IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	)	No. S158073
	)	
ROBERT WESLEY COWAN,	)	Related to:
	)	*People v. Robert Wesley Cowan*,
Petitioner,	)	Automatic Appeal No. S053413
	)	
On Habeas Corpus.	)	Kern County
	)	Superior Court No. 05HC75A

REPLY TO INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT:

I.

INTRODUCTION

The petition states sufficient facts and includes sufficient documentary support to warrant this Court's issuance of an order to show cause. Respondent argues that many of petitioner's claims should be denied because additional documentation was not submitted as exhibits. It appears, however, that respondent has confounded petitioner's pleading-stage burden to state fully and with particularity the facts that render his confinement illegal with petitioner's ultimate burden of proof. It is true, as respondent points out, that petitioner has the burden to prove the facts upon which he relies to overturn the judgment.

Petitioner, however, does not have to "prove" his claims at the initial, pleading stage. As this Court stated in *People v. Duvall* (1995) 9 Cal.4th 464, 474-475, a court receiving a habeas petition "evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief? . . . If . . . the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an OSC." (See also, *In re Harris* (1993) 5 Cal.4th 813, 827 ["one seeking relief on habeas corpus need only file a petition for the writ alleging facts which, if true, would entitle the petitioner to relief"].)

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

Respondent places particular emphasis on the absence of additional declarations from trial counsel concerning several of petitioner's claims of ineffective assistance. It is urged by respondent that the absence of such declarations requires the denial of these claims. This contention assumes that petitioner has control over trial counsel, and can at will order up a declaration reviewing all of the multiplicity of trial actions and omissions at issue in the present case. That is simply not so. Only when trial counsel has been subpoenaed to testify at an evidentiary hearing can counsel be compelled to "fully describe

his or her reasons for acting or failing to act in the manner complained of." (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

In addition, respondent has not cited a single case that stands for the proposition that a declaration from trial counsel is a pleading-stage requirement to the issuance of an OSC. Indeed, such a requirement would make little sense as trial counsel's unavailability or unwillingness to provide a declaration on a particular claim would necessarily result in a bar to habeas relief. In the instant case, for example, petitioner's lead trial counsel, Michael L. Sprague, who "was responsible for all trial decisions, including what defenses to pursue, what motions to file, which witnesses to call, and what legal objections to make," passed away more than three years before the appointment of habeas counsel. (Declaration of James V. Sorena [Exhibit C], at p. 24.) It was thus impossible for habeas counsel to obtain declarations from lead trial counsel regarding any strategic decisions in petitioner's case.

In addition, to the extent respondent contests the factual allegations contained in the habeas petition, the informal response contains no contrary declarations or even any documentary evidence at all. The informal response affords respondent an opportunity to submit factual materials to refute claims in the habeas petition. (*People v. Romero* (1994) 8 Cal.4th 728, 742.) Respondent has not availed itself of that opportunity. Instead, when respondent senses that additional facts might be necessary to buttress the response, it relies on its own speculation.

II.

CLAIMS FOR RELIEF

CLAIM 1: LEAD TRIAL COUNSEL'S PRIOR PROSECUTION OF PETITIONER FOR ROBBERY RESULTED IN A CONFLICT OF INTEREST THAT ADVERSELY AFFECTED COUNSEL'S PERFORMANCE

Respondent argues that no conflict arose from the fact that lead trial counsel, Michael L. Sprague, previously prosecuted petitioner for a robbery that was charged as a sentencing enhancement pursuant to Penal Code sections 667(a) and 667.5(b) and was introduced as a circumstance in aggravation in the penalty phase. Additionally, respondent claims that even assuming arguendo a conflict existed, petitioner was not prejudiced because there is not a reasonable probability the conflict affected his conviction and death judgment. (Informal Reply (hereafter "IR"), at p. 48.)

Respondent is wrong that Mr. Sprague's prior prosecution of petitioner for a robbery that was used both as a sentencing enhancement and as an aggravating circumstance in support of his death sentence did not amount to a conflict of interest. Moreover, when arguing that any conflict of interest was harmless, respondent relies on the wrong standard. The *Strickland* test[1] for determining whether counsel's deficient assistance was prejudicial does not apply when counsel has a conflict.

A. Applicable Law

"The right to effective assistance of counsel, secured by the Sixth Amendment to

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[1] *Strickland v. Washington* (1984) 466 U.S. 668.

the federal Constitution and article I, section 15 of the California Constitution, includes the right to representation that is free from conflicts of interest." (*People v. Cox* (2003) 30 Cal.4th 916, 948.) Conflicts of interest include "situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by . . . his own interests." (*People v. Roldan* (2005) 35 Cal.4th 646, 673 (internal quotations and citations omitted).)

Under the federal Constitution, prejudice is presumed when trial counsel has an actual conflict of interest that adversely affects counsel's performance.[2] (*People v. Dunkle* (2005) 36 Cal.4th 861, 914; *Cuyler v. Sullivan* (1980) 446 U.S. 335, 350.) To obtain a reversal, "the defendant need not demonstrate specific, outcome-determinative prejudice." (*People v. Bonin* (1989) 47 Cal.3d 808, 837-838 (internal quotations and citations omitted).)

> [A]dverse effect on counsel's performance . . . is not the same as 'prejudice' in the sense in which we often use that term. When, for instance, we review a 'traditional' claim of ineffective assistance of counsel (i.e., one involving asserted inadequate performance as opposed to 'conflicted' performance), we require the defendant to show a reasonable probability that the *result* (i.e., the disposition) would have been different.

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[2]Under the Sixth Amendment, the requirement of showing an actual conflict of interest that adversely affected counsel's performance applies only when the defendant fails to object to the conflict at trial. (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 350.) "Where a trial court requires the continuation of conflicted representation over a timely objection, reversal is automatic." (*People v. Clark* (1993) 5 Cal.4th 950, 994.) Here, petitioner made no objection, but through no fault of his own. As explained in footnote 4, *infra*, he was not aware that Mr. Sprague had previously prosecuted him, and therefore had no opportunity to object to the conflict. Petitioner submits that on these facts reversal should also be automatic. In any event, reversal is warranted even under the *Cuyler* standard, as explained *infra*.

(*People v. Clark*, *supra*, 5 Cal.4th at p. 995 (italics in original).) The strength of the prosecutions's case is thus irrelevant in determining whether counsel's performance was adversely affected by a conflict of interest. (*United States v. Mett* (9th Cir. 1995) 65 F.3d 1531, 1535.)

The standard under the California Constitution's right to effective assistance of counsel is even more rigorous. "[A] defendant need only demonstrate a *potential* conflict, so long as the record supports an 'informed speculation' that the asserted conflict adversely affected counsel's performance." (*People v. Frye* (1998) 18 Cal.4th 894, 998 (italics in original).) This more rigorous standard applies even if the defendant made no objection to the conflict at trial. (*People v. Cox* (1991) 53 Cal.3d 618, 654.)

This Court has also suggested that the determination of whether counsel's performance was "adversely affected" by a conflict of interest "requires an inquiry into whether counsel 'pulled his punches,' i.e., whether counsel failed to represent defendant as vigorously as he might have, had there been no conflict." (*People v. Dunkle*, *supra*, 36 Cal.4th at p. 915 (internal quotations and citations omitted).) The record must be examined "to determine (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission." (*Ibid* (internal quotations and citations omitted).)

The Ninth Circuit has emphasized that the defendant "need not prove that the actual conflict 'was the cause of any inactions' by" trial counsel. Rather, it need only be shown

that the conflict was "likely" to have had "some effect on counsel's handling of particular aspects of the trial." (*Lockhart v. Terhune* (9th Cir. 2001) 250 F.3d 1223, 1231.)

B. Lead Trial Counsel had a Conflict of Interest

In *People v. Hernandez* (2003) 30 Cal.4th 835, appellant argued for reversal of his death judgment based on lead counsel's alleged conflict of interest. The facts of *Hernandez* were strikingly similar to those of the instant case. Hernandez's lead counsel had previously prosecuted him for a robbery, evidence of which was introduced against him in the penalty phase. This Court did not resolve the conflict issue because it reversed the death judgment on other grounds. In dictum, however, it recognized there may "have been serious error pertaining to the evidence of the robbery" due to trial counsel's prior prosecution of the defendant. (*Id.*, at p. 876, fn.5.) It also expressed concern that "the record contain[ed] little evidence that defendant was made aware of the dangers and potential drawbacks of this possible conflict of interest." (*Id.*, at p. 877.) "In a death penalty case, we expect the trial court and the attorneys to proceed with the utmost care and diligence and with the most scrupulous regard for fair and correct procedure." (*Ibid.*)

An actual conflict of interest was found in *United States v. Ziegenhagen* (7th Cir. 1989) 890 F.2d 937, which also involved facts similar to the instant case. In *Ziegenhagen*, the defendant was convicted at trial and the government sought to enhance his sentence with three prior felony convictions. The defense attorney filed a motion to bar application of the sentence-enhancing statute. After filing the motion, the attorney realized he was the deputy district attorney who, 20 years earlier, appeared at the sentencing hearing regarding

two of the convictions that the government was relying upon as sentencing enhancements. The attorney disclosed his involvement to the defendant but never mentioned it to the district court. The defense motion was denied and the district court enhanced the defendant's sentence based on the prior convictions. (*Id.*, at pp. 938-939.)

The Seventh Circuit concluded that "government employment in a prosecutorial role against one defendant and subsequent representation of that defendant in a defense capacity is not proper." (*Id.*, at p. 940.) Moreover, "the prosecutorial role that Ziegenhagen's counsel took in the earlier convictions was substantial enough to represent an actual conflict" even though "he was not the prosecuting attorney of record" and "merely appeared at the sentencing hearing to recommend the length of sentence." (*Ibid*; see also, *Westbrook v. Zant* (1983 D. Ga.) 575 F.Supp. 186, 189, reversed on other grounds ["an attorney may not represent a criminal defendant when he . . . has previously represented the government in the prosecution of the defendant"].)

In *Maiden v. Bunnell* (1994) 35 F.3d 477, 480, the Ninth Circuit agreed with the finding of an actual conflict in *Ziegenhagen*, but hesitated to adopt the broader pro se rule announced in that case. Nonetheless, it warned that "the possibilities for actual conflicts are very real when attorneys 'switch sides' in a subsequent criminal case involving the same defendant." (*Id.*, at pp. 480-481.) The critical inquiry is whether the case in which the attorney previously prosecuted the defendant is "substantially related" to the case in which the attorney is now representing the defendant. Cases are "substantially related" when, in the present case, the attorney will be "required to undermine, criticize, or attack

his . . . own work product from the previous case." (*Id.*, at p. 481.)

Here, petitioner's prior robbery conviction in which Mr. Sprague was involved as a prosecutor clearly was "substantially related" to the instance case in which Mr. Sprague was lead defense counsel. The robbery conviction was charged as a sentencing enhancement pursuant to Penal Code sections 667(a) and 667.5(b), introduced as a circumstance in aggravation in the penalty phase, and cited by the prosecutor in her penalty phase argument as a reason for the jury to return a death sentence (13 RT 2984-2985).[3] Mr. Sprague was required to defend petitioner against the prior conviction that he himself had helped to obtain. He was required to analyze, critique and challenge his own work product from the previous case.

Moreover, Mr. Sprague's involvement in the prosecution of petitioner's prior robbery case was far greater than that of the conflicted attorney in *Ziegenhagen*. The attorney in *Ziegenhagen* only appeared at the sentencing hearing to recommend an appropriate sentence. Here, Mr. Sprague prepared the prior robbery case for trial and would have tried it had it not been settled.

People v. Adcox (1988) 47 Cal.3d 207, not cited by respondent, is distinguishable from the instant case. In *Adcox*, the defendant's attorney previously had been the prosecutor who negotiated a plea bargain resulting in a conviction that was introduced as a

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[3]The prosecutor argued, "You will see People's 69 is a – is a certified copy of a conviction of this man for, guess what, robbery. You will see it, it is there, it has a description of the – of the – of the Court proceedings and so forth. You can take that in the room with you . . . ." (13 RT 2984.)

circumstance in aggravation in the penalty phase. Unlike the present case, however, trial counsel promptly disclosed his involvement in the prior conviction to both the court and his client. In addition, trial counsel, who according to this Court "[was] in the best position professionally and ethically to determine when a conflict of interest exists," believed there was no conflict and the defendant stated he had no objection to counsel's continued representation. Finally, counsel zealously represented his client by successfully obtaining an order excluding any evidence of violent conduct underlying the prior convictions. (*Id.*, at pp. 262-264.) On this record, *Adcox* held alternatively that either a conflict of interest was not established or that if a conflict existed, it was waived by the defendant. (*Id.*, at pp. 263-264.)

Here, by contrast, Mr. Sprague did not disclose his prior representation to petitioner or the court and did not assert his belief that no conflict existed. Nor did petitioner waive any conflict of interest.[4] Finally, as described below, lead trial counsel, unlike counsel in *Adcox*, did not zealously represent petitioner at trial.

C. Lead Trial Counsel's Conflict of Interest Adversely Affected His Performance

The Seventh Circuit's discussion of prejudice in *Ziegenhagen* is directly on point:

Despite the fact that Ziegenhagen had been convicted by a jury of the present

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[4]Petitioner could not have recognized Mr. Sprague as the assistant district attorney who prepared the robbery case for trial since Mr. Sprague did not appear in court during any pretrial proceedings or during the change of plea and sentencing proceedings. Petitioner would have seen Mr. Sprague in court prosecuting him only if the case had gone to trial.

> offense, that does not mean that [his counsel] could not decide his defense strategy . . . at sentencing . . . on the basis of the conflict. Needless to say, there may be countless ways in which the conflict could have hindered a fair trial [and] the sentencing hearing . . . . We cannot say that there was nothing another attorney could have argued based on the record to more zealously advocate on this defendant's behalf.

(*United States v. Ziegenhagen*, *supra*, 890 F.2d at p. 941.)

The same is true in this case. Mr. Sprague's actions and omissions during the trial demonstrated his performance was likely to have been adversely affected by his conflict. Mr. Sprague had petitioner waive a jury trial and the court decided whether the prior conviction could be used to enhance petitioner's sentence under sections 667(a) and 667.5(b). At the court trial, Mr. Sprague did not present any evidence to rebut the conviction records introduced by the prosecution. He also did not contest that the records established that petitioner suffered a prior serious felony conviction within the meaning of section 667(a). Mr. Sprague's only argument was that the evidence was insufficient to prove the 667.5(b) allegation because petitioner had not committed another felony within five years of his release from prison.[5] (12 RT 2802-2805.)

In addition, Mr. Sprague's representation was seriously deficient in numerous other aspects, including failing to object adequately to inadmissible evidence and improper jury instructions, failing to request appropriate jury instructions and an adequate evidentiary hearing regarding juror misconduct, failing to present expert evidence to contest the

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[5]The trial court found that the allegation pursuant to section 667(a) was true and added five years to petitioner's sentence. The allegation pursuant to 667.5(b) was found not true. (12 RT 2802-2805.)

reliability of fingerprint and ballistic identifications, failing to present significant mitigation evidence in the penalty phase, and undermining the penalty phase by firing the sole defense expert immediately prior to the date he was scheduled to testify. (*See* Claims 3 and 5; Declaration of James V. Sorena [Exhibit C], at pp. 24-27; and Declaration of Mark Goldrosen [Exhibit D], at pp.29-32.) It is reasonable to infer that this sub-standard representation emanated from the conflicted position in which Mr. Sprague found himself but which he failed to disclose either to his client or to the trial court.

Respondent argues that Mr. Sprague's prior prosecution of petitioner could not have affected his later representation outside the narrow issue of the validity of his 1970 robbery conviction, citing *People v. Dancer* (1996) 45 Cal.App.4th 1677. (IR, at p. 53.) However, *Dancer* is inapposite. There the defendant was represented by Deputy Public Defender Trevino, who, prior to trial, declared a conflict of interest limited to a single issue: the validity of a prior conviction the prosecution sought to use against the defendant. The conflict presumably arose from the public defender having previously represented the defendant when he pled guilty to the prior. The trial court appointed a conflict attorney to file a motion to strike the prior conviction, which was denied. Trevino then represented the defendant at trial. (*Id.*, at pp. 1685-86.)

The Court of Appeal found that under these circumstances Trevino's conflict was limited to the issue of the validity of the prior conviction. Once the prior was determined to be valid, her conflict was eliminated and could not have interfered with any other decisions necessary for constitutionally adequate representation. That was so "because the

only other issues related to defendant's prior conviction involved the prosecutor's use of the prior and underlying facts at trial." (*Id.*, at p. 1686.) However, Trevino's opposing such use in no way implicated the performance of prior counsel. Trevino was thus not in a position where she "might [still] feel divided loyalty" to the defendant. (*Id.*, at p.1686.)

The present case, by contrast, does involve trial counsel who was likely to feel "divided loyalty." Unlike Trevino, Mr. Sprague did not previously represent petitioner when he pled guilty to the prior offense. Instead, he was the prosecutor, successfully obtaining a conviction and prison sentence for petitioner. Mr. Sprague made no attempt to challenge the validity of the prior conviction at trial, and his position adverse to petitioner in the prior case was likely to have compromised the zealousness of his overall representation of petitioner. Moreover, in *Cuyler*, *supra*, the United States Supreme Court expressed concern regarding the effect of a conflict on what it termed counsel's "performance." "The term "performance" is to be read expansively to encompass all of the things lawyers do for their clients, from drafting motions papers to providing moral support. (*United States v. Mett*, *supra*, 65 F.3d at p. 1535; see also *Sanders v. Ratelle* (1994) 21 F.3d 1446, 1452 ["harm may not consist solely of what counsel does, but of 'what the advocate finds himself compelled to *refrain* from doing, not only at trial but also' during pretrial proceedings and preparation]".)

People v. Clark, *supra*, 5 Cal.4th 950, also provides no support for respondent's position. (IR, at p. 51.) In *Clark*, this Court found that the defendant's right to conflict-free counsel was not violated by his first lead counsel running for, and winning, the office

of county district attorney while representing him in a capital case. This Court noted that second counsel's silence regarding any deficiencies in lead counsel's representation of the defendant reinforced its conclusion, based on a review of the record, that lead counsel's performance was not adversely affected by her personal interest in winning the election. (*Id.*, at p. 997.) Here, however, second counsel, Mr. Sorena, was not silent about deficiencies in Mr. Sprague's representation of petitioner. In his declaration, Mr. Sorena criticized Mr. Sprague for acting unreasonably in unilaterally dismissing Dr. William Pierce as the main penalty phase defense witness just prior to the presentation of the defense case. Dismissing Dr. Pierce precluded the jury from hearing significant mitigation evidence concerning both petitioner's troubled childhood and his positive adjustment to prison during prior incarcerations. (Declaration of James V. Sorena [Exhibit C], at p. 25.)

Finally, respondent argues that even if Mr. Sprague had a conflict of interest, petitioner was not prejudiced because the prosecution's guilt and penalty phase cases were strong. (IR, at p. pp. 53-54.) This argument, however, applies the wrong legal standard because it fails to recognize that prejudice is presumed when the record demonstrates, as it does in this case, that trial counsel's conflict of interest adversely affected his performance. Traditional prejudice analysis, which focuses on the strength of the prosecution's case, has no relevance to a claimed violation of the right to conflict-free counsel. (*People v. Bonin, supra*, 47 Cal.3d at pp. 837-838.)

CLAIM 2: JUROR 045882'S INTENTIONAL CONCEALMENT OF BOTH HIS PRIOR ARREST FOR A CRIMINAL OFFENSE AND HIS STATUS AS A PROBATIONER WAS MISCONDUCT, RESULTING IN A PRESUMPTION OF PREJUDICE THAT WAS NOT REBUTTED

Respondent contends that Juror 045882 was not deliberately untruthful in failing to disclose his prior misdemeanor arrest and probation sentence, and that any juror misconduct was harmless. (IR, at pp. 54-60 and fn. 26.) Respondent is incorrect. The juror's concealment of his criminal background and status as a probationer constituted deliberate misconduct, resulting in a presumption of prejudice to petitioner that was not rebutted.

A. Applicable Law

It is well settled that a defendant has a right to be tried by a fair and impartial jury under both the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 16 of the California Constitution. (*Morgan v. Illinois* (2002) 504 U.S. 719, 727; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) Adequate voir dire plays a critical role in assuring that the right to an impartial jury will be honored.

"Of course, the efficacy of voir dire is dependent on prospective jurors answering truthfully when questioned." (*In re Hitchings*, *supra*, 6 Cal.4th at p. 110.) "A juror who conceals relevant facts or gives false answers during the voir dire examination . . . undermines the jury selection process and commits misconduct." (*Id.*, at p. 111; *People v. Blackwell* (1987) 191 Cal.App.3d 925, 929.) In the absence of truthful answers on voir dire, the trial court will be unable to identify and remove prospective jurors who fall

within one of the statutory categories permitting a challenge for cause. In addition, trial counsel will be unable to intelligently exercise peremptory challenges on those prospective jurors they believe cannot be fair. (*In re Hitchings*, *supra*, 6 Cal.4th at p. 110.)

> The prosecution, the defense and the trial court rely on the voir dire responses in making their respective decisions, and if potential jurors do not respond candidly the jury selection process is rendered meaningless. Falsehood, or deliberate concealment or nondisclosure of facts and attitudes deprives both sides of the right to select an unbiased jury and erodes the basic integrity of the jury trial process.

(*People v. Blackwell*, *supra*, 191 Cal.App.3d at p. 929; *People v. Diaz* (1984) 152 Cal.App.3d 926, 934 ["juror's concealment, regardless whether intentional, during voir dire examination of a state of mind which would prevent a person from acting impartially is misconduct constituting an irregularity for which a new trial may be granted"].)

Juror misconduct involving the concealment of material information on voir dire raises a presumption of prejudice that requires reversal of the conviction unless rebutted. (*In re Hitchings*, *supra*, 6 Cal.4th at p. 119.) The presumption may be rebutted only "'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] . . . .'" (*People v. Miranda* (1987) 44 Cal.3d 57, 117 (quoting *Hassan v. Ford Motor Co.* (1982) 32 Cal.3d 388, 417).) A "reasonable probability" of prejudice exists when there is a "substantial likelihood that one or more jurors were actually biased against the defendant." (*In re Hamilton* (1999) 20 Cal.4th 273, 296.)

"[I]n most cases, the honesty or dishonesty of a juror's response [to a question on voir dire] is the best initial indicator of whether the juror in fact was impartial." (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 556.) When a juror conceals material information, "that information establish[es] substantial grounds for inferring that [the juror] was biased . . . despite . . . protestations to the contrary." (*People v. Price* (1991) 1 Cal.4th 324, 400-401.) "Concealment by a potential juror constitutes implied bias justifying disqualification." (*People v. Morris* (1991) 53 Cal.3d 152, 183-184; *People v. Farris* (1977) 66 Cal.App.3d 376, 387 ["the deliberate concealment by this juror of his past and present scrapes with the law, knowing that he would otherwise be subject to dismissal from the jury panel, is another factor evidencing his unfitness to serve as a juror"]; *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 979 [juror's "lies give rise to an inference of implied bias on her part"].) A verdict must be overturned even if only one juror is biased. (*People v. Holloway* (1990) 50 Cal.3d 1098, 1112.)

Moreover, "[i]n determining whether the presumption of prejudice has been rebutted, 'it is clear that the usual "harmless error" tests for determining the prejudicial effect of an error [citations] are inapplicable. Convincing evidence of guilt does not deprive a defendant of the right to a fair trial [citation] since a fair trial includes among other things the right to an unbiased jury . . . .'" (*People v. Diaz*, *supra*, 152 Cal.App.3d at p. 935; *People v. Marshall* (1990) 50 Cal.3d 907, 951 ["if it appears substantially likely that a juror is actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict"]; *Dyer v. Calderon*,

supra, 151 F.3d at p. 973 ["The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice"].)

B. Juror 045882's Intentional Concealment of Both His Prior Arrest for a Criminal Offense and His Status as a Probationer Was Misconduct

When "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." (*People v. Blackwell*, *supra*, 191 Cal.App.3d at p. 929.) Here, Juror 045882 had at least three opportunities to reveal his misdemeanor arrest, conviction, and probation status when completing the questionnaire. Question 34 asked if the prospective juror had ever been arrested, and if so, to provide information regarding the type of criminal charge, the approximate date and location of the arrest, and the outcome of the case. In response to this question, Juror 045882 wrote, "assault and battery. 1991. From my hous (sic) charges dropped." (Juror 045882 Questionnaire [Exhibit E], at p. 43.) However, the juror did not reveal his 1995 arrest for fighting in a public place, his conviction, and his sentence to probation with terms and conditions that he refrain from further violations of the law and pay a fine of $225 (Bakersfield Court File [Exhibit G], at p. 69).

Question 39 asked the prospective juror to explain how he felt about the way law enforcement and the judicial system handled any arrests involving himself, immediate family members, or household members. Juror 045882 left blank the space provided for his answer. He again did not reveal his 1995 arrest for fighting in a public place, his

conviction, or his sentence. (Juror 045882 Questionnaire [Exhibit E], at pp. 43-44.)

Finally, Question 54 asked the prospective juror if he, his family members, or his close friends had ever had any contact with law enforcement or the criminal justice system other than that previously mentioned in the questionnaire. In response to this question, Juror 045882 checked the box "No." For the third time he did not reveal his 1995 arrest for fighting in a public place, his conviction, or his sentence.[6] (*Id.*, at p. 48.)

Thus, the questionnaire completed by Juror 045882 under oath clearly and fairly asked him to reveal fully his prior criminal record. On three separate occasions he failed to do so. Under these circumstances, it reasonably may be inferred that the his failure to disclose this information was not inadvertent, but, instead, was intentional. No other explanation is plausible. Juror 045882's conviction occurred only 14 months before his jury service and he was still on probation during jury selection. It is implausible that he would have forgotten these contacts with law enforcement and the criminal justice system, but remembered the assault and battery charges dismissed three years before.

Respondent submits that because Juror 045882 was cited and released, rather than booked into custody, he may not have believed he was arrested in 1995. (IR, at p. 60, fn. 26.) This is nothing more than unsupported speculation by respondent. Respondent

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[6]In addition, during voir dire Juror 045882 was asked if he or a close friend or relative had ever been the victim of a crime. He answered by discussing his brother's and his own contacts with the criminal justice system. He explained that his "brother was in here not too long for assault and battery," and that "about three years back" some charges made against himself were dropped without his having to come to court. (4 RT 1040-1041.) However, he made no mention of the 1995 misdemeanor conviction.

provides no declaration from Juror 045882, under penalty of perjury, that he was confused about the matter. Moreover, the police report states he was subjected to a citizen's arrest before he was given a citation. (Bakersfield Police Report [Exhibit G], at p. 75.) Undoubtedly, the juror was made aware of his arrest by the police officer who cited him. He certainly was aware of his subsequent conviction and sentence, for which he agreed to the terms and conditions of probation. In addition, any misunderstanding about whether there was an arrest would not have explained Juror 045882's failure to respond to Question 54, which asked about additional "*contact*[s] with law enforcement or the criminal justice system."[7] (Juror 045882 Questionnaire [Exhibit E], at p. 48 (italics added.)

Also of great significance is the subject matter of the information not revealed by Juror 045882. Certainly, the juror's prior misdemeanor conviction and his probationary status were of great relevance to the voir dire examination and of critical importance to defense counsel's efforts to select an impartial jury. (See *In re Hitchings*, *supra*, 6 Cal.4th at p. 116.) The withheld information established the juror's potential for bias. Had he

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[7]Even assuming arguendo that Juror 045882's failure to disclose his recent misdemeanor conviction was inadvertent, it does not follow there was no misconduct. Neither this Court nor the United States Supreme Court has held that a juror's concealment of relevant information during voir dire must be deliberate in order for there to be a constitutional violation. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1208; *In re Hitchings*, *supra*, 6 Cal.4th at p. 114-116 and fn. 5.) At least two Court of Appeal decisions have held that misconduct may result from a juror's non-intentional concealment of relevant information. (*People v. Diaz*, *supra*, 152 Cal.App.3d at p. 932; *People v. Blackwell*, *supra*, 191 Cal.App.3d at p. 929; but see *People v. Keely* (1986) 185 Cal.App.3d 118, 125, and *People v. Jackson* (1985) 168 Cal.App.3d 700, 704-706.)

been truthful about his criminal record on voir dire, defense counsel reasonably may have concluded the juror could not be fair and exercised a peremptory challenge to remove him. Alternatively, it may have been determined upon further questioning that Juror 045882 was excusable for cause due to implied or actual bias. (Code Civ. Proc. § 225, subd. (b)(1)(B) and (C).)

An excusal for cause of a prospective juror who did not disclose his misdemeanor criminal record during voir dire was upheld by this Court in *People v. Morris*, *supra*, 53 Cal.3d 152. In *Morris*, the prospective juror responded in the negative when the court asked whether he had ever been "arrested" or "in jail for anything." The prosecutor produced a rap sheet showing misdemeanor convictions including two drunk driving offenses, and two arrests for obstructing and resisting an officer which did not result in convictions. The trial court granted the prosecutor's motion to excuse the juror for cause. (*Id.*, at p. 183.)

On appeal, the appellant claimed error because the prospective juror was not specifically asked whether he had been charged with a crime. According to the appellant, the prospective juror's answer could have been correct if he was not arrested, but surrendered himself, and if he did not spend time in jail. This Court readily rejected appellant's argument, explaining that whether the prospective juror was taken into custody or surrendered himself, he was nevertheless arrested. "'An arrest is made by an actual restraint of the person, *or by submission to the custody of an officer.*'" (*Ibid*, quoting Pen. Code § 835 (italics in original).) Excusal of the prospective juror was proper because

'[c]oncealment by a potential juror constitutes implied bias justifying disqualification." (*Id.*, at pp. 183-184.)

C. The Presumption of Bias Resulting from Juror 045582's Misconduct Was Not Rebutted

Here, the record does not contain any affirmative showing that there was no prejudice to petitioner caused by Juror 045882's misconduct. To the contrary, that misconduct, along with the surrounding circumstances, indicate a substantial, unrebutted likelihood the juror was actually biased against petitioner.

As this Court and other courts have recognized, the juror's concealment of his misdemeanor record "established substantial grounds for inferring that [he] was biased." (*People v. Price*, *supra*, 1 Cal.4th at pp. 400-401; *People v. Morris*, *supra*, 53 Cal.3d at pp. 184-184; *People v. Farris*, *supra*, 66 Cal.App.3d at p. 387; *People v. Blackwell*, *supra*, 191 Cal.App.3d at p. 929; *Dyer v. Calderon*, *supra*, 151 F.3d at p. 979.) In addition, the juror's lack of candor was coupled with both a determination to serve on the jury and strong support for the death penalty. The juror's determination to be seated on the jury was evidenced by his answer to Question 30 of the questionnaire, which asked about his attitude toward jury service. The juror felt being on the jury was "a great chance for" him. (Juror Questionnaire [Exhibit E], at p. 42.) The questionnaire also revealed the juror's strong support for the death penalty. When asked to describe his feelings about capital punishment, the juror wrote, "If guilty why not." (*Id.*, at p. 48.) He further explained that he never had a different view of the death penalty, that the death penalty was imposed too

seldom, that the death penalty was not wrong for any reasons, and that he would have no trouble voting for the death penalty in the appropriate case. (*Id.*, at p. 50.)

All of these circumstances make it substantially likely that Juror 045882 concealed information about his criminal record in order "to finagle a seat on the jury so [he] could lobby for a conviction and death sentence." (*Dyer v. Calderon*, *supra*, 151 F.3d at p. 981.) Moreover, even in the absence of any vindictive bias against petitioner, Juror 045882 was unfit to serve on petitioner's jury.

> The individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent. Whether the desire to serve is motivated by an overactive sense of civic duty, by a desire to avenge past wrongs, by the hope of writing a memoir or by some other unknown motive, this excess of zeal introduces the kind of unpredictable factor into the jury room that the doctrine of implied bias is meant to keep out.

(*Id.*, at p. 982.)

In addition,

> [i]f a juror treats with contempt the court's admonition to answer voir dire questions truthfully, she can be expected to treat her responsibilities as a juror-to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions-with equal scorn. Moreover, a juror who tells major lies creates a serious conundrum for the fact-finding process. How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people's veracity? Having committed perjury, she may believe that the witnesses also feel no obligation to tell the truth and decide the case based on her prejudices rather than the testimony.

(*Id.*, at p. 983; see also *Green v. White* (9th Cir. 2000) 232 F.3d 671, 677.)

In the IR, respondent relies extensively on *In re Hamilton*, *supra*, 20 Cal.4th 273 and *People v. Carter*, *supra*, 36 Cal.4th 1114, but neither case involved a juror who

deliberately concealed a prior criminal conviction and probation sentence. In *Hamilton*, the juror failed to describe the full extent of her exposure to pretrial publicity and her brief conversation with a neighbor about the case one year before the trial. After an evidentiary hearing, this Court found that the juror was not biased because her omissions were inadvertent and her claim of impartiality at the evidentiary hearing was credible. (*In re Hamilton*, *supra*, 20 Cal.4th at pp. 300-301.) In addition, any impressions the juror formed from her conversation with her neighbor were insignificant, and the news clippings she collected contained neutral and evenhanded accounts of the trial. (*Id.*, at p. 301.)

In *Carter*, the juror was asked if she had ever been in a situation where she feared being hurt or killed "as a result of violence of any sort." The juror's answer failed to disclose that approximately 13 years before she slept with a knife under her bed for one night because she feared being the victim of a rape or murder. (*People v. Carter*, *supra*, 36 Cal.4th at p. 1206.) This Court found that even if the juror's answer in voir dire was inaccurate, the omission was insignificant because she testified at the hearing on the motion for new trial that she had not thought about the incident during the past 12 years. (*Ibid.*) In addition, the incident in which she hid the knife was very brief and occurred more than 10 years before the trial. The omitted information was also duplicative of another answer given by the juror during voir dire, in which she acknowledged that she (and, in her opinion, everyone else) feared being the victim of crime. (*Id.*, at pp. 1208-1209.)

The juror misconduct at issue in *Hamilton* and *Carter* was thus far less serious than

that in petitioner's case, in which Juror 045882 intentionally concealed his criminal conviction and probationary status, was eager to serve on the jury, and strongly supported the death penalty. In addition, unlike *Hamilton* and *Carter*, there has not been an evidentiary hearing in this case, yet, which would allow petitioner's counsel the opportunity to question the juror about his bias.

Although respondent argues that Juror 045882's "answers provided the parties ample opportunity to voir dire Juror No. 045882 and probe for bias" (IR, at pp. 59-60), obviously counsel for petitioners were in no position to probe for bias regarding an arrest and conviction of which they were unaware precisely because the juror had failed to disclose it. Respondent minimizes the significance of Juror 045882's silence on this matter because the juror disclosed information on other matters. (IR, at pp. 59-60.) But the potential significance of the undisclosed prior is heightened by his failure to disclose only this matter while being forthright as to other information. It suggests that the misdemeanor arrest and conviction had particular meaning to Juror 045882, but counsel for petitioner were deprived of the opportunity to explore that meaning by the juror's concealment.

Finally, even when "there exists any doubts regarding juror impartiality, the matter must be resolved in favor of the accused." (*People v. Diaz*, *supra*, 152 Cal.App.3d at p. 937.) For all of the reasons discussed above, petitioner is entitled to the issuance of an order to show cause based on prejudicial juror misconduct.

CLAIM 3: PETITIONER'S TRIAL COUNSEL WAS INEFFECTIVE IN THE GUILT PHASE

A. Criminalist Gregory Laskowski's Use of Mikrosil Casting to Make a Firearm Identification Was a New Scientific Technique; Counsel Was Ineffective in Failing to Present Expert Testimony That the Technique Was Unreliable and Not Generally Accepted in the Scientific Community

Petitioner contends that trial counsel failed to present available expert testimony to establish that criminalist Gregory Laskowski's use of Mikrosil casting to make a firearm identification: (1) was a new scientific technique; (2) was not generally accepted in the scientific community; and (3) did not employ correct scientific procedures. Respondent claims that: (1) the use of Mikrosil casting was not a new scientific technique subject to analysis under *People v. Kelly* (1976) 17 Cal.3d 24, 30; (2) petitioner has failed to show that trial counsel had no tactical reason for their failure to call an expert to the stand; and (3) admission of the Mikrosil test was not prejudicial. (IR, at p. 60.) With respect to whether Mikrosil casting was a new scientific technique, respondent's argument misinterprets the applicable case law and ignores the factual record, including the declaration of criminalist Jim Norris, appended to the petition as Exhibit H. In addition, respondent fails to address petitioner's claims that the Mikrosil casting technique was not generally accepted in the scientific community and that Laskowski did not employ correct scientific procedures.

1. Applicable Law

Kelly set forth certain "general principles of admissibility" for expert testimony

based on new scientific techniques. A technique may be deemed "scientific" if "'the unproven technique or procedure appears *in both name and description* to provide some definitive truth which the expert need only accurately recognize and relay to the jury.'" (*People v. Leahy* (1994) 8 Cal.4th 587, 606 (italics in original, quoting *People v. Stoll* (1989) 49 Cal.3d 1136, 1156).) The significant factor in determining whether a scientific technique is "new" for *Kelly* purposes is whether the techniques has been subjected to "repeated use, study, testing and confirmation by scientists or trained technicians." (*People v. Leahy*, *supra*, 8 Cal.4th at p. 605.)

The *Kelly* test for the admissibility of expert testimony based on a new scientific technique includes the following "traditional" two-step process: "(1) [T]he *reliability of the method* must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly *qualified as an expert to give an opinion* on the subject. . . . Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case. [Citations.]" (*People v. Kelly*, *supra*, 17 Cal.3d at p. 30 (italics in original); see also *People v. Leahy*, *supra*, 8 Cal.4th at p. 594.) To be reliable, a scientific method must have gained "general acceptance in the field to which it belongs." (*People v. Kelly*, *supra*, 17 Cal.3d at p. 30; see also *People v. Guerra* (1984) 37 Cal.3d 385, 418 [use of the technique must be "supported by a clear majority of the members of that community]".)

Thus, under *Kelly*, the decision to admit evidence based on a new scientific technique must be "carefully considered." (*People v. Leahy*, *supra*, 8 Cal.4th at p. 595.)

Kelly was concerned that "[l]ay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials" and that "a new scientific process" is often enveloped with a "'misleading aura of certainty'" that obscures the "'currently experimental nature'" of the technique. (*People v. Kelly*, *supra*, 17 Cal.3d at pp. 31-32.) For these reasons, the *Kelly* "doctrine contemplates an undefined period of testing and study by a community of experts before a new scientific technique may be deemed 'generally accepted,' thus delaying the admissibility of evidence derived from the technique." (*People v. Leahy*, *supra*, 8 Cal.4th at pp. 601-602.)

2. Laskowski's Use of Mikrosil Casting Was a New Scientific Technique

Respondent's claim that Mikrosil casting was not a new scientific technique is fraught with inconsistency. Initially, he argues that *Kelly* is inapplicable because Mikrosil casting is not a scientific technique or experiment, citing *People v. Ayala* (2000) 24 Cal.4th 243 and *People v. Rowland* (1992) 4 Cal.4th 238. (IR, at pp. 66-67.) Respondent then concedes that Mikrosil casting is a scientific technique, but claims it is admissible because it is based on other well-established techniques – ballistics analysis and toolmark analysis. (IR at pp. 67-68.) Respondent can't have it both ways. Moreover, both of respondent's arguments are wrong.

As stated by criminalist Jim Norris in his declaration submitted in support of the habeas corpus petition, Laskowski's use of the Mikrosil casting was a "scientific methodology or technique for determining whether a bullet had been fired from a

particular firearm." (Declaration of Jim Norris [Exhibit H], at p. 81.) Under the *Leahy/Stoll* test, it was a procedure that "'provide[d] some definitive truth which the expert need[ed] only accurately recognize and relay to the jury.'" That truth was that the markings on the bullets recovered frm Mr. Merck matched those on the mold made with Mikrosil from the barrel of the Colt .25 handgun.

Moreover, respondent's unsupported assertion that the Mikrosil casting technique did not involve "matters that are so esoteric as to be beyond the understanding of the average juror," (IR at p. 68), is incorrect. The Mikrosil casting technique was "so foreign to everyday experience as to be unusually difficult for laypersons to evaluate." (*People v. Venegas* (1998) 18 Cal.4th 47, 80.) The danger existed that the jury would be misled into viewing the results of the technique as infallible, despite its lack of reliability. No distinction can be made between the Mikrosil casting and other techniques for which the courts have invoked the *Kelly* rule. These techniques have involved "novel devices or processes such as lie detectors, 'truth serum,' Nalline testing, experimental systems of blood typing, 'voiceprints,' identification by human bite marks, microscopic analysis of gunshot residue, and hypnosis [citation], and, most recently, proof of guilt by 'rape trauma syndrome.'" (*People v. McDonald* (1984) 37 Cal.3d 351, 372-373; see also *People v. Leahy*, *supra*, 8 Cal.4th 587 [horizontal gaze nystagamus test].)

Respondent's reliance on *People v. Ayala* (2000) 24 Cal.4th 243 and *People v. Rowland* (1992) 4 Cal.4th 238 is misplaced. In *Ayala*, the victims were shot with both .38 and .22 caliber guns. The fatal bullet could not be extracted from one of the victims.

After an investigator taped two bullets, one a .22 caliber and the other a .38 caliber, to the victim's skin near the lodged bullet, a radiologist took an x-ray, allowing a visual comparison of the size of the bullets. (*Id.*, at p. 280.) The radiologist did not testify as a ballistics expert. Rather, he testified, based on his examination of the x-ray, that the embedded bullet was the same size as the taped .38-caliber projectile. (*Ibid.*)

This Court held that *Kelly* was inapplicable because the radiologist did not conduct an "experiment." (*Id.*, at p. 281.) The procedure employed by the radiologist – x-raying the victim's skin – merely "'isolate[d] physical evidence whose existence, appearance, nature, and meaning [were] obvious to the senses of a layperson.'" (*Ibid*, quoting *People v. Webb* (1993) 6 Cal.4th 494, 524.) Here, the opposite is true. Criminalist Laskowski did conduct an experiment by using Mikrosil to cast a mold of the gun barrel and then using a microscope in his laboratory to compare the markings on the mold to those on the recovered bullets. Moreover, the technique employed by Laskowski did not merely expose physical evidence which was viewed and readily understood by the jury. Instead of exposing the gun barrel for direct viewing by the jurors, Laskowski's technique attempted to replicate the markings in the barrel. The cast that he made was not something "whose existence, appearance, nature, and meaning [were] obvious'" to the senses of the jurors, notwithstanding respondent's unsupported assertion to the contrary. (IR, at p. 68.)

Similarly, *Rowland* did not involve an experiment relating to the analysis of physical evidence. In *Rowland*, the prosecution was permitted to elicit expert testimony from a medical doctor that the absence of genital trauma was not inconsistent with

nonconsensual sexual intercourse. (*People v. Rowland*, *supra*, 4 Cal.4th 238, 266.) This Court held that *Kelly* did not apply to the expert's opinion because medical testimony that is based on physical examinations by experts does not implicate a "new scientific technique." (*Ibid.*) Here, however, the expert testimony at issue is not that of a medical doctor, but that of a criminalist who conducted a novel experiment to assist him in analyzing ballistics evidence.

Not only was Laskowski's use of the Mikrosil cast a scientific technique, it was new to the field of ballistics identification. Respondent argues that "[b]allistics comparisons of bullets to identify a firearm used in a shooting is a well-established method" and that "Mikrosil casting is used to aid identification of tool marks." (IR, at p. 67.) Even if these propositions are true, it does not follow that use of Mikrosil casting to make a ballistics identification, a technique even Laskowski admitted had never been utilized before, was not a new methodology.

A "new scientific technique," requiring separate *Kelly* validation, may include a novel application of an established technique. (See, e.g., *People v. Ashmus* (1991) 34 Cal.3d 932, 971 [prosecution conceded that electrophoretic analysis of dried semen stains was a new scientific technique, notwithstanding that the electrophoretic analysis of dried blood stains was a generally accepted forensic technique]; *People v. Nolan* (2002) 95 Cal.App.4th 1210, 1214-1215 [*Kelly* "applies to new methodologies"].) Even a technique which has been in long-standing use by police officers may be considered "new" for *Kelly* purposes if it has not been repeatedly "use[d], stud[ied], test[ed] and confirm[ed] by

scientists or trained technicians." (*People v. Leahy*, *supra*, 8 Cal.4th at p. 605.)

Here, as Jim Norris explained in his declaration, Mikrosil casting was a new method for identifying the firearm from which a bullet had been fired. It differed significantly from the traditional identification method, which involved the comparison of the markings on a test bullet fired from the firearm in question to those on the spent bullet to determine if they matched. Laskowski instead compared the markings on the spent bullets with those on the Mikrosil cast made from the gun barrel. (Declaration of Jim Norris [Exhibit H], at p. 81.) Norris had never employed Mikrosil casting in any firearm identifications he had attempted and was not aware of any other criminalists who had utilized this technique. (*Ibid.*)

3. Expert Testimony Would Have Established That Mikrosil Casting Had Not Gained General Acceptance in the Community of Firearms Identification and Ballistics Experts in 1996 and That Laskowski's Experiment Did Not Employ Correct Scientific Procedures

Respondent's argument in support of the admissibility of the Mikrosil casting experiment rests entirely on the erroneous assertion that the analysis was not a new scientific technique and therefore not subject to *Kelly* analysis. Respondent does not argue alternatively that Laskowski's experiment was sufficiently reliable to satisfy the *Kelly* standard. This omission is not surprising since Norris's declaration indisputably establishes the unreliability of Laskowki's Mikrosil technique.

Norris explained in his declaration that the consensus of the experts in the community of firearms identification and ballistics experts was that "the Mikrosil casting

technique was not reliable and should not be used as a method of firearms identification." (*Id.*, at p. 82.) The most significant problem with the method was that the Mikrosil cast would not replicate the markings on a bullet actually fired through the gun barrel. Thus, a comparison of the markings on the cast to those on a spent bullet would not lead to an accurate determination of whether the spent bullet was fired from the firearm from which the cast was made. (*Id.*, at pp. 82-83.) Other problems included air bubbles and residue from the gun barrel that collect in the mold, thereby obscuring information about the markings of the firearm. These problems caused the Mikrosil cast to inaccurately reproduce markings in the gun barrel and prevent accurate comparison with the spent bullet. Finally, Laskowski did not employ correct scientific procedures when he used Mikrosil casting to make his firearm identification because he failed to validate the experiment through the use of positive and negative controls. (*Id.*, at p. 83.).

Significantly, respondent does not dispute Norris's declaration concerning both the unreliability of the Mikrosil casting technique and the incorrect procedures used by Laskowski. Here again respondent presents no declaration or other evidence to refute petitioner's assertions in this case.

4. Even If Unsuccessful in Excluding Laskowski's Firearm Identification under *Kelly*, Petitioner's Trial Counsel Should Have Introduced Expert Testimony to Rebut the Identification Before the Jury

Assuming, arguendo, that the Mikrosil casting technique was not a new scientific technique subject to *Kelly* analysis, which petitioner does not concede, trial counsel was

still obligated to present available expert testimony to attack the reliability of the evidence before the jury. Indeed, respondent's premise is that the defects in Laskowski's technique identified by Norris "could [have] be[en] pointed out to the trier of fact, through cross-examination, *presentation of defense expert testimony*, and argument." (IR, at p. 68, italics added.) The flaw in respondent's analysis is that petitioner's trial counsel failed to do precisely that which respondent indicates could, and should, have been done. Trial counsel's performance was deficient in failing to present available expert evidence to establish the unreliability of the Mikrosil technique both in the evidentiary hearing to determine the admissibility of Laskowski's firearm identification and then before the jury if the identification was found admissible at the evidentiary hearing. Given the availability of expert testimony such as that presented by criminalist Jim Norris in Exhibit H, counsel's failure to counter criminalist Laskowski's analysis does not meet the performance requirements of *Strickland*, *supra*,

5. No Tactical Reason Exists for Trial Counsel's Failure to Present Expert Testimony to Establish That the Firearm Identification Was Unreliable

Citing *People v. Ledesma* (2006) 39 Cal.4th 641, 746, respondent contends that petitioner has not established ineffective assistance of counsel because the record fails to explain why trial counsel did not introduce expert evidence to rebut Laskowski's testimony. (IR, at p. 69.) This rule, however, is not without exceptions, which are applicable under the circumstances of this case.

A claim of ineffective assistance will not be defeated by the absence in the record

of an explanation for counsel's omission when counsel is asked for such an explanation but does not provide one. (*People v. Rhoden* (1989) 216 Cal.App.3d 1242, 1254.) The rationale for this exception is that a petitioner should not be penalized when counsel's unwillingness to cooperate prevents him from obtaining an explanation of the omission being challenged. The circumstances of petitioner's case, while not involving an uncooperative counsel, present an even more compelling case for an exception to *Ledesma*. Here, lead trial counsel, Michael Sprague, was unable to provide an explanation of his failure to present expert testimony due to his death prior to the appointment of habeas corpus counsel.

Although petitioner had second counsel, Mr. Sprague was solely "responsible for all trial decisions, including what defenses to pursue, what motions to file, which witnesses to call, and what legal objections to make." (Declaration of James V. Sorena [Exhibit C], at p. 24.) As second counsel, James Sorena's role was only "to assist [Mr. Sprague] as requested." (*Ibid.*) Thus, the decision not to present expert testimony to rebut the firearm identification was made by Mr. Sprague, and only he could have provided any reason for that omission.

In addition, ineffective assistance may be found when there can be no satisfactory explanation for counsel's omission. (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 746.) This exception also applies to petitioner's case. No reasonable explanation could have existed for trial counsel not to have presented the expert testimony set forth in Norris's declaration to rebut the reliability of Laskowski's experiment.

Respondent identifies two possible reasons why counsel may not have presented expert testimony, but these explanations are both speculative and highly implausible. (IR, at p. 70.) First, respondent speculates that counsel Sprague may have talked to experts who "opined that Laskowski's method was a viable method of identifying from which firearm a spent bullet was fired." (*Ibid.*) Counsel, however, should have had no difficulty finding a legitimate and credible expert who disapproved of the technique since "the use of Mikrosil casting as a method of firearms identification was a topic that had been discussed amongst the experts in the field" in 1996. (Declaration of Jim Norris, [Exhibit H], at p. 82.) "The consensus of the experts was that the Mikrosil casting technique was not reliable and should not be used as a method of firearms identification." (*Ibid.*)

Respondent also speculates that it is "possible that the expert or experts Sprague consulted, although opining that the Mikrosil method was unreliable, also opined, for reasons unstated on the record, that Laskowski's ultimate conclusion as to the identity of the gun that fired the bullets was correct." (IR, at p. 70.) Again, respondent's scenario is both speculative and highly implausible. Any expert who believed that the Mikrosil method was unreliable, and that Laskowski's experiment lacked validation, would have had no basis for concluding that the identification was correct since that was the only method that resulted in an identification. When Laskowski employed traditional ballistics analysis, comparing markings on recovered bullets with those on test fires, he found no match. (2 RT 435.)

6. Petitioner Was Prejudiced by Trial Counsel's Failure to Present Expert Testimony Concerning the Unreliability of the Mikrosil Casting Technique

Respondent contends that there is not a reasonable probability that the outcome of the trial would have been different, even had Laskowski not been allowed to opine that the .25-caliber pistol recovered from Lutts's hotel room fired the bullets that killed Clifford Merck. (IR, at p. 71.) Respondent is incorrect. Laskowski's identification was a critical part of the prosecution's case against petitioner, and the prosecutor made a considerable effort to introduce it into evidence, because it suggested that petitioner actually killed the Mercks rather than merely received property stolen from their house by someone else who committed the murders.

In closing argument, the prosecutor emphasized Laskowski's identification and chastised the defense for failing to rebut it with expert testimony.

> Again, I ask you if it didn't match, if the gun – if those bullets were not fired from that gun, where is the evidence?
>
> Where is someone defense counsel brings to say no, this can't be done, this is not true, these bullets do not match these and this gun can't be tied to this murder? There is no one.
>
> I assure you that if there is someone that could say that, he would be here and he would have testified.

(12 RT 2669.)

Respondent contends that petitioner was linked to the crime through other evidence including fingerprint identifications and his possession of other property belonging to the Mercks. As explained more fully in the petition (pp. 41-46), however, the reliability of this evidence was highly suspect. The positive fingerprint identifications found in 1994

were contradicted by a prior contemporary comparison by criminalist Jerry Roper that resulted in no matches. (6 RT 1589-1590, 1595.) In addition, the witnesses who claimed they saw petitioner in possession of property allegedly belonging to the Mercks lacked credibility and were impeached with their commission of prior bad acts, extensive drug use, mental instability, prior inconsistent statements, self-interest, and failed memories.

B. Counsel Was Ineffective for Not Presenting Evidence That the Match Between the Latent Prints from the Merck Residence and Petitioner's Known Prints Was Unreliable

Respondent claims that petitioner received effective representation regarding the fingerprint evidence introduced against him, but does not dispute the accuracy of Dr. Simon Cole's declaration that fingerprint identifications are unreliable. Instead, respondent argues only that Dr. Cole's declaration does not establish that the unreliability of fingerprint identifications was widely known in 1996 when petitioner's trial took place. (IR, at p. 72.)

Although many of the articles and books mentioned in Dr. Cole's declaration were published after petitioner's trial, the inherent problems in fingerprint identification he discusses were not discovered as a result of any expertise or technology available only after 1996. An expert at the time of petitioner's trial could readily have explained that fingerprint identification was not a valid science. In 1996, as now, the underlying premise of fingerprint identification (all persons have unique fingerprints that can be distinguished by fingerprint examiners) was not scientifically validated, the rate of error in identifications was undetermined, there were no uniform standards for identification,

proficiency testing of examiners revealed false positive identifications, and fingerprint identification had not been subjected to peer analysis or review. Moreover, the proficiency testing that reported the false positive identifications began in 1983, long before petitioner's trial. Indeed, the most egregious, reported results were on a 1995 test in which 22 percent of the individuals taking the test reported at least one false positive. (Declaration of Simon A. Cole, Ph.D., [Exhibit I], at p. 97.)

Thus, competent counsel in 1996 would have been on notice that fingerprint identification was not a reliable science and presented evidence of the shortcomings of the method through expert testimony. No reasonable explanation exists for trial counsel not to have presented this evidence in a case where fingerprint evidence was a critical component of the prosecution's case.

Respondent's attempt to explain why counsel may not have presented expert testimony is unconvincing. (IR, at p. 73.) Respondent speculates that trial counsel might have decided only to attack the fingerprint identification through the cross-examination of the prosecution's fingerprint examiners. Yet, there was no reason for counsel not to supplement that attack on critical evidence with defense expert testimony questioning the validity of fingerprint identification in general. A two-prong attack on the fingerprint evidence was far more likely to convince the jury to disbelieve the prosecution's examiners. Dr. Cole's powerful information regarding the lack of scientific validation and the undetermined rate of error, matters not commonly available to lay person who have been conditioned to believe in "the myth of fingerprints," would certainly have engendered

reasonable doubts in the jury about the reliability of the fingerprint identifications with which they had been presented.

Finally, respondent's contention that petitioner was not prejudiced by the lack of testimony concerning the general unreliability of fingerprint evidence, (IR, at p. 74), is hard to understand in light of the critical role that the fingerprint identifications played in the prosecution's case against petitioner. It was the only evidence establishing petitioner's presence inside the Merck home. Petitioner was not charged with the murders for ten years until the fingerprint identifications were made. Absent the fingerprint identifications, the only evidence against petitioner was that he had been seen in possession of property allegedly taken from the Merck home. This evidence was supplied by witnesses who were impeached with their commission of prior bad acts, drug use, mental instability, prior inconsistent statements, self-interest, and faded memories. Without credible fingerprint identifications, the prosecution's case fell far short of proof beyond a reasonable doubt that petitioner had committed the murders. It s reasonably probable that had the jury been informed about the general unreliability of fingerprint identifications, a premise not disputed by respondent, petitioner would not have been convicted of the murders.

C. Counsel Was Ineffective for Failing to Object to Emma Foreman's Alleged Extrajudicial Statement on Constitutional Grounds

Respondent contends trial counsel was not ineffective because any objection on Confrontation Clause grounds to Foreman's alleged extrajudicial statement would have

been futile since Foreman testified and was subject to cross-examination. (IR, at p. 76.) Respondent is incorrect. The prosecution did not introduce Foreman's extrajudicial statement when Foreman was testifying, but only later during the examination of Lieutenant Porter who had previously interviewed her. (10 RT 2389.) Thus, petitioner's counsel did not have an opportunity to effectively cross-examine Foreman about her alleged statement, as required by the Sixth Amendment. (*Crawford v. Washington* (2004) 541 U.S. 36.) Foreman was no longer on the witness stand when the prosecution introduced her extrajudicial statement.

Respondent also argues petitioner forfeited his due process claim because it was asserted without argument or authorities in support. (IR, at p. 76.) The cases cited by respondent, *People v Callegri* (1984) 154 Cal.App.3d 856, 865 and *People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11, are inapposite. *Callegri* and *Gionis* involved appeals where a point was merely asserted by counsel without any supporting argument or authority. This proceeding is not an appeal, but a habeas corpus proceeding in which petitioner's argument that trial counsel was ineffective for failing to object to certain evidence on constitutional grounds is supported by both analysis and authority. The evidence at issue, Foreman's alleged extrajudicial statement to Lieutenant Porter, was unreliable in the absence of an opportunity to cross-examine Foreman about that statement, thereby rendering its admission a violation of the due process and confrontation clauses.

Finally, respondent's claim that petitioner cannot show prejudice from the

admission of Foreman's statement to Lieutenant Porter, (IR, at p. 76), is incorrect. As previously explained, the guilt determination was close, as reflected in jury deliberations that lasted more than two full days. (5 CT 1364, 1369, 1373, 1458.) Foreman's extrajudicial statement that petitioner admitted beating an elderly couple in Bakersfield, the only evidence suggesting petitioner had confessed to murdering the Mercks, was an important component of the prosecution's case which may well have been persuasive to the jury.

D. Counsel Was Ineffective for Failing to Object to Danny Phinney's Alleged Extrajudicial Statement on Constitutional Grounds

Respondent contends trial counsel was not ineffective because any objection on confrontation clause grounds to Phinney's alleged extrajudicial statement would have been futile since Phinney testified and was subject to cross-examination. (IR, at p. 77.) Respondent is incorrect. Phinney's claimed loss of memory regarding his interactions with petitioner and his statements to Sergeant Diederich, due to drug use, mental illness, and the passage of time, (see, e.g., 6 RT 1654, 1657, 1659, 1672, 1675, 1678, 1683, 1714, 1735-1736), made him essentially unavailable for meaningful cross-examination. Thus, petitioner's counsel did not have the opportunity for effective cross-examination required by the Sixth Amendment. (*Crawford v. Washington* (2004) 541 U.S. 36.) Phinney was simply unable to answer many of the questions posed to him by petitioner's counsel.

Respondent also argues petitioner forfeited his due process claim because it was asserted without argument or authorities in support. (IR, at p. 77-78.) As previously

explained, the cases cited by respondent are inapposite because this is a habeas corpus proceeding raising an ineffective assistance of counsel claim, not an appeal. (See *People v. Callegri*, *supra*, 154 Cal.App.3d at p. 865; *People v. Gionis*, *supra*, 9 Cal.4th at p. 1214.) The evidence at issue, Phinney's alleged extrajudicial statement to Sergeant Diederich, was unreliable in the absence of an opportunity for cross-examination, thereby rendering its admission a violation of the due process and confrontation clauses.

Although respondent claims petitioner cannot show prejudice from the admission of Phinney's statements to Sergeant Diederich, (IR, at p. 78), this was a close case in which the prosecution relied heavily on Phinney's testimony to establish petitioner's possession of property belonging to the Mercks, including Clifford's Colt handgun used in his own killing. Admission of the prior statements made to Sergeant Diederich, after counsel had impeached Phinney with his drug use, mental illness and prior criminal record, improperly rehabilitated Phinney and bolstered his credibility,.

E. Counsel Was Ineffective for Not Including the Magistrate Judge's Admonition Limiting Gerry Tags's Testimony When Reading That Testimony to the Jury

Respondent does not claim petitioner's trial counsel acted reasonably in failing to include the magistrate judge's admonition explaining the limited purpose of Gerry Tags's former testimony when reading that testimony to the jury. Instead, respondent argues only that petitioner was not prejudiced by the omission. (IR, at pp. 78-79.)

As discussed in the petition (Claim IIIC, paragraphs 53-73), the prosecution's case against petitioner was so tenuous that for years the prosecution believed it did not have

enough evidence to charge petitioner. Moreover, the jury was unlikely to have viewed Tags's testimony that she believed petitioner was guilty of the charged murders as merely uncorroborated speculation on her part. Rather, in the absence of the limiting admonition, the jury was likely to give this testimony great weight and accept it for the truth of what was stated because Tags was petitioner's girlfriend at the time of the killings. The jury could reasonably have concluded she knew that petitioner committed the murders and had additional information, not revealed to the jury, establishing his guilt.

F. Counsel Was Ineffective for Failing to Object on Constitutional Grounds to Mitzi Cowan's Testimony That in Early September, 1984 Gerald Cowan Returned to Her Apartment with Folded U.S. Currency

Respondent contends that trial counsel was not ineffective because any objection pursuant to the Eighth and Fourteenth Amendments to Mitzi Cowan's testimony would have been futile. According to respondent, the Eighth Amendment does not provide a basis for excluding irrelevant evidence, separate and apart from state evidentiary rules. (IR, at p. 81.)

Respondent fails to consider that the Fourteenth Amendment is violated when the admission of irrelevant evidence so infects the sentencing proceeding with "unfairness as to render the jury's imposition of the death penalty a denial of due process." (*Romano v. Oklahoma* (1994) 512 U.S. 1, 12.) In addition, under the Eighth Amendment a decision to sentence a defendant to death "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" (*Johnson v. Mississippi* (1988) 486 U.S. 578, 585, quoting *Zant v. Stephens* (1983) 462

U.S. 862, 884-885, 887, fn. 24) Thus, even though the federal constitution does not establish a federal code of evidence for state penalty trials, the admission of evidence in violation of state evidentiary rules may violate the federal constitution. That is what happened when the trial court allowed Mitzi Cowan to testify that Gerald Cowan returned to her apartment with folded currency. Petitioner's counsel acted unreasonably in not also objecting to admission of this evidence on constitutional grounds.

Respondent also argues that admission of Mitzi Cowan's testimony did not prejudice the death verdict. (IR, at p. 82.) Respondent is incorrect. This evidence undoubtedly influenced those jurors who voted in favor of convicting petitioner for murdering Russell. During closing argument the prosecutor emphasized Gerald's possession of the folded currency in support of her contention that petitioner was guilty. (11 RT 2676.)

Those jurors who believed beyond a reasonable doubt that petitioner had murdered Russell were entitled to consider that murder as a circumstance in aggravation in the penalty phase. If Mitzi Cowan's testimony had been excluded, however, it is likely fewer, or even no, jurors would have believed that petitioner was guilty of the Russell murder, and the prosecution's case for death would have been substantially weakened. The penalty decision was close, as indicated by the jury's returning a death sentence on only one of the two murder counts.

G. Counsel Was Ineffective for Not Calling Gerald Cowan as a Witness

Respondent preliminarily notes that the petitioner's trial occurred during the

pendency of Gerald's petition for writ of mandate seeking reinstatement of his guilty plea. Therefore, respondent claims, counsel would have been prohibited by the rules of professional conduct from speaking directly to Gerald and would not have known the substance of Gerald's testimony prior to trial. (IR, at pp. 83-84.) These rules, however, would not have precluded Gerald's counsel from giving petitioner's counsel permission to speak with Gerald. Alternatively, petitioner's counsel could have learned about Gerald's testimony by asking Gerald's counsel or by having petitioner speak with his brother.

In addition, if Gerald was unwilling to testify until his guilty plea was accepted and he was sentenced, petitioner's counsel could have sought a continuance of his trial; the temporary unavailability of such a highly exculpatory witness would have constituted good cause. (Pen. Code, § 1050, subd. (c).) Respondent argues that the likelihood of this Court's reversing the decision of the lower courts was too speculative to warrant a continuance of petitioner's trial. (IR, at p. 84.) However, a reversal was not necessary for petitioner to obtain Gerald's testimony. If the plea to voluntary manslaughter was disallowed, Gerald might have reached a different disposition that would have permitted him to testify, or alternatively, Gerald would have gone to trial with petitioner and testified to his own lesser culpability in the Russell killing while exonerating petitioner. Thus, regardless of this Court's decision, a continuance was likely to have resulted in petitioner's obtaining the benefit of Gerald's testimony.

Respondent also contends that even if it were known that Gerald's trial testimony would match what is stated in his declaration, petitioner's counsel may have had strategic

reasons for not calling Gerald as a witness. (IR, at p. 84.) The reasons suggested by respondent, however, are not plausible. There was no risk in presenting Gerald's testimony to the jury. The jury was likely to believe his account of the Russell killing because it was corroborated by the physical evidence from the crime scene, including the impressions on the cigarette butt that were consistent with Gerald's teeth. Gerald's description of the killing and his explanation for why he killed Russell were credible. Moreover, none of the circumstances related to the Russell killing indicated that more than one person committed the crime.

In addition, Gerald's testimony that he did not participate in the killing of the Mercks and did not know who killed them would not have made petitioner more likely to have been convicted of those crimes. (See IR, at pp. 84-85.) Trial counsel never attempted to establish reasonable doubt by arguing that Gerald killed the Mercks. The elimination of Gerald as a suspect in the Merck killings would not have had any negative repercussions for petitioner's defense. Gerald's confession to being the sole killer of Russell would have significantly improved petitioner's chance of being acquitted of the Russell murder charge without jeopardizing his defense to the Merck murder charges.

Finally, respondent contends petitioner was not prejudiced by the absence of Gerald's testimony. (IR, at p. 85.) However, the evidence against petitioner in the Russell case was very weak, as indicated by the jury's nine-to-three deadlock. If Gerald had testified he alone killed Russell, it is reasonably probable fewer jurors would have believed beyond a reasonable doubt that petitioner murdered Russell, and therefore, fewer,

if any, jurors would have considered the Russell killing as an aggravating circumstance in the penalty phase. The elimination of the Russell murder as a circumstance in aggravation for most, if not all, of the jurors would likely have led to a more favorable penalty determination given the closeness of the penalty decision.

CLAIM 4: NEWLY DISCOVERED EVIDENCE REGARDING THE UNRELIABILITY OF FINGERPRINT IDENTIFICATIONS UNDERMINES THE ENTIRE PROSECUTION CASE

Petitioner is entitled to habeas corpus relief if newly discovered "evidence casts fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1246.)

Respondent is incorrect that petitioner's evidence establishing the unreliability of fingerprint identifications, if viewed as newly discovered, fails to meet the standard for relief. (See IR, at pp. 85-86.) The alleged match of petitioner's left middle finger and left thumb to latent prints lifted from the Merck home was the most critical evidence in the prosecution's case for guilt. Indeed, it was not until the fingerprint identifications were made, 10 years after the crimes, that a complaint was even filed against petitioner. Absent the fingerprint identifications, the prosecution had no evidence placing petitioner inside the Merck home. The prosecution's case consisted only of witnesses who claimed to have seen petitioner in possession of property that allegedly belonged to the Mercks. The credibility of these witnesses was highly suspect for a variety of reasons, including faded memories, drug use, prior criminal conduct, mental illness, and self-interest.

Thus, the entire prosecution case is undermined by the new evidence concerning the unreliability of fingerprint identifications set forth in Dr. Cole's declaration. (See Declaration of Simon A. Cole, Ph.D. [Exhibit I], at pp. 86-99.) That evidence reveals that

fingerprint identification was not a valid science due to the absence of scientific validation (*id.*, at pp. 92-93), an undetermined rate of error (*id.*, at pp. 89-90, 92-94), the lack of uniform standards for identification (*id.*, at pp. 90-92), the high rate of false positives in the proficiency testing of examiners (*id.*, at p. 97), and the absence of peer analysis or review (*id.*, at pp. 89-90, 93-94).

CLAIM 5: PETITIONER WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE

A. Counsel Was Ineffective for Not Presenting Evidence of Petitioner's Neurological Deficits

Respondent contends that trial counsel was not ineffective because he conducted a reasonable investigation into petitioner's brain damage and that the failure to present evidence of petitioner's neurological deficits did not prejudice the penalty verdict. (IR, at pp. 92.) Respondent is incorrect. Trial counsel were aware, or reasonably should have been aware, of numerous, very strong indicators of possible brain damage in petitioner's history, yet they failed to conduct an investigation adequate to disclose the existence and extent of these impairments. Had the evidence of petitioner's brain damage been introduced in the penalty phase, there is a reasonable probability petitioner would not have been sentenced to death. The penalty decision was close, and petitioner's brain damage was a compelling circumstance in mitigation.

1. Applicable Law

"To perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present [] and explain [] the significance of all the available [mitigating] evidence.'" (*Mayfield v. Woodard* (9th Cir. 2001) 270 F.3d 915, 927 (en banc) (quoting *Williams v. Taylor* (2000) 529 U.S. 362, 399.) "[L]ong-standing professional standards direct that investigation into the background of persons charged with capital crimes ordinarily be undertaken, for the purpose of the penalty phase of trial." (*In re Lucas* (2004) 33 Cal.4th 682, 728.) "[W]here

counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition as a mitigating factor in a penalty phase hearing, without a supporting strategic reason, constitutes deficient performance." (*Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1043.) "The Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy." (*Deutscher v. Whitley* (9th Cir. 1989) 884 F.2d 1152, 1161, *vacated on other grounds*, 506 U.S. 935 (1992).)

As explained in *Wiggins v. Smith* (2003) 539 U.S. 510, 522-23, the determination of whether trial counsel acted reasonably in the penalty phase is focused "on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background *was itself reasonable*." Trial counsel in *Wiggins* was ineffective because their investigation was abandoned after obtaining limited social history records and failing to follow up on mitigating information contained in those records. (*Id.*, at pp. 524-25.) This lack of investigation prevented trial counsel "from making a fully informed decision with respect to sentencing strategy." (*Id.*, at pp. 527-528.)

This Court has reiterated that "'before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation.'" (*In re Lucas*, *supra*, 33 Cal.4th at pp.721-722 (quoting *In re Marquez* (1992) 1 Cal.4th 584, 602).) Moreover, trial "counsel's alleged tactical decisions must be subjected to 'meaningful scrutiny'" by the reviewing court. (*In re Lucas*, *supra*, 33 Cal.4th at p. 722.)

In determining whether trial counsel's deficient representation was prejudicial, the court "reweigh[s] the evidence in aggravation against the totality of available mitigating evidence." (*Wiggins v. Smith*, *supra*, 539 U.S. at p. 534). The totality of the available evidence includes "'both that adduced at trial, *and the evidence adduced in the habeas proceeding[s]*.'" (*Id.*, at p. 536 (italics in original) (quoting *Williams*, 529 U.S. at pp. 397-98).) "Evidence regarding social background and mental health is significant, as there is a 'belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" (*Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079, 1090 (quoting *Boyde v. California* (1990) 494 U.S. 370, 382).)

2. Petitioner's Counsel Did Not Conduct a Reasonable Investigation into Whether Petitioner Suffered from Brain Damage

Respondent asserts trial counsel adequately investigated the possibility that petitioner suffered from an organic brain disorder that mitigated his culpability for the crime. (IR, at p. 89.) Reasonably competent attorneys, however, would have investigated further.

According to Dr. Khazanov, petitioner's history contained "numerous, very strong indicators of possible brain damage." (Declaration of Natasha Khazanov, Ph.D. [Exhibit P], at p. 187.) These "indicators," which should have been readily apparent to trial counsel, included petitioner's family history of alcoholism; multiple head traumas suffered by petitioner beginning in early childhood, some of which resulted in the loss of

consciousness; petitioner's long-term alcohol and polysubstance abuse, beginning at a very early age; petitioner's suffering from chronic violence, including parental abuse and neglect, both physical and emotional; petitioner's poor performance in school and on standardized testing; and petitioner's lapses in consciousness while engaged in conversation with others. (*Id*,. at pp. 187, 195-196.)

In addition, further investigation has uncovered another strong indicator of possible brain damage from petitioner's childhood – exposure to neurotoxicants.[8] As explained in Betty Cowan's declaration, petitioner lived in converted military barracks in Richmond and Rodeo, California from 1954 to 1956, when petitioner was six to eight years old. (Declaration of Betty Jane Cowan [Exhibit Q], at p. 204.) In Richmond, the Cowans lived at 701-1e S. 14th Street. (Excerpt from 1954-55 Richmond city directory [Supp. Exhibit A], at p.2.) In Rodeo, the family address was F2 Bayo Vista. (Excerpt from 1956 Rodeo city directory [Supp. Exhibit B], at p. 4.)

Both of these addresses were extremely close to toxic waste sites that were

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[8]The petition for writ of habeas corpus in this case was filed on November 9, 2007. As of that date, the allowance for habeas corpus investigation funds was capped at $25,000 by this Court's policies regarding death penalty cases. Habeas counsel exhausted those funds without being able to investigate petitioner's exposure to neurotoxicants in childhood. On January 1, 2008, this Court modified its policies to allow additional funding for habeas corpus investigation in cases in which either the habeas corpus petition or a timely reply to an informal response had not yet been filed. (Policy 3, Standard 2-2.1.) Petitioner used these additional funds to conduct further investigation into the possible causes of petitioner's brain damage. Petitioner requested that this Court allow him additional time to complete this investigation before filing the reply to the informal response, but that request was denied.

polluting the environment. ("Hazardous Sites Multiplying," Contra Costa Times, April 21, 1985 [Supp. Exhibit C], at p. 6.) A 1980 investigation by the California Department of Health Services located 18 abandoned waste sites in western Contra Costa County. These sites were located in areas with extensive chemical and oil refining industries. The abandoned toxic materials consisted of "bags and barrels and old waste ponds containing such things as pesticide residues, fertilizers, heavy metals, materials used in the manufacturing of dynamite and washings from the cleaning of railroad cars." One site - Old American Smelting & Refining Company – was located in Selby, adjacent to Rodeo; nine sites – Cooper Chemical Company, Drew Sales, 801 Wharf Street, Stauffer Chemical Company, Bray Oil Company, Richmond Tank Car and Manufacturing Company, United Heckathorn, South 47th Street, and California Cap Company – were located in Richmond. ("Waste Sites Found in Contra Costa," San Francisco Chronicle, October 8, 1980 [Supp. Exhibit D], at pp.8-9.)

The high number of abandoned waste sites found in Contra Costa County was likely attributable to the heavy concentration of industry in the county. As of 1980, there were 50 major chemical plants and oil refineries in the county as well as primary metals, metal fabrication, electrical machinery and transportation equipment manufacturing facilities. "Contra Costa [wa]s the primary generator and dumping ground for hazardous wastes in the Bay area. Close to half the area's industrial waste [wa]s produced in Contra Costa – with 87 percent of it coming from petroleum refineries and chemical plants." ("Locations of Former Waste Dumps Told," Martinez News-Gazette, October 8, 1980

[Supp. Exhibit E], at pp. 11-12.)

One particularly notorious polluter near Rodeo was the Old American Smelting and Refining Company, which operated a smelter from 1886 until 1970. The company left behind a slag heap that had polluted the San Pablo Bay throughout its existence. Lead and arsenic continuously leaked from the heap into the bay. ("More state money sought to clean up Selby slag heap," Contra Costa Times, March 10, 1987 [Supp. Exhibit F], at p. 14; "Selby slag heap cleanup under way," Contra Costa Times, February 26, 1991 [Supp. Exhibit G], at p. 16.)

Even closer to petitioner's residence in Rodeo was the Unocal refinery, which began operating in 1895. The refinery, which was adjacent to the Bayo Vista housing projects, had a long history of emitting toxins into the air of Rodeo. (Excerpt from E. Werth, The History of Rodeo [Supp. Exhibit H], at pp. 20-22; Excerpt from Case 6: Unocal Good-Neighbor Agreement (Crockett & Rodeo, CA) [Supp. Exhibit I], at p. 24.)

A significant polluter in Richmond was the Richmond Stauffer Chemical Company, which operated at least from 1945 to 1997. It caused a putrid odor in the air and left a fine mustard-brown dust on cars parked nearby. ("Rotten egg smell and brown dust: Life in Seaport – next door to a plant making pesticides," San Francisco Chronicle, August 31, 2004 [Supp. Exhibit J], at pp. 26-28.) After the chemical plant was closed, arsenic, heavy metals, lead, nitric acid and volatile organic compounds were found at the site. (*Id.*, at p. 27.)

It is well settled in the mental health field that exposure of children to

neurotoxicants may cause impairments in brain development. (See *Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1226-1228.) "Children are uniquely susceptible to hazardous environmental exposures – they are not little adults. (National Academy of Sciences, 1993). Exposures that occur before conception and continue through late adolescence can cause or contribute to disease and can disrupt development, learning, and behavior." (Antoniadis, A., Gilbert, S.G., & Wagner, M.G. (2006, Sept. 26). Neurotoxicants: Environmental contributors to disability in children. *The ASHA Leader*, 11 (13), 6-7, 38-39 [Supp. Exhibit K], at p. 30.) Moreover, "exposures to neurotoxicants such as lead, mercury, and pesticides can have a particularly detrimental impact on brain function and in turn lead to the expression of learning and developmental disabilities . . ." (*Ibid*; see also T. Schettler, J. Stein, F. Reich, & M. Valenti, Executive Summary, *In Harm's Way: Toxic Threats to Child Development* (2000) Greater Boston Physicians for Social Responsibility [Supp. Exhibit L], at p. 40 ["studies demonstrate that a variety of chemicals commonly encountered in industry and the home can contribute to developmental, learning, and behavioral disabilities"in children].)

Petitioner's exposure to neurotoxicants and other likely causes of brain damage should have put trial counsel on notice that a neuropsychological assessment of petitioner was needed to determine the existence of neurological deficits. Instead of a neuropsychological assessment, however, counsel had petitioner examined by Dr. John Byrom, Ph.D., a clinical psychologist with no expertise in brain damage. He administered psychological tests, but these tests were designed to assess petitioner's personality and

intelligence, not to determine the presence of brain damage. (Declaration of Natasha Khazanov, Ph.D. [Exhibit P], at pp. 182, 183.) Despite the absence of appropriate testing, Dr. Byrom suspected that petitioner had brain damage because of his history of head trauma and advised trial counsel to refer petitioner for "some sort of neuropsychiatric testing." (*Id.*, at p. 183.)

Trial counsel followed up on Dr. Byrom's recommendation by having petitioner undergo testing that was known to be "notoriously insensitive to many brain disorders." (*Id.*, at pp. 183-184) These tests, an electroencephalogram and a SPECT brain scan, were "not an adequate substitute for the neuropsychological test battery that was available for testing Mr. Cowan before his trial in 1996." (*Ibid.*) It was thus unreasonable for trial counsel to stop their investigation into whether petitioner suffered from longstanding brain damage simply because of the normal findings on this limited testing. In light of petitioner's history replete with indications of brain damage and Dr. Byrom's recommendation, "counsel knew or should have known" further investigation might turn up materially favorable evidence. (*People v. Williams* (1988) 44 Cal.3d 883, 937.) The further investigation should have consisted of neuropsychological testing that was known in 1996 to be a reliable indicator of brain damage. The fact that trial counsel conducted some further testing does not excuse counsel's failure to conduct appropriate further testing.

3. Petitioner Suffered Prejudice

Respondent does not dispute the validity of Dr. Khazanov's findings by presenting

a contrary declaration from another expert or by citing to any scholarly writings that are inconsistent with her declaration. Despite the opportunity afforded respondent to present such evidence in his Informal Response, no such evidence has been adduced. Instead, respondent again resorts merely to speculation. He claims that the jury would not have credited Dr. Khazanov's opinions because they were inconsistent with the allegedly purposeful manner in which the murders were committed and petitioner's later attempts to conceal his identity as the killer. Thus, according to respondent, petitioner was not prejudiced by the absence of evidence concerning his neurological deficits. (IR, at pp. 90-92.)

Dr. Khazanov, however, never opined that petitioner's brain damage rendered him incapable of committing the crimes for which he was convicted. Instead, Dr. Khazanov found that petitioner had damage in his frontal lobes, which through no fault of his own, increased his vulnerability to impulsive aggression. Dr. Khazanov explained that the frontal lobes are "primarily responsible for the organization, planning, execution and regulation of complex motor movements and actions." (Declaration of Natasha Khazanov, Ph.D. [Exhibit P], at p. 184.) The behavioral effects of frontal lobe damage "are many and varied," including many abnormalities that would have contributed to petitioner's inappropriate use of violence to solve his problem of how to obtain property that could be exchanged for drugs without his being arrested. (*Id.*, at pp. 185-186.)

Most pertinent amongst these behavioral effects were deficits in abstract thinking which meant that petitioner had impairments in problem-solving abilities and difficulties

in considering alternative solutions. In addition, his judgment was deficient, he lacked insight, and he was unable to adapt to new situations. He also had problems controlling his behavior, which led to poor emotional control, impulsivity, over-reactivity, difficulty inhibiting inappropriate or unwanted responses, diminished frustration tolerance, and disinhibition regarding aggression. (*Id.*, at pp. 185-186.) All of these manifestations of frontal lobe dysfunction were consistent with the manner in which the killings of the Mercks occurred.

Respondent claims petitioner "was able to 'plan or carry out a specific course of action,'" but there is no indication that petitioner pre-planned a "specific course of action" that included killing the Mercks. (See IR, at p. 91.) If petitioner was responsible for the homicides, it is more likely they were the result of an impulsive, uninhibited explosion of violence caused by the stress of unexpectedly coming into contact with the Mercks during the burglary of their home. Petitioner was unable to consider an alternative solution to violence or to deter his inappropriate response. In addition, petitioner's alleged conduct after the killings did not demonstrate he was able to "assess the environment" and "respond rationally," as claimed by respondent. (See IR, at p. 91.) If the prosecution's evidence is to be believed, petitioner sold or gave away much of the property he took from the Mercks, including the murder weapon to Danny Phinny and Rob Lutts (6 RT 1631, 1635, 1648; 7 RT 1894), a turquoise ring to his sister Catherine Glass (9 RT 2161-2163), and a cigarette lighter case to Ronnie Woodin (8 RT 1926, 1938-1939; RT 2164). This conduct, which directly exposed petitioner as a suspect in the murders, hardly qualified as

a "rational" response to petitioner's situation.

In *In re Lucas*, this Court found a reasonable probability that the petitioner would not have been sentenced to death if his trial counsel had presented additional mitigation evidence because "[a] significant potential existed[ed] that this evidence would [have] produce[d] sympathy and compassion in members of the jury and l[e]d one or more to a more merciful decision." (*In re Lucas*, *supra*, 33 Cal.4th at p. 735.) The same "significant potential" exists with respect to the evidence of brain damage omitted from petitioner's trial. "Had the jurors been provided with such evidence, they would not have been left to consider inexplicable acts of violence, but would have had some basis for understanding how it was that petitioner became the violent murderer he was shown to be at the guilt phase." (*Id.*, at p. 732.) Since the penalty decision was close (the jurors deliberated approximately 10 hours over three days and returned only one death sentence), there is a reasonable probability petitioner would have received a more favorable verdict if counsel had presented this powerful mitigating evidence.

B. Counsel Was Ineffective for Failing to Present Additional Evidence of Petitioner's Troubled Childhood and Other Mitigating Circumstances

Respondent contends that trial counsel acted reasonably in limiting the scope of the mitigation evidence, and that petitioner was not prejudiced from the omission of any additional evidence concerning his troubled childhood and other mitigating circumstances. (IR, at pp. 93-95.) Respondent is incorrect.

1. Counsel's Performance was Deficient

During the penalty phase trial counsel present limited evidence of mitigating circumstances in petitioner's childhood and background through the testimony of petitioner's cousin, Leroy Cowan, and aunt, Selma June Yates. This testimony primarily touched on Wes Cowan's alcoholism and his physical abuse of petitioner and Betty Cowan. Respondent speculates trial counsel may have chosen not to present additional evidence because counsel "considered such evidence cumulative of the evidence already presented, and unlikely to convince the jury." (IR, at p. 93.) Respondent's explanation is not plausible.

Additional evidence concerning the mitigation themes discussed by petitioner's cousin and aunt would have served to corroborate their testimony, making the jury more, not less, likely to find the evidence truthful and persuasive. In addition, the evidence trial counsel failed to present would not have merely repeated the testimony of Leroy Cowan and Selma June Yates. Leroy and Selma were only with the Cowans for very short periods during petitioner's childhood and their knowledge of petitioner's background was far less extensive than that of petitioner's immediate family members, none of whom were called to testify. Family members could have expanded upon the extent and severity of abuse inflicted by Wesley Cowan.[9]

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[9]Respondent speculates counsel may have been disinclined to call petitioner's mother as a witness because Michael Hilburn's declaration states she was abusive towards petitioner and addicted to pills. (See IR, at pp. 93-94.) Respondent misreads the declaration. Hilburn said his own mother, not Betty Cowan, was addicted to pills.

For example, Betty Cowan could have testified that when petitioner was eight, Wes whipped him so hard with a belt petitioner was left with welts on his body. (Declaration of Betty Cowan [Exhibit Q], at p. 208.) Catherine Glass could have testified that when petitioner was about 15, Wes beat him into unconsciousness, claiming he had to make petitioner into a man. (Declaration of Catherine Glass [Exhibit T], at p. 246.) Melanie Griffith could have testified that when petitioner was about 16, Wes used his fist to repeatedly punch petitioner in the head, while petitioner crouched in the corner of the yard and begged Wes to stop. (Declaration of Melanie Griffith [Exhibit V], at p. 255.)

In addition, evidence that could have been presented through family members, friends, and social history records would have established additional, significant mitigating circumstances not discussed by Leroy Cowan and Selma June Yates. These circumstances included petitioner's multiple head traumas, petitioner's frequent moving and changing of schools throughout childhood, emotional abuse inflicted by petitioner's father, petitioner's long-term alcohol and substance abuse, the incarceration of petitioner's father in prison when petitioner was 12, the divorce of petitioner's parents when petitioner was 18, the death of petitioner's father when petitioner was 20, the failure of petitioner's two marriages, and petitioner's infertility.

(Declaration of Michael Hilburn [Exhibit CC], at p. 279 ["my mother was addicted to pills"].) In addition, Betty's abusiveness towards petitioner should not have deterred counsel from using her as a witness. Additional abuse inflicted by the parent whom petitioner looked to for protection from his abusive father rendered petitioner's childhood even more traumatic.

With respect to most of this additional mitigation evidence – multiple head traumas, frequent moving and changing of schools, emotional abuse, father's incarceration, and parents' divorce – respondent suggests no strategic reason to justify their omission. Respondent argues only that counsel may have had strategic reasons not to present evidence of petitioner's failed marriages, the death of his father, his long-term substances abuse, and his infertility because it could have made the jury more likely to impose the death penalty. (IR, at p. 94.) To the contrary, these circumstances helped to explain the difficulties petitioner faced in his life and would have made the jury more sympathetic in deciding penalty. Indeed, second counsel, James Sorena intended to have Dr. William Pierce explain how the death of petitioner's father affected petitioner until Mr. Sprague ordered Dr. Pierce not to testify. (Declaration of James V. Sorena [Exhibit C], at p. 25.) Wes Cowan's death was significant because it caused petitioner to experience greater depression and feelings of hopelessness when all hope he could somehow earn his father's affection was extinguished. Petitioner no longer cared about anything, and, not surprisingly, the seriousness of his criminal conduct escalated. (Declaration of Samuel Jinich, Ph.D. [Exhibit EE], at pp. 322-327.)

Petitioner's long-term substance abuse was significant evidence in mitigation because it was a potential contributing factor to his brain damage. It also revealed petitioner's acute need to self-medicate his depression, thereby corroborating the existence and severity of that illness. (*Id.*, at pp. 323-324, 326-327.) Evidence about petitioner's failed marriages and inability to have children was also highly mitigating. In the absence

of a close attachment with his parents, petitioner had a profound need to find someone with whom he could have a secure attachment. The failure of his marriages was therefore especially disappointing and left petitioner without a sense of emotional security to operate as an internal resource for successfully coping with life's problems. (*Id.*, at pp. 327, 330.) Petitioner's inability to have children was traumatic because it represented petitioner's failure as a man and was largely the cause for the break-up of his second marriage. (*Id.*, at p. 331.) Thus, no reasonable explanation existed for trial counsel not to present additional mitigation evidence through petitioner's family members and friends and through social history records.

Respondent compares petitioner's case to *In re Andrews* (2002) 28 Cal.4th 1234, where a claim of ineffective assistance in the penalty phase was denied, but ignores glaring differences between the cases. (See IR, at pp. 94-95.) Most significantly, in *Andrews* the petitioner insisted counsel not involve his family in the penalty phase defense. An attorney "is not required to present potentially mitigating evidence over the defendant's objection." (*In re Andrews*, *supra*, 28 Cal.4th at p. 1254.) In addition, counsel's preliminary investigation into Andrews's background did not disclose "an excessively abusive or impoverished upbringing" and counsel "had no significant documentation of any mental deficiencies petitioner might suffer." (*Id.*, at p. 1255.) Finally, Andrews's counsel adopted a penalty phase strategy of portraying him as a follower in order to mitigate his criminal responsibility, which did not warrant a lengthy presentation of his background. (*Id.*, at p. 1256.)

None of these circumstances were present in the instant case. Petitioner did not object to his family testifying in the penalty phase. Investigation into petitioner's family and background did disclose compelling evidence of excessive abuse and mental deficiencies. Finally, counsel's penalty phase strategy was to mitigate petitioner's culpability based upon the abuse he suffered in childhood. In closing argument, counsel argued:

> This guy [Wes Cowan] beat on this kid [petitioner] and beat on the family, beat on his family until he was stopped by someone else, maybe the lady with the rolling pin to knock him out. That is the kind of life that this man grew up in. That is the kind of element that took from him the competence to be the individual, the caring and loving and sensitive individual that we take for granted in our society.

(13 RT 2996-2997.) Given this defense strategy, counsel was unreasonable in failing to further develop and corroborate the mitigating circumstances presented at trial, and in failing to introduce additional circumstances in mitigation relating to the traumas suffered, and obstacles faced, by petitioner.

2. Petitioner Was Prejudiced by Counsel's Omissions

Respondent contends that even if counsel acted unreasonably, petitioner was not prejudiced because counsel presented some evidence about petitioner's childhood and additional mitigation evidence would not have swayed the jury. (IR, at p. 95.) However, when the evidence in aggravation is reweighed against the totality of available mitigating evidence, including the additional evidence adduced in theses proceedings, there is a reasonable probability that petitioner would not have been sentenced to death if counsel

had performed reasonably. The mitigation evidence not introduced at trial paints a very different portrait of petitioner which the jury would have viewed more sympathetically. There was a very wide "discrepancy between what counsel did investigate and present and what counsel could have investigated and presented." (*Stankewitz v. Woodford* (9th Cir. 2004) 365 F.3d 706.)

C. Counsel Was Ineffective for Failing to Present Expert Psychological Testimony to Identify and Explain Problems That Thwarted Petitioner's Development as a Child and Adolescent and Compromised His Ability to Function as an Adult

1. Counsel's Performance Was Deficient

Respondent's brief misstates the scope of petitioner's claim for relief. According to respondent, "[p]etitioner asserts his trial counsel was ineffective for not calling *a psychologist, Dr. William Pierce*, at trial 'to testify about numerous mitigating factors relating to [petitioner's] mental condition and life history.'" (IR, at p. 96 (italics added).) In fact, petitioner's claim was stated more broadly and was not specifically limited to the failure to call Dr. Pierce. Petitioner asserted that counsel was ineffective for not presenting the testimony of "a mental health expert," whether that expert was Dr. Pierce or any other psychologist, who would have testified about the mitigating evidence identified in Dr. Samuel Jinich's declaration. (Petition, at p. 116; see also pp. 118-119.) Respondent does not address this broader claim.

In order to establish the unreasonableness of counsel's omission, the petition notes that even second counsel, Mr. Sorena, recognized the importance of presenting expert

testimony concerning the traumas and developmental obstacles experienced by petitioner during his childhood, adolescence, and adulthood. Accordingly, Mr. Sorena developed a penalty phase strategy that focused on expert testimony from Dr. Pierce. However, just when the penalty phase was about to begin, Mr. Sprague unilaterally decided Dr. Pierce would not testify. (Petition, at pp. 116-117.)

According to respondent, petitioner's claim must be denied because Mr. Sprague had a tactical reason for not calling Dr. Pierce as a witness. (IR, at 97.) This argument, however, does not address counsel's failure to present an expert witness other than Dr. Pierce in the penalty phase. Moreover, just because Mr. Sprague may have had a reason for dismissing Dr. Pierce does not mean his performance was competent. As this Court stated in *In re Lucas*, *supra*, 33 Cal.4th at p. 722, trial "counsel's alleged tactical decisions must be subjected to 'meaningful scrutiny'" by the reviewing court. "[A]n attorney's performance is not immunized from Sixth Amendment challenges simply by attaching to it the label of 'trial strategy.' Rather '[c]ertain defense strategies may be so ill-chosen that they may render counsel's overall representation constitutionally defective.'" (*Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 846 (quoting *United States v. Tucker* (9th Cir. 1983) 716 F.2d 576, 586).) Trial counsel's strategic decisions therefore must be reasonable under the circumstances. (*Jones v. Wood* (9th Cir. 1977) 114 F.3d 1002; *In re Marquez*, *supra*, 1 Cal.4th at p. 602 ["[B]efore counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation"].)

Here, Mr. Sprague's decision not to present testimony from Dr. Pierce, or any other expert witness, regarding petitioner's troubled background was "so ill-chosen" that it fell outside the range of reasonable representation. Mr. Sorena, who prepared the penalty phase presentation, vehemently disagreed with Mr. Sprague's decision. He believed that the benefits of Dr. Pierce's testimony far outweighed Mr. Sprague's concern, whatever that may have been, and that the penalty phase defense was doomed to failure without testimony from Dr. Pierce. (Declaration of James V. Sorena [Exhibit C], at pp. 25-26.) In addition, Mr. Sprague was unreasonable in instructing Mr. Sorena to go forward with the penalty phase rather than asking for a continuance to obtain a replacement expert.[10]

2. Petitioner Was Prejudiced by the Absence of Expert Testimony from a Psychologist in the Penalty Phase

Respondent argues petitioner was not prejudiced by the omission of testimony from a mental health expert. Again, respondent incorrectly focuses only on the testimony of Dr. Pierce, rather than the testimony of an expert in general. (IR, at pp. 98-99.) Respondent claims "there was already significant evidence of petitioner's troubled childhood before the jury," but that evidence focused primarily on Wes's alcoholism and the abuse he inflicted, thus falling far short of identifying the full scope of the problems petitioner faced in his childhood, adolescence, and adulthood. The jury was not informed of petitioner's

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[10]Respondent criticizes Mr.Sorena's declaration because it includes opinion evidence that, according to respondent, is inadmissible under the rules of evidence. (IR, at pp. 97-98.) There is no requirement, however, limiting exhibits submitted in support of a habeas petition to evidence admissible in court.

intense need to gain approval from his father, the *emotional* abuse inflicted by his father, his frequent change of residences and schools, the incarceration and later death of his father, his parents' divorce, his failed marriages, and his inability to have children.

In addition, in the absence of testimony from a mental health expert, the jury would not have understood how the numerous physical and psychological traumas, deprivations, and developmental obstacles faced by petitioner thwarted his development and compromised his ability to function adequately. "The jury did not have the benefit of expert testimony to explain the ramifications of these experiences on [petitioner's] behavior. Expert evidence is necessary on such issues when lay people are unable to make a reasoned judgment alone." (*Caro v. Calderon*, *supra*, 165 F.3d at p. 1227.)

Respondent also claims testimony by an expert about petitioner's experience in prison was likely to have harmed, rather than aided, the jury's perception of petitioner. The jury, however, had already found petitioner guilty of two first-degree murders and learned from evidence introduced at penalty phase that he had been convicted of a robbery in 1970 (13 RT 2872-2875), and had committed a robbery in 1985 (11 RT 2583-2589). Thus, it was unlikely evidence of prior incarcerations would have come as a surprise or further lowered their perception of petitioner. Instead, expert testimony about petitioner's accomplishments and positive adjustments in prison could only have been viewed by the jurors as powerful evidence in mitigation.

Respondent further argues that any claim of prejudice is speculative because Dr. Pierce's declaration lacks specificity regarding how his testimony would have been helpful

to the defense. (IR, at p. 99.) Dr. Pierce lost his case file and was unable to refresh his memory about the testimony he was intending to give. (Declaration of William Pierce, Ph.D. [Exhibit DD], at p. 284, fn. 1.) Dr. Pierce's failure of memory, however, is not dispositive because, again, the claim made by petitioner is not specific to Dr. Pierce. Petitioner claims he was prejudiced by counsel's failure to present any testimony from a mental health expert. Dr. Samuel Jinich's declaration [Exhibit EE] illustrates the nature of the expert testimony that could have been introduced had trial counsel performed competently. Dr. Jinich identified the totality of traumas, deprivations, and obstacles that thwarted petitioner's social and psychological development, and explained how these experiences turned him into an adult with low self-esteem, deep feelings of inadequacy, depression, a sense of alienation from the world around him, a dependence on methamphetamine and alcohol, and a limited capacity to constrain impulsive behavior. Additionally, testimony from a psychologist would have detailed petitioner's impaired mental functioning, including his deficits in judgment and decision-making, at the time of the killings. (Declaration of Samuel Jinich, Ph.D. [Exhibit EE], at p. 346.)

Respondent finds fault with Dr. Jinich's declaration because it relies in part on Dr. Khazanov's declaration which, according to respondent, would not have been available to Dr. Pierce at the time of trial. (IR, at p.99.) However, had trial counsel performed competently, they would have had neuropsychological testing administered to petitioner. (See Claim 5A.) Thus it would have been known in 1996 that petitioner had brain damage, and the clinical psychologist could have relied on that finding in rendering an

expert opinion about petitioner's social and psychological development.

As recognized by second counsel Mr. Sorena, the absence of a mental health expert left a gaping hole in petitioner's penalty phase defense. (Declaration of James V. Sorena [Exhibit C], at p. 26.) An expert would have helped the jury "understand[] how it was that petitioner became the violent murderer he was shown to be at the guilt phase." (*In re Lucas*, *supra*, 33 Cal.4th at p. 732.)

D. Counsel Was Ineffective for Failing to Present Evidence of Petitioner's Accomplishments and Positive Adjustment During Previous Incarcerations and in the Prison Ministries Program

Respondent contends trial counsel was not ineffective for failing to present evidence of petitioner's positive adjustments during previous incarcerations because counsel may have had sound tactical reasons for not doing so. Alternatively, respondent claims petitioner was not prejudiced by the absence of this evidence. (IR, at pp. 100-102.) Respondent is incorrect. There was no sound tactical reason for the omission, which prevented the jury from considering powerful mitigating evidence.

1. No Reasonable Strategic Decision Supported Counsel's Omission

Since Mr. Sprague, who was responsible for all decisions concerning the witnesses to be called, is deceased, petitioner is unable to obtain a direct explanation for counsel's omission. Nonetheless, the justification for presenting evidence of petitioner's positive adjustment in prison was so overwhelming there could have been no reasonable strategic decision for its omission. Indeed, Mr. Sorena intended to present the prison-adjustment evidence through Dr. Pierce until Mr. Sprague directed him not to testify. Mr. Sprague's

decision left the defense with no other witnesses to address petitioner's accomplishments.

Respondent argues counsel's interviewing of Bobby Novak, house manager at the Prison Ministries Program in Sacramento, but not calling him to testify, suggests counsel had a tactical reason for not presenting such evidence. (IR, at pp. 100-101.) Respondent's argument is speculative, establishing only that counsel were aware of petitioner's accomplishments in the Prison Ministries Program but providing no insight into why Novak was not called to testify. Moreover, it is inconsistent with Mr. Sorena's intention to present prison-adjustment evidence through Dr. Pierce.

Respondent further speculates counsel may have thought it unwise to emphasize to the jury that appellant had been previously imprisoned for serious crimes. (IR, at p. 101.) However, as already explained, from the prosecution's penalty phase evidence, the jury was aware petitioner had committed other serious crimes and would have presumed he had served time in prison. Moreover, the jury had already convicted petitioner of two violent murders. In the context of what the jury had already learned about petitioner, it is implausible additional details regarding his prior prison commitments would have had any aggravating effect. The prison-adjustment evidence would not have worsened their perception of petitioner's character, and instead, would have put the aggravating evidence in context with the mitigating evidence.

Respondent also conjectures that trial counsel may have been concerned that evidence of petitioner's positive adjustment in prison could have opened the door to rebuttal evidence or cross-examination that showed the contrary. (IR, at p. 101.) That

speculation is belied by the fact that Mr. Sorena intended to have Dr. Pierce testify about petitioner's accomplishments in prison in spite of the possibility of opening the door to evidence of bad acts. Here, again, respondent resorts to surmise rather than to evidence. If there was other "undesirable evidence" (ibid.), respondent surely would have been able to access and plead it. The failure to do so suggests such evidence does not exist; it certainly does not support speculation that it does.

Moreover, petitioner's disciplinary record in prison, was minimal at best. While in prison from March 12, 1986 to October 7, 1991, petitioner had only four minor disciplinary violations – one for failing to leave his dormitory (for which he received a warning), one for not dropping water off at the location directed by the fire captain, and twice for drinking home-made alcohol. (CDC Disciplinary Records [Exhibit SS], at pp. 400-403.) It is significant, and the jury undoubtedly would have considered it significant, that none of these violations involved acts of violence, threats of violence, the use of a weapon, or escapes from custody.

Petitioner's minor disciplinary record was far overshadowed by his record of tremendous accomplishments both in prison and on parole. This record included graduating from high school, completing adult education classes, receiving certificates for successful participation in recreation activities, participating in religious activities, counseling inmates while in the Prison Ministries program, working as an upholsterer and receiving excellent evaluations from his supervisors, completing the training program for being an inmate fire fighter and being designated top student, and working as an inmate

fire firefighter and receiving exceptional evaluations from his supervisors. (See Exhibits FF-RR.) Thus, introducing evidence of petitioner's accomplishments in prison and on parole could only have benefitted petitioner's penalty phase defense.

2. Petitioner Was Prejudiced by Counsel's Omission

Respondent claims petitioner cannot show prejudice from the lack of evidence of his adjustment to previous incarcerations because "the circumstances of petitioner's crimes were horrific." (IR., at pp. 101-102.) Respondent ignores the closeness of the penalty decision. The jury sentenced petitioner to death only for Alma Merck's murder and deliberated approximately 10 hours over three days before returning that verdict.

Counsel obviously was seeking to convince the jury to vote for a life without possibility of parole sentence. The jurors were certainly more apt to vote so if they believed petitioner, if incarcerated for life, would not be a threat to the safety of other inmates and guards, would not be an escape risk, and would function productively. There was no better evidence to establish these points than petitioner's exceptional record of adjustment while in prison and in the Prison Ministries program. Had counsel presented this evidence, there is a reasonable probability the jury would not have sentenced him to death.

E. Counsel Was Ineffective for Failing to Adequately Object to Improper Victim Impact Evidence

Respondent concedes Denise Cox's testimony that "we're asking for the death penalty" for petitioner (13 RT 2847) was improper. (IR, at p. 103.) Respondent contends,

however, that counsel's failure to object more specifically to the remaining victim impact testimony under the Eighth and Fourteenth Amendments and *People v. Boyd* (1985) 38 Cal.3d 762, 771-776, 778, was not ineffective because the testimony was admissible and further objection would have been futile. (IR, at pp. 102-104.) Alternatively, respondent argues admission of the evidence was not prejudicial to petitioner. (IR, at pp. 104-105.) Respondent is incorrect. The evidence was inadmissible because it included opinions about the crimes, petitioner and the appropriate punishment, and petitioner was prejudiced by its highly inflammatory nature.

1. Counsel's Failure to Adequately Object to the Testimony of Alma Merck's Family Members Was Not Futile Because the Evidence Was Inadmissible

"[E]vidence showing the direct impact of the defendant's acts on the victims' friends and family is not barred by the Eighth and Fourteenth Amendments to the federal Constitution." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180.) Victim impact evidence, however, "does not include characterizations or opinions about the crime, the defendant, or the appropriate punishment, by the victims' family members or friends, and such testimony is not permitted." (*Ibid.*) In addition, evidence of a defendant's lack of remorse after the offense is inadmissible because it does not relate to any mitigating or aggravating factors in Penal Code section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 762, 771-776, 778; *People v. Jones* (2002) 29 Cal.4th 1229, 1265.)

Here, the testimony of Alma Merck's family members did not qualify as proper victim impact evidence. Denise Cox rendered opinions about the crime when she

speculated about the the terror and fear Alma Merck experienced before her death, and when she expressed her lack of understanding as to why the Mercks were brutally murdered. (13 RT 2845-2846.) Her testimony also included opinions about petitioner, whom she described as having a heart that was "hard" and having "no remorse." (13 RT 2847.) Betty Turner's testimony was similarly improper. She speculated about the crime, stating that Clifford Merck had tried his best to protect Alma, and that Alma was terrified and had gone through pure hell before her death. She also had no sympathy for petitioner because he took the innocent lives of others. (13 RT 2850.) Since the testimony of Cox and Turner was not admissible under the Eighth and Fourteenth Amendments and *People v. Boyd*, counsel acted unreasonably in failing to make adequate objections.

2. Counsel's Failure to Object Adequately to the Testimony of Cox and Turner Prejudiced Petitioner

In arguing that the testimony from Cox and Turner did not prejudice petitioner, respondent ignores the highly inflammatory nature of the evidence. Respondent claims that the jurors would have understood that Cox and Turner were not eyewitnesses to the murders and that their testimony did not describe what actually happened, but how they felt about the events. (IR, at p. 104.) Respondent's argument misses the point. Petitioner is not asserting that the jury might have mistakenly believed Cox and Turner actually witnessed the crimes, but that the jury was swayed to vote for death by the witnesses' emotionally-charged and inflammatory imaginings of the murders.

Respondent faults petitioner's argument that the death verdict for only Alma's

murder indicates the jury was influenced by the improper testimony of Alma's family members. According to respondent, the difference in the verdicts is better explained by Alma's murder being more horrific. (IR, at p. 105.) Respondent's speculation is belied by the record. Any difference in the gruesomeness of the murders was minimal at most. Due to his age and poor health, Clifford was an extremely vulnerable victim who had his hands and ankles bound and a pillow put over his head before he was shot in the head and the neck. (6 RT 1606; 10 RT 2261-2264.)

Respondent further claims the testimony of Cox and Turner related to both murders, and "thus belies petitioner's claim that the jury's differing verdicts are evidence of prejudice." (IR, at p. 105.) Respondent overlooks that Cox and Turner were Alma's relatives, not Clifford's. Cox was Alma's granddaughter and Turner was her daughter. (13 RT 2845, 2848.) The primary focus of their testimony was Alma's murder. Cox graphically described how she imagined Alma felt just before her death.

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

(13 RT 2845-2846 (italics added).) Turner similarly emphasized Alma's plight, stating "*I know that my mother was terrified that day*, and they must have gone through pure hell before it was all over with." (13 RT 2850 (italics added).) Thus, the most reasonable explanation for the difference in the penalty verdicts is the improper victim-impact testimony by Alma's family members.

Because counsel failed to object adequately, Cox and Turner were permitted to paint a vivid, wholly speculative picture of Alma's extreme suffering before her death, to attack petitioner for his supposed heartlessness, and to plead with the jury for his death. Had this testimony been excluded, there is a reasonable probability petitioner would not have received a death sentence for Alma's murder.

F. Counsel Was Ineffective for Failing to Object to Michael Hunt's Alleged Extrajudicial Statement on Constitutional Grounds

Respondent contends trial counsel was not ineffective because any confrontation clause objection to Michael Hunt's alleged extrajudicial statement would have been futile since Hunt testified and was subject to cross-examination. (IR, at p. 106.) Respondent is incorrect. The prosecution did not introduce Hunt's extrajudicial statement when Hunt was testifying, but during the examination of Sheriff's Deputy Michael Rascoe, who had previously interviewed him. (13 RT 2954-2955.) Thus, petitioner's counsel did not have an opportunity to cross-examine Hunt effectively about his alleged statement, as required by the Sixth Amendment (*Crawford v. Washington* (2004) 541 U.S. 36), because Hunt was no longer on the witness stand when the prosecution introduced it.

Respondent also argues petitioner forfeited his Eighth and Fourteenth Amendment claims because they are asserted without argument or authorities in support. (IR, at p. 106-107.) Petitioner has already addressed that argument in the context of other claims, and explained why the cases cited by respondent are inapposite. (See, *supra*, at p. 41.) Hunt's alleged extrajudicial statement to Deputy Rascoe, was unreliable in the absence of an

opportunity for cross-examination, thereby rendering its admission a violation of due process and the right to a reliable penalty determination.

Finally, respondent claims that petitioner cannot show prejudice from the admission of Hunt's statement to Deputy Rascoe. (IR, at p. 107.) As previously explained, the penalty determination was close, as reflected by the lengthy jury deliberations and the jury returning only one death verdict. A critical issue for the jury in deciding penalty was whether petitioner had committed an additional crime of violence by abusing Robert Hunt. In her summation the prosecutor cited the abuse of Robert Hunt as one ground for the jury to impose death. (13 RT 2982-2984.) The defense strongly disputed petitioner's guilt, presenting testimony from Brenda and Robert Hunt that petitioner had not committed the offense. That testimony was greatly undermined by the admission of Michael Hunt's alleged prior statement. Had that statement been properly excluded, there is a reasonable probability the jury would have found that the claim of child abuse was not proven beyond a reasonable doubt and returned no death verdicts.

G. Counsel Was Ineffective for Not Requesting That the Trial Court's Instructions Include the Jewell Russell Murder as a Crime the Jury Could Not Consider as a Circumstance in Aggravation Unless Proven Beyond a Reasonable Doubt

1. Trial Counsel's Omission Was Not Supported by a Reasonable Strategic Decision

In his declaration, Mr. Sorena states he is unaware of any strategic reason why Mr. Sprague did not request that the Russell murder be included in the instruction requiring a finding of proof beyond a reasonable doubt for other crimes evidence. (Declaration of

James V. Sorena [Exhibit C], at p. 24.) Respondent nevertheless argues that despite Mr. Sorena's declaration, the defense may have had a tactical reason for the omission. According to respondent, Mr. Sprague may not have wished to draw attention to Russell's murder as a possible aggravating circumstance. (IR, at p. 110.) Respondent's speculation is untenable.

If Mr. Sprague had not wanted to call attention to the Russell murder, he would have asked the trial court not to identify any of the other crimes in the reasonable doubt instruction. It made little sense for the instruction to make mention of the residential burglary, the residential robbery, and child abuse, but omit the Russell murder. The conspicuous omission of the murder had the effect of singling out the Russell killing rather than de-emphasizing it. Moreover, the jury was led to believe that evidence of that crime alone was to be considered under a different, lower standard than the other crimes evidence presented in the penalty phase and identified in the instruction.

Moreover, even if respondent were correct about Mr. Sprague's strategy, it soon became clear such strategy was a failure. Once the jury asked for readback of Dr. Dollinger's testimony concerning the Russell autopsy, it was apparent they were considering the Russell murder as a circumstance in aggravation and any hope they would overlook the Russell murder in penalty phase deliberations was gone. At that point there surely was no longer any reason for Mr. Sprague to persist in this faulty strategy. Counsel should have asked the court to instruct the jury regarding application of the reasonable doubt standard to the Russell murder.

2. Counsel's Omission Prejudiced Petitioner

Respondent claims petitioner was not prejudiced by counsel's omission, but his reliance on *People v. Johnson* (1989) 47 Cal.3d 1194, 1250 is misplaced. (See IR, at p. 110.) In *Johnson* the trial court did not enumerate any of the other crimes that the jury could consider as aggravating circumstances. Thus, the court's instructions did not suggest the jury should apply varying standards of proof to the different other crimes. Here, by contrast, the trial court specified three other crimes in its instruction regarding application of the reasonable doubt standard, but omitted the Russell murder. Given this significant difference between this case and *Johnson*, the absence of any prejudice in *Johnson* has little relevance to petitioner's case.

There is a reasonable likelihood petitioner's jury interpreted the court's instruction as meaning that the Russell murder could be considered as an aggravating circumstance even if not proven beyond a reasonable doubt. In the guilt phase, either three or nine jurors found this standard had not been met. Those jurors who voted to acquit petitioner of the Russell murder were now being told that they were free to use that crime as a basis for a death sentence. As already discussed, the penalty decision was close. Under these circumstances, there is a reasonable probability that had trial counsel requested that the Russell murder be specified as one of the other crimes to which the reasonable doubt standard applied, petitioner would not have received a death sentence.

H. Counsel Was Ineffective in Failing to Object to the Court's Instruction That the Jury Could Consider Both the Residential Robbery of James Foster and the Burglary of Foster's Apartment as Separate Circumstances in Aggravation

Respondent contends that the trial counsel was not ineffective for failing to object to the instruction listing residential robbery and residential burglary as separate aggravating circumstances because the instruction was proper. Alternatively, respondent argues that petitioner was not prejudiced by the omission. (IR, at pp. 111-112.) Respondent is incorrect.

The instruction was erroneous because petitioner committed only one act of violence that resulted in both a residential robbery and a residential burglary. *People v. Cooper* (1991) 53 Cal.3d 771, 840-841, cited by respondent, is inapposite. *Cooper* held that a jury may consider evidence of nonviolent criminal conduct that is part of a continuous course of criminal activity involving violence. However, it did not hold that the nonviolent crime is to be considered by the jury as a circumstance in aggravation, separate from the violent criminal conduct. Indeed, the trial court in *Cooper* committed error by instructing on the elements of the nonviolent crimes. (*Ibid.*) When part of a continuous course of criminal conduct resulting in violence, nonviolent criminal activity is a circumstance of the crime of violence, but not a separate circumstance in aggravation under Penal Code section 190.3. The trial court's enumerating both burglary and robbery as other violent crimes committed by petitioner improperly inflated the prosecution's case for death.

Petitioner was prejudiced by counsel's failure to object to the instructional error. The penalty decision was close, and the jury's mistaken belief that the burglary was another crime of violence to be considered as an aggravating circumstance may have tipped the scale in favor of death.

I. Counsel Was Ineffective for Failing to Request a Hearing Adequate to Uncover Juror Misconduct

Respondent posits multiple arguments in opposition to petitioner's claim – the evidentiary hearing conducted by the court was adequate, counsel might have had a strategic reason for not asking for further investigation into juror misconduct, and counsel's omission was harmless. (IR, at pp. 114-116.) None of these contentions have merit.

The hearing conducted by the trial court exposed possible jury misconduct but was inadequate to reach any resolution of the issue. It remained unknown whether Juror 045829 had spoken with any of petitioner's family members outside the courtroom; whether Juror 045829 had overheard any conversation between petitioner's family members that influenced her or other jurors who learned about the statements; and whether jurors favoring death were berating Juror 045829 in order to coerce her into changing her vote.

Respondent speculates trial counsel may have wanted no further investigation into juror misconduct in order to avoid the risk of having Juror 045829 excused for cause. (IR, at p. 115.) Even if trial counsel had such a strategy, it would not have been reasonable.

Counsel needed to know whether Juror 045829 favored death as a result of anything she heard said by petitioner's family members, or, alternatively, if she favored an LWOP sentence, whether she was being berated by other jurors attempting to coerce her into changing her vote. These significant questions could have been resolved only if counsel had asked the court to conduct a more thorough evidentiary hearing with the jurors.

Finally, in claiming that petitioner has not met his burden of showing prejudice, respondent overstates the standard that must be met. (IR, at pp. 115-116.) Petitioner is not required to prove to a certainty that further investigation would have revealed misconduct. Under *Strickland v. Washington* (1984) 466 U.S. 668, 694, he need only show a "reasonable probability" that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Petitioner has met that standard.

CLAIM 6: PETITIONER IS ENTITLED TO CLAIM HE DID NOT RECEIVE COMPETENT ASSISTANCE FROM COURT-APPOINTED MENTAL HEALTH EXPERTS WHO FAILED TO ADVISE DEFENSE COUNSEL TO ARRANGE FOR A NEUROPSYCHOLOGICAL EXAMINATION

Respondent claims that petitioner does not have a federal constitutional right to the effective assistance of a mental health expert. (IR, at pp. 116.) In *Ake v. Oklahoma* (1985) 470 U.S. 68, 83, the United States Supreme Court held "that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a *competent* psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." (Italics added.)

Petitioner acknowledges that in *People v. Panah* (2005) 35 Cal.4th 395, 436, the Court held *Ake* does not give rise to a federal constitutional right to the effective assistance of a mental health expert. Petitioner urges the Court to reconsider its holding.

In addition, despite this Court's holding in *Panah*, it went on to consider the competence of the psychiatrist appointed to assist the defense. The Court stated, "[i]n any event, defendant received reasonable ancillary services, and there was no showing that the appointed psychiatrists were unqualified or incapable of administering the psychologist tests defendant now argues were crucial to his defense." (*Id.*, at p. 436.)

Here, unlike in *Panah*, petitioner did not receive "reasonable ancillary services" from court-appointed experts who failed to advise defense counsel to arrange for a neuropsychological examination that would have shown that petitioner, prior to and at the

time of the killings, suffered from longstanding neuropsychological impairments, including impairments in his ability to moderate emotional responses and constrain violent impulses.

CLAIM 7: PETITIONER HAS SHOWN THAT NEWLY DISCOVERED EVIDENCE ESTABLISHES HIS INNOCENCE OF CAPITAL MURDER

Respondent agrees a criminal judgment may be collaterally attacked on the basis of newly discovered evidence "if the new evidence 'casts fundamental doubt on the accuracy and reliability of the proceedings.' (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1246.)" (IR, at p. 117.) At the penalty phase, a petitioner is entitled to relief if the evidence "so clearly changes the balance of aggravation against mitigation that its omission 'more likely than not' altered the outcome." (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1246.)

The petitioner's showing in *Gonzalez*, which consisted of declarations from mental health experts concerning mental impairments, was found to be inadequate to "meet the requirements for collateral relief." (*Ibid.*) The instant case, however, is distinguishable. Here, the evidence that petitioner acted with premeditation and the intent to kill was not as great as in *Gonzalez*, where the defendant admitted to deliberately killing a police officer who "had it coming," and "there were strong indications that defendant, an experienced gang leader, could not have believed he was under gang attack as he claimed." (*Id.*, at p. 1247.) In addition, petitioner's brain impairment in the instant case is far more severe, and therefore much more likely to have negated the elements of malice and premeditation, than the impairment suffered by the defendant in *Gonzalez*. Here, Dr. Khazanov found deficits in the executive functions of petitioner's brain which impaired both his ability to constrain impulsive outbursts and to monitor or terminate behavior once it had begun. By contrast, the brain damage suffered by the defendant in *Gonzalez* was described as only "caus[ing]

highly literal thinking, limit[ing] defendant's attention span, impair[ing] his ability to perceive unfamiliar or fast-moving events accurately, and reduc[ing] his capacity to evaluate options and make good judgments under stress." (*Id.*, at p. 1243.) Thus, unlike in *Gonzalez*, the newly-discovered evidence of brain damage in petitioner's case "so clearly change[d] the balance of aggravation against mitigation that its omission 'more likely than not' altered the outcome." (*Id.*, at p. 1246.)

CLAIM 8: PETITIONER IS ENTITLED TO RELIEF BECAUSE OF CUMULATIVE ERROR

Respondent contends there were "few, if any errors" to cumulate in petitioner's trial. (IR, 119.) On the contrary, both the appellate brief and the petition for writ of habeas corpus identify multiple errors relating to prejudicial pre-charging delay, jury selection, judicial bias, the admission and exclusion of evidence, the instructions given and not given to the jury, counsel's conflict of interest, juror bias, juror misconduct, and ineffective assistance of counsel. The cumulative effect of these errors was to deny petitioner a fundamentally fair and accurate trial at both the guilt and penalty phases.

CLAIM 9: CALIFORNIA'S DEATH PENALTY LAW IS UNCONSTITUTIONAL

California's death penalty law is unconstitutional because it fails to meaningfully narrow the class of persons eligible for the death penalty. Contrary to respondent's claim (see IR, at pp. 119-120), Professor Steven Shatz's study regarding California's death penalty law (Exhibit XX) provides substantial support for petitioner's position. Professor Shatz found the special circumstances listed in Penal Code section 190.2 did not genuinely narrow the class of first-degree murderers eligible for death, and the determination of which death-eligible, first-degree murderers actually received death sentences was arbitrary. (Declaration of Steven F. Shatz [Exhibit XX], at pp. 457-458.) Petitioner acknowledges this Court has previously rejected the claim that California's death penalty scheme does not meaningfully distinguish the few cases in which the death penalty is imposed from the many in which it is not, but respectfully requests that the issue be reconsidered for the reasons set forth in the petition at pages 165-169.

CLAIM 10: PETITIONER'S EXECUTION FOLLOWING HIS LENGTHY CONFINEMENT IS CRUEL AND UNUSUAL PUNISHMENT

Petitioner has now been confined for more than 14 years, including more than 12 years under sentence of death. Executing petitioner after such a lengthy period of confinement is unconstitutional. Petitioner acknowledges this Court has previously rejected this claim, but respectfully requests that the issue be reconsidered for the reasons set forth in the petition at pages 170-177.

CLAIM 11: EXECUTION BY LETHAL INJECTION IS UNCONSTITUTIONAL

Executing petitioner by lethal injection constitutes cruel and unusual punishment. Petitioner acknowledges this Court's previous rejection of this claim, and the recent decision of the United States Supreme Court in *Baze v. Rees* (2008) ___ U.S. ___, 128 S.Ct. 1520, but respectfully requests the issue be reconsidered for the reasons set forth in the petition at pages 178-184.

CLAIM 12: THE DEATH PENALTY IS IMPOSED ARBITRARILY AND CAPRICIOUSLY DEPENDING ON THE COUNTY IN WHICH THE DEFENDANT IS CHARGED

Respondent argues this claim must be dismissed because petitioner does not detail how prosecutorial standards differ from county to county and how those standards differ to such a degree as to violate equal protection. (IR, at p. 122.) Petitioner first asserts that any shortcoming in his showing are attributable to the lack of resources provided by this Court. In his petition, petitioner asked this Court to permit discovery, issue subpoenas and process as necessary, and hold a full evidentiary hearing to further develop the facts supporting this claim. (Petition, at p. 186.) To date, this Court has not approved petitioner's request.

In addition, respondent fails to adequately explain why the equal protection principles discussed by the Supreme Court in *Bush v. Gore* (2000) 531 U.S. 98, in the context of election law are not applicable to a death penalty case. The Supreme Court recognized that when fundamental rights are at stake, uniformity among the state's counties in the application of processes that affect a person's fundamental rights is essential. (*Id.*, at pp. 104-110.) Here, the equal protection clause has been violated because there is no uniformity amongst the various California counties in determining of which murders should be charged as capital.

CLAIM 13: PETITIONER'S CONVICTION AND DEATH SENTENCE VIOLATE INTERNATIONAL LAW

Petitioner acknowledges this Court has previously rejected this claim, but respectfully requests that the issue be reconsidered for the reasons set forth in the petition at pages 188-196.

CLAIM 14: PETITIONER'S MENTAL CONDITION PROHIBITS HIS CAPITAL SENTENCE

Respondent's assertion that petitioner's claim is premature (IR, at p. 124), is incorrect. Penal Code section 3700.5 establishes a procedure for evaluating the sanity of a defendant after the setting of an execution date. That section, however, does not preclude this Court from making an earlier determination that petitioner has debilitating mental impairments that will render his execution unconstitutional in violation of the Eighth and Fourteenth Amendments. While petitioner's mental health experts have not declared that he is mentally retarded or insane, they have found he suffers from continuing neurological deficits that similarly limit or impair his mental and psychological processes and render his execution, now or in the future, unconstitutional.

CLAIM 15: PETITIONER IS RECEIVING INADEQUATE POST-CONVICTION REVIEW OF HIS CONVICTION AND DEATH SENTENCE

Respondent claims that because petitioner has no constitutional right to representation in postconviction collateral proceedings, he cannot complain that the Court has placed limitations on the scope of that representation with respect to timeliness and compensation. (IR, at p. 126.) However, as respondent concedes,

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

(*In re Barnett* (2003) 31 Cal.4th 466, 475.) In addition, Government Code section 68662 now requires this Court to appoint habeas corpus counsel to any indigent defendant sentenced to death who does not reject representation by counsel.

Given that petitioner has a statutory right to habeas corpus counsel, due process requires that this Court not set unreasonable restrictions regarding the time for filing petitions and compensation standards for counsel, investigators, and experts that interfere with the effective litigation of habeas corpus claims. In addition, it is a violation of due process and equal protection that only habeas corpus cases for which private counsel are appointed are subject to the compensation limitations. When capital petitioners are represented by the Office of the State Public Defender or the Habeas Corpus Resource Center, this Court's guidelines limiting investigation expenditures are not applicable.

III.

CONCLUSION

For the foregoing reasons, petitioner respectfully request that this Court grant the Prayer for Relief in the Petition for Writ of Habeas Corpus. (Petition, at pp. 216-217.)

DATED: October 22, 2008

Respectfully submitted,

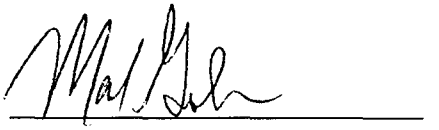
MARK GOLDROSEN
NINA WILDER
Attorneys for Petitioner
ROBERT WESLEY COWAN

CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY TO INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS uses a 13 point Times New Roman font and contains 23,611 words.

DATED: October 22, 2008

Respectfully submitted,



MARK GOLDROSEN

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over eighteen years of age and not a party to the within action; that my business address is 255 Kansas Street, Suite 340, San Francisco, California 94103; and that on October 22 , 2008, I served a true copy of REPLY TO INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS on the parties below by depositing a true copy of the original thereof enclosed in a sealed envelope with postage fully prepaid, in the United States mail at San Francisco, California addressed as follow:

Lewis Martinez
Deputy Attorney General
2550 Mariposa Mall
Room 5090
Fresno, CA 93721

Michael Millman
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Executed October 22, 2008 at San Francisco, California.

JESSE RAMER