IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **ALFREDO REYES VALDEZ,** On Habeas Corpus.	**CAPITAL CASE** S107508 Related Automatic Appeal No. S026872

Los Angeles County Superior Court No. KA007782
The Honorable Thomas Nuss, Judge

INFORMAL RESPONSE TO HABEAS CORPUS PETITION

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PRELIMINARY STATEMENT

By letter dated June 14, 2002, citing rule 60 of the California Rules of Court, this Court requested an informal response to the petition for habeas corpus (Petition) in this case. The related automatic appeal in case number S026872 has been fully briefed, but no date has been set for oral argument. As will appear, many claims in the Petition are based on the record in S026872, and were raised and answered in the briefs in S026872. Thus, for purposes of brevity and judicial economy, when appropriate, respondent will respond to a claim in the Petition by: (1) citing to the transcripts in S026872; and (2) incorporating the answer briefed in the Respondent's Brief in S026872. Otherwise, respondent will respond to all claims in the Petition, and will invoke procedural defaults where warranted. The Petition does not include a declaration from Petitioner in support of the factual innocence claim, and does not include a declaration from trial counsel in support of the various claims of ineffective assistance of trial counsel. Each claim in the Petition states that the facts supporting it require full investigation, discovery, access to this Court's subpoena power, adequate funding, and an evidentiary hearing. At any rate, as will appear, each claim in the Petition lacks merit, and should be denied.

ARGUMENT

I.

STANDARD OF REVIEW FOR HABEAS CORPUS

A habeas corpus proceeding is a collateral attack upon a criminal judgment which is presumed to be valid because of societal interest in the finality of judgments. (*In re Sanders* (1999) 21 Cal.4th 697, 703; *People v. Duvall* (1995) 9 Cal.4th 464, 474; *In re Clark* (1993) 5 Cal.4th 750, 764; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260.) Petitioner bears "a heavy burden" to both plead and prove grounds for relief by a preponderance of the evidence. (*In re Visciotti* (1996) 14 Cal.4th 325, 351; *In re Sasounian* (1995) 9 Cal.4th 535, 546-547; *People v. Duvall, supra,* 9 Cal.4th at p. 474.) To satisfy his burden, petitioner must state fully and with particularity the facts supporting his claim, along with reasonably available documentary evidence, including affidavits or declarations. (*People v. Duvall, supra,* 9 Cal.4th at p. 474.) Conclusory allegations are insufficient, particularly when a paid lawyer prepared the petition. (*Ibid.; People v. Karis* (1988) 46 Cal.3d 612, 656.) "For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them." (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1260 [italics in original]; accord *People v. Duvall, supra,* 9 Cal.4th at p. 474.)

"The state may properly require that a defendant obtain some concrete information on his own before he invokes collateral remedies against a final judgment." (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1260.) Indeed, habeas counsel has a duty to investigate factual and legal grounds before filing a habeas petition. (See *Marks v. Superior Court* (2002) 27 Cal.4th 176, 179; *In re Robbins* (1998) 18 Cal.4th 770, 793, fn. 15.) This is so because "collateral review by habeas corpus is not a reiteration of or substitute for an appeal." (*Marks v. Superior Court, supra,* 27 Cal.4th at p. 188.) In other words,

"'[h]abeas corpus will not serve as a second appeal.'" (*In re Harris* (1993) 5 Cal.4th 813, 825, quoting *In re Foss* (1974) 10 Cal.3d 910, 930.)

This Court insists that "a litigant mounting a collateral challenge to a final criminal judgment do so in a timely fashion." (*In re Sanders, supra,* 21 Cal.4th at p. 703.) "Delay in seeking habeas corpus or other collateral relief has been measured from the time a petitioner becomes aware of the grounds on which he seeks relief. That time may be as early as the date of conviction." (*In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5.) As this Court has stated:

> By requiring that such challenges be made reasonably promptly, we vindicate society's interest in the finality of its criminal judgments, as well as the public's interest "in the orderly and reasonably prompt implementations of its laws." [Citation.] Such timeliness rules serve other salutary interests as well. Requiring a prisoner to file his or her challenge promptly helps ensure that possibly vital evidence will not be lost through the passage of time or the fading of memories. In addition, we cannot overestimate the value of the psychological repose that may come for the victim, or the surviving family and friends of the victim, generated by the knowledge the ordeal is finally over. Accordingly, we enforce time limits on the filing of petitions for writs of habeas corpus in noncapital cases [citation], as well as in cases in which the death penalty has been imposed [citations].

(*In re Sanders, supra,* 21 Cal.4th at p. 703.)

Also, "imposition of procedural bars substantially advances important institutional goals[.]" (*In re Robbins, supra,* 18 Cal.4th at p. 778, fn. 1.) This Court has "recognized and imposed procedural bars *as a means of protecting the integrity of our own appeal and habeas corpus process*." (*Ibid.*, italics in original.) Thus, for instance, when a petitioner attempts to avoid a procedural bar by relying on proof from outside an appellate record, this Court applies the applicable procedural bar "if the exhibit contains nothing of substance not

already in the appellate record." (*Id.* at p. 814, fn. 34.)

Further, when the basis of a challenge to the validity of a judgment is constitutional ineffective assistance by trial counsel, this Court has stated:

> the petitioner must establish either: (1) As a result of counsel's performance, the prosecution's case was not subjected to meaningful adversarial testing, in which case there is a presumption that the result is unreliable and prejudice need not be affirmatively shown [citations]; or (2) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome. [Citations.] In demonstrating prejudice, however, the petitioner must establish that as a result of counsel's failures the trial was unreliable or fundamentally unfair. [Citation.] "The benchmark for judging any claim of ineffective assistance must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."

(*In re Visciotti, supra,* 14 Cal.4th at pp. 351-352, citing *Strickland v. Washington* (1984) 466 U.S. 668, 686 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

Finally, habeas counsel (and appellate counsel) "performs *properly* and *competently* when he or she exercises discretion and presents *only* the strongest claims instead of every conceivable claim." (*In re Robbins, supra,* 18 Cal.4th at p. 810, italics in original, citing among other cases *Jones v. Barnes* (1983) 463 U.S. 745, 752 [103 S.Ct. 3308, 77 L.Ed.2d 987]; see *Smith v. Robbins* (2000) 528 U.S. 259, 288 [120 S.Ct. 746, 145 L.Ed.2d 756].)

II.

THE PETITION SHOULD BE DENIED

The Petition raises 13 general claims. Claim I urges that Petitioner is factually innocent for four reasons. Claim II attacks three rulings (two pre-trial and one at the guilt phase). Claim III asserts that the prosecutor committed six acts of misconduct (three at the guilt phase and three at the penalty phase). Claim IV charges that trial counsel was constitutionally incompetent in 15 ways (one having three sub-claims). Claim V states that Petitioner was denied a constitutional right to an appropriate examination by a competent mental health profession. Claim VI alleges that the conviction and sentence were due to a total breakdown in the adversarial process. Claim VII contends that appellate counsel (now habeas counsel) was incompetent if any claim in the Petition should have been raised in the appeal. Claim VIII prays for entitlement to discovery and subpoena power before adjudication of the Petition. Claim IX calls our method of execution (lethal injection by non-doctors or "untrained death technicians") cruel and unusual punishment. Claim X opines that our State's death penalty violates equal protection principles because it is arbitrarily and capriciously imposed depending on the county in which someone is charged. Claim XI theorizes that cruel and/or usual punishment law as well as "international law" bar an execution after "lengthy confinement." Claim XII predicts that Petitioner's conviction and sentence violate various international laws. Finally, Claim XIII is a pitch for reversal based on cumulative error.

Hence, the Petition raises 39 total claims. Respondent denies that there is "unlawful restraint" (Pet. at 1) and incorporates here the "Statement of the Case" and "Statement of Facts" stated in the Respondent's Brief (RB) filed in S026872. (RB 1-27.) All claims lack merit, and some claims were procedurally defaulted. Thus, as will appear, the Petition should be denied.

A. Discovery, Subpoena, Evidentiary Hearing and More Investigation

With the exception of Claim VII, i.e., ineffective assistance of appellate counsel (now habeas counsel), and Claim XIII, i.e., cumulative error, Petitioner states that the facts supporting each claim requires full investigation, discovery, access to this Court's subpoena power, adequate funding, and an evidentiary hearing. (Pet. at 10 [Claim I], 22 [Claim II], 35-36 [Claim III], 53 [Claim IV], 91-92 [Claim V], 100 [Claim VI], 102 [Claim VIII], 123 [Claim IX], 120 [Claim X], 123 [Claim XI], 131 [Claim XII].) Petitioner claims he "needs and is entitled to adequate funding, discovery, an evidentiary hearing and any other opportunity to fully and fairly develop the claims raised herein." (Pet. at 9.) Respondent disagrees.

Indeed, this Court has held:

> Whatever role court-ordered discovery might properly play in a habeas corpus proceeding, the bare filing of a claim for postconviction relief cannot trigger a right to unlimited discovery. A habeas corpus petition must be verified, and must state a "prima facie case" for relief. That is, it must set forth specific facts which, if true, would require issuance of the writ. Any petition that does not meet these standards must be summarily denied, and it creates no cause or proceeding which would confer discovery jurisdiction.

(*People v. Gonzalez, supra,* 51 Cal.3d at p. 1258.) Petitioner acknowledges the above law, but asks this Court to overturn its holding. (Pet. at 102-103.) Respondent agrees with the above precedent.[1/] This Court's rules are clear and make sense, i.e., "there is no postconviction right to 'fish' through official files for belated grounds of attack on the judgment, or to confirm mere speculation

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1. Petitioner claims he is entitled to an order to show cause "without regard" to *Gonzalez*. (Pet. at 104.) That is not true, as soon demonstrated.

or hope that a basis for collateral relief exist." (*Id.* at pp. 1259-1260.) Thus, the Petition must be granted or denied as currently pled.

It is not the intent of this Court to "authorize or fund 'fishing expeditions' whose purpose is solely to discover if any basis for a collateral attack on a presumptively valid judgment can be found." (*In re Clark, supra,* 5 Cal.4th at p. 783, fn. 19.) Pursuant to this Court's precedent:

> An attorney whose appointment includes responsibility for habeas corpus representation has had, since June 1989, a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus. This duty requires that counsel (i) conduct a follow-up investigation concerning specific triggering facts that come to counsel's attention in the course of, among other things, reviewing the reporter's and clerk's transcripts, reviewing trial counsel's existing files, preparing or reviewing the appellate briefs, and interviewing the client or trial counsel, and (ii) timely present to this court any resulting potentially meritorious habeas corpus claims. Counsel is not expected to conduct an unfocused investigation grounded on mere speculation or hunch, without any basis in triggering fact.

(*In re Robbins, supra,* 18 Cal.4th at p. 781.) In other words, "habeas corpus is not a device for obtaining postjudgment discovery on speculative claims." (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38.) Once again, the Petition must be granted or denied as currently pled.

"Petitioner must show more than mere speculation" (*In re Beal* (1975) 46 Cal.App.3d 94, 103; see *In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38), and as noted earlier, "[c]onclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing" (*People v. Karis, supra,* 46 Cal.3d at p. 656; accord *People v. Duvall, supra,* 9 Cal.4th at p. 474; see *In re Swain* (1949) 34 Cal.2d 300, 303-304.) The habeas writ was

created to "'promote'" justice and not to "'defeating or embarrassing justice[.]'" (*In re Clark, supra,* 5 Cal.4th at p. 764, fn. 3.)

Finally, a claim of innocence based on newly discovered evidence that "presents only a conflict with the evidence which was before the jury" and "affords only a basis for speculation or conjecture" and "does not point unerringly to [petitioner's] innocence" does not justify habeas corpus relief. (*In re Lindley* (1947) 29 Cal.2d 709, 724; accord *In re Imbler* (1963) 60 Cal.2d 554, 570.) This is fair because: "Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." (*Herrera v. Collins* (1993) 506 U.S. 390, 399 [113 S.Ct. 853, 122 L.Ed.2d 203].) Petitioner was afforded a fair trial, as proved in the Respondent's Brief (RB 33-218) and below.

B. Claim I

Petitioner claims he is innocent because: (1) the blood on the pants in the Monte Carlo did not belong to the victim, and thus, neither did the blood on the gun in the Monte Carlo; (2) he did not kill Ernesto; (3) there was no robbery; and (4) his mental state barred his forming the intent for felony murder or the special circumstances. (Pet. at 10-22.) He claims that "evidence existing before trial as well as recently discovered evidence" prove the above. (Pet. at 10.) Respondent disagrees for the follow reasons.

1. Blood On The Pants In The Monte Carlo

Petitioner urges that since the blood on the pants was scientifically proved to come from someone other than the victim, the blood on the gun (found in the car with the pants) must not have been the victim's blood despite evidence that the blood on the gun matched the victim's blood-type. (Pet. at 11-14.) Petitioner argues that since the blood on the gun was not subjected to

"DNA testing" (and there was merely "serology testing"), the trial proof of the blood on the gun was untrustworthy. Petitioner envisions:

> The blood on the gun in all likelihood belonged to the same person who deposited the blood on the pants and if that person was not Ernesto Macias [the victim], the already extremely tenuous link to petitioner is completely broken. Possible sources of the blood on the pants and the gun could be Eliseo Morales the driver of the car, or Juan Velador, the owner of the car, neither of whom were tested.

(Pet. at 12-13.) The instant "innocence" claim should be denied.[2/] Indeed, since this claim could have been found "as early as the date of conviction" (*In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5) in 1992 (Pet. at 6), and counsel was appointed over five years ago in 1996 (Pet. at 7), this claim should be denied as untimely. (*In re Sanders, supra,* 21 Cal.4th at p. 703; *In re Robbins, supra,* 18 Cal.4th at p. 781; *In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5; see *Marks v. Superior Court, supra,* 27 Cal.4th at p. 188; *In re Gay* (1998) 19 Cal.4th 771, 779, fn. 3 [delay "explained and justified"].)

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2. Petitioner remarkably does not present this Court with his personal declaration supporting his claim of "factual" innocence. Also, all "recently discovered evidence" (Pet. at 10) now pled (Pet. at 10-22) "presents only a conflict with the evidence which was before the jury" and "affords only a basis for speculation or conjecture" and "does not point unerringly to [petitioner's] innocence" and thus does not justify habeas corpus relief. (*In re Lindley, supra,* 29 Cal.2d at p. 724; accord *In re Imbler, supra,* 60 Cal.2d at p. 570.) This claim is based on speculations and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) This claim "contains nothing of substance not already in the appellate record." (See *In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.)

2. The True Killer

Petitioner urges: (1) Arturo, Pato and Liberato could have been the killer; (2) "it appears that the case against petitioner was contrived by" Arturo and Pato; (3) Pato "did not like" petitioner; (4) Pato and the victim regularly sold drugs to petitioner before the killing; and (5) Petitioner may not have been in the house on the day of the killing. (Pet. at 14-18.)

This "innocence" claim should be denied for the reasons explained in footnote 2. Also, since this claim could have been discovered "as early as the date of conviction" (*In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5) in 1992 (Pet. at 6), and counsel was appointed over five years ago in 1996 (Pet. at 7), this claim should be denied as untimely. (*In re Sanders, supra,* 21 Cal.4th at p. 703; *In re Robbins, supra,* 18 Cal.4th at p. 781; *In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5; see *Marks v. Superior Court, supra,* 27 Cal.4th at p. 188.)

3. The Robbery

Petitioner urges: (1) "No one knows the events that led to Macias' death, and while it is apparent that numerous people had access to him that evening, any one of who could have killed him, it can not [sic] be inferred from the state of the evidence that anyone robbed him"; (2) "Circumstantial evidence showed, at most, that Macias **could have had** a wallet containing cash on his person that evening" (bold in original); (3) "it is impossible to determine when the intent to take the gun was formed"; (4) "It defies logic that an unarmed houseguest [evidently Petitioner], knowing that mutual friends were moments from returning, would suddenly attack his armed host for the purposes of stealing his gun"; (5) "The second problem with the gun being the target of a robbery is that there is no evidence that the gun found in the Monte Carlo belonged to" the victim; (6) "**If** petitioner was there, later that evening and **if** Ernesto stayed behind while the others left, petitioner knew where they were

going, what they were going for, and petitioner was told (according to Gerardo) that he could come back into the house when they returned"; (7) "Petitioner, would thus have known that he would be immediately blamed for anything that happened in their absence"; (8) the victim and Pato were "known drug dealers in whose pockets one would expect to find cash or drugs"; and (9) the fact that Arturo, Rigoberto and Gerardo "did not get out of the car to try to help but instead went to El Pato's house to decide how to handle" discovery of Ernesto's body "indicates that they had criminal misdeeds to cover up that went far beyond traffic warrants." (Pet. at 18-21, bold-type in original.)

This "innocence" claim should be denied for reasons explained in footnote 2 of this Response. Also, since this claim could have been found "as early as the date of conviction" (*In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5) in 1992 (Pet. at 6), and counsel was appointed over five years ago in 1996 (Pet. at 7), this claim should be denied as untimely. (*In re Sanders, supra,* 21 Cal.4th at p. 703; *In re Robbins, supra,* 18 Cal.4th at p. 781; *In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5; see *Marks v. Superior Court, supra,* 27 Cal.4th at p. 188.) At any rate, the challenge to the robbery evidence should be denied. (See *People v. Hughes* (2002) 27 Cal.4th 287, 356-363.)

4. Petitioner's Mental State

Petitioner defers briefing until Claims IV-V, and simply declares that his "mental state" precluded his having formed the requisite intent for capital murder because Dr. Boyd (see Ex. AA to Pet.) opines "petitioner's adult behavior is the result of post traumatic stress syndrome and organic brain damage as a result of head trauma and ingestion of toxic substances." (Pet. at 21-22.) This claim must be denied for reasons stated in footnote 2. Further, since this claim could have been discovered "as early as the date of conviction" (*In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5) in 1992 (Pet. at 6), and counsel was appointed over five years ago in 1996 (Pet. at 7), this claim should be

denied as untimely. (*In re Sanders, supra,* 21 Cal.4th at p. 703; *In re Robbins, supra,* 18 Cal.4th at p. 781; *In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5; see *Marks v. Superior Court, supra,* 27 Cal.4th at p. 188.)

C. Claim II

Petitioner claims that the trial court: (1) deprived him of effective assistance of counsel by failing to grant his *Marsden* and *Faretta*[3] motions; (2) refused to allow evidence that a "third party may have committed" the murder or took property from the victim; and (3) refused to hold a "full and fair hearing" on a claim that the gun in the Monte Carlo should have been suppressed due to a violation of petitioner's Fourth Amendment right to privacy. (Pet. at 22-35.) Respondent disagrees for reasons stated below.

1. *Marsden-Faretta* Rulings

Since this claim (Pet. at 22-30) restates an appellate claim, respondent incorporates the appellate answer (RB 33-79). (*In re Harris, supra,* 5 Cal.4th at p. 825; *In re Dixon* (1953) 41 Cal.2d 756, 759.) This claim is based on speculations and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) Petitioner does not submit a declaration from himself or trial counsel, and this claim "contains nothing of substance not already in the appellate record." (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.) The *Marsden-Faretta* claims should be denied (RB 33-79, see *People v. Jenkins* (2000) 22 Cal.4th 900, 958-963 [no abuse of discretion in

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3. *People v. Marsden* (1970) 2 Cal.3d 118; *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562].

denying *Faretta* motion]).

2. Third Party Culpability Evidence At Guilt Phase

Since this claim (Pet. at 30-33) restates an appellate claim, respondent incorporates the appellate answer (RB 98-111). (*In re Harris, supra,* 5 Cal.4th at p. 825; *In re Dixon, supra,* 41 Cal.2d at p. 759.) Also, this claim is based on speculations and conclusory assertions. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) Petitioner gives no declaration from trial counsel or himself, and this claim "contains nothing of substance not already in the appellate record." (See *In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.) This "third party" claim should be denied (RB 98-111).

3. "Standing" To Challenge Admission Of The Gun Evidence

Since this claim (Pet. at 33-35) restates an appellate claim, respondent incorporates the appellate (RB 143-150). (*In re Harris, supra,* 5 Cal.4th at p. 825; *In re Dixon, supra,* 41 Cal.2d at p. 759.) Also, this claim is based on speculations and conclusory opinion. Such pleading is insufficient grounds for habeas relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) Petitioner does not offer a declaration from himself or trial counsel, and this claim "contains nothing of substance not already in the appellate record." (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.) The Fourth Amendment "standing" claim should

be denied (RB 143-150). (See *People v. McPeters* (1992) 2 Cal.4th 1148, 1171-1172 [no "standing"].)

D. Claim III

Petitioner claims misconduct was committed when the prosecutor: (1) presented false evidence and knowingly argued false guilt theories; (2) deliberately elicited testimony about identification of Petitioner as a suspect which showed that Petitioner had prior offenses; (3) "testified" to facts not in evidence; (4) argued facts not in evidence about Petitioner's aunt and sisters; (5) invited jury speculation that Petitioner was a gang member; and (6) argued that Petitioner had intimidated potential penalty phase witnesses. (Pet. at 35-53.) These theories should be denied for reasons stated below.

1. False Evidence and Argument At Guilt Phase

For the first time, Petitioner claims that the prosecutor committed misconduct by eliciting testimony (and then arguing) that the blood on the pants found in the Monte Carlo came from the victim when she "knew" that was false. (Pet. at 36-43.) This claim is record-based, and thus, it should have been raised on appeal. It is now procedurally defaulted since habeas corpus does not serve as a second appeal. (*In re Harris, supra,* 5 Cal.4th at p. 825.) The writ does not lie for claims that could have been, but were not, raised on a timely appeal from the judgment of conviction. (*In re Clark, supra,* 5 Cal.4th at p. 765, citing among other cases *In re Dixon, supra,* 41 Cal.2d at p. 759.) Further, this Court has held:

> When a petitioner attempts to avoid the bars of *Dixon, supra,* 41 Cal.2d 756, or *Waltreus, supra,* 62 Cal.2d 218, by relying upon an exhibit (in the form of a declaration or other information) from outside the appellate record, we nevertheless apply the bar if the exhibit

contains nothing of substance not already in the appellate record. (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.) Since Petitioner does not proffer new evidence of substance, this claim is untimely.

Petitioner procedurally defaulted here for another reason. He did not object to any of the challenged acts. His failure to objects means he waived all claims (RB 152 [waiver law]). (*People v. Price* (1991) 1 Cal.4th 324, 460 ["We need not decide whether the prosecutors committed misconduct during argument because the defense did not object at trial to the prosecutors' statements or seek an admonition."]; see *People v. Hillhouse* (2002) 27 Cal.4th 469, 501-502; *People v. Hughes, supra,* 27 Cal.4th at p. 392; *People v. Jenkins, supra,* 22 Cal.4th at p. 1043; *People v. Samayoa* (1997) 15 Cal.4th 795, 842.)

Nevertheless, the cited acts do not show prosecutorial misconduct for reasons briefed on direct appeal. (RB 151-154, see *People v. Hillhouse, supra,* 27 Cal.4th at p. 502.) Further, since the cited acts (see RB 166-172) would arguably be governed by the state standard of prejudice in *People v. Watson* (1956) 46 Cal.2d 818 (RB 154, citing *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250; *People v. Bolton* (1979) 23 Cal.3d 208, 214; see also *People v. Hughes, supra,* 27 Cal.4th at p. 375), and the evidence of Petitioner's guilt as to the robbery, felony murder and special circumstance was strong (see RB 83-97), this claim should be denied. Indeed, if *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705], somehow governed here, any error was harmless beyond a reasonable doubt. (RB 110, 174-175.) Thus, this claim should be denied.

2. Eliciting "Prior" Offense Testimony At Guilt Phase

Since this claim was raised in the "briefing on direct appeal" (Pet. at 43), Respondent incorporates the appellate answer (RB 154-158). (*In re Harris, supra,* 5 Cal.4th at p. 825; *In re Dixon, supra,* 41 Cal.2d at p. 759.) Also, speculations and conclusory opinion are insufficient grounds for relief. (*In re*

Robbins, supra, 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) This claim "contains nothing of substance not already in the appellate record." (See *In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.) This claim should be denied.

3. The Prosecutor "Testified"

Since this claim was "argued" on appeal (Pet. at 45), respondent incorporates the appellate answer (RB 158-161). (*In re Harris, supra,* 5 Cal.4th at p. 825; *In re Dixon, supra,* 41 Cal.2d at p. 759.) Also, speculations and conclusory assertions are insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) This claim "contains nothing of substance not already in the appellate record." (See *In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.) This claim should be denied.

4. Penalty Phase Argument Concerning Petitioner's Relatives

Since this claim (Pet. at 46-48) restates an appellate claim, respondent incorporates the appellate answer (RB 205-210). (*In re Harris, supra,* 5 Cal.4th at p. 825; *In re Dixon, supra,* 41 Cal.2d at p. 759.) Also, this claim is based on speculations and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) This claim "contains

nothing of substance not already in the appellate record." (See *In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.) Given the above, the instant claim should be denied.

5. Penalty Phase Argument Inviting "Gang" Speculation

Since this claim (Pet. at 48-50) restates an appellate claim, respondent incorporates the appellate answer (RB 202-204). (*In re Harris, supra,* 5 Cal.4th at p. 825; *In re Dixon, supra,* 41 Cal.2d at p. 759.) Also, this claim is based on speculations and conclusory assertions. Such pleading is insufficient grounds for habeas relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) This claim "contains nothing of substance not already in the appellate record." (See *In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.) Given the above, the instant claim should be denied.

6. Penalty Phase Argument About Witness Intimidation

Since this claim (Pet. at 50-53) restates an appellate claim, respondent incorporates the appellate answer (RB 206-210). (*In re Harris, supra,* 5 Cal.4th at p. 825; *In re Dixon, supra,* 41 Cal.2d at p. 759.) This claim is based on speculations and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) This claim "contains nothing of substance not already in the appellate record." (See *In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.)

For the first time, petitioner attacks a penalty phase argument as follows: "The prosecutor inferred from the statement that the prisoner declined to prosecute out of fear of petitioner." (Pet. at 52.) The law required an objection. Given no objection, this claim was waived. (RB 152.) Since this claim is record-based, the failure to raise this claim on appeal means it is procedurally defaulted because habeas corpus does not serve as a second appeal. (*In re Harris, supra,* 5 Cal.4th at p. 825; see *In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34; *In re Clark, supra,* 5 Cal.4th at p. 765; *In re Dixon, supra,* 41 Cal.2d at p. 759.) Simply put, this claim is untimely. (*In re Sanders, supra,* 21 Cal.4th at p. 703; *In re Robbins, supra,* 18 Cal.4th at p. 781; *In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5; see *In re Gay, supra,* 19 Cal.4th at p. 779, fn. 3 [delay "explained and justified"].)

At any rate, the cited acts were not prosecutorial misconduct for reasons stated on direct appeal. (RB 151-154.) Indeed, since the cited acts (Pet. at 52-53) are arguably governed by *Watson* (RB 154), and the proof of Petitioner's guilt for the robbery, felony murder and special circumstance was strong (RB 83-97), this claim should be denied. If *Chapman* applied here, any error was harmless beyond a reasonable doubt. (RB 110, 174-175.) Thus, this claim should be denied.

E. Claim IV

Petitioner claims he received ineffective assistance of trial counsel because counsel: (1) failed to present DNA evidence that blood on the pants in the Monte Carlo did not belong to the victim; (2) failed to make a proper offer of proof as to third party culpability evidence; (3) elicited testimony that Petitioner was a homicide suspect in another case; (4) argued that there was no "standing" to challenge the gun seizure; (5) failed to request proper instructions on after "acquired intent," complete instructions on the special circumstance allegation, and lesser included instructions on manslaughter and first and second

degree murder; (6) failed to inform Petitioner of his "Vienna Convention" right to "consular Assistance"; (7) failed to object to several instances of prosecutorial misconduct; (8) failed to investigate, consult with experts and present mitigation proof of "severe and unrelenting emotional and physical abuse" Petitioner had "throughout his childhood" causing "mental state and serious resulting substance abuse" problems; (9) failed to seek admission of third party guilt evidence at the penalty phase; (10) failed to object to admission of the prior Texas conviction; (11) failed to object to CALJIC No. 2.06; (12) failed to investigate and rebut aggravating evidence; (13); failed to seek permission to question potential jurors or seek judicial questions to uncover jury bias to protect Petitioner's right to a fair and impartial jury; (14) failed to challenge admission of all prior convictions because Petitioner was incompetent in those cases and the lawyers in those cases were ineffective for not recognizing this; and (15) was prejudicial pursuant to *Strickland* and *Pope*.[4/] (Pet. at 53-91.) These *Strickland-Pope* assertions should be denied for reasons explained below. (*In re Gay, supra,* 19 Cal.4th at p. 790 ["A habeas corpus petitioner bears the burden of proof of the facts on which an incompetent counsel challenge to the validity of the judgment under which the petitioner is restrained is predicated, by a preponderance of the evidence."]; *People v. Jennings* (1991) 53 Cal.3d 334, 379 ["Appellate courts will not secondguess a trial attorney's reasonable tactical decisions[.]"].) Petitioner's conviction and death penalty were not the result of a "'breakdown in the adversary process[.]'" (*Bell v. Cone* (2002) ___ U.S. ___ [122 S.Ct. 1843, 1850, 152 L.Ed.2d 914], quoting *Strickland, supra,* 466 U.S. at p. 687; see *Mickens v. Taylor* (2002) __ U.S. __ [122 S.Ct. 1237, 1240, 152 L.Ed.2d 291]; *Glover v. United States* (2001) 531 U.S. 198, 203 [121 S.Ct. 696, 148 L.Ed. 604]; *Williams v. Taylor* (2000) 529 U.S. 362, 390-393 [120 S.Ct. 1495, 146 L.Ed.2d 389].)

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4. *People v. Pope* (1979) 23 Cal.3d 412.

1. Blood On Pants In Monte Carlo

Since this theory restates Part 1 of Claim I (Pet. at 11), respondent incorporates the response given earlier. Specifically, as shown, this claim is untimely, and is based on speculations and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) Petitioner does not submit a declaration from trial counsel, and this claim "contains nothing of substance not already in the appellate record." (See *In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.) There was no incompetence here. (See *People v. Lewis* (2001) 25 Cal.4th 610, 675 ["the appellate record does not disclose the existence, availability, or relative weight of such evidence"].)

Indeed, there was a reasonable tactical reason for failing to present alleged DNA proof that the blood found on the pants did not come from the victim. In short, even conclusive proof that the blood on the pants did not come from the victim would not have led to the inescapable conclusion that the blood on the gun did not come from the victim.[5/] "Defense counsel is not required to advance unmeritorious arguments on the defendant's behalf." (*People v. McPeters, supra,* 2 Cal.4th at p. 1173.) Thus, counsel was not incompetent as claimed (Pet. at 11-14, 54-55). (*People v. Jennings, supra,* 53 Cal.3d at p. 375

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5. Indeed, the Monte Carlo was found about 24 hours after the murder, and it was found away from the murder scene. Several persons were near the car when it was found, and there was no direct or circumstantial proof linking the car to the murder. Petitioner did not own the car, and he was arrested with another person when Lieutenant Todd saw the gun lying in plain view on the floorboard near the open driver's door. At that time, the other person had come from the driver's door, and petitioner was already outside the car. (RB 9, 113, 143-150.) Finally, the victim was found with his pants on. (RB 8.)

["Although trial counsel clearly has a duty to adequately investigate possible defenses to enable formulation of an informed trial strategy [citation], we will not presume from a silent record that counsel failed in this duty."], citing *People v. Ledesma* (1987) 43 Cal.3d 171, 218, quoting *People v. Pope, supra,* 23 Cal.3d at p. 426; accord *People v. Lewis, supra,* 25 Cal.4th at pp. 674-675.)

At any rate, counsel's choice was not prejudicial under *Strickland-Pope*. The jury learned that the victim was one of about 1.3 million persons who could have been the source of the blood found on the gun. (RB 10-11.) Thus, evidence that the blood on the pants did not come from the victim would not have affected the result. Indeed, after agreeing to talk after his arrest, petitioner said that he did not know there was a gun in the car and that he never touched that gun. He said he was innocent. (RB 12-13.) Hence, the alleged evidence about the pants would not have changed the conviction or death penalty outcome. Confidence in the result is not shakened by counsel's alleged failure to present DNA evidence about the blood on the pants. Given the above, the instant *Strickland-Pope* theory should be denied. (See *In re Visciotti, supra,* 14 Cal.4th at pp. 351-352.)

2. Third Party Culpability Evidence

Since this *Strickland-Pope* claim restates Part 2 of Claim II (Pet. at 30), respondent incorporates the response given earlier. This claim is based on speculations and conclusory allegations. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) Petitioner does not submit a declaration from trial counsel, and this claim "contains nothing of substance not already in the appellate record." (See *In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.)

Also, there was a reasonable tactical reason for failing to make "an adequate offer of proof and to cite appropriate authority" for the third-party culpability theory. In short, there was no substantial evidence of third-party culpability, as demonstrated (RB 98-111). "Defense counsel is not required to advance unmeritorious arguments on the defendant's behalf." (*People v. McPeters, supra,* 2 Cal.4th at p. 1173.) Indeed, as this Court has stated:

> the mere fact that counsel, had he chosen another path, "might" have convinced the court to issue a favorable evidentiary ruling, is not enough to carry defendant's burden on demonstrating that "'counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms.'"

(*People v. Jennings, supra,* 53 Cal.3d at pp. 379-380, citing *People v. Ledesma, supra,* 43 Cal.3d at p. 216, quoting *Strickland, supra,* 466 U.S. at p. 688.) There was no incompetence here. (See *People v. Lewis, supra,* 25 Cal.4th at p. 675 ["the appellate record does not disclose the existence, availability, or relative weight of such evidence"].) Even assuming counsel was deficient as vaguely alleged now (Pet. at 55-56), counsel's choice was not prejudicial within the meaning of *Strickland-Pope.* (RB 107-111.)

Given the above, the instant *Strickland-Pope* theory should be denied. (See *In re Visciotti, supra,* 14 Cal.4th at pp. 351-352.)

3. Eliciting Proof That Petitioner Was Suspect in Another Killing

Petitioner claims that counsel "unwittingly elicited testimony" that he (petitioner) was the suspect of another homicide. (Pet. at 56-58.) To the extent this claim is purely record-based, it should have been raised on appeal. Since it was not, the claim is now procedurally defaulted because habeas corpus does not serve as a second appeal. (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34; *In re Harris, supra,* 5 Cal.4th at p. 825; see *In re Clark, supra,* 5 Cal.4th at p.

765; *In re Dixon, supra,* 41 Cal.2d at p. 759.)

Also, the claim is based on speculations and conclusory assertions. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.)

Assuming arguendo that counsel was deficient, counsel's choice was not prejudicial under *Strickland-Pope*. Given the strength of the proof as to the conviction and death penalty, it is not reasonably probable that a result more favorable to petitioner would have been reached had Officer Terrio not testified "two separate homicide investigations" or "another prior case I'd been working" (Pet. at 56-57). The instant *Strickland-Pope* theory should be denied. (See *In re Visciotti, supra,* 14 Cal.4th at pp. 351-352.)

4. Standing To Challenge Gun Seizure

Since this *Strickland-Pope* theory restates Part 3 of Claim II (Pet. at 33), respondent incorporates the response given earlier. This claim is based on speculations and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) Petitioner does not submit a declaration from trial counsel. Thus, this claim "contains nothing of substance not already in the appellate record." (See *In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.)

Also, there was a reasonable tactical reason for the concession that Petitioner lacked "standing" to challenge admission of the gun seized from the Monte Carlo. In short, petitioner clearly lacked standing, as briefed (RB 143-

150). (See *People v. McPeters, supra,* 2 Cal.4th at pp. 1171-1172 [no "standing"].) "Defense counsel is not required to advance unmeritorious arguments on the defendant's behalf." (*Id.* at p. 1173.) Also, the gun was in plain view. Thus, the blood visibly seen on the grip part of the gun would have been inevitably discovered after the car was inventoried by the police. (RB 9, 146-147, 149-150.) Further, since the victim was one of about 1.3 million persons who could have been the source of the blood on the gun (RB 10-11), counsel may have reasonably wanted the jury to learn that 1.3 million other persons could have been the source of the blood on the gun. This tactic would reasonably support the trial evidence that petitioner was factually innocent (RB 13). (See *People v. Lewis, supra,* 25 Cal.4th at pp. 674-675.)

Finally, counsel's choice was not prejudicial under *Strickland-Pope* since there was enough (albeit circumstantial) evidence of petitioner's guilt without the additional proof of the blood on the gun and/or evidence of petitioner's palm print on the grip part of the gun. (See RB 83-97.)

Given the above, the instant *Strickland-Pope* theory should be denied. (See *In re Visciotti, supra,* 14 Cal.4th at pp. 351-352.)

5. Failing To Request Cited Instructions

a. After Acquired Intent

Since this *Strickland-Pope* theory restates an appellate claim, respondent incorporates the appellate answer (RB 113-119). This claim is also based on speculations and conclusory opinion. Such pleading is insufficient grounds for habeas relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) Petitioner does not submit a declaration from trial counsel. Thus, this claim "contains

nothing of substance not already in the appellate record." (See *In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.)

Also, there was a reasonable tactical reason for not pursuing the "after-acquired intent" defense. In short, it would have been inconsistent with evidence of Petitioner's post-arrest claim that he did not steal from or murder Ernesto (RB 13). "Defense counsel is not required to advance unmeritorious arguments on the defendant's behalf." (*People v. McPeters, supra,* 2 Cal.4th at p. 1173.) Indeed, this Court "will not presume from a silent record that counsel failed in [a] duty" to investigate. (*People v. Jennings, supra,* 53 Cal.3d at p. 375; *People v. Ledesma, supra,* 43 Cal.3d at p. 218 ["Although from a review of the record on appeal alone we have serious doubt that a satisfactory explanation could be provided, we are unable to conclude that it could not. The argument, therefore, must be rejected."]; *People v. Pope, supra,* 23 Cal.3d at p. 426 ["In some cases, however, the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal."]; accord *People v. Lewis, supra,* 25 Cal.4th at pp. 674-675; *People v. Samayoa, supra,* 15 Cal.4th at pp. 845-846.)

Further, there was no substantial evidence to warrant instructions on after-acquired intent (RB 116-117; see *People v. Hughes, supra,* 27 Cal.4th at pp. 356-363), and CALJIC No. 9.40.2 (Pet. at 59-60) was created years after petitioner's conviction (RB 113, fn. 24). Finally, as articulated in the Respondent's Brief:

> Here, the jury could deem it doubtful that after committing a sudden, unexpected, and gruesome killing against a "friendly acquaintance," appellant [petitioner] would, for the first time, decide to take the alleged acquaintance's wallet, cash, gun and/or other property.

(RB 116.)

At any rate, counsel's choice was not prejudicial under *Strickland-Pope* since the issue of after-formed intent was necessarily resolved adversely to petitioner under other properly given instructions. (RB 117-118.) Given the above, the instant *Strickland-Pope* theory should be denied. (See *In re Visciotti, supra,* 14 Cal.4th at pp. 351-352; see also *People v. Hughes, supra,* 27 Cal.4th at pp. 356-363 [discussion on robbery and "afterthought theft"].)

b. Truncated CALJIC No. 8.81 Instruction

Since this *Strickland-Pope* claim restates an appellate claim, respondent incorporates the appellate answer (RB 121-127). This claim is also based on speculations and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) Petitioner does not submit a declaration from trial counsel. Thus, this claim "contains nothing of substance not already in the appellate record." (See *In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.)

Also, there was a reasonable tactical reason for not seeking a full CALJIC No. 8.81.17 instruction. (Pet. at 60-61.) As stated on appeal, "this was not a case where the intent to rob was formed after the use of force, or, where appellant [petitioner] merely wished to collect a token, memento or souvenir" (RB 122). Further, there was no substantial evidence to warrant the deleted "merely incidental" language. (RB 123.) Counsel's choice was reasonable. (See *People v. Jennings, supra,* 53 Cal.3d at pp. 379-380.) "Defense counsel is not required to advance unmeritorious arguments on the defendant's behalf." (*People v. McPeters, supra,* 2 Cal.4th at p. 1173.) Finally, this Court "will not presume from a silent record that counsel failed in [a] duty" to investigate. (*People v. Jennings, supra,* 53 Cal.3d at p. 375; *People v. Ledesma, supra,* 43

Cal.3d at p. 218; *People v. Pope, supra,* 23 Cal.3d at p. 426; accord *People v. Lewis, supra,* 25 Cal.4th at pp. 674-675.)

At any rate, counsel's choice was not prejudicial under *Strickland-Pope*. As proved on appeal, the missing "merely incidental" language was harmless. (RB 124-127.) Given the above, the instant *Strickland-Pope* theory should be denied. (*In re Visciotti, supra,* 14 Cal.4th at pp. 351-352.)

c. Lesser Included Instructions

Since the first and second degree murder part of this claim restates an appellate claim, respondent incorporates the appellate answer (RB 128-133). This claim is also based on speculations and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.)

For the first time, Petitioner claims counsel should have sought instructions on voluntary and involuntary manslaughter. (Pet. at 62-66.) To the extent this claim is purely record-based, it should have been raised on appeal. The failure to do so means the claim is now procedurally defaulted because habeas corpus does not serve as a second appeal. (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34; *In re Harris, supra,* 5 Cal.4th at p. 825; see *In re Clark, supra,* 5 Cal.4th at p. 765; *In re Dixon, supra,* 41 Cal.2d at p. 759.) Simply put, this claim should be denied as untimely. (*In re Sanders, supra,* 21 Cal.4th at p. 703; *In re Robbins, supra,* 18 Cal.4th at p. 781; *In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5; see *In re Gay, supra,* 19 Cal.4th at p. 779, fn. 3 [delay "explained and justified"].)

At any rate, there was a reasonable tactical reason for not seeking (voluntary and involuntary) manslaughter and premeditated (first and second

degree) murder instructions. In short, there was no substantial evidence to warrant such instruction (RB 130-133). Such instruction would have been inconsistent with Petitioner's post-arrest trial evidence that he did not steal or murder (RB 13). "Defense counsel is not required to advance unmeritorious arguments on the defendant's behalf." (*People v. McPeters, supra,* 2 Cal.4th at p. 1173.) Also, after petitioner conferred with counsel, they told the trial court that they "do not want to request any lessers" (RT 1282; see RB 129 [invited-error doctrine]). Thus, the instant conduct was a clear tactical choice made with petitioner's express consent, and equally important, this Court "will not presume from a silent record that counsel failed in [a] duty" to investigate. (*People v. Jennings, supra,* 53 Cal.3d at p. 375; *People v. Ledesma, supra,* 43 Cal.3d at p. 218; *People v. Pope, supra,* 23 Cal.3d at p. 426; see *People v. Lewis, supra,* 25 Cal.4th at pp. 674-675.) Simply put, any error here was "invited." (See *People v. Hughes, supra,* 27 Cal.4th at pp. 345-346.)

Also, counsel's choice was not prejudicial under *Strickland-Pope* because the evidence shows that petitioner was a cold-blooded killer. (RB 132-133.) This *Strickland-Pope* theory should be denied.

6. Notification Of Vienna Convention and Consular Assistance

Petitioner claims he had a right to "consular assistance" under the "Vienna Convention" as a foreign national,[6/] and counsel was deficient for failing to notify him of this right (Pet. at 66-68). This claim rests on speculations and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp.

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6. This theory is raised a second time under Claim XII. (Pet. at 131.)

303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.)

Indeed, Petitioner does not submit a declaration from trial counsel or himself, and fails to allege specific facts demonstrating that he fell within the protection of the Vienna Convention at the time of trial in 1992. He also fails to explain how his Vienna Convention rights were violated, and if so, he fails to explain how such violation was prejudicial and/or a violation of federal or state statutory or constitutional law. (*Breard v. Greene* (1998) 523 U.S. 371, 375 [118 S.Ct. 1352, 140 L.Ed.2d 529] [Vienna Convention claim procedurally defaulted by failing to raise claim in state court]; *United States v. Lombera-Camorlinga* (9th Cir. 2000) 206 F.3d 882, 885-888 [violation of "consular notification" under Vienna Convention does not require suppression of subsequently obtained evidence in a criminal proceeding against a foreign national]; see *United States v. Alvarado-Torres* (S.D.Cal. 1999) 45 F.Supp.2d 986, 988-993; *People v. Corona* (2001) 89 Cal.App.4th 1426, 1428-1430 [exclusion of evidence is not the remedy for violation of Vienna Convention]; *Silva v. Superior Court* (1975) 52 Cal.App.3d 269, 275-278.)

Thus, this claim "contains nothing of substance not already in the appellate record." (See *In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.) Given counsel was appointed over five years ago (Pet. at 7), this claim could have been raised on appeal, and the Vienna Convention pre-dates the instant 1992 trial (*Silva, supra,* 52 Cal.App.3d at pp. 275-278), this claim should be denied as untimely. (*In re Sanders, supra,* 21 Cal.4th at p. 703; *In re Robbins, supra,* 18 Cal.4th at p. 781; *In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5; see *Marks v. Superior Court, supra,* 27 Cal.4th at p. 188; *In re Gay, supra,* 19 Cal.4th at p. 779, fn. 3.)

At any rate, given the above, the instant claim should be denied. Indeed, this Court "will not presume from a silent record that counsel failed in [a] duty" to investigate. (*People v. Jennings, supra,* 53 Cal.3d at p. 375; *People v. Ledesma, supra,* 43 Cal.3d at p. 218; *People v. Pope, supra,* 23 Cal.3d at p.

426; see *People v. Lewis, supra,* 25 Cal.4th at pp. 674-675.) There was no incompetence. (*People v. Lewis, supra,* 25 Cal.4th at p. 675 ["the appellate record does not disclose the existence, availability, or relative weight of such evidence"].)

Assuming counsel was deficient, counsel's choice was not prejudicial under *Strickland-Pope*. Indeed, the record shows that petitioner was a cold-blooded killer (RB 132-133), and the Petition does not give any reason why the lack of "consular assistance" under the Vienna Convention (assuming such right existed as to Petitioner) means that "'the trial cannot be relied on as having produced a just result.'" (*In re Visciotti, supra,* 14 Cal.4th at p. 352, citing *Strickland, supra,* 466 U.S. at p. 686.) Given the above, this *Strickland-Pope* theory should be denied.

7. Failing To Object To Instances Of Prosecutorial Misconduct

Since this *Strickland-Pope* theory restates Claim III (Pet. at 35, 68), respondent incorporates the response given earlier and the appellate answer on point (RB 151-175). This claim fails. (*People v. Lewis, supra,* 25 Cal.4th at p. 678 ["rarely will the failure to object establish incompetence of counsel, because the decision whether to raise an objection is inherently tactical"].) Here, the claim is based on speculations and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) Petitioner does not submit a declaration from trial counsel. Thus, this claim "contains nothing of substance not already in the appellate record." (See *In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.)

Also, there was a reasonable tactical reason for failing to object to the

cited acts, i.e., there was no prosecutorial misconduct. (See *People v. Price, supra,* 1 Cal.4th at p. 460; see also *People v. Lewis, supra,* 25 Cal.4th at p. 678.) Precedent from the United States Supreme Court and this Court supports respondent here (RB 152-154, citing among other cases *Greer v. Miller* (1987) 483 U.S. 756, 765 [107 S.Ct. 3102, 97 L.Ed.2d 618]; *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [94 S.Ct. 1868, 40 L.Ed.2d 431]; *People v. Cunningham* (2001) 25 Cal.4th 926, 1000-1001). "Defense counsel is not required to advance unmeritorious arguments on the defendant's behalf." (*People v. McPeters, supra,* 2 Cal.4th at p. 1173.) Further, assuming counsel was deficient, counsel's choice was not prejudicial under *Strickland-Pope* due to the alleged failures to object for reasons previously shown. (RB 154-175.) Nothing urged here (Pet. at 68) proves that "'the trial cannot be relied on as having produced a just result.'" (*In re Visciotti, supra,* 14 Cal.4th at p. 352, citing *Strickland, supra,* 466 U.S. at p. 686.) This *Strickland-Pope* theory should be denied.

8. Failure To Present Mental State and Abuse Evidence

Petitioner notes that counsel presented the jury with mitigation evidence about his history. (Pet. at 69.) In fact, the jury heard testimony from petitioner's father, mother, two sisters, an aunt, and three friends. (RB 21-25.) Thus, counsel presented eight mitigation witnesses at the penalty phase, and also presented (over the People's relevancy objection) testimony from a retired correctional officer about housing conditions for "LWOP" inmates (RB 25-26). Despite all of this, Petitioner now claims that counsel was deficient for failing to investigate, consult with experts, and present "evidence in mitigation concerning the severe and unrelenting emotional and physical abuse petitioner suffered throughout his childhood. His resulting mental state and serious resulting substance abuse problem." This claim largely rests on declarations

from the same persons who testified at trial (Pet. at 69-83; RB 22-25). Now, however, petitioner adds a declaration from a doctor, who basically opines that petitioner: (1) was incompetent to stand trial; (2) could not form the requisite intent for felony-murder; and (3) does not qualify for the death penalty (Pet. at 74-75; Ex. AA to Pet.).

Since this *Strickland-Pope* claim largely restates Part 4 of Claim I (Pet. at 21-22) and Claim V (Pet. at 91-99), respondent incorporates the response given earlier and later in this filing.[7/] This claim is based on speculations and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) Petitioner does not offer a declaration from counsel or himself. Thus, this claim "contains nothing of substance not already in the appellate record." (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.)

Also, there was a reasonable tactical reason for failing to present more mitigation evidence. In short, given the overwhelming aggravation evidence (RB 17-21), including unchallenged conclusive evidence that petitioner had escaped from custody (RB 13, 21), counsel reasonably chose to focus the jury on sparing petitioner from the death penalty by proffering evidence that he could not escape from prison if given "LWOP" status (RB 25-26). (*People v. Lewis, supra,* 25 Cal.4th at p. 676 [rejecting claim that counsel was deficient "at the penalty phase for not presenting any evidence in mitigation and delivering a meager closing argument that offered no reasons for sparing his client's life"]; see *People v. Jennings, supra,* 53 Cal.3d at p. 378 ["From the pretrial

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7. Later, petitioner cites to writings on mental, physical and emotional disorders about mother's condition, and thus, his own plight. (Pet. at 94-99.)

perspective under which counsel operated, it was reasonable for him to speculate that the People might garner convictions for all the rape counts."].) Also, counsel presented the jury with strong evidence about petitioner's history and dealings with his parents and others to humanize him in the eyes of the jury. (RB 22-25.) Moreover, this Court "will not presume from a silent record that counsel failed in [a] duty" to investigate. (*People v. Jennings, supra,* 53 Cal.3d at p. 375; *People v. Ledesma, supra,* 43 Cal.3d at p. 218; *People v. Pope, supra,* 23 Cal.3d at p. 426; see *People v. Lewis, supra,* 25 Cal.4th at pp. 674-675.) There was no incompetence here. (See *People v. Lewis, supra,* 25 Cal.4th at p. 676.)

Further, assuming counsel was deficient, counsel's choice was not prejudicial under *Strickland-Pope* because he clearly presented strong evidence about petitioner's history and dealings with his parents and others to humanize him in the eyes of the jury. (RB 22-25.) This *Strickland-Pope* theory should be denied. (*In re Visciotti, supra,* 14 Cal.4th at pp. 351-352.)

9. Failure To Seek Third Party Culpability Reconsideration

Since this *Strickland-Pope* theory largely restates Part 2 of Claim I (Pet. at 30-33) and Part 2 of the instant Claim IV (Pet. at 55-56), respondent incorporates the response given earlier and the appellate answer on point. (RB 98-111, 183-186.) Petitioner did not have a constitutional right to present "lingering doubt" (Pet. at 83) evidence at the penalty phase (*In re Gay, supra,* 19 Cal.4th at p. 814; *People v. Zapien* (1993) 4 Cal.4th 929, 989; see *People v. Hughes, supra,* 27 Cal.4th at p. 405), and at any rate, the jury had no lingering doubt in this case. As noted on appeal (RB 186), even the Ninth Circuit has held that defendants are not entitled to present "lingering doubt" evidence at the penalty phase. (*Grisby v. Blodgett* (9th Cir. 1997) 130 F.3d 365, 371; see *Franklin v. Lynaugh* (1988) 487 U.S. 164, 172-174 [108 S.Ct. 2320, 101 L.Ed.2d 155] (plur. opn.); *California v. Ramos* (1983) 463 U.S. 922, 1005, fn.

19 [103 S.Ct. 3446, 77 L.Ed.2d 1171].) Further, this claim is based on speculations and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) Petitioner does not submit a declaration from trial counsel. Thus, this claim "contains nothing of substance not already in the appellate record." (See *In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.)

Also, there was a reasonable tactical reason for not seeking reconsideration of the third party culpability ruling since petitioner clearly did not have a constitutional right to present lingering doubt evidence at the penalty phase, as previously briefed (RB 186). (See *People v. Jennings, supra,* 53 Cal.3d at pp. 379-380.) "Defense counsel is not required to advance unmeritorious arguments on the defendant's behalf." (*People v. McPeters, supra,* 2 Cal.4th at p. 1173.)

Assuming counsel was deficient, counsel's choice was not prejudicial under *Strickland-Pope*. Indeed, given the overwhelming aggravation evidence (RB 17-21), including undisputed proof that petitioner would have killed a fellow inmate merely because he felt "disrespected" (RB 19), the jury would not have been left with a lingering doubt had the jury heard third party culpability evidence at the penalty phase. Finally, the record confirms that counsel presented strong and sufficient evidence about petitioner's past to humanize him in the eyes of the jury. (RB 22-25.) The instant *Strickland-Pope* claim should be denied. (See *In re Visciotti, supra,* 14 Cal.4th at pp. 351-352.)

10. Failure To Object To Proof Of Texas Prior Felony Conviction

This *Strickland-Pope* claim is based on speculations and conclusory

opinion. (Pet. at 84-85.) Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) Petitioner does not submit a declaration from himself or counsel. (*People v. Lewis, supra,* 25 Cal.4th at p. 678 ["rarely will the failure to object establish incompetence of counsel, because the decision whether to raise an objection is inherently tactical"].) This claim "contains nothing of substance not already in the appellate record." (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.) This Court "will not presume from a silent record that counsel failed in [a] duty" to investigate. (*People v. Jennings, supra,* 53 Cal.3d at p. 375; *People v. Ledesma, supra,* 43 Cal.3d at p. 218; *People v. Pope, supra,* 23 Cal.3d at p. 426; see *People v. Lewis, supra,* 25 Cal.4th at pp. 674-675.)

Assuming counsel was deficient, counsel's choice was harmless under *Strickland-Pope* given other properly admitted strong and powerful aggravation evidence, including: (1) five prior convictions for first degree residential burglary in our state (RB 18, fn. 11); (2) a "stabbing" in prison committed by petitioner years before the instant murder (RB 18-19); (3) an attempted murder in prison committed by petitioner years before the instant murder (RB 19); (4) a carjacking and robbery (while out of custody) committed by petitioner over one year after the instant robbery-murder (RB 19-20); (5) a robbery and battery in jail committed by petitioner nearly two years after the instant robbery-murder (RB 20-21); (6) a courtroom escape committed by petitioner nearly two years after the instant crime; and (7) a second "stabbing" (this time in jail) committed by petitioner over two years after the instant murder (RB 21). "The admission of evidence of unadjudicated crimes at the penalty phase does not deny a defendant due process or any other federal constitutional guarantee." (*People v. Lewis, supra,* 25 Cal.4th at p. 676.) The instant *Strickland-Pope* theory

should be denied. (See *In re Visciotti, supra,* 14 Cal.4th at pp. 351-352.)

11. Failure To Object To CALJIC No. 2.06 Instruction

This *Strickland-Pope* claim is based on speculations and conclusory opinion. (Pet. at 85.) Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) Petitioner does not offer a declaration from trial counsel. (*People v. Lewis, supra,* 25 Cal.4th at p. 678 ["rarely will the failure to object establish incompetence of counsel, because the decision whether to raise an objection is inherently tactical"].) This claim "contains nothing of substance not already in the appellate record." (See *In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.) "Defense counsel is not required to advance unmeritorious arguments on the defendant's behalf." (*People v. McPeters, supra,* 2 Cal.4th at p. 1173; see *People v. Lewis, supra,* 25 Cal.4th at pp. 674-675.) Assuming counsel was deficient, counsel's choice was harmless under *Strickland-Pope* given other properly admitted strong and powerful aggravation evidence previously noted. This claim should be denied. (See *In re Visciotti, supra,* 14 Cal.4th at pp. 351-352; see also *People v. Hughes, supra,* 27 Cal.4th at p. 348 rejecting claim that CALJIC No. 2.06 instruction was error].)

12. Failure To Investigate and Rebut Aggravating Evidence

To the extent this claim restates Part II of Claim II (Pet. at 85), respondent incorporates the response given earlier. This *Strickland-Pope* claim is based on speculations and conclusory opinion. (Pet. at 86.) Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51

Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) Petitioner does not offer a declaration from himself or counsel in support of this claim. Thus, this claim "contains nothing of substance not already in the appellate record." (See *In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.) This Court "will not presume from a silent record that counsel failed in [a] duty" to investigate. (*People v. Jennings, supra,* 53 Cal.3d at p. 375; *People v. Ledesma, supra,* 43 Cal.3d at p. 218; *People v. Pope, supra,* 23 Cal.3d at p. 426; see *People v. Lewis, supra,* 25 Cal.4th at pp. 674-675.) There was no incompetence here. (See *People v. Lewis, supra,* 25 Cal.4th at pp. 674-676.)

Assuming counsel was deficient, counsel's choice was not prejudicial under *Strickland-Pope* given the powerful aggravation evidence, including, among other proof, documentary proof of five prior convictions for first degree residential burglary in California (RB 18, fn. 11). "The admission of evidence of unadjudicated crimes at the penalty phase does not deny a defendant due process or any other federal constitutional guarantee." (*People v. Lewis, supra,* 25 Cal.4th at p. 676.) This claim should be denied. (*In re Visciotti, supra,* 14 Cal.4th at pp. 351-352.)

13. Failure To Uncover Jury Bias During Voir Dire Process

Petitioner claims that trial counsel unreasonably failed to seek permission to question jurors (and failed to request the court to ask proper questions) to "uncover jury bias" during the voir dire process. (Pet. at 85-88.) Without any citation to proof, he boldly claims that he was "subjected to a prejudicial jury" (Pet. at 88). This claim should be denied as untimely since it could have been raised on appeal. (*In re Sanders, supra,* 21 Cal.4th at p. 703; *In re Robbins, supra,* 18 Cal.4th at p. 781; *In re Harris, supra,* 5 Cal.4th at p. 825; *In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5; *In re Dixon, supra,* 41 Cal.2d at p. 759; see *In re Gay, supra,* 19 Cal.4th at p. 779, fn. 3].) A "voir dire" claim

like the instant has been rejected on appeal. (*People v. Jenkins, supra,* 22 Cal.4th at pp. 990-991.)

At any rate, there was no incompetence here. (See *People v. Lewis, supra,* 25 Cal.4th at p. 675 ["the appellate record does not disclose the existence, availability, or relative weight of such evidence"].) Indeed, this claim is based on speculations and conclusory opinion. (Pet. at 86.) Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) Petitioner does not offer a declaration from himself or counsel, and this claim "contains nothing of substance not already in the appellate record." (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.) This Court "will not presume from a silent record that counsel failed in [a] duty" to investigate. (*People v. Jennings, supra,* 53 Cal.3d at p. 375; *People v. Ledesma, supra,* 43 Cal.3d at p. 218; *People v. Pope, supra,* 23 Cal.3d at p. 426; see *People v. Lewis, supra,* 25 Cal.4th at pp. 674-675.)

Assuming counsel was deficient, counsel's choice was harmless under *Strickland-Pope* given the strong evidence of guilt and overwhelming evidence in aggravation previously noted. Further, petitioner fails to cite to any evidence in support of a claim that he was "subjected to a prejudicial jury" (Pet. at 88). Thus, this *Strickland-Pope* theory should be denied. Indeed, a trial court has "discretion" during the voir dire process in a death penalty case (*People v. Samayoa, supra,* 15 Cal.4th at p. 823), and a claim like the instant has been rejected (*People v. Jenkins, supra,* 22 Cal.4th at pp. 990-991).

14. Failure To Attack Priors On Incompetency and IAC Grounds

Petitioner urges that trial counsel was deficient for failing to attack the

admission of all prior felony convictions on grounds that: (1) he was incompetent to plead in all prior cases; and (2) counsel in those cases were deficient for failing to recognize petitioner's incompetence. (Pet. at 88-89.) This *Strickland-Pope* theory is based on speculations and conclusory opinion. (Pet. at 86.) Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) Petitioner does not offer a declaration from himself or counsel in support of this claim. Thus, this claim "contains nothing of substance not already in the appellate record." (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.) This Court "will not presume from a silent record that counsel failed in [a] duty" to investigate. (*People v. Jennings, supra,* 53 Cal.3d at p. 375; *People v. Ledesma, supra,* 43 Cal.3d at p. 218; *People v. Pope, supra,* 23 Cal.3d at p. 426; see *People v. Lewis, supra,* 25 Cal.4th at pp. 674-675.)

Assuming counsel was deficient, the choice by trial counsel in this case was not prejudicial under *Strickland-Pope* given the strong aggravation evidence apart from proof of the five prior felony convictions (RB 18-21). "The admission of evidence of unadjudicated crimes at the penalty phase does not deny a defendant due process or any other federal constitutional guarantee." (*People v. Lewis, supra,* 25 Cal.4th at p. 676.) This claim should be denied. (*In re Visciotti, supra,* 14 Cal.4th at pp. 351-352.)

15. *Strickland-Pope* Evidence Of Prejudice

As shown, petitioner suffered no prejudice based on counsel's performance at the guilt and penalty phase. This last *Strickland-Pope* claim (like all others) is based on speculations and conclusory opinion. (Pet. at 89-91.) Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v.*

Gonzalez, supra, 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) Petitioner does not offer a declaration from himself or counsel. Thus, this claim "contains nothing of substance not already in the appellate record." (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.) This Court "will not presume from a silent record that counsel failed in [a] duty" to investigate. (*People v. Jennings, supra,* 53 Cal.3d at p. 375; *People v. Ledesma, supra,* 43 Cal.3d at p. 218; *People v. Pope, supra,* 23 Cal.3d at p. 426; see *People v. Lewis, supra,* 25 Cal.4th at pp. 674-675.) "Defense counsel is not required to advance unmeritorious arguments on the defendant's behalf." (*People v. McPeters, supra,* 2 Cal.4th at p. 1173.) For the above reasons, Claim IV should be denied. (*In re Visciotti, supra,* 14 Cal.4th at pp. 351-352; see *People v. Lewis, supra,* 25 Cal.4th at pp. 674-676.)

F. Claim V

Petitioner claims he was denied a constitutional right to a proper pre-trial examination by a competent mental health professional. (Pet. at 91-99.) A similar claim has been summarily rejected on the merits. (*In re Gay, supra,* 19 Cal.4th at pp. 779-780, fn. 4 [rejecting claim that defendant "did not receive the assistance of a competent metal health professional"].) Indeed, a defendant does not have a federal constitutional right to the effective assistance of mental health expert. (*People v. Samayoa, supra,* 15 Cal.4th at p. 838.) Given a similar claim was raised in this Court three years ago in *Gay*, and counsel was appointed over five years ago in 1996 (Pet. at 7), this claim should be denied as untimely. (*In re Sanders, supra,* 21 Cal.4th at p. 703; *In re Robbins, supra,* 18 Cal.4th at p. 781; *In re Harris, supra,* 5 Cal.4th at p. 825; *In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5; *In re Dixon, supra,* 41 Cal.2d at p. 759; see *In re Gay, supra,* 19 Cal.4th at p. 779, fn. 3].)

At any rate, since this claim restates Part 4 of Claim I (Pet. at 21-22)

and Claim V (Pet. at 91-99), respondent incorporates the response given earlier. Here, as previously noted, petitioner cites to writings on mental, physical and emotional disorders about mother's condition, and thus, his own plight. (Pet. at 94-99.) This claim is based on speculations and conclusory allegations. Such pleading is insufficient grounds for habeas relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.)

Besides the cited medical articles and Dr. Boyd's declaration (Pet. at 91-99), this claim "contains nothing of substance not already in the appellate record." (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.)

Petitioner has not met his habeas burden. Thus, this claim should be denied. (*In re Gay, supra,* 19 Cal.4th at pp. 779-780, fn. 4; *People v. Samayoa, supra,* 15 Cal.4th at p. 838 [no federal constitutional right].)

G. Claim VI

Petitioner claims the conviction and sentence were due to a total breakdown in the adversarial process. (Pet. 99-101.) This claim is based on speculations and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) This claim clearly "contains nothing of substance not already in the appellate record." (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34; *In re Harris, supra,* 5 Cal.4th at p. 825; *In re Dixon, supra,* 41 Cal.2d at p. 759.) Petitioner has not met his habeas burden here, and thus, this claim should be denied. (See *In re Gay, supra,* 19 Cal.4th at p. 826 ["This is not a case in which there was a total breakdown of the

adversarial process at the penalty phase in which prejudice may be presumed."]; *In re Visciotti, supra,* 14 Cal.4th at p. 352 ["this is not a case in which there was a total breakdown of the adversarial process"].)

H. Claim VII

Without citing a claim in the Petition which "should have been raised in the direct appeal," habeas counsel claims that she was incompetent if any claim raised in the Petition should have been raised by her in the direct appeal. (Pet. at 101-102.) This Court has considered and rejected claims that representation by the same counsel on appeal and on habeas corpus proceedings creates a conflict of interest. (*People v. Hughes, supra,* 27 Cal.4th at p. 406.)

At any rate, this claim is based on speculations and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) This claim "contains nothing of substance not already in the appellate record." (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.)

Accordingly, petitioner has not met his habeas burden here, and thus, this claim should be denied. Indeed, as noted earlier, habeas counsel (and appellate counsel) "performs *properly* and *competently* when he or she exercises discretion and presents *only* the strongest claims instead of every conceivable claim." (*In re Robbins, supra,* 18 Cal.4th at p. 810, italics in original, citing among other cases *Jones, supra,* 463 U.S. at p. 752; see *Smith, supra,* 528 U.S. at p. 288; *People v. Hughes, supra,* 27 Cal.4th at p. 406; see also *People v. McPeters, supra,* 2 Cal.4th at p. 1173.)

I. Claim VIII

Petitioner claims he is entitled to discovery and subpoena power before the Petition is adjudicated. (Pet. at 102-104.) As noted, petitioner is not entitled to discovery and subpoena assistance before adjudication of the Petition. Indeed, petitioner is not entitled to go "fishing" given this Court's precedent under *People v. Gonzalez, supra*, 51 Cal.3d 1179. Further, there is no need to overrule *Gonzalez* (Pet. at 102-103.) Finally, as demonstrated throughout this Response, petitioner has not presented a "prima facie case" on any claim in the Petition in its current form. (Pet. at 103-104.) Hence, the instant claim should be denied.

J. Claim IX

Citing numerous examples from executions occurring outside our state, petitioner claims that our method of execution is cruel and unusual punishment. (RT 104-119.) This claim should be denied as untimely since it could have been raised on appeal. (*In re Sanders, supra,* 21 Cal.4th at p. 703; *In re Robbins, supra,* 18 Cal.4th at p. 781; *In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5; see *In re Gay, supra,* 19 Cal.4th at p. 779, fn. 3.) This Court has rejected the "lethal injection" claim in other cases on appeal. (*People v. Hughes, supra,* 27 Cal.4th at p. 406; *People v. Taylor* (2001) 26 Cal.4th 1155, 1177; *People v. Samayoa, supra,* 15 Cal.4th at p. 864.)

At any rate, this claim is based on speculations and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) This claim "contains nothing of substance not already in the appellate record." (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.)

Petitioner has not met his habeas burden. Thus, this claim should be denied as in other cases. (*People v. Hughes, supra,* 27 Cal.4th at p. 406; *People v. Taylor, supra,* 26 Cal.4th at p. 1177 ["asserted imperfection in the method of execution is no basis for reversal of the judgment"]; *People v. Samayoa, supra,* 15 Cal.4th at p. 864.)

K. Claim X

Petitioner claims that our death penalty process violates equal protection rules since it is arbitrarily and capriciously imposed depending upon the county. (Pet. at 120-122.) This claim should be denied as untimely since it could have been raised on appeal. (*In re Sanders, supra,* 21 Cal.4th at p. 703; *In re Robbins, supra,* 18 Cal.4th at p. 781; *In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5; see *In re Gay, supra,* 19 Cal.4th at p. 779, fn. 3.) This Court has rejected this claim in other cases on appeal. (*People v. Lewis, supra,* 25 Cal.4th at p. 677 ["Permitting the district attorney of each county the discretion to decide in which cases to seek the death penalty does not amount, in and of itself, to a constitutional violation."].)

At any rate, the claim is based on speculations and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) This claim "contains nothing of substance not already in the appellate record." (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.)

Petitioner has not met his habeas burden here, and thus, this claim should be denied as in other cases. (*People v. Lewis, supra,* 25 Cal.4th at p. 677, numerous citations omitted.)

L. Claim XI

Petitioner claims that cruel and/or usual punishment principles as well as "international law" bar an execution after "lengthy confinement." (Pet. at 123-131.) This claim should be denied as untimely since it could have been raised on appeal. (*In re Sanders, supra,* 21 Cal.4th at p. 703; *In re Robbins, supra,* 18 Cal.4th at p. 781; *In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5; see *In re Gay, supra,* 19 Cal.4th at p. 779, fn. 3.) This Court has rejected this claim in other cases on appeal. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 511 ["international law" claim]; *People v. Hughes, supra,* 27 Cal.4th at p. 406 [lengthy confinement]; *People v. Taylor, supra,* 26 Cal.4th at pp. 1176-1177 [lengthy confinement]; *People v. Jenkins, supra,* 22 Cal.4th at p. 1055 ["international law"]; *People v. Fyre* (1998) 18 Cal.4th 894, 1030-1032 [lengthy confinement].)

At any rate, this claim is based on speculations and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) This claim "contains nothing of substance not already in the appellate record." (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.)

Petitioner has not met his habeas burden. Thus, this claim should be denied as in other cases. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 511; *People v. Hughes, supra,* 27 Cal.4th at p. 406; *People v. Taylor, supra,* 26 Cal.4th at p. 1176 ["A relatively lengthy period of incarceration pending appeal and execution is necessary to provide careful appellate review."]; *People v. Jenkins, supra,* 22 Cal.4th at p. 1055; *People v. Fyre, supra,* 18 Cal.4th at pp. 1030-1032.)

M. Claim XII

Petitioner claims that his conviction and death penalty violate various international laws. (Pet. at 131-135.) Respondent incorporates here the response given earlier to Part 6 to Claim IV. Specifically, given counsel was appointed over five years ago (Pet. at 7), this claim could have been raised on appeal, and the Vienna Convention pre-dates the instant 1992 trial (*Silva, supra,* 52 Cal.App.3d at pp. 275-278), this claim should be denied as untimely. (*In re Sanders, supra,* 21 Cal.4th at p. 703; *In re Robbins, supra,* 18 Cal.4th at p. 781; *In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5; see *Marks v. Superior Court, supra,* 27 Cal.4th at p. 188; *In re Gay, supra,* 19 Cal.4th at p. 779, fn. 3.) This Court has rejected an "international law" claim in other cases. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 511; *People v. Jenkins, supra,* 22 Cal.4th at p. 1055.)

At any rate, this claim is based on speculations and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins, supra,* 18 Cal.4th at p. 781; *People v. Duvall, supra,* 9 Cal.4th at p. 474; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1241, fn. 38; *People v. Karis, supra,* 46 Cal.3d at p. 656; *In re Swain, supra,* 34 Cal.2d at pp. 303-304; *In re Beal, supra,* 46 Cal.App.3d at p. 103.) This claim "contains nothing of substance not already in the appellate record." (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.) Further, as previously noted, petitioner fails to allege specific facts demonstrating that he fell within the protection of the Vienna Convention at the time of trial in 1992. He also fails to explain how his Vienna Convention rights were violated, and if so, he fails to explain how such violation was prejudicial and/or a violation of federal or state statutory or constitutional law. (*Breard, supra,* 523 U.S. at p. 375; *United States v. Lombera-Camorlinga, supra,* 206 F.3d at pp. 885-888 [violation of "consular notification" under Vienna Convention does not require suppression of subsequently obtained evidence in a criminal proceeding against a foreign national]; see *United States v. Alvarado-Torres, supra,* 45 F.Supp.2d at pp. 988-993; *People v. Corona, supra,* 89 Cal.App.4th

at pp. 1428-1430]; *Silva v. Superior Court, supra,* 52 Cal.App.3d at pp. 275-278.)

Petitioner has not met his habeas burden. Thus, this claim should be denied. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 511 ["International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements."]; *People v. Jenkins, supra,* 22 Cal.4th at p. 1055.)

N. Claim XIII

Petitioner urges that the judgment of conviction and death penalty must be reversed due to cumulative error. (Pet. at 135-137.) As shown in this Response and in the Respondent's Brief (RB 181, 218), there was little or no error in this case. Thus, a cumulative error claim should be denied. (See *People v. Hughes, supra,* 27 Cal.4th at p. 407; *People v. Taylor, supra,* 26 Cal.4th at p. 1184; *People v. Cunningham, supra,* 25 Cal.4th at p. 1009; *People v. Lewis, supra,* 25 Cal.4th at p. 678; *People Jenkins, supra,* 22 Cal.4th at p. 1057; *People v. Samayoa, supra,* 15 Cal.4th at p. 849; *People v. Jackson* (1996) 13 Cal.4th 1164, 1245; *People v. Clark* (1993) 5 Cal.4th 950, 1017; *People v. Price, supra,* 1 Cal.4th at p. 462.)

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the petition for writ of habeas corpus be denied.

Dated: July 9, 2002

Respectfully submitted,

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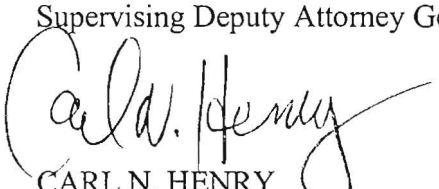

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/cnh
LA2002XH0003

DECLARATION OF SERVICE

Case Name: ***In re Alfredo Reyes Valdez*** No.: **S107508**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On JUL 0 9 2002, I placed a copy of the attached

INFORMAL RESPONSE TO HABEAS CORPUS PETITION

in the internal mail collection system at the Office of the Attorney General, 300 South Spring Street, Los Angeles, California 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Marilee Marshall
Attorney at Law
48 North El Molino Avenue
Suite 202
Pasadena, California 91101
(2 copies)

Mel Greenlee
Attorney at Law
California Appellate Project
One Ecker Place, Suite 400
San Francisco, CA 94105
(1 copy)

That I caused a copy of the above document to be deposited with the Clerk of the Court from which the appeal was taken, to be by said Clerk delivered to the Judge who presided at the trial of the cause in the lower court; and that I also caused a copy to be delivered to the appropriate District Attorney.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on JUL 0 9 2002, at Los Angeles, California.

K. Amioka

K. Amioka
Signature

CNH:ksa
LA2002XH0003