d 856, 865 [disapproved on other grounds, as stated in *People v. Coffman* (1986) 184 Cal.App.3d 1539, 1542]; *People v. Gionis* (1995) 9 Cal.4th 1196, 1214, n. 11 [matters are not properly raised if "perfunctorily asserted without argument or authorities in support"].)

In any case, petitioner cannot show prejudice from the admission of Foreman's statement. As discussed ante, the evidence against petitioner was

strong (Arguments III.A.4., III.B), and it is not reasonably probable that exclusion of the statements would have led to a more favorable result for petitioner. Thus, his claim of ineffective assistance of counsel based on inadequate objection to Foreman's statements must fail.

D. Petitioner's Trial Counsel Was Not Ineffective For Not Bringing Constitutional Objections To The Admission Of Phinney's Extrajudicial Statements

Petitioner objected at trial to certain statements Phinney made to Sergeant John Diederich on hearsay grounds; objections the trial court overruled on the grounds that the statements were admissible under Evidence Code section 1237. (Pet. 36; 7 RT 1775-76, 1779, 1787-89, 1791-96, 1806.) Sergeant Diederich ultimately testified as to Phinney's statements to him, including statements by Phinney regarding certain property he saw at the house on Pearl Street in the presence of petitioner, including two "government-type checks" in the name of Merck, a man's billfold with carving on it, costume jewelry, and a 1922 silver dollar. (7 RT 1843-47.)

Petitioner now asserts that his trial counsel was ineffective for not objecting to the statements on Confrontation Clause and due process grounds. (Pet. 37.) Petitioner is incorrect. Any objection on Confrontation Clause grounds would have been futile, and he has forfeited his due process argument.

Both Phinney and Sergeant Diederich were cross-examined at trial (6 RT 1672-94, 1711-45; 7 RT 1848-70.) Phinney was subject to recall (6 RT 1745) and, presumably, given the length of the trial, Sergeant Diederich could have been subpoenaed, as well. (RB 109.) Because Phinney, the declarant, was available at trial, petitioner's Confrontation Clause argument fails, and any objection by trial counsel would have been futile. (*Crawford v. Washington, supra*, 541 U.S. at p. 59, n. 9; *United States v. Owens, supra*, 484 U.S. at p. 559.) Because petitioner offers no reasoned basis or assertion of authority

independent of his Confrontation Clause argument for his proposition that his right to due process was violated by the admission of Phinney's statement (Pet. 36-37; Petitioner's Exh. J [AOB 152-63]), that claim fails as well. (*People v. Callegri, supra,* 154 Cal.App.3d at p. 865; *People v. Gionis, supra*, 9 Cal.4th at p. 1214, n. 11.)

In any case, given Phinney's trial testimony as to the items he saw at the house (6 RT 1654-60), and given the other evidence presented at trial, it is not reasonably probable that petitioner would have received a more favorable result absent the evidence of Phinney's statements to Sergeant Diederich. Accordingly, petitioner's claim of ineffective assistance of counsel fails.

E. Petitioner's Trial Counsel Was Not Ineffective For Not Including The Magistrate Judge's Admonition Limiting Tags's Testimony When Reading That Testimony To The Jury

Petitioner argues that his trial counsel was ineffective for not including a magistrate judge's admonition during Tags's preliminary hearing testimony in counsel's reading of Tags's testimony at trial. (Pet. 37; 9/7/94 RT 169-70; 10 RT 2384-85.) Petitioner is incorrect.

1. Background

During Tags's preliminary hearing testimony, on cross-examination by appellant's counsel, Tags stated that she hated petitioner because he had her work as a prostitute, because he beat her, "and other things." (9/7/94 RT 154-55.) On redirect, when asked to explain what other reasons Tags had for hating petitioner, she explained,

> Why is because me havin' it in my own mind that – what I think that he's done, you know; and other things, too.
>
> And I can't say that he done it because I wasn't there or nothing; but, in my own mind, I would . . . always hate him . . ..

(9/7/94 RT 169.)

Tags explained that petitioner "hurt people that shouldn't have been hurt [sic][,]" the people in this case. (9/7/94 RT 170.) Over an objection by Gerald Cowan's counsel, Torres, on grounds of speculation, the trial court admitted the statement, but not for its truth, when the prosecutor explained that the statement went to Tags's state of mind. (9/7/94 RT 170.)

At trial, petitioner, through counsel, objected to admission of the Tags's statement that she hated petitioner because she thought he hurt the people in the instant case, on the grounds of relevance and prejudice under Evidence Code section 352. (7 RT 1834.) In the alternative petitioner requested a limiting instruction. (7 RT 1835.) The trial court ruled, "Just leave in the statement by the court that it won't be admitted for the truth. Any other limiting instruction will be given the jury at the appropriate time." (7 RT 1835.) Subsequently, Sprague read the relevant portion of the transcript in court, but did not read in the objection or the magistrate judge's comment that it was not considering the statement for its truth. (10 RT 2384-85.)

2. Any Error Is Harmless

As discussed, ante (Argument III.A.4.), the evidence against petitioner was strong: fingerprint evidence (8 RT 1957-60, 1994-95, 2003-04); evidence that petitioner possessed Clifford's .25 caliber automatic pistol that was the murder weapon (6 RT 1660-63; 8 RT 2058; 9 RT 2196-98); and, evidence that petitioner possessed items from the Mercks' residence (6 RT 1654-59; 9 RT 2161-63, 2168-73). Moreover, as discussed more fully in respondent's brief (RB 153), Tags's statement that "I can't say that he done [sic] it because I wasn't there or nothing" (10 RT 2384) told the jury that her beliefs were just that – beliefs and not established facts. In light of the strength of evidence against appellant, and Tags's statements that showed the limitations of her knowledge, it is not reasonably probable that inclusion of the magistrate court's statement of the limitation of the evidence would have led to a more favorable

result for petitioner. Thus, petitioner cannot show prejudice from his counsel's omission of that statement, and his ineffective assistance of counsel claim must fail.

F. Trial Counsel Was Not Ineffective For Not Objecting To Mitzi Cowan's Testimony On Constitutional Grounds

Petitioner asserts his trial counsel was ineffective for not objecting to Mitzi Cowan's testimony on constitutional grounds. (Pet. 38-39.) He is incorrect.

1. The Proceedings Below[29/]

At trial, Mitzi Cowan testified that on September 5 or 6, 1984, at approximately 5 p.m., petitioner and Gerald Cowan left Gerald's and Mitzi's apartment. (11 RT 2430-31.) Gerald returned at approximately 10 p.m. and Mitzi let him use her car. (11 RT 2432.) When Gerald returned at approximately 1 a.m., he threw $200 on the bed, folded in half.[30/] (11 RT 2440-41.) Petitioner returned at approximately 3 a.m., wearing different clothes than he had been wearing when he previously left.[31/] (11 RT 2441-42.) The trial court overruled petitioner's objection to the evidence on the grounds of relevance and prejudice, and denied petitioner's motion for a mistrial. (11 RT 2434-35, 2437, 2440.) On appeal, petitioner argues that the evidence of Gerald's possession of the folded money was not relevant without evidence of a criminal conspiracy between Gerald and petitioner, and that petitioner was prejudiced in the penalty phase of the trial by the "erroneous admission" of the

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29. Respondent's Brief on appeal contains a more complete summation of Mitzi Cowan's testimony and the related proceedings below. (Argument XI.A., pp. 155-57.)

30. Mitzi Cowan testified earlier that Bobby Russell customarily carried his money folded neatly in his front pocket. (11 RT 2429.)

31. As previously stated, Russell's body was found on September 7, 1984. (8 RT 2074-85.)

evidence, under the Eighth and Fourteenth Amendments. (Petitioner's Exh. M, pp. 154-56 [AOB 224-30].)

2. Any Objection On Constitutional Grounds Would Have Been Futile

To the extent petitioner continues to argue that Mitzi Cowan's testimony was irrelevant, respondent has answered that contention in his brief on appeal, and stands on that argument. (RB 158-59, Argument XI.C.) To the extent petitioner argues that the evidence was inadmissible because capital cases require "a greater degree of reliability in determination that death is the appropriate punishment" (Petitioner's Exh. M, p. 156 [AOB 228]), he is incorrect. In general, ordinary rules of evidence do not infringe on constitutional rights. (*People v. Marks* (2003) 31 Cal.4th 197, 226-27.) Nor does the Eighth Amendment require a different outcome. For example, states enjoy a wide latitude in prescribing evidentiary rules at penalty hearings. (*Romano v. Oklahoma* (1994) 512 U.S. 1, 7.) In refusing to reverse the petitioner's sentence of death on the grounds that the jury heard evidence petitioner had already received a sentence of death for another murder, the *Romano* court stated, "The Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings." (*Id.* at p. 12.)

Similarly, the Eighth Amendment does not require exclusion of Mitzi Cowan's testimony in the present case. Thus, any objections petitioner's counsel might have made to her testimony on that ground would have been futile, and counsel was not ineffective for not making such an objection. Therefore, petitioner's arguments to the contrary must fail.

3. Admission Of Mitzi Cowan's Testimony Was Not Prejudicial In Any Event

Respondent submits that admission of Mitzi Cowan's testimony did not prejudice petitioner for the reasons stated in Respondent's Brief on appeal. (RB 159-60, Argument XI.D.)

In brief, although the evidence was admitted during the guilt phase, it could only have affected the penalty phase of the trial, since the jury did not convict petitioner of killing Russell. However, by the penalty phase the jury had already found that petitioner brutally murdered two defenseless elderly people, and heard considerable other evidence of aggravating circumstances, such as evidence that appellant committed other crimes (13 RT 2853-57 [robbery of Foster and Cruz], 2864-69, 2951-57 [abuse of Robert Hunt].) Moreover, as discussed more fully, post (Argument V.G.), neither party mentioned the Russell murder during the penalty phase (13 RT 2977-3000), and the jurors were properly instructed on how they should consider evidence of other criminal acts. (13 RT 2972.) It is not reasonably probable that the absence of Mitzi Cowan's testimony would have led to a more favorable result for petitioner at the penalty phase of trial.

G. Trial Counsel Was Not Ineffective For Not Calling Gerald Cowan As A Witness

Petitioner asserts that his trial counsel was ineffective for not calling Gerald Cowan as an exculpatory witness regarding the Russell killing. (Pet. 39-40.) Petitioner is incorrect. Trial counsel was not ineffective for not calling Gerald Cowan as a witness.

1. Background

According to petitioner, on January 29, 1996, co-defendant Gerald Cowan pled no contest to committing voluntary manslaughter by killing Gerald Russell.

(Pet. 39.) On February 14, 1996, on the motion of the People, Gerald Cowan's plea was set aside and the original charges reinstated. (3 Aug. 1st Supp. CT 869.) On December 9, 1996, this Court reversed, ordering the Fifth District Court of Appeal to issue a peremptory writ of mandate compelling the superior court to allow Gerald Cowan to waive the statute of limitations and plead guilty to voluntary manslaughter. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 377.) On February 20, 1997, Gerald Cowan's plea was reinstated. (3 Aug. 1st Supp. CT 892.)

Petitioner submits a declaration from Gerald Cowan dated December 28, 2005. (Petitioner's Exh. N.) The declaration states in relevant part, as follows: 1) Gerald committed the murder of Russell; petitioner was not present and "had nothing to do with it[;]" 2) Gerald did not commit the murders of Clifford and Alma Merck, and had no personal knowledge or other information about the crimes; and, 3) had Gerald been called as a witness at trial, "I would have truthfully testified about this information, including the fact that Robert did not participate in the killing of Jewell Russell." (Petitioner's Exh. N, p. 162.)

2. Trial Counsel May Have Had A Tactical Reason For Not Calling Gerald Cowan As A Witness

Preliminarily, respondent notes that the trial occurred during the pendency of Gerald's petition for a writ of mandate, when it was still uncertain whether Gerald's plea would be reinstated or whether he would face the charges originally brought against him. Since, presumably, Gerald was represented by counsel at that time, it would have been inappropriate for petitioner's trial counsel to contact Gerald to find out to what Gerald might testify. (Rules Prof. Conduct, rule 2-100(a) ["While representing a client, a member shall not communicate directly or indirectly about the subject matter of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer"].) There is

nothing to indicate on this record that such permission would have been forthcoming from Gerald's counsel. Certainly, it seems unlikely that Gerald would have admitted culpability in Russell's murder before his plea and the resulting sentence were reinstated.

While petitioner asserts that he could have obtained a continuance until after Gerald's sentencing (Pet. 40, n. 7), this appears unlikely. In March of 1996, when the pretrial motions in limine were heard, it was by no means certain that Gerald's plea would be reinstated. The Fifth District Court of Appeals denied Gerald's writ (*Cowan v. Superior Court, supra,* 14 Cal.4th at p. 370), and this Court did not grant review until May 1, 1996. (S052051 [1996 Cal.LEXIS 2468].) It seems speculative, at best, that trial counsel could have obtained a continuance of a number of months on the chance that this Court would grant review and reverse the decisions of the trial court and the Fifth District Court of Appeal. This is particularly so since, as discussed post, Gerald's proposed testimony was of limited value.

Because it was practically impossible for petitioner's counsel to interview Gerald and determine what his testimony might be, petitioner's counsel may have reasonably reached a conclusion that the risks of calling a party whom counsel had not been able to interview outweighed any benefits that might accrue from that person's testimony.

Moreover, even if trial counsel were able to find out that Gerald's trial testimony would match what Gerald now states in his declaration, petitioner's counsel may still have reached a reasoned decision that the risks of Gerald's testimony outweighed the benefits. For example, trial counsel may have reasonably concluded that the jury would be disinclined to believe Gerald's testimony, which tended to exculpate petitioner without creating any extra risk for Gerald. Furthermore, to the extent Gerald's testimony, if believed, indicated that he did not participate in the murder of the Mercks, this could have had the

effect of removing any residual doubt from the jurors' minds that petitioner committed those murders, thus making it more likely that he would be convicted of those crimes. It also could have made it more likely that the jury would conclude appellant was the triggerman in murders of both Alma and Clifford, thereby increasing the likelihood that the jury would find the death penalty was justified. Thus, counsel was not ineffective for not calling Gerald as a witness at trial.

3. Petitioner Was Not Prejudiced By The Absence Of Gerald Cowan's Testimony

Even if Gerald Cowan had testified as stated in his declaration, it is not reasonably probable that petitioner would have received a more favorable result at trial. The murders of the Mercks were particularly brutal, and, as discussed ante, the evidence against petitioner was strong. Considering Gerald's obvious motives for giving exculpatory evidence, and considering the fact that he was an admitted murderer, it is unlikely the jury would have believed his testimony, or, had it believed his testimony, determined that the death penalty was not warranted in petitioner's case. Thus, petitioner was not prejudiced by counsel's alleged error.

IV.

PETITIONER HAS NOT ESTABLISHED FACTUAL INNOCENCE

Petitioner contends, "Newly discovered evidence that fingerprint identification is unreliable establishes that petitioner is innocent of capital murder." (Pet. 57.) Petitioner continues,

> If this Court were to determine that defense counsel should not have been aware of evidence establishing the unreliability of fingerprint identification at the time of petitioner's trial in 1996, petitioner alleges that this evidence is newly-discovered and establishes his innocence of capital murder.

(Pet. 57.) In support of his contention, petitioner cites Dr. Cole's declaration. (Pet. 58-63; Petitioner's Exh. I.) Petitioner is incorrect.

Newly discovered evidence is a valid basis for collateral attack of a judgment only if it "casts fundamental doubt on the accuracy and reliability of the proceedings." (*In re Clark, supra*, 5 Cal.4th at p. 766.) At the guilt phase, such evidence "if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability." (*Ibid.*) "It is not sufficient that the evidence might have weakened the prosecution case or presented a more difficult question for the judge or jury." (*Ibid.*)

Here, petitioner has not met this heavy burden. As discussed ante (Argument III.B.), Dr. Cole's declaration does not indicate that the fingerprint identification made in this case was *erroneous*, or that the fingerprints found in the Merck house were *inconsistent* with petitioner's known fingerprints. To the extent that Dr. Cole's declaration is to be believed, it merely indicates that fingerprint identifications may be less reliable than is generally thought. However, this does not "undermine the entire prosecution case and point unerringly to innocence or reduced culpability." (*In re Clark, supra,* 5 Cal.4th at p. 766.) This is particularly so in light of the other evidence presented at trial: evidence that petitioner possessed items of the Mercks' property, evidence that petitioner possessed the murder weapon, and evidence of petitioner's statements to Tags. Thus, petitioner has not established factual innocence of capital murder.

V.

PETITIONER WAS NOT DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE

Petitioner claims ineffective assistance of counsel in the penalty phase, citing a number of individual claims. (Pet. 64-155.) As discussed, post, these claims fail.

A. Counsel Was Not Ineffective For Not Presenting Evidence Of Petitioner's Neurological Deficits

Petitioner claims his trial counsel was ineffective because he "failed to recognize the need to inquire into whether petitioner suffered from a brain impairment, to retain a neuropsychologist, and to arrange for appropriate testing[,]" and he did not

> provide the mental health experts whom he did retain with all of the readily available information about petitioner's background . . . that would have made the need for a neurophysiological examination apparent.

(Pet. 73-74.) Petitioner is incorrect. Trial counsel acted reasonably in light of the information available to him at the time.

1. Trial Counsel Conducted Reasonable Investigation

To prove ineffective assistance of counsel at the penalty phase, petitioner must show that counsel's performance did not meet an objective standard of reasonableness under prevailing professional norms, and he suffered prejudice thereby. (*In re Andrews* (2002) 28 Cal.4th 1234, 1253.) Prejudice is established when there is a reasonable probability that, absent the errors of counsel, the jury would have concluded "that the balance of aggravating and mitigating factors did not warrant death." (*Ibid.*) As in the guilt phase, a reasonable probability is one that undermines confidence in the verdict. (*Ibid.*)

"[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .." (*In re Andrews, supra,* 28 Cal.4th at p. 1253.) In considering claims of ineffective assistance of counsel, the reviewing court addresses "not what is prudent or appropriate, but only what is constitutionally compelled." (*Id.* at p. 1255.)

By way of comparison, criminal trial counsel have no blanket obligation to investigate possible mental defenses, even in a capital case. (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1244.) Rather, to show ineffective assistance, the defendant must show that counsel knew or should have known that further investigation might reveal materially favorable evidence. (*Ibid.*)

> Competent representation does not demand that counsel seek repetitive examinations of the defendant until an expert is found who will offer a supportive opinion.

(*People v. Williams* (1988) 44 Cal.3d 883, 945-46.) A defendant's ability to produce conflicting evidence years later does not establish that the factual inquiry by trial counsel was inadequate. (*Id.* at p. 946.) "The proper test is whether the original inquiry by counsel was adequate in light of facts he knew or should have known at the time the inquiry was undertaken." (*Ibid.*)

Here, in support of his assertion that trial counsel was ineffective, petitioner offers a declaration from Dr. Natasha Khazanov, a clinical psychologist. (Petitioner's Exh. P.) Dr. Khazanov conducted a neuropsychological evaluation of petitioner in 2005, conducted a clinical interview of petitioner, and "reviewed documents and other materials relevant to Mr. Cowan's [petitioner's] medial and social history . . .." (Petitioner's Exh. P, pp. 167-72.) Based on the tests and petitioner's clinical history, Dr. Khazanov opines that petitioner, at the time of the offense, "was seriously mentally impaired and under the influence of an extreme mental disturbance." (Petitioner's Exh. P, p. 200.) According to Dr. Khazanov,

> As a consequence, his ability to appreciate the criminality of his conduct, to conform his conduct to the requirements of the law, to control his behavior, or to comprehend the consequences of that behavior was severely impaired. Furthermore, Mr. Cowan's mental impairments were greatly exacerbated when he was under the influence of alcohol or drugs.

(Petitioner's Exh. P, p. 200.)

However, neither Dr. Khazanov's declaration nor any other evidence submitted by petitioner shows that trial counsel did not adequately investigate the possibility that petitioner might suffer from an organic brain disorder that mitigated his culpability for the crime. Indeed, Dr. Khazanov's declaration leaves the opposite impression. According to the declaration, Dr. Byrom, a clinical psychologist retained by trial counsel, administered a battery of psychological tests, including personality tests and intelligence tests.[32/] (Petitioner's Exh. P, pp. 182-83.) In addition, petitioner underwent other psychological testing when he was incarcerated in April of 1986. (Petitioner's Exh. P, p. 184.) Dr. Khazanov now states that the tests petitioner underwent are not adequate to perform a neuropsychological assessment. (Petitioner's Exh. P, p. 183.)

According to Dr. Khazanov, in a letter dated July 12, 1995, Dr. Byrom advised counsel that petitioner should be referred for "some sort of neuropsychiatric testing" and further opined that an EEG, CT scan, or MRI would be helpful, in light of petitioner's history of head trauma. (Petitioner's Exh. P, p. 183.) On August 8, 1995, petitioner underwent an electroencephalogram and underwent a "SPECT brain scan" on August 22, 1995. (Petitioner's Exh. P, p. 183-84.) Dr. Khazanov concedes that the findings of these tests were normal, but opines

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32. According to Dr. Khazanov's declaration, trial counsel did not keep a copy of the test results, and Dr. Byrom's widow destroyed his file before she was contacted by habeas counsel. (Petitioner's Exh. P, p. 183.)

> these tests are notoriously insensitive to many brain disorders and are not an adequate substitute for the neuropsychological test battery that was available for testing Mr. Cowan before his trial in 1996.

(Petitioner's Exh. P, p. 183.)

Thus, the record shows that counsel proceeded reasonably in investigating the possibility that petitioner might suffer from some mental disorder that reduced his culpability for the crimes for which he was convicted. Counsel retained a clinical psychologist who administered a battery of intelligence and personality tests, in addition to the tests petitioner previously completed while incarcerated in 1986. After Dr. Byrom opined that further testing might be useful in light of petitioner's history of head trauma, petitioner underwent two further tests, an electroencephalogram and a brain scan.

Although Dr. Khazanov now believes that these tests were not an adequate substitute for neuropsychological testing (Petitioner's Exh. P, p. 183), this does not mean that trial counsel conducted an inadequate investigation "in light of facts he knew or should have known at the time the inquiry was undertaken" (*People v. Williams, supra,* 44 Cal.3d at p. 946), or that counsel's representation fell outside "the wide range of reasonable professional assistance . . ." accorded him. (*In re Andrews, supra,* 28 Cal.4th p. 1253.) Rather, it shows counsel acted reasonably in retaining an expert who administered a series of tests, and in following up with further tests on the advice of that expert. Counsel needed to do nothing more to meet the minimal standards required by the Sixth Amendment.

2. Petitioner Suffered No Prejudice

Even assuming, arguendo, that counsel performed inadequately in not having petitioner undergo neuropsychological testing, petitioner cannot show

prejudice thereby. The circumstances of the Mercks' murder, and the other evidence in the case belie any mitigating effect that evidence of petitioner's brain damage might have had with the jury.

Dr. Khazanov opines, in part, that, because of petitioner's "serious organic brain damage" his

> abilities to plan or carry out a specific course of action, to act independently or make informed decisions, to interpret social or interpersonal cues (verbal or nonverbal), and to assess his environment or specific situations and respond rationally or thoughtfully are severely and chronically impaired.

(Petitioner's Exh. P, pp. 197-98.) Dr. Khazanov further opines that petitioner's "ability to accurately perceive, retain and relate even basic information is severely impaired" and petitioner's impairments "individually and collectively, have left Mr. Cowan highly vulnerable to the influence and suggestions of those around him." (Petitioner's Exh. P, p. 198.) Finally, Dr. Khazanov concludes that petitioner's

> ability to appreciate the criminality of his conduct, to conform his conduct to the requirements of the law, to control his behavior, or to comprehend the consequences of that behavior was severely impaired.

(Petitioner's Exh. P, p. 200.)

The circumstances of the case belie Dr. Khazanov's opinions. Petitioner was able to "plan or carry out a specific course of action" when he tied up and killed the Mercks, Alma by strangulation and Clifford by an execution-style shooting; and when he took the property of the Mercks. When petitioner killed Clifford, he used pillows to muffle the sounds of the shots. (6 RT 1608-09.) Moreover, assuming petitioner killed the Mercks in order to avoid leaving witnesses, this indicated he was able to "appreciate the criminality of his conduct" and to "comprehend the consequences" of his behavior. After the crime, petitioner was able to "assess his environment" and "respond rationally" enough to tell Phinney not to get caught with the .25 caliber Colt (6 RT 1662),

to travel with Gerald and Tags out of state (10 RT 2347-49), and to threaten to cut Tags's throat if she said anything. (10 RT 2362.)

Given the evidence of the murders for which the jury had just convicted petitioner, and the manner in which they were committed, it is not reasonably probable that the jury would have credited the evidence of petitioner's brain damage to reduce petitioner's culpability for the crime, or to impose a lesser sentence than, in fact, the jury imposed.

Indeed, given circumstances of the crime, it is quite possible trial counsel would have been reluctant to present evidence of petitioner's brain damage, even had such evidence been available. (See, *In re Andrews, supra,* 28 Cal.4th at pp. 1257-59 [reasonable to limit mental health expert testimony where crimes showed considerable brutality and planning, and where cross-examination would allow the prosecution "several opportunities to repeat the circumstances of the crime as well as petitioner's past criminality"].) This further shows the lack of prejudice from the absence of neuropsychological testing. Because counsel was not ineffective, and because petitioner can show no prejudice in any event, his claim of ineffective assistance of counsel must fail.

B. Trial Counsel Was Not Ineffective For Not Calling Certain Witnesses Concerning Appellant's Childhood And Circumstances

Petitioner contends that trial counsel was ineffective in not presenting additional evidence of mitigating circumstances concerning petitioner's background, including evidence of petitioner's childhood from his mother, siblings, and other people; and evidence from petitioner's school and prison records, and from court records of his parents' divorce. (Pet. 74-75.) According to petitioner,

> Additional mitigating circumstances that could have been established through these witnesses and sources included petitioner's multiple head traumas, petitioner's frequent moving and changing of schools throughout childhood, emotional abuse inflicted by petitioner's father, petitioner's long-term alcohol and substance abuse, the incarceration of petitioner's father in prison when petitioner was 12, the divorce of petitioner's parents when petitioner was 18, the death of petitioner's father when petitioner was 20, the failure of petitioner's two marriages, and petitioner's infertility.

(Pet. 75.) Petitioner is incorrect. Counsel acted reasonably in limiting the scope of the mitigation evidence. Moreover, petitioner can show no prejudice from omission of the evidence he now says should have been presented at trial.

1. Counsel Was Not Ineffective For Limiting The Scope Of The Mitigation Evidence

At trial, counsel presented evidence, through Selma Yates, petitioner's aunt, and Leroy Cowan, petitioner's cousin, describing rather graphically petitioner's upbringing, including the beatings petitioner received at the hands of his alcoholic father. (13 RT 2889-16.) To the extent counsel chose not to present additional evidence of petitioner's childhood, counsel may have considered such evidence cumulative of the evidence already presented, and unlikely to convince the jury.

Counsel may have decided, for example, that the testimony of Leroy Cowan, who apparently was a successful and stable businessperson (13 RT 2901-02), would be more convincing than the testimony of Betty Cowan, petitioner's mother, who stayed with petitioner's abusive alcoholic father for many years (Petitioner's Exh. Q, pp. 203-11 [Betty married Wes in 1948 and divorced him in 1967]), and who would naturally be expected to give the most sympathetic testimony possible for her son; or Gerald Cowan (Petitioner's Exh. N), who was originally a co-defendant in petitioner's case, and who admitted killing Bobby Russell. As to Betty Cowan, it is noteworthy that at least one other witness whom petitioner now says should have been called says that Betty, too, was

abusive towards petitioner, and was addicted to pills. (Petitioner's Exh. CC, pp. 280-81 [Declaration of Michael Hillburn].)

To the extent counsel chose not to present other evidence, such as that of petitioner's failed marriages, the death of petitioner's father, petitioner's long-term substance abuse, and petitioner's infertility (Pet. 75), there may have been sound tactical reasons for not doing so. Petitioner's failed relationships could have emphasized his inability to fit into society or form close relationships, and thus made the jury more likely to impose the death penalty. Similarly, to the extent petitioner's substance abuse was not already made clear by the evidence presented at the guilt phase, it is possible that further evidence in this regard (Pet. 106; Petitioner's Exh. W, p. 258 [declaration of Jeff Cowan]; Petitioner's Exh. X, p. 262 [declaration of Stuart Cowan]) might make the jury look on petitioner less favorably, as a person who preyed on other people to feed his own addiction. (See, 10 RT 2332-34, 2359 [petitioner ingested methamphetamine daily and used Tags as a prostitute to make money]; 13 RT 2853-57 [petitioner's robbery of Cruz and Foster]; 6 RT 1631, 1635, 1648 1660-63 [evidence Clifford's pistol was traded for drugs].) Finally, evidence of petitioner's infertility and of the loss of his father (Pet. 75; Petitioner's Exh. Q, pp. 209, 212-13) could have invited the jury to make unfavorable comparisons between petitioner and other people who undergo similar emotional traumas and yet commit no serious crimes. Thus, counsel was not ineffective for not presenting this evidence.

By way of comparison, in *In re Andrews, supra,* 28 Cal.4th at pages 1255-1256, it was reasonable to eschew "a lengthy presentation of a broad range of witnesses describing in detail various aspects of the petitioner's background" and instead "minimize petitioner's culpability by circumscribing his background and mitigating his criminal responsibility, portraying him as a follower rather

than violently antisocial." Here, similarly, it was reasonable for counsel to take a focused approach at the penalty phase.

Respondent notes that co-counsel Sorena, according to his own declaration, "jointly developed the penalty phase case" with Sprague, even though Sprague retained final decision-making authority, and in fact presented the penalty phase. (Petitioner's Exh. C, p. 24.) Nevertheless, Sorena's declaration is silent on whether there was a tactical reason for not calling the witnesses that petitioner now asserts should have been called at the penalty phase, except for Sorena's discussion of the contemplated testimony of Dr. William Pierce, discussed further, post. (Petitioner's Exh. C, pp. 24-27.) The declaration of current habeas counsel, Mark Goldrosen, is also silent on whether Goldrosen asked Sorena whether there was a tactical reason for not calling these witnesses, although it discusses other purported omissions Goldrosen asked Sorena to review. (Petitioner's Exh. D.) Because counsel may have had good tactical reasons for not presenting the evidence petitioner now says should have been presented, petitioner's claim of ineffective assistance of counsel must fail.

2. Petitioner Was Not Prejudiced By The Purported Omissions

Even assuming, arguendo, counsel acted unreasonably in not presenting the witnesses discussed above, petitioner can show no prejudice thereby. Counsel presented considerable evidence of petitioner's upbringing through Yates and through Leroy Cowan, and further evidence in this regard was unlikely to have swayed the jury. As previously discussed, other evidence, such as that of petitioner's substance abuse and failed marriages, could just as easily have been viewed by the jury as aggravating, rather than mitigating, and again was unlikely to have changed the jury's determination that the death penalty was appropriate in petitioner's case. Thus, there is no reasonable probability that petitioner would have received a more favorable outcome had the evidence been presented, and his claims of ineffective assistance of counsel must fail.

C. Counsel Was Not Ineffective For Not Calling William Pierce As A Witness

Petitioner asserts his trial counsel was ineffective for not calling a psychologist, Dr. William Pierce, at trial "to testify about numerous mitigating factors relating to [petitioner's] mental condition and life history." (Pet. 117.) Petitioner is incorrect. Trial counsel had a tactical reason for not calling Dr. Pierce as a witness. Moreover, petitioner cannot show prejudice from the omission of Pierce's testimony.

1. Counsel Had A Tactical Reason For Not Calling Pierce As A Witness

According to the declarations of co-counsel Sorena and Dr. Pierce (Petitioner's Exh. DD), Sorena intended to call Dr. Pierce at the penalty phase of petitioner's trial "to testify about numerous mitigating factors relating to Mr. Cowan's mental condition and life history." (Petitioner's Exh. C, p. 25.) However, within a few days of the beginning of the penalty trial, Sprague learned that Dr. Pierce had become aware of certain information which was known to the prosecution but had not been presented at trial.[33/] (Petitioner's Exh. C, p. 25.) Sorena's declaration indicates that he cannot recall what the information was, but asserts "I remember I did not think it was a big problem" and he believed "that the benefits of having Dr. Pierce testify far outweighed

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33. Dr. Pierce's declaration indicates that he cannot recall Sprague's justification for his decision, and cannot locate petitioner's file to refresh his memory. (Petitioner's Exh. DD, p. 284.)

the concern expressed by Mr. Sprague." (Petitioner's Exh. C, pp. 25-26.) Despite Sorena's efforts to persuade Sprague otherwise, Sprague's decision prevailed. (Petitioner's Exh. C, p. 26.) Moreover, Sprague did not ask for a continuance in order to obtain another witness, both because he believed it would be denied and because, if granted, it might hurt the defense's credibility with the jury. (Petitioner's Exh. C, p. 26.)

Thus, the record shows that Sprague had a tactical reason for not having Dr. Pierce testify, albeit one with which co-counsel Sorena disagreed. The fact that co-counsel may have disagreed with Sprague's decision, or even thought it unreasonable, does not indicate that Sprague's decision fell below the objective standard of reasonableness prescribed by the Sixth Amendment. (See, *In re Andrews, supra,* 28 Cal.4th at pp. 1253-54 ["There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way"].)

Co-counsel Sorena speculates that Sprague used Dr. Pierce's awareness of adverse information as a pretext for discharging him. (Petitioner's Exh. C, p. 26.) According to Sorena, "It appeared that, for some reason unknown to me, Mr. Sprague did not like Dr. Pierce; there was a definite chill in Mr. Sprague's attitude towards him." (Petitioner's Exh. C, p. 26.) However, other than his vague statement of "a definite chill" Sorena does not provide any basis (such as specific instances of interactions between Sprague and Dr. Pierce, or specific comments Sprague may have made) for his opinion that Sprague disliked Sorena. Thus, his opinion of Sprague's alleged dislike of Dr. Pierce is not competent evidence. (See, Evid. Code, § 800 [lay opinion limited to that permitted by law, including one "Rationally based on the perception of the witness" and "Helpful to a clear understanding of his testimony;" *People v. Chatman* (2006) 38 Cal.4th 344, 397 [lay witness generally may not give an opinion about another's state of mind, although he may testify about objective

behavior and describe that as being consistent with a state of mind]; see also, *People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40 [error to allow officers to testify as to truthfulness of interviewee, the complaining witness].)

Significantly, Dr. Pierce's declaration does not give any indication of a conflict or a poor working relationship between Sprague and Dr. Pierce. (Petitioner's Exh. DD.) This indicates that, to the extent a conflict between Dr. Pierce and Sprague existed at all, it may have been less serious than Sorena now believes to be the case.

Sorena's statement that "the unreasonableness of Sprague's position suggested that Mr. Sprague was using Dr. Pierce's awareness of this allegedly adverse information as a pretext for discharging him" (Petitioner's Exh. C, p. 26) is just as speculative as his statement that Sprague did not like Dr. Pierce, in that Sorena provides little factual basis for his assertion. Thus, it is not competent evidence showing that Sprague was ineffective, and petitioner has not made out a prima facie case of counsel's incompetence.

2. Petitioner Has Not Shown Prejudice From The Absence Of Dr. Pierce's Testimony

Even assuming, arguendo, Sprague's decision not to have Dr. Pierce testify was unreasonable, petitioner has not shown prejudice thereby. According to Sorena's declaration, Dr. Pierce would have testified

> about numerous mitigating factors relating to Mr. Cowan's mental condition and life history[,] . . . includ[ing] (1) physical abuse by Mr. Cowan's father . . . (2) Mr. Cowan's intense need to gain approval from his father, who refused to express love for him; (3) Mr. Cowan's frequent change of residences and schools during childhood; (4) the death of Mr. Cowan's father when Mr. Cowan was 21 years old; and (5) Mr. Cowan's positive adjustment to prison during prior incarcerations.

(Petitioner's Exh. C p. 25.) According to Dr. Pierce, his testimony

> would have explained the significance of the hardships and traumas Mr. Cowan experienced during his childhood to his subsequent behavior as an adult.

(Petitioner's Exh. DD, p. 284.)

However, there was already significant evidence of petitioner's troubled childhood before the jury, and evidence that petitioner had previously been incarcerated a number of times was likely to harm the jury's perception of petitioner, rather than aid him. Although Dr. Pierce states that he would have explained "the significance" of petitioner's hardships and traumas, we do not know what that significance might have been, beyond Dr. Pierce's vague statement that he believes "that my testimony would have been helpful to the defense case in mitigation." (Petitioner's Exh. DD, p. 284.) Because we do not know specifically what Dr. Pierce's testimony might have been, any claim of prejudice is speculative on this record.

Petitioner cites a declaration from Samuel Jinich, a psychologist, and states that conclusions such as those reached by Dr. Jinich "would have provided powerful mitigation at the penalty phase." (Pet. 119-29; Petitioner's Exh. EE.) However, there is no indication that Dr. Pierce would have reached the same, or similar conclusions that Dr. Jinich reached. For example, Dr. Jinich relies in part on Dr. Khazanov's declaration for his opinion (Petitioner's Exh. EE, p. 288), which would have been unavailable to Dr. Pierce at trial. Because Dr. Jinich's conclusions do not indicate what Dr. Pierce's testimony would have been, they do not help petitioner show prejudice from the absence of Dr. Pierce's testimony.

Moreover, regardless of the psychological testimony presented, the facts of the case show appellant robbed, bound, and killed an elderly couple. Nothing shows petitioner was remorseful for his crimes, or that the crimes themselves were an impulsive act borne of rage or some other strong emotion. Quite the reverse: petitioner's actions during and after the crime show a calculated effort

to commit a crime and escape liability for it. On this record, it is not reasonably probable that Dr. Pierce's testimony, whatever it might have been, would have resulted in a more favorable outcome for petitioner. Thus, petitioner's claim of ineffective assistance of counsel must fail.

D. Counsel Was Not Ineffective Because He Did Not Present Evidence Of Petitioner's Adjustment To Previous Incarcerations

Petitioner contends his trial counsel was ineffective because he did not present evidence that petitioner adjusted well to previous incarcerations and to living at the Prison Ministries Program for ex-offenders in Sacramento. (Pet. 130-31.) Petitioner also contends that his trial counsel erred in not presenting expert testimony that petitioner had the capacity to make a positive adjustment when serving a prison sentence (Pet. 139-40), relying in part on his previous argument. (Pet. 115-18 [Claim 5.C].) Petitioner is incorrect.

1. Counsel Could Reasonably Decide Not To Present Evidence Of Petitioner's Previous Incarcerations

Preliminarily, to the extent petitioner contends his trial counsel was ineffective for not calling Dr. Pierce to testify as to petitioner's capacity to adjust to incarceration, respondent stands on his previous argument. (Argument V.C., ante.) To the extent petitioner contends counsel erred by not presenting other evidence of petitioner's adjustment to incarceration, counsel may have had sound tactical reasons for not doing so.

Counsel Sorena's declaration is silent as to whether there was any tactical reason for not presenting evidence of petitioner's adjustment to previous incarcerations, except for his statement that he planned to have Dr. Pierce testify as to petitioner's "positive adjustment to prison during prior incarcerations." (Petitioner's Exh. C, p. 25.) The fact that counsel interviewed Bobby Novak, the house manager at the Prison Ministries Program in Sacramento at the time petitioner was paroled there, yet did not call Novak to testify (Pet. 131;

Petitioner's Exh. JJ, pp. 362), suggests that counsel had a tactical reason for not presenting such evidence.

Indeed, reasonable grounds for such a decision appear on the record. For example, counsel may have thought it unwise to emphasize to the jury the fact that appellant had been imprisoned a number of times for serious crimes before he killed the Mercks. Also, evidence of petitioner's positive adjustment to prison may have been subject to the introduction of undesirable evidence showing the contrary.

For example, Cowan's disciplinary record shows that he was disciplined at least once for failing to vacate a dormitory room, as ordered to, and twice for drinking alcohol. (Petitioner's Exh. SS, pp. 400-01, 403.) More seriously, on August 3, 1989, according to a disciplinary report, petitioner refused repeated direct orders to drop water off at particular fire line position. (Petitioner's Exh. SS, p. 402.) Instead, in the words of the Luis Gonzalez, the fire captain who gave petitioner the orders, "He stated that he wasn't going to put up with any of my Bullshit." (Petitioner's Exh. SS, p. 402.) According to Gonzalez,

> Inmate Cowan's actions delayed our ability to complete our fire assignment, during a critical fire operation. His continuing questioning of my instructions made Inmate Cowan a liability to himself and Gabilan Crews.

(Petitioner's Exh. SS, p. 402.)

In light of the risks of emphasizing petitioner's previous incarcerations, and the possibility of the revelation of unfavorable information, it was not unreasonable for counsel to forego presenting evidence of petitioner's adjustment to previous incarcerations. Thus, counsel was not ineffective for not presenting such evidence.

2. There Was No Prejudice

In any event, petitioner cannot show prejudice from the lack of evidence of his adjustment to previous incarcerations. As discussed ante, the circumstances

of petitioner's crimes were horrific. In light of this evidence, it is not reasonably probable that evidence of petitioner's adjustment to previous incarcerations would have led to a more favorable outcome for petitioner. Thus, his claims of ineffective assistance of counsel must fail.

E. Counsel Was Not Ineffective For Failing To Object Adequately To Victim Impact Evidence

Petitioner asserts that trial counsel was ineffective for not objecting on more specific grounds to certain victim impact evidence. (Pet. 140-42; Petitioner's Exh. TT [AOB 231-44].) He is incorrect. Any further objection by counsel would have been futile, since the evidence was properly admitted. Moreover, petitioner was not prejudiced by admission of the evidence.

1. The Evidence Was Properly Admitted, Making Any Objection Futile

Petitioner claims trial counsel should have objected more specifically, under the Eighth and Fourteenth Amendments, and *People v. Boyd* (1985) 38 Cal.3d 762, 771-76, 778, to the following statements:

1) Denise Cox testified that she and other members of the family performed the difficult task of cleaning the house: "I will never forget the smell in the house, the smell of death and blood was everywhere. Fingerprint dust was everywhere . . .." (13 RT 2845.) Then, as to Alma's murder, Cox stated,

> And it goes over and over in my mind what she must have experienced just minutes prior to her death. I can only imagine her pleading for her life, the terror, the fear of this evil people or person in the this house, and I envision her hearing her husband, my grandfather, being murdered in the other room knowing that her life . . ..

(13 RT 2845-46.) At this point, counsel objected unsuccessfully. (13 RT 2846.) Cox stated that the Mercks could not hear or see well and were defenseless. She could not understand why anyone would "brutally murder them." (13 RT 2846.)

Cox stated of petitioner,

> I pray for Mr. Cowan because right now I believe his heart is hard and he has no remorse, and he does not realize what he has done. I pray that his heart softens, because he will feel the pain, and I want him to feel the pain of what he has done, and the guilt, and yes, we're asking for the death penalty, and it is not out of revenge. We're not vengeful people. It is out of justice and fairness. An eye for an eye, tooth for a tooth. He made the choice. He should suffer the consequences, and thank you for listening to me.

(13 RT 2847.)

2) Betty Turner, Alma's daughter, testified how close she was to Clifford and Alma, and stated that she would never forget the day she found out they had been murdered. (13 RT 2848-49.) Then she stated, "I don't understand it. I knew Cliff tried to do the best he could to protect my mother that day, but he couldn't." (13 RT 2849.) At this point, counsel objected. (13 RT 2849.) After the objection was overruled, Turner continued, "I know that my mother was terrified that day, and they must have gone through pure hell before it was all over with." (13 RT 2850.) Then she stated that now "when it is all over with" the family might be able to move on, and that she had no sympathy "for anyone who takes an innocent life." (13 RT 2850.)

In his opening brief on appeal, petitioner argues that the witness's "tortuous conjectures regarding Alma Merck's last minutes alive" was improper because it was highly inflammatory and speculative, violating petitioner's due process rights. (Petitioner's Exh. TT, pp. 412-13 [AOB 238-39].) Petitioner also argues that Cox's "characterization of petitioner as lacking remorse" violated his Eighth Amendment rights; and that Cox's statement requesting the death penalty with the biblical reference of "an eye for an eye" was an impermissible appeal to the jury that violated petitioner's Eighth Amendment rights. (Petitioner's Exh. TT, pp. 413-15 [AOB 239-41].)

With the exception of Cox's statement asking that the death penalty be imposed (RB 173), the statements petitioner challenges on appeal and in the

instant petition were admissible, for the reasons stated in respondent's brief on appeal. (RB 164-74.) To briefly reiterate those arguments, victim impact testimony is admissible under section § 190.3, factor (a), although it should not include characterizations or opinions about the crime or the appropriate punishment. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180.) Here, the trial court properly allowed Cox and Turner to testify about their beliefs regarding Alma's last minutes of life because the testimony provided the jury with a personal glimpse of the impact of petitioner's actions on Alma's family. (See, *id.* at p. 1182 [testimony that son could not remember his parents without imagining their final sufferings admissible].) Because the evidence was admissible, any objection by trial counsel would have been futile.

Moreover, petitioner cannot show prejudice from admission of the evidence, for the reasons stated in respondent's brief on appeal. (RB 174-76.) Respondent reemphasizes the following points:

The jury was well aware of the circumstances of the crime, through the extensive testimony presented at the guilt phase of the trial. Moreover, in overruling counsel's objection at trial, the trial court stated,

> I think the jury understands that [this is how Cox feels]. It is impact-type testimony, and it is not to be considered by the jury. Obviously, this witness was not a percipient witness.

(13 RT 2846.) Thus, the jury must have understood that any statements by Cox and Turner as to the circumstances of the crime related to the impact their perception of the crime had on them, and was not to be considered as evidence of the circumstances of the crime itself. Therefore, this evidence could not have been prejudicial.

Petitioner, in his reply brief, emphasizes the fact that the jury returned a verdict of death only with respect to Alma, stating,

> The unavoidable conclusion is that the emotionally-charged victim impact testimony accounted for the jury's return of a death verdict for the murder of Alma Merck and a life verdict for the murder of her husband.

(ARB 102-03.) Not so.

First, respondent notes that as horrific as Clifford Merck's murder was, Alma's was even more so. She was bound with electrical cord, strangled with a telephone cord, and stuffed into a closet. (6 RT 1520; 10 RT 2264-66.) She might have lived up to four or five minutes after the cord was tightened around her neck. (10 RT 2265.) The jury could rationally have concluded petitioner was more deserving of the death penalty for the strangulation of Alma than he was for the shooting death of Clifford. Thus, the differing verdicts are not evidence of prejudice.

Second, the nature of the evidence petitioner now objects to related to both murders, and thus belies petitioner's claim that the jury's differing verdicts are evidence of prejudice. For example, the statements of "an eye for an eye and a tooth for a tooth" related to both murders, as did the statements about the hardness of petitioner's heart, and asking for the death penalty related to both murders, not just Alma's murder. Finally, statements such as "I knew Cliff tried to do the best he could to protect my mother that day, but he couldn't" (13 RT 2849) and, "I know that my mother was terrified that day, and they must have gone through pure hell before it was all over with" (13 RT 2850) related to both murders, not just Alma's murder. Thus, the differing verdicts of the jury did not indicate prejudice.

Because the victim impact testimony was permissible, and because, in any event, its admission was harmless, appellant's claim of ineffective assistance of counsel must fail.

F. Counsel Was Not Ineffective For Not Objecting To Michael Hunt's Statement On Constitutional Grounds

At trial, Sheriff's Deputy Michael Rascoe testified over defense counsel's objection of "lack of foundation" as to Michael Hunt's statement that petitioner picked Robert Hunt up by the hair and threw him backwards. (13 RT 2954-55.) On appeal, petitioner argues that Michael Hunt's statement was inadmissible hearsay, and that it violated petitioner's constitutional rights of confrontation, due process, and right to a reliable penalty determination. (Petitioner's Exh. UU, pp. 422-23 [AOB 269-73].) In the instant petition, petitioner now argues that counsel was ineffective because counsel did not object to the statement

> on the constitutional grounds that admission of Michael Hunt's extrajudicial statement violated petitioner's right to confrontation under the Sixth Amendment, his right to due process of law under the Fourteenth Amendment, and his right to a reliable penalty determination under the Eighth Amendment.

(Pet. 143.)

However, appellant's confrontation rights were not violated, since Michael Hunt testified at trial and, and since he was subject to recall (13 RT 2938-45, 2954). (*Crawford v. Washington, supra*, 541 U.S. at p. 59, fn. 9; *United States v. Owens, supra,* 484 U.S. at p. 559 [Confrontation Clause guarantees only the opportunity for cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defendant might wish].) Thus, the statements were not excludable on the basis of the Confrontation Clause, and any objection on that basis would have been futile. Counsel was not ineffective for not so objecting. To the extent petitioner asserts that the Eighth and Fourteenth Amendments provide an independent basis for exclusion of the statements independent of state law hearsay grounds and Confrontation Clause grounds, he has offered no reasoned argument in support thereof, either on appeal or in the instant petition, and has therefore forfeited that claim. (*People v. Callegri, supra*, 154 Cal.App.3d at p. 865; *People v. Gionis, supra*, 9 Cal.4th

at p. 1214, n. 11 [matters are not properly raised if "perfunctorily asserted without argument or authorities in support"].)

In any event, petitioner cannot show prejudice from admission of the statements, for the reasons stated in respondent's brief on appeal (RB 211-12 [Argument XVIII.D]): Michael Hunt's statement to Deputy Rascoe was cumulative of Robert Hunt's statements to Deputy Rascoe. (13 RT 2954-55.) In light of Robert Hunt's statements and the other evidence presented at trial, it was not reasonably probable that exclusion of Michael Hunt's statement would have led to a more favorable result for petitioner.

G. Counsel Was Not Ineffective For Not Requesting An Instruction That The Jury Could Not Consider The Russell Murder As An Aggravating Circumstance Unless It Was Convinced Beyond A Reasonable Doubt That Petitioner Committed The Crime

Petitioner argues on direct appeal that the trial court erred because it did not instruct sua sponte that the jury could only use the Jewell murder as an aggravating factor if the crime was proven beyond a reasonable doubt. (Petitioner's Exh. VV [AOB 245-52].) In the instant petition, petitioner argues his trial counsel was ineffective for not requesting that the Jewell murder be included in the list of crimes that the jury could not consider as a circumstance in aggravation unless proven beyond a reasonable doubt. (Pet. 144-45.) Petitioner is incorrect.

1. Background

During the penalty phase, the trial court instructed the jury in relevant part as follows:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts. One, residential burglary, two, residential robbery, and three child abuse, which involved the express or implied use of force or violence or the threat of force or violence. Before a juror may consider any of such criminal acts as an aggravating circumstance in this case, a juror must first be satisfied

beyond a reasonable doubt that the defendant did, in fact, commit such criminal acts. A juror may not consider any evidence of any other criminal acts as an aggravating circumstance.

It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(13 RT 2972.)

The trial court then instructed the jury that the instructions on the elements of residential burglary and robbery given at the guilt phase were applicable to the penalty phase as well, and instructed the jury on the elements of child abuse. (13 RT 2972-73.) During argument at the penalty phase, neither party mentioned the murder of Jewell Russell (13 RT 2977-3000), although the prosecutor cited the robbery of Foster and Cruz, the abuse of Robert Hunt, and petitioner's previous conviction for robbery as circumstances in aggravation. (13 RT 1982-84.)

During deliberations on the penalty phase, the jury asked for a readback of Dr. Dollinger's testimony. (13 RT 3011.) Outside the presence of the jury, petitioner, through counsel, objected to the reading of the testimony regarding the post-mortem of Russell, since there was a mistrial with regard to his murder, and thus for the jury to consider it in any way would be grounds for a mistrial. (13 RT 3012.) Counsel moved for mistrial. (13 RT 3014.)

The trial court sent a note back to the jury asking if it wanted to hear the testimony of Dr. Dollinger with regards to the examination of Russell, to which the jury responded that it did. (13 RT 3014.) The trial court stated that the jurors who were convinced beyond a reasonable doubt of appellant's guilt as to Russell's murder could properly consider that murder in making their decision. (13 RT 3016.) The requested testimony was read back to the jury. (13 RT 3016.) Later that day, the jury reached its verdict. (13 RT 3024-25.)

2. Trial Counsel Was Not Ineffective

The trial court instructed the jurors that they could not consider evidence of certain other crimes as an aggravating circumstance unless they were individually convinced beyond a reasonable doubt that the crimes occurred. (13 RT 2972.) Petitioner argues on direct appeal that the trial court's instruction was erroneous, in that it failed to include the Russell murder as one of the other crimes that the jury could rely upon as an aggravating factor only if proven beyond a reasonable doubt. (Petitioner's Exh. VV, p. 429 [AOB 248].) Thus, according to petitioner, "the jury may well have believed that the omission of the Russell murder from the limiting instruction meant that the instruction was not applicable to that crime[,]" meaning that the jury may have employed a different, and lower standard of proof than that employed for the evidence of other crimes that was presented in the penalty phase. (Petitioner's Exh. VV, p. 429 [AOB 248].)

Petitioner also argues on direct appeal that trial counsel was ineffective for not requesting such an instruction since he

> could not have had a strategic reason for failing to request that the Russell murder be included in the reasonable doubt instruction, especially since he vigorously objected to the readback of Dr. Dollinger's testimony and moved for a mistrial based on the jury's consideration of the Russell murder in the penalty phase.

(Petitioner's Exh. VV, p. 430 [AOB 249].)

In the instant petition, petitioner argues that there was no tactical reason for counsel's purported omission, citing a declaration from co-counsel Sorena stating that Sorena was not aware of any strategic reason for not including the Russell murder in the instruction requiring proof of other crimes beyond a reasonable doubt. (Pet. 145; Petitioner's Exh. C, p. 24; Petitioner's Exh. D, pp. 31-32.)

Respondent submits that there may have been a tactical reason for Sprague not asking for the instruction, even if co-counsel Sorena is now unaware of this reason. For example, Sprague may have not wished to draw attention to Russell's murder as a possible aggravating circumstance, particularly since neither party mentioned it as such at argument in the penalty phase.

In *People v. Cox, supra*, 30 Cal.4th at page 964, the prosecutor introduced evidence of the defendant's other crimes in the guilt phase of the trial. At the penalty phase, the trial court did not instruct the jury that it could not consider other crimes evidence unless those crimes were proven beyond a reasonable doubt. (*Ibid.*) The *Cox* court held that trial court had no sua sponte duty to do so, reasoning that the defendant

> may not want the penalty phase instructions . . . [to] lead the jury to place undue emphasis on the crimes rather than on the central question of whether he should live or die.

(*Ibid.*) Similarly, here, counsel may not have wished to draw undue attention to the Russell murder through an instruction that specifically reminded the jurors of that murder.

In any event, petitioner cannot show prejudice from the omission of the instruction. In *People v. Johnson* (1989) 47 Cal.3d 1194, 1250, this Court rejected a defendant's claim of prejudice from the fact that the trial court did not list the other crimes being considered. Here, similarly, this Court should reject petitioner's claim of prejudice. The instruction, as given, states in relevant part,

> Before a juror may consider any of such criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did, in fact, commit such criminal acts. A juror may not consider any evidence of any other criminal acts as an aggravating circumstance.

(13 RT 2972.) Thus, logically, the instruction required that the jury reject as an aggravating circumstance any evidence of other crimes as to which the instruction, including its burden of proof requirement, did not apply.

Because of this requirement, there is no reasonable probability that the jury interpreted the instruction in the manner petitioner now asserts. (See, *People v. Kelly* (1992) 1 Cal.4th 495, 525-26 [in determining correctness of a jury instruction, reviewing court determines whether there is a reasonable likelihood the jury understood the instruction in the manner complained of].) Thus, the instruction was correct, and petitioner has not shown prejudice from the fact that counsel did not request further instruction. Because petitioner has shown neither ineffective assistance of counsel nor prejudice, his claim must fail.[34/]

H. Trial Counsel Was Not Ineffective For Failing To Object To The Trial Court's Instruction Listing Both Residential Burglary And Residential Robbery As Other Violent Crimes Committed By Appellant

On direct appeal, petitioner argues that trial court's instruction that the prosecution had introduced evidence of petitioner's violent residential burglary, residential robbery, and child abuse allowed the jury to "view the residential burglary and residential robbery as separate aggravating circumstances" when they should only have been used as one aggravating circumstance, which thus "artificially inflated the prosecution's case for the death penalty." (Petitioner's Exh. WW, pp. 259-60 [AOB 259-62].) In the present petition, petitioner further contends that trial counsel was ineffective for not objecting to the instruction on this ground. (Pet. 145-46.) He is incorrect.

Respondent asserts in his brief on appeal that the trial court's instruction was proper, and in any event, that there was no prejudice. (See, RB 195-98; *People v. Cooper* (1991) 53 Cal.3d 771, 840-41 [All crimes committed during a continuous course of criminal activity which includes force or violence may be considered in aggravation]; *id.* at p. 841 [error in instructing on elements of

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34. Respondent also continues to rely on the assertions made in Argument XIII (RB 177-85) of his brief on appeal, to the extent they are relevant to the present argument.

nonviolent crimes harmless since the instructions "added little, if anything, to the impact of the evidence and the instructions on the far more serious violent crimes"]; *People v. Clair* (1992) 2 Cal.4th 629, 678, fn. 11 [evidence of a burglary harmless where the actual and proper focus of the penalty phase was the defendant and his capital crime].)

Respondent incorporates those arguments herein and, accordingly, submits that 1) counsel was not ineffective for not objecting to a proper instruction, and, 2) in any event, that there is no reasonable probability petitioner would have received a more favorable result had counsel in fact so objected. Thus, petitioner's claim of ineffective assistance of counsel must fail.

I. Counsel Was Not Ineffective For Not Requesting Further Hearing To Discover Juror Misconduct

On direct appeal, petitioner argues that the trial court failed to adequately investigate juror misconduct during penalty phase deliberations. (AOB 274-78.) In the instant petition, petitioner argues that trial counsel was ineffective for failing to request a hearing adequate to discover juror misconduct. (Pet. 146-50.) He is incorrect.

1. Background

On June 14, 1996, at approximately 8:50 a.m., the trial court received a note indicating that one of the jurors wished to speak with the trial court. (13 RT 3017-18; 6 CT 1574.) The juror, Juror No. 040149, told the trial court that one of the other jurors, Juror No. 045829, claimed she was having second thoughts as to her guilty verdicts. (13 RT 3018-19.) Juror No. 040149 told the court that the previous day he saw Juror No. 045829 seated near two of petitioner's relatives, his aunt and another person. Juror No. 040149 stated,

> I don't know if she was conversing with them. I did note that they were talking and it was maybe purse room between the three. I don't know if maybe she heard something that she is now, you know, holding up or

trying to recant or whatever. I just feel that that needs to be brought to the Court's attention.

(13 RT 3019.)

When asked for comment, the prosecutor stated, "I don't have any ideas, your Honor." (13 RT 3020.) Defense counsel Sprague said, "I think we just have to play it out and see what happens." (13 RT 3020.)

Then the trial court received word that Juror Nos. 045829 and 024178 wished to speak with the trial court. (13 RT 3020.) The court spoke with Juror No. 045829 first, who began, "Well, the other juror said I was talking, he thought that I was talking to the –." (13 RT 3021.) At this point, the trial court said that the other juror did not see Juror No. 045829 talking to family members, only that he saw her seated next to some members of the family. (13 RT 3021.) Juror No. 045829 replied, "That is what he said in there." (13 RT 3022.) The trial court responded,

> I don't know what was said in there. I don't want to know what was said in there. I can only tell you that the Court wasn't going to take any action as a result of anything that was told or spoken to the Court by that juror because there wasn't anything indicated by that juror that would have suggested any impropriety on your part.

(13 RT 3022.) Juror No. 045829 did not have anything else about which she wished to speak to the trial court. (13 RT 3022.)

When the trial court asked Juror No. 024178 whether she wished to speak to the court, she responded, "Now I just – no, I am fine." (13 RT 3022.) The trial court indicated that it was available, should the juror wish to talk in the future. (13 RT 3023.)

Counsel had no objections or comments to put on the record. (13 RT 3023.) The jury rendered its verdict in open court at 2:10 p.m. that day. (6 CT 1574.)

2. Counsel Was Not Ineffective

When a trial court is aware of possible juror misconduct, the court must make whatever inquiry is reasonably necessary to resolve the matter. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1255.) The trial court is required to do so, however, only "when the defense comes forward with evidence that demonstrates a 'strong possibility' of prejudicial misconduct." (*Ibid.*) An evidentiary hearing should not be used as a fishing expedition to search for possible misconduct. (*People v. Schmeck* (2005) 37 Cal.4th 240, 294.)

A trial court's failure to investigate the possibility of misconduct does not require reversal unless the record shows that the defendant was prejudiced. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1412.) In *Leonard*, the defendant asserted that the trial court did not properly investigate evidence that one of the jurors refused to deliberate. (*Ibid.*) However, this Court found that the error, if any, did not require reversal, since the juror's failure to deliberate, under the facts of the case, was harmless. (*Ibid.*)

Here, nothing indicates the trial court did not conduct reasonable inquiry, particularly since neither party requested further investigation. At most, Juror No. 040149's statements indicate that Juror No. 045829 may have been seated close to some of petitioner's family members at some point, and may have heard some conversation that they had. Juror No. 040149's statements did not indicate that Juror No. 045829 actually communicated with petitioner's family members or otherwise behaved improperly.

Nor is there any indication that other jurors "may have engaged in misconduct by berating Juror 045829 in order to coerce her into voting for death on Count II." (Pet. 150.) At most, Juror No. 040149's statements indicate that Juror No. 045829 commented on the fact that Juror No. 040149 may have talked to family members. When given the opportunity to speak to the trial court, Juror No. 024178 had no comment, further indicating that no

such "berating" occurred in the present case. Thus, the trial court properly did not conduct further investigation, and counsel was not ineffective for not asking for further investigation.

Morever, there may have been a sound tactical reason for counsel not asking for further investigation. Co-counsel Sorena's declaration is silent as to this issue. (Petitioner's Exh. C.) Counsel may have made a reasoned decision that it was better to retain a juror who had residual doubts about her original guilt verdict, rather than take the chance that an investigation would result in the dismissal of one or more jurors, and the appointment of alternates. Because there may have been a tactical reason for counsel not asking for further investigation, he was not ineffective.

Moreover, petitioner cannot show prejudice. As stated, ante, petitioner bears the burden of showing error:

> For purposes of collateral attacks, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended.

(*People v. Duvall, supra,* 9 Cal.4th at p. 474, quoting *People v. Gonzalez, supra,* 51 Cal.3d at p. 1260, emphasis in original.) A petition is judged on the factual allegations contained within it, without reference to the possibility of supplementing claims with facts to be developed later. (*In re Clark, supra,* 5 Cal.4th at p. 781, fn. 16.) A petitioner claiming ineffective assistance of counsel must prove prejudice as a "'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." (*People v. Williams, supra,* 44 Cal.3d at p. 937.)

Here, petitioner has not met this burden. He has provided no declarations or other statements from Cowan's family members or other witnesses indicating that Juror No. 045829 actually talked with family members or otherwise committed misconduct. Nor has petitioner provided any declarations or other

statements from jurors that indicate coercion or other misconduct occurred during jury deliberations. Because he has not shown that any misconduct actually occurred, he also has not shown that any request by counsel for further investigation would have uncovered such misconduct, let alone that he would thereby have received a more favorable result. Thus, petitioner's claim of ineffective assistance of counsel must fail.

VI.

PETITIONER CANNOT CLAIM INEFFECTIVE ASSISTANCE FROM HIS MENTAL HEALTH EXPERTS

Petitioner claims he received incompetent assistance from two clinical psychologists retained by defense counsel: Drs. John Byrom and William Pierce, who, according to petitioner, failed to conduct neuropsychological testing that would have revealed petitioner's impairments. (Pet. 156-57.) However, petitioner's claim fails at the outset because he has no right to effective assistance of court-appointed experts.

Neither *Ake v. Oklahoma* (1985) 470 U.S. 68, 85 (requiring appointment of psychiatrist where sanity is likely to be a significant factor in defense), nor the broader rule guaranteeing court-appointed experts necessary for the preparation of a defense (see, *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319) gives rise to a federal constitutional right to effective assistance of a mental health expert. (*People v. Samayoa* (1997) 15 Cal.4th 795, 838; *People v. Panah* (2005) 35 Cal.4th 395, 436.) The decisions holding that there is no right to effective assistance of a mental health expert

> recognize that a mental health expert is clearly distinguishable from legal counsel with regard to protection of a defendant's fundamental rights in the adversarial process and, unlike the ascertainable standard of competent legal representation, the question whether a mental health expert has performed "competently" with regard to the assistance provided in the preparation of a defense is not readily ascertainable.

(*People v. Samayoa, supra*, 15 Cal.4th at p. 838.)

Here, petitioner claims that his mental health experts rendered ineffective assistance. However, under *Samayoa* and *Panah* he can make no such claim. Thus, this claim fails.

VII.

PETITIONER HAS NOT SHOWN NEWLY DISCOVERED EVIDENCE ESTABLISHING HIS INNOCENCE OF CAPITAL MURDER

Petitioner, citing Dr. Khazanov's declaration (Petitioner's Exh. P), alleges that his mental impairment "undermines the prosecution's entire penalty phase case and points unerringly to petitioner's reduced culpability." (Pet. 159-60.) Thus, according to petitioner, "Had the jurors known of petitioner's brain impairment, it is likely they would have sentenced petitioner to life without the possibility of parole on both counts." (Pet. 160.) Petitioner is incorrect.

A criminal judgment may be collaterally attacked on the basis of newly discovered evidence only if the new evidence "casts fundamental doubt on the accuracy and reliability of the proceedings." (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1246.) At the guilt phase,

> such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability. [Citations.] By analogy, "new" evidence should not disturb a penalty judgment unless the evidence, if true, so clearly changes the balance of aggravation against mitigation that its omission "more likely than not" altered the outcome.

(*Ibid.*)

In *Gonzalez*, this Court rejected claims that declarations indicating the defendant's organic brain damage constituted new evidence warranting a new trial. (*People v. Gonzalez, supra,* 51 Cal.3d at pp. 1246-47.) The declarations did not eliminate or negate evidence that the defendant acted "with malice, premeditation, and the intent to kill a police officer." (*Id.* at p. 1247.) At most, they conflicted with the trial evidence on that issue. (*Ibid.*) Thus,

> While they might thus have presented more difficult questions for the guilty and penalty juries, they do not qualify as "new evidence" that fundamentally undermines the judgment.

(*Ibid.*)

Here, similarly, evidence of petitioner's brain damage, if believed, did not eliminate or negate the evidence presented at trial that petitioner planned and carried out the robbery and murder of a defenseless elderly couple, by strangulation and gunshot. Thus, the evidence did not "undermine the entire prosecution case and point unerringly to innocence or reduced culpability[,]" nor did it more likely than not alter the outcome of petitioner's case. (*People v. Gonzalez, supra,* 51 Cal. 3d at p. 1246.) Accordingly, petitioner's claim of newly discovered evidence must fail.

VIII.

PETITIONER IS NOT ENTITLED TO RELIEF BECAUSE OF CUMULATIVE ERROR

Petitioner claims that his convictions and death sentence must be reversed because of the cumulative effect of errors complained about in the instant petition and on direct appeal. (Pet. 161-64.) He is incorrect.

Petitioner is entitled only to a fair trial, not a perfect one, even where his life is at stake. (Cf. *People v. Marshall* (1990) 50 Cal.3d 907, 945; *People v. Hamilton* (1988) 46 Cal.3d 123, 156; see also *Schneble v. Florida* (1972) 405 U.S. 427, 432.) When a defendant invokes the cumulative error doctrine, "the

litmus test is whether defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.) Therefore, any claim based on cumulative errors must be assessed "to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*Ibid.*)

Applying that analysis to the instant case, petitioner's contention should be rejected. As shown ante, and in respondent's brief on appeal, there were few, if any errors. Review of the record without the speculations and interpretations exacted by appellant, shows that appellant received a fair and untainted trial. The Constitution requires no more. Even when taken together, it is not reasonably probable that absent all the alleged errors appellant would have received a more favorable verdict, and any errors were harmless beyond a reasonable doubt. (*People v. Noguera* (1992) 4 Cal.4th 599, 637; see *Chapman v. California* (1967) 386 U.S. 18, 36.) Thus, petitioner's claim of cumulative error must fail.

IX.

THE CALIFORNIA DEATH PENALTY STATUTE IS CONSTITUTIONAL

Petitioner argues that the statutory scheme under which he was sentenced to death is unconstitutional because it

> fails to adequately narrow the class of person eligible for the death penalty and creates a substantial and constitutionally unacceptable likelihood that the death penalty will be imposed in a capricious and arbitrary fashion.

(Pet. 165-69.)

Petitioner makes a similar claim on appeal. (AOB 280-84.) His exhibit in support of his habeas claim, a declaration by law professor Steven Shatz giving the results of a study on the narrowing effect of California's death penalty law (Petitioner's Exh. XX) adds little to this claim. Thus, this Court may reject

petitioner's claim on the ground that it has already been presented on direct appeal. (*In re Terry, supra*, 4 Cal.3d at p. 927; *In re Robbins, supra*, 18 Cal.4th at p. 814, fn. 34.)

In any event, the argument fails. This Court has previously rejected claims that California's statutory capital punishment scheme is impermissibly broad. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1058; *People v. Morgan* (2007) 42 Cal.4th 593, 622; *People v. Blair* (2005) 36 Cal.4th 686, 752.) Respondent respectfully urges this Court to similarly reject petitioner's claim.

X.

PETITIONER'S EXECUTION FOLLOWING HIS CONFINEMENT IS NOT CRUEL AND UNUSUAL PUNISHMENT

Petitioner argues that his execution after his lengthy confinement (currently totaling 13 years, during more than ten of which he has been under a sentence of death), constitutes cruel and unusual punishment under various provisions of the California and federal Constitutions, and under international law. (Pet. 170-77.) Petitioner is incorrect.

The time a defendant spends awaiting execution does not amount to cruel and unusual punishment under the Eighth Amendment. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 45; *People v. Huggins* (2006) 38 Cal.4th 175, 254; *People v. Anderson* (2001) 25 Cal.4th 543, 605-06.) Moreover, the existence of an automatic appeal is not a constitutional defect; it is a constitutional safeguard. (*People v. Ochoa* (1998) 19 Cal.4th 353, 476-77.) Appellate delay does not prevent fulfillment of legitimate purposes of punishment: deterrence and retribution. (*People v. Ochoa* (2001) 26 Cal.4th 398, 463.) Because petitioner's confinement awaiting execution is not cruel and unusual punishment, his claims to the contrary must fail.

XI.

CALIFORNIA'S METHOD OF EXECUTION IS CONSTITUTIONAL

Petitioner asserts California's method of execution, by lethal injection, is unconstitutional because it unnecessarily risks "unnecessary and wanton infliction of pain." (Pet. 178-84.)[35/] Petitioner is incorrect.

Execution by lethal injection is not per se cruel and unusual punishment. (*People v. Boyer* (2006) 38 Cal.4th 412, 484.) Any alleged imperfections in the method of execution do not affect the validity of the death judgment itself. (*Id.* at p. 485.) Petitioner's "attack on illegalities in the execution process that may or may not exist when his death sentence is carried out is premature." (*Ibid.*) Thus, petitioner's claims should be rejected here.

XII.

THE DEATH PENALTY IS NOT IMPOSED ARBITRARILY AND CAPRICIOUSLY

Petitioner contends, citing, inter alia, *Bush v. Gore* (2000) 531 U.S. 98, 104-110, that the death penalty violates his equal protection rights because "county prosecutors use different, or no standards, in choosing whether to charge a defendant with capital murder." (Pet. 185-86.) Petitioner is incorrect.

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35. Respondent notes that many of the factual allegations in this argument are unsupported by affidavit, declaration, or otherwise, including allegations as to the types of drugs used, as to the risk that inadequate dosages may be administered, as to the risk that improper storage and handling will reduce the potency of chemicals, and as to the risk that the technicians conducting the procedure will not be able to adequately handle any problems that arise. (Pet. 180-82.) Thus, respondent submits that these factual allegations are inadequate to support a prima facie case for relief. (See, *People v. Duvall, supra*, 9 Cal.4th at p. 474 [petition should state with particularity the facts on which relief is sought and should include copies of reasonably available documentary evidence supporting the claim].)

Preliminarily, respondent notes that petitioner does not detail how prosecutorial standards differ from county to county, let alone show how those standards differ to such a degree as to violate equal protection. Thus, his claim may be dismissed. (See, *People v. Karis, supra,* 46 Cal.3d at p. 656 [conclusory allegations do not warrant relief]; *In re Clark, supra,* 5 Cal.4th at p. 781, fn. 16 [petition judged on factual allegations contained within it, without reference to the possibility of supplementing claims with facts to be developed later].)

In any event, the claim fails on the merits. Prosecutorial discretion to select death-eligible cases in which the death penalty will actually be sought is not unconstitutional (*People v. Snow* (2003) 30 Cal.4th 43, 126), nor does it,

> in and of itself evidence an arbitrary and capricious capital punishment system or offend principles of equal protection, due process, or cruel and/or unusual punishment.

(*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1024; see also *People v. Williams* (2006) 40 Cal.4th 287, 339.)

Petitioner urges this Court to reconsider its precedents

> holding that prosecutorial discretion as to which defendants will be charged with capital murder does not offend principles of due process, equal protection or cruel and unusual punishment.

(Pet. 186-87, citing *People v. Anderson, supra*, 25 Cal.4th at pp. 601-02;[36] *People v. Williams* (1997) 16 Cal.4th 153, 278; *People v. Keenan* (1988) 46 Cal.3d 478, 505.) However, petitioner presents no compelling reason for doing so. The *Gore* court considered the constitutionality of a vote recount procedure implemented by a state court in a presidential election (*Bush v. Gore, supra,* 531 U.S. at pp. 100-01, 109), and is clearly distinguishable on its facts from the present case. Indeed, the *Gore* court itself limited its decision to the

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36. Petitioner actually cites pages 622-623. However, the *Anderson* decision ends on page 609.

circumstances then before it: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." (*Id.* at p. 109.) *Bush v. Gore* is not authority for petitioner's propositions. Thus, petitioner's claims should be rejected.

XIII.

PETITIONER'S CONVICTION AND SENTENCE DO NOT VIOLATE INTERNATIONAL LAW

Petitioner claims that his conviction and capital sentence violate various aspects of international law. (Pet. 188-96.) He is incorrect. This Court has

> consistently held that international law does not prohibit a death sentence rendered in accordance with state and federal constitutional and statutory requirements.

(*People v. Boyer, supra*, 38 Cal.4th at p. 489 [rejecting claims that defendant's capital trial did not meet minimal guarantees for a defense as informed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Declaration of the Rights and Duties of Man]; see also *People v. Perry* (2006) 38 Cal.4th 302, 322 [capital punishment does not violate International Covenant of Civil and Political Rights]; *People v. Beames* (2007) 40 Cal.4th 907, 935 [California's application of capital punishment does not violate international norms of humanity and decency].) Respondent respectfully urges this Court to similarly reject petitioner's claims.

XIV.

PETITIONER'S MENTAL CONDITION DOES NOT PROHIBIT HIS CAPITAL SENTENCE

Petitioner argues that executing him would be unconstitutional because he suffers from an organic brain dysfunction as a result of chronic substance abuse

and chronic physical and psychological trauma. (Pet. 197-99.) Petitioner is incorrect.

To the extent petitioner argues that he is factually innocent of capital murder, or that the jury would not have rendered a sentence of death had it heard evidence of petitioner's organic brain dysfunction, respondent has answered those claims in Argument VII., ante. To the extent petitioner suggests that he is presently incompetent to be executed, his claim is premature.

Execution of an insane person is prohibited by the federal Constitution and by California law. (*People v. Leonard, supra*, 40 Cal.4th at p. 1430.) However, the question whether a defendant is mentally competent to be executed is not determined until an execution date is set. (*Ibid.*, citing § 3700.5.)[37/] Thus, this Court may reject petitioner's claim as premature. (*Ibid.*)

Petitioner argues in part that his mental condition is "the functional equivalent" of mental retardation, as well as insanity. (Pet. 197.) Mental retardation is defined as "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior

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37. Section 3700.5 provides in relevant part as follows:

> Whenever a court makes and causes to be entered an order appointing a day upon which a judgment of death shall be executed upon a defendant, the warden of the state prison to whom such defendant has been delivered for execution . . . shall notify the Director of Corrections who shall thereupon select and appoint three alienists, all of whom must be from the medical staffs of the Department of Corrections, to examine the defendant, under the judgment of death, and investigate his or her sanity. It is the duty of the alienists so selected and appointed to examine such defendant and investigate his or her sanity, and to report their opinions and conclusions thereon, in writing, to the Governor[] [and] to the warden of the prison at which the execution is to take place . . . at least 20 days prior to the day appointed for the execution of the judgment of death upon the defendant.

(*Ibid.*)

and manifested before the age of 18." (*In re Hawthorne* (2005) 35 Cal.4th 40, 47; § 1376, subd. (a).) To the extent petitioner argues that he is mentally retarded, his claim fails. In order to state a prima facie claim for relief in habeas on the grounds of mental retardation, the petition must contain a declaration from a qualified expert stating his opinion that the petitioner is mentally retarded, and giving the basis for that opinion. (*In re Hawthorne, supra*, 35 Cal.4th at p. 47; § 1376, subd. (b)(1).) However, neither Dr. Khazanov nor Dr. Jinich opine that petitioner is mentally retarded. (Petitioner's Exh. P, EE.) Thus, any claim of mental retardation fails at the outset.

Because petitioner's claims are premature, and, in any event, meritless, they must fail.

XV.

PETITIONER HAS RECEIVED ADEQUATE POST-CONVICTION REVIEW

Petitioner complains that "he was deprived of adequate and fair post-conviction review" because of procedures adopted by this Court in capital cases, including 1) the policy that habeas and appellate procedures be pursued simultaneously; 2) the timeliness standards; 3) allegedly inadequate compensation rates for post-conviction appellate counsel; 4) allegedly inadequate payment guidelines for necessary expenses relating to preparation of a petition for writ of habeas corpus; and, 5) the $25,000 limit for expert assistance and investigator fees. (Pet. 200-01.) Petitioner alleges that inadequate compensation for counsel resulted in a delay of over eight years before appointment, and inadequate funding prevented counsel from retaining experts and investigators necessary to perform a competent investigation, resulting in prejudice from the loss of evidence. Petitioner is incorrect. He has no right to post-conviction appointment of habeas counsel, and thus cannot complain of the reasonable limitations this Court places on appointed counsel

representing him. Moreover, he has not shown prejudice from the limitations of which he now complains.

"Postconviction relief is even further removed from the criminal trial than is discretionary direct review." (*In re Barnett* (2003) 31 Cal.4th 466, 474.)

> States have no obligation to provide this avenue of relief, [citation], and when they do, the fundamental fairness demanded by the Due Process Clause does not require that the state supply a lawyer as well.

(*Ibid.*, quoting *Pennsylvania v. Finley* (1987) 481 U.S. 551, 556-57.)

Nor does the California constitution require appointment of counsel for seeking postconviction collateral relief. (*In re Barnett, supra,* 31 Cal.4th at p. 475.) Nevertheless,

> the longstanding practice of this Court is to appoint qualified counsel to work on behalf of an indigent inmate in the investigation and preparation of a petition for a writ of habeas corpus that challenges the legality of a death judgment.

(*Ibid.*)

> This practice . . . promotes the state's interest in fair and efficient administration of justice and, at the same time, protects the interests of all capital inmates by assuring that they are provided a reasonably adequate opportunity to present their habeas corpus claims.

(*Ibid.*) This Court's practice of appointing habeas counsel in capital cases is now codified in Government Code section 6682. (*Ibid.*)

In short, petitioner has no right to any representation in postconviction collateral proceedings. He therefore cannot complain because this Court has placed reasonable limitations on the scope of that representation with regards to timeliness and compensation. Accordingly, his claims fail.

Even assuming, arguendo, the limitations petitioner now complains of were unreasonable, this is not a ground for relief, since, as discussed post, petitioner has not shown prejudice from these limitations.

Petitioner complains that the timeliness standards and the requirement that habeas proceedings be pursued simultaneously with appellate proceedings

restrict presentation of claims and prejudices him. (Pet. 200.) Respondent notes that even if a petition is filed after the period of presumptive timeliness, a petitioner may establish good cause for the delay "by showing particular circumstances sufficient to justify a substantial delay." (Supreme Court Policies Regarding Cases Arising From Judgments Of Death, Policy 3, 1-2.) Petitioner has not shown how this reasonable policy requiring timeliness has restricted the presentation of his claim or otherwise prejudiced him. Thus, his claim must be rejected.

Petitioner also claims that payment guidelines for necessary expenses are inadequate, and that the $25,000 "limitation" for expert assistance and fees is "capricious, arbitrary, and inadequate." (Pet. 201.) However, while the policies place certain limitations on expenditures without prior approval of this Court (Policy 3, 2-2.1, 22-2.4), the policies also provide a mechanism for counsel to request further funds if they are needed. (Policy 3, 2-4 et. seq.) Petitioner has not alleged that he requested further funds in this manner, still less that these funds were denied to his prejudice. Thus, his claim must fail.

Finally, petitioner claims that the delay in appointment of counsel and inadequate investigatory funds prevented counsel from performing an adequate investigation, with the consequence that

> important witnesses have died or could not be located, memories have faded, important evidence has disappeared, and social history records have been destroyed, all to petitioner's prejudice.

(Pet. 201-02.) However, petitioner does not specify what evidence, records, or statements he has been unable to obtain because of the purported delay, still less how the absence of these items has prejudiced him. Thus, his claims must fail.

Petitioner has not shown that he has a right to representation for postconviction collateral review, that this Court's limitations on the scope of the review he has been granted is unreasonable, or that he has been prejudiced by

those limitations. Thus, his claim of inadequate post-conviction review must fail.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the instant petition be denied.

Dated: March 5, 2008.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS uses a 13 point Times New Roman font and contains 38,778 words.

Dated: March 5, 2008.

Respectfully submitted,

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

LEWIS A. MARTINEZ
Deputy Attorney General

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***In Re Robert Wesley Cowan***

Case No.: **S158073** (Related to S055415)

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 March 5, 2008, I served the attached **INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 2550 Mariposa Mall, Room 5090, Fresno, California 93721, addressed as follows:

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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 March 5, 2008, at Fresno, California.

Debbie Pereira-Young
Declarant

Debbie Pereira-Young
Signature