SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE	)	
	)	
ALFREDO REYES VALDEZ,	)	No. S107508
	)	
Petitioner.	)	Related Appeal S026872
	)	
	)	CAPITAL CASE
	)	

FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE THOMAS NUSS, JUDGE PRESIDING

reply to return

PETITIONER'S ~~TRAVERSE~~
AND MEMORANDUM OF POINTS AND AUTHORITIES

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DEATH PENALTY

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PETITIONER'S TRAVERSE

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT.

By this verified Traverse, petitioner Alfredo Reyes Valdez, by and through his counsel, responds to the state's Return as follows:

I. INTRODUCTION

Petitioner Alfredo Reyes Valdez has been sentenced to death for the murder of Ernesto Macias. His conviction and sentence were affirmed by this Court on direct appeal in ***People*** v. ***Valdez*** (2004) 32 Cal. 4th 72, cert. denied (2005) 161 L. Ed. 2d 105. His Petition for a Writ of Habeas Corpus was filed on June 14, 2002. After informal briefing by the parties, this Court, on November 7, 2004, issued an Order to Show Cause, limited in scope to four claims of ineffective assistance of counsel. On March 9, 2005, respondent filed its Return

to the Order to Show Cause. Petitioner submits that the Return actually supports petitioner's request for an evidentiary hearing on the issues identified by the court. Indeed, the Return admits facts sufficient to justify the issuance of the writ without an evidentiary hearing.

When this Court issues an order to show cause, it attests that those facts to which the court order applies are sufficient, if true, to justify the relief sought. "Issuance of an OSC signifies the court's preliminary determination that the petitioner has pleaded sufficient facts that, if true, would entitle him to relief." (***People v. Duvall*** (1995) 9 Cal. 4th 464, 475.) The burden then shifts to the respondent to controvert in the return the facts to which the order to show cause pertains. (***Ibid.***) At that point, the burden shifts again to the petitioner who, in his traverse, must admit or deny the allegations of the return. (***Id.*** at 477.)

The process has three possible outcomes: First, petitioner may admit the allegations of the return or respondent may demonstrate that the facts alleged in the petition cannot be true, which will result in the denial of the relief sought. (***Ibid.***) Second, the return and the traverse, considered together, may demonstrate the existence of disputes as to material facts which must be resolved in an evidentiary hearing. "[T]he factual allegations in the return are either admitted or disputed in the traverse, and this interplay frames the factual issues that the court must decide." (***Ibid.***) The respondent may admit, in its return, material facts

alleged in the petition. If those fact are sufficient to justify the relief sought, that relief may be granted without an evidentiary hearing. "When the return effectively admits the material factual allegations of the petition and traverse by not disputing them, we may resolve the issue without ordering an evidentiary hearing." (***In re Sixto*** (1989) 48 Cal. 3d 1247, 1252 (quoted with approval in ***Duvall, supra***, 9 Cal. 4th at 477.)

Respondent in its Return has admitted facts sufficient to justify, without more, the issuance of a writ of habeas corpus. In its Order to Show Cause, this Court expressly identified two ineffective assistance of counsel claims which, if petitioner's pertinent allegations are true, would necessitate the setting aside of his conviction.

Petitioner's Claim I A, alleged that trial counsel was prejudicially ineffective for not introducing evidence at his disposal that the blood on the pants in the Monte Carlo did not belong the victim. Far from denying this claim, respondent acknowledges that the blood on the pants in the Monte Carlo was proven by DNA testing to have come from someone other than the victim and that the blood on the gun was only subjected to gross serological testing, not DNA testing. He further admits that counsel, or at least counsel's associate, was given the report concerning the blood on the pants. (Return at 7.) Respondent further admits that defense counsel elicited from Frank Terrio that when Terrio searched

the Monte Carlo, he found a pair of gray trousers in the passenger compartment of the Monte Carlo on which he observed traces of blood; Terrio noted the pants and the blood in his inventory report. (R.T. 1118, 1119, Return at 8.) Respondent admits that defense counsel mentioned in his argument to the jury that jurors should consider the fact that the blood on the pants had been tested, and that, thus, the prosecution had not shown that the blood on the pants was consistent with the blood on the gun. (R.T. 1373, 1324, Return at 8.) If counsel had known that the blood on the pants had been tested it is doubtful he would have argued to the jury that it had not been tested especially when the results of the test would have been helpful to his client. Yet, respondent admits that counsel had constructive if not actual knowledge that the testing had in fact been done; moreover, respondent admits that counsel knew or had constructive knowledge that the results of the test indicated that the blood on the pants did not belong to Macias, at the time counsel argued that the blood had not been tested. (R. T. 11, Return at 7.)

Respondent admits that after counsel argued that the blood had not been tested, the prosecutor then seized the opportunity to argue that if the blood on the pants was important to the defense, the defense would have had the pants tested or called its own expert, that it was unknown what Terrio did with the pants and that defense counsel had not even asked him any questions about what he did with the

pants. (Return, p. 8.)

In preparing for its Return, respondent claims t
with trial counsel on December 13, 2004. (Return at 2
this conversation had any content in support of respoı
Respondent would offer his own declaration as to wh
this conversation. Instead respondent claims in an unverified Return that he believes there is good cause to dispute facts alleged in the petition. (Return, p. 2.) Initially, it should be noted that trial counsel is under no obligation to provide respondent with a declaration and in fact is under an obligation to his client not to reveal privileged communications. California courts have interpreted waiver of the privilege narrowly. In a case where a petitioner asserts ineffective assistance of counsel and there is a hearing to resolve the merits of this claim, petitioner waives the attorney-client privilege only *to the extent relevant to the claim*. (Evid.Code, § 958; ***In re Scott*** (2003) 29 Cal.4th 783, 813; ***In re Gray*** (1981) 123 Cal.App.3d 614, 616.) California law appears to contemplate that questions of the existence and scope of privileges should be determined by the courts; "Generally, the lawyer should claim the privilege on behalf of his client unless he has been otherwise instructed." (***Stearns v. Los Angeles County School Dist.*** (1966) 244 Cal.App.2d 696, 723.)

Proceedings used by courts to protect clients from unnecessary

consequences of disclosure have included *in camera* review of the information to determine which material is or is not privileged, and orders limiting the persons to whom information deemed not privileged may be disclosed. (***In re National Mortgage Equity Corp. Mortgage Pool Cert.*** (C.D. Cal 1988) 120 F.R.D. 687, 691-692.) Such orders have also been made by federal judges in capital habeas corpus litigation. For example, in ***McDowell v. Calderon*** (9th Cir. 1999) 197 F.3d 1253, an in-camera inspection procedure was used in district court. After determining that some of the documents were not privileged, the judge issued a protective order that the information in those files could be used only to litigate the habeas claims and that it could not be disclosed to law enforcement agencies or prosecutors, except by further order of the court. The Ninth Circuit upheld limited disclosure and use of the protective order.

It is, therefore, to be assumed that trial counsel correctly refused to discuss his representation of petitioner, especially any confidential communications, with the Attorney General prior to an evidentiary hearing in which a court can decide the question of whether and to what extent the privilege has been waived in this case. Counsel's ongoing responsibility to petitioner requires him to assert the attorney-client and work product privileges against any disclosure of information to opposing parties. By waiting until a court's decision of questions related to the waiver of petitioner's privilege, trial counsel is fulfilling his continuing

responsibility to petitioner as his advocate.

Petitioner submits that the speculative reasons respondent attributes to trial counsel, especially in the absence of any evidence or even a Verification of the Return, are not sufficient and should be disregarded entirely. Petitioner further submits that, even if the reasons advanced by respondent were the reasons trial counsel offered, hinted at (or when asked leading questions about his tactical reasons) said "could be," they would not constitute reasonable tactical decisions.

Specifically, respondent speculates that counsel failed to offer evidence about the blood on the pants found in petitioner's car not belonging to Ernesto Macias, because counsel was skeptical of DNA results. (Return at 2.) Respondent speculates that trial counsel wanted to maintain credibility with the jury, that is, given his trial tactic to discredit DNA results as to the blood on the gun, he would have lost credibility if he had embraced DNA by offering results that the blood on the pants did not come from the victim. (Return at 2.) According to respondent, counsel may also have been concerned about admission of unfavorable rebuttal evidence. Respondent speculates that petitioner may have told counsel something that caused counsel to believe the blood on the pants came from another victim or from petitioner himself. (Return at 2.)

Respondent's argument is incoherent and belied by the report itself. Respondent admits and the report so states that the blood on the pants was

determined not to be that of Ernesto Macias. The report does not indicate that it was tested against petitioner's blood or against any other conceivable victim of some imagined or conceivable crime. All counsel needed to do was, as the prosecutor suggested in argument, ask the prosecution's witness whether or not the blood had been tested and whether in fact it had come back negative as to Ernesto Macias. The fact of the exclusion was a scientific one that would have been impossible to rebut. Also, as for fear of rebuttal, petitioner' blood would probably not have been relevant, and even if deemed relevant, would not have been harmful. Unless the blood belonged to petitioner or Macias, its source would have been totally irrelevant in these proceedings.

This court has stated clearly that in "habeas corpus proceedings, there is an opportunity in an evidentiary hearing to have trial counsel fully describe his or her reasons for acting or failing to act in the manner complained of." (***People v. Pope***, (1979) 23 Cal. 3d 412.) ***Pope*** contemplates full factual development of trial counsel's representation in an evidentiary hearing which Petitioner has not yet been afforded. However, " If the petition is sufficient on its face, this court is obligated by statute to issue a writ of habeas corpus." (***People v. Romero*** (1994) Cal. 4th 728, 737-738.) Thus, even assuming arguendo, without conceding, that counsel could offer some tactical reason for not doing additional testing, there is no conceivable tactical reason for not eliciting the fact that the blood on the pants

was not Ernesto Macias' blood. Whatever petitioner may or may not have told his attorney would have been and is irrelevant as to whether or not counsel should have asked that one important question. It was a question to which there could only be one answer and counsel knew or reasonably should have known the answer. " No, DNA tests showed the blood on the pants did not belong to the victim." Counsel could have argued that while the testing done on the gun was inconclusive, the testing done on the pants absolutely excluded Ernesto Macias as a possible donor of the blood.

In Claim IV B petitioner alleges that trial counsel was prejudicially ineffective for failing to make an adequate offer of proof and to cite appropriate authority to the court with respect to the admission of third party culpability evidence. It is undisputed that trial counsel did attempt to introduce evidence with respect to the arrest of Liberato Gutierrez, a drunk, extremely nervous young man who was found in the alley near the crime scene with blood on his clothing. Contrary to respondent's contentions, once trial counsel made a tactical decision to try to introduce this evidence, there could be no tactical reason for not citing the appropriate legal theory, making an adequate offer of proof and citing appropriate authorities . Counsel wanted to introduce evidence from which he could argue that there was a reasonable doubt as to whether Liberato Gutierrez, rather than petitioner, killed Macias or at least took his wallet after he had

collapsed in the street, but counsel was unprepared to rebut the prose incorrect statements of law and fact with respect to the admissibility evidence.

Here again respondent's fanciful deductions are not evidence and should be completely disregarded. Respondent speculates that trial counsel did not want to point the finger at Liberato because petitioner may have told counsel he killed and robbed Macias and that it would be improper as an officer of the court for counsel to present false evidence. (Return at p. 12.) Respondent's speculation on counsel's motive and strategy is belied by the fact that counsel did try to present this evidence; he just did not know how. Without regard to anything petitioner may or may not have told his attorney, it would still have been counsel's duty to raise all legal and factual defenses available to his client. (See ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 10.8, 10.10.) Assuming, without conceding, that counsel somehow knew Liberato did not kill Macias, it would have been inappropriate for counsel to put on a witness he knew was testifying falsely to say that he saw Liberato kill Macias. Introducing perjured testimony is presenting false evidence; introducing true facts that deflect guilt from your client is not presenting false evidence. Counsel would not have been presenting false evidence or testimony. He would have been presenting evidence which all the parties acknowledged existed which

would have lent support to counsel's argument that there was reasonable doubt petitioner killed and robbed Macias. Respondent at times, seems to reason as if petitioner had the burden of proof at trial. This is clearly not the law.

Assuming, without conceding, that there could be some tactical reason for counsel not seeking additional testing or discovery with respect to Liberato or his shoes, there could be no tactical or ethical reason, as respondent speculates, for not presenting the fact of Liberato's inebriated, bloody and nervous condition in close spacial and temporal proximity to the crime. Also, while there could conceivably be tactical reasons for an attorney not seeking to admit certain evidence, there can be no tactical reason for an attorney not offering appropriate and reasonably available legal theories and authorities for evidence that he or she is seeking to admit. Here, counsel indeed tried, however, ineffectively, at least at the guilt phase, to persuade the court to admit the very evidence that respondent now urges this Court to believe he found ethically inappropriate. Anything that petitioner may have told his client is, therefore, irrelevant to the determination of the merits of petitioner's claim and no waiver of the privilege is necessary or appropriate.

As this Court acknowledged in its order to show cause, counsel also failed to request that the court at least admit the evidence at the penalty phase where it was relevant to lingering doubt which counsel argued to the jury and upon which

the court instructed the jury. (Petitioner's Claim IV I.) Counsel should have renewed his request to present the presence of the bloody, nervous inebriated Liberato at the penalty phase to strengthen counsel's argument that there was lingering doubt as to petitioner's guilt. Anything petitioner may or may not have told his attorney is again irrelevant to counsel's performance. Counsel chose to argue lingering doubt and asked the court to instruct on lingering doubt. Evidence that another particular person may have been responsible would have supported his argument.

With respect to Claim H, petitioner's allegations that counsel failed to investigate and present evidence in mitigation, respondent does not claim that counsel had his client evaluated by a mental health professional and made a tactical decision not to use the expert's testimony. At least in this instance respondent, to his credit, does not bother to speculate based on notions of what petitioner may have told his attorney, that would have caused counsel not to have such an evaluation done at an early stage of the proceedings. (Return p. 3.)

No doubt the lack of speculation is because respondent realizes that any such claim would totally unavailing. Counsel had the option of being present during any evaluation and of admonishing the expert and the client not to discuss the offense with which he was charged. Since the evaluation would have remained confidential, unless and until counsel decided to call the expert to testify, whatever

petitioner told counsel or the expert would have been irrelevant to counsel's determination. Petitioner submits that while there could conceivably be a tactical reason for not presenting the testimony of an expert in a particular case, or of a particular expert, there could be no tactical reason in a capital case for not consulting with a mental health professional, providing the professional with as much social history as possible based on a thorough and timely investigation, and having a psychological evaluation done for guidance in preparing a guilt and penalty phase defense.

Thus, respondent's denial that petitioner's adult behavior is the result of post traumatic stress syndrome and organic brain damage due to child abuse, head trauma and ingestion of toxic substances is inadequate. (Exhibit AA.) Petitioner has presented a prima facie case of his impairment. His case is set forth in his Petition and in his informal responses in Exhibit AA, the declaration of Dr. Kaser Boyd and its appended drawings by Petitioner, in the evidence upon which she relied, Exhibits R through X, all of which are below incorporated herein by reference.

The United States Supreme Court has made emphatically clear in ***Wiggins v. Smith*** (2003) 539 U.S. 510 [123 S.Ct. 2527, 156 L.Ed.2d 471] and more recently in ***Rompilla v. Beard*** (2005 U.S. Lexis 4846 that counsel must go beyond cursory interview with a few family members. Counsel must investigate and

present mitigating evidence relating to the defendant's moral culpability. The evidence set forth in the Petition "adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury." (***Rompilla v. Beard, supra.)***

The failure of trial counsel to conduct an adequate and competent investigation meant that his decision to proceed as he did was not an informed one and was not an informed reasonable and tactical decision. Merely presenting certain categories of evidence is not enough. Rather, counsel must sufficiently investigate and prepare the case, including providing experts with the information necessary to support their conclusions, so that the defense can be effective. (See also ***Wallace v. Stewart*** (9th Cir. 1999) 184 F. 3d 1112, 1116, cert. denied, (2000) 528 U.S. 1105; ***Bean v. Calderon*** (9th Cir. 1998) 163 F.3d 1073, 1078-1081, cert. denied, (1999) 528 U.S. 922; ***In re Gay*** (1998) 19 Cal.4th 771, 807-808, (***In re Lucas*** (2004) 33 Cal. 4th 682.)

Respondent seems to maintain that the aggravation evidence was strong and, therefore, mitigation evidence was not as important as it would have been if the aggravation evidence had been weak. (Return p. 159.) Assuming arguendo, that the aggravation evidence was overwhelming, one would assume that the more overwhelming it was, the harder counsel would try to muster mitigating evidence. Here counsel failed to even conduct in- depth interviews of the few witnesses he

utilized and only succeeded in giving the jury the wrong impression of petitioner and his family. The jury was led to believe that they were a close knit loving family unit who had worked hard and if petitioner had gotten on the wrong track, it was his own fault. Counsel did not introduce any evidence of the abuse Petitioner suffered, of his constant battle with drug addiction, of his previous traumatic injuries and worst of all no mental health expert to testify as to Petitioner's mental state. The failure to present what would have been readily available mitigation evidence could not have been a tactical decision since no doctor was ever appointed to examine Petitioner and consult with counsel. Counsel's failure in this regard was particularly inexcusable and prejudicial because testimony similar to Dr. Kaser Boyd's declaration would have enabled the jury to understand the causes of appellant's adult behavior at the time of the crime and while in custody, thus mitigating not only the offense for which they convicted him but all of the prosecution's aggravating evidence.

Counsel's failure is also particularly inexcusable given the numerous ***Marsden*** motions, written and oral, some which took place early in the proceedings, all indicating, at least from counsel's perspective, that petitioner had serious mental problems. Respondent recites all the ***Marsden*** hearings, in his Return, as if they somehow excuse counsel's failure to have his client evaluated. (Return 132-142.) Quite to the contrary, counsel's responses at the Marsden

hearings show that, petitioner in counsel's eyes, was behaving irrationally, making unreasonable and contradictory demands, and was refusing to cooperate in his own defense. (Return 132-142.) Had counsel had the benefit of a psychological evaluation at an early state of the proceedings, it would have, at the least, helped him to understand and cope with his client's deteriorating mental state. Frankly, assuming without conceding that, if as respondent suggests, counsel believed or thought his client was guilty, his failure to have him evaluated was even more egregious as any reasonable advocate would have wanted to explore his client's mental state at the time of the crime for both guilt phase and penalty phase purposes.

II. **INCORPORATION BY REFERENCE**

Petitioner expressly re-alleges and incorporates by reference all the material allegations, prayers for relief, and accompanying exhibits set forth in his Petition for Writ of Habeas Corpus filed in this Court on June 13, 2002, his informal reply, and his supplemental exhibits and memorandum of points and authorities filed in this court on March 24, 2005, as though set forth in full. Petitioner responds to those points and arguments in the Return on which a reply would assist the Court. Petitioner does not waive any individual claim or argument on which he does not comment or present argument or evidentiary support in this Traverse. (See, e.g. ***In re Sixto, supra***, 48 Cal. 3rd at 1252,.)

Petitioner has alleged facts sufficient to demonstrate that absent counsel's errors and omissions he would not have been convicted or sentenced to death. (***Strickland v. Washington***(1984) 466 U.S. 668, 694 [104 S.Ct. 2052; 80 L.Ed.2d 674].) Since "investigation and preparation are the keys to effective representation," (***People*** v. ***Ledesma***, ***supra***, 43 Cal.3d at 222) counsel has a duty to interview potential witnesses, read the discovery provided to them, and "make an independent examination of the facts, circumstances, pleadings and laws involved." ***(Strickland*** v. ***Washington***, ***supra***, 466 U.S. at 691.)

Had counsel acted as a diligent, conscientious advocate, it is reasonably probable that petitioner would not have been convicted of capital murder or sentenced to death. (***Strickland*** v. ***Washington, supra*** 466 U.S. at 694). All of the errors and omissions of counsel separately and collectively contributed to the guilty verdict, the true finding on the special circumstance and to the death penalty verdict and sentence.

III CLAIM SPECIFIC ADMISSIONS, DENIALS AND INADEQUATE DENIALS

A. CLAIM IVA

Petitioner's Claim That Trial Counsel Was Prejudicially Ineffective When He Failed to Present the Guilt Phase Jury With DNA Evidence That Blood on the Pants In the Monte Carlo Did Not Belong to Macias, The Victim.

Respondent's Admissions

Respondent admits that blood was found on pants seized from a car about 24 hours after the instant shooting (which occurred on or about April 30, 1989) was sent to a laboratory in Maryland for testing in June 1991. On August 19, 1991, the laboratory dated a letter to the Los Angeles County Sheriff's office stating that the DNA obtained from material cuttings labeled blood stains from pants did not originate from the victim and that this is the letter which is marked Exhibit F to the petition. Respondent admits that counsel constructively received the letter from the prosecutor around September 4, 1991. (Return, p. 6, 7.)

Respondent admits that the report [Pet. Ex F.] was not given directly to trial counsel but only to the attorney who appeared on his behalf, Charles Uhalley. (Return p. 79, Note 26.)

Respondent admits that counsel could have easily called a Maryland

laboratory official to testify that the blood on the pants did not come from the victim. (Return p. 7.)

Respondent admits that the prosecution offered no evidence about the blood on the pants. (Return p. 7.)

Respondent admits it was trial counsel who elicited guilt phase trial testimony during a re- cross examination of a police officer that the blood was found on pants seized from the passenger compartment of the Monte Carlo during a search shortly after petitioner's arrest. (Return p. 8.)

Respondent admits that trial counsel in closing argument urged the jury to consider the fact that (1) the blood on the pants had not been tested and (2) no analysis had been provided by the prosecution to show that the blood on the pants was consistent with the blood on the gun. (Return p. 8,)

Respondent admits that trial counsel's only capital case experience was one previous appointment as advisory counsel. (Return p. 9, note 7.)

Respondent admits that trial counsel lacked even a rudimentary understanding of DNA evidence, even to the extent of understanding the significance of a DNA exclusion. (Return 100-101.)

Respondent's Inadequate Denials

Respondent's denial that counsel's representation fell below an objective

standard of reasonableness is inadequate to satisfy his pleading burden. Respondent's admissions alone render his denial inadequate. Respondent essentially states that it was ethical and appropriate for counsel to lie to the jury by stating that blood had not been tested when he knew in fact that it had been tested. In the next breath, respondent argues that it would not have been ethical and appropriate to tell the jury the truthfully that the blood had been tested and did not belong to the victim. (Return at 8.)

Respondent's denial that trial counsel rendered ineffective assistance in introducing evidence of more blood found in the car and then arguing that it had not been tested is inadequate. (Return p. 9.) It was ineffective for counsel to fail to introduce evidence that blood, not belonging to the victim, was found on pants in the car. It was, however, far more ineffective to introduce evidence that there was blood found and then not make absolutely sure that the jury knew it was not the victim's. Counsel's argument called forth the prosecutor's comments that counsel had asked no questions about whether the blood was tested and in fact defense counsel could have had it tested himself. The jury was thus left with the distinct impression that the blood on the pants must have been the victim's blood. (Return p. 9.)

Petitioner's Denials

Petitioner denies that counsel had actual knowledge of the test results with

respect t the blood on the pants or that he made any reasonably informed tactical decision in that regard.

Petitioner denies that anything he may have told his attorney could possibly have rendered it ethically improper for counsel to present scientific evidence that the blood on the pants did not come from the victim.

Petitioner denies that anything he may have told his attorney could have rendered it ethically improper for counsel to argue to the jury that since the blood on the pants did not come from the victim, there was a reasonable doubt that the blood on the gun did not come from the victim either. (Return at. 7.)

Petitioner denies that anything he may have said could have been relevant to counsel's decision since the DNA evidence excluding Macias as a donor of the blood on the pants was the absolute truth. (Return at. 7.)

Petitioner denies respondent's allegation that counsel's presentation was tactical and reasonable. (Return 8, 9.)

Petitioner denies that it was tactical and reasonable to introduce evidence that blood was found on the pants in the car, and then not to prove conclusively that it did not belong to the victim.

Petitioner denies that it was tactical and reasonable to introduce evidence and argument with respect to blood found on the pants and not to prove that it did

not come from the victim, where counsel could have anticipated the prosecutions's response.

Petitioner denies respondent's allegations that petitioner was afforded the effective assistance of counsel and realleges that he was denied the effective assistance of counsel.

B. CLAIM IV B

Petitioner's Claim That He Was Deprived of the Effective Assistance of Counsel When Counsel Failed To Make A Proper Offer Of Proof As to Third Party Liability Evidence.

Respondent's Admissions

Respondent admits that counsel's representation to the trial court was accurate, namely that a police report dated April 20, 1989 indicated that four suspects including Gutierrez, were taken to the police station from the crime scene. The report states that Gutierrez appeared to have blood on his shirt and on a shoe, his hands were shaking as if he was nervous as he spoke to Detective Guenther and the above gave police reasonable cause to arrest Gutierrez on suspicion of murder. (Return, p. 10, 11, C.T. "Supplement One: 18-22-23,26-28, 30-31.)

Respondent's Inadequate Denials

Respondent denies that trial counsel wanted to introduce direct evidence that Liberato Gutierrez may have killed the victim or at least taken the victim's wallet after the shooting; respondent claims counsel failed to do so because he had a duty to refrain from offering false evidence. (Return, 10, 11.) Respondent speculates about counsel's motive, not from a phone conversation, but from reading between the lines of barely coherent ***Marsden*** motions. (Return 10-11.) Respondent speculates that petitioner may have told his counsel that he committed the murder robbery and that counsel had a duty to refrain from introducing false evidence. (Return 10, 11.) Respondent's argument is belied by the record. Trial counsel did not seek to introduce ***direct*** evidence that would point the finger at Liberato Gutierrez because he did not have any such evidence; rather, what counsel wanted to introduce was circumstantial evidence of Gutierrez's guilt. Specifically, he wanted to introduce evidence from which the jury could infer that Liberato may have committed the murder and/or robbery such as the fact of his bloody clothing and shoes, his proximity to the crime scene his nervousness and his inebriation. Petitioner reasonably believes the record establishes that counsel wanted to introduce this evidence because counsel argued strenuously for its admission. Counsel just did not realize that this was evidence that was admissible within the meaning of ***People v. Kaurish*** (1990) 52 Cal. 3d

648, and ***People v. Hall*** (1986 41 Cal. 3d 915. Whatever petitioner may or may not have told his counsel is however, irrelevant because as counsel stated, he was not going to be calling witnesses who would say that they saw Liberato kill Macias. The evidence which counsel sought to present through Detective Guenther was undisputedly true testimony, not perjury as respondent would imply. As it was, counsel made the argument with a watered down version of the evidence; he was not allowed to mention that Liberato had been arrested, or that he was bloody, nervous and inebriated.

Petitioner's Denials

Petitioner denies that he received the effective assistance of counsel, or that counsel had or could have had any tactical or ethical reason for not arguing an appropriate theory and appropriate legal citation for the evidence he sought to admit.

C. Claim IV I

Petitioner's Claim That Petitioner Received Ineffective Assistance of Trial Counsel When Counsel Failed to Request the Admission of Third Party Culpability Evidence At the Penalty Phase On The Issues of Lingering Doubt.

Respondent's Admissions

Respondent admits that trial counsel requested and received an instruction on lingering doubt and argued lingering doubt to the jury. (Return at 71.)

Respondent's Inadequate Denials:

Respondent denies that trial counsel was ineffective when he failed to seek the admission of his best lingering doubt evidence, Detective Guenther's testimony about the arrest of Liberato Gutierrez. (Return at 72.) Respondent admits that counsel failed to seek the admission of the Gutierrez evidence speculating that counsel had a duty, as an officer of the court, to refrain from knowingly proffering false trial evidence, and further speculating that petitioner ***may*** have told counsel he was guilty. (Return at 72.)

Respondent's denial is inadequate because, as respondent admits, counsel argued to the jury that there was reasonable doubt, that *he believed* there was reasonable doubt, that he should have won the guilt phase, that the jury's decision was based on a couple of drunks, that it was not certain that it was the victim's blood on the gun, that mistakes take place in the system and it is impossible to correct those mistakes once someone is dead. (Return at 71, 72.)

Since counsel obviously believed, as any reasonable attorney would, that it was ethical, if not obligatory, to make this argument, he would have certainly deemed it ethical and obligatory, if supported by the evidence, to argue that someone else may have committed the robbery and/or murder. There could be no

ethical reason, no matter what his client may or may not have told him, to prevent counsel from introducing evidence of other likely perpetrators, thus deflecting guilt from his client. Again, the evidence about the existence of Gutierrez and his condition was true, not false. Anything petitioner may have told his attorney is, therefore, irrelevant to the issue before this Court.

D. CLAIM IV H

Petitioner's Claim that He Was Deprived of the Effective Assistance of Counsel By Counsel's Failure to Consult with Competent Experts and Present Available Mitigation Evidence

Respondent's Admissions

Respondent admits or at least does not deny that trial counsel did not have his client evaluated by a mental health expert. All of respondent's denials are, therefore, inadequate, as none of counsel's decisions with respect to mitigation evidence could conceivably have been well informed decisions.

Respondent's Inadequate Denials

Respondent's denial that petitioner received the ineffective assistance of counsel and made reasonable tactical decisions is inadequate because counsel's choice not to present expert testimony was not well informed as he did not have his client evaluated and had no idea what type of mental health problems an

examination of his client would yield. (Return 46-47.)

Respondent's denial that the portrait of petitioner's family and childhood was grossly misleading is inadequate as it is belied by the uncontroverted evidence presented by petitioner in his original petition. (Return 49-66.)

Respondent's denial that petitioner suffered extreme and unrelenting physical and emotional abuse as a child is inadequate as the evidence offered by petitioner in his original petition is controverted by any evidence to the contrary. (Petition Exhibits R through X.),

Respondent's denial that petitioner's adult behavior is the result of post traumatic stress syndrome and long term substance abuse is inadequate as Dr. Kaser Boyd's opinion is not controverted.(Exhibit AA.)

Contrary to respondent's assertion, (Return, at p. 74.) Dr. Kaser Boyd, reviewed petitioner's social history, and declarations R through X, as well as the defense and prosecution's penalty phase evidence, ***prior to interviewing and evaluating petitioner at San Quentin on two consecutive days.*** (Exhibit AA, par. 1.) Dr. Kaser Boyd opined that petitioner, on multiple occasions, experienced the specific traumatic stressor of sever child abuse, physical and psychological and as a result developed chronic Post Traumatic Stress Disorder. (Exhibit AA, par. 7.) Petitioner fails to understand, and respondent does not explain, what the probation reports or ***Marsden*** hearings would have added to her evaluation.

(Return, p. 47.) Obviously limited resources made it impractical for her to review the whole case .

Post Traumatic Stress Disorder was well know at the time of petitioner's trial. The development of Post Traumatic Stress Disorder (Hereinafter, PTSD) has been formally recognized by the medical community since 1980. (Hamblen, Jessica Ph.D., PTSD in Children and Adolescents, National Center for Post Traumatic Stress Disorder.)

One of respondent's most inane suggestions is that Dr. Kaser-Boyd could not have been utilized an expert at petitioner's trial because she had only had her present job for two years. (Return p. 68, note 22.) As her curriculum vitae indicates, however, she completed her post doctoral work in forensic psychiatry in 1981 and became a member of the expert witness panel in Los Angeles County Superior Court in 1982. (Exhibit AA.1) She would clearly have qualified as an expert at the time of petitioner's trial, as would many other competent mental health professionals.

Petitioner's Denials

Petitioner denies that trial counsel conducted a reasonable investigation into petitioner's social history and mental impairment and alleges that failure to discover and present the evidence presented in his Petition denied him the effective assistance of trial counsel, a fair trial and reliable penalty determination.

IV PETITIONER'S GENERAL DENIALS

In addition to the discussion above of claim specific admissions and denials. Petitioner by this Traverse denies virtually every material allegation of the Return and, by these denials, puts at issue each allegation identified by this Court in it Order to Show Cause, thereby fully supporting his request for a writ of habeas corpus and an evidentiary hearing

V CONCLUSION

Petitioner submits that respondent has admitted facts sufficient to justify, without more, the issuance of a writ of habeas corpus. In addition, numerous material facts pertinent to the claims identified in the Order to Show Cause are in dispute. Therefore, petitioner respectfully requests that the Court issue the writ or order a evidentiary hearings on the facts at issues.

Dated: July 5, 2005

Respectfully submitted,

Marilee Marshall

MARILEE MARSHALL
Attorney for Petitioner

VI VERIFICATION

I, Marilee Marshall, hereby declare:

I am an attorney admitted to practice law in the State of California. As appointed counsel, I am the attorney for petitioner, Alfredo Reyes Valdez.

I am authorized to file this Traverse on petitioner's behalf. I make this verification on his behalf because he is incarcerated in county different from that in which I have my office. In addition, many of the facts alleged are within my own knowledge as much as, or more than petitioner's. All facts alleged in this document not otherwise supported by citation to the record, exhibits or other documents are true of my own personal knowledge.

I declare under penalty of perjury under the law of the State of California that the foregoing is true and correct.

Executed at Los Angeles, California, this 5th day of July 2005.

Marilee Marshall

MARILEE MARSHALL

VII MEMORANDUM OF POINTS AND AUTHORITIES

PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the United States Constitution has been interpreted by the United States Supreme Court to guarantee to every criminal defendant the right to effective assistance of counsel. (***Gideon* v. *Wainright*** (1963) 372 U.S. 335, 344 [83 S.Ct. 792, 796, 9 L.Ed.2d 799].) Therefore, "[i]t has long been recognized that the right to counsel is the right to effective assistance of counsel." (***U.S.* v. *Cronic*** (1970) 466 U.S. 648, 654 [104 S.Ct. 2039, 80 L.Ed.2d 657], quoting from ***McMann* v. *Richardson*** (1970) 397 U.S. 759, 771, n. 14 [90 S.Ct. 1441, 1449, 25 L.Ed.2d 763].) That right is "recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." (***U.S.* v. *Cronic, supra***, 466 U.S. at p. 658.) "Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits." (***Evitts* v. *Lucey*** (1985) 469 U.S. 387, 395 [105 S.Ct. 830, 835, 83 L.Ed.2d 821].) This Court has held that a "defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent, conscientious advocate." (***People* v. *Pope*** (1979) 23 Cal.3d 412.) To establish entitlement to relief for ineffective assistance of counsel, the burden is on the defendant to show (1) trial

counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates; and (2) counsel's omissions deprived him of a potentially meritorious defense (***People* v. *Miranda*** (1987) 44 Cal.3d 57, 119), or, but for counsel's deficient performance, it is reasonably probable that the outcome would have been different. (***People*** v. ***Ledesma*** (1987) 43 Cal.3d 171; ***Strickland*** v. ***Washington*** (1984) 466 U.S. 668 [104 S.Ct. 2052; 80 L.Ed.2d 674].) But for trial counsel's deficient performance in the instant case, it is reasonably probable that petitioner would not have been convicted and/or sentenced to death.

Throughout the Return, respondent attempts to excuse counsel's errors and omissions by asking this Court to infer that counsel behaved as he did because his client was guilty and must have admitted guilt to his counsel. Respondent bases this rash, unverified conclusion on an illusory phone conversation, the content of written and spoken ***Marsden*** motions, all of which are subject to many different interpretations, some of which are not even coherent, and none of which are relevant to the issues upon which this court has issued an order to show cause. [1]

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[1] Perhaps most capricious is that Respondent, contrary to the Constitution of the United States, asks this court to infer that petitioner must be guilty and counsel must have known it, because counsel advised his client not testify at the penalty phase and petitioner took his advice. (Return at 16-18.) Respondent fails to mention that the court ruled that petitioner could testify at the penally phase and the cross examination would be limited to the scope of the direct. (R .T. 1744, Respondent's premise would invert the protections of the Fifth Amendment, inviting a presumption of guilt. (R.T. 1745.) While petitioner ultimately went along with his attorneys wishes and did not testify, he did not, as respondent

Absent further orders from a court, petitioner will not debate with respondent the meaning to be attributed to each individual statement made by petitioner during the ***Marsden*** motion or for that matter counsel's responses.

Petitioner's position is that any attorney client communication that respondent could possibly imagine, or hope for, would not be relevant to the claims asserted herein as there could be no communication which would excuse counsel's failure to present valid, exculpatory evidence in the guilt phase and to investigate, discover and present readily available mitigation evidence in the penalty phase. By respondent's reasoning, only those defendants whose innocence is already patent would be entitled to fair trials. Such a view is not in accord with the Sixth, Eighth or Fourteenth Amendments.

A. Counsel Unreasonably and Prejudicially Declined to Introduce Evidence at His Disposal that Ernest Macias Had Been Excluded As a Possible Donor of the Blood On the Pants Found in the Monte Carlo.

Respondent seeks in vain for a valid tactical reason for counsel's failure to introduce this obviously exculpatory and irrefutable piece of evidence. In support of his outlandish assertion that an attorney, trying a capital murder case in 1992 was reasonably skeptical of a DNA exclusion, counsel points this Court to, what was, at that time, evolving jurisprudence concerning the use of DNA profiling to

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suggests, fail to testify in order to avoid having to discuss the guilt phase evidence.

prove the identify of the perpetrator of a crime. While this was undoubtedly the purpose of the prosecution sending the pants out for DNA testing, such a 'skeptical' match was not what counsel had to contend with in the instant case. The pants, as respondent admits, were subjected to RFLP testing and Macias was ***excluded*** as a donor of the blood. (Return at 105-107.)

Restriction fragment length polymorphism, (RFLP) testing has three discrete steps: (1) processing of a DNA sample from a relevant source (e.g., suspected genetic material found at a crime scene) and a DNA sample from a relevant subject (e.g., genetic material of criminal defendant) to produce X-ray films (autorads) that indicate the lengths of the polymorphic fragments of each sample; (2) examination of the autorads of both samples to determine whether any sets of fragments match; and (3) if there is a match, determination of the match's statistical significance. (***People v. Venegas*** (1998) 18 C.4th 47, 60, 74 C.R.2d 262, 954 P.2d 525.) The cases respondent attempts to discuss, as this Court undoubtedly knows, all concern either the handling of the samples, the validity of the match and/or the determination of a match's statistical significance. They do not concern the validity of an exclusion.

Years before DNA profiling was used to prove identity in criminal cases, a blood test exclusion was widely accepted in both the scientific and judicial community. Such tests were primarily utilized in paternity cases. In fact in 1981,

the United States Supreme Court stated that "the Landsteiner classification of blood groups, as improved by later scientific studies, is the basis of a widely recognized test of non paternity of a person asserted to be the father of a child. The medical profession generally regards this test, when properly conducted, as practically conclusive on that issue. And this is the present view of courts and commentators: "As far as the accuracy, reliability, dependability--even infallibility--of the test are concerned, there is no longer any controversy. The result of the test is universally accepted by distinguished scientific and medical authority. There is, in fact, no living authority of repute, medical or legal, who may be cited adversely. ... [T]here is now ... practically universal and unanimous judicial willingness to give decisive and controlling evidentiary weight to a blood test exclusion of paternity." (***Little v. Streater*** (1981) 452 U.S. 1, [101 S.Ct. 2202, 2206, 68 L.Ed.2d 627, 633.] citations omitted.)

Thus, while the prosecution had, (in all likelihood realizing they had a weak case,) hoped to obtain a DNA match indicating that the blood on the pants found in the Monte Carlo came from Macias, what they got instead was an exclusion. Pursuant to ***Brady v. Maryland*** (1963) 373 U.S. 83, [83 S. Ct. 1194,10 L. Ed. 2d 215,] they were obligated to turn over this exculpatory piece of evidence to the defense, and as respondent admits, they did so in September 1991. (Return at 11.) Any reasonably competent trial attorney in trial counsel's place, whether in

1992 or years earlier, would have considered the exclusion of Macias as a possible donor of the blood on the pants, to be his or her most valuable piece of evidence. This is especially true since the blood on the gun was not subjected to DNA testing, the results were uncertain, and there was little else linking petitioner to the crime. Even if, as respondent suggests, counsel did not know what an exclusion meant, he received the information in September of 1991 and certainly had an obligation to do the necessary research or to consult with someone who could explain the significance of the test to him. Counsel certainly knew that it was an important test that the prosecution was spending time and resources on having done. (Return p. 79, 80.) Any reasonably competent attorney, even if previously totally unaware of the meaning of such evidence, would have consulted with forensic experts so as to ensure that by the time of trial he understood the reports provided to him by the prosecution sufficiently well to utilize the evidence to defend his client. (See ABA Guidelines.)

B. Counsel Unreasonably and Prejudicially Failed to Argue to the Court That the Evidence He Sought to Present Was Admissible Under ***Hall*** and ***Karuish***.

According to Detective Guenther's reports and his testimony at the Evidence Code section 402 hearing, upon his arrival at the murder scene, he was advised that four individuals had been discovered in the alley north of the Macias residence and were subsequently detained. (SCT 22, RT 1164). Guenther noted

there were footprints leading north toward the alley. (RT 1165). There was also a distinctive footprint in blood on the front porch. (SCT 34). Upon contacting the detained individuals, Guenther focused on Gutierrez because he had blood on his shirt and shoes and was visibly nervous. (SCT 23, RT 1165.) Guenther felt that he had reasonable cause to believe that Gutierrez was involved in the incident and arrested him for suspicion of murder. (SCT 23.) A breath test administered at the police station indicated that Gutierrez's blood alcohol was .30. (RT 1165-1166). In addition to sending Gutierrez's clothing to the crime lab, a gun shot residue test was administered to Gutierrez, the result of which is apparently unknown. (ACT 30.)

The majority of this Court found that "[b]ecause defendant's proffered testimony was not directed at eliciting testimony that Liberato Gutierrez was the person responsible for killing or robbing the victim, but rather was aimed at a general attack on the police investigation, the trial court did not abuse its discretion under Evidence Code section 352 in limiting defendant's examination of Detective Guenther." (***People v. Valdez, supra*** 32 Cal. 4th 73, 108.) The majority stated that the "probative value of such an attack on the investigation was minimal and was properly excluded under Evidence Code section 352." (***Id*** at 108.) Finally, the majority concluded, "***defendant's present contention as to third party culpability and Liberato Gutierrez comes too late" because defense counsel at trial stated***

that he did not intend to "point the finger" at Gutierrez. (Id. at 108) In essence, this Court has already stated that if counsel had termed the evidence he wanted to present third party evidence, the trial court would have been compelled to admit it and failure to do so would have been reversible error.

Defense counsel argued to the court that all of the evidence concerning Gutierrez's presence at the scene (such as the fact that he was nervous, drunk and spattered with blood) was sufficient to raise a reasonable doubt as to whether the police had the right man on trial and whether the jury could rely on the investigation that had been done. (R.T. 1169.) The trial court admitted evidence that other people were found in the area and questioned but prevented defense counsel from going into any details, such as the presence of blood and the lack of testing, thereby stripping the evidence of its substance, and rendering it a meaningless abstraction. (R.T. 690, 1169, 1170-1171.) The fact that counsel sought to admit the evidence and argue that the police did not have the right man on trial belies respondent's notion that counsel had a tactical or, as respondent suggests, ethical constraints about pointing the finger at Liberato. The only reasonable inference is that counsel, as respondent would have it, was deliberately sabotaging his client's defense, or that he did not understand, that the evidence he was seeking to admit would constitute third party evidence under the prevailing case law. Either scenario is inexcusable under Sixth Amendment jurisprudence

and the ABA Guidelines.

This Court in ***People*** v. ***Hall, supra,*** 41 Cal.3d 826, established that third party evidence need only be capable of raising a reasonable doubt of a defendant's guilt. (***Id*** at 833.) The ***Hall*** court held that the standard for admitting exculpatory evidence of third party culpability was the same as for other exculpatory evidence: The evidence has to be relevant under Evidence Code section 350, and its probative value could not be "substantially outweighed by the risk of undue delay, prejudice or confusion" under Evidence Code section 352 .(***Id.***, ***People v. Valdez supra***, 32 Cal. 4th 73, 105.)

As ***Hall*** and its progeny make clear, third party culpability evidence should be treated like any other evidence. As noted above, in petitioner's case it has been established that the evidence would in fact have cast a reasonable on petitioner's guilt. Clearly, the presence of and condition of Liberato would have cast reasonable doubt on the issue of whether or not petitioner was, in fact, the person responsible for the murder/robbery. It was, therefore, inexcusable and below prevailing standards of representation, that counsel did not know enough to state that he was offering third party evidence.

C. Counsel Unreasonably and Prejudicially Failed to Investigate and Present Evidence In Mitigation

In two recent cases the United States Supreme Court has found ineffective

assistance of counsel at the penalty phase of capital trials. In ***Rompilla v. Beard***, ***supra***, U. S. Lexis 4846, the court found that counsel failed to investigate, discover and present their mental health expert with readily available mitigation evidence concerning the defendant's alcoholism and horrific childhood. In ***Wiggins v. Smith***, ***supra,*** 539 U.S. 510 the defendant's attorneys unreasonably failed to retain a forensic social worker to prepare a social history, failed to follow up and conduct further investigation into the defendant's background after learning some relevant material through PSI and DSS records. In both instances, the United States Supreme Court found that counsel's failure to fully investigate the defendant's background and present mitigating evidence related to the defendant's moral culpability was constitutionally ineffective.

The court in ***Rompilla*** and in ***Wiggins*** reiterated its holding in ***Strickland v. Washington*** (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674]. In ***Wiggins***, the court stated:

> Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonably precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments. (***Wiggins v. Smith, supra***, 539 U.S. at 521-522, citing ***Strickland v.***

Washington, supra, 466 U.S. at 690-691.)

With respect to the mitigation evidence in a capital case, the court referred to the ABA guidelines as the standard against which counsel's performance is measured. The guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by a prosecutor." (***Wiggins v. Smith, supra***, 539 U.S. at 524 citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989).) Among the topics counsel should consider presenting are: (1) Medical history (including mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); (2) Educational history (including achievement, performance and behavior, special educational needs including cognitive limitations and learning disabilities) and opportunity or lack thereof; (3) Family and social history (including physical, sexual or emotional abuse, neighborhood surroundings and peer influence); other cultural or religious influence; professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services); and (4) Expert testimony concerning any of the above and the resulting impact on the client, relating to the offense and to the client's potential at the time of sentencing.

(ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6.)

In ***Wiggins***, the court determined that the scope of counsel's investigation was unreasonable given the material contained within the DSS and PSI records in possession of defense counsel indicating that the defendant's mother was an alcoholic, the defendant was shuffled from foster home to foster home, displayed some emotional difficulties while in the foster system, had frequent absences from school and on at least one occasion, had been left alone by his mother. (***Wiggins v. Smith, supra***, 539 U.S. at 527.) The court found that "strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgements support the limitations on investigation." (***Id.*** at 533.) With respect to defense counsel in ***Wiggins***, the court found that the decision to end the investigation where counsel did was "neither consistent with the professional standards that prevailed. . . nor reasonable in light of the evidence counsel uncovered in the social services records- - - evidence that would have led a reasonable competent attorney to investigate further." (***Id.*** at 534.) The Court further concluded that counsel's failure to investigate mitigating evidence was prejudicial in ***Wiggins'*** case because the mitigating evidence counsel failed to uncover was powerful and show that he has had "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability. ***Penry v.***

Lynaugh (1989) 492 U.S. 302, 319 [106 L.Ed.2d 256, 109 S.Ct. 2934 ("Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse"; see also ***Eddings v. Oklahoma*** (1982) 455 U.S. 104, 112 [71 L.Ed.2d 1, 102 S.Ct. 869] (noting that consideration of the offender's life history is a "part of the process of inflicting the penalty of death."); ***Lockett v. Ohio*** (1978) 438 U.S. 586, 604 [57 L.Ed.2d 973, 98 S.Ct. 2954](invalidating Ohio law that did not permit consideration of aspects of a defendant's background)." (***Wiggins v. Smith, supra***, 539 U.S. at 535.) Thus, the court concluded that counsel's failure to investigate and present mitigating evidence was unreasonable and there was a reasonable probability that at least one juror would have struck a different balance and refused to impose death. (***Id.*** at 537, ***In re Lucas, supra*** 33 Cal. 4th 682, 734.

Again, in ***Rompilla v. Beard***, ***supra*** U. S. Lexis 4846, the court found that the undiscovered mitigating evidence taken as a whole might well have influenced the jury's appraisal of the defendant's culpability and the likelihood of a different result, had the evidence gone in is sufficient to undermine confidence in the outcome actually reached at sentencing. (***Id***. citations omitted.)

On the afternoon of March 25, 1992, the prosecution rested, and the defense

waived opening statement. (C.T. 302). Court was not in session on Thursday, March 26, 1992. (R.T. 1683.) The defense presented the bulk of its extremely short and cursory presentation on Friday. On Monday, the defense presented only Mr. Park, the expert on prison security. (C.T. 304, 1807-1825.) Other than Mr. Park, the defense case consisted of nothing but pathetic pleas for mercy from a few family members and friends. Needless to say. there was no mental health testimony.

Trial counsel could certainly have developed and presented the mitigation evidence as set forth in the Petition and it was his duty to do so. Counsel could not have made a reasonable, informed tactical decision not to present such evidence as he did not develop the social history, did not consult with an expert or present the social history to a qualified expert, and did not even have his client evaluated. He did not discover that his client suffered from serious mental illness which was a product of his horrific childhood. Counsel's mitigation investigation was late and inadequate. As a result, the mitigation presentation was at best superficial and in fact misleading, as it led the jury to believe that petitioner had a nurturing, loving family and that he was somehow just the proverbial bad seed. As petitioner's un- controverted evidence demonstrates, this was far from the truth. Had the jury heard the real story of petitioner's childhood and adolescence as presented in his Petition and the accompanying exhibits it is unlikely they would

have sentenced him to death.

D. Conclusion

As show in the Petition and by respondent's admissions and lack of adequate denials, petitioner has demonstrated that his conviction and sentence of death are in violation of the California and United States Constitutions because he was deprived of the effective assistance of counsel at both the guilt and penalty phase of his trial. For this reason, a writ of habeas corpus should issue.

Dated: July 5, 2005

Respectfully submitted,

MARILEE MARSHALL
Attorney for Petitioner

DECLARATION OF SERVICE

I, the undersigned declare under penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause and employed at 523 West Sixth Street, Suite 1109, Los Angeles, CA. 90014 On the date of execution below I served the attached document by depositing in the U.S. Mail before the close of business a true copy thereof, enclosed in a sealed envelope with postage prepaid addressed to the following:

California Appellate Project
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Attn: Central Docketing

Carl Henry
Deputy Attorney General.
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Mr. Alfredo Valdez
#H-37100/5-E4-41
San Quentin State Prison
San Quentin, CA 94974

Executed at Los Angles, California, this 5th day of July, 2005.

SHANNON CALLAHAN