S117235

No._____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

ROBERT LEWIS, JR.

CAPITAL CASE
No.S117235

(Related Automatic Appeal
No. S020670

On Habeas Corpus

Los Angeles Superior
Court No. A027897

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**PETITIONER'S INFORMAL REPLY TO INFORMAL RESPONSE FOR WRIT OF HABEAS CORPUS**



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TABLE OF CONTENTS

## TABLE OF AUTHORITIES

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## CLAIMS

### CLAIM I: PETITIONER MAKES A PRIMA FACIE CASE THAT RON SLICK DEPRIVED PETITIONER OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Ron Slick, now infamous for his pathetic record as an appointed lawyer, in capital defense cases, conducted Petitioner's capital trial in four days. (Petn. 31.) The penalty phase took 1 hour and 36 minutes, including the arguments of counsel and the instructions by the judge. (*Ibid.*) Despite Petitioner's excruciating life history, Mr. Slick put on no meaningful mitigation evidence. (*Ibid.*)

Claim I asks this Court to consider the big picture regarding Mr. Slick's representation of Mr. Lewis. Respondent does not take on the disturbing facts of this case directly. Instead, they try to pick apart the big picture and distract this Court with analysis of irrelevant detail.

For instance, Respondent argues that Petitioner fails to provide sufficient factual specifics to establish deficient performance and prejudice under *Strickland v. Washington* (1984) 466 U.S. 668. (IR 18.) Respondent further asserts that Petitioner has not made the requisite showing of total breakdown of the adversarial process under *United States v. Cronic* (1984) 466 U.S. 648, and therefore must show prejudice. (IR 19.) Respondent also argues that Petitioner fails to provide evidence demonstrating ineffective assistance of counsel in Mr. Slick's representation of Paul

Tuilaepa, Senon Grajeda, Oscar Lee Morris and Donrell Thomas. (IR 19-20.) Further, Respondent asserts that the allegations of ineffective assistance regarding Andre Burton, Robert Wilson, and Robert Glover do not show Mr. Slick's performance in this case was deficient or that Petitioner was prejudiced. (IR 20.)

Respondent opts not to directly defend Mr. Slick's record as a capital lawyer because it is an undefendable record of incompetence. Instead, Respondent wants this Court to look at each one of the cases in which a client of Ron Slick was sentenced to death as unrelated to Petitioner's case and unrelated to each of the other cases in which Mr. Slick's assistance resulted in a death sentence. This argument misses the point. It is not a coincidence that the same attorney who conducted Petitioner's entire trial in four days is also responsible for putting these other men on death row through his incompetence.

Mr. Slick's egregious behavior in his abject failure to defend Mr. Lewis was consistent with his pattern and practice of incompetence. (Petn. 29.) His record of not presenting exculpatory evidence and not challenging prosecution evidence fits neatly with his conduct in Petitioner's case. (Petn. 29-31.) As argued below, trial counsel's assistance fell far below the *Strickland* standard.

The United States Supreme Court has held that the standards for

capital defense work articulated by the American Bar Association ("ABA") are "guides to determining what is reasonable." (*Wiggins v. Smith* (2003) 123 S. Ct. 2527, 2537.) Mr. Slick's performance as Mr. Lewis' trial counsel was the antithesis of these standards. As argued below, his performance failed to meet the ABA standards for trial preparation overall, voir dire and jury selection, and the investigation and presentation of the penalty phase. (ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) 10.10.1, 10.10.2, 10.11.)

As argued in Claims V-XVI, trial counsel failed Mr. Lewis at every stage of his representation. Mr. Slick put on no meaningful defense despite exculpatory evidence available to him. (Petn. 31.) He failed to present mitigating evidence, despite Mr. Lewis' mental retardation and excruciating childhood. (Petn. 31.) His failure to adequately investigate all aspects of the case prevented him from making reasonable tactical decisions. (Petn. 33-36.)

Mr. Slick's representation fell far below any reasonable standard for trial counsel in a capital case. The right to counsel is meaningless if Mr. Lewis can be put to death based on a record like this.

## CLAIM II: THE PETITION IS NEITHER SUCCESSIVE, NOR UNTIMELY WITHIN THE MEANING OF THIS COURT'S PROCEDURAL DEFAULT RULES.

Respondent boldly contends that the Court should bar itself from

considering the merits of any of Petitioner's claims except for Claims III, IV, XXII, XXIII, and XXV. (IR 15.) The government argues that all of the other claims fall victim to the Court's decision of *In re Clark* (1993) 5 Cal.4th 750, that procedurally bars habeas corpus claims that are untimely made.[1] This contention is based on a misunderstanding of Petitioner's pleadings and the rules in *Clark*. Petitioner's claims are not procedurally defaulted.

### A. Respondent Misunderstands - and Explicitly Concedes the Merits of - Petitioner's Claim II.

Respondent asserts that Petitioner devotes "23 pages of his 307-page petition to the issue of timeliness." (IR 4.) This is not accurate. The pages of the petition to which Respondent refers (Petn. 37-59) are actually devoted to the issue of "successiveness."[2] Petitioner set forth a number of reasons why it would be unfair and unwarranted to apply a successiveness bar to his claims, including that, at the time Petitioner's 1988 petition was filed:

(1) Petitioner's appointed counsel was under no obligation to conduct a habeas investigation or an investigation of any particular scope,
(2) there was no clearly established or regularly applied "successiveness" bar that would have put counsel on notice

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[1]Respondent explicitly concedes that Petitioner is not subject to the other procedural bar announced in *Clark*, that of successiveness. (IR 5, fn. 3.)

[2]I.e., to explain why the petition's claims should not be barred because Petitioner failed to present them in his first petition, filed on April 29, 1988. (See *In re Clark* (1993) 5 Cal.4th 750.)

that if he failed to include particular claims in a first petition that Petitioner would be barred from presenting them in a second petition,

(3) much of the factual support for Petitioner's new claims was unavailable to Petitioner's 1988 counsel because of various reasons, including the lesser amount of funding then available to appointed counsel for habeas investigation, and

(4) the legal basis for some of Petitioner's new claims was unavailable in 1988. (Petn. 37-47.)

Furthermore, as raised in the petition, failure to consider Petitioner's various claims would also effect a miscarriage of justice. (Petn. 47-59.) In addition, Respondent concedes the issue.

Respondent agrees that it would be inappropriate to apply a successiveness bar to Petitioner's claims, and cites language in a footnote in this Court's opinion in *In re Robbins* (1998) 18 Cal.4th 770, establishing that the Court "will not apply the successive petition bar to cases where prior habeas corpus petitions were filed prior to the decision in *In re Clark* [(1993) 5 Cal.4th 750]." (IR 5, fn. 3.) In that footnote, the Court, after noting that the rules concerning successiveness had not been regularly adhered to prior to the *Clark* decision, the court stated:

> Because the prior habeas corpus petition in this matter was filed before the date of finality of *Clark, supra*, we . . . do not rely upon our successiveness rule. *Clark* serves to notify habeas corpus litigants that we shall apply the successiveness rule when we are faced with a petitioner whose prior petition was filed *after* the date of finality of *Clark, supra*.

(*In re Robbins, supra*, 18 Cal.4th at p. 778, fn. 9, emphasis added.)

Petitioner agrees with Respondent's reading of the Court's language

in the cited *Robbins* footnote. Petitioner's prior habeas petition was filed in 1988, long before the decision in *Clark*. Thus, in accordance with the Court's stated policy in *Robbins*, and the parties' agreement, it is clear that there is no successiveness bar to Petitioner's claims.

### B. Petitioner's Claims Are Presumptively Timely Under the Court's Announced Policies and Precedent.

It is equally clear that there is no untimeliness bar to Petitioner's claims. A petition for writ of habeas corpus is presumptively timely if filed within 180 days of the final due date for the filing of the Appellant's Reply Brief in the concurrent automatic appeal. (Sup. Ct. Policies Regarding Cases Arising From Judgment of Death [hereinafter, "Standards"], Policy 3 [hereinafter "Policy 3"], std. 1-1.1.[3]) Petitioner's Reply Brief in the concurrent automatic appeal was filed on January 3, 2003. The present Petition was due to be filed on July 2, 2003, 180 days later. Therefore, Mr. Lewis's claims are presumptively timely and so not barred by the rule in *Clark*. (See *In re Robbins* (1998) 18 Cal.4th 770, 784; *In re Clark*, *supra*, 5 Cal.4th at p. 783.)

The detailed timeliness pleading burden which Respondent asserts Petitioner has failed to satisfy (see IR, pp. 6-7, et seq.) is a burden

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[3]As it read as of the time of the filing of the petition, Standard 1-1.1 provided as follows: "A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if is filed within 180 days after the final due date for the filing of appellant's reply brief on the direct appeal, or within 24 months after appoint of habeas corpus counsel, whichever is later."

applicable only where a petition is filed after expiration of the Standards' period of presumptive timeliness. (See, e.g., *In re Robbins*, *supra*, 18 Cal.4th at p. 779 ["whenever a habeas corpus petition is filed more than 90 days[4] after the filing of the reply brief in the direct appeal, the petitioner has the burden of establishing the timeliness of the claims raised in the petition"]; *In re Clark*, *supra*, 5 Cal.4th at p. 784 ["[w]here the presumption of timeliness is not applicable . . . any substantial delay in the filing of a petition after the factual and legal bases for the claim are known or should have been known must be explained and justified"]; Policy 3, std. 1-1.2 ["a petition filed more than 180 days after the final due date for the filing of appellant's reply brief on the direct appeal . . . may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim and (b) became aware, or should have become aware, of the legal basis for the claim"].)

Respondent overlooks that when Petitioner's current counsel was appointed on May 2, 1994, Policy 3 was in place and quite clearly stated that a petition would be deemed timely if filed within the prescribed number of days from the final due date of the direct appeal reply brief. Both *Clark* (5 Cal.4th at pp. 783-786) and *Robbins* (18 Cal.4th at pp. 779-780)

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[4]The post-reply-brief period of presumptive timeliness, now 180 days, was 90 days at the time of the decisions in *Robbins* and *Clark*.

reiterated that message. Neither Petitioner, nor his counsel, had any reason to suspect that a successor petition, filed and prepared with funding newly made available under the Standards, could be deemed untimely if filed within the prescribed period of presumptive timeliness. It would be unfair, and, indeed, violative of due process, to procedurally bar Petitioner's claims on the basis of some new, previously unannounced stricter standard. (Cf. *Ford v. Georgia* (1991) 498 U.S. 411, 423 ["[n]ovelty in procedural requirements cannot be permitted to thwart review . . . applied for by those who, in justified reliance upon prior decisions, seek vindication . . . of their federal constitutional rights"].)

Respondent apparently believes that the limited nature of the trial court remand following Petitioner's initial direct appeal somehow alters the clear language of the Standards and this Court's explication of those standards in *Clark* and *Robbins*, and somehow put Petitioner on notice that he could not rely upon the period of presumptive timeliness set forth in the Standards and discussed in those opinions. (IR 6.) Respondent is wrong.[5]

It is true that the trial court remand was solely for a new section 190.4(e) hearing (and not for a complete new trial) and that the new direct appeal is limited to issues arising from the new section 190.4(e)

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[5]Indeed, although the entirety of Respondent's twelve page procedural argument requires that the Court be willing to carve up Petitioner's claims into "first-trial" and "remand" categories, the government provides no citation or additional analysis in favor of the proposed distinction.

proceedings and the imposition of a sentence of death. (*People v. Lewis* (1990) 50 Cal.3d 262, 292.) However, no similar limitation was imposed on any habeas petition counsel might file; nor was there any reason for Petitioner or his counsel to believe that any such limitation would or could be imposed. Nothing in *Clark*, which sought to clarify state law concerning successive petitions, in any way suggested that a proper successor petition was limited to issues relating to a newly re-litigated stage of the trial court proceedings. And, indeed, the Court has issued OSC's and granted evidentiary hearing on issues raised in successor petitions filed long after the end of trial court proceedings and without regard to whether any particular stage of the trial proceedings had been re-litigated. (See, e.g., the OSC's and evidentiary hearing orders recently issued in *In re Bacigalupo*, Case No. S079656; and *In re Miranda*, Case No. S058528.) Certainly nothing in the language of Policy 3 suggests that the period of presumptive timeliness prescribed therein is limited by the scope of the re-litigated trial court proceedings giving rise to a new appeal,[6] and Respondent never

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[6]Nor has the Court so read Policy 3 in prior cases. See, for example, the Court's June 30, 1999 order denying relief in *In re Davenport*, Case No. S049760. The petition in that matter had been filed by the attorney appointed to represent Davenport on his direct appeal following a penalty phase retrial. (See, *People v. Davenport* (1995)11 Cal.4th 1171, 1188 [noting that the case was reaching the Court again "after a penalty phase retrial following this court's affirmance of defendant John Galen Davenport's 1980 first degree murder conviction . . . and torture-murder special-circumstance finding . . . , and reversal of his death sentence based on instructional error"].) The petition, which raised both guilt and penalty phase claims, was filed within 90 days of the final due date for the reply brief on the penalty-retrial direct appeal, and relied upon the Standards' presumption of timeliness as establishing that the petition was timely filed. (*Davenport* Petition, Case No. S049760, 11.) Respondent argued there, as in the present case,

suggests how Petitioner could be said to have been on notice of such a dramatic recasting of that language. There is simply no fair or legitimate basis for treating Petitioner's presumptively timely petition as anything but timely.

In sum, neither the successiveness bar nor the untimeliness bar applies to this petition, and the Court should simply proceed to consider the merits of petitioner's claims for relief.

## CLAIM III: THE GOVERNMENT'S FAILURE TO PRESERVE MR. LEWIS'S CASE FILES PREVENTED PETITIONER FROM REVIEWING MATERIALS TO WHICH HE MAY BE CONSTITUTIONALLY ENTITLED.

The government mistakenly responds to Petitioner's Claims III and IV as though they were the same animal in different clothes. (See IR 21.) Although the government appropriately recognizes that both of these claims arise from the same set of facts - namely, that the district attorney and the Long Beach Police have lost or destroyed their files on Mr. Lewis - the legal basis supporting each claim for relief differs substantially. As such, Petitioner declines to conflate Claims III and IV, and will address each of

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that the claims unrelated to the re-litigated stage of the proceedings (i.e., the guilt phase claims) should be barred as untimely. (*Davenport,* Case No. S049760, Informal Response, 1-6.) The Court disagreed, addressing the merits of the guilt phase claims without mention of any untimeliness bar. (See, June 30, 1999 order, noted above; see also, *In re Robbins*, *supra*, 18 Cal.4th at 815, fn. 34 [when respondent asserts that a particular claim or subclaim should be barred as successive or untimely, and "our order disposing of a habeas corpus petition does not impose the proposed bar or bars as to that claim or subclaim, this signifies that we have considered respondent's assertion and have determined that the claim or subclaim is not barred on the cited ground or grounds"].)

them in turn.

Respondent admits that the Court is not procedurally barred from deciding the merits of Claim III. (IR 15.) The government cites *California v. Trombetta* (1984) 467 U.S. 479 and *Arizona v. Youngblood* (1988) 488 U.S. 51 in arguing both (1) the standard for the state's duty to preserve evidence and (2) that Mr. Lewis has not presented facts which satisfy that standard. (IR 21-22) Mr. Lewis respectfully submits, however, that *Trombetta* and its progeny do not control his case. Furthermore, Mr. Lewis has presented facts which satisfy the *Trombetta* standard if the Court decides that it does. Because he has made a prima facie claim for relief under Claim III and has demonstrated that he should prevail on the merits, Petitioner therefore urges the Court to issue the writ and reverse his death sentence.

### A. The Government's Reliance on *Trombetta* is Not Persuasive.

Respondent correctly identifies *Trombetta* as affirming that the state has a duty to preserve evidence in a criminal action under the Due Process Clause. (IR 21) The Supreme Court there recognized that, whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed. (*California v. Trombetta*, *supra*, 467 U.S. at p. 487.)

In deciding how best to undertake that task, the *Trombetta* court held that the destruction of any particular piece of evidence is a violation of Due Process where the particular evidence might be expected to play a significant role in the suspect's defense and its exculpatory value was apparent before destruction. (*Id.* at p. 488.) Later cases have continued to evaluate the scope of the government's duty to avoid the negligent destruction of potentially-exculpatory evidence. (See, e.g., *Arizona v. Youngblood*, *supra*, 488 U.S. at pp. 337-338 [holding that bad-faith, negligent destruction of potentially useful evidence constitutes a violation of due process]; *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 11-12 [holding that the routine destruction of *Pitchess* complaints after five years does not violate due process because "the mere 'possibility' that the complaint might be exculpatory in some future case is insufficient [evidence of bad faith]."].)

Petitioner submits, however, that the *Trombetta* line does not govern a case like this, where the state has failed to maintain *any* of the records relating to his arrest and prosecution *even though* they knew or should have known that his case was proceeding on appeal. In such cases, the government's wholesale destruction or mishandling of a defendant's file makes it all but impossible for a defendant to know what the state did during pre-trial and trial proceedings, and makes it almost certain that she

or he will be unable to identify police or prosecutorial misconduct or even to identify specific items of evidence that should have been subject to disclosure or preservation under *Brady* or *Trombetta*. An application of *Trombetta* in these circumstances would be a signal to prosecuting agencies that the proper way to avoid a successful due process appeal is not to destroy one item of evidence, but the whole file. Because this would undermine the principles so clearly announced in *Brady* and *Trombetta*, Petitioner submits that his case cannot be governed by a direct application *Trombetta* or its progeny.

### B. Even Under *Trombetta* and *Youngblood*, Petitioner Makes a Prima Facie Case for Relief in Claim IV.

The government asserts that Mr. Lewis has failed to make a prima facie case for relief under by "failing to identify what exculpatory evidence of significant value was not preserved." (IR 22.) In support for this contention, the government argues that (1) Mr. Lewis has not identified "a single document or piece of evidence that is 'missing' or has been destroyed and has not been previously provided to him or current available from another source," (*Ibid.*); (2) Mr. Lewis has not alleged facts "establishing that the police file was 'missing' at the time that the petition was filed," (IR 23); and (3) Mr. Lewis has not included "reasonably available documentary support establishing that trial counsel was not provided any document originally in the file maintained by the Los Angeles County District

Attorney's Office to which he was or is now entitled" (*Ibid.*).[7] For the reasons given below, each of these arguments fail to undermine Mr. Lewis's claim. Because the government's contention is therefore baseless, Mr. Lewis urges the court to recognize that he has presented a prima facie case for relief, even under the *Trombetta* standard.

1. *Mr. Lewis is unable to certainly identify any particular document or piece of evidence that was lost or destroyed precisely because the state lost or destroyed his entire file.*

It is inconceivable to suppose, as Respondent proposes, that the burden is properly placed on Petitioner to identify each document or piece of evidence that the Long Beach Police Department and Los Angeles County District Attorney's office lost or destroyed when they lost or destroyed his entire file. This is not a case where police destroyed a breath sample after testing it for alcohol content, but maintained the test report. (See *California v. Trombetta* (1984) 467 U.S. 479) Neither is this a case where the state failed to properly preserve clothing that contained semen from an alleged sexual offense, but kept records of the clothing's collection and storage. (See *Arizona v. Youngblood*, *supra*, 488 U.S. 51.) This is not even a case where police routinely destroyed records that might only

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[7]The government cites the *Youngblood* for the proposition that where the police fail to preserve potentially useful evidence, a criminal defendant must show bad faith on the part of the police in order to establish denial of due process of law. (IR 22 [citing *Arizona v. Youngblood*, *supra*, 488 U.S. at p. 58].) Respondent does not apply this rule to the facts of Mr. Lewis' case, but simply concludes it is not presumptive bad faith.

someday be relevant to an unknown case. (See *City of Los Angeles v. Superior Court, supra,* 29 Cal.4th 1.)

Rather, this is a case where prosecuting agencies did not produce to habeas counsel a single document from Petitioner's files relating to his arrest and prosecution. This is a case where Petitioner is unable to even determine whether all of the records were lost, destroyed according to a policy,[8] or destroyed in an intentional or negligent manner. This is a case where the government has so thoroughly covered its prosecutorial tracks, that Petitioner is forced to hypothesize about what *should have* been in the state's files – like the police reports and "murder book" – because the state has effectively immunized itself from specific discovery requests by eliminating all traces of their investigation methods.

To date, Petitioner has recovered only 52 pages of police reports and those were only recently recovered from a third party. (Petn. 62.) The dates on these reports range from October 28, 1983 to November 3, 1983. (Exhibit 65, Declaration of Robert M. Sanger.) It is improbable that the police conducted a capital murder investigation in a week and that the entire file consists of 52 pages. (Exhibit 65.) Further, the police reports refer to "Robert Lewis, Jr." one time, and otherwise refer to the suspect by the alias of "Sherman Davidson." (Exhibit 65.) The police must have conducted an

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[8]Such a policy might itself violate Petitioner's right to due process. (See, e.g, *City of Los Angeles v. Superior Court, supra,* 29 Cal.4th at pp. 27-29 [dis. op. of Moreno, J.].)

investigation to determine that "Sherman Davidson" was actually Robert Lewis, Jr. Also, at Petitioner's trial, there was testimony that Jacqueline Estell accompanied police officers to Mr. Estell's house on October 31, 1983 and that she told the police that the following property was missing: a television, television stand, camera, radio and cassette player. (3RST 511:10-512:3.) Ms. Estell's visit to Mr. Estell's home and the fact that she stated certain property was missing are not documented in the 52 pages of police reports. (Exhibit 65.)

Respondent's position, if followed, inevitably leads to either (1) the conclusion that the state can avoid post-conviction discovery under Penal Code, section 1054.9[9] by destroying their entire file subject to standard operating procedures, or (2) the conclusion that Petitioner's case was investigated and prosecuted without the preparation of any discoverable documents. The first of these conclusions is blatantly violative of a defendant's statutory and constitutional rights. The second is patently absurd. Therefore, Petitioner urges this Court to recognize that the naming of a particular document or piece of evidence that was lost or destroyed is not properly his burden where, as here, he has been prevented from doing so by the loss or destruction of *all* of the documents and evidence relating to his case that the government possessed.

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[9]See also *In re Steele* (2002) 32 Cal.4th 682 (holding that Penal Code § 1054.9 entitled a defendant to post-conviction discovery in preparation for a petition for writ of habeas corpus).

2. *The Long Beach Police Department file was missing or otherwise unavailable as of July 2, 2003.*

Petitioner submits that he has made all reasonable efforts to retrieve the indicated documents from the Long Beach Police Department. (See Petn. 62-63.) Petitioner's actions placed the Police Department on notice that he sought discovery of the indicated records. If the Police Department has located those records after being so notified, they are under the obligation to bring that fact to Petitioner's attention.[10] Petitioner respectfully submits that their failure to do so is sufficient to meet his burden of pleading a prima facie claim for relief.

Further, Respondent no doubt has more ready access to law enforcement records than Petitioner, and more ability to enlist the active assistance of law enforcement officials in searching for police files. If the file existed and was available as of July 2, 2003, Respondent could no doubt have obtained a declaration to that effect or otherwise documented the file's availability. Respondent has not done so.

3. *In light of Ron Slick's failure to turn over documents to habeas counsel, it is irrelevant to the present Claim whether the Los Angeles County District Attorney's Office turned any documents over to Mr. Lewis's trial counsel.*

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[10]It is not alleged - nor could it reasonably be alleged - that the Long Beach Police Department would be unable to locate or contact Petitioner or his counsel.

Respondent asserts that Petitioner has failed to adequately support his assertion some of the destroyed documents were not turned over to trial counsel, Ron Slick. (IR 23.) As discussed in the petition, Ron Slick was uncooperative when Petitioner tried to obtain the original trial file, turning over only a portion thereof. (Petn. 61.) Ron Slick admitted that he did not send the police reports or any physical evidence examination reports to Petitioner's current counsel. (Exhibit 8, Letter from Ron Slick to Catherine J. Swysen dated September 17, 1996 [attached to petition].) Because Ron Slick was unable or unwilling to turn over his complete trial file after Petitioner made reasonable efforts to obtain them, it is irrelevant to the present inquiry whether the documents ever made their way into Ron Slick's hands from those of the Los Angeles County District Attorney's Office.

**CLAIM IV: THE GOVERNMENT'S FAILURE TO PRESERVE MR. LEWIS'S CASE FILES DEPRIVED PETITIONER OF HIS RIGHT TO A THOROUGH AND MEANINGFUL PETITION FOR WRIT OF HABEAS CORPUS.**

As noted in the discussion of Claim III above, the government fails to recognize that the legal basis for Petitioner's Claim IV is a separate and sufficient basis for the Court to issue a writ of habeas corpus. Respondent admits that the Court is not procedurally barred from deciding the merits of this claim. (IR 15.) Because he has made a prima facie claim for relief under Claim IV and has demonstrated that he should prevail on the merits,

Petitioner therefore urges the Court to issue the writ and reverse his death sentence.

### A. Respondent Fails to Persuasively Address the Legal Basis for Claim IV.

As noted above and in Claim III, the government attempts to kill two claims with one cite to *California v. Trombetta* (1984) 467 U.S. 479. (IR 21.) As also noted, however, the government fails to recognize an important distinction between Claims III and IV. While *Trombetta* is at least arguably applicable to the merits of Claim III,[11] it cannot be relied upon where the issue is a meaningful right to a petition for writ of habeas corpus. Because the government offers no other legal argument for rejecting Petitioner's claim for relief, Respondent implicitly concedes the legal basis of Claim IV.

As discussed in the Petition for Writ of Habeas Corpus, Mr. Lewis has the constitutional right to a meaningful petition for writ of habeas corpus. (Petn. 72-73.) Respondent does not make any contrary assertion. (See IR 21-23.) As previously discussed, that right was violated when the District Attorney and the Long Beach Police Department lost or destroyed their copies of Mr. Lewis's files. (Petn. 72-75.)

The government's reliance on *Trombetta* to refute this claim is unpersuasive because the duty discussed in *Trombetta* arises from an

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[11]But, see Claim III, *supra*.

extension of the state's duty to disclose potentially exculpatory evidence under the Due Process Clause and *Brady v. Maryland* (1963) 373 U.S. 83. (*People v. Trombetta*, *supra*, 467 U.S. at pp. 485-487) *Brady* and its progeny are, in turn, based upon the defendant's right to a trial that comports with fundamental standards of justice. (*Brady v. Maryland*, *supra*, 373 U.S. at pp. 87-88.) *Trombetta* does not contemplate or purport to address the state's obligation to preserve evidence for the purpose of guaranteeing a defendant's right to a fair and full petition for habeas corpus relief from an unlawful conviction and sentence.

At most, then, Respondent implicitly urges this Court to extend the reach of *Trombetta* and its progeny without providing any legal analysis for why it should do so. An extension under these circumstances would be particularly unfair where, as here, the state agencies involved knew or should have known that Mr. Lewis's case has remained with the trial and appellate courts since his initial conviction in 1984 and where Mr. Lewis's life is on the line. Under these circumstances, the courts should ask for more from the government than an implicit argument extending a line of cases that protects the state's right to treat a defendant's files negligently. (See *Arizona v. Youngblood* (1988) 488 U.S. 51, 58 [finding that the state's negligent destruction of potentially exculpatory evidence does not necessarily constitute a breach of the Due Process clause].)

### B. Petitioner has Demonstrated an Adequate Factual Basis for Claim IV.

As discussed in the Petition for Writ of Habeas Corpus and above, Petitioner has demonstrated the factual basis for Claim IV. (See Petn. 73-75; Claim III, *supra*.) In brief, they include the fact that (1) the District Attorney lost or destroyed its copy of Mr. Lewis's file; (2) the Long Beach Police Department lost or destroyed its copy of Mr. Lewis's file; (3) Mr. Lewis's trial counsel Ron Slick failed to turn over a complete copy of Mr. Lewis's file; (4) habeas counsel was unable to recreate Mr. Lewis's complete file from any reasonably available documentary source; and (5) both the District Attorney and the Long Beach Police department knew or should have known that Mr. Lewis's case has been with the courts almost continuously since his arrest.

## CLAIM V: PETITIONER MAKES A PRIMA FACIE CASE THAT HE WAS DENIED THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT THE PRE-TRIAL STAGE OF THE PROCEEDINGS.

Respondent asserts that petitioner fails to include specific factual allegations in support of the contentions raised in Claim V. (IR 24.) Petitioner stated seven specific factual instances of ineffective assistance of counsel by trial counsel Ron Slick. The Supreme Court of California has held that to satisfy the initial burden of pleading adequate grounds for relief a petition should both "(I) state fully and with particularity the facts on

which relief is sought, as well as (ii) include copies of reasonably available documentary evidence supporting the claim." (*People v. Duvall* (1995) 9 Cal. 4th 464, 474.) As stated in the Petition for Writ of Habeas Corpus, other facts will be presented after adequate funding, full investigation, discovery, access to this Court's subpoena power, and evidentiary hearing. (Petn. 75.)

Mr. Slick failed to conduct meaningful investigation, failed to bring a discovery motion, failed to employ experts, failed to establish a foundation for the motel registration card, failed to prepare for and handle jury voir dire, failed to ascertain that Robert Lewis, Jr. suffered a traumatic life, failed to ascertain that Robert Lewis, Jr. suffered from the effects of institutionalization and failed to determine that Robert Lewis, Jr. was mentally retarded and suffered from learning disabilities. (Petn. 76-77.)

The factual allegations of Mr. Slick's pre-trial ineffective assistance are further addressed with greater specificity in other portions of the petition and are supported with reasonably available documentary evidence in petitioner's Exhibits. (See Petn. Claims I, VI, VII, VIII, XI, XII, XIV, XV, XVI; See Exhibits 1-3, 7, 11-61.) Also, the amount of reasonably available documentary evidence is limited by the government's loss or destruction of its files. (See Claims III, IV.)

Mr. Lewis had a right to develop defenses at the preliminary hearing

and to discover mitigating evidence through investigation and discovery. A reasonably competent attorney would have used the preliminary hearing and pre-trial discovery to develop defenses for the petitioner to use at the guilt and penalty phases of his trial. Mr. Slick's collective failure to adequately defend petitioner during the pre-trial stages of his case resulted in Mr. Lewis' unlawful conviction, sentence and confinement.

## CLAIM VI: PETITIONER MAKES A PRIMA FACIE SHOWING THAT HE WAS DENIED THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE THE GUILT PHASE OF THE TRIAL BY INTERVIEWING LEWIS WONG

Respondent asserts that petitioner does not state a prima facie case of ineffective assistance of counsel as to this claim because of a failure to allege specific facts establishing that petitioner was prejudiced by counsel's failure to interview Mr. Wong prior to trial. (IR 26.)

Ron Slick's investigation and preparation were ineffective because he asked the wrong jeweler to compare the chain in evidence to the wrong item on the receipt. Mr. Slick's admits that he never interviewed Lewis Wong, of Lewis Jewelry, to determine if the gold chain worn by Mr. Lewis at his preliminary hearing was the same gold chain that was purchased from the store by his sister, Gladys Spillman. (IR Exhibit 2.) Instead, he contacted Marion Kluger, a jeweler in Los Angeles, and had her examine the gold chain in question. (*Ibid.*)

Ron Slick asked Ms. Kluger to compare the chain in question to the wrong item on the receipt. Ms. Spillman's receipt from Lewis Jewelry is for three items. (Exhibit 66, Supplemental Declaration of Lewis Wong.) The items are an "18" 14K Gold V Chain", a "20" 14K Gold Link Chain", and a "charm." (Exhibit 66.) The chain worn by Petitioner at the preliminary hearing, which was later used by the prosecution to link Mr. Lewis to the crime, is a link chain, not a V chain. (Exhibit 66.)

Mr. Slick's 1989 declaration states that Ms. Kluger advised him that the receipt's description of an 18" "14K Gold V Chain" did not describe the chain in question. (IR Exhibit 2.) His declaration makes no mention of the link chain listed on the receipt. (IR Exhibit 2.) Nothing in trial counsel's declaration suggests that he actually showed the receipt to Ms. Kluger or that he asked her to compare the chain in question to the description of a link chain on the receipt. (IR Exhibit 2.) Mr. Slick's failure to ask Ms. Kluger whether the chain in question matched the description of the other chain on Ms. Spillman's receipt constitutes ineffective assistance of counsel and renders her opinion meaningless.

Mr. Slick declares that Ms. Kluger advised him that the receipt possessed by Ms. Spillman was either a forgery or related to other jewelry. (*Ibid.*) He further declares that based on Ms. Kluger's opinion, he rejected as futile the idea of calling Mr. Wong. (*Ibid.*) Of course, a simple

interview of Mr. Wong, himself, shows that Ms. Kluger's speculation was absolutely incorrect.

Lewis Wong viewed a photo of the chain in evidence and stated that the chain in evidence matched the description of the link chain on the receipt, except that the chain in evidence is 18" rather than 20". The chain in evidence is 18" (Exhibit 67, Supplemental Declaration of Reggie Stewart.) and is a link chain. (Exhibit 66.) Lewis Wong sold chains of that type in 1983. (Exhibit 66.) It is possible that Mr. Wong simply incorrectly recorded the length of the chain on the receipt as 20" when it was actually an 18" chain. (Exhibit 66.) Had Mr. Slick simply interviewed Mr. Wong in 1983, the year the sale occurred, the events would have been fresher in Mr. Wong's memory (Exhibit 66) and he may have been able to definitively state that the length of the chain had been recorded incorrectly on the receipt.

Ron Slick's failure to even attempt to contact Mr. Wong was an unreasonable unwillingness to investigate and prepare Petitioner's defense at the guilt phase and, therefore constituted ineffective assistance of counsel. He stated in his declaration that he decided not to introduce Ms. Spillman's receipt and not to call Lewis Wong as a witness, because the receipt bore no relation to the chain in question. (IR Exhibit 2.) However, he was not in a position to reasonably decide not to introduce the receipt or

to not call Mr. Wong, due to his failure to contact Mr. Wong and failure to ask Ms. Kluger whether the chain in question matched the description of the link chain on the receipt.

Ms. Kluger was not qualified to state an opinion as to whether the receipt from Lewis Jewelry was authentic and whether it reflected the chain worn by the defendant at the preliminary hearing. Mr. Slick gives no indication that Ms. Kluger was familiar with Mr. Wong's handwriting, the inventory of his store, his prices or his procedure of issuing receipts for purchases. (IR Exhibit 2.)

Ms. Kluger's opinion is worthless because it was formulated without accurate information. While Ms. Kluger may be qualified to state an opinion on general issues related to jewelry, her opinion is not an adequate substitution for interviewing an important witness with firsthand knowledge of a crucial piece of the prosecution's evidence. Her opinion as to whether the chain matched the description on the receipt or whether such a chain could have been purchased for $88 is meaningless because she was asked about the wrong chain. Yet Mr. Slick, despite having Mr. Wong's phone number in his possession, chose to call Ms. Kluger instead of Mr. Wong. (Petn. 79.) Mr. Slick's decision to interview Ms. Kluger, a person without firsthand knowledge related to this case, instead of Mr. Wong, constituted ineffective assistance of counsel.

Further, Mr. Wong is the only other person with firsthand knowledge of that transaction. He could have authenticated the receipt for evidentiary purposes by stating that the stamp on it was his; that it is filled out in his handwriting and in a way that had been customary for him in 1983; and that the phone number in the receipt was that of Lewis Jewelry in that same year. (Exhibit 11, Declaration of Lewis Wong.) This testimony would have challenged the People's credibility on this important piece of evidence. (Petn. 79.)

Respondent argues that Mr. Lewis was not prejudiced by Mr. Slick's decision because Mr. Wong's testimony would not have resulted in a more favorable verdict. (IR 26.) Respondent's argument is based on the premise that Mr. Wong's testimony would not have contradicted Ms. Kluger's opinion that the chain worn by Mr. Lewis at the preliminary hearing did not match the chain described on the receipt. (IR 26.) As discussed above, this premise is incorrect because he asked her about the wrong item on the receipt. Further, Respondent is unreasonably discounting the potential impact of Mr. Wong's testimony.

The gold chain was used by the government to link Mr. Lewis to the crime. (4RST 725-728.) Ms. Spillman stated that she purchased the chain worn by Mr. Lewis, at the preliminary hearing, from Mr. Wong. (4RST 690-692.) The idea that Mr. Lewis was brazen enough to wear the victim's

chain to his preliminary hearing was strong evidence of guilt and of a lack of remorse. Without strong defense evidence to rebut such an argument, the jury was left with the perception that Mr. Lewis wore a chain that belonged to Mr. Estell at his preliminary hearing. Had trial counsel acted effectively, this perception could have been neutralized.

**CLAIM VII: PETITIONER STATES A PRIMA FACIE CASE THAT HE WAS DENIED THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE THE GUILT PHASE OF THE TRIAL BY DETERMINING WHETHER A MENTAL DEFENSE WAS AVAILABLE.**

Respondent asserts that Petitioner cannot plead a prima facie case because he cannot show counsel's actions were not the result of a reasonable tactical decision, due to a lack of documentary evidence. (IR 27.) To support this claim, Petitioner attached Exhibit 13, Declaration of Natasha Khazanov, which documents that Robert Lewis Jr. is brain damaged, mentally retarded, and suffers from learning disabilities. Further, Dr. Khazanov's declaration makes it clear that Mr. Slick's investigative efforts regarding possible mental defenses were inadequate, in that Mr. Slick failed to investigate, discover, and provide to mental health experts the wealth of readily available social history information that would have made clear the need for a comprehensive neuropsychological assessment, addressing the issues of both organic brain damage and mental retardation.

Petitioner's school records, for example, showed that petitioner had

scored in the mentally retarded range on a student intelligence test in 1968, had a long history of academic difficulties, and started failing school in kindergarten! (Exhibit 13.) This and other social history information would have made clear the need for a comprehensive neuropsychological evaluation, but such information was never made available to Dr. Kaushal Sharma, a mental health expert hired by Mr. Slick. (Exhibit 2; Supplemental Declaration of Natasha Khazanov, paragraph 38, attached as Exhibit 65.) Thus, the assessment prepared by Dr. Sharma was necessarily incomplete and flawed due to Mr. Slick's failure to investigate and provide access to relevant social history data. This likely explains why Dr. Sharma wrote that mitigating factors may not exist in this case. (Exhibit 13.)

Dr. Michael Maloney, another expert retained by Mr. Slick, measured Mr. Lewis' intelligence using the Wechsler Adult Intelligence Scale- Revised (WAIS-R) in 1984. (Exhibit 13) Ron Slick failed to provide Dr Maloney with Petitioner's school records or prior IQ results, showing scores well within the mentally retarded range. (Exhibits 2, 65.) Dr. Maloney's was testing was incomplete in that he did not administer all the WAIS-R sub-tests. (Exhibit 13) He also failed to further explore the possibility that Mr. Lewis was mentally retarded even though his partial administration of the WAIS-R resulted in what he calculated to be 73, which falls within the plus or minus 5 margin of error, where the cut-off

score for mental retardation is 70. (*Ibid.*) Had Dr. Maloney been provided with Petitioner's school records and prior I.Q. scores in he mental retardation range (including a prior full scale I.Q. score of 61 [Exhibit 59, Clinic Education Report]), it is unlikely that he would have administered less than the entirety of the WAIS-R or otherwise cut short the inquiry into Petitioner's impairments. Thus, Dr. Maloney's evaluation of Mr. Lewis, like that performed by Dr. Sharma, was significantly flawed and incomplete as a result of Mr. Slick's deficient performance.

Mr. Slick ignored Mr. Lewis' mental condition in a capital case requiring proof that the defendant had the *mens rea* for murder and that he killed with pre-meditation and deliberation as well as had the mental state for the purpose of the special circumstance. (Petn. 81.)

Robert Lewis, Jr. suffers from serious organic brain damage, mental retardation, and learning disabilities. Mr. Slick's inadequate investigation amounted to a withdrawal of a defense and as such was a violation of his constitutional rights to Due Process, a fair trial, the Effective Assistance of Counsel, Equal Protection, Privileges and Immunities, the prohibition against Cruel and/or Unusual Punishment and a reliable verdict of guilt and sentence of death as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution and Article I, Sections 1, 7, 15, 16, 17, and 24 of the California Constitution. (Petn. 82.)

Respondent asserts that Exhibit 13,

> conclusively demonstrates that trial counsel *did investigate* possible mental defenses by consulting mental heath experts who tested and examined petitioner and advised trial counsel that no mental defenses were available.

(IR 27.)

It is not enough, however, to simply ask a mental health expert to evaluate the defendant in a capital case. A proper psychological evaluation cannot be done without an adequate social history of the defendant.[12]

> Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.

(*Wiggins v. Smith* (2003) 123 S. Ct. 2527, 2539.)

Ron Slick was never in a position to make valid strategic decisions regarding a possible mental defense because of his incompetent investigation. Petitioner was denied effective assistance of counsel by trial counsel's inadequate investigation and preparation of a mental health

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[12]A comprehensive evaluation must be founded on "thorough acquisition of the current and past medical history, family history, developmental and social history, and a review of personal habits." (Kaplan & Sadock, *Comprehensive Textbook of Psychiatry/VI*, at p. 709.) Further, because a defendant, or any patient, particularly if impaired, cannot be counted upon to provide an accurate, comprehensive account of his own history, and may be unaware of information important to that history, the evaluation must be based on information not only from the defendant, but from additional sources as well. (Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed-Speculation*, 66 Va. L. Rev. 4237 (1980); accord *Report of the Task Force on the Role of Psychiatry in the Sentencing Process*, Issues in Forensic Psychiatry, 202 (1984); Pollack, *Psychiatric Consultation for the Court*, 1 Bull. Am. Acad. Psych. & L. 267, 274 (1974); H. Davison, *Forensic Psychiatry* 38-39 (2d ed. 1965).)

defense.

**CLAIM VIII: PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO FULLY PREPARE AND PRESENT HIS DEFENSE OF ALIBI.**

Respondent asserts that, due to a lack of documentary evidence, Petitioner cannot plead a prima facie case because he cannot show that Mr. Slick's actions were not the result of a reasonable tactical decision. (IR 29.)

The petition states sufficient facts and includes sufficient documentary support to warrant this Court's issuance of an order to show cause. Respondent argues that many of Petitioner's claims should be denied because additional documentation was not submitted as exhibits. It appears, however, that respondent has merged Petitioner's pleading-stage burden to state fully and with particularity the facts that render his confinement illegal with Petitioner's ultimate burden of proof. It is true, as Respondent points out, that Petitioner has the burden to prove the facts upon which he relies to overturn the judgment. But, of course, Petitioner does not have to "prove" his claims at the initial, pleading stage. As this Court stated in *People v. Duvall* (1995) 9 Cal.4th 464, 474-475, a court receiving a habeas petition "evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief?... If... the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an OSC." (See also *In re*

*Harris* (1993) 5 Cal.4th 813, 827 ["one seeking relief on habeas corpus need only file a petition for the writ alleging facts which, if true, would entitle the petitioner to relief"].)

Documentary evidence attached to the petition may "serve to persuade the court of the bona fides of the allegations," but, at the pleading stage, Petitioner is not required to have documentary support for every fact upon which Petitioner's claim rests. (*In re Fields* (1990) 51 Cal.3d 1063, 1070, fn.2.) Here, in light of the limited funding and investigative mechanisms available at the pre-OSC stage, Petitioner's documentary support is more than sufficient to establish that his allegations are genuine.

Respondent places particular emphasis on the absence of additional declarations from trial counsel concerning Petitioner's claims of ineffective assistance. It is urged by respondent that the absence of such declarations requires the denial of these claims. This contention assumes that Petitioner has control over trial counsel, and can at will order up a declaration reviewing all of the multiplicity of trial actions and omissions at issue in the present case. That is simply not so. Only when trial counsel has been subpoenaed to testify at an evidentiary hearing can counsel be compelled to "fully describe his or her reasons for acting or failing to act in the manner complained of." (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

In addition, respondent has not cited to a single case that stands for

the proposition that a declaration from trial counsel is a pleading-stage requirement for the issuance of an OSC. Indeed, such a requirement would make little sense as trial counsel's unavailability or unwillingness to provide a declaration on a particular claim would necessarily result in a bar to habeas relief.

Further, to support this claim, Petitioner attached Exhibit 12, Declaration of Kristina Kleinbauer, Mr. Slick's investigator. Ms. Kleinbauer's declaration, however, demonstrates that Mr. Slick's preparation and presentation of Mr. Lewis' alibi defense was inadequate. He failed to lay a foundation to introduce the hotel registration card, failed to call his investigator to testify as to the chain of custody and failed to authenticate the document to the jury or the court. (Petn. 83-84.) Additionally, Mr. Slick did not even call Petitioner's wife for the simple purpose of verifying Mr. Lewis' prior use of the vehicle. (Petn. 84; Exhibit 12, ¶ 9[confirming that Petitioner's wife could have confirmed Petitioner's use of the vehicle prior to the time of the alleged robbery-murder].)

Respondent notes that the hotel registration card was introduced into evidence at trial without objection as Defense Exhibit B. (IR 29.) However, without the proper foundation the jury was left to assume that the card could have been filled out in the hallway a few moments before it was presented. (Petn. 84.)

Respondent further asserts that Petitioner does not provide factual support for the argument that either the motel manager could lay foundation for the registration card as a business record or that Ms. Kleinbauer could testify "that she had gone to the hotel and observed the clerk render the card from her records." (IR 30.) This argument merely highlights Mr. Slick's ineffective assistance of counsel.

Despite the fact that the hotel registration card was a crucial part of Mr. Lewis' alibi defense, Mr. Slick first asked Ms. Kleinbauer to track down a copy of the hotel registration card on July 24, 1987, the eve of trial. (Exhibit 12.) Mr. Slick should have provided his investigator with more time to track down and verify the validity of the registration card.

Respondent asserts that the prosecutor's argument at trial was not that the information on the hotel registration was placed on the card after the fact. (IR 30.) Instead, the prosecutor argued that Petitioner's father, the source of the information on the card, was unreliable and that Petitioner could have entered the license plate number of the victim's car on the motel registration card before the car was taken. (IR 30.) This argument does not address the central point here. Mr. Slick did nothing to authenticate the document to the jury or the court. (Petn. 84.) Had he acted competently, the legitimacy of the registration card would not have hinged on the credibility of Petitioner's father.

If trial counsel had been reasonably competent, he would have called his investigator to verify that she had gone to the hotel and observed the clerk retrieve the card from her records. (Petn. 84.) He would have had the clerk testify that she had retrieved the record from the files kept in the ordinary course of business. He would have had Petitioner's wife testify to Petitioner's prior use of the vehicle. (Petn. 84.)

Instead, Mr. Slick failed to do any of these things, which resulted in Petitioner being denied the effective assistance of counsel.

## CLAIM IX: PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL CONCEDED HIS ALIBI DEFENSE DURING CLOSING ARGUMENT.

Mr. Slick's closing argument concession of the alibi defense was outside the bounds of competent advocacy based on his failure to adequately prepare and lay the foundation for such a concession.

### A. The Court is Not Procedurally Barred From Hearing This Claim.

Respondent argues erroneously that the Court is procedurally barred from considering the merits of Claim IX because Petitioner previously presented this issue in another petition. (IR 31.) As discussed in Claim II, *supra*, the Court is not procedurally barred from taking this opportunity to hear this claim.

### B. Petitioner Makes a Prima Facie Case for Relief in Claim IX.

Respondent asserts that Petitioner offers no different or persuasive reason for this Court to alter its prior assessment of this claim. (IR 31.) Rather than presenting an argument on the merits of the claim, respondent relies entirely on the observation of the Court in its opinion, in *People v. Lewis* (1990) 50 Cal.3d 262, 291-292. However, the Court's analysis ignores the overall ineffectiveness of Mr. Slick's defense.

First, trial counsel did not obtain the consent of Mr. Lewis to abandon the alibi theory, prior to his surrender of Petitioner's substantial rights. (Petn. 86.) Second, Mr. Slick did not present any foundational evidence to support his accomplice theory prior to the closing argument. (Petn. 86.) This fact alone negates any supposed "persuasive force" that could be gained by acknowledging the fingerprint evidence in the closing. Trial counsel's decision to introduce a new theory during closing argument cannot be considered tactical because the theory was wholly unsupported by the evidence presented to the jury. Finally, trial counsel failed to adequately investigate or present Petitioner's alibi defense theory. (Petn. 86.) Ron Slick could not have made a valid strategic decision to concede Petitioner's alibi defense because he lacked the necessary information to do so.

Further, when Mr. Slick was specifically asked about his course of action in closing argument, he was unable to give any answer or

explanation. (Petn. 86.)

**CLAIM X: THE TRIAL COURT ERRED IN GIVING CERTAIN JURY INSTRUCTIONS DURING THE GUILT PHASE OF THE TRIAL AND IT WAS INEFFECTIVE ASSISTANCE OF COUNSEL TO FAIL TO OBJECT TO SAID INSTRUCTIONS.**

Petitioner was denied his rights under the state and federal constitutions when the trial court erroneously gave certain jury instructions and failed to give other instructions. (Petn. 87-88.) Trial counsel was ineffective when he failed to request the appropriate jury instructions. (Petn. 87.)

The jury was not properly instructed regarding several aspects of Petitioner's trial. The inclusion of the murder count in CALJIC No. 2.15 improperly permitted the jury to draw an inference of guilt as to the murder from the possession of the Cadillac. (Petn. 89.) The 1975 version of CALJIC 2.22, given at Petitioner's trial, is unconstitutional in that it lessened the burden of proof for the prosecution. (Petn. 90.) The trial court failed to instruct on the aider and abettor theory, raised by trial counsel. (Petn. 91.) Further, Mr. Slick was ineffective when he failed to request this instruction. (Petn. 91.) The court also failed to instruct under CALJIC 8.80 regarding the intent to kill and trial counsel failed to request the instruction. (Petn. 92.) The Court's improper instructions and defense counsel's failure to object to, and request proper, instructions denied Petitioner of his fundamental rights. (Petn. 87-88.)

### A. The Court is Not Procedurally Barred From Hearing This Claim.

#### 1. Claim X falls under the fundamental constitutional error exception to the *Dixon* rule.

The trial court's error in giving certain jury instructions during the guilt phase of the trial was clear and fundamental, and struck at the heart of the trial process. The erroneous instructions went to the heart of the prosecution's case and unduly prejudiced Petitioner. (Petn. 89.) The effect of these erroneous instructions and failure to give appropriate instruction was that the prosecution's burden of proof was unconstitutionally lowered. This claim is one of the "rare situations" discussed in *In re Harris* (1993) 5 Cal. 4th 813, 836, involving a fundamental constitutional error.

#### 2. The *Dixon* rule does not apply to the ineffective assistance of counsel portion of Claim X.

Respondent concedes that Petitioner's ineffective assistance of counsel claims are not procedurally barred. (IR 32.)

#### 3. Claim X is not barred by Ron Slick's failure to make appropriate objections and request appropriate instructions at trial.

The Supreme Court of California has held that these types of instructional errors are reviewable on appeal to the extent that they affect Petitioner's substantial rights and are not barred by a failure to object by trial counsel. (*People v. Prieto* (2003) 30 Cal. 4th 226, 247.) Further, Petitioner maintains that it is the Court's *sua sponte* duty to instruct

properly in these instances and that, to the extent that trial counsel failed to object or to request the proper instructions, trial counsel was incompetent. (Petn. 87.)

### B. Petitioner Makes a Prima Facie Case for Relief in Claim X.

#### 1. CALJIC 2.15

The trial court erroneously gave CALJIC Instruction 2.15 in its entirety and specifically indicated that this instruction applied to the murder count, as well as the robbery count. (Petn. 88.) This allowed the jury to infer that possession of the decedent's Cadillac was evidence of murder. (Petn. 89.)

Respondent asserts that there is "no possibility" that this instruction reduced the prosecution's burden of proof in this case because the jury heard other instructions that informed them of the burden of proof. (IR 37.) Respondent concedes that the instruction was erroneous and confines its arguments to prejudice. In *People v. Prieto* (2003) 30 Cal. 4th 226, 248, the Supreme Court of California held that it was improper for the trial court to use CALJIC 2.15 for nontheft offenses like rape or murder, but that the error was harmless in that case. This holding was based on the holding in *People v. Barker* (2001) 91 Cal. App. 4th 1166.

The error was not harmless in this case, however, because there is a reasonable likelihood the jury would have reached a different result had the

court limited the permissive inference described in CALJIC 2.15 to the theft offense. The holding that there was "no possibility of prejudice" in *Prieto*, was based on "overwhelming evidence of defendant's guilt on the nontheft offenses." (*People v. Prieto*, *supra*, 30 Cal. 4th at p. 249) In *Barker*, the court held that it was not reasonably probable that a result more favorable to the defendant would have been reached because of the defendant's multiple admissions of his guilt. (*People v. Barker*, *supra*, 91 Cal. App. 4th at p. 1177.)

This case is distinguishable from *Prieto* and *Barker* because there is not overwhelming evidence of guilt here. In *Prieto*, two surviving victims identified the defendant as the man who raped them, and sexually assaulted and murdered the non-surviving victims. (*People v. Prieto*, *supra*, 30 Cal. 4th at p. 249.) Their unrebutted testimony also established that the murders took place during the course of the robberies, kidnapings and rapes. (*Ibid.*) The holding in Prieto was based on the unusually strong evidence of that defendant's guilt. In *Barker*, the defendant confessed more than once. (*People v. Barker*, *supra*, 91 Cal. App. 4th at p. 1177.)

In contrast, the evidence of Petitioner's guilt is not overwhelming. There were no eyewitnesses who claimed to have seen Petitioner kill Mr. Estelle and there was evidence presented that Mr. Lewis possessed the Cadillac prior to the killing. Mr. Lewis did not confess to committing the killing. The findings of no prejudice in *Barker* and *Prieto* were specific to

the facts of those cases and do not apply in the case at bar.

Petitioner has made a prima facie case that the trial court prejudiced Petitioner when it erroneously gave CALJIC 2.15 and specifically applied it to the murder count, and that trial counsel's failure to object to and prevent the giving of this erroneous instruction constituted ineffective assistance of counsel.

**2. CALJIC 2.22**

The 1975 version of CALJIC 2.22, given in Petitioner's case, is unconstitutional because it lessens the prosecution's burden of proof. (Petn. 90.) Contrary to the instruction, the test is not the "relative convincing force" of the evidence presented by the prosecution as opposed to the evidence presented by the defense. (Petn. 90.) Rather, the test is that the prosecution must prove its case beyond a reasonable doubt. (Petn. 90.) Further, trial counsel acted ineffectively when he failed to object to this instruction.

Respondent argues that this Court has concluded that this wording of CALJIC No. 2.22 is appropriate and unobjectionable when accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof. (IR 38.)

This instruction was accompanied by other erroneous instructions, as discussed above and below. The cumulative effect of these instructions was to allow for the jury to apply a lesser burden of proof

### 3. Failure to Give Aider and Abettor Instruction and Failure to Give Intent to Kill Instruction

Trial counsel failed to request a jury instruction regarding the defense theory that another person was present with Mr. Lewis, at the murder scene. (Petn. 91.) Further, trial counsel failed to request CALJIC 8.80 regarding the intent to kill required to establish an aider and abettor's special circumstance liability. As argued elsewhere, it was ineffective assistance of counsel for Mr. Slick to argue that another person might have been present with Mr. Lewis because it conceded Petitioner's alibi defense. (*Ibid.*) Mr. Slick did not introduce evidence supporting this theory and did not ask for the appropriate instruction so that the jury could properly evaluate such a theory. (*Ibid.*) It was ineffective to put an aider and abettor theory in front of the jury without supporting the theory with evidence and asking for the proper instructions. (*Ibid.*)

Respondent asserts that the evidence presented at trial was insufficient to warrant jury instructions defining the scope of aider and abettor liability. (Petn. 40.) This argument supports Petitioner's claim that trial counsel was ineffective. Mr. Slick undermined the credibility of Petitioner's defense by putting an aider and abettor theory in front of the jury, without presenting any evidence supporting such a theory to the jury. Further, trial counsel's ineffectiveness was compounded by the fact that the presentation of this theory conceded Petitioner's alibi defense.

## CLAIM XI: TRIAL COUNSEL'S FAILURE TO CONDUCT MEANINGFUL VOIR DIRE WAS INEFFECTIVE ASSISTANCE OF COUNSEL AND DEPRIVED PETITIONER OF A CONSTITUTIONALLY GUARANTEED IMPARTIAL JURY.

Ron Slick conducted only the most cursory of voir dire examinations. (Petn. 94.) He declined to collect or review any outside information about the prospective jurors prior to voir dire and he accepted a jury within two days of the start of voir dire. (*Ibid.*) The result of this ineffective voir dire was that Petitioner was denied his right to a constitutionally guaranteed an impartial jury.

### A. The Court is Not Procedurally Barred From Hearing This Claim.

Respondent argues erroneously that the Court is procedurally barred from considering the merits of Claim XI because Petitioner previously presented this issue in another petition. (IR 41.) As discussed in Claim II, *supra*, the Court is not procedurally barred from taking this opportunity to hear this claim.

### B. Petitioner Makes a Prima Facie Case for Relief in Claim XI.

Respondent asserts that Petitioner fails to allege what additional information, if any, concerning jurors Owens, Norris, Sciacca and Cramer would have been discovered had trial counsel utilized a service to "collect outside information" about these jurors. Further, respondent asserts that Petitioner does not allege what additional information, if any, would have

been discovered had trial counsel engaged in further unspecified questioning of these jurors during voir dire.

Had Ron Slick conducted effective voir dire, Petitioner would not have been denied his right to a constitutional jury at the guilt and penalty phases of his trial. Jurors with impermissible bias in favor of the death penalty could have been exposed and jurors who were incapable of considering mitigating evidence could have been weeded out of the jury.

Trial counsel's unreasonably limited voir dire examination regarding the penalty phase fails to meet the *Strickland v. Washington* (1984) 466 U.S. 668, standard for effective assistance. The United States Supreme Court has long held that the standards for capital defense work articulated by the American Bar Association (ABA) are "guides to determining what is reasonable." (*Wiggins v. Smith* (2003) 123 S. Ct. 2527, 2537.) The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 10.10.2(B) (2003) states:

> Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques: (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

Mr. Slick's "strategy" clearly fails to meet the ABA guideline. Asking a minimal number of voir dire questions and hoping the prosecution doesn't ferret out jurors who are reluctant to impose death is not an effective voir dire strategy within the requirements of *Strickland*.

The fact that trial counsel attempts to justify his limited voir dire based on his experience as a lawyer in death penalty cases (IR Exhibit A) is ridiculous, given his disgraceful record as a capital defender. Mr. Slick also attempts to explain his voir dire by stating that the prosecution had a strong case against Mr. Lewis. (IR Exhibit A.) This admission only bolsters Petitioner's arguments that trial counsel should have adequately investigated and prepared a mitigation defense, as well as conducted a competent voir dire that included questions meant to uncover jurors incapable of considering mitigating evidence.

## CLAIM XII: TRIAL COUNSEL'S FAILURE TO COMPETENTLY MOVE TO CHALLENGE POTENTIAL JURORS FOR CAUSE OR TO COMPETENTLY EXERCISE PEREMPTORY CHALLENGES WAS INEFFECTIVE ASSISTANCE OF COUNSEL AND DEPRIVED PETITIONER OF A CONSTITUTIONALLY GUARANTEED IMPARTIAL JURY

Ron Slick failed to move to challenge potential jurors for cause and failed to exercise peremptory challenges against jurors who competent trial counsel would have removed, or attempted to remove, from the jury. Jurors Owen, Shively, and Mingo indicated that they knew or were related to police officers. (Petn. 99.) Jurors Norris, Williams, Cramer, and Lawson

had friends or relatives who were police officers. (Petn. 100.) Six of the twelve jurors had been victims of crime. (*Ibid.*) Juror Vandyke had been burglarized six times and Juror Sciacca had been burglarized twice and robbed once. (*Ibid.*) Juror Norris had been robbed within three months of the trial. (*Ibid.*)

Respondent asserts that Petitioner fails to state facts that would suggest that the named jurors were reasonably subject to a challenge for cause and, as a result, Petitioner has not shown prejudice. (IR 43.) Further, Respondent argues that because of Petitioner's failure to present a declaration from trial counsel, addressing his reasons for declining to issue peremptory challenges as to the named jurors, Petitioner has failed to state a prima facie case. (IR 43.)

As argued above, Ron Slick failed to conduct a competent voir dire based on established standards for defense lawyers in capital cases. His ineffective voir dire failed to uncover impermissible bias in favor of the death penalty or an inability to consider mitigating evidence among the potential jurors. Common sense dictates that a jury composed of friends and relatives of police officers who have been the victims of burglaries and robberies would not be desirable for the defense in a capital case involving a robbery allegation. (Petn.100) Mr. Slick's cursory examination of these potential jurors regarding their ability to keep an open mind did not justify failing to challenge any of them for cause or exercising a peremptory

challenge against any of them. Mr. Slick's failure to exercise any such challenges constituted a wholesale abandonment of the mechanisms provided to protect a defendant's Sixth Amendment right to a fair and impartial jury, and effectively undermined and, indeed forfeited, that fundamental right, something which he as counsel had no right to do and which should be deemed presumptively prejudicial. (See, e.g., *Hughes v. United States* (6th Cir. 2001) 258 F.3d 453[finding ineffective assistance where counsel failed to take steps to remove a biased juror, and noting, among other things, that counsel cannot waive a criminal defendant's Sixth Amendment right to trial by an impartial jury, and that where a biased juror was impaneled, prejudice under *Strickland* was presumed from counsel's failure to move to strike the juror for cause].)

Respondent fails to address Petitioner's argument that Mr. Slick's failure to use any of his peremptory challenges to remove these potentially biased jurors, without any indication that they were predisposed in Petitioner's favor, was ineffective assistance of counsel. (Petn. 100.)

## CLAIM XIII: PETITIONER STATES A PRIMA FACIE CASE THAT THE ROBBERY SPECIAL CIRCUMSTANCE PROVISION FAILS TO ADEQUATELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

The robbery special circumstance provision, which provided the sole statutory basis for petitioner's being found death-eligible fails to adequately narrow the class of persons eligible for the death penalty, and is therefore

unconstitutional. (Petn. 101.)

Respondent asserts that Petitioner fails to state a prima facie case for relief because statistics are insufficient to show irrationality, arbitrariness and capriciousness under the Eighth Amendment analysis. (IR 44.) Respondent further asserts that Mr. Shatz's analysis is based on unsound inferences drawn from an incomplete statistical analysis. (IR 45.)

Respondent's first argument against the use of statistics misinterprets *McCleskey v. Kemp* (1987) 481 U.S. 279. Respondent is essentially arguing that *McCleskey* bars the use of statistics in Eighth Amendment analysis. (IR 44.) The Supreme Court, in *McCleskey*, however, held only that claims alleging invidious discrimination must be based on the facts of the case, not on statistical evidence of discrimination based on race or gender.

The Court did not hold that statistics could never be used in Eighth Amendment arbitrariness analysis. In fact, the Supreme Court has used statistics in Eighth Amendment analysis in other cases. (See *Thompson v. Oklahoma* (1988) 487 U.S. 815; *Endmund v. Florida* (1982) 458 U.S. 782.) It is not improper to consider statistics for the purpose of analyzing whether a particular death penalty statute violates the Eighth Amendment based on arbitrariness., or more specifically, on a failure to narrow.

In the present case, Petitioner is arguing that Professor Shatz's analysis demonstrates that the special circumstance provision, used to make Petitioner death eligible, does not adequately narrow the class of crimes

eligible for the death penalty. Nothing in *McCleskey* provides support for the argument that this is an improper use of statistics for Eighth Amendment analysis.

Respondent's arguments that claim to specifically refute Professor Shatz's study amount to generic attacks that could be superficially applied to any statistical analysis. Upon closer inspection, however, these arguments are unpersuasive. Respondent asserts that Professor Shatz's sample is not statistically representative and that Professor Shatz overlooks the limiting procedures endorsed by the Supreme Court when determining which defendants are "factually" death eligible. (IR 45.) Further, Respondent argues that Professor Shatz disregards the Supreme Court's conclusion that "the constitution is not offended by inconsistency in results based on the objective circumstances of the crime" and argues that an apparent statistical discrepancy is virtually meaningless as to the death sentence in a specific capital case. (IR 45-46.)

Respondent's cursory dismissal of Professor Shatz's study as statistically unsound fails to offer any analysis to support Respondent's assertion. Other than Respondent's bald assertion, Respondent offers no evidence that Professor Shatz's sample is unrepresentative of the universe of cases in California. Respondent doesn't define what a representative sample would look like and offers no statistical analysis to counter Professor Shatz's findings.

Further, and more importantly, Respondent appears to misunderstand both the claim and Professor Shatz's declaration. The fact, emphasized by Respondent, that "infinite factual variations" may underlie decisions to seek or impose a death sentence is simply irrelevant. (IR, pp. 45-46.) Neither the declaration nor Claim XIII compares or purports to comment on the quality of any individual decision to charge a case capitally or to impose death. What the declaration presents, based on empirical data, is a very simple comparison of two numbers: (1) the number of persons made death-eligible under the terms of the robbery special circumstance provision, and (2) the number of such persons actually sentenced to death. What that comparison shows is that only 7.0 % of those made death-eligible by virtue of the robbery special circumstance provision are actually sentenced to die, and thus that this statutory provision permits an even greater risk of arbitrariness than the statutes considered in *Furman*, *supra.* As was true for those sentenced to die in pre-*Furman* Georgia, being sentenced to die in California upon conviction of murder with a robbery special circumstance is "cruel and unusual in the same way that being struck by lightning is cruel and unusual." (*Furman v. Georgia*, *supra*, 408 U.S. at pp. 309-310 (Stewart, J., concurring).)

Respondent does not address the specific findings of Professor Shatz. Instead, Respondent asserts that statistics have no place in Eighth Amendment analysis and makes broad arguments against statistics without

ever examining the particular statistics presented by Petitioner. Petitioner makes a prima facie case that the robbery special circumstance is unconstitutional.

**CLAIM XIV: PETITIONER PRESENTS A PRIMA FACIE CASE THAT TRIAL COUNSEL'S FAILURE TO INTRODUCE ANY MEANINGFUL MITIGATING EVIDENCE RESULTED IN AN UNRELIABLE SENTENCE IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS' PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.**

Trial counsel's penalty phase presentation was incompetent in that no meaningful mitigating evidence was presented and Petitioner's death sentence is therefore unreliable. (Petn. 104.) This unreliable sentence violates both the Eighth Amendment and Article 1, Section 17, of the California Constitution. (*Ibid.*)

Trial counsel was not in a position to make justifiable tactical decisions regarding the presentation of mitigating evidence because he did not conduct an adequate investigation. Respondent asserts that Petitioner does not state a prima facie case for relief because the petition fails to establish Petitioner's family members or petitioner himself confirmed any of the information now alleged in the petition, when they were interviewed in 1984. (IR 47.)

The United States Supreme Court, in *Wiggins v. Smith* (2003) 123 S. Ct. 2527, 2538, held that *Strickland* requires more than the kind of cursory investigation conducted by Ron Slick and that "tactical" decisions that are

based on such investigations are not justified. The fact that Mr. Slick limited his investigation to several interviews of family members illustrates his ineffectiveness.

No competent capital defense lawyer would expect the defendant's family to discuss evidence of sexual abuse, abandonment, alcoholism, incest, or a family history of mental illness during a brief interview. These mitigating factors represent their darkest family secrets. The standard practice of lawyers representing defendants in death penalty cases, for decades, has been to do thorough investigation of mitigating circumstances in order uncover this type of sensitive information. Mr. Slick's performance fell far short of this standard.

Here, like in *Wiggins*, plenty of mitigating evidence was available for trial counsel to uncover and present during the penalty phase. As was the case in *Wiggins*, Petitioner's mother was a chronic alcoholic, who suffered from cirrhosis of the liver. (Petn. 111-112.) She ran a gambling house, conducted a series of casual relationships with men, and left Petitioner unsupervised and alone. (Petn. 105.) Trial counsel could have presented evidence of organic brain damage, mental retardation, a family history of sexual abuse and incest, the detailed criminal background of Petitioner's father, and Petitioner's problems adjusting to Youth Authority and prison, and the complete failure of those institutions (particularly CYA) to diagnose his impairments and psychological problems, and provide

appropriate treatment and vocational training. (Exhibits 16, 24-30, 32-59.) All of this evidence was readily available to anyone who conducted more than a cursory investigation prior to Petitioner's trial.

Respondent argues that the allegations in the petitioner appear to convey minimal mitigating value because the petition does not allege incidents of excessive physical, emotional, or sexual abuse, and does not allege drug use. (IR 47.) The value of the mitigating evidence speaks for itself, particularly when one keeps in mind that the multiple obstacles to normal development faced by petitioner would almost certainly have had a mutually reinforcing and destructive impact.

Mr. Lewis suffered through a childhood of chaos, dysfunction and neglect. (Petn. 105.) Petitioner's father sexually abused Petitioner's 12 year old half-sister and a child was produced by that relationship. (Exhibit 26.) His father has a long criminal history, documented in publicly available records, and is a sexual predator. (Petn. 105.) Petitioner has a Full Scale IQ of 67 which is in the mentally retarded range and suffers from organic brain damage. (Petn. 105-106.) As discussed below, Petitioner's mother was a chronic alcoholic. (Petn. 105.) Mr. Lewis spent most of his formative years in juvenile institutions and these institutions utterly failed him. (Petn. 106.)

All of this information was available to Ron Slick, had he conducted an adequate investigation. Mr. Slick's failure to investigate led to his

incompetent decision to limit his mitigation argument to three sentences. He stated:

> You can consider the history of Mr. Lewis. You can consider that his father has been in jail, his brother is in jail now, and that he has been in jail. I think you can consider that, the environment that he was brought up, as to why he is in this spot that he is in now. I think that is a valid consideration. The court is going to tell you to consider that.

(RTSA 841)

No competent defense attorney would have limited Petitioner's mitigation evidence to this tiny amount of evidence, knowing what trial counsel actually knew and what trial counsel could have easily discovered with minimal effort.

This information was readily available to trial counsel had counsel researched Petitioner's family history through public records and more extensive interviews. His failure to investigate and present mitigating evidence was grossly incompetent.

Respondent also states that Petitioner fails to identify any significant evidence of good character available to trial counsel. (IR 48.) Petitioner provided meaningful evidence of good character in the Petition. (Petn. 124.) As noted therein, family and friends could have testified that despite the deprived and chaotic nature of Petitioner's childhood and the negative impact of his institutionalization, Petitioner, at least in his interactions with them, was loving, generous, and considerate. Respondent states that trial counsel failed to present this evidence for strategic reasons. As argued

above, Mr. Slick was not in a position to make strategic decisions at the penalty phase because he did not conduct an adequate investigation. Further, trial counsel's explanation of his incompetence resembles the kind of *post-hoc* rationalization mentioned by the Supreme Court in *Wiggins*. (*Wiggins v. Smith*, *supra*, 123 S. Ct. at p. 2538.)

Respondent further claims that Petitioner fails to allege that presentation of mitigating evidence regarding institutionalization was standard practice for defense counsel in Los Angeles in 1984. As argued more extensively in Claim XVI, Petitioner has made a prima facie case that competent trial counsel would have investigated and presented mitigating evidence based on Petitioner's history of institutionalization.

Trial counsel's ineffective representation led to an unreliable verdict of death. Imposing the unreliable sentence would constitute cruel and unusual punishment.

## CLAIM XV: TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE REGARDING PETITIONER'S MENTAL RETARDATION, LEARNING DISABILITIES, AND BRAIN DAMAGE WAS INEFFECTIVE ASSISTANCE OF COUNSEL UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS.

Respondent asserts that petitioner failed to allege facts establishing that trial counsel's performance in 1984 was deficient within the meaning of *Strickland*. (IR 49.) The United States Supreme Court recently explained the obligations of trial counsel with regard to investigation and

presentation of mitigation evidence. In *Wiggins v. Smith* (2003) 123 S. Ct. 2527, 2538, the court held:

> *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.

In the present case, Respondent asks the Court to accept Ron Slick's cursory investigation as adequate justification for his failure pursue further investigation into Petitioner's mental retardation and brain damage, as well as other mitigating evidence. (IR 50.) This argument is a retrospective attempt to portray Ron Slick's decisions as tactical, rather than as ineffective assistance. Mr. Slick conducted an unreasonably superficial investigation. Such an investigation does not provide adequate support to justify halting any further investigation into mitigation evidence. Respondent's attempt to justify counsel's limited pursuit of mitigating evidence "resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." (*Wiggins v. Smith*, *supra*, 123 S. Ct. at p. 2538.)

### A. Ron Slick's Failure to Investigate Reasonably Available Evidence Constitutes Ineffective Assistance of Counsel.

Respondent asserts that the petition fails to establish what documents were ultimately made available to and reviewed by Dr. Kaushal Sharma and Dr. Michael Maloney. (IR 51.) In fact, Ron Slick's letters to Dr. Sharma

and Dr. Maloney state exactly what was made available to the experts. (Petn. 162; 163-164.) Mr. Slick provided the experts with the formal charging document (the information), the police report, the transcript of the preliminary hearing, and three probation reports. (Petn. 162-164.)

Petitioner has also alleged facts that show what life history was reasonably available to trial counsel. Mr. Slick should have obtained Petitioner's school records, institutional records and prior testing, including an educational test administered in 1968, which demonstrated Petitioner's IQ fell squarely within the mentally retarded range. (Petn. 162-163.) He also should have completed a detailed social history before he ever asked either expert to examine Petitioner.

Further, Mr. Lewis' petition included a great deal of reasonably available documents that would have been uncovered had Mr. Slick conducted an adequate investigation. (Exhibits 16, 24-59.) Among these exhibits, are documents that show Petitioner's father was convicted of child molestation and incest for fathering a child with Petitioner's half-sister. (Exhibits 16, 24-27.) Documents chronicling Mr. Lewis' institutional history were also reasonably available. (Exhibits 28-29, 32, 37-39, 41-58.) Additionally, documents regarding Petitioner's educational history were reasonably available to trial counsel. (Exhibits 33-36.)

Had a reasonable investigation been conducted, Dr. Sharma and Dr. Maloney would have been provided with documentation containing

evidence of mental retardation, a family history of sexual abuse, the criminal background of Petitioner's father, his problems adjusting to Youth Authority and prison, and the fact that Petitioner's mother was a chronic alcoholic with cirrhosis of the liver. (Exhibits 16, 24-30, 32-59.) The standard of care for forensic mental health evaluation requires such a social history. (See footnote 12, *supra.*) Ron Slick's incompetence prevented Petitioner from receiving an evaluation within the standard of care.

### B. Trial Counsel's Failure to Provide Reasonably Available Evidence to Dr. Sharma and Dr. Maloney Constitutes Ineffective Assistance of Counsel.

As previously noted in connection with Claim VII, Mr. Slick failed to investigate, discover, and provide to his mental health experts the wealth of readily available social history information that would have made clear the need for a comprehensive neuropsychological assessment, addressing the issues of both organic brain damage and mental retardation. Accordingly, Mr. Slick's reliance on the evaluations of Dr. Maloney and Dr. Sharma as a basis for stopping his investigation and not presenting mitigation evidence was tainted by his own deficient investigation. He could not have made a competent tactical decision regarding whether to pursue further investigation and present evidence in mitigation, because he did not possess the necessary information to rationally make such a decision.

Dr. Khazanov's neuropsychological evaluation of Petitioner began

with a review of Petitioner's history, family history, educational records and institutional records, based on the above mentioned reasonably available documents. (Petn. 136-137.) That evaluation, based on adequate materials, made clear the need for a comprehensive neuropsychological assessment, which has confirmed that Petitioner suffers from both serious organic brain damage and mental retardation. (Petn. 159.)

Further, without the necessary information that would have triggered a more comprehensive evaluation, Dr. Maloney, on the basis of incomplete testing, advised Mr. Slick that Mr. Lewis' Full Scale IQ was 73, and that Mr. Lewis' academic skills were extremely limited- facts which reasonable counsel would have explored as possible sources of mitigation, in that they suggested a very limited intelligence and limited set of practical skills which would have severely limited Mr. Lewis's life options, and further, lessened the likelihood that Mr. Lewis on his own could have plotted to fabricate the hotel registration evidence suggesting that he had obtained the victim's car days before the homicide occurred.

Respondent cites *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, for the proposition that "trial counsel need not continue shopping for an expert just because an unfavorable opinion has been received." (IR 50.) Respondent misses the point of Petitioner's argument. Petitioner is not claiming that Mr. Slick was obligated to find an expert with a favorable opinion. Rather, Petitioner has alleged facts that demonstrate Mr. Slick's

investigation was unreasonable because he failed to provide reasonably available background materials needed to conduct an effective psychological evaluation. (Petn. 161-164.) This led to unreliable evaluations.

Respondent further asserts that Petitioner does not allege that either expert informed trial counsel that Petitioner was mentally retarded or suffered from learning disabilities that would qualify as mitigating circumstances. (IR 49.) Respondent later asserts that the experts hired by trial counsel did not alert him that more testing was required. (IR 51) However, as argued above, trial counsel was not in a position to make tactical decisions based on the findings of his experts, because he did not conduct a reasonable investigation upon which reliable expert findings could be made.

### C. There is a Reasonable Probability That at Least One Juror Would Have Voted for Life Without the Possibility of Parole, Had Mr. Slick Provided Effective Assistance.

> Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is reasonable probability that at least one juror would have struck a different balance.

(*Wiggins v. Smith* (2003) 123 S. Ct. 2527, 2543.)

Mr. Slick's inadequate investigation led to an ineffective presentation during the penalty phase. Trial counsel presented a minimal amount of mitigation evidence because he conducted an unreasonably limited investigation.

Mr. Slick conceded that the jury should not consider any issue of mental disturbance. He stated:

> Mental disturbance. I agree with Mr. Hodgman, there is no evidence of it. It shouldn't be considered. It is not applicable. The court will tell you in giving the instructions, you shall consider the following factors, before he lists the factors to you. Consider the following factors, if applicable. So what you have to do is to decide if each factor is applicable. Well, mental disturbance is not applicable. Don't consider it.

(RSTA 840:20-841:1.)

Instead, he limited his mention of mitigating evidence relating to Mr. Lewis' background to a single paragraph in his closing argument at the penalty phase. He stated:

> You can consider the history of Mr. Lewis. You can consider that his father has been in jail, his brother is in jail now, and that he has been in jail. I think you can consider that, the environment that he was brought up, as to why he is in this spot that he is in now. I think that is a valid consideration. The court is going to tell you to consider that.

(RTSA 841.)

There is a reasonable probability that at least one juror would have struck a different balance, had the jury listened to an effective presentation of mitigating evidence from the excruciating life history of Mr. Lewis. As discussed above, a plethora of reasonably available mitigation evidence existed.

Trial counsel could have presented evidence of mental retardation, organic brain damage, a family history of neglect and sexual abuse, the criminal background of Petitioner's father, his problems adjusting to Youth

Authority and prison, and the fact that Petitioner's mother was a chronic alcoholic with cirrhosis of the liver as mitigating evidence. (Exhibits 16, 24-30, 32-59.) Instead, he limited his presentation to three sentences regarding the fact that Petitioner's father and brother had been in jail and that Petitioner had previously been in jail, as well as a vague reference, unsupported by actual evidence, to Petitioner's upbringing.

There is a reasonable probability that at least one juror would have voted against the death penalty had trial counsel effectively investigated and presented mitigating evidence. Mr. Slick's failure to investigate and present mitigating evidence prejudiced Petitioner.

## CLAIM XVI: PETITIONER MAKES A PRIMA FACIE CASE THAT REASONABLY COMPETENT TRIAL COUNSEL WOULD HAVE PREPARED AND PRESENTED MEANINGFUL MITIGATING EVIDENCE REGARDING THE IMPACT OF PETITIONER'S INSTITUTIONALIZATION.

Ron Slick failed to investigate and present evidence of Petitioner's history of institutionalization. (Petn. 167.) A review of available records demonstrates that Petitioner entered the criminal justice system at an unusually young age and was placed at a correctional facility before less restrictive and punitive measures were attempted. (Petn. 168.)

A reasonably competent attorney would have prepared and presented meaningful mitigation evidence regarding Petitioner's history of institutionalization. Petitioner has presented ample mitigating evidence

regarding his history of institutionalization. It has been standard practice for defense lawyers in death penalty cases to prepare and present mitigating evidence regarding institutionalization for decades. The ABA standards mentioned in *Wiggins v. Smith* (2003) 123 S. Ct. 2527, have long been accepted as standard practice for trial counsel in a capital case. (*Id.* at 2537.)

The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) , which are based on the 1989 ABA Guidelines, which were a codification of long standing standard practices, specifically state that "prior juvenile and adult correctional experience" is among the possible mitigating evidence that needs to be explored by counsel. (ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7.6)

> Although the instant case was tried before the 1989 ABA edition of the standards was published, the standards merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases.

(*Hamblin v. Mitchell* (2003) 354 F.3d 482, 487.)

Further, as a more general matter, it is clear that penalty phase counsel has long had an "obligation to conduct a thorough investigation of the defendant's background. [See 1 ABA Standards for Criminal Justice 4-4.1, commentary, page 4-55 (2d ed.1980)." (*Williams v. Taylor* (2000) 529 U.S. 362, 396.) Given that Petitioner was committed to a CYA facility as a

12 year old and by the time of trial had spent nearly two thirds of his life, including his formative years, in Youth Authority and/or adult institutions, there is no way reasonable counsel could have fulfilled that obligation without exploring Petitioner's institutional history as a potential source of mitigation.

Respondent also asserts that trial counsel fails to make a prima facie case because Dr. Sharma advised trial counsel that no mitigating circumstances existed. (IR 52.) As argued elsewhere, trial counsel did not adequately investigate Petitioner's background prior to consulting Dr. Sharma and he was therefore not in a position to make tactical decisions regarding the presentation of mitigating evidence. An expert cannot sit down with a defendant facing the death penalty and determine whether any mitigating evidence exists based on standardized tests, without first being provided with relevant background information. No reasonable trial attorney would rely on such advice. Further, it is ultimately counsel's responsibility to identify and investigation potential sources of mitigation. That a mental health expert did not suggest exploring Petitioner's 20 year institutional history as a potential source of mitigation did not excuse counsel from conducting such an investigation.

Finally, Respondent argues that if Mr. Slick had presented mitigating evidence of institutionalization he would have opened the door to rebuttal argument or cross-examination that would have undermined the defense by

depicting petitioner as aggressive and desensitized to violence. This is an attempt to portray trial counsel's deficient performance as tactical and has no merit. Mr. Slick stipulated to Mr. Lewis' record of robbery convictions and specifically referenced the fact that he had been incarcerated during his penalty phase argument. Since Mr. Slick did not provide a competent defense for Petitioner at any stage of his trial, there was nothing to be undermined.

Trial counsel put on the kind of "halfhearted mitigation case" mentioned by the court in *Wiggins*. (*Wiggins v. Smith*, *supra*, 123 S. Ct. 2527 at p. 2538.) He limited his presentation of mitigating evidence to three sentences and allowed the jury to continue to imagine Petitioner as aggressive and desensitized to violence. Reasonably competent trial counsel would have adequately investigated and presented mitigation evidence regarding Petitioner's history of institutionalization.

## CLAIM XVII: PETITIONER MAKES A PRIMA FACIE CASE THAT THE COURT'S FAILURE TO INSTRUCT THE JURY AS TO THE TRUE NATURE OF LIFE WITHOUT POSSIBILITY OF PAROLE DENIED PETITIONER OF HIS CONSTITUTIONAL RIGHTS.

### A. The Court is Not Procedurally Barred From Hearing This Claim.

Respondent argues erroneously that the Court is procedurally barred from considering the merits of Claim XVII because Petitioner did not raise this claim on a previous appeal. (IR 53.) This claim falls under the *In re*

*Harris* exception, based on a change in the law since Petitioner's first appeal. *Simmons v. South Carolina* (1994) 512 U.S. 154, and *Shafer v. South Carolina* (2001) 532 U.S. 36, were both decided after Petitioner's first appeal. Also, to the extent that this claim is based on an ineffective assistance of counsel claim, it is not barred by *Dixon*.

### B. Petitioner Makes a Prima Facie Case for Relief in Claim XVII.

Respondent asserts that *Shafer v. South Carolina* (2001) 532 U.S. 36, is distinguishable from the present case and that Petitioner's jury was properly instructed. (IR 54.) CALJIC 8.84 does not do enough to clarify for the jury that LWOPP absolutely does not allow for the possibility of parole. Jurors are often misinformed that the death penalty is the only way to make sure that the defendant will never be released from custody. The phrase "life without the possibility of parole", by itself, does not correct this common misconception.

## CLAIM XVIII: PETITIONER MAKES A PRIMA FACIE CASE THAT PETITIONER IS MENTALLY RETARDED WITHIN THE MEANING OF THE *ATKINS* DECISION.

Petitioner was diagnosed as mentally retarded by Dr. Khazanov, a licensed clinical psychologist[13]. (Petn. 180.) The Supreme Court held, in *Atkins v. Virginia* (2002) 536 U.S. 304, that the execution of the mentally

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[13] The bases for this diagnosis are set forth in detail in Dr. Khazanov's declaration and supplemental declaration (Exhibits 13 and 68) and in Claim XV.

retarded constitutes cruel and unusual punishment. (Petn. 180.) Under *Atkins*, the criteria for mental retardation is the standard used by the American Association of Mental Retardation (AAMR). (Petn. 181, IR 55.) The AAMR defines mental retardation as:

> Mental retardation refers to substantial limitations in present functioning. It is characterized by: (1) Significantly sub-average intellectual functioning; existing concurrently with (2) Related limitations in two or more of the following applicable adaptive skill areas; communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, work; (3) Mental retardation manifests before age 18.

(Petn. 181)

Petitioner has made a prima facie case that he falls within the *Atkins* definition of mental retardation. Petitioner's Full Scale IQ is 67. (Petn. 182.) Petitioner scored in the mentally retarded range on a 1968 student intelligence test, administered prior to his 18th birthday. (Petn. 182.) He suffers from deficits in several of areas of adaptive functioning, including functional academics, daily living skills (self-care) and social skills. (Petn. 182-183.)

Respondent argues that Petitioner does not meet the three prong *Atkins* definition of mental retardation. (IR 55.) Respondent's argument amounts to a second opinion that Petitioner is not mentally retarded, by lay persons not qualified to make such a diagnosis.

### A. Intellectual Functioning

Respondent claims that Mr. Lewis' IQ score was 83 when he was 16

years old and that this score precludes Petitioner from showing that his IQ and intellectual functioning place him in the mentally retarded range. (IR 60.) Further, Respondent further challenges Dr. Khazanov's diagnosis by referencing Dr. Maloney's evaluation that Petitioner had an IQ score of 73.

It should be noted that prior evaluations of Petitioner's intellectual functioning were done without access to a detailed social history of Petitioner and without reasonably available relevant materials. The standard of care for forensic mental health evaluation requires a social history. Trial counsel failed to provide an adequate social history to Dr. Sharma and Dr. Maloney that would have allowed them to provide a mental health evaluation within the standard of care.

Nevertheless, past evaluations of Petitioner clearly demonstrate signs of mental retardation that meet the AAMR definition. Mr. Lewis' 1968 IQ score fell squarely within the mentally retarded range. (Petn. 182.) His 1984 IQ score of 73 was within the margin of error for mental retardation. (Exhibit 13.) There is evidence to suggest that this score was artificially high as the result of errors committed by Dr. Maloney. (*Ibid.*)

**B. Adaptive Skills**

Respondent disputes Dr. Khazanov's finding that Petitioner meets the AAMR criterion of limitation in at least two adaptive skills by asserting that Dr. Khazanov does not provide facts to support her claim. This argument is without merit.

Petitioner suffers from deficits in functional academics, daily living skills, and social skills, among other deficits. Dr. Khazanov's declaration provides ample facts that support her ultimate conclusion in this area. Furthermore, Dr. Khazanov conducted additional testing of Petitioner on August 18th and 20th, 2003. (Supplemental Declaration of Dr. Natasha Khazanov, paragraph 3, attached as Exhibit 68.) This additional testing only clarifies and bolsters Petitioner's assertion that he is mentally retarded within the meaning of *Atkins*. (Id. at paragraph 25.)

*1. Academics*

Petitioner sporadically attended school and did not like being there . (Exhibit 13.) The WRAT, administered twice, indicated that Petitioner was functioning well below normal. (*Ibid.*) In fifth grade, Mr. Lewis attended only 20 days out of 180 days. (*Ibid.*) In ninth grade he failed every class except for Government, in which he received a D-. (*Ibid.*) His high school record from the Department of Youth Authority indicates that he was enrolled in remedial English, Reading, Spelling and Math classes. (*Ibid.*)

Dr. Khazanov interviewed Mr. Lewis and determined that he failed to grasp simple concepts, had a limited vocabulary and was unable to spell simple words like "arm" or "jar." (Exhibits 13, 68.)

*2. Daily Living Skills*

Petitioner has never held a steady job and has demonstrated he is deficient in self-care. (Exhibit 13.) A 1975 Adult Authority report notes

that Mr. Lewis lacks internal control or desire to change his life, has not developed any coping mechanisms during his incarceration, has no realistic parole plans and no employable skills. (*Ibid.*)

Dr. Khazanov, based on an evaluation that included the administration of adaptive functioning tests, found that Petitioner demonstrated difficulties in a number of activities of daily living that are necessary to normal adaptive functioning. He does not know the alphabet, cannot make written sentences, and is unable to provide sensible verbal instructions. He cannot tell time accurately, and is unable to prepare simple meals for himself, pay bills or maintain a checking account. He is a safety risk to himself; he makes poor decisions about basic street-crossing and would be unable to obtain appropriate medical care when faced with an emergency. Further, he appears unable to learn about these things despite experience. (Exhibit 68.)

*3. Social Skills*

Petitioner's 1968 screening for Youth Authority states that Mr. Lewis was noted to "act out of order to gain acceptance" and that he "lacked the positive relationship with adults necessary for healthy personality development." (Exhibit 13.) A probation officer who knew Mr. Lewis in 1972 stated that "there may be some form of mental deficiency that causes this defendant to act the way he does." (*Ibid.*) Dr. Khazanov specifically found that the impairments revealed by the testing she

administered "limit Mr. Lewis' ability to communicate effectively with others." (Exhibit 68.)

### C. Manifestation Before Age 18

Respondent claims that Petitioner's IQ score of 83 in 1968 demonstrates that he was not retarded when he was 16 years old. (IR 62.) Further, respondent contends that Mr. Lewis' organic brain impairments were not discovered in 1968 and 1984. (*Ibid.*)

Due to poverty, a scarcity of social services and a total lack of parental interest in his life, Petitioner's mental retardation was overlooked during his childhood. This is hardly surprising, considering the circumstances of his upbringing. This does not mean that his retardation was not manifested, however. Petitioner has demonstrated that signs of mental retardation were present prior to Mr. Lewis' 18th birthday. His 1968 Q score of 61 fell squarely within the mentally retarded range. (Petn. 182.) His poor attendance and low academic performance should have led to further exploration of whether he was mentally retarded. Further, his failure to demonstrate appropriate adaptive skills in academics, daily living and socialization throughout his childhood suggest that the onset of his mental retardation occurred before age 18.

Petitioner has made a prima facie case that he is mentally retarded under the AAMR definition. If this Court concludes that Mr. Lewis is retarded, *Atkins* requires that the death sentence be modified to a sentence

of life imprisonment. If the Court is unable to conclude that the weight of the mental retardation evidence warrants sentence modification, then a mental retardation determination by a jury and, if necessary, a new sentencing trial should be ordered.

## CLAIM XIX: PETITIONER MAKES A PRIMA FACIE CASE THAT SUBSTANTIVE DUE PROCESS REQUIRES PROPORTIONALITY REVIEW.

### A. The Court is Not Procedurally Barred From Considering The Merits of This Claim.

Respondent argues erroneously that the Court is procedurally barred from considering the merits of Claim XIX because Petitioner previously presented this issue. (IR 63-64.)

This claim is based on United States Supreme Court case law since 1994 and hence could not have been raised during Petitioner's first automatic appeal. (See, *State Farm Mut. Auto. Ins. Co. v Campbell* (2003) U.S. 123 S.Ct. 1513; *Cooper Indus., Inc. v Leatherman Tool Group* (2001) 532 U.S. 424; *BMW of North American., Inc. v Gore* (1996) 517 U.S. 559; *Honda Motor Co. v Oberg* (1994) 512 US 415.) This claim falls within the new rule of law exception set forth in *In re Harris* (1993) 5 Cal. 4th 813. The new case law has vitiated *Pulley v. Harris* (1984) 465 U.S. 37.

Further, the California capital sentencing scheme, as construed by this Court as not requiring or permitting proportionality review, is unconstitutional. A failure to consider the claim would be a miscarriage of

justice within the meaning of *In re Clark* (1993) 5 Cal.4th 750, 797-798.

### B. Petitioner Makes a Prima Facie Case for Relief in Claim XIX.

Respondent makes no attempt to refute the underlying reasoning of this claim. Substantive due process and the prohibition against cruel and/or unusual punishment under the Fifth, Eighth, and Fourteenth Amendments to the Federal Constitution and Article I, Sections 1,7, and 17 of the California Constitution now require proportionality review of the punishment of death, based on the fact that the United States Supreme Court has relied on proportionality review of monetary punishments. (Petn. 183.) *Pulley v. Harris* (1984) 465 U.S. 37 can no longer stand as a basis to shield California death judgments from proportionality review. (Petn. 186.) Otherwise, the system would have the obscene consequence of interpreting the Constitution to protect money and not life itself. (Petn. 186.)

## CLAIM XX: PETITIONER MAKES A PRIMA FACIE CASE THAT EQUAL PROTECTION REQUIRES PROPORTIONALITY REVIEW.

### A. The Court is Not Procedurally Barred From Considering the Merits of This Claim.

Respondent argues erroneously that the Court is procedurally barred from considering the merits of Claim XX because Petitioner previously presented this issue. (IR 63-64) As discussed in Claim XIX, this claim is based on United States Supreme Court case law since 1994 and hence could not have been raised during Petitioner's first automatic appeal. (See, *State*

*Farm Mut. Auto. Ins. Co. v Campbell* (2003) U.S. 123 S.Ct. 1513; *Cooper Indus., Inc. v Leatherman Tool Group* (2001) 532 U.S. 424; *BMW of North American., Inc. v Gore* (1996) 517 U.S. 559; *Honda Motor Co. v Oberg* (1994) 512 US 415.)

Also, as argued in Claim XIX, the California capital sentencing scheme, as construed by this Court as not requiring or permitting proportionality review, is unconstitutional. A failure to consider the claim would be a miscarriage of justice within the meaning of *In re Clark* (1993) 5 Cal.4th 750, 797-798.

### B. Petitioner Makes a Prima Facie Case for Relief in Claim XX.

Respondent makes no attempt to refute the underlying logic of this claim. If the Court were not to accord substantive due process rights to a person facing death in a fashion equal to such rights accorded a person or corporation facing monetary damages, it would also be a violation of the right to equal protection under the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the California Constitution. (Petn. 187.)

## CLAIM XXI: PETITIONER MAKES A PRIMA FACIE CASE FOR THE ISSUES RAISED ON DIRECT APPEAL.

Petitioner raises these claims in the petition because Respondent has asserted that they are not raisable on appeal. Petitioner disagrees with Respondent's argument and wants to ensure that these claims are

considered by the Court, and should relief not be obtained, that they are preserved for federal review.

## CLAIM XXII: THE TRIAL COURT IMPROPERLY DENIED PETITIONER'S MOTION TO STRIKE THE SPECIAL CIRCUMSTANCE FINDING.

Respondent correctly notes that Petitioner's Claim XXII is a restatement of Claim V from his concurrent automatic appeal. (IR 65.) In urging this Court to reject Petitioner's claim, the government simply refers to a portion of the Respondent's Brief in the concurrent automatic appeal. (*Ibid.* [citing Respondent's Brief at pages 29-39].) In so doing, Respondent all but concedes that Judge Charvat's refusal to consider additional evidence to support a motion to strike the special circumstance violated due process and denied Petitioner equal protection of the law. Petitioner has not only made a prima facie claim for relief but has demonstrated that he should prevail on the merits. Therefore, Petitioner urges the Court to issue the writ and reverse his death sentence, remanding the matter to the trial court to permit consideration of Mr. Lewis's motion to strike the special circumstance finding.

### A. Respondent Implicitly Concedes That Petitioner Has Stated a Prima Facie Case for Relief.

The government's entire response to Claim XXII is given at page 65 of the Informal Response to Petition for Writ of Habeas Corpus. After summarizing Petitioner's claim, Respondent says only:

> This claim, which was raised verbatim in the opening brief filed in the concurrent automatic appeal (AOB 46-53 [Arg. VI]), should be rejected for the reasons stated in the Respondent's Brief at pages 29 through 36.[14]

(IR 65.)

Respondent's brief in the concurrent automatic appeal argues that (1) the issue is not cognizable on appeal (PRB 30), (2) Judge Charvat's decision was proper (PRB 30-31), (3) the trial court lacked the authority to grant the motion (PRB 31-33), (4) Petitioner failed to demonstrate an equal protection violation (PRB 34-35), and (5) that any error was harmless (PRB 35-36). The first of these arguments is a procedural one relating to the appellate context only. As such, it is irrelevant in the present context. The remainder of these arguments go to the merits of Petitioner's claim for relief. Respondent raises no relevant procedural bars, nor challenges the sufficiency of the factual allegations. By limiting its present response to the arguments presented in its appellate Response Brief, the government implicitly concedes that Petitioner has stated a prima facie case for relief.

### B. Petitioner's Claim Should Be Granted for the Reasons Given in His Petition for Writ of Habeas Corpus and the Reply Brief in His Concurrent Automatic Appeal.

Petitioner's respectfully submits that a writ of habeas corpus should issue for the reasons fully briefed in his Petition for Writ of Habeas Corpus

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[14]Respondent makes one other conclusory statement at page 65 (Arg. II.S) of the Informal Response, claiming that "Petitioner fails to make a prima facie case as to [Claims XXII, XXIII, XXIV, XXV, XXVI, XXIX, and XXX]." Respondent utterly fails to explain *why* this is so as regards Claim XXII.

(Petn. 188-195) and the Reply Brief for his concurrent automatic appeal (ARB 16-23). As discussed below, this is especially true because Respondent has impliedly conceded the merits of the claim as stated in the aforementioned Reply Brief.

### C. Respondent Impliedly Concedes the Merits of the Relevant Issues Raised in the Reply Brief in Petitioner's Concurrent Automatic Appeal.

As noted above, Petitioner's Claim XXII was previously presented as Claim V in his concurrent automatic appeal. The government's only response to Claim XXII is a reference to the Response Brief in Petitioner's concurrent automatic appeal. Respondent therefore fails to address Petitioner's discussion of this issue in the Reply Brief. (See ARB 16-23.) As such, Respondent impliedly concedes the relevant points of that discussion.[15]

The government's Response Brief in the concurrent automatic appeal was filed on July 15, 2002. Petitioner filed a Reply Brief on January 6, 2003. Petitioner's pleading included a detailed rebuttal to the issues raised by Respondent's brief. (ARB 16-23.) When confronted with Claim XXII in the Petition for Writ of Habeas Corpus (timely filed on July 2, 2003), Respondent declined to address the merits of that detailed rebuttal. In so

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[15]Both Petitioner's and Respondent's briefs contain discussions of whether this claim is cognizable on appeal. The resolution of that procedural matter is irrelevant to the merits of this same claim in the present context.

doing, Respondent apparently concedes that there is no strategically-sound response to the issues raised therein. As such, the Court should find that Respondent impliedly concedes the merits of those issues. Because Respondent also fails to raise any procedural bar to Claim XXII in the context of habeas corpus relief, the Court should grant the relief sought.

## CLAIM XXIII: THE TRIAL COURT IMPROPERLY DENIED PETITIONER THE OPPORTUNITY TO PRESENT RELEVANT MITIGATING EVIDENCE IN SUPPORT OF A SENTENCE LESS THAN DEATH.

The government's treatment of Claim XXIII is almost identical to its treatment of Claim XXII: summarize Petitioner's claim in a single sentence, note that it was raised in Petitioner's concurrent automatic appeal (see AOB 53-62 [Arg VI]), and refer to the appellate Response Brief in arguing that the Court should refuse to issue a writ of habeas corpus. (IR 65-66.) This casual treatment of Petitioner's claim effectively concedes that Judge Charvat's denial of the opportunity to present relevant mitigating evidence in support of a sentence less than death violated due process and denied Petitioner his constitutional rights to equal protection and a fair, reliable, and individualized capital sentencing determination. Petitioner has not only made a prima facie claim for relief but has demonstrated that he should prevail on the merits. Therefore, Petitioner urges the Court to issue the writ and reverse his death sentence.

### A. Respondent Implicitly Concedes That Petitioner Has Stated a Prima Facie Case for Relief.

The government's response to Claim XXIII essentially mirrors its treatment of Claim XXII. After summarizing Petitioner's claim, Respondent says only:

> This identical claim has been presented to this Court in the concurrent automatic appeal (AOB 53-62 [Arg. VI]) and should be rejected for the reasons stated in the Respondent's Brief at pages 37 through 45.[16]

(IR 66)

As an initial matter, Petitioner notes that there is an important addition to the claim as presented in the Petition. This distinction and its implications are noted below. In Respondent's Brief in the concurrent automatic appeal, the government argues that (1) the trial court's decision was proper because of the nature of the limited remand order (PRB 37-38), (2) the trial court could not properly consider mitigating evidence not presented to Petitioner's penalty phase jury (PRB 38-43), (3) Petitioner's equal protection rights were not violated (PRB 43-44), and (4) any error was harmless (PRB 45). All of these arguments go to the merits of Petitioner's claim for relief. Respondent raises no relevant procedural bars, nor challenges the sufficiency of the factual allegations. By limiting its

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[16]Respondent makes one other conclusory statement at page 65 (Arg. II.S) of the Informal Response, claiming that "Petitioner fails to make a prima facie case as to [Claims XXII, XXIII, XXIV, XXV, XXVI, XXIX, and XXX]." Respondent utterly fails to explain *why* this is so as regards Claim XXIII.

present response to the arguments presented in its appellate Response Brief, the government implicitly concedes that Petitioner has stated a prima facie case for relief.

### B. Petitioner's Claim Should Be Granted for the Reasons Given in His Petition for Writ of Habeas Corpus and the Reply Brief in His Concurrent Automatic Appeal.

Petitioner's respectfully submits that a writ of habeas corpus should issue for the reasons fully briefed in his Petition for Writ of Habeas Corpus (Petn. 195-204) and the Reply Brief for his concurrent automatic appeal (ARB 24-29). As discussed below, this is especially true because Respondent has impliedly conceded both the merits of the claim as stated in the aforementioned Reply Brief.

### C. Respondent Impliedly Concedes the Merits of the Relevant Issues Raised in the Reply Brief in Petitioner's Concurrent Automatic Appeal.

As noted above, Petitioner's Claim XXIII was previously presented as Claim VI in his concurrent automatic appeal. The government's only response to Claim XXIII is a reference to the Response Brief in Petitioner's concurrent automatic appeal. Respondent therefore fails to address Petitioner's discussion of this issue in the Reply Brief. (See ARB 24-29.) As such, Respondent impliedly concedes the relevant points of that discussion.

Respondent's Brief in the concurrent automatic appeal was filed on July 15, 2002. Petitioner filed a Reply Brief on January 6, 2003.

Petitioner's pleading included a detailed rebuttal to the issues raised by Respondent's Brief. (ARB 24-29.) When confronted with Claim XXIII in the Petition for Writ of Habeas Corpus (timely filed on July 2, 2003), Respondent declined to address the merits of that detailed rebuttal. In so doing, Respondent apparently concedes that there is no strategically-sound response to the issues raised therein. As such, the Court should find that Respondent impliedly concedes the merits of those issues.

Furthermore, there is an important difference between the claim as presented in the concurrent automatic appeal and in the Petition for Writ of Habeas Corpus. Claim XXIII was initially raised as Claim VI in Petitioner's concurrent automatic appeal. (See AOB 53-62.) As presented in the Petition, Mr. Lewis bolsters his claim by noting that Petitioner was denied the right to present significant mitigation evidence at the first trial because of Ron Slick's incompetent representation. (Compare AOB 56 with Petn. 197-198.) Respondent's casual treatment of Petitioner's claim in the Informal Response to Petition for Writ of Habeas Corpus fails to address this important addition.

Therefore, because Respondent effectively concedes the merits of Petitioner's claim and fails to raise any procedural bar to Claim XXIII, the Court should grant the relief sought.

## CLAIM XXIV: PETITIONER MAKES A PRIMA FACIE CASE THAT THE DEATH PENALTY JURY INSTRUCTIONS WERE UNCONSTITUTIONALLY VAGUE AND INCAPABLE OF BEING UNDERSTOOD BY JURORS.

The jury instructions given in this case, based on Penal Code section 190.3, failed to guide the jury's discretion, are vague and incomprehensible, and resulted in arbitrary, capricious, and unreliable sentencing. (Petn. 205.) Because the Court is not procedurally barred from considering this claim, and because Petitioner has made a prima facie case for relief herein, he requests that he Court grant him the relief he seeks.

### A. The Court is Not Procedurally Barred From Considering the Merits of This Claim .

Respondent argues erroneously that the Court is procedurally barred from considering the merits of Claim XXIV because trial counsel failed to object to the instructions (IR 66), and because appellate counsel did not raise the claim on Petitioner's first automatic appeal (IR 73). As pointed out in this claim, and elsewhere, Petitioner was deprived of effective assistance of counsel at all stages of his trial. (See Petn. 205.) Further, as acknowledged by Respondent, trial counsel did request modifications to the jury instructions. (IR 66.) Also, trial counsel moved for a new trial based on the jury instructions. (4RST 856:19-859:4.) Finally, insofar as the claim is largely based on empirical studies conducted in the 1990's- following Petitioner's trial and first automatic appeal- the claim really could not have been properly presented to this or any other Court prior to the filing of the

current petition. (See Petn. 205-208.) The Court is not procedurally barred from considering the merits of this claim.

### B. Petitioner Makes a Prima Facie Case for Relief in Claim XXIV.

In addition to asserting a procedural bar, the government argues that Petitioner fails to make a prima facie case for relief in Claim XXIV (1) because the issue was waived by trial counsel (IR 66), (2) because the claims lack a sufficient factual basis for relief (IR 67), and (3) because of the reasons given in their appellate answer to some of Petitioner's arguments in the concurrent automatic appeal (*Ibid.*). Because these responses are ultimately unpersuasive, the Court should find that Petitioner has made a prima facie case for relief.

#### *1. If the Court finds that Ron Slick waived this issue by failing to object at trial, then it was Ineffective Assistance of Counsel to have done so.*

For the reasons given in the Petition and below, Petitioner submits that he has demonstrated that the jury instruction as given violated his constitutional rights. To the extent that the Court finds that Ron Slick waived an otherwise valid constitutional objection at trial, Petitioner submits that this is simply one more strike against the government's assertion that Ron Slick competently represented Petitioner. (See Claims I, V, VI, VII, VIII, IX.) As such, the Court should grant the relief sought as a violation of Petitioner's right to effective assistance of counsel under the

California and federal constitutions.

*2. Petitioner has presented sufficient facts to support Claim XXIV.*

Respondent argues that Petitioner's pleading in support of Claim XXIV is too speculative and conclusory to support relief. (IR 67.) Respondent fails to include even a brief discussion as to why this is so, or what additional information would be necessary to overcome the asserted hurdle. Without more, Petitioner submits that the government's contentions are themselves "speculative and conclusory opinion." (See id.)

*3. Respondent's misunderstands the nature of part of Petitioner's claim, and implicitly concedes the merits of the remainder.*

Respondent asserts that Petitioner largely restates portions of Argument IX.B, Argument IX.C.7, and Argument IX.C.9, as stated in the opening brief filed in the concurrent automatic appeal. (IR 67.) This is an inaccurate representation of Petitioner's claim as regards Penal Code, section 190.3, subdivision (a). As such, the government's reliance on its response to Petitioner's appellate argument IX.B (IR 67) is irrelevant and unpersuasive.[17]

Petitioner grants that portions of Claim XXIV are based on an

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[17]Even if the Court were to find Respondent's appellate briefing relevant to this issue, Petitioner incorporates by reference his reply briefing in the concurrent automatic appeal (ARB 53-54 [Argument IX.B]) and submits that the government as effectively conceded the points therein.

analysis of the statute discussed in Argument IX.B of his concurrent automatic appeal. Petitioner's appellate argument focused on the extent to which Penal Code, section 190.3, subdivision (a) allows *prosecutors* to argue such a wide range of "circumstances of the crime" that subdivision (a) is unconstitutionally vague. (See AOB 85-93; Claim XXVII.B, Petn. 234.) Claim XXIV asserts, however, that Penal Code, section 190.3, subdivision (a) is unconstitutionally vague because the statutory language provides the *jury* with inadequate guidance to distinguish a death-worthy case from a death-unworthy case. (Petn. 208-209.) Respondent's briefing fails to address this important distinction.

Furthermore, as discussed in Petitioner's replies to Claims XXII, XXIII, XXV, XXVI, XXVII, XXIX, *supra* and *infra*, the government's reliance on its briefing in the concurrent automatic appeal implicitly concedes the merits of Petitioner's claims where Respondent fails to address any of the points raised in Petitioner's reply briefing in the concurrent automatic appeal.

## CLAIM XXV: THE TRIAL COURT IMPROPERLY DENIED PETITIONER'S MOTION FOR PRE-SENTENCING DISCOVERY.

The government's response to Petitioner's Claim XXV continues the pattern of lax briefing that impliedly concedes the merits of Petitioner's request for relief. (See Claims XXII-XXIII, *supra*.) Here, as above, Respondent notes that Petitioner's claim is similar to one that he raised in

the concurrent automatic appeal. (IR 67.) Respondent then answers the present claim by incorporating a portion of their Response Brief filed in the concurrent automatic appeal. (*Ibid.*) In so doing, the government all but concedes that Judge Charvat's denial of Petitioner's motion for pre-sentencing discovery violated his constitutional rights to due process of law. Petitioner therefore urges the Court to reverse his death sentence, order that discovery be granted, and remand the matter to the trial court to permit consideration of Mr. Lewis's motion to strike the special circumstance finding, and if that motion is denied, for new proceedings pursuant to section 190.4, subdivision (e)..

### A. Respondent Implicitly Concedes That Petitioner Has Stated a Prima Facie Case for Habeas Corpus Relief.

The People's entire response to Claim XXV is given at page 67 of the Informal Response to Petition for Writ of Habeas Corpus. After summarizing Petitioner's claim, the government simply incorporates by reference a portion of its response brief in the concurrent automatic appeal. (IR 67.)[18]

Respondent's brief in the concurrent automatic appeal seems to argue that (1) the issue is not cognizable on appeal (PRB 46), (2) Judge Charvat lacked jurisdiction to grant discovery (PRB 47-48), and (3) Judge

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[18]Respondent also twice states without explanation that "Petitioner fails to make a prima facie case" as to Claim XXV. (IR 65 [Arg. II.S]; IR 67 [Arg. II.W].)

Charvat did not abuse his discretion in denying Petitioner's discovery request (PRB 48-49). The first of these arguments is a procedural one relating to the appellate context only. As such, it is irrelevant in the present context. The remainder of these arguments go to the merits of Petitioner's claim for relief. Respondent raises no relevant procedural bars, nor challenges the sufficiency of the factual allegations. By limiting its present response to the arguments presented in its appellate Response Brief, the government implicitly concedes that Petitioner has stated a prima facie case for relief.

### B. Petitioner's Claim Should Be Granted for the Reasons Given in His Petition for Writ of Habeas Corpus and the Reply Brief in His Concurrent Automatic Appeal.

Petitioner's respectfully submits that a writ of habeas corpus should issue for the reasons fully briefed in his Petition for Writ of Habeas Corpus (Petn. 210-213) and the Reply Brief for his concurrent automatic appeal (ARB 30-33). As discussed below, this is especially true because Respondent has impliedly conceded the merits of the claim as stated in the aforementioned Reply Brief.

### C. Respondent Impliedly Concedes the Merits of the Relevant Issues Raised in the Reply Brief in Petitioner's Concurrent Automatic Appeal.

Petitioner's Claim XXV was previously presented as Claim VII in his concurrent automatic appeal. The government's only response to Claim XXV is a reference to the Response Brief in Petitioner's concurrent

automatic appeal. Respondent therefore fails to address Petitioner's discussion of this issue in the Reply Brief. (See ARB 30-33.) As such, Respondent impliedly concedes the relevant points of that discussion.[19]

Respondent's Brief in the concurrent automatic appeal was filed on July 15, 2002. Petitioner filed a Reply Brief on January 6, 2003. Petitioner's pleading included a detailed rebuttal to the arguments raised by Respondent's brief. (ARB 30-33.) When confronted with Claim XXV in the Petition for Writ of Habeas Corpus (timely filed on July 2, 2003), Respondent declined to address the merits of that detailed rebuttal. In so doing, Respondent apparently concedes that there is no strategically-sound response to the issues raised therein. As such, the Court should find that Respondent impliedly concedes the merits of those issues. Because Respondent also fails to raise any procedural bar to Claim XXV in the context of habeas corpus relief, the Court should grant the relief sought.

## CLAIM XXVI: THIS COURT SHOULD JOIN THE GROWING NUMBER OF JURISTS, SCHOLARS, AND RESEARCHERS IN ACKNOWLEDGING THAT THE DEATH PENALTY IS WRONG.

The government's response to Petitioner's Claim XXVI is, yet again, terse, conclusory, and ultimately unpersuasive. As with Claims XXII, XXIII, and XXV, Respondent here argues that the Court should decline to

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[19]Both Petitioner's and Respondent's briefs contain discussions of whether this claim is cognizable on appeal. The resolution of that procedural matter is irrelevant to the merits of this same claim in the present context.

grant relief to Petitioner based only on a reference to prior briefing in the concurrent automatic appeal. As with Claims XXII, XXIII, and XXV, Respondent here all but concedes the merits of Petitioner's claim. Petitioner has not only made a prima facie claim for relief but has demonstrated that he should prevail on the merits. Despite Respondent's contentions, the Court is not procedurally barred from deciding the merits of this claim. Therefore, Petitioner urges the Court to issue the writ and reverse his death sentence.

### A. The Court is Not Procedurally Barred From Acknowledging That the Death Penalty is Wrong.

Respondent argues erroneously that the Court is procedurally barred from considering the merits of Claim XXVI because Petitioner failed to present it in a timely manner. (IR 6-8, 13.) As discussed in Claim II, *supra*, the Court is not procedurally barred from taking this opportunity to join the number of jurists, scholars, and researchers in acknowledging that the death penalty is wrong.

### B. Respondent Implicitly Concedes That Petitioner Has Stated a Prima Facie Case for Relief.

The government's entire response to Claim XXVI is given at page 68 of the Informal Response to Petition for Writ of Habeas Corpus. After summarizing Petitioner's claim, Respondent says only:

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

prima facie case for relief.[20]

(IR 68)

Respondent's Brief in the concurrent automatic appeal argues that (1) the issue is not cognizable on appeal (PRB 50), (2) California's death penalty scheme is constitutionally sound (*Ibid.*), and (3) that the decision to impose the death penalty on any particular defendant is a matter for the jury, not the court (Further, the California capital sentencing scheme, as construed by this Court as not requiring or permitting proportionality review, is unconstitutional. A failure to consider the claim would be a miscarriage of justice within the meaning of *In re Clark* (1993) 5 Cal.4th 750, 797-798.). The first of these arguments is a procedural one relating to the appellate context only. As such, it is irrelevant in the present context. The second and third arguments are apparently intended to address the merits of Petitioner's claim for relief. (But see ARB 34.) In any event, Respondent raises no new and relevant procedural bars, nor challenges the sufficiency of the factual allegations. Indeed, Respondent provides *no explanation* for why it believes that Claim XXVI does not make a prima facie case for relief. By limiting its present response to the arguments presented in its appellate Response Brief, the government implicitly

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[20]Respondent makes one other conclusory statement at page 65 (Arg. II.S) of the Informal Response, claiming that "Petitioner fails to make a prima facie case as to [Claims XXII, XXIII, XXIV, XXV, XXVI, XXIX, and XXX]." Respondent utterly fails to explain *why* this is so as regards Claim XXVI.

concedes that Petitioner has stated a prima facie case for relief.

### C. Petitioner's Claim Should Be Granted for the Reasons Given in His Petition for Writ of Habeas Corpus and the Reply Brief in His Concurrent Automatic Appeal.

Petitioner's respectfully submits that a writ of habeas corpus should issue for the reasons fully briefed in his Petition for Writ of Habeas Corpus (Petn. 214-221) and the Reply Brief for his concurrent automatic appeal (ARB 34-49).[21] This is especially true because Respondent has once again declined to address Petitioner's sincere request that this Court join the growing population of jurists, scholars, and researchers acknowledging the moral and normative contradictions inherent in death penalty systems generally (and California's system specifically). (See ARB 34; IR 68.) Additionally, as discussed below, Respondent has impliedly conceded the merits of the claim as stated in the aforementioned Reply Brief.

### D. Respondent Impliedly Concedes the Merits of the Relevant Issues Raised in the Reply Brief in Petitioner's Concurrent Automatic Appeal.

Claim XXVI was previously presented as Claim VIII in Petitioner's concurrent automatic appeal. The government's only response to Claim

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[21]Petitioner notes that his counsel's analysis of California's compliance with the recommendations of the Illinois Commission Report on Capital Punishment (ARB 39-49) has been greatly expanded since he has filed his Petition. The results were published in the Santa Clara Law Review Journal. (Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California* (2003) 44 Santa Clara L.Rev. 101.) A final statistical comparison finds that California complies with only 6.17% of the recommendations that it might choose to comply with. (Id. at p. 118; but see Id. at 118, fn. 10.) The article also contains a more detailed substantive comparison between the Illinois Report and California's death penalty system than was previously presented. (Id. at pp. 118-200.)

XXVI is a reference to the Response Brief in Petitioner's concurrent automatic appeal. Respondent therefore fails to address Petitioner's discussion of this issue in the Reply Brief. (See ARB 34-49.) As such, Respondent impliedly concedes the relevant points of that discussion.[22]

The government's Response Brief in the concurrent automatic appeal was filed on July 15, 2002. Petitioner filed a Reply Brief on January 6, 2003. Petitioner's pleading included a detailed rebuttal to the issues raised by Respondent's brief. (ARB 34-49.) When confronted with Claim XXVI in the Petition for Writ of Habeas Corpus (timely filed on July 2, 2003), Respondent declined to address the merits of that detailed rebuttal. In so doing, Respondent apparently concedes that there is no strategically-sound response to the issues raised therein. As such, the Court should find that Respondent impliedly concedes the merits of those issues. Because Petitioner has also demonstrated the procedural propriety of Claim XXVI, the Court should grant the relief sought.

## CLAIM XXVII: CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT PETITIONER'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

As it did when responding to Petitioner's Claims XXII, XXIII, XXV, and XXVI, the government tries to dismiss Claim XXVII with a simple

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[22]Both Petitioner's and Respondent's briefs contain discussions of whether this claim is cognizable on appeal. The resolution of that procedural matter is irrelevant to the merits of this same claim in the present context.

reference to its briefing of similar issues raised in the concurrent automatic appeal. (IR 6-8.) As with each prior use of this tactic, Respondent here all but concedes the merits of Petitioner's claim. Petitioner has not only made a prima facie claim for relief but has demonstrated that he should prevail on the merits. Despite Respondent's contentions, the Court is not procedurally barred from deciding the merits of this claim. Therefore, Petitioner urges the Court to issue the writ and reverse his death sentence.

### A. The Court is Not Procedurally Barred From Ruling on the Constitutionality of California's Death Penalty Statute.

Respondent argues erroneously that the Court is procedurally barred from considering the merits of Claim XXVII because Petitioner failed to present it in a timely manner. (IR 68.) As discussed in Claim II, *supra*, the Court is not procedurally barred from ruling on the constitutionality of California's death penalty statute.

### B. Respondent Implicitly Concedes That Petitioner Has Stated a Prima Facie Case for Relief.

The government's entire response to Claim XXVII - a claim occupying more than 45 pages of legal and factual analysis (Petn. 222-269) - is presented in a single paragraph at page 68 of the Informal Response to Petition for Writ of Habeas Corpus. After a perfunctory list of some of the bases of Petitioner's constitutional challenge, the government blithely states that, "[e]ach claim should be rejected for the reasons stated in the Respondent's Brief at pages 51 through 65." (IR 68.)

Respondent's brief in the concurrent automatic appeal argues that (1) the issue was not cognizable on appeal (PRB 50); (2) California's death penalty statute adequately narrows the class of offenders eligible for the death penalty (PRB 51-55); (3) the factor given in California Penal Code section 190.3, subdivision (a) is not unconstitutionally vague (PRB 55); (4) the trial court did not err in refusing to instruct the jury that their penalty determination was subject to the reasonable doubt standard (PRB 56-59); (5) there is no constitutional right to a unanimity jury instruction for aggravating factors (PRB 60); (6) there is no constitutional requirement that the state provide for explicit findings regarding aggravating and mitigating factors on which the penalty jury relied (PRB 61); (7) intercase proportionality is not constitutionally required (PRB 61-62); (8) evidence of unadjudicated crimes as an aggravating factor in the penalty phase is not unconstitutional (PRB 62); (9) the terms "extreme" and "substantial" in California Penal Code section 190.3 did not improperly limit the jury's consideration of mitigating circumstances (PRB 62-63); (10) the trial court did not err by not delineating which penalty factors "could only be mitigating" (PRB 63-65); and (11) that Mr. Lewis's equal protection rights were not violated (PRB 65). The first of these arguments is a procedural one relating to the appellate context only. As such, it is irrelevant in the present context. The remainder are apparently intended to address the merits of Petitioner's claim for relief. In any event, Respondent raises no

new and relevant procedural bars, nor challenges the sufficiency of the factual allegations. Indeed, Respondent never asserts that Claim XXVII does not make a prima facie case for relief. By limiting its present response to the arguments presented in its appellate Response Brief, the government implicitly concedes that Petitioner has stated a prima facie case for relief.

### C. Petitioner's Claim Should Be Granted for the Reasons Given in His Petition for Writ of Habeas Corpus and the Reply Brief in His Concurrent Automatic Appeal.

Petitioner's respectfully submits that a writ of habeas corpus should issue for the reasons fully briefed in his Petition for Writ of Habeas Corpus (Petn. 222-269) and the Reply Brief for his concurrent automatic appeal (ARB 34-49). This is especially true because Respondent has once again declined to address Petitioner's sincere request that this Court join the growing population of jurists, scholars, and researchers acknowledging the moral and normative contradictions inherent in death penalty systems generally (and California's system specifically). (See ARB 34; IR 68.) Additionally, as discussed below, Respondent has impliedly conceded the merits of the claim as stated in the aforementioned Reply Brief.

### D. Respondent Impliedly Concedes the Merits of the Relevant Issues Raised in the Reply Brief in Petitioner's Concurrent Automatic Appeal.

Claim XXVII was presented in substantially similar form as Argument IX in Petitioner's concurrent automatic appeal. The one substantial difference between the automatic appeal and habeas versions of

this claim relates to the failure-to-narrow facet of the claim. The habeas version, part A of Claim XXVII, is supported by empirical evidence in the form of Professor Steven F. Shatz's declaration concerning the results of a study he performed to measure the narrowing impact of the statute as it read at the time of the offense underlying Petitioner's capital conviction. (Exhibit 7.) That empirical evidence and the discovery and fact development mechanisms available in habeas proceedings will permit an evidentiary at which further evidence can be adduced to either challenge or bolster Professor Shatz's analysis and conclusions. If the Court is unprepared to grant relief on the face of the pleadings, Petitioner hopes to be accorded further funding, discovery and an evidentiary at which he will have an opportunity to prove that the statute fails to satisfy the constitutional narrowing requirement.

The government does not comment here concerning the evidence provided by Professor Shatz's declaration. (But, see IR, 44-46 [re Claim XIII].) In fact, the government's only response to Claim XXVII is a reference to the Response Brief in Petitioner's concurrent automatic appeal. Respondent therefore fails to address Petitioner's discussion of this issue in the Reply Brief. (See ARB 50-61.) As such, Respondent impliedly concedes the relevant points of that discussion.[23]

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[23]Both Petitioner's and Respondent's briefs contain discussions of whether this claim is cognizable on appeal. The resolution of that procedural matter is irrelevant to the merits of this

The government's Response Brief in the concurrent automatic appeal was filed on July 15, 2002. Petitioner filed a Reply Brief on January 6, 2003. Petitioner's pleading included a detailed rebuttal to the issues raised by Respondent's brief. (ARB 50-61.) When confronted with Claim XXVII in the Petition for Writ of Habeas Corpus (timely filed on July 2, 2003), Respondent declined to address the merits of that detailed rebuttal. In so doing, Respondent apparently concedes that there is no strategically-sound response to the issues raised therein. As such, the Court should find that Respondent impliedly concedes the merits of those issues. This is particularly appropriate where Petitioner used the appellate reply brief to correct the government's mistaken understanding of the issues at hand. (See, e.g., ARB 54.) Because Petitioner has also demonstrated the procedural propriety of Claim XXVII, the Court should grant the relief sought.

## CLAIM XXVIII: PETITIONER HAS MADE A PRIMA FACIE SHOWING THAT CALIFORNIA'S DEATH PENALTY STATUTE VIOLATES EQUAL PROTECTION.

### A. The Court is Not Procedurally Barred From Ruling on the Constitutionality of California's Death Penalty.

Respondent argues erroneously that the Court is procedurally barred from considering the merits of Claim XXVIII because Petitioner failed to present it in a timely manner. (IR 69.) As discussed in Claim II, *supra*, and

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same claim in the present context.

in the petition at page 46, the Court is not procedurally barred from ruling on this equal protection claim.

### B. Petitioner Makes a Prima Facie Case to Support This Claim.

Respondent states that prosecutorial discretion to select those eligible cases in which the death penalty would actually be sought does not in and of itself evidence an arbitrary and capricious capital punishment system or offend principles of equal protection. (IR 69.) That may be so, but Petitioner's contention, supported by the case law cited in support of Claim XXVIII (Petn. 270-271), is that it does violate Equal Protection and the Eighth Amendment for such discretion to be exercised on the basis of standards that vary from county to county- with the result that whether or not a defendant is capitally charged may depend as much on where he is alleged to have committed an offense as on the nature of the offense he is alleged to have committed.

Further, Respondent argues that Petitioner does not support the claim with facts. (IR 69.) Petitioner, however, provided facts to support this claim. A geographic disparity exists, in violation of the Equal Protection Clause, and it is clearly demonstrated by the Condemned Inmate Summary List, prepared in March of 2002 by the California Department of Corrections, attached to the petition as Exhibit 63. (Petn. 271, fn. 61.)

## CLAIM XXIX: PETITIONER HAS MADE A PRIMA FACIE CASE THAT HIS CONVICTION AND DEATH SENTENCE VIOLATE INTERNATIONAL LAW.

As it did when responding to Petitioner's Claims XXII, XXIII, XXV, XXVI, and XXVII, the government's response to Claim XXIX is to rely upon a simple reference to its briefing of a similar issue raised in the concurrent automatic appeal. (IR 70.) As with each prior use of this tactic, Respondent here all but concedes the merits of Petitioner's claim. Petitioner has not only made a prima facie claim for relief but has demonstrated that he should prevail on the merits. Despite Respondent's contentions, the Court is not procedurally barred from deciding the merits of this claim. Therefore, Petitioner urges the Court to issue the writ and reverse his death sentence.

### A. The Court is Not Procedurally Barred From Considering Petitioner's Conviction and Death Sentence in the Light of International Law.

Respondent argues erroneously that the Court is procedurally barred from considering the merits of Claim XXIX because Petitioner failed to present it in a timely manner. (IR 6-8.) As discussed in Claim II, *supra*, the Court is not procedurally barred from ruling on the constitutionality of California's death penalty.

### B. Respondent Implicitly Concedes That Petitioner Has Stated a Prima Facie Case for Relief.

The government's entire response to Claim XXIX is presented in a

single paragraph at page 70 of the Informal Response to Petition for Writ of Habeas Corpus. After briefly stating that "[a] similar argument raising these claims were presented in the opening brief filed in the concurrent automatic appeal," the government responds that, "[e]ach individual claim should be rejected for the reasons stated in the Respondent's Brief at pages 66 through 69." (IR 70)

Respondent's brief in the concurrent automatic appeal argues that (1) the issue was not cognizable on appeal (PRB 66-67); (2) Petitioner lacked standing to raise this claim (PRB 67-68);(3) a brief appeal to precedent (PRB 68); and (4) a conclusory assertion that any relief warranted by the claim should be provided under state or federal law (PRB 69). The first of these arguments is a procedural one relating to the appellate context only. As such, it is irrelevant in the present context. The remainder are apparently intended to address Petitioner's claim for relief. In any event, Respondent raises no new and relevant procedural bars, nor challenges the sufficiency of the factual allegations. Indeed, Respondent never asserts that Claim XXX does not state a prima facie case for relief. By limiting its present response to the arguments presented in its appellate Response Brief, the government implicitly concedes that Petitioner has stated a prima facie case for relief.

### C. Petitioner's Claim Should Be Granted for the Reasons Given in His Petition for Writ of Habeas Corpus and the Reply Brief in His Concurrent Automatic Appeal.

Petitioner's respectfully submits that a writ of habeas corpus should issue for the reasons fully briefed in his Petition for Writ of Habeas Corpus (Petn. 272-281) and the Reply Brief for his concurrent automatic appeal (ARB 62-64). Additionally, as discussed below, Respondent has impliedly conceded the merits of the claim as stated in the aforementioned Reply Brief.

### D. Respondent Impliedly Concedes the Merits of the Relevant Issues Raised in the Reply Brief in Petitioner's Concurrent Automatic Appeal.

Claim XXIX incorporates by reference Claim X in Petitioner's concurrent automatic appeal. (Petn. 272.) It does not, however, simply present that appellate claim anew, as the government contends. (See IR 70.) Claim XXIX of the petition presents a new discussion of the emerging norms of the International community, and a fresh discussion of the role that they, and the international laws discussed in the appellate claim, play in Petitioner's case. The government's only response to Claim XXIX is a reference to the Response Brief in Petitioner's concurrent automatic appeal. Respondent therefore completely fails to address the merits of the briefing in the petition. This response also fails to address Petitioner's discussion of the issues relating to the incorporated appellate claim as contained in the Reply Brief. (See ARB 62-64.) As such, Respondent impliedly concedes

the relevant points of that both the new claims presented in the Petition and the issues raised in the appellate discussion.[24]

The government's Response Brief in the concurrent automatic appeal was filed on July 15, 2002. Petitioner filed a Reply Brief on January 6, 2003. Petitioner's pleading included a detailed rebuttal to the issues raised by Respondent's brief. (ARB 62-64.) When confronted with Claim XXIX in the Petition for Writ of Habeas Corpus (timely filed on July 2, 2003), Respondent declined to address the merits of that detailed rebuttal. In so doing, Respondent apparently concedes that there is no strategically-sound response to the issues raised therein. This is especially true where, as noted in Petitioner's Reply Brief in the concurrent automatic appeal, the government's response does not actually address the substantive merits of Petitioner's claim. (ARB 64.) As such, the Court should find that Respondent impliedly concedes the merits of both the procedural and substantive issues presented in Claim XXIX. Because Petitioner has also demonstrated the procedural propriety of Claim XXIX, the Court should grant the relief sought.

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[24]Both Petitioner's and Respondent's briefs contain discussions of whether this claim is cognizable on appeal. The resolution of that procedural matter is irrelevant to the merits of this same claim in the present context.

## CLAIM XXX: RESPONDENT FAILS TO EXPLAIN OR DEMONSTRATE WHY PETITIONER'S CLAIM XXX FALLS SHORT OF A PRIMA FACIE CASE FOR RELIEF.

Respondent fails utterly to address Petitioner's claim that executing him after over nineteen years of confinement would constitute cruel and/or unusual punishment in violation of the Fifth, Sixth, Eighth, an Fourteenth Amendments of the United States Constitution; Article I, Sections 1, 7, 15, 16, and 17 of the California Constitution; and international law, covenants, treaties and norms. (See Claim XXX, Petn.. 281-289.) The government's only responses are an assertion that Claim XXX is barred as untimely and a terse recognition that Petitioner presented this claim in his related automatic appeal and a referral to its appellate response. (IR 7; 70.)

As discussed in Claim II, *supra*, the Court is not procedurally barred from considering the merits of Claim XXX.

The government's appellate response to the substance of Petitioner's claim was scarcely more than a single case citation. (PRB 70-71.) Neither the appellate or informal habeas "responses" address one iota of Petitioner's substantive claim, presented with the respectful request that the Court consider breaking from its related precedent. (See Petn. 281-289.)

Indeed, the government's failure to address Mr. Lewis's substantive argument on two separate occasions suggests more than passingly that Respondent has no basis for urging the Court to *follow* precedent in this case. Respondent fails to justify the application of *People v. Anderson*

(2001) 25 Cal.4th 543, to the facts of this case, or accord Petitioner's argument sufficient respect to compose a lengthier legal argument than, "Petitioner offers no new or persuasive reason for this Court to depart from its precedent." (IR 70-71.)

The government's response, utterly lacking any factual analysis, lacking any but the most conclusory of legal argument, and failing for the second time to accord Mr. Lewis sufficient respect to meet the substance of his claim, also fails to explain or demonstrate why Petitioner fails to make a prima facie relief. Accordingly, Petitioner urges the Court to grant the relief that Petitioner seeks.

## CLAIM XXXI: PETITIONER STATES A PRIMA FACIE CASE THAT THE METHOD OF EXECUTION USED BY CALIFORNIA IS FORBIDDEN BY STATE, FEDERAL AND INTERNATIONAL LAW.

### A. The Court is Not Procedurally Barred From Ruling on the Constitutionality of California's Death Penalty.

Respondent argues erroneously that the Court is procedurally barred from considering the merits of Claim XXXI because Petitioner failed to present it in a timely manner. (IR 71.) As discussed in Claim II, *supra*, the Court is not procedurally barred from ruling on the constitutionality of California's death penalty.

### B. Petitioner Makes A Prima Facie Showing That California's Method of Execution is Unconstitutional

Respondent asserts that Petitioner's examples of botched executions in other states are not relevant because they did not occur in California. (IR

71.) Petitioner has alleged facts that demonstrate that execution by lethal injection violates the prohibition against cruel and unusual punishment. Anecdotal evidence from other states is relevant because these other states use the same method of execution as California. Additionally, Petitioner has described the cruel and unusual process of lethal injection in great detail. (Petn. 293-294.)

Respondent does not refute the fact that lethal injection executions have resulted in inhumane deaths. Lethal injection has been shown to cause painful, prolonged and tortuous deaths in the many instances where the procedure is botched. (Petn. 292.)

Respondent claims that Petitioner has no right to an executioner with any particular education and that Petitioner has no right to a pain free execution, only a right to a constitutional execution. (IR 71.) Respondent misses the point here. Any lethal injection by unskilled and improperly trained death technicians, not under the supervision of medical doctors, involves an inherent risk that the execution will be carried out in a manner that violates the prohibition against cruel and unusual punishment because a lack of medical training leads to errors. These errors can result in unspeakable suffering.

Respondent also states that Petitioner doesn't allege that California's method of execution is unusual because it is used in 35 other states. (IR 71-72.) What is unusual about lethal injection is that, as demonstrated by the

facts presented by Petitioner, it is a form of punishment that can result in unnecessary and wanton infliction of pain, unlike usual and humane punishments such as incarceration.

Finally, Respondent argues that this Court, and others, has held that California has "applied constitutionally" lethal injection as a method of execution. (IR 72.) Petitioner asks this Court to declare that lethal injection, under the procedures used by California, constitutes cruel and unusual punishment.

## CLAIM XXXII: PETITIONER'S CONVICTIONS AND DEATH SENTENCE MUST BE VACATED BECAUSE OF THE CUMULATIVE EFFECTS OF ALL THE ERRORS.

Respondent contends that Petitioner's supposed failure to state a prima facie case for any of the claims contained in the petition necessarily implies that there is no constitutionally defective cumulative impact. (IR 72.) Respondent also argues erroneously that the Court is procedurally barred from considering the merits of Claim XXXII because Petitioner failed to present it in a timely manner. (IR 6-8.)

As discussed in Claim II, *supra*, the Court is not procedurally barred from finding that the cumulative effect of the errors and constitutional violations throughout Petitioner's case warrant a vacatur of his conviction and death sentence.

Furthermore, the government does not refute the legal principal that cumulative error is a separate basis for relief. (See Petn. 303-306.) As

such, upon finding that any of Petitioner's claims present a prima facie case of one or more violations of his Constitutional rights, the Court must then evaluate whether the cumulative impact of those violations rise to the level of a separate constitutional violation. (See Petn. 303.) For all of the reasons given in the petition and above, Mr. Lewis respectfully requests that this Court acknowledge the cumulative errors that so infested his case from beginning to end, resulting in a denial of fundamental fairness and a fundamental miscarriage of justice. Therefore, Petitioner asks this Court to grant the relief that he seeks.

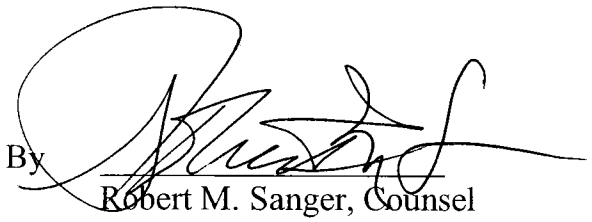
## CONCLUSION

For all the reasons set forth in this brief, Petitioner's judgment of conviction and death should be reversed or, in the alternative, the sentence reduced to life without the possibility of parole under Penal Code sections 1260 and 1181 (7) and for such other and further relief as the Court may deem just and proper.

Dated: April 16, 2004

Respectfully Submitted,

SANGER & SWYSEN



By _____
Robert M. Sanger, Counsel
For Petitioner, Robert Lewis Jr.

## PROOF OF SERVICE

I, the undersigned declare:

I am over the age of 18 years and not a party to the within action. I am employed in the County of Santa Barbara. My business address is 233 East Carrillo Street, Suite C, Santa Barbara, California, 93101.

On April 16, 2004, I served the foregoing document entitled: **PETITIONER'S INFORMAL REPLY TO INFORMAL RESPONSE FOR WRIT OF HABEAS CORPUS** on the interested parties in this action by depositing a true copy thereof as follows:

**See Attached Service List**

X **BY U.S. MAIL** - I am readily familiar with the firm's practice for collection of mail and processing of correspondence for mailing with the United States Postal Service. Such correspondence is deposited daily with the United States Postal Service in a sealed envelope with postage thereon fully prepaid and deposited during the ordinary course of business. Service made pursuant to this paragraph, upon motion of a party, shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit.

__ **BY FACSIMILE** -I caused the above-referenced document(s) to be transmitted via facsimile to the interested parties at:

__ **BY HAND** - I caused the document to be hand delivered to the interested parties at the address above.

X **STATE** - I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

____ **FEDERAL** - I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

**Executed April 16, 2004, at Santa Barbara, California.**

Carol Dowling

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