No. S161210

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

In re

ABELINO MANRIQUEZ,

On Habeas Corpus.

(Related to *People v. Manriquez*, Supreme Court No. S038023)

(Los Angeles County Superior Court No. VA004848)

Hon. Robert Armstrong, Presiding

INFORMAL REPLY

John R. Reese (SBN 137630)
Sujal Shah (SBN 215230)
Tom Clifford (SBN 253394)
Olivia Para (SBN 255592)
Dustin Brown (SBN 253010)
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111-4067
Telephone: 415.393.2000
Facsimile: 415.393.2286

Attorneys for Petitioner
Abelino Manriquez

No. S141210

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John R. Reese (SBN 37653)
Sujal Shah (SBN 215230)
Tom Clifford (SBN 233394)
Olivia Para (SBN 255592)
Dustin Brown (SBN 252019)
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111-4067
Telephone: 415.393.2000
Facsimile: 415.393.2286

Attorneys for Petitioner
Abelino Manriquez

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VOLUME 1

I. INTRODUCTION

Petitioner had no real chance in this case. Charged with four murders plus a triple homicide and rape as aggravators, he was represented by just one attorney—far below the standards of the American Bar Association and this Court. The results were terrible but predictable:

- A jury picked without essential voir dire and from which the prosecutor was allowed systematically to exclude minorities;
- A jury foreperson who lied on her juror questionnaire and in voir dire and whose personal experiences led her to harbor powerful biases against Petitioner;
- Only one defense witness in the guilt phase (a police officer with nothing to say in Petitioner's favor);
- No defense expert witness in either the guilt or penalty phase of the case;
- Virtually no objections to inadmissible and prejudicial evidence and prosecutorial misconduct;
- An incoherent penalty-phase defense opening occupying less that a single page of reporter's transcript;
- A totally inadequate investigation despite a wealth of available mitigation evidence, and no expert to explain the mitigation significance of Petitioner's tortured childhood and background; and

- No attempt to develop or use powerful evidence of Petitioner's mental impairments and drug and alcohol abuse.

Respondent has two main responses to these problems. First, Respondent conjures up possible explanations for Trial Counsel's failures. Respondent's hypotheses are imaginative, but pure speculation, and often absurd or implausible on their face. Given the volume and seriousness of Trial Counsel's ineffective performances, Respondent's arguments amount to the untenable claim that Trial Counsel really doesn't have to do anything to defend his client because Respondent after the fact can always come up with an excuse.

Second, Respondent says that each of Trial Counsel's failures didn't matter, and that fixing them would not have changed the outcome at trial. This boilerplate "no prejudice" argument suffers from the same basic defect as Respondent's first argument: by claiming in essence that nothing matters, it proves too much.

The flaws and failings that infected Petitioner's trial are too many and too grave to shrug off with rote recitations of standard mantras. Trial Counsel basically did nothing and that can't be right. Just as surely, doing nothing led to the judgment of death. Even if some of Petitioner's individual claims do not alone require reversal, the accumulation of them certainly does.

In this Informal Reply, Petitioner does not rebut every one of

Respondent's arguments in response to every one of Petitioner's claims. Given that Respondent repeats certain arguments with respect to multiple claims, Petitioner consolidates his reply to such arguments in one place, where possible. The failure of this Informal Reply to mention an argument in the Informal Response is not to be construed as a concession or waiver of Petitioner's claim.

II. GENERAL ISSUES

A. Trial Counsel's Declaration Is Not Necessary to Show Ineffective Assistance of Counsel.

Trial Counsel's representation fell far below *Strickland's* reasonable competence standard. Trial Counsel presented only one guilt phase witness, a police officer whose direct examination spans less than three pages of the reporter's transcript and only describes one witness's statements about the Rita Motel shooting (Count III). He otherwise offered no defense to the four murder charges, nor did he present any evidence countering allegations of rape and the three more murders offered as aggravators in the penalty phase. Trial Counsel went against his supervisor's recommendations by failing to have an expert assess the accuracy of eyewitness identifications in Fort Knots (Count II), and he never pursued evidence that another person was the shooter in Las Playas (Count I). He defied advice to consult further with a mental health expert whose testimony could have reduced the first-degree murder verdicts on all

four counts. As a result, Petitioner was convicted in the Fort Knots shooting despite uncontroverted evidence that his blood did not match that of the killer, and in Las Playas despite the absence of any witness who could testify that he, and not his companion, fired shots. Trial Counsel failed to discover that the friends for whom Patricia Marin claimed to be babysitting when she was allegedly raped had never heard of her, nor did he develop the evidence that would have allowed him to show that the Paramount triple homicide may have been committed in self-defense.

Addressing Trial Counsel's almost total failure of performance, Respondent repeatedly suggests that Trial Counsel could have justified these decisions, and faults Petitioner for failing to include Trial Counsel's declaration or to justify its absence. Habeas Counsel has been unable to obtain Trial Counsel's declaration. The Los Angeles Public Defender's Office (the "LAPD"), where Trial Counsel was employed at the time of trial and remains to this day, has restricted Habeas Counsel's access to Trial Counsel.

In any case, the absence of Trial Counsel's admission that he provided incompetent representation does not foreclose Petitioner's ineffective assistance of counsel claims. Many of Trial Counsel's failures were objectively unreasonable and cannot be justified on the basis of strategy. Trial Counsel often failed to do the investigation necessary to support decisions that Respondent would characterize as "strategic": one

cannot reasonably decide not to present evidence without knowing what that evidence is or says. Whether or not Trial Counsel admits his errors or attempts to excuse them, Trial Counsel's failure to mount any reasonable defense is unjustifiable and can be assessed on the record before this Court.

1. Habeas Counsel Has Been Unable to Obtain a Declaration From Trial Counsel.

Recognizing appellate counsel's responsibility to sometimes "raise as an issue the competence of trial counsel," the LAPD in 2001 issued written guidelines governing appellate counsel's communications with trial attorneys. Rep. Exh. 13, Memoranda from Law Offices, Los Angeles County Public Defender, Policies and Procedures: Communications with Appellate Counsel and Successor Counsel's Access to File, ("LAPD Communications with Appellate Counsel Policy"), Feb. 15, 2001, PRE 61. The policy is unduly restrictive, denying Habeas Counsel the access necessary to build the evidence that Respondent insists is required to support an ineffective assistance claim. The policy requires questions to the trial attorney must "be put in writing," and the trial attorney's answers have to be drafted and forwarded to the LAPD's Appellate Branch for review. *Id.* "Only after that review is completed" does the policy allow "the written response [to] be forwarded to the appellate counsel." *Id.*

Although allegedly "designed to . . . protect[] the accuracy of the appellate record," the policy was, by its own terms, imposed to "avoid[]

unjustifiably damaging the reputation of trial counsel." *Id.* Instead of enhancing the record's accuracy, the policy hampers it by eliminating successor counsel's ability to obtain the candid, unfiltered opinion of the trial attorney. It shields LAPD trial attorneys from accusations of incompetence, rather than protecting the defendants whose rights were compromised by that incompetence. The spontaneity and candor of an in-person conversation are lost when the trial attorney's responses are filtered through two layers of vetting—the attorney's own drafting process, and the secondary review by the LAPD itself. The importance of unfettered access to Trial Counsel is heightened by the sensitivity of what he is being asked to acknowledge: deficiencies in his professional competence. To expect Trial Counsel to admit fault in a written statement being directly reviewed by his supervisors is unrealistic. Only through unmonitored interviews could such a record possibly be developed.

In an April 16, 2009 letter, Habeas Counsel requested that the LAPD set aside the policy and allow Trial Counsel to "communicate openly with" Habeas Counsel and "write a declaration not subject to LAPD review" with no risk of "adverse employment action—formal or informal—against him." Rep. Exh. 14, Letter from Tom Clifford, Habeas Counsel, to Michael P. Judge, Los Angeles Public Defender ("4/16/09 Habeas Counsel Letter to LAPD"), Apr. 16, 2009, PRE 66. An LAPD representative responded by telephone that Habeas Counsel could talk to Trial Counsel only if the

conversation was audio taped. Rep. Exh. 15, Letter from Tom Clifford, Habeas Counsel, to Terri Towery, Assistant Los Angeles Public Defender ("5/6/09 Habeas Counsel Letter to LAPD"), May 6, 2009, PRE 67. Habeas Counsel declined the offer, protesting that the restriction would cause Trial Counsel to "be on guard, defensive, and unlikely to provide information that might reflect poorly on him or the LAPD." *Id.* Although the LAPD defended this position in a follow-up letter, it never agreed to dispense with the audio-taping. Rep. Exh. 16, Letter from Terry Towery, Assistant Los Angeles Public Defender, to Tom Clifford, Habeas Counsel ("5/18/09 LAPD Letter to Habeas Counsel"), May 18, 2009, PRE 71. Habeas Counsel continues to protest the LAPD's refusal to allow an unmonitored conversation with Trial Counsel, and as a result has been unable to discuss with Trial Counsel any of the specific deficiencies that are the basis of this claim.

2. Petitioner Has Sustained His Burden of Pleading Ineffective Assistance of Counsel Even in the Absence of a Trial Counsel Declaration.

Respondent repeatedly claims that Petitioner "has failed to satisfy his burden" in pleading ineffective assistance of counsel, because "there is no declaration or statement from [Trial Counsel] addressing the challenged conduct." Attorney General's Informal Response to Petition for Writ of Habeas Corpus ("Res.") 4-5; *see also id.* at 3, 7, 9, 11, 13, 14, 18, 19, 20,

22-23, 24, 27, 28, 30, 32, 35, 36, 38, 41, 42, 44, 45, 47, 48, 49, 50, 51, 52, 54, 57, 67, 68, 108-09. The fact that "the record does not illuminate the basis for the challenged acts or omissions" is not fatal to an ineffective assistance claim on habeas, because "there is an opportunity in an evidentiary hearing to have trial counsel fully describe his or her reasons for acting or failing to act in the manner complained of." *People v. Pope*, 23 Cal. 3d 412, 426 (1979) (comparing record necessary to claim ineffective assistance of counsel on appeal versus on habeas); *see also People v. Frierson*, 25 Cal. 3d 142, 161 (1979) ("[I]f the record fails affirmatively to disclose counsel's incompetence, the factual elicitation in a habeas corpus evidentiary hearing is the proper procedural remedy by which to test the competency issue."). However, an evidentiary hearing is unnecessary here, because Trial Counsel's representation was objectively unreasonable and cannot be justified by any tactical considerations.

A decision by Trial Counsel can be explained as strategic only if Trial Counsel performed the investigation necessary to support such a decision. Although Trial Counsel is afforded tremendous discretion, "the exercise of that discretion must be a reasonable and informed one in the light of the facts and options reasonably apparent to counsel at the time of trial, and founded upon reasonable investigation and preparation." *In re Hall*, 30 Cal. 3d 408, 426 (1981). The *Strickland* standard is deferential, but only to a point. "[D]eferential scrutiny of counsel's performance is

limited in extent and indeed in certain cases may be altogether unjustified." *People v. Ledesma*, 43 Cal. 3d 171, 217 (1987). Deference "is not abdication," and "must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions." *Id.* Thus, "where the record shows that counsel has failed to research the law or investigate the facts in the manner of a diligent and conscientious advocate, the conviction should be reversed since the defendant has been deprived of adequate assistance of counsel." *Pope*, 23 Cal. 3d at 425-26. Further underscoring this very point, Trial Counsel's *own boss*, LAPD Special Circumstances Coordinator Charles Gessler, testified in November, 1991 for an unrelated capital case that, "without a thorough factual investigation, defense counsel incapacitates himself from performing his constitutionally required role."[1] Rep. Exh. 2, Declaration of Charles Gessler, Los Angeles County Deputy Public Defender, Special Circumstances Coordinator, as Standard of Care Expert in Support of Jaturun Siripongs' Petition for Writ of Habeas Corpus ("Gessler Decl."), Nov. 13, 1991, PRE 08.

Respondent speculates—often wildly—as to strategies that may have motivated Trial Counsel's missteps or omissions. Respondent then asserts

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[1] LAPD Special Circumstances coordinator Charles Gessler was retained by counsel for Jaturun Siripongs to render an expert opinion regarding the prevailing standard of care for capital attorneys in support of Mr. Siripongs' Petition for Writ of Habeas Corpus.

that since Petitioner has not foreclosed every plausible explanation for Trial Counsel's decisions, Petitioner cannot meet his burden in alleging ineffective assistance. However, many of the "reasonable" rationales that Respondent proposes to justify Trial Counsel's decisions are patently unreasonable, and only further illustrate the objectively deficient nature of Trial Counsel's representation. Where Trial Counsel's failures are so egregious that even Respondent cannot concoct a reasonable explanation for them, his representation was constitutionally deficient and unjustifiable.

For example, with respect to Trial Counsel's failure to investigate the existence of a companion who committed the Las Playas shooting, Respondent asserts that "a reasonably competent counsel could have determined no further investigation was required," because Petitioner "would still be guilty for aiding and abetting the murder." Res. 11. Thus, the only "strategic" justification that Respondent can propose is that an investigation that could have exonerated Petitioner of first-degree murder was unnecessary. Deciding to forego such an investigation is objectively unreasonable. *See* Rep. Exh. 2, Gessler Decl., PRE 10-11 (criticizing Trial Counsel's failure to investigate leads that could have developed a third-party culpability theory). Similarly, Respondent argues that Trial Counsel may have reasonably concluded that an eyewitness identification expert was unnecessary due to the "number of eyewitnesses and the quality of their testimony." Res. 21. However, the very purpose of the expert is to

refute the quality of eyewitness testimony and demonstrate that such identifications are not reliable. Failing to pursue such a defense on a charge based exclusively on eyewitness testimony cannot be justified as tactical.

B. Petitioner Should Have Been Provided More Than One Attorney.

1. Complicated Death Cases Require at Least Two Counsel.

Trial Counsel said this case involved a "massive investigation" and was "time consuming and complicated." Rep. Exh. 7, Los Angeles County Lettergram from Stephen L. Hobson, Deputy Public Defender, Norwalk Superior Court, to Roger Stanton, Division Chief, Litigation Support Division: Request for Continuing Paralegal assistance on People v. Abelino Manriquez ("Trial Counsel's Paralegal Assistance Request"), Jan. 14, 1993, PRE 34. Indeed, this case's complexity is beyond dispute. The jury adjudicated four homicide charges in the guilt phase, and weighed another three homicide allegations plus a rape in the penalty phase. Potential witnesses identified early in the case numbered well over a hundred, and the penalty-phase investigation centered on a large, Spanish-speaking family in a remote region of Mexico. Few attorneys charged with such a task could provide adequate representation without additional help. Yet Trial Counsel—facing his first and only capital murder trial—did not ask for backup, and the LAPD did not provide it. The decision to defend Petitioner with a single attorney violated his right to effective assistance of

counsel.

The unequivocal professional norm at the time of trial was to staff two attorneys on any capital case that even approached the magnitude of this one. The 1989 ABA Guidelines suggest two qualified defense attorneys for *all* cases in which the death penalty is sought. *See* Pet. 210-11 ¶¶ 524-25. California courts had long stressed the importance of two attorneys in complex death cases. *See Keenan v. Superior Court*, 31 Cal. 3d 424, 434 (1982) (noting the factual and legal complexity of the case in concluding that "a second attorney is required"); Pet. 211-12 ¶¶ 526-27.

Respondent argues that the appointment of second counsel is not mandatory in a capital case. Res. 69. This misses the point. Petitioner never suggested that two attorneys are required for *every* death case. The 1989 ABA Guidelines and *Keenan* require second counsel *in this case* because it was so "massive," "time consuming and complicated." Rep. Exh. 7, Trial Counsel's Paralegal Assistance Request, PRE 34. A capital trial featuring four unrelated murder charges, plus three more homicides and a rape as aggravators, could not be competently handled by a single attorney. Although he recognized the complexity, *see generally id.*, Trial Counsel handled it alone.[2]

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[2] Ironically, Petitioner's co-defendant on just the penalty homicide charges (the "Paramount" incident) sought and received an assignment of two counsel. He was not facing the four other murder charges, nor a possible death sentence. *See* Exh. 34, *People v. Paciano Jacques Ochoa*, Motion for

2. There Was No Valid Reason Not to Provide Two Lawyers.

The LAPD should have assigned two attorneys to Petitioner's case. When it did not, Trial Counsel should have demanded it. These failures are inexcusable and unexplained.

Nor does Respondent justify it. Although he points to the absence of a declaration from Trial Counsel, that does not foreclose Petitioner from establishing a prima facie case. The professional standard according to multiple authorities called for two lawyers in complex cases, which Trial Counsel acknowledged this to be. Rep. Exh. 7, Trial Counsel's Paralegal Assistance Request, PRE 34. No explanation from Trial Counsel could justify such constitutionally inadequate staffing.

Respondent speculates that Trial Counsel may have considered requesting attorney support, but determined he could handle the case with only an investigator and paralegal. Res. 69. This is inconsistent with what Trial Counsel said at the time and denies the uniquely important role an attorney plays in preparing for a capital case. *See Keenan*, 31 Cal. 3d at 431-32 (observing that "the ultimate responsibility for coordinating the investigation and assimilating the results [in a capital case] must remain with an attorney sensitive to the potential legal issues involved," even if

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Appointment of Second Counsel; Exh. 35, *People v. Paciano Jacques Ochoa*, Signed Order for Appointment of Second Counsel. Petitioner's counsel should have requested similar staffing, but did not.

investigators and experts may "lighten" the defense attorney's "substantial burden").

Trial Counsel was likely compelled by the culture and policies of the LAPD to handle this case alone. When this case was tried, the LAPD's policy actively discouraged Grade IV attorneys (those qualified to defend death cases) from asking for help. In a 1987 memorandum to all Grade IV Attorneys, Los Angeles Public Defender Michael P. Judge made it clear that "the office recognizes your ability to handle capital cases and expects that you will do so while handling other responsibilities." Rep. Exh. 1, Los Angeles County Lettergram from Michael P. Judge, Division Chief, Central Superior Court Trials, to All Grade IV Attorneys: Special Circumstances Case Procedures ("LAPD Special Circumstances Case Procedures"), Aug. 6, 1987, PRE 03. Mr. Judge also stated that "[a]ssignment of a second attorney is not automatic." *Id.* Although the memorandum ultimately described a process for requesting a second attorney, its message was clear: individual deputy defenders were expected to handle death cases on their own. Indeed, this go-it-alone philosophy is evident in Trial Counsel's January 1993 memorandum to the LAPD authorities justifying a request for paralegal help because it would allow him "to carry [his] normal caseload." Rep. Exh. 7, Trial Counsel's Paralegal Assistance Request, PRE 34. Bowing to such pressure was not a reasonable tactical decision.

3. Even if Paralegal Help Could Be Sufficient, It Wasn't in this Case Because the LAPD Removed a Valuable Paralegal Shortly Before Trial.

In the absence of a second attorney, Trial Counsel had to rely on extensive paralegal assistance to prepare for trial. However, even that basic litigation support was stripped away with the removal of key paralegal Andrea Lua shortly before trial. Rep. Exh. 7, Trial Counsel's Paralegal Assistance Request, PRE 32. Ms. Lua was a critical partner to Trial Counsel in preparing Petitioner's defense: she led the mitigation investigation in Mexico and the United States, and acted as the primary contact with the cultural and psychological experts. *See id.* at PRE 32; Rep. Exh. 6, Letter from Dr. Romanucci-Ross to Paralegal Lua (declining cultural expert appointment but offering referrals) ("Dr. Romanucci-Ross Letter"), Dec. 1992, PRE 28; Rep. Exh. 5, Los Angeles County Lettergram from Andrea to Steve, Re: Expert - Mexican Affairs (regarding leads for cultural expert) ("12/30/92 Paralegal Lua Cultural Expert Memo"), Dec. 30, 1992, PRE 26. In January 1993, only months before trial, Ms. Lua became an attorney and was removed from the case. Rep. Exh. 7, Trial Counsel's Paralegal Assistance Request, PRE 32; Rep. Exh. 17, State Bar of California Online Attorney Search Results Re: Andrea Leigh Lua #163459, last viewed Apr. 16, 2009, PRE 72.

Losing Ms. Lua compounded Trial Counsel's failure to request

second counsel. This LAPD personnel decision deprived Petitioner of a key investigator whose extensive knowledge and experience with the case could not be replicated. Trial Counsel and Ms. Lua herself knew that her removal was prejudicial. They objected, arguing that she could be promoted to attorney *after* the trial. Rep. Exh. 16, 5/18/09 LAPD Letter to Habeas Counsel, PRE 67 (acknowledging that Ms. Lua's removal from the case was appealed to retired Public Defender Wilbur Littlefield). The LAPD was unswayed. Rep. Exh. 14, 4/16/09 Habeas Counsel Letter to LAPD, PRE 65 (requesting documents regarding Ms. Lua's removal from Petitioner's case and Trial Counsel's objection to this removal).

Not only did the LAPD fail to provide Petitioner with two lawyers, it inexplicably took away Trial Counsel's primary support. Although a replacement paralegal was later provided, she was unable to accomplish the tasks Ms. Lua already had in progress, such as managing the ongoing Mexico investigation and retaining a cultural expert and psychopharmacologist. Ms. Lua had been the key driver of Petitioner's penalty defense, and her loss resulted in the presentation of a constitutionally infirm penalty phase defense: no defense experts were even presented, and the few witnesses Trial Counsel did call were ill-prepared.

III. TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE DURING THE JURY SELECTION PROCESS

Trial Counsel's failure to raise basic objections or to adequately screen members of the venire led to the seating of a jury predisposed to convict Petitioner and condemn him to death. The prosecutor used 11 out of 13 peremptory challenges to strip the venire of minorities, seven of them—like Petitioner—Latinos or individuals with a Spanish surname. *See* Pet. 37 ¶ 106. This indisputable prima facie evidence of an equal protection violation went unremarked by Trial Counsel, who likewise failed to screen prospective jurors for bias against immigrants or in favor of the death penalty. *See* Pet. 44-49 ¶¶ 119-130. No strategic decision can justify such inexplicable failures in as fundamentally important a process as jury selection. The probability that any seated jurors were either selected out of bias or biased themselves infected the jury's deliberation and necessitates a finding of prejudice.

A. Trial Counsel Failed to Challenge Prosecutor's Race-Based Peremptory Challenges Excluding Hispanic and Other Minority Venire Members.

More than half of the prosecutor's peremptory strikes (seven out of 13, or 54 percent) removed venire members who were Latino or had Spanish last names, even though the group constituted only 23 percent of the venire. Pet. 37 ¶ 107. This pattern presented an obvious prima facie

case of racially motivated peremptory strikes under federal and state constitutional law. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *People v. Wheeler*, 22 Cal. 3d 258 (1978). Respondent does not deny the strength of the prima facie case, but argues only that Trial Counsel's failure to object was reasonable and resulted in no prejudice. Res. 3-4. Neither is true.

The scope of Petitioner's credible *Batson* challenge was not limited to Latino jurors. The prosecutor also struck two out of three Native Americans (67 percent) and two out of five African Americans (40 percent). Pet. 37 ¶ 106. By comparison, the strike rate of Caucasian venire members was only four percent (two out of 47). *Id.* Trial Counsel had a viable prima facie case with respect to each of these groups independently. *See Powers v. Ohio*, 499 U.S. 400 (1991) (holding *Batson* challenges are not limited to venire members of the defendant's own race). Considered collectively, 11 out of the prosecutor's 13 peremptory challenges (85 percent) were applied to minorities, even though minorities constituted only 40 percent of the venire. Pet. 38 ¶ 108. A challenge under *Batson* and *Wheeler*, had one been made, would have forced the prosecutor to provide plausible nondiscriminatory reasons for 11 out of his 13 peremptory strikes.

The absence of a declaration from Trial Counsel is of no consequence, as no satisfactory explanation of his failure is possible. Respondent cannot even propose a plausible tactical justification, suggesting only that Trial Counsel may have "reasonably determined" that

a *Wheeler/Batson* challenge was meritless. Res. 3-4. No reasonable defense counsel could have reached such a conclusion. The prosecutor's starkly disproportionate strikes of Latino and other minority venire members presented a textbook example of a prima facie case under *Batson* and *Wheeler*. *See, e.g.*, *United States v. Alvarado*, 923 F.2d 253, 256 (2d Cir. 1991) ("[A] challenge rate nearly twice the likely minority percentage of the venire strongly supports a prima facie case under *Batson*."); *Turner v. Marshall*, 63 F.3d 807, 813 (9th Cir. 1995) ("[T]he prosecutor's exclusion of five out of nine available African-American venirepersons removed a sufficient percentage of African-Americans to establish a pattern of discrimination."). There was no downside to objecting: unlike an objection at trial, a *Batson* challenge cannot backfire by drawing unwanted attention to unfavorable facts.

If Trial Counsel could not have reasonably *decided* against objecting, the only other explanation is that the possibility of objecting did not even occur to him—because he either did not notice the pattern, or did not realize it posed an equal protection violation. Neither would satisfy the first step of *Strickland*. Failure to know relevant law, or to recognize the facts that trigger its application, falls below the standard of competence required of defense counsel in a capital trial. *See, e.g.*, *Edwards v. Lamarque*, 439 F.3d 504, 512 (9th Cir. 2005) (finding ineffective assistance where trial counsel "lacked the legal understanding necessary for a

competent tactical decision").

Respondent relies repeatedly on the false premise that the seating of two Hispanic jurors forecloses a *Batson* claim. Res. 4. That is not the law, nor was it when Petitioner was tried in August 1991. *See, e.g., Alvarado*, 923 F.2d at 255 ("The discrimination condemned by *Batson* need not be as extensive as numerically possible."); *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987) ("[U]nder *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors."). Respondent is likewise incorrect in dismissing as irrelevant a disciplinary proceeding against the prosecutor for his use of racially derogatory language to describe a colleague. Res. 4 n.2. Historical evidence of racial discrimination "is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions." *Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003); *see also Williams v. Woodford*, 396 F.3d 1059, 1064 (9th Cir. 2005) (nine circuit judges dissenting from denial of rehearing en banc) (considering the "circumstances revealing the prosecutor's pattern and practice of racial discrimination").

Raising a *Batson/Wheeler* challenge would have changed the jury's composition because the prosecutor could not have provided plausible nondiscriminatory explanations for all 11 challenges. The prosecutor's

failure to justify even one strike would have been enough to violate *Batson*. *See United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994) ("[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose."). The struck panelists' statements on jury questionnaires and in voir dire offer no basis to justify their removal, Pet. 41 ¶ 114, and Respondent does not contend otherwise. Res. 3-4.

Assessing prejudice under *Strickland* must take into account the seriousness of an equal protection violation in jury selection. Racial discrimination in seating a jury "casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt." *Powers*, 499 U.S. at 411. When a *Batson* challenge is raised but improperly dismissed by a trial court, the resulting "structural error" affects "the entire conduct of the trial from beginning to end." *Tankleff v. Senkowski*, 135 F.3d 235, 248 (2d Cir. 1998). Although the error here was by Trial Counsel, not the Court, the constitutional violation is the same: jury selection was infected by discrimination, casting doubt on the integrity of the result. *See, e.g., Hollis v. Davis*, 941 F.2d 1471, 1483 (11th Cir. 1991) (concluding that "at least as to sentencing, there is a probability of a different result, but for the unconstitutional jury selection, sufficient to undermine confidence in the outcome"). The "reasonable probability" that a *Batson* motion would have succeeded "is sufficient to undermine confidence in the outcome of the trial because a *Batson* violation is

structural error." *Williams*, 396 F.3d at 1072 (concluding in dissent to denial of rehearing en banc that "counsel's failure to object to the discriminatory use of peremptory challenges constituted ineffective assistance").

The likelihood of prejudice, particularly in the penalty phase, is great. *See Williams*, 396 F.3d at 1070 ("That [petitioner] was facing the death penalty only heightens the prejudicial nature of racial discrimination."). Given the "highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves" in a capital case, *Turner v. Murray*, 476 U.S. 28, 33-34 (1986), the discriminatory removal of minorities from the panel upset the balance and increased the likelihood that the jury would vote for death. Trial Counsel's unreasonable failure to object to the blatant *Batson* violation prejudiced Petitioner and warrants habeas relief.

B. Trial Counsel Failed to Conduct Voir Dire Regarding Potential Jurors' Attitudes About Mexican Immigrants and Non-English Speakers.

Respondent argues that Petitioner's claim of juror bias is "mere speculation" and must be denied for that reason. Res. 5. Respondent imagines Trial Counsel could have "satisfactorily explained" his failure to probe attitudes about Mexican immigrants and non-English speakers—yet Respondent proposes no such explanation. Given the virulent anti-

immigrant sentiment pervasive in southern California at the time of trial, *see* Pet. 42-43 ¶ 117, and the fact that Petitioner is himself a Mexican immigrant, the failure to screen jurors for such a widely held bias cannot be justified. The first prong of *Strickland* is satisfied.

Respondent then insists that jurors' comments about Petitioner's immigration status "did not reflect any bias"; rather, such comments "accurately reflected the evidence presented in this case, that petitioner came into this country from Mexico, killed the four victims in the charged counts, and was involved in three more homicides in Paramount." Res. 5. That Petitioner is Mexican had no relevance, and the simple fact that his nationality was discussed by jurors *during deliberations* suggests that bias infected their decision. The substance of jurors' comments only confirms this: jurors remarked that Petitioner is "*not even a citizen* and he comes over here and kills people." Pet. 45 ¶ 121 (emphasis added). The implication is that an American citizen who committed the very same acts would be, in jurors' eyes, less culpable. They judged Petitioner not only for his alleged acts, but for his mere presence as a Mexican in the United States. By assigning him greater blame for entering the country and only then allegedly "kill[ing] people," the jurors appear to have weighed Petitioner's immigration status as an aggravator in deciding to impose a death sentence. The resulting prejudice is not speculative, but real.

C. Trial Counsel Failed to Exercise Peremptory Challenges for Death Penalty Views.

In defending a client accused of multiple murders, it would be unreasonable for an attorney to accept any juror who considers multiple murders to be an automatic basis for a capital sentence. Trial Counsel accepted not one, but two such jurors. That jurors H.B. and W.C. ultimately retreated from their absolute positions on the death penalty in the face of Trial Counsel's questions does not soften the opinions they had already articulated. Indeed, Juror W.C. still clung to his belief that "[m]urder is a murder. Eye for an eye, so to speak," even after professing that he would "keep an open mind." RT 509.

Respondent considers it "reasonable" for counsel to "conclude[] that evidence of seven murders would make any juror inclined to vote for death rather than life at the penalty phase." Res. 7. It is hardly reasonable to decline to challenge two strong advocates of the death penalty on the basis that *any* juror would likely vote for death. Had Trial Counsel challenged those jurors, the jury seated would have been more willing to consider mitigating evidence and vote against a sentence of death.

IV. TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE DURING THE GUILT PHASE

A. Preliminary Issues.

1. Trial Counsel Unreasonably Failed to Investigate and Present Evidence of Mental Impairments and Illnesses.

Evidence of mental illness may "raise[] a reasonable doubt the defendant premeditated or deliberated" and therefore reduce a crime from first-degree to second-degree murder. *People v. Halvorsen*, 42 Cal. 4th 379, 414 (2007). Trial Counsel failed to develop any evidence of Petitioner's mental impairments, including Posttraumatic Stress Disorder ("PTSD") and Executive Dysfunction Disorder. *See* Pet. 66 (citing Exh. 129, P. Stewart Decl., PE 1228; Exh. 126, A. Llorente Decl., PE 1152). As a result, evidence negating premeditation or deliberation for any of the four murder counts was never developed or presented. Respondent, while providing no psychiatric credentials of his own, suggests that no such assessment was necessary because Petitioner's lucidity is irrefutable. No layman can make such a conclusion. By failing to retain a mental health expert, Trial Counsel sacrificed a powerful attack against first-degree murder. No reasonable tactical decision could justify this omission, which prejudiced Petitioner by eliminating a defense that likely would have reduced the verdicts.

Respondent suggests that Dr. Jose Moral, the psychiatrist hired by

Trial Counsel to perform only a preliminary assessment of Petitioner, may have indicated that Petitioner "was not suffering from any mental illness or impairment that would have assisted the defense." Res. 15-16, 30, 36-37. To the contrary, Dr. Moral advised Trial Counsel to hire an additional expert. Pet. 179-80 ¶¶ 443-44; Rep. Exh. 12, Letter from Dr. Moral to Mr. Stephen L. Hobson, Deputy Public Defender (recommending that petitioner be seen by a psychopharmacologist) ("7/30/93 Dr. Moral Letter"), Jul. 20, 1993, PRE 60. Although it appears Trial Counsel intended to follow Dr. Moral's suggestion, he never engaged any expert. Rep. Exh. 7, Trial Counsel's Paralegal Assistance Request, PRE 33; Rep. Exh. 10, Dr. Jose Moral's Handwritten Notes Re: Abelino Manriquez (stating "psychopharmacologist" with arrow pointing to Siegal) ("Dr. Moral handwritten notes"), Jul. 2, 1993, PRE 39; Rep. Exh. 8, Draft Motion and Order for Appointment of Expert and Supporting Declaration Pursuant to Penal Code section 987.9 for Ronald Siegel, Psychopharmacologist, Feb. 1, 1993, PRE 35-37.

Trial Counsel's failure to heed Dr. Moral's advice was unreasonable, particularly when mental health evidence could reduce a verdict to second-degree murder. Any reasonable attorney would have been "on notice that he needed to investigate mental health . . . more thoroughly when defending a client against a charge—first degree, capital murder—for which raising a reasonable doubt as to intent could be crucial." *Jennings v. Woodford*, 290

F.3d 1006, 1019 (9th Cir. 2002) (finding counsel's "unreasonable failure to investigate psychiatric evidence and possible medical defenses fell below the minimal standard of effectiveness that can be reasonably expected of defense counsel," prejudicing his client's defense).

Respondent repeatedly argues that Petitioner's "conduct and statements were inconsistent with . . . mental impairment or illness." Res. 31. For instance, Respondent claims that Petitioner's statement to police that he "would have shot" the Las Playas victim had his companion not done so "showed his deliberate, organized, controlled thinking and action during the murder and in dealing with investigators." Res. 16. Likewise, Respondent details Petitioner's allegedly "lucid statement to investigating officers" about the Rita Motel shooting, in which he described firing his gun "several more times" after one shot unintentionally discharged into the victim. Res. 31. Finally, Respondent insists that Petitioner's mental deficiencies "do not appear to address his conduct of committing an unprovoked shooting of an apparent stranger." Res. 37-38.

Respondent is not qualified to assess Petitioner's mental health; nor was Trial Counsel, nor were the jurors. Respondent's apparent examples of Petitioner's lucidity—telling police he would have killed someone had his friend not done so first; continuing to shoot a man after firing a single unintentional shot; and shooting a stranger sleeping at a bar—could as easily suggest mental impairment. The very reason a mental health expert

was necessary is because counsel, jurors, and even judges are not competent to make such assessments. Trial Counsel's failure to retain a mental health expert deprived Petitioner of a powerful defense that would have at least reduced some verdicts to second-degree murder.

Respondent argues that Trial Counsel may have declined to pursue the mental impairment theory because "it would have shifted the jury's focus from the victim's provocative conduct." Res. 15 n.3, 31. If anything, evidence of mental impairments would *support* the provocation theory, given that Petitioner's "impaired judgment" and behavior "dominated by instincts" would make him more susceptible to provocation. Pet. 67 ¶ 174 (citing Exh. 126, A. Llorente Decl., PE 1165 ¶ 40). Petitioner's "symptoms of posttraumatic stress disorder with its resultant problems with executive functioning caused him genuinely to believe in his mind that he had to act in self-defense or be killed by the victims." Pet. 174-75, ¶ 431 (quoting Exh. 129, P. Stewart Decl., PE 1263 ¶ 87). Likewise, it would have been unreasonable for Trial Counsel not to retain his own mental health expert to avoid further examination by a court-appointed or prosecution expert. Res. 16, 31, 37. At worst, that would have produced a battle between experts. Such a risk could not justify abandoning so powerful a defense, particularly when a corroborating opinion was equally probable.

No tactical reason could justify abandoning a mental health defense. A strategic decision can only be "founded on adequate investigation and

preparation," *People v. Ledesma*, 43 Cal. 3d at 215, but Trial Counsel ignored the advice of Dr. Moral, whose consultation represented his only inquiry into Petitioner's mental health. *See* Rep. Exh. 7, Trial Counsel's Paralegal Assistance Request, PRE 33 (showing Trial Counsel sought paralegal to assist with obtaining mental health expert, indicating that the failure to do so was not strategic but a result of understaffing). The outcome likely would have been different had jurors heard mental health evidence negating the premeditation and deliberation required for first-degree murder.

2. Trial Counsel Unreasonably Failed to Investigate and Present Evidence of Drug and Alcohol Dependency and Intoxication.

Trial Counsel failed to investigate or present evidence of drug and alcohol dependency that would have raised a reasonable doubt as to Petitioner's mental state for the four murder counts. Such evidence, had Trial Counsel pursued it, would have negated the elements of premeditation and deliberation and precluded Petitioner's first-degree murder convictions on those counts. Respondent offers implausible rationales to justify Trial Counsel's inaction, none of which constitute a reasonable tactical decision.

Petitioner's intoxication did not have to be "debilitating" to affect the first-degree murder convictions, as Respondent suggests. Res. 33. It need only be enough to "raise[] a reasonable doubt [he] premeditated or

deliberated." *People v. Halvorsen*, 42 Cal. 4th at 414 (2007). Evidence of Petitioner's serious and chronic alcohol and cocaine dependence, *see* Pet. 68 ¶ 177 (citing Exh. 129, P. Stewart Decl., PE 1258-59, 1262, ¶¶ 76-77, 85), as well as evidence that Petitioner had been intoxicated when the crimes occurred, would have raised serious doubts about whether he had the requisite mental state for first-degree murder.

Respondent suggests that Trial Counsel may have declined to present evidence of drug and alcohol dependency because it would conflict with his victim provocation argument. Res. 17, 32-33, 38-39. However, there is nothing inconsistent about arguing both that the victim provoked the killing, and that Petitioner was intoxicated. Being "addled by intoxication" would not, as Respondent claims, leave Petitioner unable to "perceive what was occurring at the time of the shooting" and therefore impervious to provocation. Res. 32-33. Both provocation and intoxication may "negative or raise a reasonable doubt as to the idea of premeditation or deliberation, leaving the homicide as murder of the second degree." *People v. Thomas*, 25 Cal. 2d 880, 903 (1945) (discussing provocation); Cal. Pen. Code § 22(b) (discussing intoxication). If anything, the two theories would complement each other: intoxication may render an individual more sensitive to provocation. Evidence that Petitioner was both inebriated and provoked would likely have cast a reasonable doubt as to whether he had the mental state necessary for first-degree murder. Trial Counsel could not,

therefore, have made a rationale strategic decision to sacrifice the intoxication theory in favor of provocation.

Likewise, it would have been unreasonable for Trial Counsel to have considered and abandoned this argument to avoid having Petitioner himself take the stand. Res. 17, 32, 38. Intoxication can be established by witnesses who observed his behavior. *See, e.g., People v. Duvall*, 9 Cal. 4th 464, 470-71 (1995) (concluding victim was "quite drunk" based on witness description of alcohol consumption, "staggering" walk, and "slurred" speech). The Las Playas (Count I) shooting occurred in a crowded restaurant where others would have seen Petitioner's alcohol intake and demeanor; similar testimony could have been elicited for Rita Motel (Count III) and Mazatlan (Count IV) from prosecution witnesses who had spent time with Petitioner before the killings.[3] It would have been unreasonable for Trial Counsel not to pursue this defense based on the incorrect conclusion that Petitioner would have had to testify.

Finally, Respondent argues that Trial Counsel may have sought to avoid contradicting Petitioner's own statement to an investigating officer that he had not drank or taken drugs on the date of the Rita Motel killing. Res. 32. That an individual who consumes drugs and alcohol would deny

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[3] Although the prosecution at times elicited testimony regarding Petitioner's drug and alcohol consumption, *see, e.g.*, RT 1273 (Petitioner and two companions were "drinking and doing coke" at Rita Motel), Trial Counsel never followed up to show Petitioner had become intoxicated.

doing so is unsurprising. Not putting on evidence that could avert a first-degree murder conviction, simply to avoid exposing Petitioner's misrepresentation about his own drug and alcohol use, would be irrational. Petitioner's credibility was never at issue, and there was no need to protect it.

Evidence of Petitioner's drug and alcohol dependence would likely have reduced at least some of his four convictions to second-degree murder. Trial Counsel's failure to pursue such evidence constituted ineffective assistance, which prejudiced Petitioner by preventing the jury from properly assessing his mental state and convicting him only of a lesser offense.

B. Las Playas (Count I)

1. Trial Counsel Failed to Pursue Evidence of Alternate Suspects.

Petitioner's explanation and defense of the Las Playas shooting was that the actual shooter was Francisco Manzano, while Petitioner merely held the crowd at bay. Pet. 59 ¶ 152. The prosecutor attacked this defense by claiming that Petitioner and Manzano were one and the same because Petitioner had used that name when arrested.

In fact, the police had identified a completely different person, Jesus Manzo Andrade, as a potential suspect in the shooting, and had interviewed him a few days after the shooting. *Id.* at ¶ 151. The existence of this

alternate suspect with almost the same name supported Petitioner's defense and undercut the prosecutor's claim that Petitioner and Manzano were the same person. Trial Counsel's failure to investigate and present this evidence was unreasonable and inadequate representation that prejudiced Petitioner's defense.

Respondent's response to this showing is that there is no proof that Jesus Manzo Andrade and Francisco Manzano were the same person, so there was no reason for Trial Counsel to pursue the matter. Res. 11. This misses the point. Even if it was not proved that Manzo Andrade and Manzano were the same person (which Trial Counsel never even investigated), the police themselves had identified Manzo Andrade as the possible shooter, showing that there really was another person out there—Manzo or Manzano—and negating the prosecutor's claim that Petitioner was that person.

There was also potent evidence from multiple witnesses indicating that the shooter was probably a man called "Rancher" who had fought with the victim (Garcia) some two weeks before the shooting. Pet. 61-62 ¶¶ 157-59. Indeed, one witness (Fernando Brava) told the police flat out that Rancher shot Garcia. *Id.* This, too, was powerful defense evidence, because no witness testified to seeing Petitioner shoot Garcia. But, again, Trial Counsel failed to present this evidence.

Respondent asserts that not all these witnesses said Rancher was the

shooter, that the direct evidence from Brava may have been hearsay and that it didn't really matter anyway because Petitioner admitted that he had played *some* role in the shooting. Res. 12-13. But picking away at pieces of this evidence doesn't negate the thrust of it: together, multiple witnesses told a consistent story of the events surrounding Garcia's fight, and directly implicated the man he had fought, not Petitioner, as his killer. Trial Counsel should have presented this evidence, which raised doubt that Petitioner was guilty of the shooting. As to Respondent's final point, obviously holding people at bay is not the same as pulling the trigger to commit murder.

2. Trial Counsel Failed to Put on Evidence of Provocation.

The evidence of provocation available to Trial Counsel was colorful and persuasive. Pet. 63-65 ¶¶ 163-69. It showed that the Garcia was a violent man and an out of control, belligerent drunk on the night of the shooting. *Id.* He challenged "if you have balls, pull your gun and shoot." Exh. 1, Excerpts from Notebook of Deputy Ronald Riordan, PE 0026-27. Trial Counsel unreasonably failed to develop or present this available evidence.

Respondent says Trial Counsel's failure is excusable because there was already evidence of drinking and provocation, and that the prejudice is speculative because Trial Counsel may not have been able to find the

witnesses and get them to testify. Res. 13-14. But the evidence Respondent cites is nothing compared against what was available, as indicated in the police reports. It did not begin to do justice to the provocation defense that should have been presented.

As for Respondent's speculation that Trial Counsel may not have been able to find the witnesses, how can that excuse Trial Counsel's failure even to try? The witnesses were named in the police reports, and they had already demonstrated their willingness to talk by telling what they knew to the police. But Trial Counsel did nothing. Trial Counsel's failure to pursue this evidence was prejudicial ineffective assistance of counsel.

C. Fort Knots (Count II)

The Fort Knots murder was the State's weakest count. Petitioner's conviction rested solely on questionable eyewitness testimony that went unchallenged. The only physical evidence, blood collected at the scene, did not match Petitioner's. The jury foreperson, Constance Bennett, confirmed the weakness of the State's case, noting that voting for death on Count II "was more difficult because the evidence was not as overwhelming." Exh. 123, Declaration of Constance Bennett, PE 1141 ¶ 5, and that Trial Counsel "did virtually nothing" and "what he did not do was give the man a defense," *id.* at PE 1142 ¶¶ 7-8. Trial Counsel's failure to properly challenge the State's evidence was unreasonable and prejudicial. Had Trial Counsel provided a defense, it is likely that Petitioner would have obtained

a more favorable result on this count.

1. Trial Counsel Failed to Use an Eyewitness Identification Expert.

Trial Counsel's failure to present an eyewitness identification expert fell below the standard for a reasonable attorney and was prejudicial. Pet. 75-79 ¶¶ 197-200. An identification expert would have undercut the central premise of the State's case: that the eyewitness identifications were reliable.[4] Because the only evidence presented was eyewitness testimony, challenging that testimony was essential to Petitioner's defense.

a. An Identification Expert Would Have Challenged the Reliability of the Eyewitness Testimony.

Dr. Kathy Pezdek addresses multiple factors that undermine the reliability of a witness's memory of a crime, including physical conditions at the time, duration of exposure, "weapon focus," race/ethnicity differences, degree of distraction versus concentration, motivation to observe, stress, and the influence of drugs and alcohol. Pet. 75 ¶ 197; Exh. 127, Declaration of Dr. Kathy Pezdek ("K. Pezdek Decl."), PE 1197 ¶ 8. The accuracy of eyewitness identification is further affected by the time between the event and the identification, interference, and suggestibility. Pet. 75 ¶ 197; Exh. 127, K. Pezdek Decl., PE 1198 ¶ 9. Finally, there is a low "correlation between the reported confidence of the

[4] Thus the Russian proverb, "He lies like an eyewitness."

eyewitness identification and the accuracy of the identification" and the "use of composite sketches for identification has been shown in studies to not be very accurate." Exh. 127, K. Pezdek Decl., PE 1198 ¶ 9.

All of these factors affect the reliability and accuracy of the identifications in this Count. Only two witnesses saw the shooter: Barbara Quijada[5] and Mario Medel. Quijada only saw the shooter in a dimly lit hallway through a mirror covered in a gold mottled pattern and only for a few seconds. Pet. 14 ¶¶ 44-45, 198. Medel, too, saw the shooter for just a few seconds, through a mirror in the same dimly lit hallway. Pet. 12 ¶ 39; RT 1098-99, 1134-35. Their identifications are suspect because of the poor light conditions and the brevity of their observations. Pet. 74-79 ¶ 194-200. Moreover, both witnesses described the gun used in the shooting, a "weapons focus" that makes it less likely they saw the shooter's face. Pet. 76-78 ¶ 198. Two other witnesses, Deneen Baker and Mark Herbert, did not see the shooter at all, but rather identified Petitioner as a patron who was kicked out of the bar earlier. These identifications were cross-racial, making them less reliable. *Id.*

All four identifications are also suspect because of the long time between the shooting and the first identification of the Petitioner in a photographic line-up. Quijada and Medel first identified the Petitioner approximately 12 months and 10 months, respectively, after the shooting.

[5] There is some doubt whether Quijada even saw the shooter. Pet. 75 ¶ 198.

Id. Baker and Herbert first identified the Petitioner approximately 13 months and 10 months, respectively, after the shooting. *Id.* Although the witnesses were relatively confident in their identifications, this is not an indication of accuracy. Exh. 127, K. Pezdek Decl., PE 1205 ¶ 27. Moreover, the in-court identifications made by the witnesses are subject to an inherent bias. *Id.* Finally, although the composite sketch shows a superficial likeness to a photo of the Petitioner, the similarity is largely due to hairstyle. Few other facial features are similar. *Id.* at PE 1206 ¶ 29.

Trial Counsel needed an identification expert to develop all of these arguments and to counter the State's only evidence—eyewitness testimony—that was admittedly "not as overwhelming." Exh. 123, C. Bennett Decl., PE 1141 ¶ 5. There is no valid reason for Trial Counsel's failure to provide such a defense to this count.

b. Respondent Ignores the Effect That an Eyewitness Identification Expert Would Have at Trial.

Respondent barely acknowledges that an eyewitness expert could have undermined the credibility of the eyewitness testimony. *See* Res. 20-21. Instead, he speculates that Trial Counsel may have "considered retaining such an expert but determined it would have been of little assistance given the number of eyewitnesses and the quality of their testimony." Res. 21. This argument makes little sense since the very purpose of retaining an eyewitness expert was to challenge the quality of

the testimony. Respondent thus falls into the same trap as Trial Counsel and the jury by falsely assuming that the eyewitness testimony was credible and accurate. An eyewitness identification expert would have refuted this assumption and demonstrated that the State's eyewitness evidence was, in fact, weak. Respondent's repeated, question-begging references to "strong identification evidence" only underscore the need for an identification expert to challenge popular notions of eyewitness reliability, particularly here where the identifications suffered from numerous problems and were the only evidence to convict the Petitioner.

Respondent's reliance on *People v. Sanders*, 11 Cal. 4th 475, 507-510 (1995), to argue that Trial Counsel may have considered but rejected retaining an eyewitness expert because she may have been of little use, Res. 21, is curious. If anything, *Sanders* underscores Trial Counsel's incompetence. First, the Court in *Sanders* stated that the trial court did not abuse its discretion in excluding eyewitness expert testimony when eyewitness testimony "was not the only evidence linking the defendant to the crime." *Sanders*, 11 Cal. 4th at 509. But the Court, citing a case from 1984, also "acknowledged that scholarly research had uncovered a set of psychological principles concerning eyewitness identifications that had become widely accepted in the scientific community" and that "the body of information available on psychological factors bearing on eyewitness identification was 'sufficiently beyond common experience' that in

appropriate cases expert opinion thereon could at least 'assist the trier of fact.'" *Id.* at 508 (citing *People v. McDonald*, 37 Cal. 3d 351, 369 (1984), overruled in part on other grounds by *People v. Mendoza*, 23 Cal. 4th 896, 914 (2000)). *McDonald* was decided nearly a decade before Petitioner's trial, giving Trial Counsel plenty of notice that eyewitness experts can assist defense counsel in challenging eyewitnesses. Moreover, expert testimony is particularly helpful "[w]hen an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability." *McDonald*, 37 Cal. 3d at 377; *Sanders*, 11 Cal. 4th at 508. Here, there was no corroborating evidence; indeed, the only other evidence—blood recovered from the scene—indicated that Petitioner was not the shooter.

c. Trial Counsel's Failure Was Unreasonable and Prejudicial.

There was no good reason not to retain an eyewitness expert and to present that expert's testimony at trial. Trial Counsel's supervisor specifically recommended that he consult with an expert, but he failed to do so. Pet. 76 ¶ 198. As eyewitness testimony was the only evidence presented by the State, the failure to challenge this testimony was tantamount to providing no defense at all.

The State presented only the eyewitness testimony Quijada, Medel, Baker, and Herbert. As noted above, this testimony, when reviewed by an

eyewitness expert, was neither strong nor credible. *See* pp. 35-40, above. And as the prosecutor noted at trial, it was the jury's responsibility to "judge the credibility of the witnesses." RT 1765. But Trial Counsel never gave the jury the information it needed to properly assess the credibility of the eyewitnesses. Instead, the jury only heard the one-sided, unchallenged testimony of prosecution witnesses.

Trial Counsel's failure to retain an expert infected every aspect of his defense, or lack thereof, of the Fort Knots murder charge. An expert would have undermined the only evidence the State presented, which was "not as overwhelming." The only physical evidence—blood identified as the assailant's, and shown not to be Petitioner's—should in fact have exonerated Petitioner. It is therefore likely that Petitioner would have obtained a more favorable result had Trial Counsel used an expert to challenge the weak eyewitness testimony on which his conviction rested.

2. Even Without an Expert, Trial Counsel Unreasonably Failed to Challenge the State's Evidence.

a. Barbara Quijada Was Not Reliable.

Trial Counsel failed to investigate and impeach Quijada with her prior felony convictions for drunk driving ("DUI"). A reasonable investigation would have revealed Quijada's felony conviction for DUI in 1990 and her admissions to three prior DUI convictions. Pet. 82 ¶ 210.

This information would have enabled Trial Counsel to impeach her. Quijada's multiple felony convictions alone would have cast doubt on her credibility. *Id.* at ¶ 211; Cal. Const., art I, § 28, subdivision (f). More importantly, Trial Counsel could have used her multiple DUI convictions to impeach her claim that she was not drinking at the time of the shooting and so to challenge the credibility of her identification. Pet. 82-83 at ¶ 212.

Respondent's speculation that Trial Counsel may have not pursued an investigation into Quijada's background "given the number and quality of eyewitnesses" is not persuasive. Res. 23. Trial Counsel did not even attempt to investigate Quijada. He cannot make an informed decision of whether information would be relevant for impeachment purposes without even undertaking an investigation. Quijada's DUI convictions go to her "quality" as a witness and weaken her identification, particularly if she was drinking at the time of the shooting.

Similarly, Trial Counsel's failure to object to Quijada's inflammatory testimony was also unreasonable. Quijada repeatedly gave testimony that was more prejudicial than probative, including testifying in detail about her attempts to perform CPR on the victim and check his vital signs. Pet. 86 ¶ 225. Additionally, she testified at length about how she talked to the victim before he died about his wife, how the police told her she "had done a wonderful job," and how she would "never forget what you [Petitioner] did. I will never forgive what you did." Pet. 87 ¶¶ 226-27.

Trial Counsel failed to object to any of this prejudicial testimony, which violated Evidence Code section 352. Pet. 86 ¶ 225. He had no tactical reason for not objecting and moving to strike this highly inflammatory testimony.

Respondent states that Quijada "related nothing more than an unsurprising emotional reaction of an eyewitness to a cold-blooded murder." Res. 25. To the contrary, the testimony was plainly irrelevant and prejudicial, as it had nothing to do with Quijada's identification of Petitioner. It does not matter whether or not the "emotional reaction" was "unsurprising." Trial Counsel should still have objected to this improper testimony. Respondent also claims that Quijada's "long narrative answers" allowed Trial Counsel to challenge her testimony during his closing argument. *Id.* But later arguments don't cure initial incompetence. He wouldn't need to challenge the inflammatory testimony if he had objected to it in the first place.

Had Trial Counsel challenged Quijada's credibility with her DUI convictions and objected to her inflammatory testimony, Petitioner would have likely obtained a more favorable result. Quijada was a key witness for the State. She aided a sketch artist in putting together a composite sketch, and gave highly emotional testimony regarding what happened on the night of the shooting. Because Petitioner was only convicted based on eyewitness testimony, challenging Quijada's testimony would have further

eroded the State's weakest case.

b. Trial Counsel Elicited Damaging Hearsay Testimony From Deneen Baker.

Not only did Trial Counsel fail to provide a defense for Petitioner, he was affirmatively incompetent by unreasonably and prejudicially eliciting unhelpful hearsay testimony from Deneen Baker. Baker did not observe the shooter or the shooting. Instead, she only identified Petitioner as the man who had touched her earlier. Despite this, Trial Counsel asked Baker whether she "understood that the person you . . . had thrown out was the person that shot [the victim]; right?" Baker answered affirmatively. RT 1067; Pet. 89-90 ¶ 233. Contrary to Respondent's assertion, Res. 27, this testimony is hearsay. Baker drew a link between the person thrown out and the shooter, despite having no firsthand knowledge of the connection. Pet. 89-90 ¶ 233. The testimony, on its face, was not limited by "the fact that Baker had spoken to others and drawn this conclusion." Res. 27. Such a connection served no purpose for the defense and only aided the State's case. Nor is there any tactical reason why Trial Counsel would want to make the connection as that would only strengthen Baker's identification. Given the weakness of the State's case on this Count, it is reasonably probable that Trial Counsel's deficient performance adversely affected Petitioner's defense.

c. Trial Counsel Failed to Investigate Witnesses Who Could Not Identify Petitioner.

Barbara Quijada said that approximately ten witnesses saw the same photographic lineup she did. RT 1205-07. But only four witnesses identified Petitioner at trial. Therefore, several other witnesses likely failed to identify Petitioner as the shooter. Pet. 79-80 ¶ 203. In addition, the police conducted a field show-up involving other possible suspects shortly after the shooting. *See* CT 53-54. Trial Counsel did nothing to investigate these facts, and he did not present any evidence at trial about them.

Respondent speculates nonsensically that Trial Counsel may have believed that such evidence of witnesses who could not identify Petitioner "would emphasize the strength of the positive eyewitness identifications." Res. 22. The opposite is true. Moreover, Trial Counsel failed to even investigate the other witnesses and therefore could not make a reasoned strategic decision about them. *See In re Hall*, 30 Cal. 3d at 427 (refusing to consider that counsel may have had "legitimate reasons for deciding not to parade a large number of witnesses to the stand to corroborate an alibi" where he "did not bother to speak to any of these witnesses"). Respondent argues that Trial Counsel was still able to point out that the "six to ten other witnesses who saw the photo display" did not testify and rhetorically ask, "Why didn't they testify here?" Res. 22. This only underscores Trial Counsel's deficient performance. That question could be interpreted

adversely by the jury, who may have assumed Trial Counsel failed to present those witnesses because they would only offer testimony that would aid the prosecution. In truth, those witnesses did not testify at trial due to Trial Counsel's incompetence. Trial Counsel's closing arguments cannot substitute for actual witnesses who would testify in Petitioner's favor.

The lack of witnesses was important. As Juror Bennett explained, Trial Counsel "did virtually nothing," "did not put up any defense on any counts except to say that his client was not present at the nightclub," and "did not have any witnesses to rebut the prosecution." Exh. 123, C. Bennett Decl., PE 1142 ¶ 7. Had Trial Counsel investigated these other witnesses, it is reasonably probable that Petitioner would have obtained a more favorable result. Since the State relied solely on eyewitness testimony, any evidence rebutting that testimony would have significantly undermined the prosecution's case.

3. Trial Counsel Failed to Keep the Jury From Being Influenced by Irrelevant Factors.

a. Trial Counsel Failed to Object to Testimony Regarding the Procedure for Collecting Blood Evidence.

The prosecution's theory was that a patron was kicked out of the Fort Knots bar, fought with the victim, George Martinez, and later returned to the bar and shot the Martinez. Pet. 10-15 ¶ 32-47. During the fight

outside the bar, the patron hit his head on a wall and spilled blood on the sidewalk. Pet. 12 ¶ 38. Mario Medel showed the blood droplets to the police, and the serologist, David Hong, collected blood samples as evidence. The blood was then tested, but the results were not shared with the prosecution or Trial Counsel until midway through the trial (after the prosecution's four eyewitnesses testified). The blood did not match either Petitioner or Martinez as a source. Pet. 90-91 ¶ 236. Accordingly, it was stipulated that the blood evidence collected at the scene was not Petitioner's or the victim's. Pet. 91 ¶ 237.

However, examining Detective Verdugo, the detective at the scene of the Fort Knots murder, the prosecutor asked a series of improperly leading questions regarding the ability of Dr. Hong to collect and test blood samples. Pet. 91-92 ¶ 238. Thus, he asked, "Some [bloodstains] were smaller than others and incapable of being collected?" and Detective Verdugo answered, "That is correct sir." RT 1437. Similarly, Detective Verdugo testified as follows to leading questions regarding Dr. Hong's ability to test more than two of the samples collected:

Q: And there were more than two [blood samples] collected?

A: That's correct, sir.

Q: But only two were tested?

A: That's correct sir.

Q: Based upon their quantity and amount?

A: That is correct, sir.

Q: The ability to test?

A: That's correct, sir.

RT 1438. Despite the many deficiencies in this leading line of questioning, Trial Counsel unreasonably failed to object or move to strike the testimony.

Respondent claims, without explanation, that the testimony was proper and that any objection would not have been sustained. Res. 28. Wrong. Not only are the questions improperly leading, but Detective Verdugo was an inappropriate witness to answer such questions: he did not collect the blood and had no scientific background or foundation for claiming that other bloodstains were too small to be collected. There is no question that the court would have sustained an objection to this line of questioning.

Moreover, Trial Counsel's failure to object was significant. The blood on the sidewalk was crucial to make out that the ejected patron (identified as Petitioner) was the killer. As the prosecutor could not abandon his theory of the case, he later argued that that blood samples that were not collected implicated the Petitioner: "*to tell you that the blood is not the defendant's is not true*. There was still blood there they [the serologist] couldn't pick up. There were samples they picked up but weren't big enough to test." RT 1901 (emphasis added); *see also* Pet. 93 ¶ 240. This improper argument was based entirely on Detective Verdugo's

improper testimony.[6] The serologist may have had other reasons for not collecting samples from every bloodstain or testing every blood sample. For example, he may have thought it would be duplicative and provide the same results as the samples that were tested. Had Trial Counsel objected to Verdugo's improper testimony, he would have foreclosed the prosecutor's argument that other blood samples would have matched Petitioner's. The jury clearly discounted the exculpatory blood evidence in favor of the eyewitness testimony. Without Verdugo's improper testimony and the prosecutor's argument, this would have been very hard to do and the jury would have had to give greater weight to the blood evidence.

Respondent also claims that Trial Counsel may have had a tactical reason not to object by speculating that "[e]vidence that the investigators had collected all the blood that they could, but only two samples had enough blood to test, supported counsel's argument that there was no blood evidence to connect petitioner to the killing, regardless of how many of the samples had been tested." Res. 28. This argument makes no sense. Trial Counsel could have argued that no blood evidence connected Petitioner to the killing regardless of why other samples were not tested. Detective Verdugo's testimony allowed the prosecutor to argue that the untested blood may have matched the Petitioner. No reasonable counsel would have

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[6] Because Detective Verdugo's testimony was only elicited through leading questions by the prosecutor, this entire line of argument was wholly concocted by the prosecutor.

allowed the prosecutor to elicit this testimony from Detective Verdugo.

b. Trial Counsel Failed to Object to Modus Operandi Testimony.

Detective Verdugo also testified that that Fort Knots (Count II) has a similar modus operandi to the Las Playas incident (Count I): "[A]t one point I was speaking with Detective Riordan and Sergeant Laurie who had *linked* the case with another case. And as we began to talk, it's a thing where I might call it an M.O., *a modus operandi* we may have heard of." RT 1441 (emphasis added). Detective Riordan and Sergeant Laurie had already testified regarding Count I. Pet. 88 ¶ 230. The clear import of this testimony was that both crimes shared a similar modus operandi, and it invited the jury to consider the Las Playas incident when determining whether the Petitioner committed the Fort Knots murder. *Id.*

This testimony was highly improper since the counts were not cross-admissible. There was no reason for Trial Counsel to not object to and move to strike it. Pet. 89 ¶ 231.

Respondent claims that, considered in context, Detective Verdugo was simply providing "foundational information as to why all the detectives routinely shared information about their cases." Res. 26. This misreads the testimony. Detective Verdugo was explaining how he connected the Fort Knots murder to Petitioner, who was a suspect in the Las Playas murder. Indeed, he specifically mentioned that the cases were "linked" and that the

common factor was a modus operandi. This was not some "innocuous" remark, as Respondent claims. *Id.* It was a clear attempt to link the two crimes by alleging a shared a modus operandi. Given the weakness of the State's evidence, the fact that no other evidence corroborated the eyewitness testimony, and blood evidence that pointed to another shooter, inviting the jury to consider evidence from another crime was prejudicial. Indeed, the jury actually cross-considered Counts I and II, as evidenced by their request to see testimony that the same gun was used in the Las Playas and Fort Knots murders. CT 791. There was no such testimony because the two crimes involved different weapons, but the request demonstrates the jury's confusion about the connection between both crimes. Pet. 235 ¶ 580.

Trial Counsel had no tactical or strategic reason to not object to and move to strike this testimony. Pet. 89 ¶ 231. Respondent only claims that any objection "was unnecessary or would be overruled, and counsel additionally reasonably might have elected not to object so as to avoid underscoring that remark." Res. 27. Because of the briefing on Trial Counsel's motion to sever, the court was already aware of the danger of cross-admissibility, and it would undoubtedly have sustained an objection. Additionally, any objection would not have underscored the remark; rather, it would reinforce that the counts were not cross-admissible and help the jury keep them separate.

4. Cumulative Prejudice

Each of Trial Counsel's failures was prejudicial. Cumulatively, they demonstrate that Trial Counsel failed to provide any defense to Count II. No physical evidence tied Petitioner to this crime; the blood evidence actually exonerated him. Count II was the weakest of the four Counts, and Petitioner was convicted solely on the basis of eyewitness testimony. Had Trial Counsel challenged the credibility of the identifications (and the individuals making the identifications) and investigated whether other witnesses would not have identified Petitioner as the shooter, Petitioner would have likely obtained a more favorable result at trial. Moreover, if Trial Counsel had prevented the prosecutor from speculating about the blood evidence or the jury from cross-considering evidence from Count I, the strength or weakness of the eyewitness identifications would have taken an even more central importance to the determination Petitioner's guilt or innocence on Count II. In short, Trial Counsel's failure to provide any sort of defense on this Count was unreasonable, and his inaction severely prejudiced Petitioner at trial.

D. Rita Motel (Count III)

Petitioner told Syliva Tinoco that he only shot Efrem Baldia, the victim at Rita Motel, because he thought Baldia was about to shoot him. Pet. 94-95. Petitioner's subjective belief of the need to defend himself, even if objectively unreasonable, would eliminate the element of malice

and make him ineligible for murder. *People v. Humphrey*, 13 Cal. 4th 1073, 1082 (1996). However, Trial Counsel failed to develop this evidence or present an "imperfect self-defense" theory to the jury. The failure to investigate a theory that could have reduced the verdict to manslaughter and made Petitioner ineligible for death on this count is unjustifiable.

Respondent's position that this argument contradicts "statements and testimony of witnesses at the scene" is nonsensical. Res. 29 n.4. No other witness was in a position to observe whether Baldia's gestures could have been construed as reaching for a weapon. Ramiro Gamboa Salazar was sitting in a car and "only once" turned around to observe Baldia's interaction with Petitioner. RT 1349. Nicholas Venegas and Beatriz Escamilla were inside motel rooms at the time and did not see the shooting. RT 1267, 1379. Furthermore, an imperfect self-defense argument hinges not on the observations of others, but on the subjective perceptions of the shooter. A mental health expert, had one been engaged, could have testified that Petitioner "genuinely . . . believe[d] in his mind that he had to act in self-defense or be killed by the victims." Pet. 174-75 ¶ 431 (quoting Exh. 129, P. Stewart Decl., PE 1263 ¶ 87). The theory that Petitioner believed he needed to defend himself was consistent with the record and could have been developed by Trial Counsel. His failure to do so constituted ineffective assistance.

E. Mazatlan (Count IV)

Two witnesses gave very different accounts of the Mazatlan shooting. Beatriz Escamillo testified that the victim, Gutierrez, insulted Petitioner and challenged him to use his gun, and that Petitioner tried to avoid a confrontation and said he didn't "want any problem." After the third challenge, Petitioner finally shot Gutierrez. Pet. 99-100 ¶ 258-59.

In contrast, Adela Lopez said Gutierrez was sleeping at the bar, that Petitioner simply walked over and grabbed Gutierrez by the back of the neck. She said she heard a shot and then saw Petitioner fire several shots at the victim as he lay on the floor. Pet. 100 ¶ 260-61.

Trial Counsel knew there was another witness (Campista) who could have broken this tie and confirmed that Gutierrez had provoked Petitioner, telling him to "go fuck his mother." Pet. 100 ¶ 262. But Trial Counsel did not contact Campista, who returned to Mexico and provided no testimony. Had Campista testified, the strong weight of the evidence would have supported Petitioner's provocation defense. Instead, that was just one of two conflicting accounts. There was no reason or excuse for Trial Counsel's failure to secure evidence from Campista.

Respondent speculates that Trial Counsel may have contacted Campista and that Campista may not have had personal knowledge of the provocation. Res. 35. This is just made up. There is no basis for either speculation, certainly no reason to think Campista did not witness the

events he described so graphically. In sum, Trial Counsel failed to contact a crucial witness who could have altered the weight of the evidence in Petitioner's favor. His failure to do so was unreasonable and prejudicially ineffective assistance of counsel.

V. TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE DURING THE PENALTY PHASE

Trial Counsel barely defended against the State's aggravation case, and his mitigation case was doomed by poor management and the absence of tactical decision-making. He outsourced the mitigation case to his paralegals, failing to involve himself in a significant way even after his primary paralegal was removed from the case. As a result, investigators talked to few witnesses and never followed up with those they did reach. The few witnesses he did present were ill-prepared and selected not for the force of their testimony, but for the ease of getting them to trial. Exacerbating this ill-managed process, Trial Counsel failed to retain and present a mitigation expert who could repackage the mitigation evidence as a meaningful and coherent story for the jury.

Trial Counsel's ineffective representation—and in particular his inability to manage the penalty phase—highlights a much broader problem: a case so large and complex *requires* more than one attorney. Neither Trial Counsel nor the LAPD acted to ensure that at least two attorneys were staffed on this case. This critical mistake lies at the root of the separate

instances of ineffective assistance that recurred throughout the penalty phase: the workload was too great for one attorney to handle.

Respondent gives only superficial responses to Petitioner's penalty phase ineffective assistance claims, offering some combination of three arguments. The assertion that Petitioner cannot meet his prima facie case for lack of Trial Counsel's declaration is wrong because many of his failings cannot be justified as strategic. Second, even Respondent's liberal speculation about Trial Counsel's possible reasoning fails to provide plausible tactical rationales for his decisions and should be taken for exactly what it is: speculation. Third, Respondent dismisses Petitioner's evidence by claiming that the ultimate result—the death verdict—would not have been different even had Trial Counsel presented the case Petitioner alleges he should have. Respondent thus implies that no possible mitigation case could ever sway a jury that has already voted for guilt, which is contrary to the very reasons for having a penalty phase.

A. Trial Counsel Failed to Investigate, Prepare, and Present a Proper Affirmative Mitigation Case.

1. Trial Counsel Had No Tactical Reason for Failing to Develop Mitigating Evidence.

Trial Counsel did not meet his duty to investigate fully the available mitigation evidence. *Lambright v. Schriro*, 490 F.3d 1103, 1120 (9th Cir. 2007) (holding that trial counsel has a "duty to investigate all potentially

mitigating evidence" that is not discharged by a limited investigation); Pet. 116 ¶ 299. The mitigation case required that evidence be collected from remote, rural areas of Mexico, a poverty-stricken environment where Petitioner endured severe trauma through childhood. Trial Counsel was obligated to conduct a thorough investigation of Petitioner's upbringing to uncover factors that would mitigate his culpability. *See* Rep. Exh. 2 Gessler Decl., PRE 13 ("Defense counsel literally must find out as much as he can about his client. He must interview anyone he can who has had contact with his client").

The actual investigation was flawed from the outset, falling far below the standards of reasonable competence and offering Petitioner little defense against the death penalty. A paralegal, Andrea Lua—who was removed from the case shortly before trial—sent a team to Mexico to investigate with little involvement from Trial Counsel. Pet. 117 ¶ 300. The investigators found and interviewed, albeit briefly, several key witnesses, but never followed up to bring them to trial. *Id.* They missed out on witnesses who could have provided a trove of information never presented at trial, and who could have corroborated and strengthened existing stories. Finally, they failed to locate witnesses who were not family members who could corroborate and expand on what family witnesses said. Moreover, Trial Counsel spent no time with the witnesses he did call, and never prepared them. Pet. 117 ¶ 301. The result was that the few mitigation

witnesses who testified for Petitioner were ill-prepared, nervous, and easy for the prosecution to "flip."

Scores of witnesses knew Petitioner and would have testified, had they been contacted. Pet. 119-44 ¶¶ 306-69. Notably, Respondent does not rebut *any* of the testimony presented by these witnesses' declarations, but argues that none of the information from the 39 potential witnesses adds anything new—it is all cumulative. *Id.* This is false. Preparation of a proper mitigation case would have developed profound and credible evidence showing chronic, extreme physical and emotional abuse and neglect; maternal abandonment; early childhood trauma; extreme childhood (and lifelong) poverty; exposure to dangerous toxins and medical practices; exposure to guns and gun violence; transience; and exposure to criminality and negative role models. *See* Pet. 124-44 ¶¶ 313-69. Because Trial Counsel failed to investigate and develop this evidence, none of it was presented to the jury.[7]

Respondent is wrong to argue that the evidence was unlikely to change the result. This evidence was *reasonably probable* to have changed the jury's mind. *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007); *In re Lucas*, 33 Cal. 4th 682 (2004). The *Lucas* court held that mitigation

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[7] Even if some of this additional evidence were cumulative, additional testimony would have deepened existing testimony, provided corroborating evidence, and allowed Trial Counsel to rebut the prosecutor's argument that all of the witnesses were biased because they were related to Petitioner.

evidence about the abandonment and abuse that petitioner suffered would have had a reasonably probable chance of causing a juror to find some basis for mercy. *In re Lucas*, 33 Cal. 4th at 690. The same is true here. These jurors were presented with a fraction of the mitigation evidence available on just one topic: abuse. Had jurors heard additional testimony to corroborate and strengthen what little they did hear, and to prove other aspects of mitigation, then it is reasonably probable they would have voted for life.

2. Trial Counsel Had No Tactical Reason for Presenting Unprepared Witnesses.

Trial Counsel's failure to prepare the mitigation witnesses that he did put on cannot possibly have been the result of a tactical decision. Pet. 148-50 ¶¶ 379-83. Respondent's suggestion that more preparation would not have affected the testimony is baseless. Such preparation would have equipped Trial Counsel to rebut the prosecutor's cross-examination theme that the witnesses grew up in the same place as Petitioner and turned out fine.

Jurors never learned that these witnesses' exposure to the violence of Petitioner's father and grandmother was nowhere near as severe as that endured by Petitioner. Pet. 165 ¶ 408. Moreover, four of the five witnesses presented were women who were not subjected to the same culture of gun violence as Petitioner and other men. Pet. 169-72 ¶ 419-25. The one man

who did testify, Juan Manriquez Ayon, did not turn out "ok": he has a criminal record in the United States and Mexico and is a substance abuser himself. Pet. 165-66 ¶ 410. Adequate investigation and preparation of the witnesses would have revealed as much. Trial Counsel could not rehabilitate these witnesses because he was not even involved in their selection and preparation.

3. Trial Counsel Had No Tactical Reason for Failing to Use Experts.

a. No Tactical Reason Not to Explain the Role of Mitigation Through a Mitigation Expert.

Aggravation and mitigation are often misunderstood by jurors. A mitigation expert could have drawn connections between the abuse of Petitioner's youth and his actions later in life, to show how the mitigation evidence supported a vote for life in prison. Such information "would have been critically important in enabling the . . . jurors to fully understand the issues before them and to render a fairer and more reliable sentencing verdict." Exh. 130, Declaration of Craig Haney, PE 1399.

From the outset, Trial Counsel and his superiors at the LAPD, including Charles Gessler, thought it was critical to present such an expert. Rep. Exh. 4, Los Angeles County Lettergram from Andrea to Steve Re: Manriquez Meeting w/Gessler ("3/24/92 Paralegal Lua Memo to File"), Mar. 24, 1992, PRE 24 (discussing the importance of using a cultural

expert); *see also* Rep. Exh. 5, 12/30/92 Paralegal Lua Cultural Expert Memo, PRE 26 (describing attempt to retain cultural expert). Attention to retaining a cultural expert continued throughout Petitioner's case; indeed, Trial Counsel was still planning to use a cultural expert as late as July 23, 1993, just days before trial. *See* Rep. Exh. 11, Handwritten Notes Re: Meeting Investigator Hernandez and Paralegal, Jul. 23, 1993, PRE 57; Rep. Exh. 7, Trial Counsel's Paralegal Assistance Request, PRE 32-33.

Despite the acknowledged importance of putting on a cultural or mitigation expert to explain Petitioner's mitigating evidence to the jury, Trial Counsel failed to do so. There is no way this could have been a strategic decision by Trial Counsel, as Respondent argues. Consistent with the opinion of his supervisors, Trial Counsel intended to use a cultural expert up to the eve of trial. The record suggests that Trial Counsel simply made no effort to find an expert who was available to testify. *See* Rep. Exh. 6, Dr. Romanucci-Ross Letter, PRE 28; *see also* Rep. Exh. 5, 12/30/92 Paralegal Lua Cultural Expert Memo, PRE 26.

There was no downside to putting on a mitigation expert that could justify Trial Counsel's failure to do so as strategic. A full explanation of Petitioner's social history and its importance would have had great impact on the jurors, leading them to place greater weight on the mitigation evidence and making them far less likely to vote for death. Dr. Craig Haney, Petitioner's mitigation expert and social historian, emphasizes that

Trial Counsel "made no meaningful attempt to provide the jury with an understanding of the arc or direction of [Petitioner's] life. Indeed, although trial counsel did call a few witnesses who provided some social historical information, there was no genuine social history presented." Pet. 157-59 ¶ 396. Dr. Haney also notes that Trial Counsel's lack of presentation of a social history was exacerbated by his failure to "make clear to the jurors why [the mitigation evidence] did or should matter to them." Pet. 159-60 ¶ 398. Finally, Dr. Haney states that to make an adequate case for mitigation, Trial Counsel needed to elicit testimony from experts about the connections between Petitioner's social history and his behavior later in life, which he never did. Pet. 159 ¶ 397.

Dr. Haney's contentions demonstrate the inadequacy of Trial Counsel's penalty phase defense and show what an expert would have been able to offer to the jury at trial. Respondent fails to rebut—or even mention—any of this testimony.

b. No Tactical Reason Not to Investigate, Develop and Present Evidence of Petitioner's Mental Disorders.

Expert testimony from a neuropsychologist (Dr. Llorente) and an M.D. specialist in clinical and forensic psychology (Dr. Stewart) would have demonstrated to the jury that Petitioner suffered from impaired executive functioning, post-traumatic stress disorder (PTSD) and mood

disorder. These ailments made Petitioner less morally culpable for the offenses the jury found him guilty of committing. *See* Pet. 178 ¶ 440. None of this evidence was developed by Trial Counsel or presented at trial, which any reasonably competent counsel would have done to argue against the death penalty. Such incompetence violated not just any reasonable standard of care, but the one articulated by Trial Counsel's own boss, LAPD's Special Circumstances Coordinator Charles Gessler. In a November 1991 expert declaration for an unrelated capital case, Mr. Gessler opined that counsel had provided ineffective assistance of counsel by not calling a mental health expert who would have presented psychological mitigating evidence. In his declaration, Mr. Gessler testified that "[t]here simply is not any strategic reason for failing to ask [a doctor] to investigate the availability of psychological mitigating evidence and if discovered, as it was in this case, to present such mitigating evidence to the jury." *See* Rep. Exh. 2, Gessler Decl., PRE 21. Likewise, in Petitioner's case, Trial Counsel failed to develop or present expert testimony on the state of Petitioner's mental health to the jurors. Without such testimony, they attributed to Petitioner far greater culpability than was warranted, resulting in a verdict of death.

Dr. Stewart explained that Petitioner "suffers from multiple mental impairments and neurocognitive disorders, each of which was present and acute at the time of the offenses." Pet. 174-75 ¶ 432. These disorders

explain much of his behavior. "[Petitioner] was hypervigilant to assault and threats of being killed as a result of a life long pattern of being tortured in near fatal abuse inflicted by his father" and "[h]is symptoms of posttraumatic stress disorder with its resultant problems with executive functioning caused him to genuinely believe in his mind that he had to act in self defense or be killed by the victims." *Id.* Dr. Stewart's testimony and the facts on which it is based are not rebutted by Respondent.

Nor does Respondent rebut Dr. Llorente's testimony. Dr. Llorente conducted a battery of neuropsychological tests over several days with Petitioner, determining that he suffers from pronounced impairments in complex visual memory and higher order executive functioning skills. These impairments "are exacerbated" when coupled with PTSD and alcohol-drug abuse, "leading to responses and behaviors that may be less controlled by cortical outputs and instead dominated by instincts." Pet. 178 ¶ 439. This means that Petitioner is prone to react in self defense more quickly and actively than the average person. Pet. 183 ¶ 453.

Respondent never addresses these expert opinions, but instead notes that Trial Counsel *did* retain one expert, Dr. Moral, whom he did not use at trial. Thus, Respondent speculates that Dr. Moral must have determined that Petitioner suffered from anti-social personality disorder, which is wrong.

Dr. Moral was paid just $1,000 to meet with Petitioner for a few

hours. Pet. 179 ¶ 442. His only conclusion was that Trial Counsel should seek additional testing from a psychopharmacologist—which Dr. Moral is not. *Id.* at ¶ 443; *see* Rep. Exh. 12, 7/30/93 Dr. Moral Letter, PRE 60. Trial Counsel's notes demonstrate that he intended to follow Dr. Moral's suggestion. Rep. Exh. 7, Trial Counsel's Paralegal Assistance Request, PRE 33. He considered experts but failed to engage any of them. *See* Rep. Exh. 11, Dr. Jose Moral's handwritten notes (stating "psychopharmacologist" with arrow pointing to Siegal), PRE 39; Rep. Exh. 8, Draft Motion and Order for Appointment of Expert and Supporting Declaration Pursuant to Penal Code section 987.9 for Ronald Siegel, Psychopharmacologist, Feb. 1, 1993, PRE 36-37. A psychopharmacologist would have provided the same kind of powerful mitigation testimony about Petitioner's lack of impulse control and diminished moral culpability that Dr. Llorente and Dr. Stewart offered in the Petition. There is no tactical explanation for Trial Counsel's failure to engage such an expert.

Respondent also argues that evidence of mental disorders would not have changed the outcome of the trial. He posits that the jury, having seen evidence of four murders during the guilt phase and three additional murders and a rape in the penalty phase, would not have been swayed by evidence of mental disorder. This speculation is unsupported, and denies the unique importance of the penalty phase. A mitigation case *always*, indeed *only*, comes after the jury has seen (and accepted as true) bad facts

during the guilt phase. Regardless of the nature or extent of a defendant's crimes, diminished mental capacity reduces culpability and therefore militates against a sentence of death—even for one convicted of four murders.

This argument also ignores the prosecution's emphasis on Petitioner's culpability in arguing for the death penalty, which went largely unrebutted. For example, the prosecutor argued that Petitioner "liked to kill" and that there was "no other explanation for his acts." Pet. 180 ¶ 448. This is untrue, but Trial Counsel had developed no mental health mitigation case to use in rebuttal. Had Trial Counsel done so, Dr. Stewart could have directly confronted this proposition by pointing to Petitioner's PTSD and related neurocognitive impairments as the most likely explanation of his bad acts. Similarly, Trial Counsel was unable to rebut the prosecution's argument that no evidence showed Petitioner committed these acts under the influence of severe mental disturbance. A fully developed mitigation case would have enabled Trial Counsel to show that, at the time of the killings, Petitioner was in a dissociative state and "genuinely [believed] in his mind that he had to act in self defense or be killed by the victims." Pet. 183 ¶ 453.

The weight and credibility of the mental health experts' testimony is uncontested. Petitioner has shown that Trial Counsel's failure fell below reasonable competence and prejudiced Petitioner's defense. Respondent

never rebuts their conclusions or the underlying facts on which their opinions are based. Petitioner has met his prima facie case.

c. No Tactical Reason Not to Investigate and Develop Evidence of Petitioner's Dependence on Drugs and Alcohol and His Reduced Degree of Intent and Culpability.

Trial Counsel did nothing to show the role drugs and alcohol played in Petitioner's actions. He should have. Dr. Stewart's report demonstrates that Petitioner abused drugs and alcohol to self-medicate his mental disorders. The impact of drugs and alcohol on his already fragile mindset was horrific, exacerbating Petitioner's inability to control his actions. Pet. 184-85 ¶ 457.

Respondent argues that Trial Counsel may not have pursued this argument based on "privileged information from petitioner himself that minimized his cocaine and alcohol use as a mitigation factor." Res. 59. Not so. Even Petitioner's own denial of substance abuse could not have excused Trial Counsel's failure to investigate the issue, particularly on a sensitive topic like drug and alcohol use about which a client may be evasive. Trial Counsel failed to develop witnesses who would have testified about Petitioner's substance abuse, such as Jesus Manriquez. Pet. 184-85 ¶ 457. Nor did Trial Counsel ever contact or attempt to retain an expert witness such as Dr. Stewart, who could have testified that

Petitioner's substance abuse exacerbated his mental disorders, causing him to routinely commit unplanned, unrestrained acts.

B. Trial Counsel Failed to Adequately Defend Against the Prosecution's Aggravation Case.

1. Trial Counsel's Opening Statement Was Incoherent and Inadequate.

Trial Counsel barely responded to the prosecutor's thorough condemnation of Petitioner in his penalty opening. His comments consume less than one page of transcript. RT 2162. He was incoherent and presented no compelling mitigation theme. Pet. 146 ¶ 373. Instead, he merely stated that he was going to present some "evidence in mitigation" without explaining what that evidence was or what it would prove. He never said why mitigation is important, or what role it should play in a juror's deliberations. He *did* erroneously and prejudicially tell the jury that poverty was *not* an important aspect of the mitigation case. RT 2162 ("The poverty part is not really the mitigation factor."). In fact, Petitioner's traumatic childhood experience with poverty is a significant factor that has been considered in mitigation in other cases. *See In re Lucas*, 33 Cal. 4th at 734; Pet. 146 ¶ 373.

Respondent argues that Trial Counsel's short, lifeless opening statement may have been the result of a tactical decision "in recognition of the powerful prosecution penalty phase case that had just been presented to the jury." Res. 50. This makes no sense. Giving up is not a valid tactical

option. There is no reasonable explanation for Trial Counsel's failure to frame the mitigation case with a strong opening.

Respondent's argument that even adequate counsel would not have obtained a more favorable result underestimates the importance of counsel's role in the penalty phase. Trial Counsel offered the jury no reason, after it had convicted Petitioner of four murders, to spare his life. Had Trial Counsel only established a compelling rationale for considering the facts in mitigation, it is reasonably probable that jurors would have voted for life in prison rather than death.

2. Trial Counsel Failed to Rebut the State's Felony Murder Theory for the Paramount Robbery.

The prosecution offered a felony-murder theory to explain the importance of the Paramount killings as an aggravator in the penalty phase. Trial Counsel failed to rebut this theory despite extensive evidence suggesting that the victims—and not Petitioner—had planned to commit robbery. Such a defense would have significantly dampened the impact of the State's most serious aggravator, and would likely have altered the jury's calculus in weighing the death penalty. This was ineffective assistance.

Respondent suggests that Trial Counsel may have concluded that challenging the State's theory would have brought out even more damaging corroborating evidence. Res. 42. Respondent's speculation makes little sense. It is difficult to imagine more damaging facts than those already in

the record on this charge. Respondent offers none, because none exist. Even Trial Counsel's concern about uncovering other bad facts would not excuse his failure to investigate, which can never be justified as strategic. *Pope*, 23 Cal. 3d at 425-26.

Respondent's claim that no facts support the theory that the victims intended to rob Petitioner is not accurate. Res. 43. Extensive evidence of the victims' plans to commit robbery went undeveloped. A gun clip for .45 caliber with seven bullets was found on one of the victims. RT 2114-17. The victims had been involved in a recent robbery—which Trial Counsel knew about, *id.* at ¶ 291—and a friend of the victims said they had discussed plans to steal drugs from Petitioner, *id.* Indeed, one of the victims—not Petitioner—was carrying handcuffs, Pet. 23-24 ¶ 72, and no evidence showed that Petitioner knew the brick was cheese, Pet. 113 ¶ 291. Had Trial Counsel presented any of this, the State's felony murder theory would have been difficult to sustain.

3. Trial Counsel Did Not Defend Against the Rape Allegation.

Trial Counsel was also ineffective because he failed to investigate and defend against the rape aggravator. Pet. 114-16 ¶¶ 295-98. Respondent's speculation that Trial Counsel offered no defense on this aggravator because Petitioner may have confidentially admitted to the crime is unfounded. The owners of the house where the rape allegedly

occurred were home at the time but had never heard of a Patricia Marin—nor were they aware of a rape occurring in their home. Pet. 115 ¶ 296. Respondent does nothing to rebut this powerful exculpatory evidence, which Trial Counsel had no reason not to uncover and present at trial.

Petitioner has not failed to demonstrate prejudice, as Respondent claims. Jury foreperson Bennett had an undisclosed personal connection to rape, which she marked on questionnaire as "very" significant on her decision to vote for death. Pet. 219 ¶ 543. Respondent's theory proves too much: if the rape aggravator was inconsequential to the outcome, then why did the State devote the resources to charging and proving it? The effect of Respondent's prejudice argument is to excuse Trial Counsel's absolute failure to defend his client on this aggravator.

4. Trial Counsel Failed to Develop the Mitigation Evidence Needed to Rebut the Prosecution's Penalty Phase Attacks.

The prosecutor easily discredited Trial Counsel's inadequate mitigation case, which he could not have done against a reasonably competent defense. Testimony from Petitioner's family was attacked as biased and meaningless, an argument that would have carried far less weight had Trial Counsel called a robust set of witnesses—including non-family and an expert witness. The prosecution also argued that Petitioner carried a gun because he "liked to kill," a claim that Trial Counsel could easily have rebutted by calling witnesses like Jesus and Esperanza

Manriquez. They could have explained that men routinely carried guns in rural Mexico, not because they "liked to kill," but to protect themselves. Pet. 138-39 ¶ 353. An understanding of why Petitioner carried a gun—particularly one rebutting the prosecution's argument that Petitioner "liked to kill"—would likely have changed some juror's minds by diminishing their perception of Petitioner's culpability.

Respondent argues that this claim relies on the speculation that had Trial Counsel presented a better mitigation case, the prosecution would have abandoned these arguments. Res. 55. This is not correct: the prosecutor would not likely have made arguments that went against the weight of the evidence. Moreover, Respondent misses the point. Trial Counsel was deficient both in failing to put on enough evidence to forestall these arguments, and in failing to rebut them *after* they were made. Put another way, even if Trial Counsel could not have prevented the prosecution from making certain arguments, he certainly could have put on enough well corroborated evidence to rebut them.

5. Trial Counsel Failed to Employ Reasonable Litigation Tactics to Limit the Effect of Prosecution's Affirmative and Rebuttal Cases.

Trial Counsel's superficial rebuttal of the State's affirmative penalty case and his bungling of the investigation, preparation and presentation of Petitioner's mitigation case were not his only failures. He also neglected to

employ basic litigation tactics, like requesting critical jury instructions or moving to exclude evidence, to vigorously defend his client.

a. No Tactical Reason Not to Request Key Jury Instructions.

Trial Counsel should have requested an instruction defining "life without parole" ("LWOP") as a penalty which would never allow for defendant's release from prison. A proper LWOP instruction would have mollified juror concerns that a sentence other than death would allow Petitioner to some day go free. Jurors never heard such an instruction, because Trial Counsel never asked for it. Respondent argues that such an instruction was unnecessary because LWOP is a common term that the jurors knew and understood. Res. 61. The record is otherwise. Jurors expressed concern that Petitioner might "get out" again, and worried that a sentence of LWOP might allow that to happen. Pet. 187 ¶ 466. Trial Counsel himself had undermined jurors' confidence in the reliability of a LWOP sentence during voir dire. Pet. 50 ¶ 131. Reasonably effective counsel would have requested the jury instruction, which would have been granted. *People v. Ramos*, 37 Cal. 3d 136 (1984). Trial Counsel did not, and the jury voted for death.

Trial Counsel also failed to request an instruction requiring jurors to disregard race, nationality, and immigration status during their deliberations. Respondent faults the Petition for not offering any specific

suggestions as to what this instruction should have said. None is required. It is enough for Petitioner to argue that Trial Counsel should have crafted, offered and obtained such an instruction, particularly given the inflammatory nature of Petitioner's immigration status at that time in California history. Pet. 188 ¶ 468. The fact that jurors *did* consider Petitioner's race and immigration status in their deliberations demonstrates that Trial Counsel's failure prejudiced Petitioner.

Finally, Trial Counsel should have requested an admonition regarding the medical examiner's testimony, in a single sitting, about all of the not cross-admissible crimes. Pet. 189-91 ¶¶ 472-78. Jurors needed to be reminded to keep this testimony separate in their minds. Respondent argues that such an instruction was unnecessary because Trial Counsel had requested an instruction that the jury keep all evidence separate. Res. 63. But the instruction Trial Counsel sought on cross admissibility was denied. And, given the high likelihood that the coroner's testimony on all four counts—which came in at the end of the prosecution's case, closest to jury deliberation—would cause jurors to improperly cross-consider evidence, Trial Counsel should have requested a specific instruction for this testimony.

Respondent also argues that there was no prejudice because the court would have rejected such a special instruction. This is untrue. Indeed, the court initially agreed to tell the jury to separate the coroner's testimony for

each crime, but Trial Counsel failed to follow up and the court never admonished the jury in this way. Pet. 190-91 ¶¶ 473-475. Had Trial Counsel requested an instruction with respect to the medical evidence, it would have likely been given and would have served as a reminder to the court to admonish the jury to not allow evidence about one crime have a cumulative effect on their deliberations about another.

b. No Tactical Reason Not to Move to Exclude Evidence.

Trial Counsel should have moved to strike certain State evidence. Any reasonably competent counsel would have moved to exclude Petitioner's police statement taken in violation of *Miranda*, and would have objected to gruesome photographs and witnesses' statements that they fear Petitioner. His failure to do so was prejudicial.

Trial Counsel never moved to exclude Petitioner' statement to the police at the hospital as violative of *Miranda*. He should have. Respondent speculates that Trial Counsel may have determined that a *Miranda* exclusion motion would be meritless because the statements had been preceded by the required advisements and waivers. This is untrue: the advisements were not given and Petitioner did not waive his *Miranda* rights. Pet. 273-74 ¶ 661-63. Indeed, the police engaged in multiple rounds of interrogation pre-*Miranda*, and curative measures were not taken until two days later. *Id.* Trial Counsel should have moved to exclude them.

Respondent also argues that the *Miranda* violations did not occur as a result of state action. This makes no sense. Petitioner was held at the hospital, chained to the bed by the police. Pet. 273 ¶ 661. He was a captive of the state, and his *Miranda* rights should have been observed.

Finally, Respondent suggests that there can be no prejudice because the court would have denied the motion. Respondent is wrong. Petitioner's statements to the police infected everything, enabling police officers to testify at trial about what Petitioner had told them. This was prejudicial error.

Trial Counsel should have also challenged the admissibility of witnesses' testimony about their fear of Petitioner. Respondent's argument that perhaps Trial Counsel expected such a motion to be denied is weak. Even if the judge may have allowed such evidence to establish witness credibility, he would not have allowed the prosecutor to use it in closing, where he wielded it to argue future dangerousness. Pet. 278-80 ¶ 677-81. It is reasonably probable that Trial Counsel would have succeeded in excluding this testimony, or at least precluding its use in the prosecutor's closing.

Finally, Trial Counsel should have moved to exclude the gruesome photographs that the prosecutor showed to jurors. These photographs were irrelevant but highly inflammatory, showing the dead bodies of several victims. Pet. 280-82 ¶ 682-85. Respondent speculates that there could

have been a good reason for this: perhaps Trial Counsel and the prosecution had a deal as to which pictures could be shown, or Trial Counsel concluded the pictures would be admitted over any objection. Res. 67-68. This is pure speculation. Even if that were correct, no reasonably competent counsel would have made such a deal. The tendency of these pictures to inflame far outweighed any probative value, and gave Trial Counsel a strong basis for exclusion.

C. Conclusion.

Each of Trial Counsel's aforementioned acts—or omissions—constitute ineffective assistance. The combined effect of his mistakes and failures gave Petitioner no chance to escape a death verdict in the penalty phase. Had Trial Counsel conducted more than a superficial investigation of mitigation, prepared the few witnesses he did use, and employed experts to put the facts in context, jurors would have achieved a deeper understanding of Petitioner's cruel upbringing and mental deficits. Had Trial Counsel fought each aspect of the prosecution's aggravation case with zeal and employed even the most basic litigation strategy to limit and preclude harmful evidence, Petitioner's sentence probably would have been different. Overwhelmed and exhausted, Trial Counsel unfortunately—and unconstitutionally—did not.

VI. JUROR MISCONDUCT

Jury foreperson Constance Bennett ("Juror Bennett") lied on her

questionnaire by failing to disclose that she had been raped and used for slave labor as a child. She then used her experience to sway jurors against considering Petitioner's own childhood abuse in mitigation. Her actual bias is clear on the record, and Respondent has failed to rebut the presumption of prejudice triggered by her misconduct. The penalty verdict—at the very least—must be overturned.

A. Juror Misconduct Invalidates the Verdict if the Presumption of Prejudice Goes Unrebutted.

Respondent misstates the legal test for Petitioner's claims of juror misconduct by saying that Petitioner is required to "plead facts showing that juror C.B. intentionally concealed this information." Res. 72. "Intentional" concealment is not an element of juror misconduct; nor is Petitioner's "claim based upon intentional concealment." *Id.* Juror misconduct can take many forms, including exposure to media coverage, intoxication, improper jury discussion, failure to deliberate, juror experimentation, and exposure of extraneous evidence. Once a party has established that juror misconduct occurred, a presumption of prejudice arises that, unless rebutted, requires the verdict to be set aside. "It is well settled that a presumption of prejudice arises from *any* juror misconduct." *People v. Honeycutt*, 20 Cal. 3d 150, 156 (1977) (emphasis added). Moreover, juror misconduct involving "[f]alsehood, *or* deliberate concealment *or* nondisclosure of facts and attitudes" on voir dire is

particularly egregious because it "deprives both sides of the right to select an unbiased jury and erodes the basic integrity of the jury trial process." *People v. Blackwell*, 191 Cal. App. 3d 925, 929 (1987) (emphasis added).

To rebut this presumption of prejudice, Respondent must prove that there is no "reasonable probability" that Petitioner was actually harmed by Juror Bennett's misconduct. *In re Stankewitz*, 40 Cal. 3d 391, 402 (1985) (citing *People v. Pierce*, 24 Cal. 3d 199, 207 (1979)). Juror Bennett failed to disclose that she was the victim of several unreported crimes, including being beaten, raped, and used for slave labor from the age of five through seventeen. She then told other jurors about these experiences during penalty-phase deliberations on Petitioner's mitigating evidence involving very similar facts. Thus, the evidence reinforces the presumption of prejudice and does not rebut it as Respondent claims. Far from showing no "reasonable probability" of harm, the undisputed evidence shows the opposite: a *high* probability that one or more jurors were "impermissibly influenced to the defendant's detriment." *People v. Marshall*, 50 Cal. 3d 907, 950-51 (1990).

Respondent does not present evidence to rebut this strong presumption of prejudice, but rather attempts to shift the burden by implying that Petitioner must prove that "the juror's wrong or incomplete answer hid the juror's actual bias." Res. 72. This is wrong. "An implication of this sort, which shifts the risk of nonpersuasion from the

People to the defendant, amounts to a presumption of *non*prejudice." *People v. Nesler*, 16 Cal. 4th 561, 592 (1997). Respondent's arguments grossly misconstrue the record and fail as a matter of law. Furthermore, Respondent has not identified *any* admissible or credible evidence he could present in an evidentiary hearing to prove that there is no reasonable probability that even "one juror was impermissibly influenced to the defendant's detriment." Therefore, the Court should set aside the penalty judgment and need not order an evidentiary hearing.

B. Respondent Essentially Concedes That Juror Bennett Committed Misconduct.

Respondent acknowledges that Juror Bennett failed to disclose in voir dire that she had been beaten, raped, and used for slave labor from ages five to seventeen on the farm where she grew up with her foster mother. *See* Res. 71-73. Respondent observes that Juror Bennett "*did not reveal* [her] childhood abuse," *id.* at 72; there was a "*discrepancy* between her responses in the pretrial voir dire questionnaire and her post-trial statements," *id.* at 71; it is "clear that her childhood abuse came up in jury deliberation discussions on the weight to be given petitioner's childhood abuse," *id.* at 73; and Juror Bennett "reveal[ed] the *undisclosed information* to petitioner's trial counsel in a 1993 post-trial questionnaire," *id.* (emphasis added). There is no factual dispute that Juror Bennett made statements in jury deliberations and after trial that contradicted what she

said in voir dire. Respondent also accepts Juror Bennett's later statements about her childhood abuse as true. *Id.* Accordingly, the prior, contradictory statements were false—Respondent only argues the false statements were mistakenly made. Juror Bennett's false responses to voir dire questions that went to her potential bias constitute juror misconduct as a matter of law. *People v. Diaz*, 152 Cal. App. 3d 926, 934 (1984).

C. Respondent Offers No Admissible Evidence to Rebut the Presumption of Prejudice Arising From Juror Bennett's Misconduct.

The presumption of prejudice arising from juror misconduct "may be rebutted by *an affirmative evidentiary showing* that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct." *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 417 (1982) (emphasis added). Juror Bennett's false answers on voir dire and her statements regarding her own childhood abuse and rape during penalty-phase deliberations harmed Petitioner by denying him the right to a fair and impartial jury. Since "the presence of a biased juror cannot be harmless," *People v. Carter*, 36 Cal. 4th 1114, 1208 (2005), the only way for Respondent to rebut the presumption of harm to Petitioner's substantial right to a fair and impartial jury is to prove that there was no reasonable probability that Juror Bennett was biased *and* that no juror was improperly influenced by her statements.

Respondent does not suggest that there is any additional evidence he could present to dispute the facts establishing Juror Bennett's misconduct or the resulting presumption of prejudice. Instead, Respondent simply argues untenable and self-contradictory interpretations of the evidence. Each of Respondent's arguments fails as a matter of law.

D. As a Matter of Law, None of Respondent's Arguments Rebuts the Presumption of Harm to Petitioner.

1. Respondent's Argument #1: No Reasonable Probability That Juror Bennett Was Biased Because She Viewed Her Subjection to Beatings, Slave Labor, and Rape as a "Rough Childhood."

Respondent proposes that Juror Bennett's experience of being beaten, used as slave labor, and raped as a child is not inherently likely to have influenced her because these experiences were "very different" from Petitioner's penalty-phase evidence. Res. 74-75. The record does not support this conclusory statement. Indeed, the fact that Juror Bennett's childhood abuse and rape "came up in jury deliberation discussions on the weight to be given to petitioner's childhood abuse," Res. 73, indicates that Juror Bennett thought that her experiences were very similar to Petitioner's penalty-phase evidence.

Indeed, the parallels between Petitioner's penalty-phase evidence and the facts that Juror Bennett concealed are striking. Petitioner's

mitigation case presented evidence of the harsh slave-like labor conditions Petitioner endured as a child and young teen working on his family's rural farm and the beatings and abuse inflicted by his father and grandmother. Pet. 219 ¶ 542. Juror Bennett concealed information about having been used for slave labor starting at the age of five through her teenage years on the farm where she was raised by her foster mother where she suffered regular beatings. Res. 72. The prosecution presented aggravating evidence that the Petitioner raped a woman. Pet. 219-20 ¶ 543. Juror Bennett had been raped while living on the farm but did not disclose this in voir dire. Res. 72.

These parallels not only fail to rebut the presumption of prejudice but actually confirm the presumption of bias as a matter of law. *Diaz*, 152 Cal. App. 3d at 934 (holding the trial court abused its discretion in refusing to discharge the jury foreperson when the court learned that she failed to disclose she had been the victim of an attempted rape at knifepoint in a case where the defendant was charged with committing assault with a knife). The *Diaz* court recognized that when a juror conceals personal experiences similar to the conduct being alleged at trial, the probability of bias is heightened and it is appropriate for a court to imply prejudice as a matter of law. *Id.* at 938-939. "In light of the surrounding circumstances here, highlighted by the inevitable subliminal ramifications upon a juror's ability to fairly and objectively judge a person accused of committing the same

type of violent physical assault to which the juror has been subjected, we conclude the trial court abused its discretion in not discharging [the juror]. The probability of bias is substantial when a juror has been victimized by the same type of crime." *Id.*, *aff'd*, *People v. McPeters*, 3 Cal. 4th 1148 (1992) ("In *Diaz*, the jury foreperson failed to disclose she was assaulted with a knife during an attempted rape and had pursued and stabbed her assailant, despite specific voir dire questions whether she had been a victim of a crime or involved in a knife fight. In view of the traumatic nature of the event and the specificity of the questions, it is highly unlikely the foreperson's nondisclosure was inadvertent.")

Federal cases also recognize that a juror's personal experience—where similar or identical to the fact pattern at issue in the trial—is inherently and substantially likely to influence the juror. *See, e.g.*, *U.S. v. Gonzales*, 214 F.3d 1109, 1112 (9th Cir. 2000) (presuming prejudice "'where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances'") (quoting *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir. 1990)); *Burton v. Johnson*, 948 F.2d 1150, 1159 (10th Cir. 1991) (requiring a new trial because "[a]lthough the juror did not admit to bias, the facts in her case show such a close connection to the petitioner's that bias must be presumed" as a matter of law); *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979)

(reversing conviction in heroin distribution case because juror who failed to disclose that his sons were in prison for heroin-related crimes during voir dire was presumed impartial); *Dyer v. Calderon*, 151 F.3d 970, 981 (9th Cir. 1998) (reversing conviction on grounds of implied bias where juror failed to disclose that her brother had been killed six years earlier and her husband was jailed when questioned about whether any of her relatives had ever been the victim of a crime or accused of any offense: "Because the implied bias standard is essentially an objective one, a court will, where the objective facts require a determination of such bias, hold that a juror must be recused even where the juror affirmatively asserts (or even believes) that he or she can and will be impartial.")

These cases compel the same conclusion here: bias is established as a matter of law.

2. Respondent's Argument #2: Juror Bennett Was Not Biased Because Her Concealment Was Honest and Unintentional.

Respondent suggests that Juror Bennett's failure to truthfully answer questions on voir dire was unintentional or honest concealment, and argues that there is no reasonable probability that Juror Bennett was biased. Res. 75. To support this claim of unintentional concealment, Respondent points out that (1) Juror Bennett discussed her childhood abuse with other jurors, (2) she revealed the undisclosed information to Trial Counsel after

the verdict, and (3) she probably viewed her childhood experiences, including the rape, as being part of a "rough childhood" and not as criminal conduct. Res. 73. In fact, this evidence shows that the concealment was intentional and reinforces the presumption of prejudice, rather than rebutting it.

Even if the Court were to assume that Juror Bennett's concealment of material information on voir dire was just an "honest mistake," that is not enough. Overwhelming evidence shows that Juror Bennett's state of mind in the penalty phase prevented her from acting with entire impartiality, and Respondent cannot rebut the presumption that other jurors were improperly influenced by Juror Bennett's statements during deliberations. Judged objectively, Juror Bennett's severe childhood abuse and rape—circumstances strikingly similar to evidence presented during the penalty phase—are inherently and substantially likely to have influenced Juror Bennett and the other jurors who learned of her history during penalty-phase deliberations.

a. Revealing Undisclosed Facts During Jury Deliberations Supports a Finding of Actual Bias.

Respondent inexplicably argues that the fact that Juror Bennett revealed her own childhood abuse during jury deliberations about Petitioner's childhood abuse shows that Juror Bennett was not biased.

Res. 73. To the contrary, such circumstances actually establish bias and harm to Petitioner. Juror Bennett concealed facts about beatings and rape that she endured during voir dire and then, as jury foreperson, disclosed these facts to the other jury members to contradict Petitioner's mitigation evidence of similar experiences. It is obvious Juror Bennett did not and could not put aside these undisclosed facts during trial, confirming a substantial likelihood of actual bias. *See People v. Nesler*, 16 Cal. 4th 561 (1997) (remanding for new trial on sanity issues because there was a substantial likelihood that juror was actually biased as evidenced by her repeated references to information she obtained outside the courtroom during jury deliberations); *cf. People v. San Nicolas*, 34 Cal. 4th 614 (2004) (presumption of prejudice was rebutted where juror consistently testified that he "never thought about" the stabbing during the trial); *In re Carpenter*, 9 Cal. 4th 634 (in finding no substantial likelihood that juror was biased, the court emphasized several factors, including that the evidence did not indicate that the juror told any fellow jurors what she had learned); *Tinsley v. Borg*, 895 F.2d 520, 524 (9th Cir. 1990) (state court finding of no bias was supported by the record where, among other indicators, juror "had no recollection of thinking about the [undisclosed facts] during deliberations"). "A juror's disclosure of extraneous information to other jurors tends to demonstrate that the juror intended the forbidden information to influence the verdict and strengthens the

likelihood of bias." *In re Carpenter*, 9 Cal. 4th at 657.

Nesler is particularly compelling. There, the defendant was accused of shooting and killing a man on trial for sodomizing her child. During deliberations in the sanity phase of trial, Juror Boje referenced outside information during deliberations about whether the defendant's drug use was occasional or repeated and whether the defendant truly was concerned for her child's welfare. This evidence was juxtaposed against defendant's expert's testimony that defendant suffered from amphetamine intoxication and posttraumatic stress disorder causing her to become hyper-vigilant about protecting her children from abuse. *People v. Nesler*, 16 Cal. 4th 561 (1997).

This Court found that the juror's "repeated references to and use of the outside information during deliberations establish a substantial likelihood that her extraneous knowledge concerning defendant caused her to prejudge issues that arose during deliberations and to render a verdict that was not based solely upon the evidence presented in court." *Id.* at 583. The Court found the juror's misconduct was "substantially related to important matters raised during trial" because the questions of defendant's drug use and parental concern played a significant role in the testimony of a number of expert witnesses with regard to defendant's sanity. The juror "disclosed the damaging information concerning defendant, which contradicted other evidence presented at the trial, precisely when the jury

was debating the merits of these conflicting expert opinions." *Id.* at 585. "[I]f Boje had not been influenced by what she had learned, she would not have used the information to attempt to convince other jurors that defendant truly was a bad mother and more involved with drugs than the evidence showed." *Id.*

The *Nesler* Court ordered a new trial on the issue of sanity, concluding that "Boje's interjection of extraneous evidence into the deliberations suggests that, in deciding the questions presented at the sanity phase, she was unable to put aside both the information she had acquired outside of court and her impressions and opinions derived from that information, thus indicating a substantial likelihood of actual bias on her part." *Id.* at 587 (holding that presumption of prejudice arising from the misconduct was not rebutted and thereby reversing lower court's conclusions from their evidentiary hearing). The same conclusion must be reached here. Under *Nesler*, the penalty judgment must be vacated.

b. Revealing Undisclosed Facts After Verdict Was Rendered Is Not Evidence Supporting Unintentional Concealment.

Respondent argues that Juror Bennett's willingness to reveal the undisclosed information to Trial Counsel in a 1993 post-trial questionnaire is evidence that she was not attempting to conceal the fact that she was a crime victim. Res. 73. However, the fact that Juror Bennett waited until

after the verdict was final is evidence that her concealment was intentional. Where a juror conscientiously comes forward with undisclosed information prior to entering a verdict, this can be evidence to support a rebuttal to the presumption of prejudice. *See People v. McPeters*, 3 Cal. 4th at 1148 (finding juror to be impartial where he had candidly disclosed improper contact as soon as he realized the connection and before trial began); *People v. Jackson*, 168 Cal. App. 3d 700 (1985) (juror demonstrated his conscientiousness by coming forward before a verdict was rendered about past personal experience). That Juror Bennett waited until after trial to make this revelation indicates that she was intentionally concealing her bias.

c. That Juror Bennett Misunderstood the Question Is Not Credible, Nor Sufficient to Establish Unintentional Concealment.

There is no evidence to support Respondent's hypothetical explanations for why Juror Bennett's concealment of material information on voir dire may have been an honest mistake and unintentional. Res. 73-75. For example, Respondent's contention that Juror Bennett did not consider being beaten and raped "criminal conduct," Res. 73, is off point and unpersuasive. The jury questionnaire was not limited to criminal conduct, but clearly and unequivocally sought the type of information that Juror Bennett failed to disclose. The questionnaire asked if Juror Bennett

ever experienced or was present during "a violent act, *not necessarily a crime*" (Question 64) (emphasis added), and sought information about whether Juror Bennett had been in "a situation where [she] feared being hurt or being killed as a result of violence of any sort" (Question 66). Juror Bennett mentioned only a single instance of home robbery, and failed to disclose that she had been repeatedly beaten and raped. The questions were unambiguous, clearly asking jurors to reveal *all* violent acts and situations where the juror felt fear of being hurt as a result of any kind of violence. The questions were in no way limited to "crimes," as Respondent suggests. *Cf. People v. Jackson*, 168 Cal. App. 3d 700 (1985) (attorney's poorly worded question asking jurors whether or not they had any "skeletons in the closet" that they thought should be brought to the court's attention was not sufficiently specific to elicit the fact that juror's nephew had supposedly died from drug-related reasons 12 years earlier).

Even if Juror Bennett was to testify that her false voir dire answers resulted from an honest mistake (for example, memory failure), such testimony would not be credible. Any such claimed "honesty" is contradicted by the fact that the voir dire questions were clear and unambiguous, they pertained to matters about which Juror Bennett had substantial knowledge, and Juror Bennett later discussed the undisclosed facts during jury deliberations. *See Diaz*, 152 Cal. App. 3d 926 (1984); *In re Hitchings*, 6 Cal. 4th 97 (1993). There is no evidence now in the record,

nor any credible evidence that could be offered, to support a finding that Juror Bennett's concealment of material information on voir dire was honest or unintentional.

d. Juror Bennett Intentionally Concealed Material Information on Voir Dire Because She Believed It Was "No One's Business."

The facts indicate that Juror Bennett's concealment was intentional. Jurors may conceal information for many reasons, including to avoid embarrassment, *People v. Kelly*, 185 Cal.App.3d 118 (1986), because they are unaware of their bias, *Diaz*, 152 Cal. App. 3d at 938, or due to emotional distress, *Burton v. Johnson*, 948 F.2d 1150, 1159 (10th Cir. 1991). Here, Juror Bennett's declaration indicates that she intentionally concealed her childhood abuse and rape because some of the questions were "intense" and "seemed to have no purpose" and because she had determined, contrary to the law and the trial court's instructions, that "[s]uperficial questions about where you were brought up, or your education, or income should be no one's business." Exh. 123, C. Bennett Decl., PE 1191 ¶ 4.

Juror Bennett's reasons for concealing material information during voir dire confirm that the concealment was conscious, deliberate and intentional. *People v. Blackwell* was almost identical. In *Blackwell*, a domestic abuse case, one juror who had indicated no personal experience

with such violence or alcoholism on voir dire admitted after the verdict that she was the victim of an abusive former husband who became violent when drunk. She also acknowledged that she had drawn on her own experiences in determining defendant's guilt. She declared, "*Based upon my personal experiences, it is my opinion that* [followed by a description of Juror R.'s personal views on battered wives]" (italics added). She went on to declare that "[s]ince I was personally able to get out of a *similar situation* without resorting to violence, I feel that if she had wanted to, [appellant] could have gotten out, as well." *Blackwell*, 191 Cal. App. 3d at 929. Like Respondent here, the People argued that no prejudicial misconduct occurred. The court, however, held that "[i]f the voir dire questioning is sufficiently specific to elicit the information which is not disclosed, or as to which a false answer is later shown to have been given, the defendant has established a prima facie case of concealment or deception." *Id.* Further, the court held that the misconduct was prejudicial since the record contained no affirmative evidentiary showing that prejudice did not exist. *Id.* at 931. The record and Respondent's arguments in this case are virtually the same as in *Blackwell*. The outcome should be the same, as well.

Contrary to Respondent's claim that Juror Bennett's concealment of material information was unintentional, the record affirmatively shows that the concealment was intentional and that Juror Bennett was actually biased. Thus, there can be no rebuttal to the presumption that Petitioner was

harmed. *See People v. Carter*, 36 Cal. 4th at 1208 (since "the presence of a biased juror cannot be harmless," the presumption of prejudice cannot be rebutted where the records shows juror was biased).

e. Even if Juror Bennett's Concealment Was Unintentional, This Is Insufficient Evidence to Prove That There Was No Reasonable Probability That She Was Biased.

Although intentional concealment of material information on voir dire establishes an unrebuttable presumption of prejudice, intentional concealment is not necessary for a juror to be "sufficiently biased to constitute good cause for the court to find . . . that he is unable to perform his duty." *People v. McPeters*, 3 Cal. 4th 1148, 1175 (1992). Indeed, the United States Supreme Court has recognized that whether or not a juror's answer on voir dire was intentional is simply a factor to consider in determining whether the juror was actually biased. *See McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). Judged objectively, Juror Bennett's severe childhood abuse and rape—circumstances substantially similar to evidence presented during the penalty phase—are inherently and substantially likely to have influenced Juror Bennett and the other jurors who learned of this during penalty-phase deliberations.

3. Respondent's Argument #3: Juror Bennett Wasn't Biased, She Just Wasn't Inclined to Give Defendant's Background Much Weight.

Respondent relies on an open-ended and ambiguous voir dire question and a noncommittal response to argue that Juror Bennett "was not inclined to give a defendant's background much weight on the question of penalty." Respondent summarizes the exchange as follows:

> To the question of what type of things she would want to know about a defendant in making the penalty decision, she wrote, "I am not sure at this time." During the oral voir dire, petitioner's trial counsel asked C.B. about her uncertain response to the last question, and she stated she did not want to "make a prejudgment of thinking, so it would depend on that which I heard." When counsel asked if she would be able to follow an instruction that told her that she "should look at the person's background or his mental condition or whatever" in determining penalty, she replied, "Absolutely."

Res. 73-74.

This exchange directly contradicts Respondent's contention. That Juror Bennett "did not list a single thing that she would want to know about the defendant in making the penalty determination" is not evidence that she "was not inclined to give a defendant's background much weight on the question of penalty." *Id.* Indeed, Juror Bennett confirmed that she would be inclined to consider a "person's background or his mental condition or whatever" in response to Trial Counsel's follow-up question. *Id.*

Therefore, the evidence directly contradicts Respondent's argument. If Respondent means that Juror Bennett lied in saying that she would "absolutely" be able to follow an instruction to look at a person's background, this would further confirm her disqualification as a juror for lying on voir dire.

4. Respondent's Argument #4: Juror Bennett Wasn't Biased, She Was Simply Viewing Evidence Through the Prism of Her Own Experiences.

Respondent essentially claims that Juror Bennett is entitled to be biased: "At the penalty phase, C.B. was entitled to view evidence of petitioner's childhood abuse 'though the prism of [her] own experiences.' (*See People v. Wilson*, 44 Cal. 4th 758, 823 (2008) [no concealment by juror who was never asked whether he would interpret evidence of abuse 'through the prism of his own experiences; indeed we expect jurors to use their own life experiences when evaluating the evidence'].)" Res. 74. However, *Wilson* and other cases discussing jurors' "prism" of experiences are inapposite. They deal with *general* background experiences such as culture, *Wilson*, 44 Cal.4th at 758, or professional experience, *In re Malone*, 12 Cal. 4th 935, 963 (1996) (not improper for juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial, but the injection of external information in the form of a juror's own

specialized knowledge of a matter at issue is misconduct). A juror's "prism" may also encompass information that is "common knowledge," *People v. Fauber*, 2 Cal. 4th 792, 839 (1992), to the "average juror," *People v. Pride*, 3 Cal. 4th 195, 268 (1992). General background experiences are different from specific experiences that invoke emotional responses and therefore prevent a juror from being impartial, *People v. Boyette*, 29 Cal. 4th 381 (2002) (juror dismissed where his emotional connections between the penalty-phase evidence and his own relationship with his son convinced him to vote a certain way); result in predetermined opinions, *People v. Thomas*, 218 Cal. App. 3d 1477 (1990) (juror did not accept testimony of police officer because she firmly believed, based upon personal experience, that police officers in her area generally lied); or lead to the improper injection of extraneous evidence, *Nesler*, 16 Cal. 4th at 587.

While it is appropriate, even inevitable, that jurors "bring to their deliberations knowledge and beliefs about *general* matters of law and fact that find their source in *everyday life and experience*," the experience of being beaten, raped and used as slave labor as a child cannot be considered an everyday experience of the average juror. *People v. Marshall*, 50 Cal. 3d 907, 950 (1990). Juror Bennett's traumatic experiences do not constitute a permissible "prism" a juror can bring to a case involving those very circumstances. Rather, those experiences are inherently likely to prevent a juror from acting with entire impartiality and without prejudice to

Petitioner's substantial rights.

E. Any Doubts About Whether Juror Bennett Was Biased Must Be Resolved Against the Juror.

"A juror is considered to be impartial 'only if he can lay aside his opinion and render a verdict based on the evidence presented in court.'" *Gonzales*, 214 F.3d at 1114 (quoting *Patton v. Yount*, 467 U.S. 1025, 1037 n.12 (1984)). "Doubts regarding bias must be resolved against the juror." *Id.* at 1114, 1158 (quoting *Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991)). The presumption of prejudice arising from juror misconduct is particularly strong in capital cases, which are subject to a heightened standard of reliability under the Eighth Amendment. *See People v. Hogan*, 31 Cal. 3d 815 (1982); *In re Stankewitz*, 40 Cal. 3d at 403.

F. Petitioner is Entitled to a New Guilt and Penalty Trial or a Reduction in Penalty From Death to Life Without Possibility of Parole in Lieu of Ordering a New Penalty Trial.

The evidence overwhelmingly shows that Juror Bennett was biased against Petitioner. Where juror bias is "not known to the accused until after the trial and verdict" the appropriate remedy is for the court "to grant to the accused a new trial." *Williams v. Bridges*, 140 Cal. App. 537, 543 (1934). The evidence also indicates that Juror Bennett was "biased against the entire jury system" by blatantly disregarding the trial court's instructions and lying on voir dire. *See Noll v. Lee*, 221 Cal. App. 2d 81, 88-89 (1963) (finding a juror who had served on juries several times before, like Juror

Bennett had, to be "biased against the entire jury system" where he "violated his oath to follow the instructions given by the court" when he took a copy of the vehicle code into the jury room to instruct his fellow jurors upon the law). Juror Bennett's misconduct and bias against Petitioner infected the entire trial and violated Petitioner's fundamental right to a fair and impartial jury. Accordingly, he is entitled to a new guilt *and* penalty trial.

Alternatively, and at the very least, Petitioner's death sentence must be reduced to life without possibility of parole. This court may command such a sentence without ordering a new penalty trial. California Penal Code Section 1181(7) states: "When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed." This amendment makes "clear that the court may reduce the punishment in lieu of ordering a new trial, when there is error relating to the punishment imposed." *People v. Odle*, 37 Cal. 2d 52, 58-59 (1951). Therefore, the Court may simply order that Petitioner's death sentence be reduced to life in prison without possibility of parole, it need not order a new trial.

VII. ADDITIONAL CLAIMS

A. The State Failed to Turn Over a Videotape of Petitioner When He Was Hospitalized.

Although the State committed a number of *Brady* violations, one was particularly egregious. As is evident from the last 10 seconds of Exhibit 73, People's Trial Exhibit No. 40, the police videotaped Petitioner in the hospital. Pet. 226 ¶¶ 638-39. While he was hospitalized, police elicited statements about the Rita Motel and Las Playas murders without properly informing Petitioner of his Miranda rights. Pet. 266-67 ¶ 640. Moreover, he was drugged at the time he waived his Miranda rights. The videotape would have demonstrated both of these facts. Because the State used Petitioner's inadmissible statements to secure convictions at trial, Pet. 267 ¶ 641, the State's failure to turn over this evidence was prejudicial. *Id.* at ¶ 640. Without Petitioner's statements being introduced at trial, Petition would have likely obtained a more favorable result on Counts I and III.

Respondent's argument that Trial Counsel has not submitted a statement regarding whether the defense received the videotape, Res. 85, is meritless. No videotape was in Trial Counsel's file. Moreover, Respondent's assertion that "Petitioner has failed to plead facts establishing what was videotaped," is nonsensical. The State cannot defend its failure to produce significant evidence by basing its argument on the fact that

Petitioner does not have access to the evidence. Doing so turns *Brady* on its head. *See People v. Filson*, 22 Cal. App. 4th 1841 (1994) (concluding that undisclosed videotape "met the test for material evidence," and finding due process violation in court's refusal to order its production, even though "neither side appears to have had a precise idea of what was on it"). It is self-evident from the 10 seconds appended to the videotape of the Paramount crime scene that Petitioner was videotaped while in the hospital. The State's apparent mistake in including this videotape is enough to demonstrate its misconduct in hiding or destroying this evidence in the first instance.

B. Petitioner's Mental Illness and Impairments Render His Execution Unconstitutional.

Petitioner's death sentence should be vacated given his mental illness and cognitive impairments. *See* Pet. 381-82 ¶ 892; *see also* pp. 25-32, above; *Atkins v. Virginia*, 536 U.S. 304, 318 (2002). Respondent argues that because the Supreme Court has not extended the *Atkins* reasoning to those suffering from mental illness, Petitioner's claim must fail. Res. 106. Not so.

Although the Supreme Court has not extended *Atkins* to mental illness, it makes little sense not to extend the reasoning in *Atkins* to the specific facts of this case. The Supreme Court has noted that the Eighth Amendment demands that capital punishment be reserved for "those

offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins*, 536 U.S. at 319). In *Atkins*, the Court held prohibited the execution of those who were mentally retarded. But it did not do so in a vacuum. Instead, it explained that mentally retarded offenders had diminished culpability because "they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others," and that "they often act on impulse rather than pursuant to a premeditated plan." *Atkins*, 536 U.S. at 318.

These factors—giving rise to the societal disapproval of the execution of the mentally retarded—generally indicate societal disapproval of the execution of those with diminished culpability. *See id.*; *Roper*, 543 U.S. at 571 (banning the execution of juveniles). It follows then that Petitioner's execution would fail to comport with evolving standards of decency and thus violate the Eighth Amendment. Petitioner's post traumatic stress disorder and other cognitive impairments have caused impaired judgment, behavior "dominated by instincts," significant cognitive deficits, and a compromised ability to develop meaningful social relationships. Exh. 129, P. Stewart Decl., PE 1261-63; Exh. 126, A. Llorente Decl., PE 1165. While not every mental illness may lead to

diminished culpability, the specific mental illness and impairments suffered by Petitioner match the factors that led the Supreme Court to prohibit executions of the mentally retarded in *Atkins*. As a result, Petitioner's sentence violates the Eighth Amendment under the facts of this case.

VIII. CONCLUSION

Too many things went wrong here, serious lapses and deviations from the essentials of a fair trial. Respondent cannot explain them all away. If not separately then together those lapses were prejudicial. The Court should grant the Petition.

DATED: June 30, 2009

Respectfully submitted,

BINGHAM McCUTCHEN LLP

By: _____
John R. Keese
Attorneys for Petitioner
Abelino Manriquez

PROOF OF SERVICE

I am over eighteen years of age, not a party in this action, and employed in San Francisco County, California at Three Embarcadero Center, San Francisco, California 94111-4067. I am readily familiar with the practice of this office for collection and processing of correspondence for mailing with the United States Postal Service and correspondence is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 30, 2009 I served the attached:

INFORMAL REPLY; and

EXHIBITS TO THE INFORMAL REPLY
VOLUME 1 REPLY EXHIBITS 1 TO 17

by causing a true and correct copy of the above to be placed in the United States Mail at San Francisco, California in sealed envelope(s) with postage prepaid, addressed as follows:

Sharlene A. Honnaka, Esq.
Deputy Attorney General
Office of the Attorney General,
State of California
300 S. Spring Street
Los Angeles, CA 90013

California Appellate Project
101 2nd Street, Suite 600
San Francisco, CA 94105

Nora Cregan, Esq.
619 Mariposa Avenue
Oakland, CA 94610

Habeas Corpus Resource Center
50 Fremont Street, Suite 1800
San Francisco, CA 94105

Office of the State Public Defender
221 Main Street, 10th Floor
San Francisco, CA 94105-1925

Service will be made on the Petitioner within 30 days in accordance with the California Supreme Court rules.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed on June 30, 2009, at San Francisco, California.

Kelley A. Garcia

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