#6

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In re MARK CHRISTOPHER CREW,	)	No. S107856
	)	
Petitioner,	)	[Related Appeal No. S034110]
	)	[Santa Clara Superior Court,
On Habeas Corpus	)	No. 101400]
	)	
	)	

PETITION FOR WRIT OF HABEAS CORPUS

LYNNE S. COFFIN, SBN 121389
State Public Defender

ANDREW S. LOVE, SBN 119990
Assistant State Public Defender

221 Main Street, Tenth Floor
San Francisco, CA 94105
Telephone: (415) 904-5600

Attorneys for Petitioner
MARK CHRISTOPHER CREW

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Pages

CASES

TABLE OF AUTHORITIES CITED CONT'D

Pages

TABLE OF AUTHORITIES CITED CONT'D

Pages

TABLE OF AUTHORITIES CITED CONT'D

TABLE OF AUTHORITIES CITED CONT'D

TABLE OF AUTHORITIES CITED CONT'D

Pages

TABLE OF AUTHORITIES CITED CONT'D

Pages

TABLE OF AUTHORITIES CITED CONT'D

Pages

TABLE OF AUTHORITIES CITED CONT'D

Pages

TABLE OF AUTHORITIES CITED CONT'D

Pages

TABLE OF AUTHORITIES CITED CONT'D

TABLE OF AUTHORITIES CITED CONT'D

Pages

TABLE OF AUTHORITIES CITED CONT'D

Pages

TABLE OF AUTHORITIES CITED CONT'D

Pages

TABLE OF AUTHORITIES CITED CONT'D

STATUTES

TABLE OF AUTHORITIES CITED CONT'D

TABLE OF AUTHORITIES CITED CONT'D

Pages

STATUTES

TABLE OF AUTHORITIES CITED CONT'D

Pages

STATUTES

TABLE OF AUTHORITIES CITED CONT'D

Pages

STATUTES

TABLE OF AUTHORITIES CITED CONT'D

Pages

STATUTES

TABLE OF AUTHORITIES CITED CONT'D

Pages

TEXT AND OTHER AUTHORITIES

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In re MARK CHRISTOPHER CREW,	)	No. _____
	)	
Petitioner,	)	[Related Appeal No. S034110]
	)	[Santa Clara Superior Court,
On Habeas Corpus	)	No. 101400]
	)	
_____	)	

PETITION FOR WRIT OF HABEAS CORPUS

PETITION FOR WRIT OF HABEAS CORPUS

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

Petitioner, Mark Christopher Crew, through his attorneys, hereby petitions this Court for a writ of habeas corpus and by this verified petition sets forth the following facts and causes for the issuance of the writ.

I.

UNLAWFUL RESTRAINT

1. Petitioner is a prisoner of the State of California. He is illegally and unconstitutionally confined at the California State Prison at San Quentin by Warden Jeanne Woodford, and Director of the California Department of Corrections, C.A. Terhune, pursuant to a judgment of death imposed upon him by the Santa Clara Superior Court on July 22, 1993. *People v. Mark Christopher Crew*, Santa Clara Superior Court, No. 101400.

2. The claims asserted in this petition are cognizable in a habeas corpus proceeding and brought in a timely manner. The petition has been filed within ninety days of the final due date of petitioner's reply brief on direct appeal.

3. With leave of this Court, one prior application for a writ of habeas corpus has been made in regard to petitioner's detention and restraint.

4. The first petition was filed on December 20, 1999, pursuant to this Court's order of November 10, 1999, which ruled that "Petitioner may file a petition for a writ of habeas corpus, raising the proposed claim . . .

immediately. A second habeas petition raising any remaining claims will not be barred as *successive* as long as it is filed in a timely manner" (emphasis in original).

5. This second petition is necessary because petitioner has no other plain, speedy, or adequate remedy at law for the substantial violations of his constitutional rights as protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their state constitutional analogues.

II.

PROCEDURAL HISTORY[1]

6. On August 5, 1985, the District Attorney of Santa Clara County filed an information against petitioner, charging him with one count of murder (Cal. Penal Code § 187) with a financial gain special circumstance (Cal. Penal Code § 190.2(1)), five counts of grand theft (Cal. Penal Code §§ 484-487), and one count of conspiracy to commit murder (Cal. Penal Code § 182.1). CT 1925-26.

7. On November 18, 1985, petitioner was arraigned and entered a plea of not guilty to the charges set forth in this information, and denied the special circumstance allegation. CT 1934; 11/18/85 RT 9.

8. On October 14, 1986, an amended information was filed against petitioner, adding conspiracy counts and charges against co-defendant Bergin Mosteller. CT 1935-1939.

---

[1] The Clerk's Transcript will be referred to as "CT #." The Reporter's Transcript of petitioner's trial, which is consecutively paginated from pages 1-5752, will be referred to as "RT #." The Reporter's Transcript which is not included within these consecutively numbered pages will be referred to by the date of the proceedings.

9. On October 15, 1986, the case was assigned to the Honorable John Schatz, Judge of the Superior Court. CT 2008.

10. The matter was continued several times because of the involvement of the Public Defender (who initially represented petitioner) the prosecutor, and the trial court in other capital cases. *See, e.g.*, 8/5/86 RT 7; 10/31/86 RT 3; 3/20/87 RT 16.

11. On July 7, 1987, the Public Defender was relieved as counsel, and was replaced by private counsel, Joseph O'Sullivan. 7/7/87 RT 3. The case was then further continued because the prosecutor was trying another capital case, 2/29/88 RT 3, and the trial court had begun another capital case. 6/13/88 RT 3.

12. On December 8, 1987, the prosecutor's motion to consolidate the trials of petitioner and Bergin Mosteller was denied. CT 2041.

13. The trial of petitioner was set to commence on September 19, 1988. CT 2060.

14. On September 8, 1988, Mr. O'Sullivan requested an additional six months continuance because of alcohol abuse and other stress-related mental health problems. CT 2062. According to testimony from O'Sullivan's doctor, Mr. O'Sullivan had been alcohol dependent for several years and in the previous two years it had "gotten way out of hand." This included drinking daily, and cutting back on his work so he could indulge in alcohol consumption. Mr. O'Sullivan had reportedly stopped drinking by early September 1988, and needed a period of time to recover so as not to resume drinking. 9/16/88 RT 21-22.

15. On November 29, 1988, the continuance was granted to April 17, 1989, and Joseph Morehead was appointed as second counsel for petitioner. CT 2087.

16. On April 17, 1989, jury selection in petitioner's case commenced. CT 2126.

17. On April 25, 1989, a second amended information was filed against petitioner, charging one count of murder with a financial gain special circumstance and one count of grand theft. The other grand theft counts and conspiracy counts were dismissed by the District Attorney. CT 2133-34.

18. On June 26, 1989, the jury was selected and sworn to try the cause. CT 2257.

19. The guilt phase portion of the trial began on June 28, 1989. CT 2259. On July 26, 1989, the jury rendered its verdicts, finding petitioner guilty of murder in the first degree and grand theft, and finding the financial gain special circumstance to be true. CT 2272.

20. On August 1, 1989, the penalty phase portion of the trial began. CT 2290. The jury rendered its verdict of death on August 10, 1989. CT 2300.

21. On February 23, 1990, the trial court found that the jury's determination that the aggravating circumstances outweighed the mitigating circumstances was contrary to the evidence presented and granted petitioner's motion for modification of sentence pursuant to Penal Code section 190.4(e). The court set side the death penalty and sentenced petitioner to life without possibility of parole. The court also imposed the aggravated terms as to the grand theft. RT 5158-5182.

22. On September 17, 1990, the murder trial of Bergin Mosteller and Bruce Gant, another alleged co-participant, began. On November 20, 1990, the jury acquitted Gant and Mosteller of murder.

23. On December 31, 1991, the California Court of Appeal, Sixth

District, vacated the penalty judgment in petitioner's case and remanded the case for the limited purpose of redetermining the modification motion. *People v. Crew*, 1 Cal.App.4th 1591 (1991). Petitioner's petition for review by this Court was denied on March 26, 1992. Then-Associate Justice George was of the opinion that the petition should be granted. *Id.* at 1610.

24. On April 3, 1992, the remittitur issued. CT 2715.

25. On April 10, 1992, Judge Schatz indicated that he was available to resentence petitioner and continued the matter to May 1, 1992. CT 2747. However, on April 14, 1992, a letter purportedly written by Judge Schatz to Presiding Judge Leonard P. Edwards announced Judge Schatz's intention to retire on August 2, 1992. The letter stated that as of April 14th, Judge Schatz would "no longer be available to conduct any judicial proceedings" and would take medical leave until the commencement of his retirement. CT 2793.

26. On May 15, 1992, the case was assigned to the Honorable Robert Ahern, Judge of the Superior Court. CT 2749. On July 16, 1992, Judge Ahern appointed a special master to determine Judge Schatz's availability to hear the matter. CT 2769. The special master filed reports on August 13, 1992, and on August 27, 1992, first determining that Judge Schatz would be available if certain conditions were met, but ultimately concluding that Judge Schatz was not available. CT 2790, 2794.

27. On December 15, 1992, Judge Ahern referred the matter to Judge Edwards to determine whether the case should be reassigned to Judge Schatz. 12/15/92 RT at 84. In an order dated December 18, 1992, Judge Edwards declined to reassign the case to Judge Schatz, and assigned the case to Judge Ahern. CT 2897.

28. On February 2, 1993, a writ filed in the Court of Appeal, Sixth

Appellate District was denied. A petition for review filed in this Court was denied on March 25, 1993. No. S031140.

29. On May 10, 1993, Judge Ahern stated that he had commenced reading the trial transcript for purposes of ruling on the motion to modify the verdict. CT 2940. On May 17, 1993, Judge Ahern stated that he had completed reading the transcript and that he would read the transcript a second time. CT 2943. On May 26, 1993, Judge Ahern indicated that he completed a second reading of the transcripts, including guilt and penalty phases, the instructions and arguments of counsel, and the 190.4(e) pleadings. Judge Ahern also read and considered the Court of Appeal opinion "for guidance." CT 2946.

30. On June 22, 1993, this Court denied petitioner's application for stay and petition for writ of mandate. No. S033435.

31. On June 23, 1993, the 190.4(e) motion to modify the verdict was argued and submitted. CT 3002. On July 22, 1993, Judge Ahern denied the 190.4(e) motion, CT 3004, and judgment of death was entered. CT 3016.

32. On June 26, 1997, Andrew Love and Lynne Coffin, Law Offices of Coffin & Love, were appointed to represent petitioner on his automatic appeal, including any related habeas proceedings, in this Court.

33. The record on appeal was certified and filed in this Court on June 11, 1999.

34. On July 13, 1999, petitioner filed a Motion for Order Granting Leave to Preserve Testimony of Critical Witnesses. The motion sought authorization to conduct the depositions of Judge Schatz and his wife, Jacqueline Schatz, limited to the circumstances surrounding Judge Schatz's unavailability to hear petitioner's case following remand from the Court of Appeal.

35. On November 10, 1999, this Court denied the motion and ruled that "Petitioner may file a petition for a writ of habeas corpus, raising the proposed claim to which this motion relates, immediately. A second habeas petition raising any remaining claims will not be barred as *successive* as long as it is filed in a timely manner" (emphasis in original).

36. On December 20, 1999, petitioner filed a habeas petition pursuant to this Court's November 10, 1999 Order, which raised three claims for relief: a) The Court of Appeal Erroneously Reversed the Trial Court's Grant of the Motion for Modification and the Resulting Death Sentence was Unlawfully Imposed; b) The Trial Judge Was Precluded From Resentencing Petitioner Through Prosecutorial Misconduct and/or Judicial Misconduct; and c) The Manner in Which Petitioner Was Sentenced to Death Demonstrates That The Sentence of Death Was Achieved In An Arbitrary, Capricious and Unreliable Manner.

37. On December 27, 1999, this Court ordered informal briefing pursuant to Rule 60 of the California Rules of Court.

38. In early February 2000, Judge Schatz died at the age of 76.

39. Respondent filed her informal response on February 25, 2000, and petitioner filed his reply to the informal response on May 30, 2000.

40. On May 30, 2000, petitioner also filed a motion for an order granting leave to conduct discovery.

41. On June 28, 2000, this Court denied the petition on the merits and denied the motion for discovery.

42. On June 29, 2000, petitioner filed his opening brief on appeal.

43. On August 9, 2000, the order appointing Andrew Love and Lynne Coffin, Law Offices of Coffin & Love, was vacated and Lynne Coffin, State Public Defender, was appointed as attorney of record for

petitioner for both his appeal and related habeas proceedings.

44. On or about August 10, 2001, respondent filed her opposition brief.

45. On March 28, 2002, petitioner filed his reply brief.

III.

STATEMENT OF RECORD FACTS

A. GUILT PHASE

46. Nancy Andrade ("Andrade") married petitioner on June 4, 1982, and was last seen on August 23, 1982, after leaving for South Carolina with petitioner. She was never heard from again. The prosecution's theory was that petitioner killed her, took her money and sold her belongings, and with the help of a friend disposed of her body in a manner by which she could not be found.

47. In 1981, Andrade divorced Steve Andrade, her husband of ten-to-twelve years, with whom she had two children, because she wanted to return to the single life. RT 3539, 3580, 3650. After her divorce, Nancy Andrade frequented the Saddle Rack, a bar in San Jose. As one friend put it, "she didn't go every night, but she went very often." RT 3541. Andrade had many one night stands. RT 3549, 3574. She used cocaine and enjoyed it. 3547-3548, 3570. She also smoked marijuana. RT 3567, 3694.

48. While she initially had custody of her children after her divorce, Andrade had them stay with her parents in Santa Cruz. RT 3548, 3570, 3650. One friend agreed that the children were better off with Andrade's parents because she was confused, screwing up her life and her crazy life style was not conducive to children. RT 3571.

49. Andrade was tired of being a wife and mother. RT 3574. Andrade's ex-husband, Steve Andrade testified that her parents had custody

of their two children during the school year in 1982, and he had the children for the summer, while she went with her friend Darlene Bryant on a cross-country trip. RT 3652-3653.

50. Andrade was bored with being a nurse. RT 3563. Due to personal problems her work deteriorated. "She was teary eyed, seemed somewhat distraught, showed a lack of attention to detail . . . ." RT 3597.

51. Andrade suffered from severe stress beginning in 1978, and was treated for depression beginning in 1980. RT 3614-3615. She attended Lifesprings, an "EST-like" self-assertiveness training program in which she kept an apple in her room, until it shriveled away, which symbolized that those things that were part of her life were gone. RT 3553, 3590.

52. Andrade met petitioner at the Saddle Rack during the fall of 1981. RT 3663. It was Andrade who initiated contact and first asked petitioner to dance. RT 3664, 3707. They became romantically involved in November or December of 1981 for a short period of time, after which they stopped seeing each other. RT 3707. They began seeing each other again in May 1982, and soon thereafter Andrade asked petitioner to marry her. RT 3708-3709. They were married a week later on June 4, 1982. RT 3708-09.

53. Andrade's behavior was erratic. RT 3554, 3571, 3650-51, 3654. She was troubled, confused, and was going through many changes. RT 3554, 3569. There was also evidence to suggest that she wanted to leave San Jose, and married petitioner out of a desire to start a new life in a new place where she could fulfill her dream of raising horses. RT 3562-3563, 3565-3566, 3584-3585, 3607-3609, 3690-3691, 3705-3706.

54. Andrade and petitioner saw each other infrequently in the weeks following their marriage. RT 3542, 3556-57, 3581. Indeed, petitioner's

behavior was completely at odds with someone who was plotting to do away with his new wife. The two were rarely together. RT 3709, 3556. For the first three weeks after the marriage, they lived with Andrade's friend Tanis Langlois, but petitioner was hardly ever there. RT 3562. He did not often come home at night and when he did he was always very late. RT 3669. Andrade caught him twice at the Saddle Rack with other women during this time. RT 3709, 3669-72. Thus, from the start, the marriage was troubled, RT 3669, 3709, and it soon became apparent that it was not going to work out. RT 3710. Andrade considered getting an annulment. RT 3542, 3557, 3581-3584, 3671.

55. Petitioner was also romantically involved with a woman named Lisa Moody. RT 4123. In June 1982, petitioner asked Moody to marry him. She agreed, but they set no specific date. RT 4110, 4120.

56. In early July 1982, petitioner moved to Greer, South Carolina, with his friend Richard Elander. RT 3970. On the way to South Carolina, petitioner told Elander that his marriage to Andrade was going to be annulled. RT 3973. Petitioner and Elander stayed at petitioner's mother and step-father's residence, RT 3970, and established a truck service business. RT 3972.

57. In July 1982, Andrade and her friend Darlene Bryant left on a cross-country trip. RT 3537, 3673. No evidence was presented to suggest that at this point petitioner had any intention of reconciling with Andrade. However, while on the trip with Bryant, Andrade decided she wanted to visit Greer, and see petitioner. RT 3573, 3674-3676. She called petitioner and they spent a night together, but petitioner left town the next day. He did not change the oil in her car as he had promised. RT 3674-3676.

58. Upon returning to California, Andrade moved in temporarily

with Bryant. Andrade owned a horse, and wanted to start a horse ranch in South Carolina. RT 3584, 4006-08. After talking frequently with petitioner on the telephone, she decided to move back to South Carolina to give her relationship with petitioner another chance. RT 3677-80, 3556-57, 3565, 3584.

59. Steve Andrade had approached his ex-wife about a change of custody before she left for her vacation in July because he did not agree with her lifestyle. RT 3652-3653. When Andrade planned to leave with petitioner for South Carolina in August, she gave custody of the children to him. While some of Andrade's friends believed that she would return at Christmas and take custody of her daughter, the custody arrangement with Steve was considered permanent. RT 3539-40, 3551, 3562.

60. Andrade wanted to leave San Jose, and during the spring and summer of 1982, as late as August, she was considering moving to Reno, Nevada or Dallas, Texas or Idaho. RT 3607-3609. When she said goodbye to her ex-husband before leaving with petitioner, she told him she was not sure she was even going to South Carolina and suggested that they take the children and go to Idaho. RT 3654-3655.

61. Meanwhile, petitioner had been in contact with Lisa Moody while he was in South Carolina. They discussed taking a vacation together, and agreed that when petitioner returned to California, he would take Moody back to South Carolina with him for a visit. RT 4127-29.

62. On August 21, 1982, petitioner and his step-father, Bergin Mosteller, arrived at Darlene Bryant's house to take Andrade, her horse, and her belongings to South Carolina. Mosteller, who was driving a station wagon with a horse-trailer, RT 3682, was going to drive the trailer to Texas, and leave the horse in Texas, where petitioner had relatives. RT 3680.

Andrade and petitioner were going to drive to Texas in Andrade's two vehicles, a yellow Corvette and a pickup truck. RT 3694, 3703. Elander was going to retrieve the truck with Andrade's belongings and the horse in Texas, and return to South Carolina, while petitioner and Andrade went on a two week honeymoon in the Corvette. RT 3703.

63. Mosteller did not go to Texas. He boarded the horse at a stable in San Jose before leaving California, RT 4523, and then drove to Reno, Nevada, eventually flying back to South Carolina. RT 4457.

64. Andrade appeared to be aware that the horse was brought to the stable in San Jose by Mosteller. Cathy Romero testified for the defense that she was in charge of Coronado Stables in San Jose, where Mosteller boarded the horse on August 21, 1982. RT 4523. The horse remained at the stables until it was picked up by petitioner on August 29th. RT 4524. During the time the horse was boarded, petitioner came twice to see the horse with two different women -- one with dark hair who drove a 280 Z,[2] and one with blonde hair and a dog. RT 4523-25.[3] (The prosecutor conceded that it was possible that Andrade went to the second stable on the morning of August 24th, and was thus, aware of her horse being boarded there. RT 4606).

65. On Monday, August 23rd, Andrade, with petitioner, left for South Carolina from her parents' house in Santa Cruz. RT 3703, 3777. Andrade had packed her belongings, including a stereo and microwave, in the pickup truck and Corvette. RT 4234-35. Andrade had approximately $8000 in cash, which she withdrew from her bank account. RT 3686, 3689.

---

[2] Lisa Moody owned a 280 Z. RT 4124.

[3] Nancy Andrade had blonde hair and owned a dog. RT 3967, 3549.

66. Petitioner and Andrade checked into a Motel 6 in Fremont, California, on August 23rd, and petitioner paid for two nights. RT 3491, 4457.

67. Petitioner arrived at Lisa Moody's apartment in San Jose, California on either August 25th or August 26th, at which time he gave to her Andrade's microwave and stereo. RT 4137-4138, 4198-4199, 4203. On August 26th, he took Moody to a stable in San Jose to see a horse. RT 4135-36, 4138. They also went to petitioner's friend Bruce Gant's house. RT 4135.

68. On August 26th or 27th, Moody was working at Denny's when, at about 8:30 a.m., petitioner came in and asked her to go next door to the bank and get a cashier's check for $5000. Petitioner gave her the money for the check in a bag. As instructed, she obtained a cashier's check made out to Bergin Mosteller. RT 4144-45, 4156-58.

69. On Saturday, August 28th, petitioner and Moody left for South Carolina in a pickup truck with the horse in a trailer. RT 4148. They stopped in Texas and stayed there a couple of days with petitioner's grandmother. RT 4149-50. While they were at petitioner's grandmother's, petitioner spoke on the telephone, after which he became upset. RT 4151.[4]

70. Before arriving in South Carolina, petitioner sent a check for $5000 to Mosteller. RT 3993. Mosteller kept $750 and gave the balance to Elander. Elander took $250, and gave petitioner the remaining $4000 when he arrived. RT 3994.

71. Petitioner and Moody arrived in South Carolina on

---

[4] Telephone records indicate that there was a five minute telephone call from Bruce Gant's residence to petitioner's grandmother's residence in Texas at 5:49 p.m., on August 31, 1982. RT 4455.

approximately September 4, 1982. RT 4160. On September 7th, petitioner opened a bank account in South Carolina in his and Nancy Andrade's name, and deposited two checks totaling $2, 275. By December 1982, there was no balance left in the account. RT 4328-30.

72. Petitioner and Moody returned to California on September 17th or 18th in the pickup truck. RT 4166. Petitioner sold the pickup truck for approximately $4000. RT 3743-48.

73. Paul Balbas was a teenager in 1982, and he lived next door to petitioner and Elander in San Jose. He recalled a conversation with petitioner in which petitioner said that if he went cross country with Andrade, he would open the door half way and kick her out. RT 3825-3826. This conversation occurred after petitioner had been having an argument with Andrade over the telephone. After the conversation, Andrade arrived at petitioner's residence, and she and petitioner appeared to make up. RT 3831-3832.

74. Petitioner's step-brother, Doug Crew, lived with petitioner and Elander for a period of time in San Jose. Doug Crew testified that sometime in the six months prior to June 1982, petitioner said to him something to the effect of: "Doug I've done so many things. I think I could kill someone, just to see if I could get away with it." RT 4359-61. The defense presented evidence that Doug did not get along with petitioner and was particularly angry that petitioner and Elander had stuck Doug with a $400 phone bill when they left for South Carolina. Doug told petitioner's father that he would pay the bill in his own time and that the day would come when he would settle it with petitioner. RT 4517-18.

75. Richard Elander was the prosecution's key witness, and was the only witness to testify about the manner in which Andrade was allegedly

killed. However, his credibility was suspect. On cross-examination, Elander admitted giving numerous false statements to the police about the crime. RT 4025-32. He acknowledged lying at the preliminary hearing, RT 4041, to the homicide detectives, RT 4041-52, to the FBI, RT 4052-56, and to the District Attorney's investigator. RT 4060-70. Elander received immunity from prosecution. RT 4081. The defense presented evidence that Elander was a drug addict who could not be trusted. RT 4504-06.

76. Elander testified that petitioner had talked about killing Andrade at the end of May 1982, before Elander left for work at a dude ranch in Utah. RT 3968-69. While in Utah, Elander talked to his boss about disposing of a body in the mountains. Shortly thereafter, in late June, Elander was fired and returned to San Jose. RT 3969, 4216. Within a matter of days, Elander and petitioner left for South Carolina. RT 3970.

77. Elander testified that in August 1982, after Andrade's July visit to Greer, petitioner told him that Mosteller was taking him to California for the purpose of killing Andrade. RT 3973-74. According to Elander, petitioner said he had not decided how he was going to kill her, and they discussed various methods. RT 3975. Petitioner talked about concealing the body so that it could never be found. RT 3976. Elander testified that after petitioner went to California, he called petitioner and told him not to kill Andrade, but petitioner said, "sorry, it has been done." RT 3977.

78. Elander testified that he recalled receiving a telephone call from petitioner when petitioner was in Texas. Petitioner told Elander that he had received a call from Gant who said the body was stinking. RT 3984. Elander believed petitioner said the body had been buried in Gant's backyard. RT 3985.

79. Elander claimed that petitioner told him the details of the killing

on the day he returned to Greer with Lisa Moody. Elander and petitioner went to a stables to board the horse, and, according to Elander, petitioner related the following:

> [Andrade and petitioner] had left San Jose to go to Greer, and [petitioner] stopped along the way and they walked up into the woods up on a hillside. And she was sitting Indian style in front of him. He was sitting behind her. They were just talking, conversing. And he said he shot her in the back of the head.

RT 3982.

80. Elander testified further: Petitioner said he then "rolled her down in a ravine or a ditch and covered her up with some blankets." RT 3982. Petitioner left one vehicle and drove the other to his friend Bruce Gant's house, and he and Gant then went and recovered the other vehicle. RT 3982-83. The following evening, petitioner and Gant went out and got drunk, and then went to the site where Andrade's body was. Petitioner said "he walked down to the body, and it had moved. She was still alive." RT 3983. Petitioner "freaked out," ran back to the truck and told Gant, who "went down and tried to strangle her and break her neck, and finally ended up cutting her head off." *Id.* Petitioner told Elander that Andrade's body was put in a 55-gallon drum filled with cement. The head was put in a 5-gallon bucket filled with cement and thrown off the Dumbarton Bridge. RT 3984.

81. Elander testified he and Mosteller sorted through Andrade's belongings that had been in the pickup truck, and sold her clothing at a flea market. RT 3985-86. Elander believed they received $500-600 dollars for selling the items. RT 3987. The money was split three ways between

petitioner, Mosteller and Elander, but Elander gave his share to petitioner. RT 3989.

82. The Corvette was sold for $3000 cash, some equipment, and a 1974 Oldsmobile. RT 4438. The horse was also sold. RT 4315-21.

83. Marion Mitchell testified that in South Carolina in the summer of 1982, he contracted with petitioner and Elander to service his company's trucks. RT 4432-33. In the fall of 1982, Mitchell discussed with petitioner and Elander the purchase of a yellow Corvette. Petitioner told Mitchell that the car was part of a divorce settlement, and that if Mitchell bought the car, petitioner would provide him with the title after the divorce was resolved. RT 4437-40. Mitchell did not see petitioner after he bought the car, but asked Elander on several occasions for the title to the car. RT 4440.

84. Mitchell testified that Elander eventually told him that petitioner was not returning to South Carolina because he had killed his wife and the police were looking for him. Elander told Mitchell that petitioner had shot his wife, that after returning to where he had shot her the body had moved, that he had placed her in a 55 gallon drum, cut her head off, filled the barrel with concrete and buried it in somebody's yard. RT 4442.

85. In October 1982, petitioner began living with Kathy Harper in Greer, South Carolina. RT 3889. They lived in her trailer with her son, who was ten years old at the time. RT 3890-91. Sometime after Christmas, petitioner moved away. RT 3892.

86. In January 1983, petitioner called a woman he knew in Connecticut named Jeanne Meskell, and told her he wanted to come there. RT 3869. When petitioner arrived, according to Meskell, he told her that he had killed a girl. Petitioner said she was in two pieces in two 55-gallon drums, one was in the bay and the other was buried in someone's yard. RT

3870. Alayne Bolster, an investigator for the public defender's office, interviewed Jeanne Meskell on April 21, 1985. RT 4534. Bolster testified for the defense that while Meskell told her that petitioner claimed to have killed a woman, she had also related that at a different time petitioner merely said he was going to take the fall for the killing. RT 4535.

87. On March 2, 1983, Larry Demkowski, a San Jose police officer, executed a search warrant at the residence of Bruce Gant, where he recovered a table lamp that was identical to a lamp owned by Andrade. RT 3546, 3656.

88. Officer Demkowski testified for the defense that he conducted three searches of Gant's backyard, including the use of metal probes and heavy equipment, but did not find a body. RT 4539-43. District Attorney Investigator Ronald McCurdy testified that he was unable to locate any records that would tie Gant to the crime or disposal of a body. RT 4544-45.

89. Both Gant and Mosteller were later acquitted of all charges.

B. PENALTY PHASE

No Prior Criminal Violence or Felony Convictions

90. The parties stipulated that petitioner had never suffered a prior felony conviction. RT 4931. The record contains no evidence that petitioner ever committed or participated in prior violent criminal activity. The prosecution's case in aggravation relied exclusively on the evidence presented at the guilt phase. RT 4687-88.

Petitioner's Background

91. Petitioner's father, William Crew, was the primary witness for the defense with regard to petitioner's background. He testified as follows:

- Petitioner had a normal childhood and did very well in school. RT 4727-4729.

• William worked as a pressman and petitioner's mother, Jean, was a housewife. For a period of time the family lived on a ranch in Petaluma, California, where they had a garden, a horse and raised animals. RT 4727-28.

• William and his wife, Jean, had no problems at all in the early years of their marriage, but later had marital difficulties because Jean wanted to marry a more mature man with more money, and was unhappy that William was working so much. RT 4726-27, 4730.

• William and petitioner got along fabulously. They were buddies, and went fishing and hunting together. RT 4729.

• Jean became withdrawn and uncommunicative, and sometimes stayed in the bedroom with the door closed without talking to anyone for two or three days. RT 4731, 4749.

• William and Jean got divorced when petitioner was about 13 years old. Petitioner lived with William after his parents separated, and William played the role of mother and father. RT 4732-33.

• Everything was going well until William married his second wife, Barbara, in late 1970. Petitioner, who was 14 or 15 years old, found himself increasingly isolated when he unsuccessfully tried to integrate into his step-mother's family, which included her three children. Petitioner had conflicts with one of Barbara's children, and William no longer had as much time to spend with petitioner. RT 4734-36.

• Petitioner decided to join the Army at the age of 17. He was stationed in Georgia, served for four years, made sergeant, and was honorably discharged. RT 4737-4739.

• When he returned to California in 1978-1979, after a failed marriage in Minnesota, petitioner got along with William as well as ever.

Petitioner was going to school, driving a truck and was his normal self. RT 4740-41.

• William was uncomfortable around petitioner's friend, Dick Elander, because Elander was doing drugs. He was worried that petitioner was using drugs but did not know whether or not he was doing so. RT 4743-44, 4747.

• In 1981-1982, petitioner changed, and became guarded and not as happy as he had been. He also was not as attentive to William. RT 4744.

• William agreed with the prosecutor on cross examination that: a) William was a loving parent who did everything he could as a father to give petitioner a good home; b) petitioner's parents provided a good home and a normal household in petitioner's younger years; c) petitioner's mother was uncommunicative, but petitioner was not physically abused; d) the difficulties petitioner encountered when William married Barbara were normal; e) there was never any need for petitioner to have counseling for behavioral problems; f) petitioner was intelligent, and was a good student until the last year or so of high school when he wanted to go off on his own; g) William did not see any problems that would foreshadow petitioner ever having difficulty with the law. RT 4747-4753.

92. Petitioner's paternal grandmother, Irene Watson, testified briefly regarding petitioner's background as well as his helpful and caring nature:

• Ms. Watson lived in Texas. She got along fine with Jean, and saw the family often until they moved to California. RT 4785.

• Petitioner and his brother Michael had a normal, happy childhood, although William and Jean did not get along too well. RT 4786.

• After William married Barbara, who had three children of

her own, petitioner felt left out and was not happy. RT 4789.

• Petitioner stayed with his grandmother in Texas for two-to-three months, after the breakup of his marriage, and he was very helpful to her. RT 4791.

• When petitioner visited Ms. Watson in July 1982, with his friend Elander, he was nervous and not himself. RT 4793-94. When he returned in September 1982, with Lisa Moody, he was not the person she knew. He did not eat or sleep. RT 4795.

Interpersonal Relationships

93. Emily Bates, a former girlfriend, testified:

• She dated petitioner for a couple of months in 1977, and petitioner treated her well, but then suddenly married someone else. RT 4762-63.

• They resumed dating after petitioner's marriage broke up, and they lived together in San Jose, California, in 1980. RT 4766-67.

• When petitioner returned to California in 1980, he and his father had a drinking contest, in which petitioner got drunk and sick. RT 4767. She saw petitioner the morning after he got drunk on another occasion before they broke up. RT 4768-69. Petitioner drank more when he was with Elander, towards the end of 1981. RT 4771.

• She and petitioner broke up because petitioner wanted to date other people, and was, in fact, seeing other women. They remained friends. RT 4770.

• Petitioner was a pathological liar. He would lie a lot about stupid things for no reason, and would invent bizarre stories. RT 4771.

94. James Gilbert, a high school friend and army buddy testified:

• Gilbert and petitioner met in high school, where petitioner's

main interest was fixing cars. RT 4801-02.

• Petitioner was an easy, outgoing, patient, caring person. RT 4803.

• Petitioner and Gilbert enlisted in the Army together. RT 4803.

• Petitioner did well in the Army, while Gilbert struggled because of a drinking problem. Petitioner took care of Gilbert after Gilbert injured himself in drinking-related accidents. RT 4807-11.

• After his discharge, Gilbert had many problems stemming from drinking and drugs, while petitioner had a job, a house, and was "maintaining a nice structural life." RT 4814.

Military Service

95. Colonel Donald Pearce, petitioner's superior officer, testified regarding petitioner's military service. Colonel Pearce, who had served three tours in Vietnam, was Commander of Headquarters at Fort Gordon when petitioner was there. RT 4826, 4834-40. Petitioner was assigned to be Colonel Pearce's driver in 1976-1977, and during that time Colonel Pearce saw him every day. Petitioner was a very good soldier, and Colonel Pearce would rank him among the very top soldiers that he served with. RT 4842-43. He described petitioner as being intelligent, dependable, and having common sense, charisma, and mechanical ability. RT 4846-4847.

Custodial Conduct

96. The defense presented the testimony of law enforcement personnel who had almost daily contact with petitioner during the four years he was incarcerated in Santa Clara County jail awaiting trial. These officers, Ron Yount, Toby Council and Donald Varnado, all testified that petitioner was an ideal prisoner. RT 4852-94.

97. Petitioner never caused any problems and interacted well with prisoners and staff. RT 4856-57. He was helpful, non-violent, cooperative and a stabilizing influence. RT 4867-71. Petitioner took care to protect some of the younger and more vulnerable prisoners from harm. RT 4857-58, 4890. Without being an informant, he could always be relied upon to keep the peace and to alert jail staff as to potential dangers. RT 4867, 4891.

98. Jiro Jerry Enomoto, an expert on prisons and prison classification, and former head of the California Department of Corrections, testified on petitioner's behalf. RT 4918-26. According to Mr. Enomoto, if sentenced to life without possibility of parole, petitioner would be classified at level 4, which is the maximum level, and always would remain at level 4. RT 4932-33. Mr. Enomoto explained that a prisoner sentenced to life without possibility of parole would never appear before a parole board. RT 4935. A prisoner classified at level 4 would live in a very restrictive, very confined environment under constant supervision. RT 4935. In Mr. Enomoto's expert opinion, petitioner would be a stable, calming influence, and his interest in avoiding violence and protecting younger prisoners would be valuable. RT 4940-45.

Prosecution's Rebuttal Testimony

99. On rebuttal, the prosecution called an informant, Clinton James Williams. RT 4971. Williams testified that in 1985, he was a trustee in the North County Jail when petitioner talked to him about an escape plan which involved cutting the screen on the sun deck, and asked Williams to help him. RT 4975-76. Williams told Deputy Todd Dischinger about petitioner's plan. RT 4976.

100. Deputy Dischinger testified that Williams was a reliable informant. RT 4987-88.

101. It was established that petitioner was transferred from North County Jail to the Main Jail prior to an attempt by inmates to cut the screen on the sun deck at North County. RT 4993-4998. Petitioner was never prosecuted on these charges because there was insufficient evidence of an attempted escape. RT 4954, 4998.

IV.

INCORPORATION AND JUDICIAL NOTICE

102. Petitioner hereby incorporates by reference each and every paragraph of this petition in each and every claim presented as if fully set forth therein.

103. Petitioner hereby incorporates all exhibits appended to this petition as if fully set forth herein.

104. Petitioner hereby incorporates all allegations and exhibits presented in the first habeas petition as if fully set forth herein.

105. Petitioner requests that this Court take judicial notice of the certified record on appeal and all documents and pleadings on file in *People v. Crew*, No. S034110 and *In re Crew*, No. S084495, as well as in the following cases: *People v. Crew*, 1 Cal.App.4th 1591, petition for review denied, Cal. Supreme Court, No. S025032 (March 26, 1992); *Crew v. Santa Clara Superior Court*, petition for review denied, Cal. Supreme Court, No. S031140 (March 25, 1993); and *Crew v. Santa Clara Superior Court*, application for stay and petition for writ of mandate denied, Cal. Supreme Court, No. S033435 (June 22, 1993).

\\

\\

\\

V.

ALLEGATIONS APPLICABLE TO EACH AND EVERY CLAIM

106. Petitioner makes the following allegations which apply to each and every claim and allegation in the petition.

107. The facts in support of each claim are based on the allegations in the petition, the declarations and other documents contained in the exhibits; the entire record of all the proceedings involving petitioner in the trial courts of Santa Clara County; the documents, exhibits, and pleadings in *People v. Mark Christopher Crew,* on direct appeal and in related habeas proceedings; judicially noticed facts; and any and all other documents and facts that petitioner may develop.

108. Legal authorities in support of each claim are identified within that claim. Each and every claim is based both on the state and the federal constitutions.

109. Petitioner does not waive any applicable rights or privileges by the filing of this petition and the exhibits, and in particular, does not waive either the attorney-client privilege or the work-product privilege. Petitioner hereby requests that any waiver of a privilege occur only after a hearing with sufficient notice and the right to be heard on whether a waiver has occurred and the scope of any such waiver. Petitioner also requests "use immunity" for each and every disclosure he has made and may make in support of his petition.

110. If the prosecution disputes any material fact(s) alleged below, petitioner requests an evidentiary hearing so that the factual dispute(s) may be resolved. After petitioner has been afforded discovery and the disclosure of all material evidence by the prosecution, the use of this Court's subpoena power, and the funds and opportunity to investigate fully, counsel requests

an opportunity to supplement or amend this petition. He is presently aware of the facts set forth below, establishing a prima facie case for relief.

111. To the extent that the error or deficiency alleged was due to defense counsel's failure to investigate and/or litigate in a reasonably competent manner on petitioner's behalf, petitioner was deprived of the effective assistance of counsel in violation of the state and federal constitutions. To the extent that defense counsel's actions and omissions were the product of purported strategic and/or tactical decisions, such decisions were based upon state interference, prosecutorial misconduct, inadequate and unreasonable investigation and discovery, and/or inadequate consultation with independent experts and therefore were not reasonable, rational or informed, in violation of the state and federal constitutions.

112. To the extent that the facts set forth below could not reasonably have been uncovered by defense counsel, those facts constitute newly-discovered evidence which casts fundamental doubt on the accuracy and reliability of the proceedings and undermines the prosecution's case against petitioner such that his rights to due process, to a fair trial and to a reliable, non-arbitrary and individualized sentencing determination under the state and federal constitutions have been violated and collateral relief is appropriate.

113. The prosecution committed pervasive misconduct throughout petitioner's trial, in violation of the state and federal constitutions.

114. Defense counsel was ineffective at both the guilt and penalty phases of petitioner's trial, in violation of the state and federal constitutions.

115. Petitioner's conviction, special circumstance finding and death sentence were obtained in violation of his most fundamental state and federal constitutional rights, including the right to a fair trial, to an impartial

jury, to be given notice and be heard, to confront and cross-examine witnesses, to effective representation of counsel, to procedural and substantive due process, to reliable guilt determination and to a reliable, non-arbitrary and individualized penalty determination. The entire judgment must be reversed. U.S. CONST. amends. V, VI, VIII & XIV; CAL. CONST. art. I, §§ 1, 7, 15, 16, 17.

VI.

CLAIMS FOR RELIEF

116. Because a reasonable opportunity for full factual development through discovery, adequate funding, access to this Court's subpoena power, and an evidentiary hearing has not been provided to petitioner, the full evidence in support of the claims that follow is not presently obtainable. Nonetheless, the evidence that is obtainable and set out below adequately supports each claim and justifies issuance of an order to show cause and relief.

A. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT THE GUILT PHASE OF PETITIONER'S TRIAL

117. Petitioner's confinement is unlawful in that his conviction and sentence were illegally and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their state constitutional analogs as a result of the unreasonable actions and inactions of his trial counsel at the guilt and special circumstance phase of his trial. These deficiencies caused a complete breakdown in the adversarial process, and when they are considered separately and also in conjunction with other claims alleged herein, the verdicts in the guilt phase and/or the penalty phase of petitioner's trial must be set aside. There is a reasonable probability that

but for these errors and omissions, the result of the proceeding would have been different. Counsel's failures undermine confidence in the outcome of the case.

118. Petitioner alleges the following facts in support of this claim, among others to be developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

119. Counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 693-694 (1984). There is a reasonable probability that but for counsel's failings the result would have been more favorable. *Id.* at 687-96. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694.

120. Counsel's performance impaired the proper functioning of the criminal justice system to the point "that the trial court cannot be relied on as having produced a just result." *Id.* at 686.

121. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 690. In other words, "counsel must, at minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." *Sanders v. Ratelle,* 21 F.3d 1446, 1456 (9th Cir. 1994). Counsel is deemed to have rendered ineffective assistance "where he neither conducted a reasonable investigation nor made a showing of strategic reasons for failing to do so." *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1999) (quoting *Sanders*, 21 F.3d at 1456).

122. While the inquiry into ineffective assistance employs a

presumption that counsel's conduct is within the "wide range of professionally competent assistance," *Strickland v. Washington*, 466 U.S. at 689, that presumption does not excuse counsel's failure to investigate and prepare a defense. *See Turner v. Duncan*, 158 F.3d 449, 456 (9th Cir. 1998). Any presumption that petitioner's counsel reasonably exercised professional judgment is rebutted because the challenged acts and omissions alleged here were not informed tactical decisions but resulted from a lack of diligence in preparation and investigation.

123. To the extent that any of the errors and omissions alleged here were tactical decisions, they were not reasonable decisions. "An attorney's strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland v. Washington*, 466 U.S. at 690-91.

124. Petitioner was arrested in Connecticut on June 6, 1984. On March 20, 1985, petitioner was extradited from Connecticut and booked into the Santa Clara County Jail. Petitioner was represented initially by Bryan Shechmeister of the Santa Clara Public Defender's Office.

125. A preliminary hearing was held in May, June and July 1985. Petitioner was held to answer and on August 5, 1985, an information was filed against petitioner in Santa Clara County Superior Court.

126. The case was assigned to Judge John Schatz on October 15, 1986, and the matter was continued several times because of the involvement of Mr. Shechmeister, the prosecutor and the trial court in other capital cases.

127. On July 7, 1987, the Public Defender was relieved as counsel, and was replaced by private counsel, Joseph O'Sullivan, who was hired by petitioner's father, William Crew.

128. The case was further continued because the prosecutor was trying another capital case, and the trial court had begun another capital case.

129. The trial was set to commence on September 19, 1988. CT 2060.

130. On September 8, 1988, Mr. O'Sullivan requested an additional six months continuance because of alcohol abuse and other stress-related mental health problems. CT 2062. At the time he requested the continuance he had been diagnosed with Alcohol Dependence, accompanied by depressive symptoms and generalized anxiety. CT 2065. He was emotionally disorganized, his capacity to concentrate was impaired, and he suffered from bouts of depression and "unbound anxiety." 9/16/88 RT 26-27. *See also* Declaration of Joseph Morehead, attached hereto as Exhibit 1, at 1; Declaration of Joseph O'Sullivan, attached hereto as Exhibit 2, at 8; Declaration of John Murphy, attached hereto as Exhibit 3, at 12.

131. According to O'Sullivan's psychologist, who testified in support of the motion for a continuance, Mr. O'Sullivan had been abusing alcohol for several years, possibly over ten years, and in the previous two years it had "gotten way out of hand." This included drinking daily, and cutting back on his work so he could indulge in alcohol consumption. Mr. O'Sullivan had reportedly stopped drinking by early September 1988, and needed a period of time to obtain treatment and recover so as not to resume drinking. 9/16/88 RT 21-22. *See also* Morehead Dec., Exh. 1, at 1; O'Sullivan Dec., Exh. 2, at 8; Murphy Dec., Exh. 3, at 12.

132. Mr. O'Sullivan was abusing alcohol when he first began representing petitioner, and his drinking impaired his performance as counsel. 9/16/88 RT 21-22, 27. Mr. O'Sullivan's psychologist stated that

his condition prevented him from "investing himself productively in his work" and that his diagnosis "implies chronic heavy drinking, incapacitating bouts of depression and recurrent anxiety attacks." In the psychologist's opinion, "he is unable to handle the responsibility involved in defending a death penalty case . . . . In sum, Mr. O'Sullivan is in immediate need of treatment. His alcohol dependence has impaired his capacity to function occupationally. At the present time he needs to prepare the defense of a death penalty case, but he is emotionally unable to fulfill this obligation. It is expected that he would be able to reassume this responsibility after an initial six month period of treatment." CT 2065.

133. Mr. O'Sullivan stated under oath that "I clearly cannot, at this time, handle the mental and emotional commitments attendant to a Captiol [sic] Case . . . ." CT 2066. He admitted that "under *Ledesma*[5] there is no way I could try this case in my present posture." 9/13/88 RT 13, 9/16/88 RT 28-29, 33. His psychologist agreed that he was in no condition to try the case at that time. 9/16/88 RT 25.

134. On November 29, 1988, the trial court granted a continuance of the trial to April 17, 1989, to permit O'Sullivan to recover from his alcohol abuse and other mental health problems, and appointed Joseph Morehead as second counsel. CT 2087.

135. As Mr. Morehead recalls, "Mr. O'Sullivan had been retained about a year earlier, but he had a drinking problem which had impaired his ability to prepare a defense to the charges against Mark Crew and he was not ready to go to trial. At the time he contacted me he had quit drinking

---

[5] *People v. Ledesma*, 43 Cal.3d 171 (1987) is a seminal California case involving ineffective assistance of counsel.

and had asked the court for a continuance to allow him to recover from his bout with alcoholism and to prepare an adequate defense to the charges." Morehead Dec., Exh. 1, at 1.

136. John Murphy, the investigator hired by Morehead states: "Mr. Morehead was brought into the case by O'Sullivan who had asked the court for a continuance in order to recover from alcohol abuse. My impression was that by that time Mr. O'Sullivan had become fairly incapacitated due to his drinking and Morehead was doing O'Sullivan a favor by trying to salvage the case as best he could under the circumstances while O'Sullivan was in recovery. Although Morehead was technically second counsel, I received my direction and assignments with regard to investigation exclusively from him." Murphy Dec., Exh 3, at 12.

137. Mr. Morehead was brought into the case because of Mr. O'Sullivan's incapacity. His role in the case was to maintain relations with the client, assist in selecting the jury, consult with experts, draft and argue pre-trial motions, direct the investigation for the guilt phase, second chair the guilt phase, and prepare for the possibility of a penalty phase. Morehead Dec., Exh. 1, at 1.

138. From the time of his retention as counsel until the time he sought a continuance and the appointment of second counsel, Mr. O'Sullivan had not prepared adequately for trial. He had not sought funds pursuant to 987.9 of the Penal Code, had not hired an investigator, had failed to prepare or file any pre-trial motions, had failed to obtain any records other than what he had received from the prosecutor in discovery or prior counsel, and was not in any way ready to go to trial. Morehead Dec., Exh. 1, at 1; Murphy Dec., Exh. 3, at 12.

139. By the time Mr. Morehead was appointed, there was very little

time to become familiar with the case and prepare to go to trial. Thus, trial counsel's investigation as to the guilt and penalty phases of the trial was untimely, and counsel failed to retain an investigator in a timely fashion. As Morehead recalls, "I hired an investigator, John Murphy, in February 1989, and he and I barely had time to review the preliminary hearing transcripts and discovery, and to get up to speed by the time the trial was set to commence with jury selection in April 1989." Morehead Dec., Exh. 1, at 1.

140. According to Mr. Morehead: "Given the enormous time pressures, I did my best to put the guilt phase defense together. This left very little time for preparing for the penalty phase, which was scheduled to begin less than a week after the guilt phase concluded." Morehead Dec., Exh. 1, at 1-2.

141. The trial commenced with jury selection on April 17 1989, and the investigator, John Murphy, did not begin undertaking any investigation until a month before the trial began.

142. According to Murphy: "The preparation for trial, including investigation of both the guilt and penalty phases was plagued by a lack of time. Because of Mr. Morehead's and my late entry into the case and O'Sullivan's incapacity prior to having Morehead appointed, everything was being done at the last minute, from locating and interviewing witnesses, obtaining and reviewing documents, identifying and retaining experts, and seeking funding for investigation and experts." Murphy Dec., Exh. 3, at 12.

143. During this time, Mr. O'Sullivan was involved in an unrelated case in which his conduct led to disciplinary action by the State Bar of California in 1995, including suspension from the practice of law for six

months. Execution of the suspension was stayed and O'Sullivan was placed on probation for two years.

a. Mr. O'Sullivan represented David Thomas who had been arrested and charged with criminal violations following an incident on August 4, 1988, in which he was engaged in a gun battle with law enforcement officers from the California Highway Patrol and Alameda County Sheriff's Department. During the course of the gun battle Jennie Mohar, a passenger in Thomas's car was killed.

b. Mr. O'Sullivan was retained by Jennie Beyer, Mohar's mother, to represent her in a wrongful death action against the State of California and the County of Alameda at the same time he was representing Mr. Thomas.

c. Mr. O'Sullivan failed to obtain a written consent of Thomas and Beyer to his representation of conflicting interests.

d. Mr. O'Sullivan failed to timely file a complaint on Beyer's behalf against the State of California and the County of Alameda prior to the running of the statute of limitations on September 22, 1989.

e. It was found that Mr. O'Sullivan's excessive use of alcohol contributed to the misconduct.

In Re Joseph Sullivan on Discipline, Cal. Supreme Court No. S044438 (Mar. 29, 1995), attached hereto as Exhibit 51; *In re Joseph O'Sullivan,* State Bar Court's Order Regarding Stipulation As to Facts and Disposition (1994), attached hereto as Exhibit 52.

144. The following instances of ineffective assistance of counsel, individually and cumulatively, violated petitioner's constitutional rights and were prejudicial. Counsel had no tactical reasons for the errors and omissions alleged herein. The challenged actions and inactions were

uninformed and based on lack of preparation and investigation, and could not be considered sound trial strategy. *Strickland v. Washington,* 466 U.S. at 689. Had counsel performed adequately it would have "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *Strickland v. Washington,* 466 U.S. at 694-695.

(1) *Failure to Seek Instructions on State Jurisdiction*

145. Petitioner has argued on automatic appeal that because there was no evidence presented to establish that the alleged physical acts relating to the murder of Nancy Andrade occurred in California, the courts of this State had no jurisdiction with respect to those charges. As a result, the imposition of petitioner's conviction and death sentence despite the lack of jurisdiction, and the failure to instruct the jury with regard to its need to find that the crime occurred in California, violated California Penal Code sections 27 and 778a, as well as petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights. *See* Appellant's Opening Brief and Reply Brief, Claim B, incorporated herein by reference.

146. Trial counsel rendered ineffective assistance for failing to seek instructions which would have required a jury finding on jurisdiction and/or to argue to the jury that it must make such a finding. Counsel had no tactical reason for failing to seek such a jury finding. Morehead Dec., Exh. 1, at 6-7. Counsel's failure in this regard was prejudicial.

147. The last time Nancy Andrade was seen was on August 23, 1982, when she left Santa Cruz, California for South Carolina with petitioner. She was never located. While the prosecution presented circumstantial evidence at trial in order to prove she was murdered, no

evidence was presented to establish where she was fatally injured or where she died.

148. Richard Elander testified that in May 1982, petitioner talked about taking a cross-country trip with Andrade and killing her in South Carolina. Elander also inquired of an employer in Utah with regard to disposing of a body there. RT 2968-69.

149. On June 4, 1982, petitioner and Andrade were married in Reno, Nevada. RT 3665. They were planning to live in South Carolina. RT 3537, 3542, 3562. Shortly after the wedding, there were difficulties in the marriage, and petitioner and Andrade saw each other infrequently while petitioner attended to various business dealings. RT 3542, 3555-56, 3562, 3669. During this period of time Andrade lived at various residences in San Jose, California, where petitioner also occasionally stayed. RT 3538, 3562. In June 1982, with the marriage failing, petitioner and Elander moved to South Carolina where they established a truck service business, and the relationship between petitioner and Andrade was essentially over. RT 3970-71. Indeed, on the way to South Carolina, petitioner told Elander that his marriage to Andrade was going to be annulled. RT 3973.

150. In early July 1982, petitioner was unexpectedly visited in South Carolina by Andrade, who was on a trip with her friend Darlene Bryant. RT 3584. Andrade returned to California, and moved in with Bryant. She frequently talked on the telephone with petitioner, who was still in South Carolina. RT 3677-78. Andrade decided she was going to give the marriage another chance, and planned to move back to South Carolina. RT 3678-79.

151. Elander testified that the alleged conversation regarding a plan to kill Andrade did not occur until August 1982, when he and petitioner

were in South Carolina. RT 3974.

152. Petitioner and Andrade agreed that petitioner would return to California, they would pack up Andrade's belongings, and the two would return to South Carolina via Texas. RT 3679-80. Andrade quit her job as a nurse at Kaiser Hospital in San Jose, and informed her supervisor she was leaving the area. RT 3598. Andrade also gave her ex-husband custody of their two children before the planned move to South Carolina with petitioner. RT 3642, 3652.

153. On Saturday, August 21, 1982, petitioner and his step-father arrived at Darlene Bryant's residence. They had Andrade's horse in a horse trailer and assisted Andrade in packing some of her belongings in the horse trailer. The three of them left Bryant's. RT 3681-3685. The following day, Andrade returned to Bryant's in the Corvette to say goodbye while petitioner was in Fremont in Alameda County, California, getting work done on the truck. RT 3701. On that day, Andrade told Bryant that she and petitioner were going to go to her parents' house in Santa Cruz, California, load up the truck with her belongings, and leave California for South Carolina from there. RT 3702-03.

154. The following day, on August 23rd, Andrade and petitioner left Santa Cruz at approximately 5:00 p.m., after saying good-bye to her family. RT 3777. An hour later, petitioner and Andrade checked into a Motel 6 in Fremont.[6] Motel records indicate that petitioner paid for two nights, for two people, and that they had the two vehicles, Andrade's Corvette and Ford pickup. RT 4457-58; People's Exhibit 40.

---

[6] This Court may take judicial notice that it is approximately 50 miles between Santa Cruz and Fremont, and as the prosecutor stated, it would take about an hour to drive from one place to the other. RT 3493-94.

155. Elander testified that petitioner told him about the killing: "He said that they had left San Jose to go to Greer, and he stopped along the way and they walked up into the woods up on a hillside." RT 3982. According to Elander, petitioner said he shot her and then rolled her down into a ravine or ditch. RT 3981-82. There is no evidence that this took place in California, much less Santa Clara County.

156. Elander further testified that petitioner said he then went to the residence of Bruce Gant (in Santa Clara County), and that the two of them returned to the scene which was at an unspecified location, where they retrieved the second vehicle. Petitioner allegedly told Elander that the following evening they returned to the scene, discovered that Andrade was still alive, and that Gant ultimately killed her and cut off her head. RT 3983. According to Elander, petitioner said they put her body in a 55-gallon drum filled with cement, and put the head in a 5-gallon drum of cement and threw it off the Dumbarton Bridge (which is in Alameda County). RT 3984. Elander also said petitioner told him that when he was in Texas he received a call from Gant that the body was stinking. RT 3984. Elander testified that he "believed" petitioner said that Gant buried it in his backyard. RT 3985. However, extensive searches of Gant's yard revealed no body. RT 4539-43.

157. Despite these facts, trial counsel failed to seek instructions on territorial jurisdiction or argue to the jury that it could not convict petitioner unless it found territorial jurisdiction in the State. *See* Cal. Penal Code §§ 27 and 778a.

158. Counsel unreasonably failed to investigate and produce additional facts to make a challenge to jurisdiction.

159. At the time of petitioner's trial, it was clear that territorial

jurisdiction required "the doing, in California, of an act amounting to an 'attempt' to commit the offense charged, within the definition of attempt in criminal cases generally -- i.e., that there must be acts beyond mere preparation." *People v Utter*, 24 Cal.App.3d 535, 550 (1972); *People v. Buffum*, 40 Cal.2d 709 (1953).[7]

160. Reasonably competent counsel would have argued to the jury, after seeking appropriate instructions, that there was no evidence that petitioner killed Nancy Andrade in the State of California; that while petitioner and Andrade were last seen together in California, there was insufficient evidence to support an attempt in California because there was not substantial evidence supporting "an inference of the necessary union of specific intent and act within California." *People v. Chapman*, 72 Cal.App.3d 6 (1997).

161. Even under post-*Buffum* authority, the acts allegedly committed in California by petitioner were de minimus, and reasonably competent counsel would have argued the lack of territorial jurisdiction to the jury, and sought appropriate instructions.

162. Counsel's failure in this regard was prejudicial. Even if this Court finds on automatic appeal that there was sufficient evidence in the record to establish territorial jurisdiction, there was at minimum, a factual question for the jury as to whether sufficient acts occurred in California to confer jurisdiction. However, trial counsel never requested instructions for

---

[7] Well after petitioner's trial, *Buffum* and *Utter* were overruled in *People v. Morante*, 20 Cal.4th 403 (1999). However, as petitioner argued on appeal, *Morante*'s overruling of *Buffum* and *Utter* constituted an unforeseeable enlargement of a criminal statute with regard to territorial jurisdiction for murder, and could only be applied prospectively. *See* Reply Brief, at 31-36.

the jury to make any findings regarding jurisdiction and never argued the issue to the jury.

163. It is reasonably probable that but for counsel's failures, the outcome would have been different. There was no evidence that the murder actually occurred in California and the only testimony from which such an inference could even be drawn came from Richard Elander, a witness whose credibility was suspect.

164. Petitioner and Andrade were last seen in Santa Cruz by Andrade's father at 5:00 - 5:30 p.m., on August 23rd. They checked into a Motel 6 in Fremont, California (Alameda County) later that night. Petitioner is next seen by Lisa Moody at her apartment in Santa Clara County, on either August 25th or August 26th, at which time he gave to her Andrade's microwave and stereo. RT 4137-4138, 4198-4199, 4203. While there was no evidence as to when Andrade was killed, even assuming Andrade was killed and that the murder occurred before petitioner arrived at Moody's residence, this could have been accomplished any time between the evening of August 23rd and the evening of August 25th or 26th, ample time for the crime to have occurred across state lines.

165. The jury could have believed that petitioner killed Andrade but found Elander's testimony as to the manner in which the murder occurred to be not credible. Moreover, even if Elander was believed, the jury may not have drawn the inference that sufficient acts were committed in California. However, the jury was never informed that if it failed to find that petitioner had done sufficient acts in California to establish an attempt to commit murder he could not be convicted of murder in California.

\\

\\

(2) *Failure to Seek Instructions on County Jurisdiction*

166. Petitioner has argued on automatic appeal that because there was no evidence presented to establish that the physical acts relating to the murder of Nancy Andrade occurred in Santa Clara County, there was no jurisdiction or venue in the County with respect to those charges. As a result, the imposition of petitioner's conviction and death sentence despite the lack of jurisdiction and venue violated California Penal Code section 790, as well as petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights. *See* Appellant's Opening Brief and Reply Brief, Claim C, incorporated by reference.

167. Trial counsel rendered ineffective assistance of counsel for failing to seek instructions which would have required a jury finding on the County's jurisdiction and venue and/or to argue insufficient evidence of jurisdiction and venue to the jury. Had counsel done any or all of these things, it is reasonably probable that the outcome of the trial would have been different.

168. Counsel unreasonably failed to investigate and produce additional facts to make a challenge to jurisdiction and venue.

169. At the preliminary hearing, CT 1800, and again in superior court, RT 4474-4479, petitioner moved to dismiss on the ground that Santa Clara County lacked jurisdiction. Petitioner also filed a motion in arrest of judgment on similar grounds. CT 2345-2353. As petitioner argued in the trial court, the prosecution failed to establish, pursuant to Penal Code section 790, that: a) the fatal injury was inflicted in the county; b) the victim died in the county; or c) the body was found in the county.

170. As discussed above in paragraphs 147-156, 164-165,

incorporated herein by reference, assuming Andrade was murdered, there was no evidence as to the location where Andrade was killed and her body was never found. Andrade was last seen with petitioner on August 23rd in *Santa Cruz County*, and they then checked into a Motel 6 in *Alameda County* an hour later. There is no evidence that any aspect of the killing occurred in Santa Clara County. The prosecutor stated in his opening statement that Andrade and petitioner checked into the motel at 6:00 p.m., on August 23rd, and in all likelihood, Andrade was killed soon thereafter. RT 3491. The prosecutor stated that it was likely that by the morning of August 24th, when two telephone calls were made from the motel in Alameda County to the Mosteller residence in South Carolina and to petitioner's grandmother in Texas, that Andrade was no longer alive. RT 3499.

171. In his closing argument, the prosecutor acknowledged that it is "entirely possible" that petitioner and Andrade stayed in the motel in Alameda County together on the night of August 23rd, RT 4606, and that Andrade was killed as late as August 24th. RT 4568.

172. California case law has consistently made clear that the facts supporting jurisdiction in a particular county must be proved by a preponderance of the evidence. *People v. Arline*, 13 Cal.App.3d 200, 203 (1970); *People v. Jones*, 228 Cal.App.2d 74, 86 (1964); *People v. Megladdery*, 40 Cal.App.2d 748, 762-66 (1940). Here, the prosecutor acknowledged in opposition to the motion to dismiss that there was no "specific evidence as to where it occurred, whether in this county or over the county line." RT 4477. In fact, the prosecutor argued to the jury that "we cannot prove that the actual killing took place in Santa Clara County." RT 4568.

173. Under the provisions of Penal Code section 790, jurisdiction for murder is in the "county where the fatal injury was inflicted or in the county in which the injured party died or in the county in which his or her body was found." Here, there was no evidence as to where the fatal injury occurred or where the victim died, and the body was never found. Even assuming the testimony of Elander regarding the temporary burying of the body in Gant's backyard can be credited, this would be insufficient to meet the provisions of the statute, which requires that the body be *found* in the county, not that it had been buried there for an unspecified period of time. Thus, the prosecution lacked proper venue pursuant to the specific jurisdictional requirements of Penal Code section 790.

174. This Court has held that Penal Code section 790 must be read in conjunction with section 781. *See People v. Douglas*, 50 Cal.3d 468, 493-94 (1990); *People v. Price*, 1 Cal.4th 324, 385 (1991). Under section 781, "a public offense may be tried in a jurisdiction in which the defendant made preparations for the crime, even though the preparatory acts did not constitute an essential element of the crime." *People v. Price*, 1 Cal.4th at 385 (citing *People v. Powell*, 67 Cal.2d 32, 62 (1967)); *see also People v. Abbott*, 47 Cal.2d 362 (1956).

175. As argued on appeal, there was no evidence that the crime was commenced in Santa Clara County. According to the prosecution's theory, the plan to kill Andrade arose after she and petitioner reconciled in South Carolina in July 1982. Whatever preliminary arrangements were made, according to the evidence, were made in South Carolina, not Santa Clara County, California. The plan that petitioner and Bergin Mosteller would come to California for the purpose of picking up Andrade and killing her somewhere along the way was allegedly discussed in South Carolina in

August 1982. RT 3973-76. Santa Clara County was but one of several counties that petitioner and Andrade passed through in the days preceding Andrade's disappearance.

176. A county may also have jurisdiction where "acts requisite to the achievement or end of the unlawful purpose occurred" in the county. *People v. Megladdery*, 40 Cal.App.2d at 780. As argued on appeal, in petitioner's case, there was no evidence as to where the crime was consummated. Elander's testimony does not disclose where Andrade was killed. The only link between the murder and Santa Clara County was Elander's testimony that he "believed" petitioner said that Gant buried the body in his backyard in Santa Clara County. There was no evidence when this was done and what petitioner's role was. Morever, despite extensive efforts by law enforcement, there was no evidence that the body was ever buried in Gant's backyard. This testimony was not proved by a preponderance of the evidence. In any event, even assuming the body was temporarily buried in Gant's backyard, before it was moved to a place where it could be better concealed, the temporary burial of the body would not be an act sufficient to confer jurisdiction since it was not an act necessary to the successful completion of the offense.

177. Trial counsel unreasonably failed to request that the jury be instructed or be required to make express findings of the jurisdictional facts, and had no tactical reason for such failures. Morehead Dec., Exh. 1, at 6-7.

178. While the jury found petitioner guilty of murder as charged in the information, and the information alleged that petitioner committed the murder in Santa Clara, the jury was never informed that it needed to determine jurisdictional facts or what was necessary to do so beyond the misleading comments of the prosecutor.

179. The prosecutor committed prejudicial misconduct in misstating the law and misleading the jury by informing it that "the county obtains jurisdiction if either the killing occurs there or the body is *located there* or found there. And we have evidence substantial evidence that the body for a period of time was located in Campbell, within this county." RT 4568-69. As discussed above, the fact that the body may have been "located" in the county for an unspecified period of time, but was not found there is not sufficient under section 790 to confer jurisdiction. Trial counsel unreasonably failed to object to the misleading comments of the prosecutor. Counsel had no tactical reason for failing to object. Morehead Dec., Exh. 1, at 6-7.

180. Counsel's failures were prejudicial. Even if this Court finds on automatic appeal that there was sufficient evidence in the record to establish jurisdiction and venue, there was at minimum, a factual question for the jury as to whether sufficient acts occurred in Santa Clara to confer jurisdiction.

181. Given the lack of evidence that there was a murder which either commenced or was consummated in Santa Clara County, it is reasonably probable that but for counsel's failures the outcome would have been different. In view of the prosecutor's comments and in the absence of an instruction, it is reasonably probable that the jury did not know that the crime must have commenced or consummated in the county, and that it believed erroneously that the evidence about events in Santa Clara County throughout the trial were sufficient to confer venue even though none of these facts meet the requirements of Penal Code sections 790 and 781. Even more likely, the jury was focused on whether a murder occurred as opposed to where it occurred.

(3) *Failure to Argue Lack of Corpus Delicti*

182. Petitioner has argued on automatic appeal that the statements petitioner allegedly made to various witnesses regarding the murder of Nancy Andrade should never have been admitted absent proof of corpus delicti; that the admission of petitioner's extrajudicial statements violated the corpus delicti rule and, without petitioner's statements, there was insufficient evidence to convict him of murder. *See* Appellant's Opening Brief and Reply Brief, Claim D, incorporated herein by reference.

183. Trial counsel rendered ineffective assistance by failing to seek to exclude petitioner's alleged statements on the ground of lack of corpus delicti and by failing to argue lack of corpus delicti to the jury. Had counsel done any or all of these things, it is reasonably probable that the outcome of the trial would have been different.

184. "The corpus delicti rule requires that the prosecution establish the corpus delicti of the offense independently of the defendant's extrajudicial statements, admissions and confessions." *People v. Mattson*, 50 Cal.3d 826, 873-74 (1990)(citing *People v. Towler*, 31 Cal.3d 105, 115 (1982)). "The corpus delicti of a crime consists of two elements, the fact of the injury or loss or harm, and the existence of a criminal agency as its cause." *People v. Jennings*, 53 Cal.3d 334, 364 (1991)(quoting *People v. Hamilton*, 48 Cal.3d 1142, 1175 (1989)).

185. In murder cases, the corpus delicti consists of "the death of the alleged victim and the existence of some criminal agency as the cause." *People v. Manson*, 71 Cal.App.3d 1 (1977)(citation omitted). Thus, "the People's burden is met by 'evidence which creates a reasonable inference that the death could have been caused by a criminal agency . . . even in the presence of an equally plausible noncriminal explanation of the event.'"

People v. Mattson, 50 Cal.3d at 874 (citation omitted).

186. It is true that the production of the body of the victim or evidence of the means used to produce death are not essential to the establishment of corpus delicti. *See People v. Bolinski*, 260 Cal.App.2d 705, 715 (1968). However, there must be evidence – exclusive of extrajudicial statements made by petitioner – sufficient to permit a reasonable inference to be drawn that the victim died and the death was caused by criminal agency.

187. Here, there was insufficient evidence absent petitioner's alleged statements to infer that Andrade was dead and/or that she was killed by criminal agency. In contrast, however, there was substantial evidence of Andrade's instability. She lived in several different places in the year before she disappeared, and Andrade's children lived with her parents during that time. RT 3538-39. Before Andrade left for South Carolina, she had given custody of her children to her ex-husband. RT 3538-39. Andrade was described by friends as a troubled person. RT 3554. Andrade showed symptoms of stress in 1978, and suffered from signs of depression beginning in 1980. RT 3614-15. She displayed self-destructive behavior and appeared confused. RT 3650-51, 3571, 3574, 3654. Given the victim's erratic behavior it was not unreasonable to infer, absent petitioner's alleged statements, that she disappeared willfully.

188. There was also insufficient evidence absent petitioner's alleged statements that a criminal agency was the cause of death; there is insufficient evidence to infer that Andrade's death was by criminal means. Other than petitioner's extrajudicial statements there is no evidence of foul play. Andrade was last seen in Santa Cruz, California at 5 p.m., on August 23, 1982, and checked into a motel in Fremont, California with petitioner an

hour later. There was evidence that they had planned to go to South Carolina together. Instead, petitioner went to South Carolina with another woman, and disposed of some of Andrade's personal property after her disappearance.

189. Petitioner's disposal of Andrade's property was consistent with her disappearance by non-criminal means. Had Andrade abandoned petitioner on the trip, it would not be unreasonable for him to begin disposing of her property. If in fact Andrade disappeared willfully, petitioner's statements to various people that he was selling his wife's possessions as a result of their "divorce," *see, e.g.,* RT 4319-20, 4437, rather than because she left him, would not be so far from the truth that it would create an inference of criminal agency.

190. The corpus delicti rule "operates initially to establish the foundation for admission of a defendant's extrajudicial admissions and confessions." *Mattson*, 50 Cal.3d at 874. "No part of [the corpus delicti] can be proved by the extrajudicial admissions or confessions of the defendant, and unless the corpus delicti is established such statements cannot be admitted in evidence." *People v. Manson*, 71 Cal.App.3d at 41 (quoting *People v. Wong*, 35 Cal.App.3d 812, 839 (1973)).

191. Trial counsel unreasonably failed to seek to exclude petitioner's alleged extrajudicial statements to Richard Elander, Jeanne Meskell, Paul Balbas, and Doug Crew, which formed the critical aspect of the prosecution's case, on grounds of lack of corpus delicti.

192. Counsel had no tactical reason for such failures. Morehead Dec., Exh. 1, at 7.

193. While the jury was instructed that corpus delicti must be proved independent of the defendant's statements, counsel unreasonably

failed to argue the absence of corpus delicti or a theory of inadmissibility of the statements to either the judge or the jury. *See Summitt v. Blackburn*, 795 F.2d 1237, 1244-45 (5th Cir. 1986)

194. Counsel's failures in this regard were prejudicial. It is reasonably probable that had counsel sought to exclude the statements, they would have been excluded and/or had counsel argued lack of corpus delicti to the jury, the jury would have made a finding of lack of corpus delicti.[8]

195. Given the importance of these statements – which, if believed, constituted a confession to murder – trial counsel's failures were prejudicial. The statements from petitioner were critical to his conviction. Without such statements, the remaining evidence merely showed that petitioner made plans with both Andrade and another woman to go to South Carolina; that he initially left with Andrade but arrived in South Carolina with the other woman; and that he disposed of much of Andrade's property. This scenario is certainly suspicious, but does not establish sufficient evidence to convict petitioner of murder.

(4) *Failure to Seek Appropriate Instructions in Response to Prosecutorial Misconduct*

196. Petitioner has argued on automatic appeal that the prosecutor violated a court order by stating to the jury and eliciting testimony regarding the victim's alleged fear of petitioner. *See* Appellant's Opening Brief and Reply Brief, Claim E, incorporated by reference.

197. Trial counsel objected to admission of a hearsay statement that

---

[8] The jury was instructed with CALJIC 2.72, which provided in relevant part: "No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any [confession] [or] [admission] made by him outside of this trial." CT 2621.

Andrade told a friend that she was afraid of petitioner, citing Evidence Code section 352 and the case of *People v. Ireland*, 70 Cal.2d 522 (1969)(victim's out-of-court statement of fear admissible only where victim's conduct in conformity with that fear is in dispute). The trial court agreed, ruling that the statement was inadmissible. RT 3457-58.

198. The prosecutor, however, repeatedly and blatantly violated the court's ruling by informing the jury in his opening statement of the victim's alleged statement of fear of petitioner and then eliciting testimony of the victim's alleged statement of fear of petitioner. In his opening statement the prosecutor stated that Andrade told one of her friends that she was not only apprehensive of moving away, but was "apprehensive of the defendant, fearful of the defendant." RT 3506. The defense objected to the prosecutor's violation of the trial court's order, which the prosecutor then claimed was inadvertent. RT 3514-15.

199. Yet again, during testimony of Deborah Nordman, a friend of Andrade's, the prosecutor elicited the prohibited testimony as follows:

Q. And do you recall the last conversation you had with her about not going [with petitioner to South Carolina]?
A. Yes.
Q. What did you tell her?
A. Well, she expressed some concern and some fear, and basically she said to me, "if you don't hear from me in two weeks, send the police."
Q. What did you tell her before that?
A. I told her if she had fear, reservations or that, you know, first of all, she should not take the children because if anything was going to happen, she didn't want, didn't feel she should have the children involved. And I -- and I also told her that if she had the fear, and up until that point –

RT 3587-88.

200. Counsel objected, and both parties agreed that the court had ruled that such testimony was inadmissible. RT 3588. As defense counsel asserted after this testimony was elicited:

> Despite very clear rulings from this court about the question of whether or not a statement of fear would be made by any witness, despite the fact that you again repeated that admonition to the prosecutor at the close of his case -- at the end of his opening statement, nevertheless, that witness did in fact say that Nancy told her she was afraid, which is in direct contradiction of the court's ruling.

RT 3594-95.

201. While trial counsel objected, they rendered ineffective assistance by preparing an inadequate instruction that did nothing to cure the harm from the admission of the elicited testimony.

202. The instruction, offered by defense counsel, stated as follows:

> You are not to consider any testimony or evidence that Nancy Jo Crew may have expressed either fear or apprehension of the defendant Mark Crew as evidence that Mark Crew either killed Nancy Jo or that she is dead. Such evidence may only be considered for the limited purpose of establishing whether or not it was likely that Nancy Jo Crew would have traveled to South Carolina with Mark Crew.

RT 3723-24.

203. As discussed above, the testimony regarding the victim's fear was inadmissible. The cautionary instruction was therefore insufficient because it merely limited the purposes for which the jury could consider the victim's statements of fear, but did not prohibit the jury from considering

the statements altogether, contrary to the court's initial order.

204. The instruction informed the jury that the statement could not be used as evidence that petitioner killed Andrade or that she was dead but only whether it was likely that the victim would have traveled to South Carolina with petitioner. RT 3723-3724. However, the statement would only be relevant for the improper purpose of determining whether petitioner killed the victim.

205. There was no factual dispute as to whether or not Andrade willingly left with petitioner to go to South Carolina – the evidence established that she did. There was also no dispute as to whether she arrived in South Carolina with petitioner – the evidence established that she did not. The only question was whether petitioner killed her or whether she abandoned petitioner at the outset of the trip. To ask the jury to use the evidence of the victim's fear of petitioner to consider whether it was likely that Andrade traveled to South Carolina with him was merely another way of asking the jury to consider the victim's fear in relation to whether or not petitioner killed Andrade along the way. The instruction therefore did not cure the harm because the only way to consider the improperly admitted evidence was in the precise way that it was prohibited; as evidence relevant to whether or not petitioner killed the victim.

206. Counsel's failure was not based on a tactical decision. Morehead Dec., Exh. 1, at 7.

207. Counsel subsequently acknowledged that the cautionary instruction was inadequate by citing the prosecutor's misconduct as grounds for its motion for new trial. CT 2436.

208. Counsel's failure to craft and submit an appropriate instruction was prejudicial. The testimony regarding Andrade's statement was

particularly prejudicial because it was given immediately prior to another statement, "if you don't hear from me in two weeks, send the police." RT 3588; *see also* RT 3506. When viewed together, these statements by the victim could only be considered by the jury as they related to petitioner's conduct – not the victim's, and were therefore inadmissible and prejudicial. *See People v. Ruiz*, 44 Cal.3d 589, 608 (1988); *People v. Armendariz*, 37 Cal.3d 573, 586 (1984); *People v. Lew*, 68 Cal.2d 774 (1968).

209. There was no question that Andrade voluntarily left for South Carolina with petitioner. Her friend Darlene Bryant testified that she had planned to go there to make her marriage work, she gave custody of her children to her ex-husband, and she packed up her belongings and said goodbye to her parents when she left. Statements she allegedly made about fearing petitioner therefore had no relevance to her conduct. Indeed, there was "no purpose for admitting evidence of the victim['s] expressions of fear of defendant other than as proof that the fears were justified, and that defendant in fact killed [her]." *People v. Ruiz*, 44 Cal.3d at 608. Particularly in a case where there were substantial questions not only whether the defendant killed the victim, but whether she had been killed at all, such testimony that the victim feared the defendant was prejudicial.

210. In addition, such testimony was extremely inflammatory – as it provided a statement from the victim herself that she was afraid of petitioner – and undermined a central tenet of the defense case at both the guilt and penalty phase: that petitioner was a kind, generous, caring, non-violent and non-threatening person who could not have committed such a crime, and even if he did, it was an aberration of an otherwise exemplary life.

\\

(5) *Failure to Object to Admission of Irrelevant, Unreliable, Inflammatory Hearsay Evidence*

211. Petitioner has argued on automatic appeal that the trial court erred and the prosecutor committed misconduct by eliciting irrelevant, unreliable and inflammatory hearsay evidence, including: a) testimony regarding Bergin Mosteller's false report of the theft of his car and personal property; b) Bruce Gant's statement to Andrade's father, Mr. Wilhelmi, that Andrade's body would never be found; c) Doug Crew's testimony that petitioner stated he wanted to kill someone; d) Elander's statement regarding disposal of a body in Utah; e) Elander's statement to Marion Mitchell that petitioner killed his wife. *See* Appellant's Opening Brief and Reply Brief, Claim G, incorporated by reference.

212. Trial counsel rendered ineffective assistance in failing to timely and/or properly object to the admission of this evidence, and in failing to seek appropriate limiting instructions so that the evidence would not be considered for the truth of the matter asserted.

213. Counsel had no tactical reason for these errors and omissions. While counsel does not recall why he failed to object, his failure could not have been the product of sound trial strategy. O'Sullivan Dec, Exh. 2, at 8-9.

214. Counsel did object to the testimony regarding Bergin Mosteller's false report, to the testimony regarding Gant's statement to Mr. Wilhelmi, and to Doug Crew's testimony. To the extent that this Court on appeal finds that these objections were insufficient to preserve the issues related to this testimony on appeal, counsel rendered ineffective assistance of counsel. Reasonably competent counsel would have objected on all relevant state law and federal constitutional grounds, as specified in

petitioner's opening brief on appeal, and had counsel done so it is reasonably probable that the outcome would have been different, either at trial or on appeal.

215. While counsel objected to testimony regarding Bergin Mosteller's false report of the theft of his car and personal property on grounds of relevance, hearsay and Evidence Code section 352, RT 4252-4268, counsel unreasonably failed to inform the court that the false claim by Mosteller was irrelevant and had no probative value (or at least that such evidence was more prejudicial than probative) because it had nothing to do with petitioner or any alleged plan by petitioner to kill Andrade or obtain her property.

a. The prosecution presented a fairly substantial amount of evidence on what should have been inadmissible and irrelevant hearsay regarding Bergin Mosteller's filing of a false report of the theft of his car and personal property, and his misrepresentation to an insurance agent regarding the circumstances of the theft.

1) James Insley, a federal police officer who patrolled the Hoover Dam area of Nevada (RT 4270), testified that on August 23, 1982, at 7:30 a.m., while he was off duty, he came into contact with Bergin Mosteller in Boulder City, Nevada. RT 4272. (Boulder City is approximately 25 miles from Las Vegas, and Las Vegas is approximately 482 miles from Reno, Nevada. RT 4271-4272). Mosteller told him that his car and personal property had been stolen. RT 4272. Insley and Insley's neighbor went with Mosteller to a Western Union, where Mosteller had been wired some money, and then drove him to the airport. RT 4273-4274.

2) Lt. Tom Basinger of the Boulder City Police Department testified that he supervised the investigation related to a report

by Mosteller. RT 4276. Mosteller had reported his 1979 Oldsmobile station wagon missing, as well as personal property including his wallet, a money clip, a folding pocket knife, $220 in cash, credit cards, checks and three suitcases. Mosteller reported that the theft occurred in Boulder City on August 23, 1982, at 2:00 a.m. RT 4277-4278.

3) David Doucette worked as a parking lot attendant at the airport in Reno. RT 4395. He identified Mosteller's car in the airport parking lot during his shift on August 22, 1982, between 11:00 p.m., and 3:00 a.m., the following morning. RT 4397-4399.

4) Patricia Ganner was a claims adjuster with State Farm Insurance. RT 4410. On August 27th and November 8th, 1982, Mosteller provided separate statements to Ms. Ganner. RT 4411-4412. Mosteller told her that he left South Carolina on a sales trip via Texas and into California, made a detour to drop off his stepson and went back via Boulder City. RT 4411-14.

b. As discovery provided to counsel made clear, Mosteller's false reports of the theft were not connected to petitioner's conduct, but to Mosteller's attempt to conceal from his wife that he had been robbed by a prostitute he had hired in Reno. Transcript of Interview of Bergin Mosteller by D.A. Investigator Ron McCurdy, July 10, 1984, attached hereto as Exhibit 53, at 355-357, 364.

c. Reasonably competent counsel would have presented this evidence to the trial court in support of their objection to admission of the evidence of Mosteller's false police report and insurance claim. Even assuming the trial court overruled the objection, reasonably competent counsel would have presented evidence to the jury to establish that the false theft reports related to Mosteller's attempt to conceal his experience with a

prostitute from his wife and not from any desire to establish an alibi for himself and/or petitioner. Had counsel alerted the court to this evidence and/or presented it to the jury, it is reasonably probable that the evidence would have been excluded by the trial court or at minimum, discounted by the jury.

d. Admission of evidence of Mosteller's false report of the theft was prejudicial because it permitted the jury to infer petitioner's guilt based on Mosteller's actions. However, Mosteller's false reports to the police and insurance company had nothing to do with petitioner or any alleged plan by petitioner to kill Andrade or obtain her property. As the prosecutor well knew, Mosteller's "false alibi" was not connected to petitioner's conduct. The jury was never made aware of this fact, but was instead left to treat Mosteller's conduct as circumstantial evidence of petitioner's guilt.

e. In the alternative, the prosecutor committed prejudicial misconduct which rendered the trial fundamentally unfair in presenting this evidence to the jury and arguing that it was probative of a conspiracy and planning of the murder when he knew or should have known that Mosteller told the police that his true motive in making out a phony claim of robbery and a false insurance claim was to cover up the fact that he had been robbed by a prostitute in Reno so that his wife would not find out.

216. Counsel unreasonably failed to object to Elander's statement about disposing of a body in Utah when either Elander or Richard Glade testified.

a. Richard Elander testified that at the end of May 1982, he went to work at a dude ranch in Utah owned by a man named Richard Glade. RT 3968. He further testified that before leaving for Utah he had

conversations with petitioner in which killing Andrade was discussed. *Id.* According to Elander: Petitioner "talked about a plan to take a trip out across the country and end up in South Carolina. On his way he was going to stop and see me in Utah, and he said he would then kill her in South Carolina, and then come back." *Id.* Elander then testified that he had a discussion with Mr. Glade about disposing of a body in "primitive land" in the mountains. Shortly after this discussion, Elander was fired. RT 3969. Mr. Glade was also called by the prosecution and he corroborated that the discussion with Elander about disposing of a body took place. RT 4216. However, Glade could not recall whether or not Elander used petitioner's name during their discussion but merely assumed that Elander was referring to petitioner since he often talked about him. RT 4218-4219. Glade further testified that he had no way of knowing that Elander wanted this information for a third party. RT 4220.

b. Evidence of Elander's discussion with Glade about disposing of a body was highly inflammatory, as it supported the notion of a long-standing calculated plan to kill Andrade and dispose of her body in an area where she could not be found. However, there was no indication that petitioner asked Elander to talk to Glade about disposing of a body in Utah or even knew that Elander was planning on talking with Glade. This evidence was therefore irrelevant to petitioner's culpability.

c. Trial counsel unreasonably failed to object to this testimony on the ground that it was irrelevant hearsay and more prejudicial than probative.

d. Elander's statements do not fall under the co-conspirator exception to the hearsay rule, because there was no independent proof of a conspiracy, and in fact, the conspiracy charges were dismissed against

petitioner and never brought against Elander. Cal. Evid. Code § 1223(c). In addition, even assuming there was a conspiracy, there was no allegation that it had been formed at the time the statements were made. In fact, the dismissed conspiracy charges alleged that the conspiracy to commit murder began in August 1982, CT 1882-85; 1926-27; 1937-40; the statement was made in May 1982.

e. The statement was not admissible as a prior consistent statement since there was no subsequent statement regarding a plan to dispose of a body in Utah that was called into question. Elander testified that he had a discussion with Glade about disposing of a body. RT 3969. Elander testified that he was not sure that he told Glade who it was that wanted to commit the murder. *Id.* The defense did not ask Elander about this statement on cross-examination or attempt to cast doubt on his discussion with Glade. There was therefore no basis for bringing in the statement from Glade as a prior consistent statement. *See* Cal. Evid. Code § 791.

f. Given the lack of any connection between the statements and petitioner, the probative value of the evidence was far outweighed by its prejudicial effect. The evidence misled the jury into believing that even prior to petitioner's marriage to Andrade, he had planned to kill her and was involved in trying to find a suitable place to dispose of her body. The only evidence to support this theory was the uncorroborated testimony of Elander regarding his conversations with petitioner prior to petitioner's marriage, and Elander's discussion with Glade. The conversation with Glade had the affect of corroborating Elander's testimony even though there is no evidence to suggest that Elander spoke to Glade at petitioner's behest or any other indication that petitioner had formed a plan to kill Andrade prior to

his marriage to her.

217. Trial counsel unreasonably failed to request a ruling on his objection to Marion Mitchell's testimony regarding Elander's statement that petitioner had killed his wife.

a. Marion Mitchell testified that in South Carolina in the summer of 1982, he contracted with petitioner and Elander to service his company's trucks. RT 4432-33. In the fall of 1982, Mitchell discussed with petitioner and Elander the purchase of a yellow Corvette. Petitioner told Mitchell that the car was part of a divorce settlement, and that if Mitchell bought the car, petitioner would provide him with the title after the divorce was resolved. RT 4437-40. Mitchell did not see petitioner after he bought the car, but asked Elander on several occasions for the title to the car. RT 4440.

b. Mitchell testified that Elander eventually told him that petitioner was not returning to South Carolina because he had killed his wife and the police were looking for him. Elander told Mitchell that petitioner had shot his wife, that after returning to where he had shot her the body had moved, that he had placed her in a 55 gallon drum, cut her head off, filled the barrel with concrete and buried it in somebody's yard. RT 4442.

c. This testimony was admitted as a prior consistent statement. Prior to Mitchell's testimony, trial counsel moved to exclude the statement on the grounds it was hearsay. RT 3912. The prosecutor argued it was a prior consistent statement that was made before Elander was questioned by the police, and thus, according to the prosecution, before a reason for bias or motive to fabricate existed. RT 3913-3914.

d. After a discussion about whether Mitchell would be

permitted to testify out of order, defense counsel stated that if the statement were to be admitted it should only come in as a prior consistent statement and thus the jury should be informed that it could only consider the statement for determining Elander's credibility, and not for the truth of what petitioner said or did not say. RT 3916.

e. Counsel did not concede the issue, but only stated that if the court overruled the defense motion, that a cautionary instruction should be given: "Then if it comes in, the court has to make a finding of course that it comes in out of order. And I ask for a limiting instruction that it's only for the credibility of Richard Elander, i.e., assessing it, and not for the truth of what was said." RT 3917.[9]

f. The court ruled that the testimony would have to come in order (i.e., after Elander testified and his credibility was called into question), after a proper showing. RT 3928. When Mitchell was called to the stand and testified, however, counsel unreasonably failed to object or request a ruling on the prior objection. Had counsel done so, it is reasonably probable that the statement would have been deemed inadmissible. *See People v. Coleman*, 71 Cal.2d 1159 (1969).

g. Evidence Code section 1236 authorizes the admission of hearsay if the statement is consistent with a witness's trial testimony and is offered in compliance with Evidence Code section 791. Evidence Code section 791 allows a prior consistent statement if offered after "[a]n express

---

[9] The prosecution agreed that a limiting instruction would be appropriate, but that such an instruction should be drafted at the end of the trial. RT 3917. The prosecutor later contended that the testimony should come in as substantive evidence, RT 3925, and the jury was not given a limiting instruction on this evidence.

or implied charge has been made that [the witness's] testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen." Cal. Evid. Code § 791(b).

h. According to the evidence, Elander had a motive to fabricate at the time he made the statement. Mitchell testified that at the time that Elander told him the story, Elander also told him that the police were looking for petitioner. RT 4441. Furthermore, Elander testified that he was aware that the police were making inquiries into Andrade's disappearance at the time he told Mitchell about what petitioner allegedly said about killing Andrade. RT 4029. Indeed, he left a telephone message for Bruce Gant allegedly warning him in a coded message to stay away from Lisa Moody and to not move anything. RT 4021-4025; 4455-4456. Thus, during this period of time, Elander was concerned about being implicated and was actively involved in concealing information regarding the crime.

i. According to Elander, he and petitioner discussed the manner in which Andrade would be killed, he attempted to find a place to conceal the body, and he assisted in disposing of her property. Certainly, in light of Elander's involvement, he would have been aware that the police would want to question him as well. The fact that he was not questioned until after he made the statement to Mitchell is of little consequence in determining its reliability since he already would have had a motive to cast all the blame on petitioner and none on himself.

j. In *People v. Coleman*, 71 Cal.3d 1159, an accomplice had confessed two months after committing a crime, and the prosecution was

not permitted to introduce the accomplice's prior consistent statement made to his family before he turned himself in after the defense contended that the accomplice lied to the police. In this situation, the Court held that there was no reason to believe that the accomplice's improper motive had not arisen prior to making statements to his family. *See People v. Andrews,* 49 Cal.3d 200, 211 (1989). Here, although Elander's cooperation with the police and immunity agreement raise questions of bias, there was no suggestion that Elander was lying because of the favorable treatment he was already getting from law enforcement. There was no questioning of Elander regarding his fabrication of evidence based on the immunity agreement; rather, the extensive cross-examination focused on Elander's many lies from the time he first became concerned that he would be under suspicion. This case is therefore controlled by *Coleman*, and the statement to Mitchell was improperly admitted.

k. Elander was the prosecution's key witness as he provided the only detailed account of petitioner's alleged plan to kill Andrade and the carrying out of that plan. However, given Elander's own involvement, his motive to place all blame on petitioner, and his numerous lies to law enforcement and in prior testimony, there were serious questions about his credibility. To permit the prosecution to introduce prior statements that were used to bolster Elander's truthfulness despite the fact that such statements were no more trustworthy than his subsequent statements was devastating to the defense.

l. The prejudice from the admission of this testimony was exacerbated by the prosecutor's closing argument which emphasized that Elander's story as to petitioner's commission of the murder was true in view of the fact that he told the story to Marion Mitchell "before he was a

witness, before he cooperated with the police, before he got immunity." RT 4571. In view of the fact that Elander already had a motive to fabricate, this testimony has minimal indicia of reliability and was extremely inflammatory.

218. Trial counsel unreasonably failed to object to testimony elicited by the prosecution from Kathy Harper regarding a bloody blue blanket which was completely irrelevant, had no connection to the crime and was presented for no other purpose than to inflame the jury.

a. Kathy Harper, a woman living in South Carolina, testified that she developed a relationship with petitioner and eventually petitioner moved into her trailer where he lived with her and her son for a time. RT 3889-90. The prosecutor elicited testimony that on one occasion petitioner and Elander were having a conversation in the living room of her trailer which stopped abruptly when she came in. Ms. Harper testified that what she heard was "a bloody blue blanket" and "I got sick." She did not remember which one of the two made these statements. RT 3892. Ms. Harper had no idea what this conversation was about. RT 3895.

b. Ms. Harper could not state who made these statements – Elander or petitioner – and there was no connection made between these statements and the crime. In fact, Elander testified that when asked about a blue blanket by the police he stated that he could not recall anything about it. RT 4095-4097. The only blue blanket Elander could recall was one that was bloodied by his step-brother in a sexual encounter with a young girl. RT 4097.

c. Elander testified that petitioner told him that after he shot the victim he covered her in blankets. RT 3892. The statement elicited from Kathy Harper was an obvious attempt to mislead the jury into

believing that the blanket discussed between petitioner and Elander was the blanket used in the murder. However, the snippet of conversation testified to by Harper was so vague that its relevance was nonexistent and there could be no plausible connection made between the blue blanket discussed in Harper's presence and the blankets allegedly used in the murder.

d. Counsel unreasonably failed to object on the ground that the evidence admitted was hearsay and not relevant to any contested issue. Even if there was some marginal relevance to a contested issue, the probative value of this testimony regarding the blue blanket and getting sick is not apparent, and therefore the testimony should have been excluded under Evidence Code section 352. The actual purpose and effect of the introduction of this testimony was to inflame the jury by creating an image of a bloody blanket, to corroborate Elander's biased and unreliable testimony, to distract the jury from the relevant evidence, and to prejudice the jury against petitioner.

219. Had counsel properly objected to the above inadmissible evidence and/or sought limiting instructions, it is reasonably probable that the evidence would not have been admitted and the outcome would have been different.

220. As described at greater length in Appellant's Opening Brief and Reply Brief, Claim G, incorporated by reference herein, the admission of this evidence was highly inflammatory and prejudicial. At minimum, counsel unreasonably failed to preserve the issue for appeal, and had he done so it is reasonably probable that the outcome would have been different.

\\

(6) *Failure to Object or Seek an Admonition to the Introduction of Victim Impact Evidence at the Guilt Phase*

221. Petitioner has argued on automatic appeal that the trial court erred and the prosecutor committed misconduct by eliciting inflammatory testimony regarding the impact of the victim's death on her family, the closeness of the victim's relationship with her family, and her emotional farewell before her disappearance. The effect of this testimony was to inflame the jury and appeal to the jurors' sympathy and emotions at the guilt and penalty phases and was clearly improper. Moreover, improper statements were elicited by the trial judge at the conclusion of the victim's daughter's testimony. *See* Appellant's Opening Brief and Reply Brief, Claim H, incorporated by reference.

222. The testimony was also false and misleading insofar as Andrade had willingly abandoned her children, giving custody of them to her ex-husband while she left with petitioner, and previously having given custody of them to her parents while she adopted a life style more compatible with a "single life."

223. Trial counsel rendered ineffective assistance in failing to timely and properly object to the admission of this evidence, seek an admonition to preclude the jury's consideration of this evidence, or move to preclude the prosecutor from relying on this evidence at the penalty phase.

224. The prosecution called Nancy Andrade's 19-year old daughter, Stacey Andrade, who was 12 years old when her mother disappeared. RT 3624. Stacey testified that she was very close to her mother, and that although she lived with her grandparents during the school year, she stayed with her mother periodically in the summer. RT 3635-36. Stacey testified that she had wanted to live with her mother when her parents divorced, and

that she wanted to move to South Carolina with her mother when Andrade left. RT 3625-26. She testified that she and her mother went horseback riding together, went shopping, and did other "typical mother-daughter things." RT 3626. Stacey testified extensively about horseback riding. RT 3627-28. Stacey testified that her mother indicated she would come back for her at Christmas time or at some point after that, and Stacey felt that at some point her mother would come back for her. RT 3631.

225. Stacey also testified about saying good-bye to her mother, and how her father and brother were crying but she was "past the point of crying" and "sensed that something was wrong." RT 3639. Andrade's father, sister and mother also testified to their tearful good-byes. RT 3782, 4238, 4566.

226. Although the ostensible relevance of this testimony was to show that Nancy Andrade was close to her daughter and family members, and therefore would not simply disappear, a twelve-year old's perception of her mother's view of their relationship and her mother's intentions, particularly given the reality of Andrade's conduct prior to her disappearance, had minimal probative value, but was extremely inflammatory and prejudicial. The circumstances of her farewell had no probative value and were also inflammatory.

227. The evidence showed that Andrade was striving for an independent life and spent little time with her children, leaving them in the custody of her parents during the school year, choosing to take a cross-country trip with her friend Darlene Bryant in the summer, and then leaving them with her ex-husband while she moved across the country. Regardless of how a daughter might feel about a mother who she had not seen for several years, such emotional testimony would not necessarily depict the

true nature of the relationship at the time of the mother's disappearance.

228. Moreover, it was cumulative in that regard since other prosecution witnesses testified about Andrade's relationship with her daughter, *see, e.g.,* RT 3539, 3643, 3692, and thus there was no probative value in presenting this testimony through such an emotional witness.

229. The most prejudicial and least probative aspect of Stacey's testimony came before she left the witness stand, when the trial court gratuitously asked her how she was getting along. This elicited the following statement, made in front of the jury:

> Okay. I -- for a few years I had a lot of trauma in my life. I had to go see a counselor, because I had a lot of problems dealing with it. [¶] But I am moving on. I'm going to college. You know, she taught me to be the best that I can be and go to school and -- because she was very smart and very career oriented and that's how she taught me. So I'm going to school. [¶] I'm going to San Luis J.C., which is a good school. And, you know, it really put me back a lot, because there's a lot of times -- I was twelve, you know, your teenage years are very important, and I really needed my mother there for me . . . She wasn't there.

RT 3640-41.

230. The trial court responded, again in the presence of the jury: "That's a tremendous loss for a young lady to suffer. But seems to me that you're making the best of things." RT 3641.

231. This powerful statement by the victim's daughter, elicited and confirmed by the trial court, was extremely prejudicial, and injected improper victim impact testimony at the guilt phase. Stacey's remarks, together with evidence of the family's tearful good-byes, were later used

persuasively by the prosecutor in his penalty phase closing argument. RT 5062-5064.

232. Trial counsel rendered ineffective assistance in failing to object to the testimony from Andrade's family in which the probative value was substantially outweighed by its prejudicial effect, and therefore should have been excluded under Evidence Code section 352. The purpose and effect of this evidence was to create sympathy for the victim, to distract the jury from the relevant evidence and to prejudice the jury against petitioner. As a result, the jury was unable fairly and objectively to evaluate the evidence.

233. Trial counsel rendered ineffective assistance in failing to argue that such evidence was false and misleading in addition to being irrelevant, unduly inflammatory and prejudicial.

234. At minimum, once the evidence was elicited, counsel should have sought a limiting instruction to ensure that the jury did not consider the evidence in giving sympathy and emotion in favor of the victim's family and diverting the jury from its deliberative task at both the guilt and penalty phases of the trial. Counsel also should have sought an order to preclude the prosecutor from referring to this victim impact evidence in his argument at the penalty phase, particularly the statements elicited by the trial court.

235. Counsel had no tactical reason for these errors and omissions. While counsel does not recall why he failed to object to this testimony and/or take other measures to ensure that the jury did not consider it at the guilt or penalty phase, his failures could not have been the product of sound trial strategy. O'Sullivan Dec, Exh. 2, at 9.

236. Had counsel objected and/or sought an appropriate limiting instruction, it is reasonably probable that the outcome at both guilt and penalty phases would have been different.

(7) *Failure to Object to Proximate Cause Instructions and/or Request Further Instructions*

237. According to the evidence presented by the prosecution, petitioner told Elander that he shot Andrade in the back of the head, rolled her down a ravine and covered her with blankets. The next evening, petitioner and Gant got drunk and returned to the scene. Petitioner allegedly related to Elander that he walked down to where he had left the body, but found that Andrade was still alive and had moved. At this point, petitioner "freaked out and ran back up to the truck and was telling Bruce about it, and Bruce went down and tried to strangle her and break her neck, and finally ended up cutting her head off." RT 3982-83.

238. The prosecutor argued that under this scenario, petitioner was guilty of first degree murder, as the proximate cause of Andrade's death; that petitioner's and Gant's actions were concurring proximate causes of her death:

> Her death was caused by the shot to the head and by Mr. Gant. Not just one, not just the other. These are what the law calls concurring causes of death. [¶] So even though in relating it in detail to his friend and partner Elander, even though he relates that the actual death is caused by what Mr. Gant does . . . He did it. He killed her. [¶] If you look at it hypertechnically, which the law doesn't require, you might say, well, Bruce Gant's really the one that killed her. He killed her, he murdered her. Really wasn't somebody else. It is a case where the law takes a look, now there's two concurring causes operating at the time of her death.

RT 4578-80.

239. The jury was given instructions related to the issue of

proximate cause. CALJIC 8.55 provided as follows:

> To constitute murder there must be, in addition to the death of a human being, an unlawful act which was the proximate cause of that death. [¶] A proximate cause of a death is cause which, in natural and continuous sequence, produces the death, and without which the death would not have occurred.

CT 2637.

240. In addition the jury was instructed with CALJIC 3.41:

> There may be more than one proximate cause of the murder. When the conduct of two or more persons contributes concurrently as a proximate cause of the murder, the conduct of each such persons is a proximate cause of the murder if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the moment of the murder and acted with another cause to produce the murder. [¶] If you find that the defendant's conduct was a proximate cause of death to another person, then it is no defense that the conduct of some other person, even the deceased person, contributed to the death.

CT 2638.

241. Petitioner has argued on appeal that these instructions were erroneous, misleading and incomplete, and created a conclusive mandatory presumption that precluded the jury from finding that Gant's actions were a superseding cause that would have reduced petitioner's culpability. *See* Appellant's Opening Brief and Reply Brief, Claim I.2, incorporated by reference.

242. Trial counsel unreasonably failed to object or to request instructions on intervening and supervening causes, and failed to argue to

the jury that petitioner's actions were not the proximate cause and Gant's actions were an intervening or supervening cause.

243. The instructions that were given informed the jury that if it found the death to have followed petitioner's actions in a "natural and continuous" sequence, the petitioner's actions were conclusively the proximate cause of the death. There is nothing in this instruction or in CALJIC 3.41, defining concurrent causes, that would permit the jury to consider Gant's actions as an intervening factor. Trial counsel failed to request instructions on intervening or superseding causes which would have ameliorated the problem. The jury received only the erroneous instructions directing it to find proximate cause. The prosecution further exacerbated the error by arguing that if petitioner was in any way involved with the victim's death he was guilty of murder.

244. In the absence of other instructions or argument by trial counsel, if the jury found a natural and continuous sequence, it was required to find that petitioner's acts were the proximate cause of the victim's death. This was an impermissible mandatory presumption that omitted consideration of intervening factors. As a result the jury had no reasoned way to determine whether Gant's actions constituted a break in the "natural and continuous sequence" arising from petitioner's alleged shooting of the victim the night before.

245. CALJIC 3.41, an instruction defining concurrent causes, informed the jury that if two persons contributed "as a proximate cause" to the murder, the conduct of each is a proximate cause "if that conduct was also a substantial factor contributing to the murder." CT 2608. As with CALJIC 8.55, the wording of this instruction has been disapproved and has been replaced by an instruction that deletes the term "proximate." *See*

CALJIC (Fifth Edition, July 1992). The misleading definition of proximate cause tainted this instruction as well, particularly given the instruction's circular language (i.e., if a person contributed as a *proximate* cause the conduct was a *proximate cause*).

246. While there was arguably sufficient evidence to instruct the jury on concurrent causes, there also should have been instructions on intervening causes, which reasonably competent counsel would have requested. Concurrent causes, by definition, act concurrently, that is, at the same time, to produce the result. However, in petitioner's case, the causes were not necessarily concurrent. According to the prosecution's evidence, petitioner shot the victim and Gant killed her the following night. While it is possible that the jury could find that petitioner's actions were a concurrent cause, it is also possible, given the paucity of evidence, that it could find that Gant's actions were an independent intervening cause. Given that the victim was still alive and had been moving the night after petitioner shot her, it is entirely plausible that petitioner's shot did not cause a fatal wound.[10]

247. The victim was killed the following night by Bruce Gant. According to the evidence, petitioner "freaked out" and told Gant the victim was still alive. However, there is no evidence that he in any way instructed Gant to kill her. Counsel therefore should have sought instructions and argued that Gant's reaction, finding the victim and killing her, was "an unforeseeable intervening cause, an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause." *People v.*

---

[10] The prosecutor conceded in his closing argument at the penalty phase that "we don't know if medical attention could have saved her at that point, but we know there was still life in Nancy." RT 5065.

Armitage, 194 Cal.App.3d 405, 420-21 (1987). However, counsel unreasonably failed to ensure that the jury had guidance on the critical issue of whether Bruce Gant's actions in killing the victim was a superseding cause of death, which would have reduced petitioner's culpability.

248. Counsel had no tactical reason for these errors and omissions. While counsel does not recall why he did not seek clearer proximate cause instructions, including instructions on intervening and supervening causes, and argue, in the alternative, that Gant's actions were an intervening or supervening cause, his failures could not have been the product of sound trial strategy. O'Sullivan Dec, Exh. 2. at 9.

249. Counsel's failures were prejudicial. Based on the instructions that were given and the prosecutor's argument, if petitioner was in any way involved in the circumstances leading to the victim's death, he was guilty of first degree murder. This is not the law; if Gant's actions were an unforeseeable intervening cause, petitioner would not be guilty of murder. Although defense counsel argued that if Elander's story is to be believed, then Gant was the killer, RT 4599, there were no instructions to support this defense. Had the jury been properly instructed, it reasonably could have found that petitioner, having discovered Andrade to be alive, "freaked out" and would not have done anything further to harm her, and that Gant's actions were an independent superseding act.

(8) *Failure to Impeach Elander's Testimony with Readily Available Evidence*

250. Trial counsel unreasonably failed to impeach Richard Elander with readily available evidence that would have seriously undermined his credibility because it demonstrated that he lied not only in past encounters with law enforcement and at prior hearings, but was lying under oath in the

trial itself.

251. Counsel had no tactical reason for these errors and omissions. While counsel does not recall why he did not impeach Elander in this manner, his failures could not have been the product of sound trial strategy. O'Sullivan Dec., Exh. 2, at 9.

252. As alleged in more detail below, these failures, individually and collectively were prejudicial.

Phone call to Lisa Moody

253. Richard Elander was the prosecution's key witness, and was the only witness to testify about the alleged manner in which Andrade was killed. However, his credibility was suspect. On cross-examination, Elander admitted giving numerous false statements to the police about the crime. RT 4025-32. He acknowledged lying at the preliminary hearing, RT 4041, to the homicide detectives, RT 4041-52, to the FBI, RT 4052-56, and to the District Attorney's investigator. RT 4060-70. Elander received immunity from prosecution. RT 4081.

254. Elander testified that: a) petitioner discussed with him that he planned to kill Andrade; and b) after petitioner left for California, Elander called him when petitioner was at Lisa Moody's to tell him not to kill Andrade, "because it was the wrong thing to do," and petitioner told him he had already done it. RT 3976-77.

255. There are no telephone records that establish that Elander called Lisa Moody's residence at the time in question.

256. Trial counsel unreasonably failed to impeach Elander with this fact.

257. By contrast, Bruce Gant's counsel, Ken Robinson, in the Gant/ Mosteller trial impeached Elander as follows:

Q. You also told us yesterday in direct examination that you called Mark Crew when he was in California, correct?
A. Yes, sir.
Q. Okay. And that you called him to tell him not to do it, not to kill Nancy Jo, correct?
A. Correct, sir.
Q. Okay. And you told us that his response was, it's already done, correct?
A. Correct, sir.
Q. Okay. Where did you call Mark Crew at?
A. I – I don't recall for sure, sir. I made a few calls, I mean in that general vicinity.
Q. Did you call him collect?
A. I can't remember for sure. If I used a phone booth, I probably did.
Q. You've testified about this conversation on other occasions, correct?
A. Yes, sir.
Q. You've had an opportunity to review your testimony about this conversation on other occasions, correct?
A. Yes, sir.
Q. Okay. Do you recall – Do you recall being asked the following questions and giving the following responses on September 23, 1986 [which was the preliminary hearing in *People v. Mosteller*]. "Question by Mr. Davies: before he showed up at the Mosteller's with Lisa Moody and the truck and the horse, had he called you by telephone from anyplace to give you any word as to what had happened, whether he had done it or not done it, anything like that? Any information? Answer: No. I called him, sir. Question: Where did you call him? Answer: At Lisa Moody's house. Question: What did you ask him when you called there, or why did you call? Answer: I called him to tell him not to do it. That's why I called him. And he said, it's too late, it's already done. Question: when you

called him at Lisa Moody's house, had Mr. Mosteller already gotten back to South Carolina? Answer: I don't recall, sir. Question: Did you get a hold of him at Lisa Moody's house and he said, it had already been done? Answer: Yes. Question: Did you make that call from Mr. Mosteller's residence? Answer: No, sir. From a phone booth. Question: And did you pay for it or place it collect? Answer: It was collect."

Do you recall Mr. Davies asking you those questions and you giving those responses?

A. I do now, sir, what you just read to me.

Q. And that's what you told us under oath; is that correct?

A. Yes, sir.

Q. And that call was made from South Carolina, correct?

A. Yes, sir.

Q. Okay. And you went even further on September the 23rd, 1986, when you were asked the following questions: "The time that you called from a pay phone had you called to California collect? Answer: Lisa Moody, yes, sir. Question: Well, I'm talking about the one conversation in particular, did Lisa Moody answer the phone? Answer: Yes, sir. Question: And she accepted the charges when you called collect? Answer: Oh, yeah. Question: Did you talk to her for awhile? Answer: I – I don't recall. No, sir. Question: You don't recall if you did, or you did not? Answer: I don't recall if I talked to her. Question: Was Mark there when you called? Answer: Yes, sir."

You remember that?

A. Yes, sir.

Q. Okay. So, your testimony was that you called collect, you called from California [sic], Lisa Moody answered the phone, she accepted the charges, and you talked to Mark Crew and that's

when this statement was made when you told him, don't do it, correct?

A. I called from South Carolina. . . .

[Lisa Moody's subpoenaed phone records were moved into evidence as People's Exhibit 63]

Q. Mr. Elander, would you look at – you would have made this telephone call sometime between August 15th and August the 30th of 1982, correct?

A. Yes, sir.

Q. Okay. Would you look at the records between August the 15th and August the 30th, 1982, and tell me if there are any collect telephone calls to Lisa Moody from South Carolina?

A. I don't see any on this one sheet, sir. But there was a few other sheets that had August bills on it.

Q. Take your time Mr. Elander.

A. Pardon me?

Q. Take your time. If you need more time, we've got it.

A. No sir, I don't see any.

Reporter's Transcript, *People v. Mosteller and Gant*, Santa Clara Superior Court, Nos. 101400, 133537 (hereafter "M/G RT"), 1700-1705, attached hereto as Exhibit 54, at 428-433.

258. The testimony regarding the telephone call was critical evidence in that it not only provided an admission to the crime by petitioner, but also showed that the killing was planned since Elander knew about it beforehand, and put Elander in a good light, i.e., that he reconsidered whether the crime should have been committed.

259. Impeachment of Elander's trial testimony in this manner at petitioner's trial would have undermined the remainder of his testimony and

negated his credibility. Although Elander admitted that he had previously lied to law enforcement and in prior testimony, he insisted that he was telling the truth in petitioner's trial. The prosecution made this very argument in contending that Elander was a credible witness. RT 4608-10.

260. While defense counsel was able to impeach Elander with examples of prior instances of lying to the police and in the preliminary examination, the prosecution conceded that he had lied previously but was telling the truth at trial. *See, e.g.,*, RT 4001-4005. In addition, the prosecutor argued that Elander did not testify falsely as to any "material" points. RT 4608-10. The impeachment described herein was essential to establish that Elander lied about material facts during his trial testimony.

261. Reasonably competent counsel would have impeached Elander with the fact that there was no record of this telephone conversation. Indeed, as alleged above, when Elander gave similar testimony in the trial against Gant and Mosteller, counsel for Gant impeached Elander with the fact that there were no telephone records of such a call. Gant and Mosteller were subsequently acquitted.

Mixing Cement and Blisters

262. Elander claimed that petitioner told him that Andrade's head was put in a five gallon bucket, that he filled it with cement and threw it off a bridge, and that her body was put in a fifty-five gallon drum, which petitioner also filled with cement. Elander testified at the preliminary hearing that petitioner told him that his hands were blistered and calloused from the mixing of this quantity of cement and showed Elander those blisters when petitioner returned with Lisa Moody to South Carolina. CT 242-243. According to Lisa Moody, however, petitioner did not have any blisters on his hands, which demonstrated that Elander was lying and that

petitioner had not mixed any cement. Trial counsel, however, unreasonably failed to elicit statements from Elander regarding the blisters and present evidence that Elander was lying because petitioner had no blisters on his hands.

263. By contrast, in the Gant/Mosteller trial, Elander reiterated his preliminary hearing testimony that petitioner had blisters on his hands from mixing the concrete that he put Andrade's remains in, and that petitioner showed him the blisters at the time he told him how Andrade had been killed. M/G RT 1641, Exhibit 54, at 425 ("He told me he had never mixed that much cement ever again [sic]. He showed me his hands, and they were all blistered"); *see also* M/G RT 1662-63, Exhibit 54, at 426-427. This testimony was contradicted by Lisa Moody who testified that she saw no blisters and that there was nothing wrong with petitioner's hands. M/G RT 1252-53, Exhibit 54, at 423-424. Gant's counsel was thus able to argue to the jury that Elander was lying with regard to critical facts. M/G RT 2344-48, Exhibit 54, at 436-440.

264. Petitioner's counsel unreasonably failed to investigate whether or not Elander was telling the truth about the blisters by questioning Lisa Moody, and then presenting evidence at trial that petitioner had no such blisters and that Elander was lying.

265. Such failures were prejudicial because counsel could have established that Elander lied about the circumstances surrounding petitioner's alleged admission of murder, and as in the Gant/Mosteller trial, this would have undermined Elander's credibility because the lies as to critical facts would have been made before the jury.

\\

Plan to Kill Nancy Andrade

266. Elander testified that prior to petitioner and Mosteller leaving for California, petitioner told him that he was going to California to kill Nancy Andrade. RT 3974. However, at the preliminary hearing, Elander testified that petitioner indicated he was going to kill someone or something, but never mentioned Andrade's name:

Q. And what are his exact words that he spoke to you as you remember them now?
A. "I'm not certain how I'm going to do it, sharp blow to the head, strangle her or shoot her."
Q. Did he say anything else?
A. I don't recall.
Q. Are you sure that you don't recall?
A. Yes, I don't recall if he said anything else or not.
Q. So what you've told us is exactly what he said and you don't recall him saying anything else, correct?
A. That's fair to say, yes, sir.
Q. And how did you know he was talking about Nancy?
A. I guess it was my assumption that he was.
Q. So he never even mentioned the name of this individual to you; is that right?
A. Not that I recall, sir, no.

***

Q. So he never told you that he was coming to California to kill Nancy, right?
A. I don't recall, sir.
Q. In fact, he never told you that he was coming to California to kill anybody, did he?
A. I don't recall, sir.
Q. In fact, he never indicated to you if he was talking about a human being, did he?
A. I don't recall sir.

CT 462-463.

267. Trial counsel unreasonably failed to impeach Elander with this testimony. Such impeachment was critical to establish that Elander was lying under oath, and that there was no plan to kill Andrade. By contrast, Mosteller's counsel did impeach Elander in this manner. M/G RT 1713-1714, Exhibit 54 at 434-435.

268. While Elander was impeached with prior statements, the foregoing impeachment was critical insofar as it related to statements that Elander testified to under oath at petitioner's trial, and related to critical facts about the murder. Had counsel impeached Elander as was done in the Mosteller/Gant trial, it is reasonably probable that the outcome of the trial would have been different.

(9) *Failure to Establish Facts to Undermine Credibility of Jeanne Meskell*

269. In August 1981, Jeanne Meskell's car broke down on the Connecticut/Massachusetts border. Petitioner, who was driving a truck, picked her up and she decided to return to California with him. Meskell stayed with petitioner for approximately two months, returning to her home in Connecticut in October 1981. RT 3866-67.

270. In January 1983, petitioner called Meskell and told her he wanted to come to Connecticut. RT 3869. When petitioner arrived, according to Meskell, he told her that he had killed a girl; that the body was in two pieces in two 55-gallon drums, one in the bay and the other buried in someone's yard. RT 3870.

271. Meskell was a critical witness for the prosecution because other than Elander, she was the only person who testified that petitioner admitted to committing the murder. RT 3870.

272. This testimony was particularly important because there was no

evidence connecting Meskell to Elander, other than the fact that when Meskell was staying with petitioner in California, Elander was petitioner's roommate. RT 3866. Thus, according to the evidence, petitioner had admitted the crime to two independent sources, making it much more credible than if it had only come from Elander and witnesses who had heard the admission directly from Elander, such as Marion Mitchell.

273. In fact, there was a much stronger connection between Elander and Meskell that reasonably competent counsel would have presented at trial to create at least the inference that Elander had influenced Meskell's testimony. There was also available evidence that competent counsel would have used to impeach Meskell's testimony and undermine her credibility.

274. At the preliminary hearing, Meskell testified that in September 1981, she and Elander traveled together for a week. They drove from California to Connecticut, where Elander was going to help Meskell get her car back from her husband who had hidden it. They had also intended to obtain cocaine while in Connecticut, but they did not have enough time. CT 570-73, 598.

275. Meskell also testified at the preliminary hearing that when she was staying with petitioner, she and Elander went to the Saddle Rack together, alone, on a couple of occasions. CT 596-597.

276. The jury in petitioner's trial was not made aware of these critical facts regarding the relationship between two key witnesses.

277. Meskell also testified at the preliminary hearing that she told her friend Cami Bieri that petitioner told her he killed a woman. According to Meskell's preliminary hearing testimony, she discussed petitioner's alleged statement with Ms. Bieri more than once. CT 587-598.

278. However, according to Cami Bieri, Meskell never told her that

petitioner killed a woman and she had the impression that Meskell thought petitioner was innocent. Declaration of Cami Bieri, attached hereto as Exhibit 8.

279. Jeanne Meskell and Cami Bieri were close friends. Meskell asked Bieri if she and her husband would let petitioner stay at their house for a few months, and they agreed. Bieri Dec., Exh. 8. According to Meskell's testimony, she found petitioner a place to stay *after* petitioner told her about the murder. RT 3869-70. As Ms. Bieri would have testified: "Jeanne and I were close friends and worked in the same office every day. If [petitioner] had told Jeanne that he killed someone, I do not think Jeanne would then ask me if he could stay at my house." *Id.*

280. Reasonably competent counsel would have been aware or would have discovered the above-described facts with regard to Ms. Bieri and would have called her to testify at the guilt phase of the trial in order to impeach Meskell.

281. Counsel had no tactical reasons for these errors and omissions. While counsel does not recall why he did not inform the jury of a closer connection between Elander and Meskell and/or call Ms. Bieri at the guilt phase to testify that Meskell never told her about Mark's alleged statement, his failures could not have been the product of sound trial strategy. O'Sullivan Dec., Exh. 2, at 9-10.

282. Had counsel presented this evidence it is reasonably probable that the result of the proceedings would have been different.

(10) ***Stipulating to No Accomplice Instructions***

283. Trial counsel rendered ineffective assistance in stipulating that it was not necessary to give accomplice instructions with regard to Elander and/or not objecting to the giving of or seeking a modification of CALJIC

2.11.5.

284. Trial counsel indicated that "for tactical reasons," they decided not to seek accomplice instructions with regard to Elander's testimony while acknowledging that they would have been entitled to such instructions. RT 4562. Such instructions would have informed the jury that as an accomplice, Elander's testimony should be viewed with distrust (CALJIC 3.18) and required corroboration (CALJIC 3.11).

285. Trial counsel indicated that "the word accomplice makes it sound as though Mr. Crew has in fact committed a crime, Mr. Elander has in fact helped him with that. So we move not to ask for the accomplice instructions." RT 4562.

286. Trial counsel's "tactical decision" was uninformed and not the product of sound trial strategy. Counsel acted unreasonably, because they failed to consider that the lack of accomplice instructions together with other instructions given, including CALJIC 2.27 (Sufficiency of Testimony of One Witness) and CALJIC 2.11.5 (Unjoined Perpetrators of Same Crime) would lead the jury to consider Elander's testimony without the need for corroboration, without viewing it with distrust, and without even considering that his being given immunity by the prosecution was a basis for bias.

287. Furthermore, the ostensible tactical reason for not giving accomplice instructions (that the instruction would make it appear that Crew and Elander committed a crime together) made no sense in view of the fact that CALJIC 2.11.5 was given, which similarly used language inferring that Crew and Elander participated in a crime:

> *There has been evidence in this case indicating that a person other than defendant was or may*

> *have been involved in the crime for which the defendant is on trial.* [¶] Do not discuss or give any consideration to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted.

CT 2605 (emphasis added). *See also* CT 2638 (proximate cause instruction); CT 2645 (voluntary intoxication instruction).

288. Trial counsel unreasonably failed to require that CALJIC 2.11.5 explicitly refer only to those witnesses who did not testify at trial (as required by the CAJLIC Use Note), such as Gant and Mosteller, and not to those who did, such as Elander. Counsel had no tactical reason this failure. Morehead Dec., Exh. 1, at 7.

289. As argued on appeal, because CALJIC 2.11.5 did not explicitly exclude Elander, the instruction prevented the jury from considering Elander's credibility – the fact that he was testifying under a grant of immunity and would not be prosecuted. *See People v. Hall*, 208 Cal.App.3d 34, 47 (1989). Appellant's Opening Brief and Reply Brief, Claim I.1, incorporated herein.

290. The giving of CALJIC 2.11.5, together with the lack of any accomplice instructions or cautionary instructions with regard to the fact that Elander received immunity, resulted in the jury not considering that Elander's testimony should be viewed with caution, that his testimony required corroboration, or that Elander was biased because he was testifying under a grant of immunity and would not be prosecuted.

291. While the jury was given a general instruction on the credibility of witnesses, CALJIC 2.20, CT 2607, this did not cure the harm, since the jury was specifically and explicitly instructed that one of the critical grounds for judging Elander's credibility, the grant of immunity, was not to

be considered. Moreover, the prosecutor explicitly told the jury that the fact that Elander received immunity did not matter in judging his credibility. RT 4570. In addition, the prosecutor argued that the instruction regarding willfully false testimony was inapplicable, because Elander did not testify falsely as to any "material" points. *See, e.g.*, RT 4608-10.[11]

292. Elander was the primary witness for the prosecution, and his credibility was the primary focus of the defense case. His testimony regarding petitioner's statements as to the planning and commission of the murder were critical to the People's case. In failing to insure that the jury had the tools to properly evaluate Elander's credibility, trial counsel rendered prejudicial ineffective assistance.

(11) *Failure to Seek Clarifying Instructions for Special Circumstance Finding*

293. Trial counsel rendered ineffective assistance in failing to insure that the jury understood that it could only find true the financial gain special circumstance if it found that the murder was a necessary prerequisite for obtaining financial gain or otherwise clarify the definition of the financial gain special circumstance.

294. With regard to the financial gain special circumstance, the jury was instructed that to find the financial gain special circumstance to be true, the following facts must be proved: a) The murder was intentional; b) It was carried out for financial gain; and c) The defendant believed the death of the victim would result in the desired financial gain. CT 2653.

295. As argued on appeal, petitioner's jury was improperly and

---

[11] Of course, had trial counsel acted effectively with regard to impeaching Elander, see paragraphs 250-268, the prosecutor would not have been able to make this argument.

insufficiently instructed on the meaning of the financial gain special circumstance. *See* Appellant's Opening Brief and Reply Brief, Claim K, incorporated herein.

296. In *People v. Bigelow*, 37 Cal.3d 731 (1984), this Court construed the financial gain special circumstance as applying "only when the victim's death is the consideration for, or an essential prerequisite to, the financial gain sought by the defendant." *See People v. Mickey,* 54 Cal.3d 612, 678 (1991).

297. As argued on appeal, there was insufficient evidence in petitioner's case to support a financial gain special circumstance finding. Petitioner was found guilty of first degree murder and grand theft. It is without question that the evidence supporting the theft conviction coincides with the evidence supporting the financial gain special circumstance. Nancy Andrade was allegedly killed between August 23 and August 29, 1982, according to the Information. CT 2134. The grand theft allegations in the Information accused petitioner of taking Andrade's personal property from a time immediately before her death until approximately two months after. This property included money, a Ford truck, a Corvette, a microwave oven, and a stereo set. *Id.* These are precisely the items which also formed the basis for the financial gain special circumstance.

298. There was no direct evidence presented in the trial as to any financial gain motive. The prosecution's primary witness, Richard Elander, testified that he did not know why petitioner killed his wife, RT 4039, and petitioner's step-brother testified that petitioner had said he wanted to kill someone just to see if he could get away with it. RT 4359. Also, according to the prosecution's theory, it was Gant who did the ultimate killing and there was no evidence that petitioner directed him to do so or what

petitioner's motivation was at that time.

299. Even assuming petitioner killed Andrade in order to facilitate the theft of her property, the facts are insufficient to sustain a financial gain special circumstance finding. As discussed above, in *Bigelow*, this Court adopted a construction of the special circumstance which was limited to "those cases where the victim's death is essential to obtaining the financial gain, such as a killing to obtain an inheritance or life insurance proceeds." *People v. Bigelow*, 37 Cal.3d at 750. The "essential prerequisite" language was meant to distinguish felony-murders based on burglary and robbery, in which there is obviously a motive to gain financially, from these other scenarios.

300. Clearly, if the *Bigelow* construction precludes robbery and burglary from forming the basis of the special circumstance, it would also preclude theft. *See Newberry v. Superior Court*, 167 Cal.App.3d 238 (1985). In petitioner's case, while killing the victim would have made it easier, in theory, to take the victim's property and to get away with the taking, the theft was not "an essential prerequisite" to the financial gain. Thus, under *Bigelow's* "essential prerequisite" construction, there was insufficient evidence.

301. Trial counsel unreasonably failed to object to the bare bones instruction given which was ambiguous, vague and legally inaccurate. Counsel had no tactical reason for such failure. Morehead Dec., Exh. 1, at 7.

302. Reasonably competent counsel would have sought instructions that informed the jury to find that the killing was necessary or that the defendant believed it was necessary in order to gain financially.

303. Reasonably competent counsel would have explained this and

argued to the jury that it could not find true the special circumstance without first finding that the theft was an "essential prerequisite" to the financial gain.

304. On its face, the financial gain instruction applies to the broadest array of cases. Without clarifying instructions, any intentional murder could qualify under the financial gain special circumstance as long as the defendant benefitted financially in some way, regardless of whether the financial benefit was a motivating cause of the murder. The special circumstance could be found to be true in any murder that results in financial gain even if the gain was merely the result of some other aspect of the relationship between the defendant and the victim.

305. Reasonably competent counsel would not have conceded – as counsel did here, *see* RT 4593 – that petitioner was guilty of grand theft without ensuring that more than a guilty verdict of theft and murder was required to find true the financial gain special circumstance.

306. There was no other special circumstance that fit the facts of petitioner's case. As alleged on appeal, only by stretching the scope of the financial gain special circumstance in an unconstitutional manner was the prosecutor able to render appellant death eligible. Counsel should therefore have been even more aware of the need to meaningfully and appropriately define the financial gain special circumstance to the jury.

307. In this case, failure to obtain any clarifying instructions or argue the proper scope of the special circumstance to the jury impermissibly allowed the jury to find that the special circumstance was true as long as it found that petitioner committed theft. Because the jury was given no guidance on the definition of the financial gain special circumstance, it likely returned a verdict that the special circumstance was true without

finding that petitioner believed the murder was necessary to benefit financially. Since defense counsel conceded that grand theft had been committed, the special circumstance, based on the instructions, became mandatory.

308. Trial counsel's unreasonable failure to request such instructions or argue appropriately to the jury was therefore prejudicial.

B. TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT READILY AVAILABLE MITIGATING EVIDENCE AT THE PENALTY PHASE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL

309. Petitioner's confinement is unlawful in that his conviction and sentence were illegally and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their state constitutional analogs as a result of the deprivation of effective assistance of counsel at the penalty phase of his trial. Trial counsel's ineffectiveness included but was not limited to the failure to: a) conduct a timely and adequate investigation of petitioner's background and upbringing, family history, and mental health; b) adequately utilize, provide relevant information to, and prepare and present appropriate mental health experts; and c) present appropriate and readily available mitigating evidence in the penalty phase of petitioner's trial. The failure to investigate, develop and present such evidence caused a complete breakdown in the adversarial process, and when considered separately and also in conjunction with other claims alleged herein, the verdicts in the guilt phase and/or the penalty phase of petitioner's trial must be set aside. There is a reasonable probability that but for these errors and omissions, the result of the proceeding would have been different. Counsel's failures undermine confidence in the outcome of the case.

310. Petitioner alleges the following facts in support of this claim, among others to be developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

Standards for Effective Assistance at the Penalty Phase

311. Trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Strickland v. Washington*, 466 U.S. at 693-694. There is a reasonable probability that but for counsel's failings the result would have been more favorable. *Id.* at 687-96. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. Prejudice is shown if it is at least reasonably possible that the mitigating evidence "might well have influenced the jury's appraisal of [the petitioner's] moral culpability." *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (citing *Boyde v. California*, 494 U.S. 370, 387 (1990)).

312. To perform effectively in the penalty phase of a capital case, counsel had an "obligation to conduct a thorough investigation of [petitioner's] background," *Williams v. Taylor*, 529 U.S. at 396, and conduct sufficient investigation and engage in sufficient preparation to be able to "present[] and explain[] the significance of all the available [mitigating] evidence." *Id.* at 399. *See also Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001)(en banc).

313. "Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Williams v. Taylor*, 529 U.S. at 398. Therefore, "[i]t is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." *Smith v.*

Stewart, 241 F.3d 1191, 1198 (9th Cir. 2001)(quoting *Caro v. Calderon*, 165 F.3d at 1227). Because the failure "to present important mitigating evidence in the penalty phase – if there is no risk in doing so – can be as devastating as a failure to present proof of innocence in the guilt phase," *Caro*, 165 F.3d at 1227, such an omission constitutes ineffective assistance. *Bean v. Calderon*, 163 F.3d 1073, 1079 (9th Cir. 1999) ("failure to present mitigating evidence at the penalty phase of a capital trial constitutes ineffective assistance").

314. Well before petitioner's trial, the standard of practice required counsel:

> to investigate, prepare and consider presenting evidence of the client's family history, including family dynamics, any physical abuse, mental and physical illness, and the family's socioeconomic status. Then, as now, every juror wanted to know where the defendant came from and how he came to sit before them convicted of a capital crime. Jurors intuitively understand that some people are dealt a poor hand in life, through their genetic and social inheritance and their family environment. [¶] Penalty phase counsel was required to find and try to interview (either directly or through an investigator) all persons who were material witnesses to the client's genetic heritage, social history and life history. In particular, defense counsel was required to attempt to find and interview: the client, members of the client's immediate family, relatives and acquaintances who were percipient witnesses to the life history of the client, his parents and his immediate family, friends, ...

Karis v. Woodford, 283 F.3d 1117, 1133, n. 9 (9th Cir. 2002)(quoting with

approval expert testimony of criminal law specialist who had testified at evidentiary hearing without contradiction).

315. "A substantial mitigating case may be impossible to construct without a life-history investigation." *Karis v. Woodford, 283* F.3d at 1135 (citing G. Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L.Rev 299, 321 (May 1983)).

316. Counsel in capital cases "have an obligation to conduct an investigation which will allow a determination of what sorts of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert." *Caro*, 165 F.3d at 1226. Failure to select experts with the appropriate expertise for the issues involved, or failure to furnish the experts with all relevant information, is strong evidence of deficient performance. *Bean v. Calderon*, 163 F.3d at 1078; *Wallace v. Stewart*, 184 F.3d 1112, 1117 (9th Cir. 1999)(expounding upon the obligation to seek out persons with special expertise in the relevant areas and provide the examining doctor with all relevant information).

317. A reviewing court must be mindful of counsel's tactical decisions, but, if counsel had no tactical reason for failing to present available mitigation, counsel's performance is almost always deemed unreasonable. *Stewart v. Smith*, 189 F.3d 1004 (9th Cir. 1999) ("The failure to present mitigating evidence during the penalty phase of a capital case, where there are no tactical considerations involved, constitutes deficient performance"); *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995) (failure to investigate mitigating evidence in the absence of "strategic choice" may constitute deficient performance).

\\

Investigation, Preparation And Presentation of Mitigating Evidence Was Inadequate

318. Petitioner incorporates by reference paragraphs 117-308, above, as if fully set forth herein.

319. As alleged above, petitioner was represented initially by Bryan Shechmeister of the Santa Clara Public Defender's Office. During the time the Public Defender represented appellant, they did not conduct any investigation aimed at uncovering mitigating evidence. Murphy Dec., Exh. 3, at 13.

320. On July 7, 1987, the Public Defender was relieved as counsel, and was replaced by private counsel, Joseph O'Sullivan.

321. As alleged above, in September 1988, with the trial set to commence on September 19th, Mr. O'Sullivan requested an additional six months continuance because of his alcoholism and other stress-related mental health problems.

322. At the time he requested the continuance, Mr. O'Sullivan had been diagnosed with Alcohol Dependence, accompanied by depressive symptoms and generalized anxiety. CT 2065. He was emotionally disorganized, his capacity to concentrate was impaired, and he suffered from bouts of depression and "unbound anxiety." 9/16/88 RT 26-27. *See also* Morehead Dec., Exh. 1, at 1; O'Sullivan Dec., Exh. 2, at 8; Murphy Dec., Exh. 3, at 12.

323. Mr. O'Sullivan had been abusing alcohol for several years, possibly over ten years, and in the previous two years it had "gotten way out of hand." This included drinking daily, and cutting back on his work so he could indulge in alcohol consumption. Mr. O'Sullivan had reportedly stopped drinking by early September 1988, and needed a period of time to

obtain treatment and recover so as not to resume drinking. 9/16/88 RT 21-22. *See also* Morehead Dec., Exh. 1, at 1; O'Sullivan Dec., Exh. 2, at 8; Murphy Dec., Exh. 3, at 12.

324. Mr. O'Sullivan was abusing alcohol when he first began representing petitioner, and his drinking impaired his performance as counsel. 9/16/88 RT 21-22, 27. Mr. O'Sullivan's psychologist stated that his condition prevented him from "investing himself productively in his work" and that his diagnosis "implies chronic heavy drinking, incapacitating bouts of depression and recurrent anxiety attacks." In the psychologist's opinion, "he is unable to handle the responsibility involved in defending a death penalty case. . . . In sum, Mr. O'Sullivan is in immediate need of treatment. His alcohol dependence has impaired his capacity to function occupationally. At the present time he needs to prepare the defense of a death penalty case, but he is emotionally unable to fulfill this obligation. It is expected that he would be able to reassume this responsibility after an initial six month period of treatment." CT 2065.

325. Mr. O'Sullivan stated under oath that "I clearly cannot, at this time, handle the mental and emotional commitments attendant to a Captiol [sic] Case . . . ." CT 2066. He admitted that "under *Ledesma* there is no way I could try this case in my present posture." 9/13/88 RT 13; 9/16/88 RT 28-29, 33. His psychologist agreed that he was in no condition to try the case at that time. 9/16/88 RT 25.

326. On November 29, 1988, the trial court granted a continuance of the trial to April 17, 1989, to permit O'Sullivan to recover from his alcohol abuse and other health problems, and second counsel, Joseph Morehead was appointed. CT 2087.

327. From the time of his retention as counsel until the time he

sought a continuance and the appointment of second counsel, Mr. O'Sullivan had not prepared adequately for trial. He had not sought funds pursuant to 987.9 of the Penal Code, had not hired an investigator, had failed to prepare or file any pre-trial motions, had failed to obtain any records other than what he had received from the prosecutor in discovery and from the Public Defender, and was not in any way ready to go to trial. Morehead Dec., Exh. 1, at 1; Murphy Dec., Exh. 3, at 12.

328. Also, as alleged above, during this time, Mr. O'Sullivan was involved in an unrelated case in which his conduct led to disciplinary action by the State Bar of California in 1995, including suspension from the practice of law for six months with execution of the suspension stayed and O'Sullivan being placed on probation for two years. It was found that Mr. O'Sullivan's excessive use of alcohol contributed to the misconduct. *See* Exhibits 51 & 52.

329. Mr. Morehead was brought into the case because of Mr. O'Sullivan's incapacity. His role was to maintain relations with the client, assist in selecting the jury, consult with experts, draft and argue pre-trial motions, direct the investigation for the guilt phase, second chair the guilt phase, and prepare for the possibility of a penalty phase. Morehead Dec., Exh. 1, at 1.

330. Mr. O'Sullivan delegated all aspects of preparation and presentation of the penalty phase to Mr. Morehead. Morehead Dec., Exh. 1, at 1; O'Sullivan Dec., Exh. 2, at 10; Murphy Dec., Exh. 2, at 12.

331. Trial counsel failed to undertake a penalty phase investigation aimed at uncovering relevant mitigating evidence related to petitioner's background and family history.

332. The penalty phase investigation conducted in this case was

untimely, at best preliminary, superficial, and omitted a series of basic investigative steps, including the gathering of life history documents, interviewing family members and others with knowledge of petitioner's background and family history, and providing relevant information to mental health experts.

333. By the time Mr. Morehead became involved, there was very little time to become familiar with the case and prepare to go to trial. As a result, trial counsel failed to retain an investigator in a timely fashion, and failed to begin any penalty phase investigation prior to the commencement of the trial. As Morehead concedes, "I hired an investigator, John Murphy, in February 1989, and he and I barely had time to review the preliminary hearing transcripts and discovery, and to get up to speed by the time the trial was set to commence with jury selection in April 1989." Morehead Dec., Exh. 1, at 1.

334. Appellant was found guilty of grand theft and first degree murder with a financial gain special circumstance on July 26, 1989. The penalty phase commenced on August 1, 1989.

335. *No investigation* for the penalty phase was undertaken prior to trial. According to Mr. Morehead: "Given the enormous time pressures, I did my best to put the guilt phase defense together. This left very little time for preparing for the penalty phase, which was scheduled to begin less than a week after the guilt phase concluded." Morehead Dec., Exh. 1, at 1-2.

336. Investigator John Murphy agrees that, "the preparation for trial, including investigation of both the guilt and penalty phases was plagued by a lack of time. Because of Mr. Morehead's and my late entry into the case and O'Sullivan's incapacity prior to having Morehead appointed, everything was being done at the last minute, from locating and

interviewing witnesses, obtaining and reviewing documents, identifying and retaining experts, and seeking funding for investigation and experts." Murphy Dec., Exh. 3, at 12.

337. Mr. Murphy was aware of what needed to be done to prepare adequately for the penalty phase but acknowledges that it was not possible in petitioner's case because of the lack of time: "I was hired in February 1989, and jury selection began in April 1989. I was aware at the time that particularly in a capital case, it was critical to have undertaken both guilt and penalty phase investigation well before the trial began. This was necessary so that counsel would have a coherent strategy from the onset of trial and because it was virtually impossible to conduct an investigation while trying the case at the same time. In addition, in this case, the penalty phase followed the guilt phase by only about a week. It was not possible to conduct the kind of reasonably competent investigation necessary to present a penalty phase defense in such a short amount of time." Murphy Dec., Exh. 3, at 13.

338. Mr. Murphy states that: "In this case, there was no time to do an adequate investigation. By the time I had familiarized myself with the discovery and other information about the case necessary to conduct an investigation, the trial was starting. In the months that followed, given the time constraints as well as financial constraints, the focus of the investigation was on the guilt phase. What little penalty phase investigation was accomplished was done at the last minute and almost as an afterthought. Counsel and I were scrambling to try to get the case ready for trial and had little time to devote to the penalty phase." Murphy Dec., Exh. 3, at 13.

339. Trial counsel's inadequate investigation was further hampered

by the failure to obtain sufficient investigative and expert funds in a timely manner. This was due to counsel's failure to timely request investigative and expert funds and/or to provide adequate justification as to the need for investigative and expert funds. In the alternative, the Santa Clara Superior Court unreasonably denied the disbursement of reasonably necessary funds for investigative and expert services in a timely manner which hampered trial counsel's penalty phase investigation in violation of petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights. See Claim F. Morehead Dec., Exh. 1, at 4.

340. Mr. Morehead concedes that "there was not enough time or funds to adequately investigate and present a case in mitigation at the penalty phase." Morehead Dec., Exh. 1, at 2; O'Sullivan Dec., Exh. 2, at 10.

341. Reasonably competent counsel maintains responsibility for directing the investigation. Here, trial counsel failed to do so. Counsel failed to instruct the investigator in appropriate penalty phase investigation or necessary follow-up. Moreover, trial counsel failed to recognize, in the information already available to him, mitigation evidence or clues to obtaining mitigation evidence that could have been presented to persuade the jury to give petitioner a sentence less than death.

342. Reasonably competent counsel would have directed or conducted the investigation needed to develop mitigating evidence regarding petitioner's background and family history, employed appropriate experts, and presented the evidence to the jury at the penalty phase. As is demonstrated below, had such an investigation been conducted and presentation been made, it is reasonably probable that the outcome of petitioner's penalty trial would have been different. It would have "put the

whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. at 435; *Strickland v. Washington*, 466 U.S. at 694-695.

343. Trial counsel failed to conduct even minimal document gathering and interviews with regard to a family history investigation which would have uncovered a wealth of mitigating evidence regarding petitioner's family history of substance abuse, mental illness, domestic violence, marital discord, physical, sexual and psychological abuse, and neglect and abandonment, and would have led to the discovery of other mitigating evidence, including the sexual abuse suffered by petitioner as a child, his depression and other mental health symptoms and his predisposition to addiction.

344. Trial counsel did not obtain or seek to obtain records pertaining to petitioner and his family's social history that would have provided information relevant to the discovery of mitigating evidence and to a complete and reliable mental health assessment, including, but not limited to, vital records, school records, medical records, psychiatric records, military records, legal records, and civil and criminal records of petitioner, his parents, siblings, grandparents and other relatives.

345. Trial counsel ultimately obtained petitioner's county jail records and certain military records, but failed to do so in a timely manner, having obtained them after the guilt phase, and failed to provide such records to mental health experts.

346. Mr. Morehead confirms that: "One area where the lack of time was particularly problematic was in obtaining family and social history records, which I was aware was a crucial aspect of penalty phase investigation. Had there been more time, I would have ensured that medical

records, school records, marital and divorce records, court records of Mark and his family were obtained from California, Texas and South Carolina. Unfortunately, we only had time to seek Mark's military and jail records." Morehead Dec., Exh. 1, at 2.

347. John Murphy's investigative tasks for the penalty phase were unreasonably limited: "One of my primary tasks for the penalty phase was to obtain Mr. Crew's service records and to locate and interview his superior officer. The other major task I was given for the penalty phase involved obtaining Mr. Crew's jail records, locating jail deputies who would testify on Mr. Crew's behalf and identifying an expert who could testify regarding prison confinement." Murphy Dec., Exh. 3, at 14.

348. The reason Mr. Murphy did not obtain critical social history records was the lack of time: "I did not seek to obtain any of the social history records essential to an adequate investigation of Mr. Crew's background. I was aware at the time that obtaining such records as school records, medical records, psychiatric records, civil and criminal records pertaining to a client and his family were necessary to develop and present a capital defendant's social history at the penalty phase of a capital trial and to provide to mental health experts so that they can properly assess the client. Unfortunately, none of this record gathering was done prior to my entry into the case as it should have been. By the time I was involved in the case, there was insufficient time to undertake this task and my focus and the focus of counsel was primarily on the guilt phase." Murphy Dec., Exh. 3, at 14-15.

349. Trial counsel failed to interview or direct his investigator to interview family, friends, neighbors or any other individuals with regard to uncovering potential mitigating evidence. Interviews of potential witnesses

were generally restricted to obtaining information related to the guilt phase of the trial. Furthermore, because counsel had failed to undertake any independent investigation of petitioner's family, such interviews were uninformed and unhelpful in uncovering mitigating evidence.

350. Mr. Morehead agrees that: "Due to lack of time and resources, we also failed to undertake a reasonably comprehensive background investigation which would have encompassed interviewing Mark's family, including relatives who lived in Texas and South Carolina, friends and neighbors in California, and others who may have had knowledge of Mark and his family upbringing." Morehead Dec., Exh. 1, at 2.

351. Mr. Murphy was not instructed to undertake an investigation of petitioner's background: "I was not asked nor did I conduct a social history investigation, which would have been aimed at obtaining information regarding Mr. Crew's family history and background. What little I was asked to do in this regard was focused on positive or good aspects of Mr. Crew's life rather than any of the more troubling aspects such as a family history of drugs and alcohol, domestic violence, marital discord, abuse, neglect and abandonment. As a result, there was no real family history investigation in this case. There were no trips to Texas or South Carolina or any other locale where potential mitigation could have been gathered." Murphy Dec., Exh. 3, at 14.

352. Trial counsel failed to undertake an independent assessment of potential mitigating evidence and unreasonably relied on petitioner's father, William Crew, to assist in guiding the investigation. Other than interviewing petitioner's father and mother, and meeting with petitioner's grandmother just before her testimony, Mr. Morehead did not interview any other family members with regard to the penalty phase. Morehead Dec.,

Exh. 1, at 2-3.

353. Mr. Morehead acknowledges that: "Because we were under such time constraints, we relied for family information on Mark's father who presented a fairly idyllic picture of Mark's life. While he told us that Mark's mother was somewhat cold and withdrawn, he portrayed himself as a loving, devoted, caring father who made up for whatever difficulties Mark may have had with his mother. We simply did not have the time or funds to determine whether or not this was an accurate picture of Mark's life. Although I suspected that there was much more dysfunction going on in Mark's background, and was aware from police reports that Mark suffered from depression, sleep disorders, and substance abuse problems, there was simply not the time to pursue these additional areas of potential mitigating evidence." Morehead Dec., Exh. 1, at 2.

354. Reliance on petitioner's father was problematic. As Mr. Murphy put it: "Petitioner's father, Bill Crew, was the one who hired O'Sullivan originally, and he appeared to have some influence in how the penalty phase investigation was done. Information about the family was often filtered through him, and I believe that O'Sullivan, in particular, was sensitive to not wanting to offend Bill Crew or delve very deeply into family issues." Murphy Dec., Exh. 3, at 14.

355. Trial counsel investigated only positive aspects of petitioner's character and background for the penalty phase, and failed to attempt to investigate more troubling aspects of petitioner's background and family history that would have provided a meaningful and compelling case in mitigation and would have provided the jury with an understanding of the factors in petitioner's life that affected his conduct and behavior. This was not a reasonable tactical decision but was a product of the untimely nature

of counsel's investigation.

356. According to Mr. Murphy: "Counsel and I were aware that [petitioner] had substance abuse problems and likely had mental health problems, but we simply did not have the time to devote to developing such evidence." Murphy Dec., Exh. 3, at 15.

357. Mr. Morehead agrees: "We presented evidence of Mark's conduct in the military and his excellent behavior in jail, as well as the testimony of family and friends who portrayed Mark as a caring, generous, loving person. This kind of presentation was easier and much less time-consuming than attempting to investigate and present more troubling aspects of Mark's life and background." Morehead Dec., Exh. 1, at 3.

358. Counsel was in possession of information that placed him on notice that powerful mitigating evidence existed in a vast array of categories. Information provided by witnesses to the police, to counsel and to prior counsel regarding petitioner's drug and alcohol abuse, depression, anxiety, and sleep disorders were ignored as potential mitigating evidence by trial counsel, and such information was not provided to mental health experts. For example:

a. Cindy Koelsch-Erdelyi (aka Cynthia Pullman) informed the police that petitioner was an alcoholic, went on periodic drinking binges and smoked marijuana. Supplementary Offense Report, Discovery #85A-88, attached hereto as Exhibits 45 & 46.

b. Debra Lund, petitioner's ex-wife, informed the police that petitioner was "into drugs, speed, coke and marijuana." Supplementary Offense Report, Discovery #73, attached hereto as Exhibit 47.

c. Jeanne Meskell informed the police that petitioner drank, suffered from depression, and often stayed out all night. Supplementary

Offense Report, #130-135, attached hereto as Exhibit 48.

d. Beverly Ortiz Ward informed the police that petitioner drank a lot and suffered from insomnia. Supplementary Offense Report, #118-119, attached hereto as Exhibit 49.

359. Trial counsel failed to follow up on the information in their possession for purposes of the penalty phase regarding petitioner's drug and alcohol use, depression, anxiety, and sleep disorders. This information was ignored as potential mitigating evidence by trial counsel.

360. Mr. Morehead recognizes that: "We did not investigate or obtain additional evidence of Mark's depression, sleep disorders, or substance abuse for purposes of the penalty phase even though we were on notice of these issues. This was not a tactical decision, but was simply a matter of not having time nor funds." Morehead Dec., Exh. 1, at 3.

361. As Mr. Murphy states: "There was information from police reports which indicated that Mr. Crew had substance abuse problems. Although several witnesses mentioned Mr. Crew's drug or alcohol problems, and there were indications that Mr. Crew's father had a drinking problem, this was not an area that we developed. We did not pursue an investigation into the nature, extent or origin of Mr. Crew's drug and alcohol use, did not seek out witnesses who may have been able to provide information regarding Mr. Crew's drug and alcohol us, or seek to determine the causes or reasons why Mr. Crew resorted to drugs and alcohol. I believe that this issue was not pursued because of the lack of time." Murphy Dec., Exh. 3, at 15.

362. Trial counsel failed to retain appropriate mental health experts for the penalty phase, and failed to give the experts that were retained appropriate referral questions and/or provide the experts with relevant

information with regard to the penalty phase.

363. The mental health experts that were retained, Dr. David Smith, M.D., and Dr. Frederic Phillips, M.D., were asked to determine whether petitioner was under the influence of drugs and alcohol at the time the murder was committed pursuant to a potential guilt phase defense. They were provided with no documents or information other than being told orally about the facts of the crime. Morehead Dec., Exh. 1, at 3. In addition, Dr. Phillips conducted a "preliminary" interview of petitioner. Morehead Dec., Exh. 1, at 3. *See also* Declaration of David E. Smith, M.D., attached hereto as Exhibit 5, at 83; Declaration of Fredric J. Phillips, M.D., attached hereto as Exhibit 6 at 145.

364. Dr. David Smith, M.D., a psychiatrist with an expertise in addiction and toxicology, was initially retained to determine petitioner's mental state at time of crime vis-a-vis intoxication.

365. Dr. Smith is the Medical Director of the Haight Ashbury Free Clinics in San Francisco, California, a community-based health care and drug abuse treatment facility that he founded in 1967. He has testified numerous times in criminal cases, regarding a defendant's mental state at the time of the crime and has presented mitigating evidence at the penalty phase of capital trials. Smith Dec., Exh. 5, at 82-83. It would have been Dr. Smith's practice in 1989, to "recommend to counsel that they conduct a complete investigation into their client's personal, medical, psychological and drug history so that the nature and extent of his substance abuse history and whether or not he was suffering from addiction could be reliably determined." Smith Dec, Exh. 5, at 83-84. Such an investigation was not done in this case. Dr. Smith did not interview petitioner and was provided with no documents or materials. He had insufficient information relevant to

make an informed evaluation as to potential mitigating evidence.

366. Trial counsel also retained Dr. Frederic Phillips, M.D., a psychiatrist, who also was not provided with any documents or information related to Mr. Crew's background or social history. He conducted a preliminary interview of petitioner on January 5, 1989, well before any investigation had begun. Dr. Phillips did not have sufficient information relevant to make an informed evaluation as to potential mitigating evidence.

367. As Dr. Phillips recalls: "When I interviewed Mark Crew I was unaware of the family history of sexual abuse, substance abuse, marital dysfunction, and mental illness. I was also unaware of Mark Crew's long term abuse of drugs and alcohol, his symptoms of depression or his trauma history." Phillips Dec., Exh. 6, at 146. Dr. Phillips was never provided with such information and therefore did not have sufficient information relevant to make an informed evaluation as to potential mitigating evidence.

368. According to Mr. Morehead: "The two experts were retained initially for use at the guilt phase in support of a potential mental state defense that Mark's depression, sleep deprivation, and cocaine and alcohol use at the time of the crime negated specific intent." Morehead Dec., Exh. 1, at 3. However, counsel determined that this defense would have only been effective if the client testified, and they chose not to have petitioner testify. *Id.*

369. Counsel also considered using Dr. Smith and Dr. Phillips at the penalty phase in the same manner as at the guilt phase, presenting evidence on petitioner's mental state at the time of the crime. Counsel, however, decided not to put on this evidence because they did not want to open the door to cross-examination on the facts of the crime. Morehead Dec., Exh. 1, at 3.

370. The decision not to present mental health testimony and evidence of petitioner's troubled upbringing and family history at the penalty phase was not a reasonable tactical decision and was the result of lack of preparation and investigation rather than trial tactics. As described in detail below, a great deal of mitigating evidence could have been presented through lay witnesses and mental health experts that was not directly related to the crime.

371. Had trial counsel conducted a reasonable investigation, they would have uncovered readily available information through document gathering, witness interviews, and expert consultation. These actions would have yielded substantial mitigating evidence, including, but not limited to: a) a family history of mental illness, substance abuse, physical and sexual abuse, abandonment and neglect, and marital discord; b) petitioner's traumatic upbringing which included being sexually abused by his mother, who was otherwise withdrawn, depressed and emotionally unavailable; c) the lack of any ameliorative intervention and instead, the exacerbation of this abuse by others, including the male role models in petitioner's life; d) the impact of petitioner's upbringing on his functioning and mental health, including an inability to form appropriate relationships, compulsive sexual behavior, depression, substance abuse, and sleep disorders; and e) petitioner's addiction to drugs and alcohol for which he was genetically and environmentally predisposed.

372. Mr. Morehead concedes that: "There was no tactical reason for not obtaining and presenting this information at the penalty phase, and there would have been an effective way to present this evidence without delving back into the crime." Morehead Dec., Exh. 1, at 5.

373. Trial counsel failed to undertake an adequate investigation to

uncover readily available evidence regarding petitioner's background and provide it to mental health experts. The experts were provided with no records or background information.

374. Had counsel undertaken a reasonably competent investigation, they would have obtained mitigating information about petitioner's background which would have led any reasonably competent mental health professional to inquire into whether petitioner had been a victim of sexual abuse, including, but not limited to: a) the prevalence of perpetrators and victims of sexual abuse in petitioner's family; and b) petitioner's symptoms of depression, substance abuse, and compulsive sexual behavior. Declaration of Larry Allen Morris, Ph.D., attached hereto as Exhibit 4, at 63; Phillips Dec., Exh. 6, at 146.

375. A reasonably competent and timely investigation would have led to the discovery that petitioner's maternal grandfather and uncle molested young girls, that petitioner's mother had been molested by her father and that petitioner's father molested his step-daughter. Any of these facts, particularly when combined with information that petitioner had substance abuse problems and engaged in compulsive sexual behavior, would have inevitably led reasonably competent counsel to retain appropriate experts and to discover that petitioner had been molested by his mother, and exposed to sexually inappropriate behavior by his grandfather.

376. As Dr. Phillips states: "Had I been provided with the background materials that show a history of sexual abuse in Mark's family, together with Mark's symptoms of depression, chronic use of drugs and alcohol, and his compulsive womanizing, I would have advised counsel that there was a strong likelihood that Mark was sexually abused as a child, and would have inquired of Mark as to whether he had been sexually abused as

a child." Phillips Dec., Exh. 6, at 146.

377. A reasonably competent and timely investigation would have led to the discovery of petitioner's family history of substance abuse, to genetic and environmental factors which predisposed petitioner to addiction, and to the fact that petitioner was dependent on drugs and alcohol.

378. Had trial counsel conducted a reasonable investigation, and had the fruits of such an investigation been provided to reasonably competent experts, those experts could have provided the opinions expressed below regarding petitioner's social history, the sexual abuse and trauma he suffered and its devastating impact on his life, as well as petitioner's addiction to drugs and alcohol. Smith Dec., Exh. 5, at 94; Phillips Dec., Exh. 6, at 146.

379. Such a presentation, together with lay witness testimony, would have provided a sympathetic basis for why petitioner resorted to drugs and alcohol and sexually compulsive behavior beginning at a very young age including suffering from sexual abuse and its effects, such as depression, sleep disorders and low self-esteem, and being genetically and environmentally predisposed to addiction.

380. Trial counsel's penalty phase investigation into potential mitigating factors was truncated and misguided and failed to uncover readily available mitigating evidence which would have been consistent with the mitigating evidence that was presented regarding petitioner's good conduct in jail and his accomplishments in the military.

381. Trial counsel's opening statement at the penalty phase was marred by the lack of investigation and preparation, and limited by the lack of evidence counsel actually had to present.

382. Counsel's overarching failure to provide the jury with petitioner's life story and an explanation for his conduct was in stark contrast with what counsel promised the jury in his opening statement: "what we're going to show you, we're going to show you the entire history of this man, Mark Christopher Crew. We're going to tell you his life story, why he came to the place he came to." RT 4710; see also 4719 (consider "this man's entire life"). This is precisely what counsel should have done but failed to do.

383. The case presented by trial counsel in mitigation was fatally limited due to the lack of investigation and preparation and the failure to utilize appropriately mental health experts. As a result the jury heard positive aspects of petitioner's life which failed to provide an explanation for the alleged negative aspects of his character and conduct, and were given family history information that was incomplete, inaccurate and uninformed. See paragraphs 90-101, above, incorporated herein by reference.

384. Trial counsel failed to adequately prepare witnesses to testify at the penalty phase. Counsel failed to explain to witnesses the purpose of the penalty phase and the nature and scope of mitigating evidence. As a result witnesses such as petitioner's father, grandmother and others failed to provide mitigating testimony regarding the more troubling aspects of petitioner's background.

385. The self-serving inaccurate testimony of petitioner's father combined with the lack of evidence of petitioner's traumatic upbringing left the jury without critical evidence that would have explained the factors that affected petitioner's development, functioning and conduct.

386. In his closing argument, counsel conceded, in contrast to the

opening statement, that "I haven't given you everything. I haven't given you a man's entire life, I have given you what I hope satisfies your minds and your inquiries." RT 5033. Counsel summarized the family history presentation as follows:

> We had a childhood, he wasn't beat up. He was loved by his father. But he was neglected. He suffered an emotional neglect from both his mother and his stepmother. No, he wasn't sexually abused, wasn't battered, wasn't beat up. [¶] But he was deprived of something which I think is at the fiber of human beings, the love of his mother. He didn't have that. There's a hole in that part of him where that love should be, it's not there. [¶] So he goes through life, searching perhaps, going through woman to woman, marriage to marriage, maybe searching for what he never found. He didn't find it from his stepmother, he didn't find it from his wives, he didn't find it from his girlfriends.

RT 5047.

387. This argument was ineffectual in part because it was hampered by the minimal evidence presented with regard to petitioner's upbringing, which was in fact far more traumatic than counsel suggests. Moreover, the argument was undermined by the lack of expert opinion as to the impact of such trauma.

388. The prosecutor capitalized on counsel's ineffective presentation, arguing that petitioner had a positive upbringing and the circumstances of his life were not deserving of sympathy: "He has a charisma, you heard from people, that talents, that he has intelligence, that capability, what I consider to be a good and decent background, that he

turned his back on. Love of family, ability to do things, ability to get along, leadership abilities. He had all of these things. And he used them for incredible evil." RT 5065.

389. The defense presentation at the penalty phase was used affirmatively by the prosecutor to argue a lack of mitigating circumstances:

> He had a father who loved him. He had a good home in the early years. There's nothing tragic about his circumstances. There's nothing that explains why he came here. He had more advantages than many. I doubt if any of us come from a perfect background. There's no evidence in his early years of truancy, misconduct, inability to get along in school, learning disability, learning disabilities, drug or alcohol abuse. He made his own decisions, and his decision made on his own brought him to where he sits today.

RT 5068-69.

390. Because of counsel's failure to present readily available mitigating evidence and expert testimony that would have explained to the jury "why he came here," the jury was given little basis for sparing petitioner's life.

Compelling Mitigation Evidence Would Have Been Presented by Reasonably Competent Counsel

391. Had counsel acted effectively, they would have conducted a reasonable investigation of mitigation evidence, prepared lay and expert witnesses to testify and presented the evidence to the penalty phase jury.

392. There was a wealth of information that trial counsel could have presented to the jury had they conducted an adequate investigation. By interviewing family members, neighbors, and other community members,

obtaining relevant family records, and retaining appropriate experts, they could have told petitioner's life story through lay witnesses, *see* Exhibits 9-38, and expert witnesses, *see* Exhibits 4-6, incorporated herein by reference, and summarized below.

393. Dr. Larry Allen Morris, Ph.D, is a clinical psychologist with an expertise in male survivors of child sexual abuse. He was retained by current counsel to assess petitioner's social history, to specifically address whether petitioner suffered trauma and abuse as a child and, if so, what impact that had on his development, and to form an opinion concerning the mitigating significance of petitioner's background and social history, utilizing the resources and research that would have been available at the time of the penalty phase of petitioner's trial. Morris Dec., Exh. 4, at 17-19.

394. Had counsel conducted a professionally reasonable and competent investigation, and provided readily obtainable social history information to appropriate experts in a timely manner, they would have discovered and presented mitigating evidence concerning petitioner's background, social history, sexual victimization, development, symptoms of depression and dependence on alcohol and drugs. Such presentation would have been markedly different and far more powerful than the uncompelling presentation made at trial, including but not limited to the following facts:

Summary of Social History

395. Petitioner's family background is replete with a history of sexual abuse, violence, abandonment, neglect, marital discord, substance abuse, and mental illness. Petitioner was sexually abused by his mother beginning at a very young age and continuing throughout his childhood. Many male family members in petitioner's life, including his father, paternal grandfather and older brother, exacerbated the psychological

impact of maternal sexual abuse through neglect, exposure to additional inappropriate sexual experiences, drug and alcohol abuse, and by being unsuitable role models. These factors had a significant impact on petitioner's emotional well-being, the development of functional interpersonal relationships, attitudes and skills and his developing sexuality. Morris Dec., Exh. 4, at 20.

396. Petitioner's mother, Jean, was raised in an extremely violent and sexualized household, subjected to physical and sexual abuse by her father Jack Richardson. Jack also physically assaulted his son (Jean's brother) and wife (Jean's mother), and, in later years, sexually molested his granddaughter and other young girls. Jean's younger brother, Eddie Richardson, initially a victim of his father's assaultive conduct, like his father, later sexually abused young girls. Jean's parents lived with or near the Crew family for several years while petitioner was growing up. Petitioner's grandfather, Jack, created a highly inappropriate and damaging environment by regularly talking about sex and encouraging petitioner and his brother to engage in sexual activity with peers, while the grandfather watched and sometimes participated. Morris Dec., Exh. 4, at 20-21.

397. Petitioner's mother exhibited symptoms of depression, and was often withdrawn, unavailable and emotionless. She is described by many sources as frequently failing to get dressed, spending days at a time in her room or around the house in her nightclothes, allowing housework to pile up while she sat quietly at the kitchen table. Having been traumatized by her father and later abandoned by her husband, who worked long hours and engaged in numerous affairs, and being otherwise socially and emotionally isolated, Jean formed an unhealthy bond with petitioner when he was quite young. This bond included engaging in inappropriate sexual activities with

petitioner, which produced a long-term deleterious impact on petitioner's social, emotional and sexual development. Morris Dec., Exh. 4, at 21.

398. When petitioner's father, William ("Bill") Crew, was home, he and petitioner hunted, fished and camped together, which petitioner enjoyed, but which repeatedly caused conflict with petitioner's mother who resented the time petitioner spent away from her, and which led her to become more withdrawn and depressed. However, William was rarely home, working long hours and seeing other women when he was not working. He was emotionally unavailable to his sons, and rarely set any limits or gave guidance to them other than to provide an inappropriate example as a hard-drinking womanizer. William was three years old when his parents divorced and abandoned him. William was raised by his grandparents and did not know his father well. But William's mother was known to be an emotionally unstable and alcoholic woman who married and divorced several times. William Crew showed signs of depression and anxiety, and he drank and later took Valium, most likely to alleviate these symptoms. By several accounts, William was a heavy drinker who relentlessly pursued women and molested or attempted to molest young girls, including his step-daughter. Morris Dec., Exh. 4, at 21.

399. Petitioner's brother, Mike, is four years older than petitioner. Mike was anxious and hyperactive as a child and young adult. Under his maternal grandfather's influence, Mike became sexually active, and by some accounts, sexually aggressive, at a young age. He also began using and abusing alcohol and drugs as a youth, a pattern that continued into adulthood. Mike became involved with motorcycle gangs, lived as an itinerant for a period of time, and during his first marriage (he married at the age of 18), continued to drink and use drugs and have sexual relationships with other women. Mike was physically abusive to petitioner,

and exposed petitioner to drinking, drugs and age-inappropriate sexual activity when petitioner was quite young. Morris Dec., Exh. 4, at 22, 54.

400. Doug Cox, the son of a family friend, who was roughly Mike's age, lived with the Crew family when petitioner was a young teenager. Doug used drugs and alcohol, and was sexually active. Petitioner and Doug were permitted to spend a great deal of unsupervised time together, during which time Doug provided petitioner with easy access to alcohol and drugs, and involved him in sexual exploits with young girls in the neighborhood. Morris Dec., Exh. 4, at 22.

401. Petitioner's parents separated when petitioner was thirteen or fourteen years old, and petitioner subsequently lived with his father. When petitioner's father remarried in 1970, petitioner was often exposed to unorthodox, overtly sexual parties with heavy drinking hosted by his father and step-mother. In later years, petitioner and his father drank together to excess on several occasions. Morris Dec., Exh. 4, at 22.

402. The sexual abuse petitioner experienced as a child was compounded by these other relationships in his extremely disturbed family. In addition, the lack of any appropriate or ameliorative intervention in petitioner's formative years caused severe psychological damage. As is common with many male victims of sexual abuse, petitioner developed very low self-esteem, seeing himself as "damaged goods," and as someone who did not deserve anything positive in his life. He became overwhelmed, confused and depressed. From a very early age, petitioner resorted to drugs and alcohol to cope with the effects of sexual abuse and other traumatic experiences. Not surprisingly, he was conflicted in his relations with women, desperately afraid of being alone but becoming overwhelmed and anxious whenever he found himself in a reasonably stable situation with a woman. As is typical with many male sexual abuse victims, this led to a

compulsion to pursue relationships with countless other women. As petitioner's inability to form a stable, normal family life was repeatedly thwarted by his shame, self-loathing, depression, substance abuse and a compulsion to have multiple relationships with women, he became increasingly self-destructive, escalating his drug and alcohol use and ultimately living a lifestyle that was out of control. Morris Dec., Exh. 4, at 22-23.

Family History

403. Reasonably competent counsel would have obtained and presented evidence that informed the jury about petitioner's family history of sexual abuse and incest, as well as a documented history of marital strife, domestic violence, neglect and abandonment, substance abuse and mental illness. As concluded by Dr. Morris, "Both sides of Mark Crew's family exhibit extreme marital discord, which include marriages at very young ages, extramarital affairs, domestic violence, abandonment, and frequent resort to the courts for divorce proceedings or restraining orders. There is also a history of substance abuse and mood disorders, both of which are believed to have a genetic component. If Mark Crew had been raised in a family without these pathological attributes, it is possible that his sexual victimization would have been ameliorated by early and appropriate intervention. Instead, the destructive patterns intrinsic to his family history left him devoid of resources and exposed him to caretakers who further contributed to the trauma he suffered." Morris Dec., Exh. 4, at 27.

404. Jean Richardson, petitioner's mother, was born on July 25, 1931, to Jack and Irene Richardson in Forth Worth, Texas. Many reports describe Jean's father, Jack, as an extremely disturbed man who sexually molested Jean, molested other girls throughout his life, beat his wife and children, and exposed his grandsons to highly inappropriate sexual conduct.

Morris Dec., Exh. 4, at 27; Exhibit 85

405. Jack Richardson was born on May 4, 1911, in Burleson, Texas. Exhibit 113. He had two older brothers, one of whom was institutionalized after becoming psychotic. Morris Dec., Exh. 4, at 27-28; Declaration of Eddie Lee Richardson, Sr., attached hereto as Exhibit 30; Exhibits 104, 105, 119.

406. Jack's mother died on November 28, 1913, when Jack was an infant. Jack's father, Henry Richardson, married his second wife on September 10, 1914. This was a marriage marked by turbulence. They separated in June 1918, and divorced in 1925. Morris Dec., Exh. 4, at 28; Exhibits 109, 110.

407. On January 29, 1928, at the age of 16, Jack Richardson dropped out of high school and married Irene Estes, who was 14 years old at the time. Morris Dec., Exh. 4, at 28; Exhibit 115.

408. Irene Estes was born on July 1, 1913, to Edmond and Ethel Estes. Irene had a brother Robert, who is generally described as an alcoholic who was always drunk. Morris Dec., Exh. 4, at 28; E. Richardson Dec., Exh. 30; Declaration of Cheryl Norrid, attached hereto as Exhibit 28; Exhibit 103.

409. Jack and Irene had three children: the first child, Donald Richardson was born on August 2, 1929, the second was petitioner's mother Jean, and the third child, Eddie Lee Richardson, was born on June 16, 1939. Two months after Eddie's birth, Jack's father, Henry, married Irene's mother, Ethel, whose husband had died a year earlier. Donald and Henry were killed in 1943, when their car was struck by a train. Morris Dec., Exh. 4, at 28; Exhibits 106, 107, 111, 112.

410. The first reported incident of violence involving Jack Richardson occurred in 1932, when he was arrested for carrying a pistol and

assaulting another with it. He pled guilty to assault with a prohibited weapon on February 7, 1933. Morris Dec., Exh. 4, at 28; Exhibit 114.

411. Jack and Irene's marriage was marked by abusive and violent behavior. Their son Eddie describes Jack as a "very violent man" who "beat me, my mother and my sister Jean, without warning on a regular basis." Eddie states that Jack "had a very bad and unpredictable temper" and "often hit me in the head, knocking me unconscious with a single punch. I remember many times waking up from a beating to my father handing me a nickel Coke from the Coke machine in his shop. Jean and I also saw him knock out our mother." Morris Dec., Exh. 4, at 28-29; E. Richardson Dec., Exh. 30 at 247-248.

412. Eddie reports that his father was violent whether or not he was drinking, but was predictably violent when he got drunk. Morris Dec., Exh. 4, at 29; E. Richardson Dec., Exh. 30 at 248.

413. Jack Richardson beat his daughter Jean regularly until her senior year in high school when she started dating William Crew. Eddie Richardson indicates that his father also beat his grandmother (Irene's mother) Ethel and recalls a particularly vicious beating Jack gave to one of Jack's customers. Morris Dec., Exh. 4, at 29-30; E. Richardson Dec., Exh. 30 at 249-250.

414. William Crew, who married Jean in 1947, confirms that Jack "was a violent man with a very bad temper." Jean's mother and brother stayed with the Crews after suffering Jack's beatings. Eddie lived with them for several years, beginning when he was 12, because of the violence in his home. Morris Dec., Exh. 4, at 29-30; Declaration of William Crew, attached hereto as Exhibit 16, at 201; E. Richardson Dec., Exh. 30, at 249.

415. Jack and Irene separated several times during their marriage, but Irene never followed through with divorce proceedings. Her petitions

for divorce show a deeply troubled marriage, marked by neglect, abandonment and violence. Morris Dec., Exh. 4, at 30; Exhibit 116.

416. Jack enlisted in the Army on September 25, 1942. Whatever mental disturbances Jack suffered, they appeared to have been exacerbated by his experiences during World War II. Jack left for New Guinea on November 21, 1943, and subsequently suffered injuries from Japanese bombing of Wadke Island in May or June 1944, for which he received a Purple Heart. Morris Dec., Exh. 4, at 31; Exhibit 117.

417. After military service Jack returned to his wife and children, and they lived in Fort Worth Texas. Morris Dec., Exh. 4, at 32.

418. Jack not only beat, but also sexually molested his daughter Jean. According to Eddie, "When Jean was in high school, about a year before Jean met Billy Crew, she told me that Jack 'messed with her' sexually. We didn't really talk about it at the time, but I asked her about it later in life, when we were adults. At that time she confirmed that Jack had sexual relations with her throughout her childhood and teenage years." Jean also disclosed to others that her father sexually abused her. Morris Dec., Exh. 4, at 32; E. Richardson Dec., Exh. 30, at 250; Norrid Dec., Exh. 28; Declaration of John Turner, attached hereto as Exhibit 35; Declaration of Joyce Cox, attached hereto as Exhibit 15.

419. Jack also molested his granddaughter Cheryl Richardson. Cheryl states that he molested her "from as early as I can remember, virtually every time they came back to Texas for a visit from California." Morris Dec., Exh. 4, at 32; Norrid Dec., Exh. 28, at 240.

420. Eddie Richardson, Jean's brother, was married to Jo Ann Reaves from 1957 to 1962. They had two children, Cheryl and Lonnie. Eddie's second wife was Mary Bumgardner, and they had three children together, Eddie Lee, Jr., Scott, and Kimberly. Morris Dec., Exh. 4, at 32-

33; Exhibit 108.

421. Eddie repeated the patterns of violence and sexual abuse that were exhibited by his father. According to Cheryl, Eddie beat and cheated on Jo Ann. He molested Cheryl until she was 12 years old, at which time she told her mother about the abuse and no longer had to spend time with him. He also molested his other daughter, Kimberly. Morris Dec., Exh. 4, at 33; Norrid Dec., Exh. 28; Declaration of Debbie Bumgardner Bell, attached hereto as Exhibit 9.

422. Eddie's second wife, Mary, had a daughter named Debbie when she was 16 years old. Debbie was adopted by Mary's parents and raised as their daughter and Mary's sister. Debbie spent a great deal of time with Mary and Eddie, and reports that she was repeatedly molested by Eddie, beginning when she was between 6-8 years old. According to Debbie: "I became aware that Eddie not only molested me, but molested virtually any girl or young woman he could, including his daughters, other female relatives and neighborhood girls." Morris Dec., Exh. 4, at 33; Bell Dec., Exh. 9, at 195-196.

423. William Crew, petitioner's father, was born on November 23, 1929, in Fort Worth, Texas. His parents, Warnell Crew and Irene Crow, had married on April 23, 1928, when Warnell was 17 and Irene was 16. Their marriage was unstable, and they separated in May 1933, when William was three years old. According to Maurice Lambert, the son of Irene Crow's sister, Irene and Warnell split up for good when Warnell got another woman pregnant. Morris Dec., Exh. 4, at 34; Declaration of Maurice Lambert, attached hereto as Exhibit 21, at 224; W. Crew Dec., Exh. 16. William was raised by his paternal grandparents after the breakup of his parents' marriage. Morris Dec, Exh. 4, at 34-35; W. Crew Dec., Exh. 16; Lambert Dec., Exh. 21; Declaration of Darla McFarland, attached

hereto as Exhibit 26; Exhibits 88, 97, 98, 99.

424. William's mother Irene's marriage to Warnell at a very young age, the breakup of the marriage and the abandonment of their child mirrored Irene's own upbringing and foreshadowed William's marriage to Jean Richardson. Morris Dec, Exh. 4, at 35.

425. Irene Crow's parents, Jessie Crow and Corine (Cora) McCann were married in 1911, when Cora was only 15 and Jessie was 20. Irene was born in 1912, and her sister Florence was born in 1915. When their children were still quite young, Cora left Jessie, and moved to Rockdale, Texas, taking the children with her after reportedly finding a boyfriend. Jessie went to live with his sister in another part of Texas. When Irene was about 6 or 7 years old, Jessie retrieved her and her sister, and returned with them to his sister's. The girls did not see their mother again for several years. Morris Dec., Exh. 4, at 35; W. Crew Dec., Exh. 16; Lambert Dec., Exh. 21; Declaration of Margie Crow, attached hereto as Exhibit 17; Exhibits 99, 101. According to Maurice Lambert, Irene's mother, Cora, "was pretty wild" until she married her second husband, John Jolly, and settled down. Morris Dec., Exh. 4, at 35; Lambert Dec., Exh. 21, at 224.

426. In 1924, Jessie remarried to a woman named Mamie Lambert, who also had two daughters from a prior marriage. Jessie and Mamie raised Irene and Florence, together with Mamie's children, and had several children of their own. Morris Dec., Exh. 4, at 35; W. Crew Dec., Exh. 16 Lambert Dec., Exh. 21; M. Crow Dec., Exh. 17; Exhibit 102. The family was very poor. After unsuccessful attempts at farming, Jessie moved the family to Rotan, Texas, and worked at a service station. He eventually went to work for an oil company, and was usually on the road driving a large oil tanker truck, leaving Mamie and the older girls to care for the family. Morris Dec., Exh. 4, at 35; Lambert Dec., Exh. 21; M. Crow Dec., Exh. 17.

427. Sometime between 1925-1927, Irene and her sister, Florence, at different times moved to Fort Worth to live with their mother, Cora, and her second husband. Cora and John Jolly had a son, Bobby, who reportedly died in a drunk driving accident. Morris Dec., Exh. 4, at 35-36; Lambert Dec., Exh. 21; M. Crow Dec., Exh. 17.

428. After her marriage to Warnell Crew, Irene married and divorced several more times. In 1934, she married Eugene Taylor. According to the divorce files, Irene engaged in fits of anger, and cursed and abused Mr. Taylor to the extent that further living together was insupportable. They divorced in 1935. Irene married Ralph DeHart in January 1936. On April 23, 1940, they separated. According to Irene, Ralph's alcohol abuse and verbal abuse of Irene, was "causing [Irene] much mental anguish and humiliation. . . . [and] caused her to become highly nervous and to seriously impair her health . . . ." Irene married William Ewing on June 19, 1941. They separated on December 8, 1949. Divorce papers stated that "... for some time just preceding their final separation, the conduct of [Irene Ewing] towards [William Ewing], generally, was of such a harsh, cruel and tyrannical nature as to render their further living together insupportable." They divorced on April 4, 1950, but remarried sometime later. Mr. Ewing died on March 30, 1954. Irene married Jackson Watson on October 8, 1956, and remained married to him until his death in 1992. Morris Dec., Exh. 4, at 36; Exhibit 100.

429. Irene was reportedly an alcoholic. She is described as very wild and independent, "like her mother." She was a "party girl who drank and danced." She is also described as having been a nervous person. Morris Dec., Exh. 4, at 36; W. Crew Dec., Exh. 16; M. Lambert Dec., Exh. 21; M. Crow Dec., Exh. 17.

430. Jean Richardson graduated from high school in May 1947,

when she was only 15 years old. While in high school she met William Crew. They were married on August 22, 1947, when William was 17 and Jean was 16. William graduated from high school in January 1948. Morris Dec., at 37; W. Crew Dec., Exh. 16; Exhibit 89.

431. Their first child, petitioner's brother Michael, was born on August 28, 1950, in Fort Worth, Texas. At that time, William was working as an apprentice newspaper pressman and Jean was a housewife. Petitioner was born on December 25, 1954. Morris Dec., Exh. 4, at 37; W. Crew Dec., Exh. 16; Exhibits 79, 94.

432. Contrary to the evidence presented at the penalty phase, there were difficulties in the marriage early on. William admits that he and Jean separated a few times in the early years of their marriage, and each of them engaged in extramarital affairs. On March 2, 1955, Jean filed for divorce, indicating that she and William had "separated on several occasions, until about the 28th day of February, 1955, at which time they permanently separated, and have since lived wholly separate and apart." The complaint was dismissed two weeks later for failure to prosecute, and at some point the couple reconciled. Morris Dec., at 37; W. Crew Dec., Exh. 16, at 210; Exhibit 90.

433. In the late 1950s, after several moves, the family settled in California. William Crew worked long hours as a pressman and as a result was not home very much. Morris Dec., Exh. 4, at 37-38; W. Crew Dec., Exh. 16.

434. The family lived in a mobile home park for a period of time, and then moved to Petaluma, California in 1958. At that time, William was working as a pressman in San Francisco, and was rarely home. He commuted to and from work, and worked additional shifts for extra income. "As a result, during the week, I would come home for two or three hours to

sleep and then head back to work." Morris Dec., Exh. 4, at 38; W. Crew Dec., Exh. 16, at 211.

435. While William worked long hours and was rarely home, Jean worked occasionally but mostly stayed home. Consistent with her upbringing marred by sexual and physical abuse, Jean Crew suffered symptoms of depression. She is often described as sad, withdrawn, and emotionless, staying home and not getting dressed for days at a time. Morris Dec., Exh. 4, at 38.

436. William recalls that "Jean did not socialize much after our marriage. She often stayed home and did nothing at all. She sometimes stayed in bed all day long, and there were many days when she did not even get dressed. I recall coming home from work often and being able to tell she had not been up for very long." Morris Dec., Exh. 4, at 38; W. Crew Dec., Exh. 16, at 211.

437. Jean's brother remembers that Jean's depressive symptoms were evident when she was young but that she became more sad and withdrawn as she got older. Jean's closest friend growing up, Joyce Cox, described Jean as "the most withdrawn person I knew. She never seemed to have any hopes, dreams or aspirations. I don't remember her ever going after something that she wanted. She had no hobbies or activities, and did not really have any close friends except for me. Jean was very complacent." Morris Dec., Exh. 4, at 38-39; J. Cox Dec., Exh. 15, at 206; E. Richardson Dec., Exh. 30, at 250.

438. According to Joyce, Jean "often stayed home the whole day without talking to anybody" and "was one of the least social people I knew." She had few if any friends, and avoided social engagements whenever she could. "Her whole life took place at home." Morris Dec., Exh. 4, at 38-39; J. Cox Dec., Exh. 15, at 206.

439. Petitioner recalls his mother staying in bed for days at a time. When she got up she did not get dressed and did not go outside, but stayed in her bathrobe and sat at the kitchen table, drinking iced tea and smoking cigarettes all day long. When she had to drive petitioner or his brother somewhere, she did not get dressed but had a gold coat that she put on over her night clothes. Morris Dec., Exh. 4, at 39.

440. Neighbors and friends of the Crews note Jean's isolation, withdrawal, complacency and other symptoms of depression. They describe her as moody, staying home all day and keeping to herself, failing to do any housework, and wearing nothing but her nightgown, slippers, and bathrobe. Morris Dec., Exh. 4, at 39-40; Declaration of Gail Frost, attached hereto as Exhibit 18; J. Cox Dec., Exh. 15.

441. Friends of Mike's and petitioner's uniformly describe Jean as being different from the other mothers in the neighborhood. They remember Jean as being quiet, sad, and withdrawn, staying at home in her bathrobe. Morris Dec., Exh. 4, at 40; Declaration of Kenneth Lovitt, attached hereto as Exhibit 23; Declaration of Doug Cox, attached hereto as Exhibit 14; Declaration of Leslie Bringel, attached hereto as Exhibit 12; Declaration of Glen McCormick, attached hereto as Exhibit 25; Declaration of Cheryl Watts, attached hereto as Exhibit 38; Declaration of Larry Rider, attached hereto as Exhibit 31.

442. There are also descriptions of Jean's sexual promiscuity. Her ex-husband, William, claims that he caught her having affairs. In addition, a neighbor, Gail Frost, states that Jean propositioned her husband while William was propositioning Gail. Such episodes are not inconsistent with Jean's depressive symptoms and may also indicate the presence of inappropriate sexual responses as a result of being a victim of child sexual abuse. Morris Dec., Exh. 4, at 41; Frost Dec., Exh. 18, at 218; W. Crew

Dec., Exh. 16, at 210; McCormick Dec., Exh. 25.

443. Jean is also described by Joyce Cox as being full of anxiety. She also suffered from a myriad of health problems including a duodenal ulcer in about 1959 and high blood pressure in 1967. Jean died in 1990, at the age of 59. Morris Dec., Exh. 4, at 40; J. Cox Dec., Exh. 15, at 206; Exhibit 86.

444. Friends and neighbors present a consistent picture of the Crew family as isolated and distant. One neighbor in Petaluma, Bernice Sebastian, recalls: "Most of the families that lived in our neighborhood were friendly and socialized together. The Crews were different and stayed pretty much to themselves. They also did not seem to be a very a tight-knit family. Jean, Bill, Mike and [petitioner] never seemed to do much together, but rather each seemed to do their own thing." Morris Dec., Exh. 4, at 41; Declaration of Bernice Sebastian, attached hereto as Exhibit 32, at 254; Watts Dec., Exh. 38; Lovitt Dec., Exh. 23.

445. William Crew was rarely home, and in addition to working long hours, was involved in numerous extramarital affairs. He admits that he was involved with other women throughout the marriage, and Joyce Cox describes him as the most aggressive womanizer she had ever come across. Morris Dec., Exh. 4, at 41-42; W. Crew Dec., Exh. 16, at 210; J. Cox Dec., Exh. 15, at 205; Sebastian Dec., Exh. 32; Watts Dec., Exh. 38.

446. Despite her knowledge of William's promiscuity or perhaps because of it, Jean simply withdrew and became more emotionally isolated. According to Joyce Cox: "What was so unusual about their relationship was how extreme Bill's womanizing was – he was relentless – and how Jean accepted it." Morris Dec., Exh. 4, at 42; J. Cox Dec., Exh. 15, at 205.

447. Jean's withdrawal and complacency and William's absence resulted in an almost complete lack of supervision and a seeming lack of

interest in their children. Morris Dec., Exh. 4, at 42-43; Declaration of Patricia Silva, attached hereto as Exhibit 33; Declaration of Michael Boumann, attached hereto as Exhibit 10; Declaration of Cathy Logsdon, attached hereto as Exhibit 22; Frost Dec., Exh. 18; McCormick Dec., Exh. 25; Rider Dec., Exh. 31.

448. Records indicate that by 1960, Jean's father Jack was having increasing difficulty holding down a job, due, among other things, to his psychological condition. He had his own business, but later worked at a filling station. Morris Dec., Exh. 4, at 43-44; Exhibit 117.

449. In the early 1960s, Jack and Irene Richardson moved from Texas to California. They lived for a period of time with the Crew family, and eventually rented a place of their own in the area. In about 1967, the Crew family moved to a farm on the outskirts of Petaluma, where they lived for a year or two. William then took a new job in San Jose in 1968 or 1969. When the family moved to San Jose, Jack and Irene moved onto the farm, where petitioner spent a great deal of time. Morris Dec., Exh. 4, at 44-45; W. Crew Dec., Exh. 16.

450. Jack Richardson's aberrant behavior continued when he and Irene moved to California, and as a result, petitioner and his brother Mike were exposed to a disturbing sexual environment. Morris Dec., Exh. 4, at 45; Lovitt Dec, Exh., 23; McCormick Dec., Exh. 25; Rider Dec., Exh. 31.

451. In the late 1960s, Doug Cox, the son of Jean's childhood friend, Joyce Cox, got into some trouble at home in Texas and came out to California. William got him a job at his place of work, and Doug lived with the Crew family for a period of time. He was approximately four years older than petitioner, but they spent a great deal of time together. Both Doug and petitioner's brother, Mike, were drinking, using drugs and were quite sexually active. They exposed petitioner to their lifestyle despite the

fact that petitioner was still a young teen. Morris Dec., Exh. 4, at 45; J. Cox Dec., Exh. 15; Doug Cox Dec., Exh. 14; Lovitt Dec., Exh. 23; Rider Dec., Exh. 31.

452. William and Jean separated in the summer of 1969, when petitioner was about fourteen, and divorced in 1970, and petitioner lived with his father after the breakup of his parents' marriage. Morris Dec., Exh. 4, at 45; W. Crew Dec., Exh. 16; Declaration of Barbara Miller, attached hereto as Exhibit 27; D. Cox Dec., 14; Exhibit 91.

453. William remarried in 1970. William's new wife, Barbara, had three children of her own. William was a heavy drinker who typically drank throughout the day. Morris Dec., Exh. 4, at 45-46; Declaration of Doug Thompkins, attached hereto as Exhibit 34; Miller Dec., Exh 27; W. Crew Dec., Exh. 16; Lambert Dec., Exh. 21; Silva Dec., Exh. 33; Declaration of Emily Vander Pauwert, attached hereto as Exhibit 36; Exhibit 92.

454. William and Barbara had adult parties that they allowed petitioner to participate in when he was in high school. These parties included sexually-charged games and involved a great deal of drinking. Morris Dec., Exh. 4, at 46-47; Boumann Dec., Exh. 10; Silva Dec., Exh. 33.

455. William continued his extramarital affairs during his second marriage, which was a major source of tension in his marriage. His relentless pursuit of other women included petitioner's girlfriends. Emily Vander Pauwert (formerly Emily Bates), reports that William came on to her sexually when William drove her home after dinner one night. Morris Dec., Exh. 4, at 47; Miller Dec., Exh. 27; Vander Pauwert Dec., Exh. 36, at 267. Lisa Moody told Robert Coldren, an investigator hired by Andrade's parents (whose reports were provided to trial counsel) that during the

Christmas holidays of 1981, William made a sexual advance towards her after becoming intoxicated. Exhibit 50.

456. William's sexual behavior extended to underage girls. During a camping trip in the mid-1970's, William was sharing a camper with the young daughter of friends of his and Barbara's, and he groped her and tried to get her to come into his bed. Morris Dec., Exh. 4, at 47-48; Miller Dec., Exh. 27; Thompkins Dec., Exh. 34.

457. Barbara and her son, Doug, confirm that William molested Barbara's daughter Debbie. Shortly after Barbara and William separated in 1986, Debbie told Barbara that William had been molesting her for about six years both before and during her teenage years. Doug witnessed William molesting Debbie when she was about 11 years old. Morris Dec., Exh. 4, at 48; Miller Dec., Exh. 27, at 238; Thompkins Dec., Exh. 34, at 260; Exhibit 92.

458. In December 1970, Jean married Bergin Mosteller. Jean was 39 years old and Bergin was 23. They moved to Arizona and later to South Carolina. Although there were no reports about her drinking prior to moving to South Carolina, at least beginning at that time, Jean was reportedly drinking a great deal and was often depressed and withdrawn. Morris Dec., Exh. 4, at 48; Logsdon Dec., Exh. 22; Declaration of Kay Chesney, attached hereto as Exhibit 13; Declaration of Dolly Lynn, attached hereto as Exhibit 24; Exhibit 87.

459. After Jean's mother died of cancer in December 1973, Jean's father, Jack, moved to South Carolina, where Jean and Bergin lived. Jack married Ola Forrester in 1976. Morris Dec., Exh. 4, at 48; Chesney Dec., Exh. 13; Lynn Dec., Exh. 24; Exhibits 103, 118.

460. Even in his mid-60s, Jack was mean-tempered and continued his sexually aberrant ways. John Turner, Ola's son, reports that Jack

molested John's granddaughter and John's brother's granddaughter. Morris Dec., Exh. 4, at 48-49; Turner Dec., Exh. 35, at 263.

Sexual Abuse of Mark Crew and its Impact

461. Reasonably competent counsel would have obtained and presented evidence that petitioner was sexually abused and traumatized when he was young, and that this abuse included molestation by his mother, exposure to age-inappropriate sexual experiences by his maternal grandfather, and sexual victimization by others. Competent counsel also would have presented additional evidence that petitioner was adversely influenced by his brother, Mike, and by Doug Cox, both of whom involved petitioner with drugs, alcohol and inappropriate sexual behavior. Morris Dec., Exh. 4, at 24, 49.

462. This evidence would have provided a critical context within which to see petitioner's behavior that could otherwise be construed as selfish, manipulative and irresponsible. For example, petitioner's compulsive womanizing, his drug and alcohol abuse, and his apparent tendency to fabricate stories can be understood as products of the damage to his psychological development, his subsequent need to alleviate symptoms of depression and anxiety, and his lack of self-esteem wrought by the emotional and sexual abuse he suffered as a child. Morris Dec., Exh. 4, at 26.

463. From petitioner's earliest memories and continuing for many years, petitioner's mother abused petitioner sexually. This most often occurred when she brought him into her bed during the frequent nights when petitioner's father was absent and when she joined him in the bathtub when petitioner was bathing. Morris Dec., Exh. 4, at 49.

464. These episodes of inappropriate sexual contact appeared to be the only time petitioner was able to get the love and affection which he (or

any child) needed, and with which his mother seemed unable to provide him during her days of depression and withdrawal. Petitioner describes just wanting his mother to hug him and hold him, which she did after she was sexually gratified. However, the closeness petitioner achieved with his mother during these episodes carried a tremendous psychological cost. Morris Dec., Exh. 4, at 49-50.

465. In a reversal of parental roles, petitioner remembers wanting to please his mother and bring her a sense of peace. Petitioner recalls when his mother hugged him during the times she used him for sexual purposes, he felt like it was the only time she was ever happy and the contact gave her a respite from her daily life in which, as he put it, "she was all twisted up." Morris Dec., Exh. 4, at 50.

466. Even in later years, whenever petitioner stayed with his mother they shared a bed. Petitioner recalls driving a truck through South Carolina when he 23 or 24 years old, and staying with his mother and sleeping in the same bed with her. Petitioner could not explain why, but states that it was just something they did that was never questioned, and "that was the way it had always been." Morris Dec., Exh. 4, at 50.

467. The love and comfort which petitioner received from his mother only through erotic expressions of affection was extremely damaging to his social, emotional and sexual development. In many ways, petitioner learned to confuse emotional intimacy with sex, and for the rest of his life he engaged in compulsive womanizing in a desperate and futile attempt to feel the same level of emotional intensity that he felt during these confusing, yet deeply emotional experiences, with his mother. Morris Dec., Exh. 4, at 50.

468. The arrival of petitioner's grandparents and his exposure to his grandfather's highly disturbed sexuality provided further damage. Morris

Dec., Exh. 4, at 50.

469. Petitioner recalls that his grandfather was always trying to touch girls or to get him and his brother Mike to do so. Petitioner describes his grandfather as always doing or saying something sexual. Morris Dec., Exh. 4, at 50-51; Rider Dec., Exh. 31.

470. According to Doug Cox: "Jack Richardson, was a 'dirty old man.' I never met anyone who talked about sex as constantly as he did. He also made advances on the young girls that came around. Before I moved to California, I was aware that Jack had put his hands on my sister. She had told me that this happened during a vacation that our family had taken to see the Crews in Petaluma." Morris Dec., Exh. 4, at 51; D. Cox Dec., Exh. 14, at 204.

471. Petitioner's friend, Kenneth Lovitt, recalls that: "Jack was a strange man. As soon as we were alone with him, he talked dirty in a way I had never really heard. Although many men made sexual references in private, this was different and unsettling. He talked about 'young pussy.' He always talked about young girls in a sexual way and talked about the things he liked doing to girls." Morris Dec., Exh. 4, at 51; Lovitt Dec., Exh. 23, at 229-230.

472. Jack often escorted Mike and his friends and girlfriends to movies and other places, and encouraged Mike to perform sex acts on the girls while Jack watched, which petitioner heard about after they happened. Morris Dec., Exh. 4, at 51-52; McCormick Dec., Exh. 25.

473. Petitioner recalls that several times when he was 11 or 12 years old, Jack got petitioner to kiss a neighborhood girl and put his finger in her vagina while Jack watched. Morris Dec., Exh. 4, at 52.

474. By the time petitioner was 12 or 13, he was having non-relational sexual activity with girls with greater frequency. This is not

surprising since early exposure to inappropriate sexual experiences often produces more sexualized behavior in children, including sexual preoccupations and compulsive sexual activities, than in children absent age-inappropriate or child sexual abuse experiences. Such children often develop ineffective boundaries and also engage in inappropriate sexual behavior modeled by influential people in the child's life. Morris Dec., Exh. 4, at 52.

475. Sexually abused children are at higher risk for future victimization. In petitioner's case, he frequently became a sexual object for older women, further thwarting healthy social, emotional and sexual development. Such experiences, contrary to popular stereotypes about men and masculinity can be quite damaging to the social, emotional and sexual development of young males. Morris Dec., Exh. 4, at 52-53.

476. Petitioner's childhood abuse of sexuality experiences provided the foundation for sexually compulsive behavior seldom under his control. Women became like a drug, and the main focus of his life. As he describes it, "This was what life was all about." Morris Dec., Exh. 4, at 53.

477. Also, beginning at a young age and continuing into adulthood, petitioner peeked in windows and watched other people have sex. In later years, he became involved in three-way sexual activity, but often preferred to watch the other two people have sex rather than have sex with the participants himself. These voyeuristic acts are common among individuals who have been raised in sexually charged environments and/or have child sexual abuse experiences as seen in petitioner's history. Morris Dec., Exh. 4, at 53; Thompkins Dec., Exh. 34; Declaration of John Griska, attached hereto as Exhibit 19.

478. Particularly in the absence of a stable father figure, petitioner looked up to two older boys, both his brother and Doug Cox. They were

not appropriate role models, and it appears that their primary influence on petitioner was to expose him at a very young age to drinking, drugs and inappropriate sexual activity. Morris Dec., Exh. 4, at 53-54; Rider Dec., Exh. 31.

479. Michael Crew is described as suffering from many of the problems later encountered by his brother: he was anxious and depressed, had low self esteem, resorted to alcohol and drugs at a very young age and was unable to maintain a stable relationship. Mike did poorly in school, and never graduated high school, after repeating his junior year. Morris Dec., Exh. 4, at 53-54; L. Bringel Dec., Exh. 12; J. Cox Dec., Exh. 15; Logsdon Dec., Exh. 22; Lovitt Dec., Exh. 23; Exhibit 95. Contrary to petitioner's father's testimony at the penalty phase, petitioner also had trouble in school. Exhibit 80.

480. Unlike any descriptions of petitioner, his brother, Mike, is described as mean, scary and sexually violent. Morris Dec., Exh. 4, at 54; Declaration of Don Bringel, attached hereto as Exhibit 11; McCormick Dec., Exh. 25; Silva Dec., Exh. 33. Mike hit petitioner and caused his nose to bleed so frequently that petitioner recalls talk about having to get his nose cauterized. Morris Dec., Exh. 4, at 54; L. Bringel Dec., Exh. 12.

481. Most likely due to his grandfather's influence, Mike was oversexualized at a young age and inappropriately aggressive. He exposed himself to girls, and was described as "rough," "aggressive," and trying to force himself on girls all the time with encouragement from his grandfather. Morris Dec., Exh. 4, at 54; D. Bringel Dec., Exh. 11; McCormick Dec., Exh. 25; Watts Dec., Exh. 38.

482. Mike had serious substance abuse problems and showed signs of depression. He was out of control in high school, doing a lot of drinking and using drugs, and was involved in a "biker lifestyle." Morris Dec., Exh.

4, at 54-55; Logsdon Dec., Exh. 22; Rider Dec., Exh. 31.

483. Mike married Cathy Logsdon in 1968, but did not settle down. He became depressed, used drugs and came home stumbling drunk several nights a week. Morris Dec., Exh. 4, at 55; Logsdon Dec., Exh. 22. Mike and Cathy repeatedly separated and reconciled, but Mike's behavior continued. After one such reconciliation, Cathy got pregnant but it soon became clear that Mike could not handle the responsibility of raising a family. Mike continued to drink heavily, see other women and remain involved with bikers. He and Cathy divorced in 1971. Morris Dec., Exh. 4, at 55; Logsdon Dec., Exh. 22; Exhibit 96.

484. Doug Cox lived with the Crew family for 1½ to 2 years, both in Petaluma and then in San Jose, beginning when petitioner was about 13 years old. Doug was Mike's age, but was friendlier with petitioner. Petitioner's father was aware that Doug used drugs but, nevertheless, allowed Doug to spend a great deal of unsupervised time with petitioner. Petitioner and Doug moved to a barn behind the farm in Petaluma, where they had built a loft. Not surprisingly, petitioner was exposed to drugs during this period of time. Also, spending time with Doug, who was sexually active, furthered petitioner's exposure to sex with girls in the neighborhood despite his young age. Morris Dec., Exh. 4, at 55-56; D. Cox Dec., Exh. 14.

485. Petitioner's friend, Kenneth Lovitt, remembers that Doug would buy them alcohol and smoke marijuana with them. Another friend, Larry Rider, remembers petitioner and Doug did drugs together and after Doug's arrival, petitioner spent less time with kids his own age. Morris Dec., Exh. 4, at 56; Lovitt Dec., Exh. 23, at 229; Rider Dec., Exh. 31.

486. As early as junior high school petitioner was drinking and using illicit drugs, to which he was first exposed by his brother and Doug

Cox. Morris Dec., Exh. 4, at 56.

487. Kenneth Lovitt recalls that he and petitioner used a "lot of drugs" in junior high school: "We smoked marijuana, at least 2-3 joints, every day after school. On weekends we not only smoked pot, but also drank and occasionally did LSD." Morris Dec., Exh. 4, at 56; Lovitt Dec., Exh. 23, at 230.

488. Petitioner's substance abuse problems continued and got worse in high school. According to Michael Boumann: "[Petitioner] and I did drugs together during our high school years, including marijuana and "crosstops," which is a form of speed. We also drank beer and hard liquor together, sometimes at his dad's place." Morris Dec., Exh. 4, at 56; Boumann Dec., Exh. 10, at 197.

489. Kenneth Lovitt remembers: "When [petitioner] moved to the west side of San Jose for high school, I visited him at his new place, and unlike the other kids I knew, it seemed that there was no supervision. I recall that we took a great deal of acid at his place when I visited. He seemed to be doing more drugs and seemed to be more strung out at that time." Morris Dec., Exh. 4, at 56; Lovitt Dec., Exh. 23, at 230.

490. According to his high school girlfriend and first wife, Patty Silva, petitioner "did a lot of crazy things in high school. He did a lot of drugs, including marijuana, barbiturates (which we called "reds") and LSD, and he drank heavily, mostly beer. He smoked joints daily and constantly, like they were cigarettes. He also took reds or drank beer just about every day. He did LSD about once a week, sometimes even at school. [Petitioner] passed out at least once a week from drinking or doing too many drugs." Morris Dec., Exh. 4, at 56-57; Silva Dec., Exh. 33, at 255.

491. Petitioner enlisted in the Army in December 1972. He and Patty got married in April 1973, after Patty became pregnant and their

daughter was born on October 9, 1973. The marriage did not last long, evidencing petitioner's desire but inability to maintain a stable, intimate relationship. Morris Dec., Exh. 4, at 57; Silva Dec., Exh. 33; Exhibits 81, 82.

492. A month after they got married, petitioner and Patty moved to Augusta, Georgia, where petitioner was stationed. According to Patty, petitioner drank a lot, did drugs and was depressed. Although he was initially excited about being a husband and father, he was "was unable to curb his drinking and drug use, and stayed out late at night." Morris Dec., Exh. 4, at 57; Silva Dec., Exh. 33, at 257-258.

493. After Patty went back to California for a period of time, she returned to Georgia, and she, petitioner and their daughter moved into a new apartment. As Patty recalls: "Things went well for awhile, but, again, [petitioner] continued to go out, drink and use drugs. I also started hearing that he was seeing another woman." They separated in July 1974, and Patty returned to California. It was clear that petitioner was "not able to settle down and handle the responsibilities of a family." Morris Dec., Exh. 4, at 57; Silva Dec., Exh. 33, at 258-259; Exhibit 81.

494. Petitioner successfully completed his active duty tour in December 1975, and received an honorable discharge in 1978 after completing his remaining reserve duty obligations. Despite his ability to function well in the Army, as evidenced by his honorable discharge and the testimony presented at the penalty phase of his trial, he was depressed and heavily involved with drugs and alcohol throughout his tour of duty. According to Patty:

> [Petitioner] drank a lot and did a lot of drugs when we lived in Georgia, especially on weekends. He drank about a six-pack every night after work and it was not unusual for him

> to drink eighteen beers on a Saturday. [Petitioner] also drank mixed drinks, smoked pot, and did a lot of barbiturates regularly. He experimented most seriously with speed, but also with mushrooms, mescalin, and whatever else was available from people he met in the Army. I never understood how he could function in the Army while constantly using drugs and alcohol.

Morris Dec., Exh. 4, at 57-58; Silva Dec., Exh. 33, at 257; Exhibit 82.

495. Patty also describes petitioner's symptoms of depression during this time:

> [Petitioner] got depressed at times while we were living in Georgia together, about once a month. Something really minor, like a bad comment from a supervisor or a mistake he made at work, sometimes sent him into a slump for several hours or even days. He could normally deal with these minor incidents without getting depressed, but during his down times he reacted by sleeping a lot, laying around watching T.V. for hours at a time, and drinking more beer than usual.

Morris Dec., Exh. 4, at 58; Silva Dec., Exh. 33 at 258.

496. In 1976, petitioner moved to Minnesota with Debra Lund with whom he had established a relationship. However, petitioner continued to drink, do drugs and date other women. In early 1977, petitioner left Debra and returned to California. He met and began dating Emily Vander Pauwert. Several months later, Debra came to California and she and petitioner reconciled. They were married on August 26, 1977, and moved back to Minnesota. On August 6, 1979, their son Christopher was born. Morris Dec., Exh. 4, at 58; Emily Vander Pauwert Dec., Exh. 36; Griska

Dec., Exh. 19; Exhibits 47, 83.

497. Sadly, this marriage was doomed to failure. Petitioner's inability to maintain a healthy, intimate relationship led him to see other women, and he continued to drink and do drugs. As petitioner puts it, when his life appeared to be going well, he became even more self-destructive, believing that he did not deserve the things he had. Although he badly wanted what he viewed as a normal life, when it appeared he had obtained everything he wanted – a wife, baby, house and job – he became anxious and overwhelmed. Morris Dec., Exh. 4, at 59; Exhibit 83.

498. His friend in Minnesota, John Griska, remembers petitioner trying to settle down and be a good father and husband. "Then one day he told me out of the blue that he was leaving her because he just could not handle being settled down and in a responsible relationship." John Griska believed that petitioner's "decision to leave Debra was extremely painful for [petitioner]. I found him sobbing on the floor of his garage over what to do about his son when he and Debra separated. He seemed to be reacting to some part of his own experience growing up." Morris Dec., Exh. 4, at 59; Griska Dec., Exh. 19, at 219-220.

499. Petitioner left Debra and after spending some time with his grandmother in Texas, returned to California in the summer of 1980, and resumed his relationship with Emily Vander Pauwert. However, his drinking, drugs and womanizing escalated. After the failure of his marriage to Debra, petitioner realized that he was incapable of having a normal life, and the ensuing self-hatred and despair resulted in a life that spiraled out of control. Morris Dec., Exh. 4, at 59; Vander Pauwert Dec., Exh. 36.

500. Upon his return to California, petitioner spent time with his father, which often meant heavy drinking. Emily Vander Pauwert recalls William Crew as a binge drinker who encouraged petitioner to drink with

him to the point where petitioner would get sick. Morris Dec., Exh. 4, at 59-60; Vander Pauwert Dec., Exh. 36, at 265-266.

501. Emily Vander Pauwert describes petitioner as a kind man who genuinely wanted a serious relationship with her but was compelled to see other women. Morris Dec., Exh. 4, at 60; Vander Pauwert Dec., Exh. 36, at 265.

502. Petitioner was often depressed, and like his mother, would withdraw and sleep during depressive episodes. Other times he had a great deal of trouble sleeping, often staying up all night, first in the bars and then walking around until daylight. Morris Dec., Exh. 4, at 60.

503. Girlfriends describe petitioner as getting very depressed often, at least once and often twice a week, during which time he would become sad and quiet. When he got depressed he either drank or withdrew and went to sleep. Morris Dec., Exh. 4, at 60-61; Vander Pauwert Dec., Exh. 36; Declaration of Viola Horne, attached hereto as Exhibit 20; Declaration of Cynthia Pullman, attached hereto as Exhibit 29.

504. Other times, petitioner could not sleep and stayed up all night, and would then sleep during the day. One girlfriend recalls that petitioner "could also stay awake for days at a time. He would describe having been up for three or four days and then, as he put it, he would 'crash and burn' and sleep for two or three days." Morris Dec., Exh. 4, at 60-61; Pullman Dec., Exh. 29, at 245; Vander Pauwert Dec., Exh. 36; Horne Dec., Exh. 20; Rider Dec., Exh. 31; Declaration of Beverly Ward, attached hereto as Exhibit 37.

505. Petitioner was drinking daily. Doug Crew, petitioner's step-brother, lived with petitioner and Dick Elander for a period of time in San Jose. He recalls that petitioner and Elander went out to the Saddle Rack bar five or six nights a week, and got drunk almost every night. According to

Emily Vander Pauwert, petitioner and Elander went out drinking frequently and returned home drunk. Morris Dec., Exh. 4, at 61; Vander Pauwert Dec., Exh. 36, at 265-266; Thompkins Dec., Exh. 34, at 261.

506. Other women petitioner saw during this time also note his constant drinking and drug use. Beverly Ward states that petitioner drank constantly. Cynthia Pullman states that "Mark had a drinking problem. There were times when Mark tried to quit drinking and went through periods of time when he would not drink, but then he would go on a binge. Sometimes he drank until he passed out." Morris Dec., Exh. 4, at 61; Pullman Dec., Exh. 29, at 245; Ward Dec., Exh. 37, at 269.

507. Petitioner was also smoking marijuana frequently, and was also using harder drugs, including methamphetamine and cocaine. Morris Dec., Exh. 4, at 61; Horne Dec., Exh. 20; Lovitt Dec., Exh. 23; Pullman Dec., Exh. 29.

508. In the few years immediately prior to the events leading to petitioner's arrest and conviction, the legacy of his upbringing became inescapable. He was often extremely depressed and his womanizing and drinking and drug use increased significantly. Petitioner had always drunk and used drugs to self-medicate his emotional distress, but, as he puts it, he went from partying with alcohol and drugs to serious self-destructive drinking and drug abuse. Morris Dec., Exh. 4, at 61.

Social History Conclusions

509. Had counsel retained an appropriate mental health expert and provided that expert with the information set forth herein, expert testimony regarding petitioner's social history, the sexual abuse and trauma he suffered and its devastating impact on his life could have been presented at the penalty phase of his capital trial. Morris Dec., Exh. 4, at 63; Phillips Dec., Exh. 6, at 146.

510. Reasonably competent trial counsel would have presented an appropriate mental health expert at the penalty phase who would have testified about how petitioner's background and upbringing affected his development and functioning.

511. As Dr. Morris concludes:

> Mark Crew's life cannot be understood without considering the impact of his social history, and in particular, the sexual abuse he suffered from his earliest memories and throughout his childhood. His early traumatic experiences resulted in confusion, shame, insecurity, a poor self-image and extreme emotional distress. Early on, Mark, like other sexual abuse survivors, began developing strategies to deal with his traumatic childhood experiences. Unfortunately, these strategies were formed based upon a breach of basic trust between a parent or other family members and child, unmet childhood needs, a fractured self-image, confusion about sexuality and serious misconceptions about interpersonal relationships. For example, many of these strategies included methods such as denial and substance abuse to insulate himself from painful childhood memories and emotional distress. He also learned to protect himself emotionally by not allowing people, especially desirable persons, to get too close, even though he yearned for the affection found in close relationships. While these strategies may have provided some utility as a child and adolescent, collectively they became a serious liability as an adult, leaving Mark with few resources to help him understand and cope with his emotional distress and normal life events. As a result, he became increasingly depressed, desperate and self-destructive.

Morris Dec., Exh. 4, at 61-62.

512. Reasonably competent trial counsel would have presented an appropriate mental health expert at the penalty phase who would have explained to the jury that "Mark's family history is remarkable for its prevalence of marital strife, neglect and abandonment of children, sexual abuse, mood disorders, and substance abuse which set the stage for Mark's traumatic upbringing." Morris Dec., Exh. 4, at 62.

513. Reasonably competent trial counsel would have presented an appropriate mental health expert at the penalty phase who would have explained to the jury that: "Mark may also be susceptible to depression and substance abuse, which are thought to have genetic components, due to his family history of such symptoms. On both sides of his family there appear to be evidence of mood disorders, as well as diabetes and high blood pressure, which are also known to affect mood. Mark also has several relatives, including his brother, father, paternal grandmother, and maternal uncle who appear to have had alcohol and/or drug problems." Morris Dec., Exh. 4, at 62.

514. Had Dr. Phillips been provided at the time of trial with information obtained pursuant to a reasonably competent social history investigation, he would have been able to testify in a manner consistent with the above-described facts:

> In sum, I concur with Dr. Morris that Mark Crew was sexually abused by his mother, neglected by his father, and exposed to further inappropriate sexual behavior by his maternal grandfather. These experiences, together with his family history of marital discord, sexual abuse, substance abuse and mental illness, had a destructive impact on his life. The abuse and trauma Mark suffered resulted in profound feelings of shame, low self esteem, and depression. He turned to drugs and alcohol as a

> young teen in order to alleviate these feelings, and as he entered adulthood his dependence on drugs and alcohol increased. Due to his self-loathing, substance abuse, depression and the confusing and conflicted feelings he felt towards women due to his mother's abuse of him, Mark was unable to maintain a stable, intimate relationship with a woman, and instead engaged in compulsive sexual behavior with numerous women. Mark became increasingly self-destructive, increasing his abuse of drugs and alcohol, and by the time of the events for which he was ultimately arrested, his life was out of control."

Phillips Dec., Exh. 6, at 147.

Mitigating Evidence of Addiction

515. Had counsel undertaken a reasonably competent investigation as alleged above, they would have uncovered information about petitioner's background that would have led any reasonably competent mental health professional to inquire into whether petitioner was dependent on drugs and alcohol, and had this information been provided to an appropriate expert, such as Dr. David Smith, the expert could have presented mitigating evidence regarding petitioner's addiction, the genetic and environmental factors predisposing petitioner to addiction, and the impact of petitioner's chronic abuse of drugs and alcohol. Smith Dec., Exh. 5, at 85-86.

516. A qualified psychiatrist such as Dr. Smith, had he been provided with readily available information regarding petitioner's history and had he interviewed petitioner, would have been able to testify to at least the following compelling evidence in mitigation regarding petitioner's predisposition to addiction, petitioner's long term dependence on drugs and alcohol and its impact.

a. Petitioner suffers from "addictive disease, consisting of drug and alcohol dependence.

b. Petitioner comes from a family with a multi-generational history of substance abuse, mood disorders and other mental illness, and petitioner was genetically predisposed to drug and alcohol dependence as well as to depression.

c. In addition to being genetically predisposed to addiction, petitioner turned to drugs and alcohol in an attempt to ward off the feelings of depression, anxiety, shame, and self-loathing that stemmed from his traumatic childhood experiences.

d. Petitioner began abusing alcohol and drugs as early as 13 years old, and his alcohol and drug use continued with increasing frequency and severity throughout his life.

e. Petitioner's chronic use of alcohol and drugs resulted in the derailment of his psychological development, undermined his ability to cope with stressors without drugs and alcohol, exacerbated his depressive symptoms and adversely affected his judgment and reasoning.
Smith Dec., Exh. 5, at 85.

517. Petitioner's family history indicates that he was genetically predisposed toward addiction and mood disorders. Smith Dec., Exh. 5, at 86-87.

a. Petitioner's father, paternal grandmother, paternal and maternal grandfather and maternal great uncle abused alcohol. Petitioner's mother became a heavy drinker later in her life. Smith Dec., Exh. 5, at 86; *see also* paragraphs, 408, 412, 429, 453, 458, above.

b. Petitioner's brother, Michael, used drugs and drank beginning at a young age. He got married at 18, and during the course of his 3-4 year marriage, came home "stumbling drunk" several nights a week.

The marriage ended when his wife would no longer tolerate his drinking and womanizing. Smith Dec., Exh. 5, at 86-87; *see also* paragraphs 479-483, above.

518. The family history also shows signs of mental illness, and particularly mood disorders. Smith Dec., Exh. 5, at 87.

a. Jack Richardson, was psychologically disturbed in many respects, and Jack's brother, Dewey, was institutionalized due to suffering psychotic episodes. Petitioner's paternal grandmother was reportedly unstable. Smith Dec., Exh. 5, at 87; *see also* paragraphs 404-406, 410-419, 448-450, 460, 468-473, above.

b. Petitioner's mother, Jean, appeared to suffer from major depression. She was sexually abused and traumatized as well as physically abused by her father when she was growing up. As an adult she is described by multiple sources as sad, withdrawn, isolated and emotionless. She often spent her days at home without going out or getting dressed, staying in bed or sitting at the kitchen table. Smith Dec., Exh. 5, at 87; *see also* paragraphs 404, 411-418, 435-443, 446-447, 458, above.

c. Petitioner's father reported symptoms of depression and anxiety, and petitioner's brother has been described as having symptoms of depression. Smith Dec., Exh. 5, at 87; W. Crew Dec., Exh. 16; Exhibit 93; *see also* paragraphs 398, 399, 479, 482, above.

d. Petitioner's father and paternal grandfather suffered from diabetes, and his mother had high blood pressure and developed a duodenal ulcer. Petitioner was diagnosed with high blood pressure after his arrest. Diabetes and high blood pressure are known to affect mood. Smith Dec., Exh. 5, at 87; W. Crew Dec., Exh. 16; Exhibits 84, 93; *see also* paragraphs 443, 513, above.

519. It is common for persons with mood disorders to "self-

medicate" with drugs and alcohol to alleviate the symptoms of their diseases such as over-whelming anxiety and depression. Smith Dec., Exh. 5, at 87.

520. As described above, petitioner suffered from symptoms of depression. He also suffered from insomnia, although during depressive episodes he slept a great deal. Smith Dec., Exh. 5, at 88-89; *see also* paragraphs 495, 502-504.

521. As described above, petitioner was sexually abused by his mother throughout his childhood, and he never received any appropriate intervention which might have helped ameliorate the impact of the abuse he suffered. On the contrary, he was further traumatized by his maternal grandfather, who had molested petitioner's mother when she was young, and who exposed both petitioner and his brother to sexually inappropriate behavior. Petitioner's father was rarely home, and was himself a hard-drinking womanizer who sexually abused young girls. Smith Dec., Exh. 5, at 87-88; *see also* paragraphs 445, 450-457, 461-475.

522. Addiction is one of the most common consequences of sexual abuse. It has been well documented that children who are subjected to trauma and abuse are more likely to turn to drugs and alcohol to "self-medicate" in an attempt to dull the pain they are experiencing. Smith Dec., Exh. 5, at 88.

523. An important consideration for determining a predisposition to addiction is the role of the parents in encouraging or condoning drugs and alcohol use and whether there is an enabling system present for the individual who is using drugs and alcohol. In petitioner's case, the environment in which he was raised fostered drug and alcohol use because of its availability, the lack of supervision and the encouragement or at least acquiescence by role models. Smith Dec., Exh. 5, at 89.

a. Petitioner's father was usually absent from the home, and his mother was often withdrawn. Friends and neighbors have remarked on the lack of supervision in the Crew household, creating an atmosphere conducive to drug and alcohol use. Petitioner was introduced to drugs by his older brother and by Doug Cox, the son of a family friend who was living with the Crew family because of problems he had been having at home in Texas. Although petitioner's father was aware that Doug was involved with drugs, he permitted petitioner and Doug to spend a great deal of unsupervised time together. As petitioner put it, his father didn't care what petitioner was doing as long as he did not have to leave work to attend to it. Smith Dec., Exh. 5, at 89-90; *see also* paragraphs 447, 451, 478-479, 484-486.

b. Petitioner became aware of his father's drinking around the time of the breakup of his parents' marriage, when he was approximately 14 years old. At that time he noticed his father drinking all the time at home and having a bottle with him when he was out. When petitioner was in high school, he attended his father and step-mother's parties where heavy drinking and the use of marijuana was condoned. He also found marijuana and amphetamines in his father's dresser drawers. Petitioner began drinking with his father when he was in his late teens, and in later years, petitioner's father encouraged petitioner to drink to the point of becoming sick. Smith Dec., Exh. 5, at 90; *see also* paragraphs 454, 500.

524. Drug abuse and alcoholism are common responses to the mental health symptoms and environmental stressors suffered by petitioner, which in his case were compounded by a genetic predisposition. Smith Dec., Exh. 5, at 90.

525. Petitioner's polysubstance dependence began in his early youth. By age 13 or 14, he smoked marijuana daily, drank, and used hallucinogens

frequently. In high school he continued to drink, smoke marijuana and use hallucinogens, and also used amphetamines and barbiturates. He reportedly passed out from drinking and drugs at least once a week. Petitioner's excessive drinking and drug use continued in the military, which he entered at the age of 17, and throughout his adulthood. In the years prior to the events for which he was arrested he was drinking every day, smoking marijuana, and using whatever other drugs were available, including cocaine and methamphetamine. Smith Dec., Exh. 5, at 90-92; *see also* paragraphs 484-500, 505-508, above.

526. When petitioner returned to California in 1980, after the failure of his second marriage, his drinking and drug use became most acute. He drank every day, keeping a bottle of whiskey under the seat of his car, and spent most nights at a bar. He also smoked marijuana frequently and used whatever other drugs were being used by friends. He was depressed and was unable to sleep at night. Smith Dec., Exh. 5, at 92; *see also* paragraphs 499-508, above.

527. Petitioner resumed a relationship with Emily Vander Pauwert. Emily reports that Mark drank to excess many times. She also states that petitioner's friend, Dick Elander, who petitioner had met in Minnesota, moved in with them, and petitioner and Elander went out drinking all the time, and when they did, they returned home drunk. Smith Dec., Exh. 5, at 92; *see also* paragraph 500, 505.

528. In the summer of 1981, petitioner and Dick Elander moved into a house with petitioner's step-brother Doug, who recalls that petitioner and Elander went out 5-6 times a week and got drunk almost every night they went out. Smith Dec., Exh. 5, at 92-93; *see also* paragraph 505, above.

529. By this time petitioner was drinking every day and taking whatever drugs were available, including marijuana, cocaine and

methamphetamines. He stayed at the bars until closing time, and then wandered around until daylight, unable to sleep. Smith Dec., Exh. 5, at 93; *see also* paragraphs 502-508, above.

530. Petitioner's girlfriends during this period of time recalled his excessive drinking. Cynthia Pullman believed that petitioner was an alcoholic. She noted that he tried to quit on occasion but would then binge until he passed out. Beverly Ward stated that petitioner drank constantly. Smith Dec., Exh. 5, at 93; *see also* paragraph 506, above.

531. Viola Horne stated that petitioner smoked marijuana. Cynthia Pullman reported that petitioner was using cocaine. Kenneth Lovitt recalled that when they got together in 1980-1981, they "ended up snorting a lot of crank together one evening, smoked pot and drank." Smith Dec., Exh. 5, at 93; *see also* paragraph 507, above.

532. As Dr. Smith would have testified: "The cumulative effects of chronic dependence on alcohol and drugs such as marijuana and hallucinogens beginning at a young age are widely recognized in the medical and scientific community and were so recognized in 1989. They include significantly impaired judgment, deficits in cognitive functioning (e.g., difficulty concentrating), and depressive symptoms." Smith Dec., Exh. 5, at 93.

533. "The level of mental impairment from long term substance abuse depends in part on the age of onset. Generally, the earlier in one's life one begins using drugs and alcohol the more serious the impairment. Petitioner began using drugs and alcohol at a very young age." Smith Dec., Exh. 5, at 93-94.

534. "Mark suffered from depression, anxiety, low self-esteem and sleep disorders, all of which were exacerbated by drug and alcohol abuse and/or withdrawal." Smith Dec., Exh. 5, at 94.

535. "The heavy use of drugs and alcohol as an adolescent thwarts psychological development. For example, petitioner never developed the ability to cope with depression, anxiety or stress without resort to drugs and alcohol because at the age when he would otherwise be developing these skills, he was already self-medicating. As a result, his emotional and psychological development was derailed at the time his addiction began." Smith Dec., Exh. 5, at 94.

536. Petitioner "suffered from chronic alcohol and drug dependence which stemmed from his traumatic upbringing and family history, and which had a long term deleterious effect on his mental health and functioning." Smith Dec., Exh. 5, at 94.

537. The evidence regarding petitioner's addiction was available in 1989. Had Dr. Smith been provided with information regarding petitioner's family background, trauma history, and substance abuse history and given an opportunity to interview petitioner he could have provided the above-stated evidence to the jury that determined petitioner's sentence. Smith Dec., Exh. 5, at 94.

538. Trial counsel reviewed the declarations of Dr. Morris and Dr. Smith. As Mr. Morehead acknowledges, "The information contained in their declarations provides the kind of compelling mitigation case I would have liked to have presented in Mark's case. I believe this information would have been available at trial if we had been able to conduct a reasonably adequate investigation." Morehead Dec., Exh. 1, at 4; O'Sullivan Dec., Exh. 2, at 10.

539. Mr. Morehead also recognizes that: "Had we had the time and the funds to conduct an adequate investigation for the penalty phase, including record gathering and interviewing family, friends and neighbors, and providing such information to our experts, I feel confident we would

have uncovered the information presented in the declarations of Dr. Morris and Dr. Smith, including the serious and substantial dysfunction in Mark's family and upbringing, including the fact that Mark was sexually abused by his mother, and resorted to drugs and alcohol to self-medicate his trauma-related symptoms, and Mark's genetic and environmental predisposition to addiction and the long term effects of chronic substance abuse." Morehead Dec., Exh. 1, at 4-5.

Counsel's Failures at the Penalty Phase Were Prejudicial

540. Trial counsel's failure to obtain and present readily available mitigating evidence at the penalty phase was prejudicial.

541. "[T]he entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raise[s] 'a reasonable probability that the result of the sentencing proceeding would have been different' if competent counsel had presented and explained the significance of all the available evidence." *Williams v. Taylor*, 529 U.S. at 399.

542. If the jury had considered the mitigating evidence alleged herein, in addition to that presented at trial, there is a reasonable probability that it would not have sentenced petitioner to death. *See Mayfield v. Calderon*, 270 F.3d at 928-929.

543. The evidence which counsel failed to uncover and present would have given the jury an explanation of petitioner's character and conduct, and would not have allowed the prosecutor to argue as he did that petitioner had a good and decent upbringing and should be shown no mercy because he thwarted his talent and opportunities. By contrast, the jury would have learned that far from a normal, happy life, petitioner was raised in a family with a history of physical and sexual abuse, substance abuse, marital discord, neglect and abandonment, and that petitioner was

traumatized as a child in a manner which impacted his functioning, leading to depression, low self esteem, dependence on drugs and alcohol, an inability to maintain relationships with women and compulsive sexual behavior.

544. Despite this upbringing, other than the capital offense, petitioner had been convicted of no other felonies, and he had no history of violence. Rather he was described universally as kind, generous, helpful and caring. As presented at the penalty phase, petitioner had an excellent military record and adjusted well to incarceration.

545. Mr. Morehead believes that: "the presentation of this evidence would have made a difference in the outcome at the penalty phase because it provided a compelling and sympathetic explanation of Mark's character and background, and would have provided a meaningful response to the prosecutor's portrayal of Mark as a lying, manipulative womanizer." Morehead Dec., Exh. 1, at 5; O'Sullivan Dec., Exh. 2, at 10.

546. The sentencing determination was very close.[12] The jury deliberated for a half hour on August 8, 1989, CT 2298; RT 5101-5104, for a full day on August 9, 1989, CT 2299, RT 5105-5106, and reached its verdict on August 10, 1989, at 2:45 p.m. CT 2300, RT 5107-5108. The initial vote during penalty deliberations was close to an even split between death and life without parole. Declaration of Steven D'Alencon, attached hereto as Exhibit 40; Declaration of Lee Gilmore, attached hereto as Exhibit 41. It was only after many votes and intense deliberations that the jury

---

[12] The trial judge, after reviewing the evidence, believed that the mitigating circumstances outweighed the aggravating circumstances. RT 5179. Whether or not the trial judge's decision to reduce petitioner's death sentence to life without possibility of parole was legally correct, his findings do suggest that this was a close case.

voted for death. Declaration of Helen Minard, attached hereto as Exhibit 43; Declaration of Frank Sepulveda, attached hereto as Exhibit 44; D'Alencon Dec., Exh. 40.

547. In the absence of evidence regarding the traumatic aspects of petitioner's background and their impact, the evidence presented by the defense at the penalty phase regarding petitioner's good conduct in the military and in jail was not relevant to the jury's penalty phase decision, and the evidence regarding his relatively normal childhood was uncompelling and irrelevant as well as inaccurate.

a. Juror Gilmore: "I remember that the evidence at the penalty phase consisted of witnesses who talked about what a good guy Mr. Crew was and how he had a pretty decent childhood. It was hard to see how this was relevant to the decision we had to make. During deliberations the jurors in favor of the death penalty focused on the facts of the crime to support their position. The defense left me and the other jurors who were more inclined to vote for life with little to respond, and the pro-death jurors eventually wore us down." Gilmore Dec., Exh. 41, at 274.

b. Juror Sepulveda: "Although there was some evidence presented from Mr. Crew's father about the difficulties he and Mr. Crew's mother had in their marriage, and there was evidence that Mr. Crew had a somewhat distant relationship with his mother, generally I got the sense that Mr. Crew had a pretty good childhood. In terms of Mr. Crew's adult life, I recall that he dated a lot of women, but I believed that he was a pretty good and normal guy who had chosen to do a horrible, horrible thing." Sepulveda Dec., Exh. 44, at 277.

c. Juror D'Alencon: "The evidence presented by the defense at the penalty phase did not seem particularly meaningful to our decision." D'Alencon Dec., Exh. 40, at 273.

d. Juror Carothers: "At the penalty phase of the trial, the defense did not paint a picture of Mark Crew. All we had to go on in deciding life or death were the facts of the crime, the brief evidence presented by the defense and Mark sitting emotionless in front of us." Declaration of Jeffrey Carothers, attached hereto as Exhibit 39, at 272.

548. Evidence that petitioner suffered from an abusive or traumatic childhood, was dependent on drugs and alcohol, and other evidence which explained petitioner's character and background would have been important to the jury's sentencing decision and may have made a difference between life and death:

a. Juror D'Alencon: "Any evidence that would have presented a fuller picture of Mr. Crew, including evidence of a disturbed family history or abusive childhood, would have been important in assessing his character and would have been of value in our deliberations, and may have made the difference between a life and death verdict." D'Alencon Dec., Exh. 40, at 273.

b. Juror Carothers: "Evidence of Mark's traumatic childhood that explained who he was would have had a bearing on the penalty phase deliberations and might have made a difference in the outcome." Carothers Dec., Exh. 39, at 272.

c. Juror Gilmore: "Evidence about Mr. Crew's background that would have given us some understanding as to why he turned out the way he did would have strengthened the position of those of us who were looking to give Mr. Crew a life sentence. I believe evidence that Mr. Crew was sexually abused as a child and that he became dependent on drugs and alcohol was the kind of evidence that would have changed my penalty phase decision." Gilmore Dec., Exh. 41, at 274.

d. Juror McGee: "I believe that evidence that Mr. Crew

experienced a traumatic childhood and had a history of alcohol and drug abuse would have been relevant to the decision on whether or not to impose a death sentence." Declaration of William McGee, attached hereto at 42, at 275.

e. Juror Minard: "I would have liked to have heard evidence about any difficult aspects of Mr. Crew's background, including drug abuse, physical or other abuse. Such evidence could have influenced my decision to vote for life without parole instead of death." Minard Dec., Exh. 43, at 276.

f. Juror Sepulveda: "I was initially in favor of a life without parole sentence but after deliberating for two days I decided to vote for death. If I had known more about Mr. Crew's background that could have changed my decision about sentencing him to death. Evidence which showed that he did not have such a normal upbringing, particularly, evidence that Mr. Crew was sexually abused as a child would have been very important to me." Sepulveda Dec., Exh. 44, at 277.
See also Murphy Dec., Exh. 3, at 16.

549. Reversal is required because it cannot be concluded with confidence that the jury unanimously would have sentenced petitioner to death if counsel had presented and explained all of the available mitigating evidence. *Mayfield v. Woodford*, 270 F.3d at 929 (citing *Williams v. Taylor*, 529 U.S. at 368-369, 399).

550. In light of the quantity and quality of mitigating evidence counsel failed to present at trial, it cannot be concluded with confidence that a unanimous jury still would have returned a sentence of death if it had heard this additional evidence.

\\

\\

C. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE BY FAILING TO INVESTIGATE THE PROSECUTION'S INFORMANT WITNESS AND IMPEACH HIM WITH READILY AVAILABLE EVIDENCE

551. Petitioner's confinement is unlawful in that his conviction and sentence were illegally and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their state constitutional analogs as a result of trial counsel's unreasonable failure to investigate, move to exclude, impeach and/or refute the testimony of Clint Williams, which was presented by the prosecution in rebuttal at the penalty phase. As a result of such deficiencies, there was a complete breakdown in the adversarial process. When these deficiencies are considered separately and also in conjunction with other claims alleged herein, the verdicts in the guilt phase and/or penalty phase of petitioner's trial must be set aside. There is a reasonable probability that but for these errors and omissions, the outcome of petitioner's trial would have been different. Counsel's failures undermine confidence in the outcome of the case.

552. Petitioner alleges the following facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

553. On August 1, 1989, the first day of the penalty phase, defense counsel indicated that they had learned of a report in which petitioner had been suspected of being a participant in an escape plot from Santa Clara County's North County Jail with two other inmates, Earthy Young and Marcus Cato, in December 1985. RT 4695-96.

554. Counsel indicated that if the prosecution were going to bring

this matter to the attention of the jury, they would present inmate witnesses to show that petitioner was not involved. RT 4696.

555. The prosecution did present evidence, through the testimony of an informant, Clint Williams, that petitioner was involved in planning an escape and had asked for Williams' assistance. RT 4971-76. Williams also testified that petitioner admitted that he killed a woman and buried her out of state. RT 4978. Williams further testified that petitioner threatened to kill him. RT 4983. Deputy Sheriff Todd Dischinger testified that Williams was a reliable informant and that Williams was given no benefits for his cooperation. RT 4987-88, 4999.

556. As Mr. Morehead acknowledges: "We obtained from the prosecution a listing of Mr. William's extensive prior record which I used to impeach him. We did not have the time to conduct an independent investigation of Mr. Williams and did not obtain the court files from his various prior cases." Morehead Dec., Exh. 1, at 5.

557. Trial counsel did not interview or present any inmate witnesses to show that petitioner was not involved in the alleged escape plot. Counsel also failed to investigate the credibility of the informant witness, Clint Williams, beyond the discovery they received, and otherwise failed to determine the validity of the allegations against petitioner. As a result, counsel failed to present readily available evidence to refute the allegations and to impeach Clint Williams.

558. Trial counsel failed to investigate the credibility of Clint Williams to determine his history as an informant and whether or not he received any benefits for his cooperation with law enforcement and/or for testifying for the prosecution.

559. Trial counsel failed to move to exclude the evidence pursuant to Evidence Code section 402. Counsel did not move to exclude this

incident from the jury's consideration based on the insufficiency of the evidence, the inherent unreliability of Williams or on the grounds that the evidence was more prejudicial than probative.

560. Reasonably competent counsel would have: a) investigated the allegations by interviewing other inmates (as counsel indicated they would) and would have obtained readily available evidence of Williams' criminal history; b) made specific discovery requests for potentially relevant and impeaching information pertaining to Williams; c) sought to exclude the evidence prior to its presentation to the jury; d) presented evidence to the jury to undermine Williams' credibility and refute the allegations if the motion to exclude the evidence was denied.

561. Petitioner incorporates by reference paragraphs 651-677, below, as if fully set forth herein.

562. To the extent that reasonably competent counsel should have obtained the information which the prosecutor knew or should have known, counsel rendered ineffective assistance.

563. Reasonably competent counsel would have conducted a search of Mr. Williams' criminal files at the Santa Clara County Clerk's Office, and had such a search been conducted, the following information would have been disclosed:

a. The District Attorney's Office considered Williams to be untrustworthy. For example, in 1976, then-Deputy District Attorney George Kennedy, pursuant to Penal Code section 1203.01, provided the following views on Williams: "He will never be a law-abiding citizen. He is a sneaky, hard-core, professional con man." *People v. Clinton James Williams,* Santa Clara Superior Court No. 60910, Penal Code section 1203.01 Statement by Deputy District Attorney George Kennedy, attached hereto as Exhibit 55.

b. On May 9, 1986, soon after providing information on petitioner's case to deputy sheriffs, a motion to modify probation was filed in Williams' case at the request of Deputy Paul Jones.[13] The motion was granted and Williams was released from custody. *People v. Clinton James Williams,* Santa Clara Superior Court No. 102014, Declaration in Support of Motion to Modify Probation, Order and Disposition, attached hereto as Exhibit 56.

564. Had counsel obtained such information they would have been able to demonstrate that even the prosecution considered Williams to be untrustworthy and could have refuted Williams' testimony that he received no benefit for providing information regarding petitioner. This evidence would have seriously undermined Williams' credibility. Morehead Dec., Exh. 1, at 5-6; O'Sullivan Dec., Exh. 2, at 11.

565. Reasonably competent counsel would have interviewed inmates incarcerated with petitioner at the North County Jail, particularly those named in the discovery provided to trial counsel. Had counsel done so, they would have found inmates who were willing to testify that: North County Jail was known as a "snitch tank," where law enforcement and the D.A.'s Office placed inmates to procure or manufacture incriminating information through the use of informants; Clint Williams, an informant who was housed at North County, was known by the other inmates for being an informant and for being untrustworthy; petitioner did not talk about the facts of his case to others, and it was extremely unlikely that petitioner would have confided in Clint Williams about his case or about

---

[13] Paul Jones was the deputy sheriff who conducted the investigation of the alleged escape plan. RT 4696. Williams testified in petitioner's trial that Paul Jones and Todd Dischinger were the two deputy sheriffs he "worked for" at the North County Jail. RT 4976.

any alleged escape plot; and petitioner was not involved in any escape plan with Earthy Young and Marcus Cato, or any other inmate.

a. Peter Fan was housed in the Santa Clara County North County Jail in the mid-1980s. He was interviewed by Deputy Sheriff Paul Jones, and his name appears in the discovery provided to trial counsel. He was not contacted by trial counsel. He would have provided the following information to trial counsel and would have been willing to testify as follows:

1) "North County Jail was a much smaller facility than Main Jail, and security was not as tight as at the Main Jail. Inmates awaiting trial on more serious charges or inmates who were a security concern were usually housed at the Main Jail. On the other hand, North County was where jailhouse informants generally were housed, and it was common knowledge that inmates were transferred to North County so that an informant would have an opportunity to obtain a confession."

2) "I was housed at North County even though I was charged with murder because of a policy of keeping people of the same ethnic background together. At that time I was the only Asian or Asian American in custody, and there was more space available for a single occupant cell in North County. I do not know why Mark Crew was housed at North County."

3) "Jail deputies at North County cultivated certain inmates as informants and gave them preferential treatment. These informants would try to befriend other inmates and ask about the details of their cases in order to be able to obtain or manufacture a confession. An informant who wanted to learn about another inmate's case could also pick up information from newspaper articles."

4) "It was a rule of thumb among the inmates at North

County not to talk about the details of their cases and to stop talking altogether when certain inmates came around. Mark Crew was not naive, and he had a reputation for being a pretty smart guy. I am sure that he knew not to talk about his case to other inmates. He never talked about his case to me, and I never heard of him talking about the details of his case to anyone else. The basic facts of his case, however, were well-known from the media coverage it received."

5) "Clint Williams was a trustee at North County Jail while I was there. As a trustee, Williams was allowed open access to the cell tier and most of the jail at any time of day. He was one of the inmates to stay away from because he was suspected of being an informant. Particularly given Clint Williams' reputation, it is extremely unlikely that Mark Crew would have confided in Williams. I do not believe that Mark would have told Williams details about his case, confessed his guilt or talked to him about an escape plan. It is much more likely that Williams fabricated this information in order to get himself a deal of some kind."

Declaration of Peter Fan, attached hereto as Exhibit 59, at 451-452.

b. Benigno Garza was housed in the Santa Clara North County Jail in the mid-1980s. He was interviewed by Deputy Sheriff Paul Jones, and his name appears in the discovery provided to trial counsel. He was not contacted by trial counsel. He would have provided the following information to trial counsel and would have been willing to testify as follows:

1) "The North County facility housed many informants who were in protective custody, and had a reputation for being a 'snitch tank.' It was common knowledge among the inmates at North County that the District Attorneys and Sheriffs Deputies worked together to get information about inmates by making deals with other inmates. Any inmate who was too

friendly with the guards was considered a potential snitch and someone to stay away from."

2) Garza remembers Clint Williams from North County: "Clint Williams is and was a rat. His reputation for being a snitch was well known at North County. No one in their right mind would have discussed their case or any plans to escape with Clint Williams."

3) "I remember Mark Crew talking about how he was being charged with a murder where the body was not found, but he never admitted committing the crime to me or as far as I knew, to anyone else. It is extremely unlikely that he confessed to anyone, especially to someone like Clint Williams."

4) "Mark's case was all over the television and newspapers. Inmates had access to and knew of Mark's case from these sources, and an informant could easily have used this information to fabricate a confession."

5) Garza remembers "being questioned about an escape plan back in 1985, and as I told the guards back then, I knew nothing about it. Prior to being questioned by guards, I heard nothing about the planning of an escape by any inmate. I believe the escape plot was completely fabricated by Clint Williams."

6) "Earthy Young and Marcus Cato were two African Americans that I shared a cell with. I never heard them talk about any escape plan. Even if they were somehow involved in an escape plan, there is no way they would have been involved with Mark Crew. At North County, blacks generally associated only with blacks and whites only associated with whites. It is extremely unlikely that white and black inmates would have had the kind of trusting relationship that would be necessary to plan an escape together."

Declaration of Benigno Garza, attached hereto as Exhibit 60, at 453-454.

c. Earthy Young was housed in the Santa Clara North County Jail in 1985. He was interviewed by Deputy Sheriff Paul Jones, and was alleged to have been involved in the escape plot with petitioner. Like petitioner, he was transferred to the Main Jail, but was never charged or disciplined for any alleged escape. He was not contacted by trial counsel. He would have provided the following information to trial counsel and would have been willing to testify as follows:

1) "I was not involved in any plan to escape in December of 1985, and never discussed any escape plan. I never heard my cellmates, who included Marcus Cato and Benigno Garza, discuss any escape plan."

2) "I was not friendly with Mark Crew, who was also housed at the North County Jail. I did not have any discussions regarding an escape with him, and never heard him talk about an escape."
Declaration of Earthy Young, attached hereto as Exhibit 62, at 458.

d. Marcus Cato was housed in the Santa Clara North County Jail in 1985. He was interviewed by Deputy Sheriff Paul Jones, and was alleged to have been involved in the escape plot with petitioner. Like petitioner, he was transferred to the Main Jail, but was never charged or disciplined for any alleged escape. He would have provided the following information to trial counsel and would have been willing to testify as follows:

1) "North County had a reputation for being a snitch house because of the large number of inmates who were there on protective custody for being informants."

2) Cato was wary of Clint Williams, who he remembers was a trustee at North County: "I was suspicious that he was a snitch because he had too many things going his way to be trusted. The guards

favored him, which they didn't do without good cause."

3) Cato would have provided the jury with an alternative explanation for how Williams could have obtained information regarding petitioner's case: "If my cell mates and myself were out on the yard, a trustee could have had access to the paperwork in our cells."

4) "In my experience, the inmates at North County were careful not to talk about the facts of their cases with other inmates. We did not generally know the facts of the other inmates cases unless they received media coverage."

5) Cato would have testified that he "was not involved in any plans to escape in December of 1985, and never discussed any escape plans. I never heard my cellmates, who included Earthy Young, Glenn Nickerson and Benigno Garza, discuss any escape plans. I do not remember, nor did I associate with Mark Crew, and I certainly did not plan any escape with him."

6) Cato recalls being moved to the Main Jail in December 1985, but did not know why, and he was not disciplined for being involved in an alleged escape attempt at North County in December of 1985. Declaration of Marcus Cato, attached hereto as Exhibit 58, at 449.

e. Robert Glover was housed in the Santa Clara County Jail in the mid-1980s, when Clint Williams was there, and was also incarcerated at CMC West State Prison at the same time that Williams was there. He was not contacted by trial counsel. He would have provided the following information to trial counsel and would have been willing to testify as follows:

1) "North County Jail housed a large number of inmates who were in protective custody. Informants were typically given protective custody, and there were therefore many informants in North County."

2) "North County Jail was known by the inmates housed there as a 'snitch tank,' and it was common knowledge that law enforcement and the D.A. set up inmates by putting them in North County Jail so that their informants could have an opportunity to obtain incriminating information. As a result, inmates at North County Jail were usually very careful not to talk about their cases with other inmates."

3) "Clint Williams was in protective custody at North County Jail, and was known throughout the jail as an informant. He was pretty much of a loner in jail because of his reputation as a snitch and a liar who would say anything to make a deal for himself. I do not believe anyone would have confided in him, and certainly no one would have talked to him about an escape attempt or the details of the crime they were charged with."

Declaration of Robert Glover, attached hereto as Exhibit 61, at 457.

566. Trial counsel established that petitioner was transferred from the North County Jail to the Main Jail prior to an attempt by inmates to cut the screen on the sun deck at North County, allegedly part of the escape plan (RT 4993-4998), and was never prosecuted for an escape attempt due to insufficient evidence. RT 4998.

567. Trial counsel unreasonably failed to obtain and present the above-described information, which together with facts they did present, that petitioner was no longer housed at the North County Jail when the acts to further the alleged escape were committed, would have established that there was insufficient evidence of petitioner's involvement in an escape plot, and the testimony of Williams was irrelevant, inherently unreliable and far more prejudicial than probative.

568. Trial counsel unreasonably failed to seek a hearing on the admissibility of Williams' testimony pursuant to Evidence Code section

402, and had they done so and presented the above-described information, it is reasonably probable that the evidence would have been excluded.

569. Assuming the trial court refused to exclude Williams' testimony, reasonably competent counsel would have used the above-described evidence at trial to impeach Williams and Deputy Sheriff Jones, undermine Williams' credibility, and cast serious doubt that petitioner was involved in an escape plan. Without such evidence, counsel's cross-examination of Williams was wholly ineffective and the jury was permitted to discount petitioner's exemplary conduct in jail as a factor in mitigation.

570. Trial counsel unreasonably failed to seek an instruction on the inherent unreliability of jailhouse informants.

571. Trial counsel unreasonably failed to seek a limiting instruction which would have informed the jury that the testimony of Clint Williams was rebuttal to mitigating evidence and could not be considered in aggravation.

572. Counsel had no tactical reasons for his errors and omissions, Morehead Dec., Exh. 1, at 5-6, and such failures were prejudicial.

573. Williams and the deputy who vouched for his reliability were the only penalty phase witnesses presented by the prosecution, and their testimony negated evidence of petitioner's good conduct while incarcerated which formed one of the pillars of the penalty phase case. Williams' testimony also undermined any residual doubt the jury may have had by providing further evidence that petitioner admitted the crime. Had counsel undertaken a reasonably competent investigation they could have successfully moved to suppress Williams' testimony or negated the impact of his testimony by undermining his credibility and presenting further evidence of petitioner's lack of involvement in the alleged escape plan. Had they done so, it is reasonably probable that the outcome of the

proceeding would have been different. Counsel's failures undermine confidence in the outcome of the case.

D. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE BY FAILING TO ENSURE THAT THE JURY UNDERSTOOD THE NATURE AND SCOPE OF ITS ROLE IN DETERMINING THE APPROPRIATE SENTENCE

574. Petitioner's confinement is unlawful in that his conviction and sentence were unlawfully and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their state constitutional analogs because trial counsel rendered ineffective assistance of counsel at the penalty phase in offering a pinpoint instruction which restricted the jury's consideration of mitigation and in failing to object to the prosecutor's misleading argument. As a result of such deficiencies, there was a complete breakdown in the adversarial process. When these deficiencies are considered separately and together, and also in conjunction with other claims alleged herein, the verdicts in the guilt phase and/or penalty phase of petitioner's trial must be set aside. There is a reasonable probability that but for these errors and omissions, the outcome of petitioner's trial would have been different. Counsel's failures undermine confidence in the outcome of the case.

575. Petitioner alleges the following facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

576. As argued on automatic appeal, the prosecutor committed several instances of misconduct during his closing argument at the penalty phase which misled the jury as to its sentencing responsibilities. As more fully described in the Appellant's Opening and Reply Briefs, Claim N,

incorporated herein: a) the prosecutor misstated the weighing process by discussing mitigation and aggravation in terms of "good" and "bad," and by urging the jurors to compare the aggravating nature of the circumstances of the crime against the good that the jurors had done in their own lives. RT 5060; b) the prosecutor argued, based on the evidence improperly admitted at the guilt phase and in violation of the trial court's ruling, the impact of the victim's death on her family. RT 5061-64; c) the prosecutor improperly argued that petitioner's lack of remorse and future dangerousness could be considered in aggravation. RT 5064-67; d) the prosecutor improperly argued that the evidence introduced by the defense in mitigation should be considered in aggravation of sentence (e.g., the fact that defense evidence showed petitioner as a caring, generous, and helpful person actually demonstrated that he was manipulative and dangerous, and used these qualities "for incredible evil" RT 5065-5066; that evidence presented by the defense which showed that petitioner had a decent background, a good relationship with his father and was free from misconduct, drug or alcohol abuse and truancy in his early years established that he had no excuse for the crime he committed. RT 5069).

577. Trial counsel unreasonably failed to object and/or seek an admonition to these instances of misconduct, and had no tactical reason for failing to object.

578. Trial counsel sought and obtained a pinpoint instruction which informed the jury of specific evidence it was to consider in mitigation.[14] It

---

[14] The instruction informed that jury that "[i]In deciding whether or not to impose a sentence of life without the possibility of parole rather than a sentence of death you are entitled to give consideration to the evidence set out below as evidence in mitigation," and listed specific evidence including "the testimony of the defendant's father Bill Crew that the defendant's

is reasonably probable that combined with the other instructions given (and the prosecutor's argument), the jury was misled to believe that the evidence listed in the instruction comprised the only evidence it could consider in mitigation and thereby unduly restricted the jury in its consideration of mitigating evidence. Counsel's decision to offer this instruction therefore was unreasonable and not the product of sound trial strategy.

a. The jury was also given a pattern jury instruction which informed it that under factor (k) the jury should consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record *that the defendant offers* as a basis for a sentence less than death . . . ." CT 2551 (emphasis added).

b. The pinpoint instruction implied that it was a list of the precise evidence the defense was "offer[ing] as a basis for a sentence less than death." The instruction did not make clear, however, that it was a non-exclusive list of examples of mitigating evidence; that the jury was free to consider any other extenuating facts or facts which would reduce

---

mother and stepmother were emotionally neglectful towards the defendant;" the testimony of petitioner's grandmother and other witnesses that petitioner was kind, thoughtful, helpful and generous towards them; the testimony of Colonel Pearce "that the defendant was an outstanding soldier and that he served his country honorably and was promoted to sergeant;" the testimony of the jail deputies that "the defendant was a model prisoner and that he was helpful to Santa Clara sheriff's staff and to other prisoners; the testimony of Jerry Enomoto that "the defendant would make an ideal inmate in the state prison system and would provide a calm and moderating influence on some of the other prisoners;" "the testimony of the defendant's family and friends that they did not believe that he should receive a death sentence;" and "the testimony from various witnesses that the defendant had a high degree of mechanical aptitude and could provide useful skills to benefit others in the state prison system." CT 2554.

petitioner's moral culpability or justify a sentence less than death.

c. Petitioner incorporates by reference paragraphs 702-719, below, as if fully set forth herein.

d. It is reasonably probable that the jury believed that it was limited to considering as mitigation only the evidence listed in the instruction. However, under California law and under the Eighth and Fourteenth Amendments to the U.S. Constitution, the jury was entitled to consider mercy, sympathy, and any mitigating aspect of the crime or of petitioner's character whether or not it was specifically listed in the pinpoint instruction. In petitioner's case, such mitigation included, but was not limited to the following: 1) according to the evidence, it was Bruce Gant, not petitioner, who struck the fatal blow to the victim; 2) lingering doubt as to petitioner's guilt; 3) petitioner had committed no prior acts of violence and had no prior felony convictions; 4) sympathy and mercy.

579. Counsel's failures were prejudicial. The sentencing determination was close in view of the lack of any aggravating circumstances other than the crime, the length of the jury's deliberations, and the trial judge's findings. The instruction offered by counsel likely had the effect of precluding the jury from considering "any other circumstance which extenuates the gravity of the crime" or "any sympathetic or other aspect of the defendant's character and record" that was not specified in the pinpoint instructions. Furthermore, counsel's failure to object to the prosecutor's misleading argument and/or seek an admonition in order to clarify the nature and scope of the jury's role, further skewed the sentencing determination in favor of the prosecution. Counsel's failures undermine confidence in the outcome of the case. With regard to prosecutorial misconduct, at minimum, counsel unreasonably failed to preserve the issue for appeal, and had they done so it is reasonably probable that the outcome

would have been different.

E. CUMULATIVE INEFFECTIVE ASSISTANCE OF COUNSEL

580. Petitioner's confinement is unlawful in that his conviction and sentence were unlawfully and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their state constitutional analogs, because the cumulative impact of trial counsel's errors prejudiced petitioner. These deficiencies caused a complete breakdown in the adversarial process, and when they are considered separately and also in conjunction with other claims alleged herein, the verdicts in the guilt phase and/or the penalty phase of petitioner's trial must be set aside. There is a reasonable probability that but for these errors and omissions, the result of the proceeding would have been different. Counsel's failures undermine confidence in the outcome of the case.

581. Petitioner alleges the following facts in support of this claim, among others to be developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

582. Petitioner incorporates by reference all the allegations of ineffective assistance of counsel alleged herein. *See* paragraphs 117-579, above, and paragraphs 602, 650, 677, 691, 704, 805, below.

583. When the impact of counsel's multiple errors and omissions alleged herein are considered cumulatively, the prejudice is manifestly clear.

584. The nature and extent of counsel's failures rendered the trial fundamentally unfair.

\\

F. THE STATE'S DENIAL OF ADEQUATE AND TIMELY FUNDING FOR INVESTIGATIVE AND EXPERT SERVICES DEPRIVED PETITIONER OF A FAIR TRIAL

585. Petitioner's confinement is unlawful in that his conviction and sentence were unlawfully and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their state constitutional analogs, because he was deprived of necessary resources to mount a defense at the guilt and penalty phases in violation of his rights to due process, equal protection, the effective assistance of counsel, to confront and cross examine witnesses, to present mitigating evidence, to a fair and reliable determination of guilt and to a fair, reliable, non-arbitrary and individualized sentencing determination.

586. Petitioner alleges the following facts in support of this claim, among others to be developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

587. Petitioner incorporates by reference paragraphs 117-584, above, as if fully set forth herein

588. Petitioner was indigent and unable to fund the requisite investigation and expert services without state assistance.

589. The constitutional right to counsel includes the right to ancillary services that will assist counsel in preparing of a defense and are reasonably necessary therefore.

590. The right to reasonably necessary ancillary defense services is also well established in California. *See, e.g., Cornevsky v. Superior Court*, 36 Cal.3d 307, 318-320 (1984); Cal. Penal Code § 987.9.

591. On or about December 13, 1988, petitioner's counsel filed their

first ex parte application for funds pursuant to Penal Code section 987.9. The application requested reasonably necessary funds for investigation, experts, and other expenses. Sealed RT 10-13.[15] The court granted the 987.9 application in part only, ordering little more than half of the funds requested be disbursed to counsel, and denying the remaining request for funds. Sealed RT 14.

592. On or about March 30, 1989, counsel filed their second application for 987.9 funds. Sealed RT 23-27. The court granted the 987.9 application in part only, ordering less than half of the funds requested to be disbursed to counsel, and denying the remaining funds. Sealed RT 28.

593. The amount and kinds of funds requested for investigative and expert services were typically allotted in capital cases at that time. *See, e.g.,* Sealed RT 12, 26

594. The penalty phase began on August 1, 1989. On or about August 3, 1989, trial counsel filed their third application for 987.9 funds. The application requested reasonably necessary funds related to the investigation and presentation of the penalty phase. Sealed RT 148-149. The third request was not ruled on, and no further funds were disbursed to counsel prior to the conclusion of the trial.

595. To the extent that trial counsel's failures to investigate and present a defense at the guilt and penalty phases of his trial can be attributed to the lack of funding, petitioner was denied his rights under the due process and equal protection clauses to "basic tools of an adequate

---

[15] Petitioner's funds requests and the court's orders pursuant to Penal Code section 987.9 are part of the certified appellate record filed with this Court and are under seal. By raising this claim petitioner does not intend to waive his attorney-client or attorney work product privilege. *See* paragraph 109, above.

defense." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971); *see also Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

596. The "raw materials integral to the building of an effective defense" include expert assistance, both at the guilt and sentencing phases. *Ake v. Oklahoma,* 470 U.S. at 77, 84. Additionally, the "right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance." *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980); *see also In re Ketchel*, 68 Cal.2d 397, 399-400 (1968)("[a] fundamental part of the constitutional right of an accused to be represented by counsel is that his attorney . . . is obviously entitled to the aid of such expert assistance as he may need . . . in preparing the defense.").

597. The denial of necessary resources hampered the presentation of mitigating evidence in violation of the Eighth and Fourteenth Amendments. *Lockett v. Ohio*, 438 U.S. 586 (1978)(sentencer may not be precluded from considering relevant mitigating evidence); *Gardner v. Florida*, 430 U.S. 349 (1977)(a death sentence imposed, at least in part, on the basis of information which defendant has no opportunity to deny or explain, violates due process); *Beck v. Alabama*, 447 U.S. 625 (1980) (procedural rules that diminish the reliability of the guilt determination in capital cases are unconstitutional); *Woodson v. North Carolina*, 428 U.S. 280 (1976)(requiring heightened reliability in the determination that death is the appropriate punishment in a specific case).

598. Petitioner was also arbitrarily denied a state created liberty interest in the provision of all reasonably necessary funds pursuant to Penal Code section 987.9, in violation of due process and equal protection. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

599. The denial of necessary resources hampered counsel's

investigation and presentation of a defense at the guilt phase and penalty phase of trial. Morehead Dec., Exh. 1, at 2-4; Murphy Dec., Exh. 3, at 14.

600. The lack of funds for timely defense investigation and expert assistance deprived petitioner of critical witnesses and evidence both at guilt and penalty phases of trial.

601. To the extent that trial counsel's failure to present a reasonably competent defense at the guilt and/or penalty phase was due to the lack of adequate and timely funding, the denial of such funding was prejudicial because, had counsel been appropriately funded, they would have obtained and presented all the information alleged herein.

602. Reasonably competent counsel would have requested reasonably necessary investigative and expert funds in a timely manner and would have made an adequate showing of the need for such funds. To the extent that trial counsel made inadequate or untimely application for funds, counsel rendered ineffective assistance of counsel, and such failures were prejudicial.

G. THE PROSECUTION'S DECISION TO CHARGE PETITIONER WITH CAPITAL MURDER AND SEEK THE DEATH PENALTY WAS ARBITRARY AND CAPRICIOUS

603. Petitioner's confinement is unlawful in that his conviction and sentence were unlawfully and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their state constitutional analogs, because of actions of the Santa Clara County District Attorney's Office in determining to charge petitioner with special circumstance murder, and seeking to obtain a death penalty judgment against him in an arbitrary, capricious and discriminatory manner.

604. Petitioner alleges the following facts in support of this claim,

among others to be developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

605. In the 1980s, Santa Clara County was more prone to seek death penalty judgments than many other counties in California.

606. From 1984-1989, the Santa Clara County District Attorney's Office did not have standardized guidelines, protocol or criteria for determining when to charge a case capitally and to pursue the death penalty.

a. On March 5, 2002, petitioner's current counsel requested from the Santa Clara District Attorney's Office, *inter alia*, "3. Any and all policy manuals, regulations, guidelines, policy statements, internal memoranda and other writings which have been relied upon, used, or promulgated by the Santa Clara District Attorney's Office at any time pertaining to the procedure by which a decision is made as to whether to allege a special circumstance and/or to seek the death penalty in a prosecution brought under Penal Code § 190." Public Records Act Request, attached hereto as Exhibit 63.

b. On March 19, 2002, Assistant District Attorney Dave Davies, the prosecutor in petitioner's case, responded to the Public Records Act Request and indicated that to his knowledge "there are no records or documents" relating to the above-described request. Letter from Dave Davies to Andrew Love, March 19, 2002, attached hereto as Exhibit 64.

607. In petitioner's case, the Santa Clara County District Attorney's Office determined to charge petitioner with a special circumstance in order to seek the death penalty, and pursued the death penalty against petitioner, without using any standardized guidelines, protocol or criteria to make such decisions.

608. In the absence of mandated selection procedures the Santa

Clara County District Attorney's Office exercised discretion in a discriminatory, arbitrary and capricious manner based on inconsistent, undisclosed and improper criteria.

609. There was no special circumstance authorized by the California Penal Code that was applicable to petitioner's case.

610. Nancy Andrade's parents hired a private investigator after their daughter disappeared, called witnesses on their own, were in frequent contact with the police and District Attorney's Office, and were otherwise extremely involved in bringing petitioner to trial. *See, e.g.,* 9/13/88 RT 6-8; RT 3753-3760, 3775.

611. At the behest of Andrade's parents, then-Congressman Leon E. Panetta, inquired of the San Jose Police Department as to the status of the investigation into Andrade's disappearance, writing two letters to the Chief of Police. Correspondence between Congressman Leon E. Panetta and Chief of Police Joseph D. McNamara, attached hereto as Exhibit 65.

612. In petitioner's case, the Santa Clara County District Attorney's Office determined to charge petitioner with a special circumstance in order to seek the death penalty, and pursued the death penalty against petitioner for reasons which were irrelevant to the nature of the crime or the character of the defendant, including, but not limited to the following:

a. The race of the victim;

b. The socio-economic status, political influence and prominence, and persistence of the victim's family;

c. The pressure brought to bear by those with political influence;

d. The publicity generated by the case;

e. The political aspirations of members of the District Attorney's Office;

f. The personal proclivities of the Deputy District Attorney assigned to the case.

613. But for these improper and irrelevant considerations petitioner would not have been charged with capital murder, tried for capital murder or sentenced to death.

614. The decision to seek death in this case was based on an arbitrary classification beyond the scope of the District Attorney's charging discretion. The District Attorney's death penalty charging decision had a discriminatory effect against petitioner and was motivated by a discriminatory purpose. It had no rational relationship to legitimate law enforcement interests, but was instead the result of political pressures and other arbitrary, capricious and discriminatory considerations.

615. The decision to prosecute cannot be based on such arbitrary, capricious, and selective grounds. It must be based on legitimate law enforcement interests and cannot be the result of political pressures and other arbitrary, capricious and discriminatory considerations. This prohibition against selective prosecution extends to the decision to seek the death penalty.

616. The death penalty was not sought in cases involving similarly situated defendants in Santa Clara County and/or in other California counties who did not belong to this arbitrary classification and where the prosecution was not subjected to such political pressures. The death penalty would not have been sought in petitioner's case but for these political pressures and other arbitrary, capricious and discriminatory considerations.

617. Instead of being based on legitimate law enforcement interests, the decision to seek the death penalty was based on arbitrary political pressure applied to the Office of the District Attorney on the behalf of and by the victim's politically well-connected family, the personal proclivities

of the prosecutor, media attention, and other arbitrary, capricious and discriminatory considerations. Similarly situated death-eligible defendants whose cases had not been subjected to such considerations were not charged with the death penalty.

618. Petitioner's death sentence was obtained in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights to be charged, tried, convicted and sentenced based on a non-arbitrary and non-capricious decision by the prosecution as to whether to seek the death penalty, and a non-arbitrary, non-capricious, reliable and individualized sentencing determination based on the character and culpability of the defendant, and the circumstances of the crime.

H. THE PROSECUTION IMPROPERLY TAINTED THE JURY VENIRE BY EXPOSING IT TO INFLAMMATORY INFORMATION

619. Petitioner's confinement is unlawful in that his conviction and sentence were unlawfully and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their state constitutional analogs, because of actions of the Santa Clara County District Attorney's Office in exposing the potential jurors to inflammatory, inaccurate and prejudicial information about petitioner, the decedent and the alleged crimes, in a manner which prevented petitioner from obtaining an impartial jury drawn from a fair cross-section of the community and rendered the trial fundamentally unfair.

620. Petitioner alleges the following facts in support of this claim, among others to be developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

621. On Monday, April 17, 1989, jury selection in petitioner's case

commenced. The first group of prospective jurors were sworn on their qualifications and competency for jury service. Jurors without hardships filled out questionnaires and were scheduled to return for later questioning. Hardships were heard and excused. CT 2126.

622. On April 18th, 19th and 20th, 1989, additional panels of prospective jurors were sworn. Those prospective jurors with hardships were excused and the remaining jurors filled out questionnaires and were scheduled to return for later questioning. CT 2128-2130.

623. On Sunday, April 23, 1989, the San Jose Mercury News published an article entitled "Charmed to Death" by Nancy Spiller, attached hereto as Exhibit 67.

624. The article was a sensationalized account of the alleged crime with an extremely derogatory portrayal of petitioner and which included inflammatory, inaccurate and prejudicial facts which would not be admissible at trial, and which were not presented at trial, including, but not limited to the following:

a. The article included inaccurate and misleading statements allegedly made by the victim regarding her fear of petitioner which, even if true, would not have been admissible at trial, and were not properly introduced at trial: 1) Andrade was put on edge when petitioner asked her to take out a life insurance policy and name him as the beneficiary, and according to the article, she did so; 2) Andrade said to a friend "that guy's . . . psychotic and he's going to kill me;" 3) the reason Andrade gave custody of her children to her ex-husband was that she feared for their safety if she took them with her; 4) Andrade's friends told a private investigator that Andrade feared for her safety.

b. The article portrayed petitioner in an extremely negative light with misleading and inaccurate information that was not admissible at

trial, and was not introduced at trial, including, that 1) he had a fondness for divorcees, older women with the prospects of small property settlements; 2) he lied about his age and invented a personal history which included tales of heroism in Vietnam; 3) he committed prior violence and threats of violence.

c. The article stated, contrary to the evidence, that Elander's "real mission" in going to Utah to work for Richard Glade was that petitioner was planning to kill a woman and they were looking for a rugged stretch of mountains in which to dispose of the body. It further stated that given all that petitioner did for Elander, "there wasn't anything Elander wouldn't do for Crew, including finding a place in which to dispose of a body."

d. The article stated, contrary to the evidence, that petitioner and Andrade checked into a Motel 6 in Fremont on August 23rd, and that "by all accounts" that when petitioner checked out he was alone.

e. The article stated, contrary to the evidence, that when petitioner arrived in South Carolina after killing Andrade, he, Elander and Bergin Mosteller had "a few celebratory shots of Jack Daniels."

f. The article stated, contrary to the evidence, that in searching Gant's property, there was evidence that a 55-gallon drum had been on the property within a container from a semi-truck, and that bones of a dog that appeared to be the same breed, age and gender as Andrade's dog was found and that it had died from a blow to the side of the head. (Evidence regarding the dog bones was found inadmissible at trial as unduly speculative. RT 4306.).

g. The article included statements from Inspector McCurdy of the District Attorney's Office that Andrade's father, Jake Wilhelmi, would take justice into his own hands if petitioner were not convicted.

h. The article stated that Jake Wilhelmi was so distraught that

he could not work for six months and that the case had caused such strain that he and his wife have separated. (The trial court rejected the prosecutor's attempts to present victim impact evidence at the penalty phase. RT 4972.).

i. The article stated that Andrade's family "want most of all to lay their daughter to rest" and refers to an offer to petitioner that if he were to reveal the location of Nancy Andrade's body that the death penalty would be dropped, and that on two separate occasions that offer was rejected. (Such a reference could only have come from the Office of the District Attorney).

625. Assistant D.A. Davies acknowledged that there was information in the article "which is not necessarily going to be the evidence in the case" and "there is evidence in the article which is potentially prejudicial." RT 752.

626. Jury selection resumed on April 24, 1989, and continued until June 26, 1989.

627. While the prospective jurors who appeared during the week of April 17th may have been admonished not to read anything in the media, new panels of prospective jurors were called on or after April 24, 1989, and prior to that time they had not appeared in the courtroom, and therefore were not so admonished.

628. On April 24th, trial counsel stated their concerns with the article on the record. RT 748-757.

629. Many prospective jurors were excused because they had read the article and were prejudiced by it.[16]

---

[16] *See, e.g.,* RT 759-760 (Thelma Beckman stated after reading the article that she could not be fair to petitioner; that there was no way he

630. The District Attorney's Office and the San Jose Mercury News had a very friendly and cooperative relationship. *See, e.g.*, Correspondence from Delia Rios to Assistant D.A. Alan Nudleman, June 22, 1984, attached hereto as Exhibit 66. Had Assistant D.A. Davies or others in the District Attorney's Office requested that the article be delayed until jury selection was completed and/or that any inflammatory and prejudicial information be deleted from the article it is reasonably likely that the request would have been honored.

631. Members of the Office of the District Attorney's Office provided information to the reporter which resulted in the above-described prejudicial, inflammatory, misleading and inaccurate facts to be published during jury selection.

---

could be innocent); RT 778-81 (David Boddie stated that after skimming article he got impression that petitioner was guilty); RT 839-843 (Mary Chavez did not read the article but co-workers did and they gave her the impression that petitioner was guilty); RT 1296-1298 (Theresa Castro read the article which caused her to think that petitioner was guilty); RT 1493-1494 (Dolores Askew stated that she read the article and formed opinions about the case); RT 1669-1670 (Charles Burback was excused after finding the article slanted, biased); RT 2219-2220 (Kathleen Cornell was excused because of reading the article); RT 2245-2246 (Lloyd Casey was excused because of reading the article); RT 2301 (J. Bauer was excused because his wife read the article and talked to him about it); RT 2355 (Marguerite Erickson was excused because she read the article); RT 2391 (Ellen Wikle was excused because she read the article); RT 2441-2442 (Diana Magana was excused because she read the first paragraph of article); RT 2471 (Edward Kolstad was excused because he read the article); RT 2476-2477 (Phyllis Moore was excused because she read the article); RT 2778-2779 (Dorothy Ervin was excused because she read the article and came to the conclusion that petitioner was guilty); RT 2780 (Elizabeth Tracy was excused because she read the article and did not believe she could be a fair juror); RT 2783-86 (Michael Danao was excused because he read the article and was not sure he could be impartial).

632. Members of the Office of the District Attorney's Office were aware that the article was going to be published during jury selection, and were aware that some of the information they and others provided would be highly inflammatory and inadmissible but did nothing to seek to delay publication of the article or ensure that inflammatory, prejudicial or misleading facts were not presented in the article.

633. On Monday, April 24, 1989, Assistant D.A. Davies admitted that he spoke with the reporter about the timing of the article and indicated that he told her that the article could be published "after last Friday [April 21st] , so that [the court] could admonish the prospective jurors. . . ." However, as the prosecutor knew, while four panels of prospective jurors had been sworn and admonished, additional panels would need to be added to the jury venire subsequent to April 21st, *see* CT 2141, 2153, and those potential jurors would be exposed to the article without having first been admonished to avoid media reports about the case. *See* CT 2141, 2153.

634. Members of the Office of the District Attorney committed misconduct by: a) knowingly providing inaccurate, inflammatory and inadmissible information to the reporter of the article in order to present a misleading and negative portrait of petitioner to the public which they knew or should have known would unduly influence and bias the jury venire; b) encouraging publication of the article before all prospective jurors had been admonished to avoid media reports of the case; and c) doing nothing to ensure that inaccurate, inflammatory and inadmissible information would not be published in the article.

635. The actions and inactions of the District Attorney's Office tainted the jury venire, restricted the pool of unbiased prospective jurors, deprived petitioner of an impartial jury drawn from a fair cross-section of the community and rendered the trial fundamentally unfair in violation of

petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

I. THE PROSECUTION FAILED TO DISCLOSE IMPEACHING AND EXCULPATORY EVIDENCE AND KNOWINGLY PRESENTED FALSE TESTIMONY AT THE GUILT PHASE

636. Petitioner's confinement is unlawful in that his conviction and sentence were illegally and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their state constitutional analogs because the prosecution failed to disclose material, exculpatory and impeaching evidence known to the prosecution but not to the defense; misrepresented and/or suppressed material, exculpatory and impeaching evidence known to the prosecution but not the defense; knowingly presented perjured testimony; and failed to correct false statements at trial.

637. Petitioner alleges the following facts in support of this claim, among others to be developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

638. "The prosecution is obligated by the requirements of due process to disclose material exculpatory evidence on its own motion, without request." *Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir. 1997) (citing *Kyles v. Whitley*, 514 U.S. at 432-34; *United States v. Bagley*, 473 U.S. 667, 682 (1985)). Evidence is material and must be disclosed "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433; *Bagley*, 473 U.S. at 682. Material evidence includes "evidence bearing on the credibility of government witnesses." *Carriger*, 132 F.3d at 479 (citing *Bagley*, 473 U.S. at 676; *Giglio v. United States*, 405 U.S. 150, 154-55 (1972)). *See generally, Brady v. Maryland*, 373 U.S. 83,

87 (1963). This includes inducements made to witnesses in exchange for favorable testimony. *See Carriger*, 132 F.3d at 479; *United States v. Bernal-Obeso*, 989 F.2d 331, 333-34 (9th Cir. 1993).

639. The fact that the prosecutor may not have been actually aware of the facts known to law enforcement does not excuse the duty of disclosure because of the prosecutor's unique position to obtain information known to other agents of the government. *Carriger*, 132 F.3d at 479-80.

640. When it knowingly presents perjured testimony, *Mooney v. Holohan*, 297 U.S. 103, 112 (1935), allows a witness to give a false impression of the evidence, *Alcarta v. Texas*, 335 U.S. 28, 31 (1956), or allows false evidence to go uncorrected, *Napue v. Illinois*, 360 U.S. 264, 269 (1959), the State also violates due process: "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976); *see also Napue v. Illinois*, 360 U.S. at 271.

641. Richard Elander, in addition to a grant of immunity, was given other promises, consideration, favors, leniency, assistance from law enforcement and prosecutorial agencies in exchange for his cooperation and testimony that was not disclosed to the defense, including but not limited to an agreement not to investigate or prosecute Elander for perjury or any other crimes.

642. The jury was informed that Richard Elander received immunity in exchange for his testimony. *See* RT 4081.

643. The prosecutor, Assistant D.A. Davies, insisted that the immunity agreement did not cover the crime of perjury. RT 4090. However, the prosecutor had no intention of investigating or prosecuting Elander for his perjured testimony at the preliminary hearings, at

petitioner's trial and/or at the trial of Gant and Mosteller.

644. Elander testified falsely under oath as to material matters at petitioner's and Mosteller's preliminary hearing, at petitioner's trial, and at the Gant/Mosteller trial. Indeed, Elander admitted lying at petitioner's preliminary hearing. *See, e.g.,* RT 4041-42. *See* paragraph 253, above. Perjury is punishable by imprisonment in state prison for two-to-four years, Cal. Penal Code § 126, and is a capital crime where it procures the conviction and execution of an innocent person. Cal. Penal Code § 128. However, Elander was not investigated or prosecuted for perjury.

645. Elander was the prosecution's key witness. Had the jury been aware that Elander had received additional consideration for testifying other than his grant of immunity, particularly in relation to perjury, it is reasonably likely that the outcome of the case would have been different.

646. Petitioner's constitutional rights that were violated by said actions include but are not limited to the deprivations of petitioner's due process rights to a fair trial by the state (i.e., to have the prosecutor reveal all material, exculpatory evidence, including that which affected credibility and impeached prosecution statements; correct any demonstrably or inferentially false statements offered by witnesses called by the state at trial or in pretrial proceedings; refrain from suppressing or misrepresenting material exculpatory or impeaching evidence; and refrain from offering false and/or knowingly false statements against petitioner); the deprivation of his right to a fair balance of advantages between the prosecution and defense; the deprivation of his right to confront his accusers via an informed cross-examination; the deprivation of his right to a reliable determination of guilt; the deprivation of his Sixth Amendment right to effective assistance of counsel; the violation of his federal due process rights as recognized in *Hewitt v. Helms*, 459 U.S. 460 (1983); and his

Eighth Amendment right to a reliable, individualized, non-arbitrary and non-capricious sentencing determination.

647. The evidence that the prosecution suppressed, failed to reveal and failed to correct was material, and the prosecutor's acts and failures to act seriously prejudiced petitioner.

648. Had the defense been aware of or provided with the material exculpatory and impeaching evidence suppressed by the prosecution, the credibility of Richard Elander at the guilt phase would have been so substantially impeached and thoroughly undermined as to undermine confidence in the outcome of the trial.

649. To the extent that the prosecutor and his agents did not deprive petitioner of due process as stated above, the information set forth herein is newly discovered evidence which so totally undermines the accuracy and reliability of the proceeding that petitioner's federal constitutional rights, including the right to due process guaranteed by the Fourteenth Amendment to the United States Constitution and petitioner's Eighth Amendment right to heightened reliability, were violated.

650. To the extent that the prosecutor and his agents did not deprive petitioner of due process as stated above, and evidence of petitioner's claims was known or could have been discovered by diligent investigation before trial by trial counsel, said counsel was ineffective in unreasonably failing to adequately investigate and present such evidence, and but for this failure the outcome of petitioner's trial would have been different.

\\

J. THE PROSECUTION SUPPRESSED MATERIAL EVIDENCE AND KNOWINGLY PRESENTED FALSE EVIDENCE AT THE PENALTY PHASE

651. Petitioner's confinement is unlawful in that his conviction and sentence were illegally and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their state constitutional analogs because the prosecution failed to disclose material, exculpatory and impeaching evidence known to the prosecution but not to the defense; misrepresented and/or suppressed material, exculpatory and impeaching evidence known to the prosecution but not the defense; knowingly presented perjured testimony and failed to correct false statements at trial with regard to the prosecution's penalty phase witnesses.

652. Petitioner alleges the following facts in support of this claim, among others to be developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

653. Petitioner incorporates paragraphs 551-573, above, by reference as if fully set forth herein.

654. The prosecution presented no evidence in aggravation at the penalty phase. After the defense presented its case in mitigation, the prosecution called Clint Williams, a jailhouse informant, as a rebuttal witness. Over defense objection, RT 4948-49, Williams testified regarding petitioner's alleged plan to escape from county jail to rebut mitigating evidence presented of petitioner's good conduct in jail. Also over defense objection, *id.*, Williams was permitted to testify that petitioner told him he committed the murder: "He told me that the police came to his place, I believe it was in Campbell that he lived, and that he got rid of the body,

buried it in an orchard out of state." RT 4978. Williams further testified that petitioner threatened to kill him. RT 4983.

655. The prosecution presented the testimony of a jail deputy that Williams was a reliable informant who received no benefits for providing this information. RT 4987, 4999.

656. Contrary to the prosecution's representation, Williams did receive benefits for providing this information and for testifying, including, but not limited to favorable treatment and promises of leniency, which were not disclosed to the defense. Equally important, members of the District Attorney's Office considered Williams to be untrustworthy and a con man.

657. The District Attorney's Office considered Williams to be untrustworthy. In 1976, then-Deputy District Attorney George Kennedy, pursuant to Penal Code section 1203.01, provided the following views on Williams: "He will never be a law-abiding citizen. He is a sneaky, hard-core, professional con man." This material and impeaching information was known or should have been known by the prosecution but was not provided to the defense. Exhibit 55; Morehead Dec., Exh. 1, at 5; O'Sullivan Dec., Exh. 2, at 11.

658. When Williams encountered petitioner at the county jail, he was serving a one-year sentence for grand theft. Williams testified that at that time he was a trustee in the jail and was working as an informant for deputies Todd Dischinger and Paul Jones. RT 4975-76.

659. On or about December 8, 1985, Williams informed the deputies of petitioner's alleged escape plan. On May 9, 1986, a motion to modify probation was filed in Williams' case at the request of Deputy Paul Jones. The motion was granted and Williams was released from custody. Exhibit 56.

660. Deputy Jones' request was made in exchange for Williams'

cooperation in petitioner's case and in other cases. However, this material and impeaching information which was known or should have been known by the prosecution was not disclosed to the defense. Morehead Dec., Exh. 1, at 5-6.

661. By the time of petitioner's penalty phase, Williams was back in custody. He testified that he was serving time in state prison at CMC West Facility, and had sixty days remaining on his sentence. RT 4974.

662. After his testimony, he wrote a letter to Judge Schatz indicating that he had made an arrangement with the prosecutor, Dave Davies, that he would be able to serve his remaining time in protective custody in the county jail:

> I was brought down from state prison with the promise I would spend my remainder of time in protective custody at Palo Alto County Jail. This was the understanding I got from Mr. Davies, the District Attorney . . . . Mr. Davies told me personally that I would get to serve the rest of my time here.

Correspondence from Clinton Williams to Judge Schatz, attached hereto as Exhibit 57.

663. The prosecutor did not disclose to the defense that he had any meeting or communication with Williams, that he had told Williams that he would be able to serve the rest of his time in county jail, or that Williams had requested that he serve the rest of his time in county jail in exchange for testifying. Not only did the prosecutor fail to provide this material and impeaching information but he permitted Williams to testify falsely that he received no benefit in exchange for providing information. Morehead Dec., Exh. 1, at 6.

664. Williams testimony, which was bolstered by a deputy sheriff,

negated petitioner's mitigating evidence regarding petitioner's good conduct in jail. Had any or all of the above-described material and impeaching information been disclosed to petitioner, Williams' credibility would have been seriously undermined and the impact of his testimony would have been greatly diminished. Morehead Dec., Exh. 1, at 5-6; O'Sullivan Dec., Exh. 2, at 11.

665. There was no legitimate reason for petitioner to be housed at North County Jail rather than the Main Jail. Petitioner was placed in North County Jail so that incriminating or prejudicial information could be procured or manufactured by jailhouse informants who were incarcerated at the North County Jail. Fan Dec., Exh. 59; Garza Dec., Exh. 60; Glover Dec., Exh. 61.

666. The Office of the District Attorney knew or should have known that Clint Williams was an unreliable informant. Williams' testimony regarding petitioner's case and petitioner's alleged escape plan was false, and the prosecutor knew or should have known that it was false.

667. It was established that petitioner was transferred prior to an attempt by inmates to cut the screen on the sun deck, allegedly part of the escape plan. RT 4993-4998. Petitioner was not prosecuted for the escape plan based on insufficient evidence. RT 4954.

668. Williams obtained information regarding petitioner's case from the media and/or court papers and not from petitioner. Cato Dec, Exh. 58; Fan Dec., Exh. 59; Garza Dec., Exh. 60; Glover Dec., Exh. 61.

669. Petitioner was not involved in any escape plan and information regarding an alleged escape did not come from petitioner. Cato Dec, Exh. 58; Fan Dec., Exh. 59; Garza Dec., Exh. 60; Glover Dec., Exh. 61; Young Dec., Exh. 62.

670. The prosecution failed to disclose material exculpatory and

impeaching evidence regarding Williams' credibility and the favorable treatment he received in exchange for his cooperation and testimony. *Brady v. Maryland*, 373 U.S. 83; *Kyles v. Whitley*, 514 U.S. 419.

671. The prosecution elicited the above-described testimony which it knew or should have known was false and misleading, and allowed it to go uncorrected. *Giglio v. United States*, 405 U.S. 150; *United States v. Agurs*, 427 U.S. at 103; *Napue v. Illinois*, 360 U.S. at 269. Even if the presentation of false evidence was unwitting, petitioner is entitled to a new trial. *See e.g., United States v. Young*, 17 F.3d 1201, 1203-04 (9th Cir. 1994) ("A conviction based in part on false evidence even false evidence presented in good faith, hardly comports with fundamental fairness."); *see also Beck v. Alabama,* 477 U.S. 625 (heightened degree of reliability required in capital case).

672. Petitioner was prejudiced by this false and misleading testimony as it undermined a central focus of the case in mitigation regarding petitioner's institutional adjustment by providing evidence of a plan to escape and threats of violence.

673. Clint Williams' testimony was highly prejudicial at the penalty phase because he provided the jury with critical evidence of petitioner's alleged involvement in disposal of the victim's body and undermined an argument based on lingering doubt.

674. Petitioner's constitutional rights that were violated by said actions include but are not limited to the deprivations of petitioner's due process rights to a fair trial by the state (i.e., to have the prosecutor reveal all material, exculpatory evidence, including that which affected credibility and impeached prosecution statements; correct any demonstrably or inferentially false statements offered by witnesses called by the state at trial or in pretrial proceedings; refrain from suppressing or misrepresenting

material exculpatory or impeaching evidence; and refrain from offering false and/or knowingly false statements against petitioner); the deprivation of his right to a fair balance of advantages between the prosecution and defense; the deprivation of his right to confront his accusers via an informed cross-examination; the deprivation of his Sixth Amendment right to effective assistance of counsel; the violation of federal due process rights as recognized in *Hewitt v. Helms*, 459 U.S. 460; and his Eighth Amendment right to a reliable, individualized, non-arbitrary and non-capricious sentencing determination.

675. The evidence that the prosecution suppressed, failed to reveal and failed to correct was material, and the prosecutor's acts and failures to act seriously prejudiced petitioner. Had the defense been aware of or provided with the material exculpatory and impeaching evidence suppressed by the prosecution, the penalty phase testimony of Clint Williams would have been suppressed or so substantially impeached and thoroughly undermined as to undermine confidence in the outcome of the trial.

676. To the extent that the prosecutor and his agents did not deprive petitioner of due process as stated above, the information set forth herein is newly discovered evidence which so totally undermines the accuracy and reliability of the proceeding that petitioner's federal constitutional rights, including the right to due process guaranteed by the Fourteenth Amendment to the United States Constitution and petitioner's Eighth Amendment right to heightened reliability were violated. Moreover, to the extent that the trial court was made aware of any or all of the undisclosed information after the jury reached its verdict, *see* Exhibit 57, and failed to disclose it to trial counsel, the court committed error and judicial misconduct which violated petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

677. To the extent that the prosecutor and his agents did not deprive petitioner of due process as stated above, and evidence of petitioner's claims was known or could have been discovered by diligent investigation by trial counsel, said counsel was ineffective in unreasonably failing to adequately investigate and present such evidence, and but for this failure the outcome of petitioner's trial would have been different.

K. THE PROSECUTION SUPPRESSED MATERIAL EVIDENCE AT THE PENALTY PHASE REGARDING PETITIONER'S FAMILY HISTORY

678. Petitioner's confinement is unlawful in that his conviction and sentence were illegally and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their state constitutional analogs because the prosecution failed to disclose material, exculpatory and impeaching evidence known to the prosecution but not to the defense at the penalty phase.

679. Petitioner alleges the following facts in support of this claim, among others to be developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

680. Sgt. Graves of the San Jose Police Department was notified by petitioner's step-mother, Barbara Miller, that petitioner's father, William (Bill) Crew, had molested Ms. Miller's daughter, and had done so for an extended period of time.

681. At the time he received this information, Sgt. Graves was aware that petitioner was awaiting trial on capital murder charges, that Barbara Miller was petitioner's step-mother and that the molestation accusation involved petitioner's father.

682. Ms. Miller learned that Bill Crew molested her daughter after the breakup of their marriage in 1986. She then contacted the San Jose Police Department and spoke at length with Sgt. Graves: "I told him that I was aware that Bill was seeing a woman named Melea (who Bill later married) who lived in Fremont and had young daughters. I was concerned that Bill would do to them what he did to my daughter." Miller Dec., Exh. 27, at 237.

683. According to Barbara Miller, her conversation with Sgt. Graves occurred before petitioner's trial. "[Petitioner] was in Santa Clara County Jail at the time, and Sgt. Graves was aware that Bill was [petitioner's] father. Sgt. Graves assured me that he would inform the Fremont Police Department about this and that he would have them contact me. I never heard back from the Fremont Police or from Sgt. Graves." Miller Dec., Exh. 27, at 238.

684. This was material evidence relevant to the penalty phase regarding petitioner's family and background that was not disclosed to the defense by the police or prosecution. *Brady v. Maryland*, 373 U.S. 83; *Kyles v. Whitley*, 514 U.S. 419.

685. The District Attorney's Office knew or should have known of this evidence and should have disclosed it to petitioner's counsel.

686. Petitioner's constitutional rights that were violated by said actions include but are not limited to the deprivations of petitioner's due process rights to a fair trial by the state (i.e., to have the prosecutor reveal all material, exculpatory evidence, including potential mitigating evidence); the deprivation of his right to a fair balance of advantages between the prosecution and defense; the deprivation of his Sixth Amendment right to effective assistance of counsel; the violation of his federal due process rights as recognized in *Hewitt v. Helms*, 459 U.S. 460; and his Eighth

Amendment right to a reliable, individualized, non-arbitrary and non-capricious sentencing determination.

687. The evidence that the prosecution suppressed and failed to reveal was material, and the prosecutor's acts and failures to act seriously prejudiced petitioner.

688. Evidence of child abuse or child molestation by a member of petitioner's immediate family constituted relevant mitigating evidence. In addition, disclosure of such information would have led reasonably competent counsel to investigate the nature and extent of such abuse and molestation in petitioner's family which would have led to the discovery of additional mitigating evidence. *See, e.g.*, paragraph 372.

689. Had the defense been aware of or provided with this material evidence suppressed by the prosecution, a far more compelling penalty phase presentation could have been made so as to undermine confidence in the outcome of the trial. *Kyles v. Whitley*, 514 U.S. at 435.

690. To the extent that the prosecutor and his agents did not deprive petitioner of due process as stated above, the information set forth herein is newly discovered evidence which so totally undermines the accuracy and reliability of the proceeding that petitioner's federal constitutional rights, including the right to due process guaranteed by the Fourteenth Amendment to the United States Constitution and petitioner's Eighth Amendment right to heightened reliability, were violated.

691. To the extent that the prosecutor and his agents did not deprive petitioner of due process as stated above, and evidence of petitioner's claims was known or could have been discovered by diligent investigation by trial counsel, said counsel was ineffective in unreasonably failing to adequately investigate and present such evidence, and but for this failure the outcome of petitioner's trial would have been different.

L. CUMULATIVE PROSECUTORIAL MISCONDUCT

692. Petitioner's confinement is unlawful in that his conviction and sentence were illegally and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their state constitutional analogs due to the pervasive misconduct committed by the prosecution which rendered the trial fundamentally unfair and unreliable.

693. Petitioner alleges the following facts in support of this claim, among others to be developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

694. Petitioner incorporates all of the allegations of prosecutorial misconduct set forth in petitioner's first petition, No. S084495, paragraphs 147-198, as if fully set forth herein.

695. Petitioner incorporates by reference all of the allegations of prosecutorial misconduct alleged herein. *See* paragraphs 179, 198-199, 215, 221-222, 243, 576, 603-691.

696. The above-described acts, omissions and conduct of the Office of the District Attorney and their agents was so egregious and pervasive as to render petitioner's trial fundamentally unfair and unreliable. Individually and collectively, the prosecutor's misconduct violated petitioner rights and rendered his trial, conviction and sentence fundamentally unfair in violation of his Fifth, Sixth, Eighth and Fourteenth Amendments.

697. The prosecutor in this case abused his position of trust. It is well settled that a prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he performs in representing the interests, and in exercising the sovereign power, of the State. *People v. Hill*, 17 Cal.4th 800, 665 (1998); *see also Berger v. United*

States, 295 U.S. 78 (1935).

698. The proper role of a criminal prosecutor is not simply to obtain a conviction but to obtain a fair conviction. *Brady v. Maryland*, 373 U.S. at 87. Prosecutorial misconduct perverts the adversarial system and taints the results. *Napue v. Illinois*, 360 U.S. 264. Such behavior should be condemned as violative of canons fundamental to the "traditions and conscience of our people." *Rochin v. California*, 342 U.S. 165, 168 (1952)(quoting *Snyder v. Massachusetts*, 292 U.S. 97 (1934)).

699. The Santa Clara District Attorney's Office and its agents violated their proper role in the criminal justice system.

700. The claims presented herein demonstrate a pattern of misconduct by the State. This pattern of prosecutorial misconduct, in which the prosecutor was allowed unfettered opportunities to overstep the bounds and duties imposed by his position, led in this case to inflammatory, illegal, and unconstitutional methods, and if allowed by this Court, will lead in other cases to more egregious violations by prosecutors in order to secure death verdicts in capital cases.

701. Individually and collectively, the prosecutorial misconduct alleged herein rendered the trial fundamentally unfair and unreliable and was prejudicial.

M. THE PENALTY PHASE INSTRUCTIONS ARE UNCONSTITUTIONALLY VAGUE AND INCAPABLE OF BEING UNDERSTOOD BY JURORS

702. Petitioner's confinement is unlawful in that his conviction and sentence were illegally and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their state constitutional analogs as well as petitioner's statutory rights, because Penal Code section 190.3 and the jury

instructions given in this case that were based on that section, failed to guide the jury's discretion, are vague and incomprehensible, and resulted in arbitrary, capricious, and unreliable sentencing.

703. Petitioner alleges the following facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

704. To the extent that any error or deficiency alleged was due to trial counsel's failure to investigate and/or litigate in a reasonably competent manner on petitioner's behalf, including but not limited to the errors and omissions alleged above, petitioner was deprived of the effective assistance of counsel and his death sentence is unreliable, requiring reversal.

705. To the extent that any of the errors alleged in the present claim deprived petitioner of the benefits of state law in which he had a liberty interest, he was deprived of equal protection and due process of law under the state and federal constitutions. *Hicks v. Oklahoma*, 447 U.S. at 346.

706. Petitioner hereby incorporates by reference Claims P and Q from the Appellant's Opening Brief and Reply Brief.

707. Prior to penalty phase deliberations in this case, the trial court issued pattern instructions to the jury which tracked the language of Penal Code section 190.3 concerning the factors that the jury was to take into consideration in determining whether petitioner deserved the death penalty and included factors (a) through (k). CT 2550-2551, 2557.

708. Even when correctly instructed according to the law, jurors can and frequently do misapprehend the rules set forth to guide their discretion in determining whether the death penalty is an appropriate sentence. A

study of actual California jurors who have served in capital cases found:

> Many of the jurors who were interviewed simply dismissed mitigating evidence that had been presented during the penalty phase because they did not believe it 'fit in' with the sentencing formula that they had been given by the judge, or because they did not understand that it was supposed to be considered mitigating. . . . Other jurors recognized mitigating evidence as such but then rejected or limited its significance by imposing additional conditions on the concept that would make it difficult to ever influence a capital verdict. Thus, fully 8 out of the 10 California juries included persons who dismissed mitigating evidence because it did not directly lessen the defendant's responsibility for the crime itself. . . . In addition, 6 of the California juries in the study rejected mitigating evidence because it did not *completely* account for the defendant's actions.

Haney et al., *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 (No. 2) J. of Social Issues 149, 167-168 (1994) (emphasis in original); *see also McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997) (*en banc*) (although jurors "properly" instructed, the plain language of the jury's request for guidance demonstrated that eleven jurors were confused about the law and erroneously believed that they could not consider eight aspects of the defendant's background as mitigating evidence); *State v. Bey*, 112 N.J. 123, 168-170, 548 A.2d 887, 910-911 (1988) (instructions on mitigating factors that merely restate the statutory text of the mitigating factors are inadequate because they do not explain the nature of the mitigating inference sought to be drawn).

709. The systematic study of actual capital-case jurors in many

states by the Capital Jury Project demonstrates virtually without exception a serious lack of understanding on the part of these jurors of many of the concepts which are at the core of the Eighth Amendment restrictions on the death penalty. *See generally* Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043, 1077-1102 (1995); Haney, *Taking Capital Jurors Seriously*, 70 Ind. L.J. 1223 (1995). The nature of these misunderstandings is such that they virtually always skew the process in favor of death. *See* Luginbuhl & Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 Ind. L.J. 1161, 1176-1177 (1995); Haney & Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 L. & Hum. Behav. 411, 428 (1994). One study summed up, "if the final penalty decision is death, there is a high probability [i.e., more than a "reasonable likelihood"] that this final penalty verdict is partially a product of the faulty interpretation of the law." Luginbuhl & Howe, 70 Ind. L.J. at 1180.

710. The empirical data demonstrates that common understanding of these principles is so likely to be wrong that petitioner's jury's understanding cannot be relied upon consistent with the Eighth Amendment's requirement of heightened reliability in capital sentencing. *Beck v. Alabama*, 447 U.S. at 625.

711. The Capital Jury Project relied on the experience of actual jurors in death penalty trials, not mock juries or hypothetical cases. But even research of the latter type supports this claim:

> Because we studied individual rather than collective interpretations of these instructions, we could not address the issue of whether the lack of juror comprehension would likely be corrected in the course of penalty phase deliber-

ation. However, several things seem to us to minimize this possibility. Nothing in the California instruction requires capital juries to reach consensus about the meaning of the instructions themselves, and there are no verdict forms that require them to agree on the factors that led them to their verdict. Moreover, the prevalence of misunderstanding that characterized both the overall definitions [of "aggravation" and "mitigation"] and the template of factors [(a) through (k)] in the California instruction suggests that even the collective intelligence of most capital juries is likely to be highly compromised on these issues. Indeed, based on our data, the likelihood of a capital defendant's life or death verdict being decided by a jury in which at least one member is completely inaccurate in his or her definition of aggravation or mitigation, and incorrect as to at least two specific factors that form the capital sentencing template in California (19% of our sample) is greater than 2 to 1. This compares to less than a 1 in 2 likelihood of such a jury containing a juror who is legally correct on both terms and completely accurate as to the sentencing template (.04% of our sample). In addition, Ellsworth's (1989) research on the general issue of whether 'twelve heads are better than one' in improving jury comprehension of instructions indicated that while some errors of instructional interpretation are corrected in deliberation, about an equal number of correct interpretations are relinquished in favor of incorrect ones. Finally, interview data collected by Haney, Sontag, and Costanzo (1994) indicated that a number of basic instructional misconceptions were still held by actual capital jurors in California, long after they had deliberated and rendered their verdicts.

Haney & Lynch, 18 Law & Human Behavior at 425, n.14.

712. There is now "converging proof that the same kinds of misunderstandings occur in both experimental and real capital jury decision-making. Whether they are given these instructions in the quiet of the laboratory or the intense experience of the capital trial, whether they hear them from a researcher or a judge, and whether they report their understandings immediately or much later, people show serious comprehension problems." Hans, *How Juries Decide Death: The Contribution of the Capital Jury Project*, 70 Ind. L.J. 1233, 1239 (1995).

713. Allowing the decision for life or death to turn on a concept misunderstood, to the defendant's detriment, by a majority of actual and prospective jurors, is inconsistent with the extraordinary degree of reliability required by the Eighth Amendment in a capital case. There is nothing in the record of petitioner's trial or sentencing proceedings to suggest that the jurors had any extraordinary ability to understand these commonly misunderstood factors.

714. Factor (a), which directs the jury to consider the "circumstances of the crime," is unconstitutionally vague not in an abstract sense, *see Tuilaepa v. California*, 512 U.S. 967 (1994), but because it fails to identify any circumstances or types of circumstances that the jury may consider *in order to distinguish the offense from other offenses not subject to the death penalty or to make clear that there may be mitigating aspects to the circumstances of the crime*. Furthermore, factor (a) allows the sentencer to consider the presence of *any* special circumstance findings. The sentencer's discretion is therefore not properly channeled because all capital cases have at least one special circumstance; using factor (a), a jury cannot know how to distinguish a death-worthy case from one that is not death-worthy. In petitioner's case, factor (a) was the vehicle through which

evidence and/or argument of victim impact, lack of remorse, future dangerousness, and denial of a Christian burial for the victim was improperly presented and considered. For these reasons, factor (a) did not constitutionally guide petitioner's jury in determining whether death was the appropriate punishment. *Furman v. Georgia*, 408 U.S. 238, 247 (1972).

715. Factor (b) directs the jury to consider evidence of prior violent criminal conduct:

> The presence or absence of criminal activity by the defendant, other than the crime(s) for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

Factor (b) improperly allows the jury to consider the defendant's alleged criminal conduct without requiring that the jury unanimously agree that he is guilty of each – or any – of the alleged crimes beyond a reasonable doubt. There was absolutely no evidence of factor (b) evidence presented to the jury in petitioner's case. However, the vagueness of the instruction, evidence in rebuttal from an informant regarding petitioner's alleged threats and escape plot, and the prosecutor's argument regarding petitioner's future dangerousness likely caused the jury to find aggravating factor (b) evidence in this case.

716. The jury's improper consideration of factor (a) and (b) evidence violated petitioner's rights to due process under the Fourteenth Amendment to the United States Constitution, and to a fair, accurate and non-arbitrary sentencing determination under the Eighth Amendment to the United States Constitution.

717. The consideration of aggravating acts under factor (b) in

violation of state law deprived petitioner of his state-created liberty interest in violation of due process and equal protection. *Hicks v. Oklahoma*, 447 U.S. at 346.

718. The instructions also failed to explain the nature and scope of mitigating evidence. The prosecutor characterized the penalty phase evidence as "good" and "bad," rather than "mitigating and aggravating." The prosecutor also argued that petitioner's positive qualities, including his generosity and helpfulness towards others, demonstrated he was manipulative, dangerous, and that he would use these qualities for "incredible evil." RT 5065-5066. The prosecutor also implied that the evidence that petitioner had a good background made the crime all the more aggravating because he "turned his back on the background that he had." RT 5068. The instructions and argument were reasonably likely to mislead the jury into believing that evidence offered by the defense could be considered aggravating, and that mitigating evidence was limited only to "good" things in petitioner's life rather than any aspect of petitioner's life that is proffered as a basis for a sentence less than death.

719. Particularly in the absence of written findings, there is grave danger that petitioner's jury had the same sort of misunderstandings that most jurors have been shown to have concerning the meaning of the sentencing factors and that it sentenced petitioner to die because of those misconceptions, in violation of his right to equal protection and to his right to a fair trial and reliable, non-arbitrary and individualized penalty verdict reached through due process of law and protected by the Eighth Amendment. Because it is reasonable likely that the jury applied instructions given in an unconstitutional manner, vacation of petitioner's death sentence is mandated under the Eighth and Fourteenth Amendments.

\\

N. PETITIONER'S DEATH SENTENCE WAS BASED ON INACCURATE AND UNRELIABLE EVIDENCE AND IS A DISPROPORTIONATE PUNISHMENT

720. Petitioner's confinement is unlawful in that his conviction and sentence were illegally and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their state constitutional analogs as well as petitioner's statutory rights, because it was based on inaccurate, unreliable evidence, ambiguous instructions, misleading argument and is disproportionate to petitioner's culpability.

721. Petitioner alleges the following facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

722. Sentencing is a critical stage of the proceedings, at which a defendant is constitutionally guaranteed the right to effective assistance of counsel. *Gardner v. Florida*, 430 U.S. 349; *In re Perez*, 65 Cal.2d 224, 229-230 (1966). In general, defense counsel is under a duty to ascertain that the sentence is based on complete and accurate information. *People v. Vatelli*, 15 Cal.App.3d 54, 62 (1971); *People v. Cropper*, 89 Cal.App.3d 716, 719 (1979).

723. The death sentence imposed on petitioner was arbitrary, capricious and unreliable because it was based on inaccurate and unreliable evidence, confusing instructions, misleading argument and was disproportionate to his guilt and moral culpability in violation of petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

724. Because the death penalty is qualitatively different from any other criminal punishment, "there is a corresponding difference in the need

for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. at 305 (opinion of Stewart, Powell, and Stevens, JJ.). "In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases." *Ake v. Oklahoma*, 470 U.S. at 87 (Burger, C.J., concurring). "Because sentences of death are 'qualitatively different' from prison sentences, . . . this Court has gone to extraordinary measures to ensure that the person sentenced to be executed is afforded due process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings v. Oklahoma*, 455 U.S. 104, 117-18 (1982) (O'Connor, J., concurring).

725. The Supreme Court has repeatedly condemned sentencing procedures that inject unreliability into jury deliberations in capital cases. Under the Eighth Amendment to the United States Constitution, a criminal sentence must be proportionate to the crime the defendant committed. *See, e.g., Johnson v. Mississippi*, 486 U.S. 578 (1988); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Gardner v. Florida*, 430 U.S. 349; *Woodson v. North Carolina*, 428 U.S. 280.

726. The penalty of death is unique in its severity and finality. The United States Constitution therefore requires individualized sentencing in a capital case, which considers the character of the individual defendant as an "indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. at 304.

727. The death sentence imposed on petitioner is unconstitutional because it was not based on an individualized determination of his death-worthiness and was based on inaccurate, incomplete, and unreliable evidence.

728. Petitioner hereby incorporates by reference Claims A through

M of the petition and the exhibits referenced therein, as if fully set forth herein.

729. The jury's determination that petitioner was deserving of the death penalty was based on incomplete, inaccurate and unreliable evidence as the result of the failure of defense counsel to investigate, develop and present critical mitigating evidence, ambiguous instructions, and prosecutorial misconduct. The sentence of death was therefore imposed on petitioner in violation of his right to a reliable sentence under the Eighth and Fourteenth Amendments.

730. Petitioner's defense counsel failed to investigate, develop and present evidence relevant to both the guilt and penalty phases of his trial.

731. The prosecution committed misconduct which resulted in the presentation of false, inaccurate and misleading evidence at the guilt and penalty phases of trial.

732. There was no meaningful intercase or intracase proportionality review conducted in this case. *See* Appellant's Opening Brief, Claim Q.8. Indeed, the Court of Appeal reversed the trial court's reduction of petitioner's death sentence because it found that the judge had improperly engaged in proportionality review. *See People v. Crew,* 1 Cal.App.4th 1591.

733. Petitioner's sentence is "grossly disproportionate" to the offense, and therefore his sentence constitutes cruel and unusual punishment under article I, section 17 of the California Constitution. *People v. Arias*, 13 Cal.4th 92, 193 (1996).

734. The death sentence imposed on petitioner was and is disproportionate to his moral culpability.

735. Petitioner's sentence is disproportionate compared to his alleged co-participants, who were either granted immunity from prosecution

(Richard Elander) or who were acquitted of all charges (Bruce Gant and Bergin Mosteller).

736. Petitioner had no history of violent or criminal conduct, had committed no prior felonies, and no evidence was presented of prior acts of violence. The offense in this case involved one woman who disappeared and was never heard from again. The prosecution's theory was that she was shot by petitioner, but that she was still alive when petitioner's friend, Bruce Gant, killed her the following night. Petitioner only became eligible for the death penalty because the financial gain special circumstance was found true; however, there is a serious question whether this or any other special circumstance was applicable to petitioner's case.[17] *See* Appellant's Opening Brief and Reply Brief, Claim K.

737. According to the prosecution's theory of the case, the victim was alive after petitioner shot her and she was killed by Bruce Gant, who cut off her head, and buried her body for a period of time in his backyard. Bruce Gant was tried for murder and acquitted of all charges.

738. According to the prosecution's theory of the case, Bergin Mosteller was involved in a conspiracy to kill the victim, including taking petitioner to California, taking the victim's horse from where it was boarded, deceiving the victim's family as to her whereabouts, and disposing of much of the victim's property. Bergin Mosteller was tried for murder and acquitted of all charges.

739. According to the prosecution's theory of the case, Richard Elander discussed various ways of killing the victim with petitioner,

---

[17] The trial court's clerk recommended the striking of the special circumstance based on *People v. Bigelow,* 37 Cal.3d 731, and its progeny. CT 2523-26.

attempted to find a location to dispose of the body, made calls to co-participants to warn them of police investigations, and was involved in the disposal of much of the victim's property. Richard Elander was granted full immunity from prosecution.

740. The Santa Clara County District Attorney's Office was given complete unguided discretion to determine whether to charge special circumstances and to seek a death sentence in petitioner's case, and its pursuit of the death penalty against petitioner was arbitrary and capricious. Petitioner incorporates by reference paragraphs 603-618, above, as if fully set forth herein.

741. Petitioner's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and under Article 1, sections 7, 15, 16, and 17 of the California Constitution because the State failed to use consistent and permissible criteria to govern the charging decision with respect to other murder cases in Santa Clara County and throughout the State in which the death penalty could have been imposed. As a result, petitioner's sentence of death for a crime that was less egregious than those of other defendants who were not even charged with capital murder is disproportionate to the crimes of which he was convicted.

742. Accordingly, petitioner's death judgment must be vacated.

\\

O. PETITIONER'S CONVICTIONS AND DEATH SENTENCE MUST BE VACATED BECAUSE OF THE CUMULATIVE EFFECT OF ALL THE ERRORS AND CONSTITUTIONAL VIOLATIONS SHOWN IN THIS PETITION, THE FIRST PETITION AND THE AUTOMATIC APPEAL

743. Petitioner's confinement is unlawful in that his conviction and sentence were illegally and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their state constitutional analogs because the errors complained of in this petition, the first petition and the automatic appeal compounded one another, resulting in the prejudicial violation of petitioner's constitutional rights.

744. Petitioner alleges the following facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

745. Each of the specific allegations of constitutional error in each claim and sub-claim of this petition requires the issuance of a writ of habeas corpus. Assuming arguendo that the Court finds that the individual allegations are, in and of themselves, insufficient to justify relief, the cumulative effect of the errors demonstrated by this petition, the first habeas corpus petition (No. S084495) and the claims raised in petitioner's automatic appeal (No. S034110) compels reversal of the judgment and issuance of the writ.

746. When all of the errors and constitutional violations are considered together, it is clear that petitioner has been convicted and sentenced to death in violation of his basic human and constitutional right to a fundamentally fair and accurate trial, and his right to an accurate and reliable penalty determination, in violation of the Fourth, Fifth, Sixth,

Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15, 16, and 17 of the California Constitution.

747. This Court has recognized that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." *People v. Hill*, 17 Cal.4th at 844 (citations omitted). As the Ninth Circuit has held, "[a]lthough no single alleged error may warrant habeas corpus relief, the cumulative effect of errors may deprive a petitioner of the due process right to a fair trial." *Karis v. Calderon,* 283 F.3d at 1132.

748. The prejudicial impact of each of the specific allegations of constitutional error presented in this petition, the first petition and in the direct appeal must therefore be analyzed within the overall context of the evidence introduced against petitioner at trial. No single allegation of constitutional error is severable from any other allegation set forth in this petition, the first petition and/or in petitioner's automatic appeal. "Where, as here, there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." *United States v. Frederick*, 78 F.3d 1370, 1381(9th Cir. 1996); *see also United States v. Wood*, 207 F.3d 1222, 1237 (10th Cir. 2000).

749. Petitioner hereby incorporates by specific reference the record on appeal, and each of the claims and arguments raised in the appellate briefing in his related automatic appeal, (No.S034110) and any appendices and exhibits referred to therein, as if fully set forth in this paragraph. Alternatively, petitioner requests that the Court take judicial notice of the same.

750. Petitioner hereby incorporates by specific reference the record on his initial habeas corpus proceedings, and each of the claims and

arguments raised in the petition and informal briefing in the first petition (No. S084495) and any appendices and exhibits referred to therein, as if fully set forth in this paragraph. Alternatively, petitioner requests that the Court take judicial notice of the same.

751. Petitioner also incorporates by reference every claim of this petition, and the exhibits incorporated therein, as if fully set forth in this paragraph.

752. Petitioner's convictions, sentence, and confinement were obtained as the result of a plethora of errors constituting multiple violations of his fundamental constitutional rights at every phase of his trial, including but not limited to the lack of jurisdiction and venue, erroneous admission of irrelevant, inadmissible and inflammatory evidence, the inapplicability of any special circumstances, the denial of his right to competent counsel, the failure of the prosecutor to disclose material and exculpatory information to the defense, gross prosecutorial misconduct at all phases of the trial, serious instructional error, and the erroneous reversal of the trial court's grant of petitioner's 190.4(e) application by the court of appeal and the improper removal of the trial judge upon remand.

753. Justice demands that petitioner's murder conviction, special circumstance finding and sentence of death be reversed because when considered cumulatively, the errors and violations alleged in the present petition, the first petition and on his automatic appeal are prejudicial and rendered the trial fundamentally unfair and unreliable.

754. This is also true of state law violations which may not independently rise to the level of a federal constitutional violation. The cumulative effect of the state law errors in this case resulted in a denial of fundamental fairness and violate due process and equal protection guarantees under the Fourteenth Amendment and the right to a reliable,

individualized, non-arbitrary and non-capricious sentencing determination under the Eighth Amendment. *See Walker v. Engle*, 703 F.2d 903, 962 (6th Cir. 1983).

755. In light of the cumulative effect of all the errors and constitutional violations which occurred over the course of the proceedings in petitioner's case, petitioner's convictions and death sentence must be vacated to prevent a fundamental miscarriage of justice.

P. PETITIONER WAS DENIED MEANINGFUL REVIEW OF THE CLAIMS RAISED IN HIS FIRST HABEAS PETITION

756. Petitioner's confinement is unlawful in that his conviction and sentence were illegally and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their state constitutional analogs due to this Court's failure to fully and fairly adjudicate the claims raised in petitioner's first habeas petition which set forth a prima facie case for relief, including, but not limited to the failure to permit petitioner to obtain discovery, interrogatories and depositions, subpoenas, an evidentiary hearing and other mechanisms for factual development and the summary denial of the petition. This Court thereby denied petitioner a meaningful, reliable and non-arbitrary and non-capricious review in denial of his fundamental procedural and substantive due process rights, equal protection guarantees, and his right to be free from cruel and unusual punishment.

757. Petitioner alleges the following facts in support of this claim, among others to be developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

758. At the penalty phase of petitioner's capital trial, the defense presented evidence in mitigation which included the petitioner's lack of

prior criminal activity, the absence of prior felony convictions, family background, an excellent military record, interpersonal relationships, and an exceptional post arrest custodial record. The prosecution did not present any affirmative evidence in aggravation, relying upon the circumstances of the crime to justify imposition of the death penalty. After two days of deliberations, the jury returned a verdict of death. CT 2298-3081.

759. Prior to the hearing on the 190.4(e) motion for modification, Judge Schatz indicated his difficulty in deciding the motion and requested that the parties "give me some assistance by virtue of setting forth in writing what you believe the aggravating circumstance are . . . that warrant the imposition of the death penalty. And I'd appreciate it if defense counsel would do likewise as to his views as to why the penalty should not be death but rather life in prison without possibility of parole." RT 5114-15. Both defense counsel and the prosecution submitted briefs, citing their view of the evidence, and setting forth the applicable standard. CT 2320-2340; 2385, 2417-19.

760. Judge Schatz then heard the 190.4(e) motion. Before the court ruled, defense counsel discussed the applicable standard, and stated that this Court's decisions indicate "that the [trial] court is not to decide intercase proportionality or to decide whether or not considering the entire context of death penalty cases, whether this particular case does or doesn't deserve it. The court's duty remains as it always has; simply to look at the evidence presented during the trial and make its own independent evaluation of that evidence." RT 5158. Judge Schatz agreed and recited the proper standard for deciding the motion. RT 5159; *see also* RT 5110.[18]

---

[18] This Court recently rejected a *defense* claim that the trial court had applied the incorrect standard, holding that such contention was refuted by

761. In introductory remarks, prior to announcing his ruling, Judge Schatz discussed a number of issues that were not necessarily relevant to his ultimate findings. The court acknowledged the love and devotion of the victim's parents in ensuring that the case went to trial and complimented law enforcement and the district attorney's office for its handling of the case. RT 5174.

762. Judge Schatz then discussed a number of prior death penalty cases in which he had imposed a judgment of death. The judge noted that "every case that the court has tried in which the death penalty has been imposed is still on appeal." RT 5175. The court also stated that in each of these other cases, "there has been something more than there was in this case." RT 5176. For example, one involved a defendant who had raped and killed the wife of a friend, stabbing her twenty-one times; another involved an execution type, robbery case, in which three employees were made to lie face down and the defendant fired three shots, although only one died; and in another case the defendant shot and killed two young people after having previously been convicted of rape and kidnaping. RT 5175-76.

763. Judge Schatz disclaimed reliance on these cases for purposes of his ruling. This discussion served merely to illustrate that in considering the aggravating factors presented by the evidence, it was appropriate to look to whether there were circumstances above and beyond the essential constituents or elements of the crime itself. The court stated: "I only cite those cases for the purpose that they do indicate to me, at least in those cases where the death penalty has been imposed in other cases, there was

---

the trial court's recitation of the correct standard. *People v. Catlin*, 26 Cal.4th 81, 178 (2001).

always something in addition. And only once during the course of sitting as a judge in these cases have I found the verdict of a jury to be unacceptable, and the court instead of imposing the death penalty, imposed life in prison without possibility of parole. But that was for totally different reasons than exist or are present in the case here." RT 5176.

764. Judge Schatz then evaluated the mitigating evidence in petitioner's case, concluding that: "the reasons that have been presented by counsel are particularly unique to this case . . . I was impressed by the evidence that was adduced by the defense in connection with determining the penalty to be imposed." RT 5176-77. After specifying various mitigating factors presented at trial, the court granted the motion to reduce the sentence to life without possibility of parole, concluding that "after review of the mitigating circumstances and aggravating circumstances, the court has concluded that the mitigating circumstances outweighs the aggravating circumstances." RT 5178-79.

765. The minute order reflected that the court's decision was based solely on its evaluation of the aggravating and mitigating circumstances in petitioner's case and not on the extraneous issues referred to above. The minute order stated as follows: "The court, having sentenced the defendant in the above-entitled cause, sets down the following reasons for its ruling: 1) a lack of any prior criminal activity involving violence or a threat to use force or violence; 2) the absence of any prior felony conviction; 3) the defendant's background; 4) the defendant's interpersonal relationships; 5) the defendant's custodial conduct; and 6) the testimony of Jerry Enomoto, an expert witness regarding the Department of Corrections." CT 2514.[19]

---

[19] In *People v. Seaton*, 26 Cal.4th 598 (2001), this Court upheld the trial court's denial of the motion to modify the verdict. Although the trial

766. Prior to Judge Schatz's modification of petitioner's sentence, he was a well-respected judge. He had been a top homicide prosecutor and chief trial attorney in the district attorney's office during the 1950s and 1960s, before becoming first a municipal court judge and then a superior court judge. CT 2862-63, 2802.

767. In December 1989 (after the jury returned a death verdict in petitioner's case but prior to Judge Schatz's ruling on the 190.4(e) motion), Judge Schatz was reprimanded for seeking preferential treatment for his son, Christopher Kerry Schatz, who had been charged with misdemeanor drug and burglary offenses, and for giving false information to state investigators. *See Judge Rebuked for Asking Courts To Go Easy On His Son*, S.J. MERC NEWS, Dec. 16, 1989, attached hereto as Exhibit 68. However, in the wake of this controversy, prosecutors in the Santa Clara District Attorney's Office were quoted voicing their respect for Judge Schatz. *Judge Has Lawyers' Respect*, TIMES TRIBUNE, Dec. 22, 1989, attached hereto as Exhibit 69.

768. On February 23, 1990, Judge Schatz granted the 190.4(e) motion and reduced petitioner's sentence to life without possibility of parole.

769. Judge Schatz's son Christopher continued to have legal problems, including, but not limited to, the cases specified below. According to Judge Schatz's wife, as alleged below, Christopher Schatz's

---

court heard statements from the victim's family before ruling on the motion, this Court found that such extraneous evidence did not play a "significant role" in the trial court's ruling in view of the fact that the court stressed that its ruling was based on the mitigating and aggravating evidence presented at trial and "in its statement of reasons supporting denial of the motion, the court cited solely evidence presented at trial . . . ." *Id.* at 695.

legal difficulties provided an opportunity for both the Santa Clara District Attorney's Office and the Santa Clara Superior Court bench to exert pressure on Judge Schatz to retire and not hear petitioner's resentencing.

a. On April 9, 1990, Christopher Schatz pleaded guilty to burglary and cocaine possession in Santa Clara County. On May 17, 1990, he was placed on five years formal probation. Santa Clara Superior Court No. 137118.[20]

b. On May 23, 1990, Christopher Schatz pleaded guilty to possession of cocaine in San Mateo County. He was given a two year suspended sentence and placed on probation. San Mateo Superior Court No. C24345.

c. On May 11, 1992, Christopher Schatz was charged with possession of a firearm by a felon and being under the influence of a controlled substance in Santa Clara County. He was found guilty of the charges on September 23, 1992. He was also found in violation of probation. The court admitted Schatz to probation for the 1992 crimes, but in revocation proceedings, ordered that he serve the prison term to which he had been sentenced in 1990, four years and eight months. Santa Clara Superior Court, Case No. 156970.

770. On December 23, 1991, the Court of Appeal reversed the trial judge's modification order and remanded the matter to the trial court for reconsideration. The appellate court concluded that the trial judge's reliance on his experience in other capital cases constituted "intercase proportionality review" which was unauthorized and therefore erroneous.

---

[20] It should be noted that the District Attorney's Office and the Santa Clara Superior Court bench recused themselves from this case to avoid the appearance of impropriety. The case was handled by the Attorney General's Office before a Santa Cruz Superior Court judge.

People v. Crew, 1 Cal.App.4th 1591. The Court of Appeal, ordered that the "trial judge should rehear the motion personally, on the basis of the record certified to this court. If, however, he is unavailable, the motion may be heard before another judge of the same court." *Id.* at 1610 (citations omitted). The District Attorney's request that the motion be heard by a different judge was rejected by the Court of Appeal. *Id.* at 1608-09, n. 13.

771. Petitioner alleged in the first habeas corpus petition filed in this Court that the Santa Clara District Attorney's Office and Assistant District Attorney Dave Davies, in particular, orchestrated a campaign to impugn Judge Schatz's integrity and challenge his competency in order to ensure that he did not handle the resentencing of petitioner. This included making disparaging statements about Judge Schatz to the press and using peremptory challenges to prevent Judge Schatz from hearing serious cases. *See* Declaration of Joseph O'Sullivan, dated Dec. 9, 1999, attached hereto as Exhibit 70 (hereafter "O'Sullivan Dec., 12/9/99."); Declaration of Joseph Morehead, dated June 17, 1993, attached hereto as Exhibit 71 (hereafter "Morehead Dec., 6/17/93."); Declaration of John Duby, attached hereto as Exhibit 72.

772. Petitioner also alleged in the first habeas petition that the judges on the Santa Clara County Superior Court bench were involved in forcing Judge Schatz to retire and not hear petitioner's resentencing, and in precluding petitioner from obtaining evidence to bring the circumstances surrounding Judge Schatz's retirement to light. *See* O'Sullivan Dec., 12/9/99, Exh. 70; Morehead Dec., 6/17/93, Exh. 71; Duby Dec., Exh. 72.

773. Within weeks of the appellate court's decision, prosecutors were quoted in newspapers questioning the competency of Judge Schatz. The articles related complaints, mostly by prosecutors, that Judge Schatz, although only 68 years old, was no longer competent, and indicated that

prosecutors had been steering complex and important cases away from Judge Schatz because they believed he was no longer able to handle them. *See e.g.*, CT 2799, 2862, 2872, 2874, 2877.

a. On January 16, 1992, The Recorder, a legal newspaper in the Bay Area, published an article entitled "Santa Clara Judge Schatz Faces Competency Probe." The article reported that for the past year, the District Attorney's Office had instituted a policy of steering important cases away from Judge Schatz. The prosecutor in petitioner's case, Dave Davies, was quoted as stating that the office was not sending major cases to Judge Schatz. Another supervising prosecutor said the office had filed peremptory challenges against Judge Schatz approximately 24 times in the past year, noting that the office usually did not challenge a judge more than 2 or 3 times a year. CT 2874.

b. On January 24, 1992, an anonymous veteran deputy district attorney was quoted in the San Jose Mercury News stating that Judge Schatz "has trouble concentrating, as well as seeing and hearing . . . . He goes totally blank, and then he has to ask one of the attorneys to assist him." CT 2862.

774. The statements made by the District Attorney's Office regarding Judge Schatz's performance were in stark contrast to earlier statements of respect and admiration, and only arose in the wake of the appellate court's ruling in petitioner's case, which ordered that the 190.4(e) motion be heard upon remand by Judge Schatz if "available."

775. The use of peremptory challenges by the District Attorney's Office to excuse Judge Schatz from most serious felony cases was a strategy that was instituted only after Judge Schatz's ruling in petitioner's case.

776. The statements to the press by members of the District

Attorney's Office, and Assistant D.A. Davies, in particular, and the use by that office of peremptory challenges, constituted improper intimidation and manipulation to punish and embarrass Judge Schatz for ruling on a case adversely to the wishes of the prosecution, and ultimately resulted in Judge Schatz's removal from the case.

777. The comments provided by prosecutors in the District Attorney's Office to The Recorder led to an investigation of Judge Schatz's competency by the Presiding Judge of the Santa Clara County Superior Court, Leonard Edwards. CT 2874, CT 2877.

778. Judge Edwards reportedly interviewed more than 20 attorneys, including several trial deputies in the District Attorney's Office. CT 2877.

779. On January 27, 1992, after Judge Edwards completed his investigation, it was reported that Judge Schatz would take a 30-day paid medical leave. CT 2877.

780. On or about February 24, 1992, while petitioner's petition for review of the Court of Appeal's reversal of the 190.4(e) ruling was pending in this Court, the District Attorney's Office filed in this Court a Notice of Motion for Remand to a Different Trial Judge And to Request Judicial Notice. The motion sought to have the case remanded to a trial judge other than Judge Schatz. In support of the motion, the District Attorney attached and asked this Court to take judicial notice of the newspaper articles which quoted prosecutors from the District Attorney's Office questioning Judge Schatz's competency.

781. These measures by the District Attorney to remove Judge Schatz were extraordinary given that on remand petitioner could be sentenced to no lighter a sentence than life without possibility of parole.

782. On March 26, 1992, this Court denied the petition for review of the Court of Appeal's decision. No. S025032.

783. On March 27, 1992, The Recorder reported that Judge Schatz had been on medical leave for two months. (In another article, it was reported that although on medical leave, Judge Schatz made occasional appearances at hearings. CT 2880). According to two "high level prosecutors," the state Commission on Judicial Performance was investigating Judge Schatz's competency, although such investigations are supposedly confidential. Assistant D.A. Davies was quoted as stating that he was not sure petitioner's case would remain with Judge Schatz: "If he's unavailable, the case should be reassigned to another judge." CT 2873. Davies added that he might challenge Judge Schatz should the judge decide to preside over the hearing, further stating, "there's a lot of questions [and] not many answers at this time." *Id.*

784. The remittitur was returned on April 3, 1992. CT 2715.

785. Upon remand, Judge Schatz appeared prepared to rehear the motion. A hearing before Judge Schatz was held on April 10, 1992. CT 2747. In discussing the scheduling of the resentencing, petitioner's counsel indicated that it would take an hour at most, and that "basically it's a question of the articulation of reasons, whatever the reasons the court happens to have in the order." 4/10/92 RT at 4. Neither the judge nor the prosecutor disputed this characterization of the proceedings. The prosecutor merely asked if Judge Schatz was intending to hear the matter, to which Judge Schatz stated, "I will still be in court. I'm going to retire the end of the year, so if we – within this year, I'll be here." *Id.* Without objection, the matter was then calendared for May 1, 1992. *Id.* at 4-8; CT 2747.

786. At the April 10th hearing, Judge Schatz appeared perfectly lucid and rational, and he in no way appeared unaware of his further responsibilities in petitioner's case. There was no indication that he was

either physically or mentally unable to proceed with petitioner's resentencing. *See* O'Sullivan Dec., 12/9/99, Exh. 70.

787. On April 13, 1992, the Recorder reported that Judge Schatz intended to retire at the end of the year but would hear petitioner's resentencing. The article noted that Judge Schatz's plan to retire and to hear resentencing were "intertwined" since it was Judge Schatz's reduction of the death sentence "that in part led the district attorney's office to keep high profile criminal cases out of Schatz's courtroom." CT 2878. Assistant D.A. Davies reportedly stated that he might still try to disqualify Schatz from the case. *Id.* Davies said the Crew case was too closely linked to questions about Judge Schatz's competency. *Id.*

788. On April 14, 1992, a letter addressed to Judge Edwards, purportedly from Judge Schatz, announced Judge Schatz's intention to retire on August 2, 1992. The letter stated that "As of this date, April 14, 1992, I will no longer be available to conduct any judicial proceedings. Presently I am taking medical leave and have been authorized to do so until commencement of my retirement on August 2, 1992." The letter thanked Judge Edwards for his "assistance and cooperation." CT 2793. As alleged in the first petition, this letter was a forgery, written and signed by Judge Schatz's wife, Jacqueline Schatz.

789. On April 15, 1992, an article appeared in The Recorder, entitled: "Schatz Moves Up Retirement; Drops Crew Case." The article reported that Judge Edwards believed Judge Schatz's submission of the retirement letter required immediate reassignment of petitioner's case. CT 2879. Judge Edwards gave Judge Schatz permission to remain on medical leave through his effective retirement date. The article also reported that Judge Schatz was reportedly under investigation by the state Commission on Judicial Performance. Judge Edwards was quoted as stating that Judge

Schatz's "medical problems are more severe than anyone thought." *Id.*

790. On April 22, 1992, petitioner's trial counsel met with Judge Schatz's wife, Jacqueline Schatz who stated that Judge Schatz was forced off petitioner's case. *See* O'Sullivan Dec., 12/9/99, Exh. 70; CT 2836.

a. Ms. Schatz indicated that Judge Schatz had undergone some dental surgery, but desired to conduct petitioner's resentencing. *See* O'Sullivan Dec., 12/9/99, Exh. 70.

b. Ms. Schatz spoke of concern about an investigation by the Council on Judicial Performance, and that Judge Schatz was required to respond to the allegations, apparently mostly raised by prosecutors, as to his competency. According to Ms. Schatz, on April 11th, she and Judge Schatz discussed how to respond to the allegations, and were concerned with the deadline for filing the response. *Id.*

c. Ms. Schatz stated that she contacted Judge Edwards with regard to obtaining an extension of time to file the response with the Commission. She told him that Judge Schatz intended to retire at the end of the year, but was worried about dental coverage. Judge Edwards suggested that Judge Schatz retire at the end of June, and that they had to consider "the county and the press." He asked her to call him on Monday, April 13th, and that he would talk to the Commission and take care of the extension of time for filing the response. *Id.*

d. Ms. Schatz stated that on the morning of April 13th, Judge Edwards called her and said he had worked it out; that they did not have to worry about the response to the Commission, and that the Judge would receive extended medical/dental coverage through the end of July, with Judge Schatz's retirement date to commence on August 2nd. *Id.*

e. Ms. Schatz stated that Judge Edwards called her after lunch on April 13th, and said that a letter announcing Judge Schatz's

retirement would have to be brought in by her and that then the bad publicity would stop; the sooner he got the letter, the sooner it would stop. Judge Edwards told Ms. Schatz that she had to bring in the letter in person, and that as soon as he received it, he would contact the District Attorney's Office and they would hold a press conference. Ms. Schatz said she and Judge Schatz were concerned with adverse statements made by Assistant D.A. Davies, and Judge Edwards replied that he would take care of that; that he would personally meet with District Attorney George Kennedy, and take care of it. He assured Ms. Schatz that now that Judge Schatz was retiring there would be no more adverse press. *Id.*

f. Ms. Schatz stated that on Tuesday, April 14th, at 9:00 a.m., she took the retirement letter into chambers. When Ms. Schatz indicated to Judge Edwards that Judge Schatz still intended to appear for the May 1st hearing on the Crew resentencing, Judge Edwards shocked her by emphatically stating that Judge Schatz was not to appear. She then realized that this is what it was all about; that all the efforts to discredit Judge Schatz were to ensure that he would not conduct petitioner's resentencing. *Id.*

g. Ms. Schatz admitted that she signed her name on Judge Schatz's letter of resignation. *Id.*

791. On May 1, 1992, the date the hearing before Judge Schatz was to be held, the matter was before a different judge, Judge Murphy. CT 2748. Judge Murphy continued the hearing for two weeks, to May 15, 1992. *Id.*

792. On May 15, 1992, defense counsel met with Judge Murphy, in camera. Counsel related that he met with Judge Schatz's wife who told him that her husband was forced off the bench because of petitioner's case, but that he wanted to handle the case and was physically and mentally able to do so. Judge Murphy assigned the case to Judge Ahern, for all motions,

including a determination of Judge Schatz's availability. CT 2749; 2835-37.

793. On July 7, 1992, petitioner filed a motion to have Judge Schatz hear the motion for modification based on the belief that Judge Schatz was in fact available to hear the case. CT 2756. Trial counsel indicated that he had been advised by Judge Schatz's wife that Judge Schatz is "willing and is physically able to preside over this matter, that it will cause him no hardship, that he feels it is his responsibility to preside over and decide the resentencing of Mark Crew having been the trial judge." CT 2761. This motion was opposed by the district attorney.

794. As alleged in the first petition, Judge Ahern failed to permit counsel to determine Judge Schatz's availability and impeded Judge Schatz's ability to hear the case.

a. On July 16, 1992, Judge Ahern appointed a special master to determine Judge Schatz's availability. CT 2769. Judge Ahern also ordered that no attorney shall make any contact with Judge Schatz or members of his family. 7/16/92 RT 14.

b. The special master's efforts to determine Judge Schatz's availability were inadequate, the findings were preliminary, inconsistent and unsubstantiated, and the sources relied on were improper.

1) The special master filed a report on August 18, 1992. The report indicated that Judge Schatz did not meet with the special master because Schatz was out of town past the deadline of the report. Further, the report indicated that Presiding Judge Edwards stated that statutes precluded him (Judge Edwards) from discussing the situation. The special master concluded that Judge Schatz would be available to rehear the case if: a) the Chief Justice reappointed him for this purpose; and b) Judge Schatz consented to the assignment. CT 2790-92.

2) The special master filed a supplemental report on August 27, 1992. Although Judge Edwards originally stated he was not permitted to discuss the situation, subsequent to the first report, Judge Edwards provided information to the special master. He expressed concern about Judge Schatz's capacity to serve. Judge Edwards stated that he had conducted an investigation after receiving reports about Judge Schatz's performance, and that Judge Schatz retired shortly afterwards. Judge Edwards stated that based on his investigation, he would require Judge Schatz submit to a medical examination before asking the Judicial Council to reappoint him. Judge Edwards also provided the special master with newspaper clippings related to the competency probe. *See* CT 2798-2804. The supplemental report also stated that attempts by the special master to meet with Judge Schatz were unsuccessful. CT 2790-96. As a result, the special master concluded that "I do not believe that I can do anything further to determine Judge Schatz's availability. Based upon my inquiry in this matter, I believe that he is not available." CT 2796.

3) There is nothing in the special master's reports which substantiates the conclusion that Judge Schatz was not available, only that the special master was unable to arrange a meeting with Judge Schatz to discuss the matter. CT 2795-96.

795. On August 28, 1992, the special master's reports were made available to counsel. CT 2807. In view of the special master's reports, Judge Ahern asked petitioner's counsel if they wished to reconsider their request to have Judge Schatz hear the matter. Counsel indicated that they wanted a chance to question the special master. The matter was continued until September 22, 1992. 8/28/92 RT at 24-28.

796. On September 16, 1992, Judge Ahern received a letter purportedly from Judge Schatz which made explicit that the terms of his

retirement were contingent upon not hearing petitioner's resentencing: "It is appropriate for me to call your attention to the terms agreed upon relative to my retirement. [¶] Therefore, it is incumbent upon me to recuse myself from the case of People of the State of California v. Mark Crew." CT 2809. Judge Ahern indicated his belief that the signature on the letter was not that of Judge Schatz, and asked the special master to see if he could determine the letter's authenticity. The special master was unable to do so. 9/16/92 RT at 49-50. As alleged, the recusal letter was signed by Ms. Schatz.

797. Circumstances, including, but not limited to, the following raised substantial questions with regard to whether Judge Schatz was available to hear petitioner's resentencing, and, if not, whether his unavailability had been coerced or manipulated in violation of petitioner's rights: a) Judge Schatz's sudden unavailability to hear the 190.4(e) motion after indicating he intended to handle the matter; b) the timing of the media reports and ensuing investigation of Judge Schatz; c) Ms. Schatz's statements regarding a possible coerced retirement; d) the inadequacy of and conflict between the two special master reports; e) the recusal letter which suggested Judge Schatz's removal from petitioner's case as a condition of his retirement; and f) questions regarding the authenticity of the retirement and recusal letters.

798. Accordingly, petitioner's trial counsel sought discovery and/or an evidentiary hearing. Trial counsel filed a motion for an evidentiary hearing which argued that "a prima facie case has been presented to this Court, that in the very least demands an examination of the circumstances underlying Judge Schatz's retirement." CT 2825-2837; *see also* 12/15/92 RT at 75-81.

799. On December 15, 1992, Judge Ahern denied the request for an evidentiary hearing and ordered stricken as hearsay the statements of Ms.

Schatz. Treating the request as a petition for reassignment of the case to Judge Schatz, Judge Ahern referred the matter to the presiding judge, Judge Edwards, the very judge alleged to have been complicit in Judge Schatz's removal. 12/15/92 RT at 83-84; CT 2896.

800. On December 18, Judge Edwards issued an order:

> This court declines to reassign this case to Judge Schatz. That would be beyond the power of the court. Judge Schatz has retired . . . this court declines to request an appointment for Judge Schatz from the Judicial Council. Based on Judge Schatz's communications to the court, I am satisfied that he is not available for further reassignments.

CT 2897. The case was returned to Judge Ahern. 12/22/92 RT at 87-89.

801. A writ filed in the Court of Appeal, Sixth Appellate District, was denied on February 2, 1993; a petition for review filed in this Court was denied on March 25, 1993.

802. On May 10, 1992, John Duby, an employee of Thomas Lundy, who represented petitioner before the Court of Appeal, received a telephone call from Ms. Schatz. In that call, Ms. Schatz acknowledged writing and signing the recusal letter without Judge Schatz's knowledge. She claimed to have told this to Superior Court Judge Robert Foley, who scolded her about the recusal letter, and told her to call Mr. Lundy and Santa Clara District Attorney George Kennedy. Ms. Schatz told Mr. Duby that she had no intention of calling Mr. Kennedy, who had been prosecuting her son. She told Mr. Duby that Judge Edwards had pressured her to influence her husband to retire and had indicated that Judge Schatz's income would be higher by collecting his retirement, which turned out not to be true. Ms. Schatz also suggested that the fact that her son was being tried on narcotics charges was also used by Judge Edwards and the District Attorney's Office

to pressure Judge Schatz to resign. *See* O'Sullivan Dec., 12/9/99, Exh. 70; Morehead Dec., 6/17/93, Exh. 71; Duby Dec., Exh. 72.

803. On May 12, 1993, petitioner requested an in camera hearing based on the additional information that Ms. Schatz related to Mr. Lundy's office. Petitioner sought to provide Judge Ahern with an offer of proof that evidence supported the position that the recusal letter from Judge Schatz was forged by Ms. Schatz, and that Ms. Schatz had confided in Judge Foley, who told her to contact appellate counsel, not trial counsel. Once again, despite a substantial showing of malfeasance on the part of the District Attorney and/or the Superior Court bench, Judge Ahern refused to hold a hearing or to consider the evidence prior to his ruling on the 190.4(e) motion. He also reiterated his order that there must be no contact with Ms. Schatz by defense counsel. CT 2942, 2972-74; 5/12/92 RT at 155-175.

804. On June 5, 1993, petitioner moved to disqualify Judge Ahern and the entire Superior Court bench from participating in any aspect of the resentencing of petitioner. CT 2965-2982. As stated in that motion: "The case is replete with references that Judge Edwards orchestrated the removal of Judge Schatz so that he would not be able to rehear the Crew case. There is a serious question as to the authenticity of two papers purportedly signed by Judge Schatz, his letter of resignation and his letter of recusal. Most recently, there is an allegation that the present Presiding Judge, Judge Foley discussed the case with Judge Schatz's wife and advised her to withhold evidence from trial counsel and throughout this case we have been forbidden from contacting the wife of Judge Schatz either for interviews and or declarations and then told our motions fail because we plead hearsay since we are not allowed to secure actual declarations." CT 2975.

805. On June 16, 1993, Judge Robert Foley, who was at that time the presiding judge, and Judge Ahern both issued orders which did not

merely deny the motion for disqualification but ordered it to be stricken. CT 2989-2998. The motion was struck on the ground that none of the judges were personally served pursuant to Code of Civil Procedure section 170.3(c)(1). To the extent that trial counsel failed to comply with statutory standards in this regard they rendered prejudicial ineffective assistance.

806. On July 22, 1993, Judge Ahern denied the 190.4(e) motion, finding that the aggravating circumstances outweighed the mitigating circumstances, and that the jury's death verdict was supported by the evidence. He then imposed the judgment of death. CT 3004.

807. Appellate counsel was appointed for petitioner on June 26, 1997. The record on appeal was certified and filed with this Court on June 11, 1999. On July 13, 1999, petitioner filed in this Court a Motion for Order Granting Leave to Preserve Testimony of Critical Witnesses. The motion sought authorization to conduct the depositions of Judge Schatz and his wife, Jacqueline Schatz, limited to the circumstances surrounding Judge Schatz's unavailability to hear petitioner's case following remand from the Court of Appeal.

808. Petitioner's request relied in part on well settled California law which permits the accused (at the trial level) upon a proper showing, to apply for an order permitting the conditional examination of a material witness, particularly where conditions exist in which the witness's testimony may be lost due to illness or other reasons. Specifically, Penal Code sections 1335 *et seq.*, permit litigants in a case to apply for permission for a conditional examination where a material witness ". . . is about to leave the State, or is so sick or infirm as to afford reasonable grounds for apprehension that he or she will be unable to attend the trial. . ." Cal. Penal Code § 1336(a).

809. Petitioner's request was also supported by federal statute. In

the adjudication of habeas corpus petitions in federal court, Federal Rule of Civil Procedure 27 provides for the preservation of necessary evidence upon petition, prior to the commencement or during the appeal of an action when the evidence is necessary to perpetuate testimony. *Penn Mutual Life Insurance Company v. United States*, 68 F.3d 1371 (D.C. Cir. 1995)(even without a showing of the certainty of eventual litigation, deposition was warranted where the deponent was eighty years old and there would be a substantial risk that he would be unavailable for trial).

810. In essence petitioner sought an order to preserve testimony akin to Rule 27 of the Federal Rules of Civil Procedure. As the author of one legal treatise explains the prerequisites for Rule 27:

> The reasons for perpetuating the proposed testimony must demonstrate danger of losing the evidence by delay. Ordinarily, a showing that the petitioner is presently unable to bring the expected action or cause it to be brought is sufficient to establish that danger. However, when warranted by the circumstances, a showing that the persons with knowledge of the facts are aged or infirm, thus clearly indicating the danger that the evidence may be lost, is helpful.

4 Moore's Federal Practice ¶ 27.09, at 27-32 (2d ed. 1996).

811. Petitioner stated the concern that due to advanced age and poor health, critical witnesses could be lost, and that petitioner's counsel's attempts to meet with Judge Schatz and Mrs. Schatz informally had been unsuccessful. Petitioner therefore demonstrated his entitlement to preserve the testimony of these witnesses.

812. On November 10, 1999, this Court denied the motion and ruled that "Petitioner may file a petition for a writ of habeas corpus, raising the proposed claim to which this motion relates, immediately. A second habeas

petition raising any remaining claims will not be barred as *successive* as long as it is filed in a timely manner" (emphasis in original).

813. On December 20, 1999, petitioner filed a habeas petition pursuant to this Court's November 10, 1999 Order, which raised three claims for relief: 1) The Court of Appeal Erroneously Reversed the Trial Court's Grant of the Motion for Modification and the Resulting Death Sentence was Unlawfully Imposed; 2) The Trial Judge Was Precluded From Resentencing Petitioner Through Prosecutorial Misconduct and/or Judicial Misconduct; and 3) The Manner in Which Petitioner Was Sentenced to Death Demonstrates That The Sentence of Death Was Achieved In An Arbitrary, Capricious and Unreliable Manner.

814. The petition alleged, inter alia, as follows:

a. The Superior Court's involvement in pressuring Judge Schatz to be removed, impeding efforts to determine Judge Schatz's availability, and then imposing a death judgment, was in excess of the court's jurisdiction and the ensuing death sentence is void.

b. The refusal of the Santa Clara Superior Court to permit petitioner to establish Judge Schatz's availability and/or the pattern of conduct by the court and the District Attorney's Office which resulted in the removal of the trial judge, and the replacement by a substitute judge who denied the 190.4(e) motion and imposed death, violated petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to due process, equal protection, to a fair trial, to a jury trial, to confront and cross-examine witnesses, and to a reliable, non-arbitrary and individualized sentencing determination and their state constitutional analogues.

c. The combined conduct of the District Attorney's Office and Superior Court bench in pressuring Judge Schatz to retire and/or preventing petitioner from discovering and presenting facts relevant to Judge Schatz's

availability arbitrarily deprived petitioner of his state-created liberty interest in having the trial judge when available hear upon remand the 190.4(e) motion in violation of petitioner's statutory rights, and his state and federal constitutional rights.

d. The actions of the District Attorney's office constituted prosecutorial misconduct that so infected the proceedings with unfairness as to violate petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to due process, equal protection, to a fair trial, to a jury trial, to confront and cross-examine witnesses, and to a reliable, non-arbitrary and individualized sentencing determination and their state constitutional analogues.

e. The actions of the members of the Superior Court bench constituted judicial misconduct in violation of petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to due process, equal protection, to a fair trial, to a jury trial, to confront and cross-examine witnesses, and to a reliable, non-arbitrary and individualized sentencing determination and their state constitutional analogues.

f. The removal of Judge Schatz through the actions of the District Attorney's Office and/or the Superior Court bench was akin to the unconstitutional removal of a holdout juror who refused to accede to the majority's determination of guilt.

g. Judge Schatz's grant of the 190.4(e) motion constituted an acquittal of the death sentence, and the remand for resentencing violated petitioner's constitutional rights not to be placed twice in jeopardy. To the extent that Judge Schatz's ruling required clarification for purposes of establishing that the Double Jeopardy Clause would apply to bar resentencing, the actions of the District Attorney's Office and/or the Superior Court bench, to render Judge Schatz unavailable for this purpose

violated petitioner's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and their state analogues to due process, equal protection, to a fair trial, to a jury trial, to confront and cross-examine witnesses, to be free from double jeopardy and to a reliable, non-arbitrary and individualized sentencing determination.

h. The improper and unconstitutional actions by the District Attorney's Office and the Superior Court bench were prejudicial. Judge Schatz was ready, willing and able to hear petitioner's resentencing upon remand from the appellate court, and had scheduled the hearing for May 1, 1992. In view of Judge Schatz's stated findings that the aggravating factors in petitioner's case were outweighed by the mitigating factors, it is virtually certain that he intended to grant the 190.4(e) motion and sentence petitioner to life without possibility of parole. But for the actions of the District Attorney's Office and the Superior Court bench, Judge Schatz would have been available to resentence petitioner and petitioner would not have been sentenced to death.

815. The first petition prayed for, inter alia: a) the issuance of an order to show cause; b) authority to obtain subpoenas for witnesses and documents not obtainable by other means; c) the right to conduct discovery including the rights to take depositions, request admissions, and propound interrogatories and the means to preserve the testimony of witnesses; 4) an order for an evidentiary hearing.

816. On December 27, 1999, this Court ordered informal briefing pursuant to Rule 60 of the California Rules of Court.

817. In early February 2000, confirming petitioner's fears as to the infirmity of a critical witness, Judge Schatz died at the age of 76.

818. Respondent filed her informal response on February 25, 2000, and petitioner filed his reply to the informal response on May 30, 2000.

819. On May 30, 2000, petitioner also filed in this Court a motion for an order granting leave to conduct discovery of the Santa Clara District Attorney's Office, the Superior Court of Santa Clara County, and from James McManis, Esq, who was the Special Master appointed by the Superior Court to investigate Judge Schatz's availability. Motion for Discovery, filed May 30, 2000, attached hereto as Exhibit 73.

820. On June 28, 2000, this Court summarily denied the petition on the merits and denied the motion for discovery.

821. Petitioner's allegations stated a prima facie case for relief and this Court's denial of the petition was arbitrary and capricious.

822. The petition filed by petitioner consisted of over one hundred pages of allegations summarized above, in support of three claims. To demonstrate the *bona fides* of his factual allegations, petitioner included all reasonably available declarations and other documentary evidence. Thus, in full compliance with this Court's procedures, petitioner stated "fully and with particularity the facts on which relief is sought" and included "reasonably available documentary evidence supporting the claims." *People* v. *Duvall,* 9 Cal.4th 464, 474 (1995); *see also In re Harris,* 5 Cal.4th 813, 827 (1994)("one seeking relief on habeas corpus need only file a petition for the writ alleging facts which, if true, entitle the petitioner to relief.")

823. In deciding whether the petition stated a prima facie case for relief, this Court was required under state law to assume that the facts pleaded are true and may consider supporting documentary evidence. *People v. Duvall*, 9 Cal.4th at 474-475; *In re Bower*, 38 Cal.3d 865, 872 (1985); *In re Clark*, 5 Cal.4th 750, 781 n. 16 (1993). This merely required a "*preliminary assessment* [regarding whether] the petitioner would be entitled to relief if his factual allegations are proved." *People v. Duvall*, 9

Cal.4th at 475 (emphasis in original). In determining whether or not an order to show cause should issue, this Court's inquiry was limited to "whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief." *Id.* at 474-475.

824. "In a habeas corpus proceeding the petition itself serves a limited function. It must allege unlawful restraint, name the person by whom the petitioner is so restrained, and specify the facts on which he bases his claim that the restraint is unlawful. [Citation] If, taking the facts alleged as true, the petitioner has established a prima facie case for relief on habeas corpus, then an order to show cause should issue. [Citation]." *In re Lawler,* 23 Cal. 3d 190, 194 (1979); *see also People v. Duvall*, 9 Cal.4th at 475; *People v. Romero,* 8 Cal.4th 728, 737-738 (1994). This Court has reiterated this principle, acknowledging that if a "habeas petition is sufficient on its face (that is, the petition states a prima facie case on a claim that is not procedurally barred), the Court is *obligated by statute* to issue a writ of habeas corpus." *People v. Romero*, 8 Cal.4th at 737-738 (emphasis added); *see also* Cal. Penal Code § 1476.

825. Under California law, whenever a petition for writ of habeas corpus alleges a prima facie case for relief, the petitioner is entitled to the issuance of an order to show cause ("OSC"), setting in motion the procedures for factual development of the evidentiary bases for the petitioner's allegations. *See* Cal. Penal Code § 1476.

826. The issuance of an OSC creates a cause of action, which entitles the respondent and the petitioner to file additional pleadings (Cal. Penal Code § 1480 (return) and § 1484 (traverse)), and to obtain discovery relevant to litigating the claim. *People v. Gonzalez,* 51 Cal.3d 1179, 1258 (1990).

827. An OSC initiates a hearing and disposition of the petition.

People v. Duvall, 9 Cal.4th at 475; *In re Hochberg,* 2 Cal.3d 870, 873-874 & n. 2 (1970).

828. This Court denied petitioner's first habeas petition without issuing an OSC despite the sufficiency of petitioner's allegations.

829. The first petition set forth a prima facie case on all the stated claims. Therefore, petitioner was entitled to the issuance of an order to show cause, and to a full evidentiary hearing with access to this Court's subpoena power, to adequate funding and opportunity to investigate, and to conduct all the discovery relevant to each of his claims.

830. This Court's denial of the motion to conduct depositions, denial of the motion for discovery, and its refusal to grant an order to show cause which would have permitted petitioner to obtain subpoenas, conduct discovery and an evidentiary hearing precluded petitioner from further developing the facts to prove the claims raised in the first petition.

831. Meaningful appellate review by the court of last resort is a constitutional cornerstone for every capital sentencing jurisdiction. *Parker v. Dugger*, 498 U.S. 308 (1991). Meaningful appellate review must encompass issues that are cognizable only on habeas corpus. *See In re Bower*, 38 Cal.3d at 872 ("when reference to matters outside the record is necessary to establish that a defendant has been denied a fundamentally constitutional right to resort to habeas corpus is not only appropriate, but is required.").

832. Petitioner was denied fair consideration of his initial state habeas corpus petition, which was timely filed. Following the filing of the petition, the Court ordered informal briefing pursuant to Rule 60 of the California Rules of Court to permit the Court to determine whether an order to show cause was warranted, and then summarily denied the petition and the motion for discovery without an opinion, without an evidentiary hearing

and without issuing an order to show cause.

833. The informal briefing process is not statutorily authorized and provides none of the indicia of a full and fair opportunity to be heard. This process failed to provide petitioner an adequate opportunity to prosecute and prove the violations of his state and federal constitutional rights in the manner provided by statute. Cal. Penal Code § 1473 (guarantee of right to prosecute habeas petition); Cal. Penal Code §§ 1480-1485 (habeas corpus procedures, which do not authorize informal briefing); CAL. CONST. art. I, § 11 (forbidding suspension of habeas corpus unless required by public safety in cases of rebellion or invasions). *See Hewitt v. Helms*, 459 U.S. at 471-72; *Parker v. Dugger*, 498 U.S. 308; *see also In re Ibarra*, 34 Cal.3d 277, 283, n.2 (1983)(dicta noting that no authority exists for the informal briefing process and that it may violate due process).

834. On habeas review in this case, this Court should have permitted petitioner to take depositions of critical witnesses to preserve testimony, and, after the petition was filed, should have issued an order to show cause why petitioner's habeas corpus claims did not warrant relief, granted discovery, provided adequate funding, and authorized an evidentiary hearing before resolving petitioner's claims. Had this Court done so, petitioner would have proved his entitlement to relief.

835. This Court did not provide full and fair review of this case in disposing of petitioner's first state habeas petition. The denial of meaningful state habeas review by this Court was prejudicial and undermines the fairness and reliability of petitioner's death sentence.

836. The meaningful post-conviction review necessary in a capital case extends beyond the direct appellate process.

a. The opportunity to rectify defaults in the prior record in collateral proceedings, and the fact that certain issues cannot be raised on

direct review make post-conviction proceedings key to a meaningful appellate review of capital cases.

b. "[I]f a State establishes postconviction proceedings, these proceedings must comport with due process." *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 293 (1998)(Stevens, J., concurring and dissenting); *see also Yates v. Aiken*, 484 U.S. 211, 217-218 (1988). Since California provides a post-conviction means of challenging the constitutionality of a death judgment, the means chosen must be full and fair. *Ford v. Wainwright*, 477 U.S. 399, 428-31 (1986); *Evitts v. Lucy*, 469 U.S. 385, 401 (1983); *Douglas v. California*, 372 U.S. 353 (1962); and *Case v. Nebraska*, 381 U.S. 336 (1965).

c. "It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death." *Murray v. Giarratano*, 492 U.S. 1, 14 (1989)(Kennedy, J., concurring.).

d. The federal courts use the habeas exhaustion requirement to reinforce that federal and state courts are "equally bound to guard and protect the rights secured by the Constitution." *Rose v. Lundy*, 455 U.S. 509, 515-518 (1982)(quoting *Ex Parte Royall*, 117 U.S. 241, 251 (1886)).

837. The California Supreme Court's treatment of petitioner's first habeas corpus petition denied petitioner meaningful, reliable and non-arbitrary and non-capricious review on state habeas corpus, resulting in a repudiation of each of petitioner's fundamental rights.

\\

Q. THE CALIFORNIA DEATH PENALTY STATUTE FAILS TO NARROW THE CLASS OF OFFENDERS ELIGIBLE FOR THE DEATH PENALTY AND RESULTS IN IMPOSITION OF DEATH IN A CAPRICIOUS AND ARBITRARY MANNER

838. Petitioner's confinement is unlawful in that his conviction and sentence were illegally and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their state constitutional analogs because the California death penalty statute fails to narrow the class of offenders eligible for the death penalty and permits the imposition of death in an arbitrary and capricious manner. In particular, petitioner's conviction of capital murder violated the requirements of the Eighth and Fourteenth Amendments that the provisions of a state's death penalty statute must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder, and thereby resulted in the imposition of a freakish, wanton, arbitrary and capricious judgment of death. The failure to narrow the class of persons eligible for capital punishment deprived petitioner of his due process rights under the Fourteenth Amendment; it permitted arbitrary selection for prosecution without consistent guidelines to ensure reliability; and it violated the Eighth Amendment prohibition against cruel and unusual punishment.

839. Petitioner alleges the following facts in support of this claim, among others to be developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

Introduction and Summary of Claim

840. Petitioner was convicted of first degree murder and sentenced to death. The sole special circumstance rendering petitioner eligible for

imposition of a sentence of death was the financial gain special circumstance, as alleged and found true under Penal Code section 190.2(1).

841. Under the Eighth and Fourteenth Amendments, a death penalty statute must, by rational and objective criteria, genuinely narrow the group of murderers who may be subject to the death penalty. *Sawyer v. Whitley*, 505 U.S. 333 (1992); *McCleskey v. Kemp*, 481 U.S. 279, 305-306 (1987); *Zant v. Stephens*, 462 U.S. 862, 877-878 (1983).

842. In 1972, in *Furman v. Georgia*, 408 U.S. 238, the United States Supreme Court struck down the death penalty schemes of states including Georgia and Texas as unconstitutional, because they created too great a risk of arbitrary death sentences. This conclusion derived from the Court's understanding that, as to the Georgia scheme, only 15-20% of convicted murderers who were death eligible were being sentenced to death, and that such schemes permitted too great a risk of arbitrariness to satisfy the Eighth Amendment. *Furman*, 408 U.S. at 386, n. 11 (Burger, C.J., dissenting); *id.* at 435, n. 19 (Powell, J., dissenting); *Gregg v. Georgia*, 428 U.S. 153, 182, n. 26 (1976)(plurality opinion); *see also* Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman*? 72 N.Y.U.L.Rev. 1283, 1288 (1997)(hereafter "Shatz & Rivkind"); Declaration of Steven F. Shatz, attached hereto as Exhibit 7, at 155-156.

843. California's death penalty statute as written and applied fails to perform the constitutionally-required narrowing, and this Court's interpretations of the statute have actually *expanded* the statute's reach.

844. As written and applied, the California death penalty statute potentially sweeps the great majority of murders into its grasp, and permits any conceivable circumstance of a crime – even circumstances that are diametrically opposed to each other (e.g., the fact that a decedent was young as well as the fact that a decedent was old, the fact that a decedent was

killed at home as well as the fact that a decedent was killed outside the home) – to justify the imposition of the death penalty.

845. Interpretations of California's death penalty statute by this Court and the United States Supreme Court have placed the burden of narrowing the class of murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute.

846. That statute contained twenty six different crimes punishable by death at the time of petitioner's crime (not including the catchall, heinous, atrocious or cruel special circumstance, which was found to be unconstitutionally vague (*see People v. Superior Court (Engert)*, 31 Cal.3d 797, 801 (1982)), Shatz Dec., Exh. 7, at 156-157, and according to the voter's pamphlet, the statute was specifically enacted for the purpose of making every murderer eligible for the death penalty.

847. Professor Steven F. Shatz completed a study four years ago of California cases involving murder convictions in order to determine: a) the degree to which the special circumstances listed in California Penal Code section 190.2 limit death-eligibility for persons convicted of first degree murder and b) what percentage of persons convicted of first degree murder who are statutorily death-eligible are sentenced to death, i.e., California's death sentence ratio. The full study is reported in Shatz & Rivkind. Professor Shatz has provided a declaration concerning certain results of the study as they pertain to petitioner's case. Shatz Dec., Exh. 7.

848. Empirical evidence shows that the goal of making every first degree murderer in California eligible for the death penalty has largely been achieved. During the five-year period 1980-1984, there were approximately 1,686 first degree murder convictions (or approximately 337 per year), and during the same period, an average of 32 first degree murderers were sentenced to death each year. Thus approximately 9.5% of persons

convicted of first degree murder were actually being sentenced to death pursuant to section 190.2 during the period 1980-1984.[21] Shatz Dec., Exh. 7, at 157.

849. A survey of published and unpublished decisions on appeals from first degree murder convictions from 1988 through 1992, establishes that 83% of first degree murder cases are factually special circumstance cases under 190.2. Shatz Dec., Exh. 7, at 172-173;[22] Shatz & Rivkind, at 1332-1335.

850. California's death penalty scheme defines death-eligibility so broadly that it creates a greater risk of arbitrary death sentences than the pre-Furman death penalty schemes. Empirical evidence shows that, in contrast to Georgia's pre-Furman scheme, where 15% of convicted murderers who were death eligible were being sentenced to death, Shatz & Rivkind, at 1288, n.28, California's death penalty scheme results in a death sentence ratio of 11.4%. *Id.* at 1332. California's statutorily defined death-eligible class is so large and imposition of the death penalty on members of the class so infrequent as to violate *Furman* and its progeny.

851. Penal Code section 190.2's failure to genuinely narrow the class of death eligible murderers is neither corrected nor ameliorated by Penal Code section 190.3, the statute which sets forth the circumstances in

---

[21] The percentage of first degree murderers sentenced to death does not itself answer whether the California scheme satisfied *Furman* since what must be determined is the percentage of *statutorily death-eligible* convicted first degree murderers who were sentenced to death. Shatz Dec., Exh. 7, at 158.

[22] Although the study was based on cases filed or decided in a different time period, the data was analyzed on the basis of the California death penalty scheme in effect in 1982, i.e., under the then current versions of Penal Code sections 190 and 190.2. Shatz Dec., Exh. 7, at 159.

aggravation and mitigation which the jury is to consider in determining whether to impose a sentence of death upon a defendant convicted of special circumstance murder. In practice and as a result of interpretation by this Court, the Section 190.3 factors have been used in ways so arbitrary and contradictory as to violate due process of law. Furthermore, this Court's interpretations of the Section 190.3 factors have created a process biased in favor of death that does not genuinely narrow the pool of murderers to those most deserving of death.

852. California's statutory scheme is particularly death biased in cases such as petitioner's, where the financial gain special circumstance was so broadly construed so that it would apply to all those who commit murder with the least expectation of financial gain. *See* Appellant's Opening Brief and Reply Brief, Claims K and L.

853. Safeguards employed by most other states to ensure a fair jury verdict are not a part of California law, and the review of death judgments by this Court yields an affirmance rate higher than any other court in the country – much higher than the affirmance rate in states such as Florida, Georgia, or Texas.

854. According to a recent study by the San Jose Mercury News, since 1997, this Court has reversed seven of the 67 death sentences for which it has produced full rulings, or 10 percent compared to other state high courts which reverse death sentences at a rate of approximately 40 percent. Howard Mintz, *State, U.S. Courts At Odds on Sentences*, S.J. MERC NEWS, April 15, 2002.

855. Individual prosecutors in California are afforded complete unguided discretion to determine whether to charge special circumstances and to seek penalties of death, thereby creating a substantial risk of county-by-county arbitrariness. *See People v. Adcox*, 47 Cal.3d 207, 275-76

(1988)(Broussard, J. concurring); *See* Claim G, above.

856. The present death penalty law in California is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims for the ultimate sanction.

California's Death Penalty Statute

857. The number and breadth of the special circumstances, i.e., the death-eligibility finding under California's death penalty statute, has steadily increased since 1977.

858. In 1977, the California legislature enacted a new death penalty law. Under the law, one of twelve special circumstances had to be proved beyond a reasonable doubt to make a murderer death-eligible. Stats. 1977, ch. 316, at 1255-1266. Under the statute, death eligibility was to be the exception rather than the rule. As stated by this Court, first degree murder was "punishable by life imprisonment except for extraordinary cases in which special circumstances are present." *Owen* v. *Superior Court,* 88 Cal.App.3d 757, 760 (1979)(quoted with approval in *People v. Green,* 27 Cal.3d 1, 48 (1980)). Also, according to this Court, the special circumstances were intended to define death eligibility in California and thus perform the narrowing function required by *Furman. People v. Green,* 27 Cal.3d at 61.

859. The 1977 law was superseded in 1978 by the enactment of Proposition 7, known as the "Briggs Initiative." Petitioner was tried and convicted under this 1978 death penalty law. The Briggs Initiative was to give Californians the "toughest" death-penalty law in the country. *California Journal Ballot Proposition Analysis*, 9 Calif. J. (Special Section, November 1978) at 5. The intent of the voters, as expressed in the ballot proposition arguments, was to make the death penalty applicable to all murders:

> And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.

1978 Voter's Pamphlet, at 34.[23]

860. The Briggs Initiative sought to achieve this result by expanding the scope of Penal Code section 190.2 in a number of respects.

861. The Briggs Initiative more than doubled the number of special circumstances, adding five more "victim" circumstances (Cal. Penal Code § 190.2(a)(8) (federal law enforcement officer), (9) (fireman), (11) (prosecutor), (12) (judge), (13) (elected or appointed official)); four more felony-murder circumstances (Cal. Penal Code § 190.2(a)(17)(iv) (sodomy), (vi) (oral copulation), (viii) (arson), (ix) (train wrecking)); two more "means" circumstances (Cal. Penal Code § 190.2(a)(15) (lying in wait), (19) (poison)); two more "motive" circumstances (Cal. Penal Code § 190.2(a)(5) (to avoid arrest or escape), (16) ("hate" motive)); and one new catchall circumstance (Cal. Penal Code § 190.2(a)(14)(that the murder was "especially heinous, atrocious, or cruel, manifesting exceptional depravity.")).

862. The Briggs Initiative substantially broadened the definitions of prior special circumstances, most significantly by eliminating the across-

---

[23] This goal of the voters was unconstitutional, and directly pertinent to the constitutionality of the statute. This Court has repeatedly held that election ballot arguments are entitled to great weight in interpreting statutes. *Lungren v. Deukmejian,* 45 Cal.3d 727, 740, n. 14 (1988); *Long Beach City Employees Assn. v. City of Long Beach,* 41 Cal.3d 937, 943, n. 5 (1986).

the-board intent to kill requirement of the 1977 law. Under the Briggs Initiative, the majority of the special circumstances, including the felony-murder circumstances (for the actual killer) are applicable even in the absence of proof that the murder was intentional. *See* Cal. Penal Code § 190.2(a)(17); *see also People v. Anderson,* 43 Cal.3d 1104 (1987).

863. The Briggs Initiative expanded death-eligibility for accomplices by eliminating the "personal presence" and "physical aid" requirements generally applicable under the 1977 law.

864. Since adoption of the Briggs initiative in 1978, the Legislature and this Court have continued to expand the scope of both first degree murder and the special circumstances.

a. In 1982, the Legislature added a new "means" murder: knowing use of armor-piercing bullets. (1982 Cal. Stat. 950, section 1 (codified as amended at Penal Code section 189).

b. In 1981, the Legislature, as part of a general rejection of the diminished capacity defense, eliminated two mental state defenses previously available in first degree murder cases. 1981 Cal. Stat 404, sections 2, 7 (codified as amended at Penal Code sections 22, 189). This Court had previously held that proof of intoxication (and, inferentially, any mental defect) could negate malice, even in the case of a premeditated killing (*People v. Conley,* 64 Cal.2d 310 (1966)), but the defense was eliminated by amendments to the definition of "malice." Cal. Penal Code § 188; *see also People v. Saille*, 54 Cal.3d 1103 (1991)(explaining that changes in section 188 repudiated *Conley).* Similarly, this Court had earlier held that, even in the case of a planned killing, a defendant could negate "premeditation and deliberation" by raising a doubt as to whether the defendant had the capacity to maturely and meaningfully reflect upon . . . his contemplated act." *People v. Wolff,* 61 Cal.2d 795 (1964). That defense

was eliminated by amendments to the definition of "willful, deliberate, and premeditated killing." Cal. Penal Code § 189; *see also People v. Stress,* 205 Cal.App.3d 1259 (1988).

c. The list of special circumstances underwent a similar statutory expansion. In 1990, Proposition 115 added two more felony-murders to the special circumstances list: mayhem and rape by instrument. It also expanded the liability of felony-murder accomplices, eliminating the intent to kill requirement and requiring only that the accomplice meet the constitutional threshold established by *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987), that the accomplice have acted with "reckless indifference to human life and as a major participant" in a special circumstance felony. *See* State of California, Crime Victims Justice Reform Act, Initiative Measure Proposition 115, section 10 (approved June 5, 1990). In 1996, Propositions 195 and 196 were enacted, adding three more special circumstances: felony-murder car jacking, murder of a juror, and murder by discharging a firearm from a motor vehicle. *See* 1995 Cal. Stat. 478, enacted by Proposition 196, section 2 (approved March 26, 1996).

865. Despite the far broader sweep of the special circumstances under the Briggs Initiative, the special circumstances are still supposed to play the same role as they had under the 1977 law – "to channel jury discretion by narrowing the class of defendants who are eligible for the death penalty." *People v. Visciotti,* 2 Cal. 4th 1 (1992); *accord People v. Bacigalupo II,* 6 Cal.4th 457 (1993). As this Court has explained, "Under our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes. *People v. Bacigalupo*, 6 Cal.4th at 468.

California's Death Penalty Scheme Creates Too Broad a Death-Eligible Class to Comply With *Furman*

866. As a result of the number of special circumstances, the legislative definition of first degree murder, and judicial rulings on the scope of first degree murder, the special circumstances and common felonies statutes, a substantial majority of murders in California have been first degree murder and, in virtually all of them, at least one special circumstance could be proved.

867. First degree murder in California is defined by Penal Code section 189. As it read at the time of petitioner's crime and conviction, section 189 created three categories of first degree murders: murders committed by listed means, killings committed during the perpetration of listed felonies, and willful murders committed with premeditation and deliberation.

868. At the time of petitioner's crime and conviction, Penal Code section 190.2 contained 26 special circumstances, or 26 different crimes punishable by death.

869. The real breadth of the special circumstance categories is not in the number of categories alone or in the number that produce death sentences, but in two factors which, in combination, makes California's scheme exceptional.

a. First, California, along with only seven other states (Florida, Georgia, Maryland, Mississippi, Montana, Nevada, and North Carolina) makes felony-murder simpliciter a narrowing circumstance. *See People v. Anderson*, 43 Cal.3d 1104. Although the felony-murder language of Penal Code section 189 is not identical to the special circumstance language (referring to "perpetration" rather than "commission" and omitting any reference to "flight"), in application there is no difference. *See People*

v. Hayes, 52 Cal.3d 577 (1990). Shatz Dec., Exh. 7, at 166-167.

b. Second, California, along with only three other states (Colorado, Indiana and Montana), makes "lying-in-wait" a narrowing circumstance. Cal. Penal Code § 190.2(a)(15). As interpreted by this Court, this circumstance encompasses a substantial portion of premeditated murders. Only California and Montana have death penalty schemes with both felony-murder simpliciter and lying-in-wait narrowing circumstances and, unlike California's numerous and broad felony-murder special circumstances, Montana's felony-murder narrowing circumstances encompass only two felonies: aggravated kidnaping and sexual assault on a minor. *See* Mont. Code Ann. Section 46-18-303(7), (9) (1995). Shatz Dec., Exh. 7, at 166-167.

870. At the time of petitioner's trial, there was substantial overlap between the intentional murders committed by listed means in section 189 and the special circumstances set forth in section 190.2. Four of the five "means" listed in section 189 (murders by destructive device or explosive, poison, torture and lying in wait) were also special circumstances in intentional killings. *See* Cal. Pen. Code § 190.2(a)(4), (a)(6), (a)(15), (a)(18), and (a)(19).

871. There also was substantial overlap between the felony murders listed in section 189 and the special circumstances listed in Penal Code section 190.2(a)(17). Five of the six felonies listed in section 189 (arson, rape, robbery, burglary and violations of Penal Code section 288(a)) also were special circumstances. *See* Cal. Penal Code § 190.2, subds. (a)(17)(i), (a)(17)(iii), (a)(17)(v), (a)(17)(vii), and (a)(17)(viii). Only mayhem could have been the basis for a first degree felony-murder conviction without at the same time making the murderer death eligible.

872. The only intentional first degree murders not expressly

qualifying for the death penalty were those where the first degree murder was established by proof of premeditation and deliberation. Some such murders would have been capital murders because the defendant committed another murder, (Cal. Penal Code § 190.2, subds. (a)(2), (a)(3)), the defendant acted with a particular motive (Cal. Penal Code § 190.2, subds. (a)(1), (a)(5), (a)(16)), or the defendant killed a particular victim. Cal. Penal Code § 190.2, subds. (a)(7) - (a)(13).

873. Virtually all the remaining premeditated murders also would have been capital murders because, by definition, most premeditated murders are done while the defendant was lying in wait. Cal. Penal Code § 190.2, subd. (a)(15); *see People v. Morales*, 48 Cal.3d 527, 557, 575 (1989); *see also People v. Ceja*, 4 Cal.4th 1134, 1147 (1993)(Kennard, J., concurring).

a. Although the term "lying in wait" carries with it the connotation of an ambush from hiding, this Court has given this special circumstance a far more expansive interpretation. According to this Court, lying in wait is established if the defendant: 1) concealed his purpose to kill the victim; 2) watched and waited for a substantial period for an opportune time to act; and 3) immediately thereafter launched a surprise attack on the victim from a position of advantage. *People v. Morales*, 48 Cal.3d at 557. This Court has interpreted the second element to require only that the duration of the watching and waiting be "such as to show a state of mind equivalent to premeditation or deliberation." *People v. Edelbacher*, 47 Cal.3d 983 (1989). As a result, whether a premeditated murder is done while lying in wait turns on the first and third elements.

b. Most premeditated murders satisfy those two elements. It will be a rare premeditated murder, i.e., a murder done "as a result of careful thought and weighing of considerations . . . carried on coolly and

steadily, [especially] according to a preconceived design," *People v. Bender*, 27 Cal.2d 164 (1945), where the defendant reveals his purpose in advance or fails to try to take the victim from a position of advantage.

c. Thus, the lying-in-wait special circumstance applies to a wide variety of first degree murders, ranging from the true ambush, to murders where the defendant follows the victim for a period before the killing, lures the victim into a trap, engages the victim in conversation and then attacks the victim from behind, or kills the victim in his or her sleep.

874. The situation is similar with regard to unintentional first degree murders. Unintentional murders are first degree murders by virtue of the felony-murder rule. Cal. Penal Code § 189. An unintentional killing during one of the listed felonies (except mayhem) makes the actual killer death eligible.

875. At the time of petitioner's trial and in the years following, the broad reach of the felony-murder rule has resulted from three factors.

a. The felony-murder rule applies to the most common felonies resulting in death, particularly robbery and burglary, crimes which themselves are defined very broadly by statute and court decision.

b. The felony-murder rule applies to killings occurring even after completion of the felony, if the killing occurs during an escape, i.e., before the defendant reaches a place of "temporary safety," or as a "natural and probable consequence" of the felony. *See People v. Cooper*, 53 Cal.3d 1158 (1991); *People v. Birden*, 179 Cal.App.3d 1020 (1986).

c. The felony-murder rule is not limited in its application by normal rules of causation and applies to altogether accidental and unforeseeable deaths: "[F]irst degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended

homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable." *People v. Dillon,* 34 Cal.3d 441, 477 (1983).

876. The combination of the felony-murder special circumstances, which themselves perform no narrowing function at least as to the actual killer, and the lying-in-wait special circumstance, which by definition encompasses most premeditated murders, means that Penal Code section 190.2 does not effect any significant narrowing.

877. The breadth of Penal Code section 190.2 is more than just theoretical. Empirical evidence confirms what is evident from the face of the statute: a survey of 865 cases, encompassing first degree murder cases decided in the appellate courts during the five year period 1988-92 (Shatz Dec., Exh. 7, at 174-182), second degree murder cases decided in appellate courts during the five-year period 1988-92 (Shatz Dec., Exh. 7, at 183-186), and first and second degree murder cases filed in three trial courts during the period 1988-92 (Shatz Dec., Exh. 7, at 187-193), demonstrates that Penal Code section 190.2 fails to perform the narrowing function required under the Eighth and Fourteenth Amendments. Shatz Dec., Exh. 7; Shatz & Rivkind, at 1327-1335.

878. The results of this study of 253 published appeals from first degree murder convictions from 1988-92 makes clear the following points:

a. Of 158 cases reviewed by this Court, in only one did the Court reverse a capital case, in whole or in part, because of insufficient evidence to support the finding of special circumstances. *See People v. Morris*, 46 Cal.3d 1 (1988). Shatz Dec., Exh. 7, at 163-165.

b. Sixteen different special circumstances were found and affirmed in these cases. Shatz Dec., Exh. 7, at 163-165.

c. An overwhelming majority (89%) of non-death judgment first degree cases are also factually special circumstance cases. Shatz Dec., Exh. 7, at 165.

879. The results of this study of 151 unpublished appeals from first degree murder convictions decided during the period 1988-1992 generally confirm the data for the published cases. Again, the overwhelming majority (84%) of first degree murder cases are factually special circumstance cases. Shatz Dec., Exh. 7, at 166.

880. The study shows that the felony-murder special circumstances play a predominant role in defining death-eligibility in the California scheme. One or more of the felony-murder special circumstances was proved in almost three-quarters (74%) of the death judgment cases, in 60% of the other actual or potential special circumstance cases in the published cases and in a majority of the actual or potential special circumstance cases in unpublished cases. Shatz Dec., Exh. 7, at 167-168; Shatz & Rivkind, at 1328-1330.

881. The published case sample of appellate non-death judgment cases indicates that 89% of non-death judgment first degree murder cases are factually special circumstance cases, while the unpublished case sample puts the number at 84%. When the percentages for the three categories of first degree murder cases (death judgment cases, published non-death judgment cases, and unpublished cases) are combined according to their respective proportions of total first degree murder cases, the result is that approximately 86% of first degree murder cases are factually special circumstance cases under the death penalty scheme in effect in 1982. Shatz Dec., Exh. 7, at 170-171.

882. The class of first degree murderers is narrowed to a death-eligible class not only by the special circumstances of section 190.2, but also by Penal Code section 190.5, which forbids application of the death penalty to anyone under the age of eighteen at the time of the commission of the crime. When juvenile first degree murderers are excluded from the calculation, the result is that more than 83% of first degree murderers are statutorily death-eligible under Penal Code section 190.2. Shatz Dec., Exh. 7, at 172.

883. Penal Code section 190.2 fails to genuinely narrow the group of murderers who may be subject to the death penalty and does not address the risk of arbitrariness prohibited by the Eighth and Fourteenth Amendments. According to Professor Shatz's study, only 9.5% of those statutorily death-eligible under California's death penalty scheme are actually sentenced to death. If 83% of first degree murderers are statutorily death-eligible, and only 9.5% are sentenced to death, California has a death sentence ratio of 11.5%. Shatz Dec., Exh. 7, at 173. This ratio is significantly below the assumed percentage of death judgments at the time of *Furman* (15-20%,), a percentage impliedly found by the majority of the United States Supreme Court to create enough risk of arbitrariness to violate the Eighth Amendment. Shatz & Rivkind, at 1283, 1332.

884. As concluded by Professor Shatz: "A statutory scheme in which 83% of convicted first degree murderers are death-eligible does not 'genuinely narrow,' and if only 11.5% of those convicted first degree murderers who are statutorily death-eligible are sentenced to death, the scheme is more arbitrary than those in existence at the time of *Furman*, and is therefore in violation of the Eighth Amendment." Shatz Dec., Exh. 7, at 173.

885. On March 9, 2000, Governor George Ryan of Illinois

appointed a Commission to determine what reforms, if any, would ensure that the Illinois capital punishment system is fair, just and accurate. The Commission's findings were published on April 15, 2002. The Commission unanimously concluded that the list of 20 factual circumstances upon which a defendant is eligible for the death sentence in Illinois should be eliminated in favor of a simpler and narrower group of eligibility criteria. A majority of the Commission agreed that the death penalty should be applied only in cases where the defendant has murdered two or more persons; or where the victim was either a police officer or a firefighter, or an officer or inmate of a correctional institution; or was murdered to obstruct the justice system; or was tortured in the course of the murder. Report of the Governor's Commission on Capital Punishment, George H. Ryan, Governor, April 15, 2002 ("Illinois Commission"), Chapter 4 – Eligibility for Capital Punishment.

886. Because almost all first degree murders in California fall within the special circumstances enumerated in Penal Code section 190.2, the death penalty statute fails to genuinely narrow the class of death eligible murderers in violation of the Eighth and Fourteenth Amendments. As a consequence, the death-eligible class is so large that fewer than one out of eight statutorily death-eligible convicted first degree murderers is actually sentenced to death. Under California's death penalty scheme, there is no meaningful basis to distinguish the cases in which the death penalty is imposed. California's scheme defines death-eligibility so broadly that it creates a greater risk of arbitrary death sentences than the pre-*Furman* death penalty schemes.

\\

Penal Code Section 190.2's Failure to Narrow the Death-Eligible Class Is Not Corrected Nor Ameliorated by Controls on Unreliability and Arbitration at Other Points in the Process

887. Penal Code section 190.2's failure to genuinely narrow the class of death eligible murderers is neither corrected nor ameliorated by Penal Code section 190.3, the statute which sets forth the circumstances in aggravation and mitigation which the jury is to consider in determining whether to impose a sentence of death upon a defendant convicted of special circumstance murder. The purpose of this statute, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. In actual practice, it has been used in ways so arbitrary and contradictory as to violate due process of law.

888. Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" meets constitutional scrutiny, this Court has never applied any limiting construction to this factor, even to eliminate blatant capriciousness. Instead, this Court has allowed extraordinary expansions of this factor, approving reliance on the "circumstance of the crime" aggravating factor because the defendant had a "hatred of religion,"[24] or because three weeks after the crime defendant sought to conceal evidence,[25] or threatened witnesses after his arrest,[26] or disposed of the decedent's body in a manner that precluded its recovery.[27]

---

[24] *People v. Nicolaus*, 54 Cal.3d 551, 581-582 (1991).

[25] *People v. Walker,* 47 Cal.3d 605, 639, n. 10 (1988).

[26] *People v. Hardy,* 2 Cal.4th 86, 204 (1992).

[27] *People v. Bittaker,* 48 Cal.3d 1046, 1110, n.35 (1989).

889. Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

a. Because the defendant struck many blows and inflicted multiple wounds,[28] or because the defendant killed with a single execution-style wound.[29]

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[30] or because the defendant killed the victim without any motive at all.[31]

---

[28] *See, e.g., People v. Morales*, Cal. Sup. Ct. No. S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

[29] *See, e.g., People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

[30] *See, e.g., People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004379, RT 31 (revenge).

[31] *See e.g., People v. Edwards*, No. S004755, RT 10544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

c. Because the defendant killed the victim in cold blood[32] or because the defendant killed the victim during a savage frenzy.[33]

d. Because the defendant engaged in a cover-up to conceal his crime,[34] or because the defendant did not engage in a cover-up and so must have been proud of it.[35]

e. Because the defendant made the victim endure the terror of anticipating a violent death[36] or because the defendant killed instantly without any warning.[37]

f. Because the victim had children,[38] or because the victim

---

[32] *See, e.g.*, *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[33] *See, e.g.*, *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[34] *See, e.g.*, *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[35] *See, e.g.*, *People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[36] *See, e.g.*, *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11125; *People v. Hamilton*, No. S004363, RT 4623.

[37] *See, e.g.*, *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[38] *See, e.g.*, *People v. Zapien*, No. S004762, RT 37 (victim had children).

had not yet had a chance to have children.[39]

g. Because the victim struggled prior to death,[40] or because the victim did not struggle.[41]

h. Because the defendant had a prior relationship with the victim,[42] or because the victim was a complete stranger to the defendant.[43]

890. Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of factors inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[44]

---

[39] *See, e.g., People v. Carpenter*, No. S004654, RT 16752 (victim had not yet had children).

[40] *See, e.g., People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[41] *See, e.g., People v. Fauber*, No. S005868, RT 5546-47 (no evidence of struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[42] *See, e.g., People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish*, 52 Cal.3d 648, 717 (1990).

[43] *See, e.g., People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

[44] *See, e.g., People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10075 (victims were adolescents, ages 14, 15, and 17); *People v. Carpenter*, No. S004654,

b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[45]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[46]

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early

---

RT 16752 (victim was 20); *People v. Phillips*, 41 Cal.3d 29, 63 (1985) (26-year-old victim was "in the prime of life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was elderly").

[45] *See, e.g.*, *People v. Clair*, No. S004789, RT 2474-45 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S01723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[46] *See, e.g.*, *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10544 (no motive at all).

in the morning or in the middle of the day.[47]

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[48]

891. The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever.

892. Juries consider, and prosecutors have been permitted to turn entirely opposite facts, or facts that are inevitable variations of every homicide, into aggravating factors which the jury is urged to weigh on death's side of the scale.

California's Death Penalty Scheme Is Biased in Cases Alleging Financial Gain

893. California's statutory scheme is particularly death-biased in cases involving the financial gain special circumstance which is exceedingly broad if it can encompass the facts of petitioner's case, i.e., a theft-murder, rather than requiring that the murder be a necessary

---

[47] *See, e.g.*, *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

[48] *See, e.g.*, *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16749-50 (forested area); *People v. Comtois*, No S017116, RT 29760 (remote, isolated location).

prerequisite for the financial gain (e.g., murder for hire cases and cases involving murder to collect insurance proceeds). *See* Appellant's Opening Brief, Claims K & L.

Individual Prosecutors in California Are Afforded Complete Discretion to Determine Whether to Charge Special Circumstances and Whether to Seek Death, Thereby Creating Substantial Risk of County-by-County Arbitrariness

894. The California murder and death penalty statutory scheme affords the individual prosecutor complete discretion to determine whether special circumstances will be charged and whether a penalty phase will be held, in violation of the Eighth and Fourteenth Amendments, thereby creating a substantial risk of county-by-county arbitrariness. There are no statewide standards to guide the prosecutor's discretion.[49] *See* paragraphs 603-618, above.

895. Some offenders, under the California statutory scheme, are chosen as candidates for the death penalty by one prosecutor, while others with similar factors in different counties are not. This arbitrary determination can be made at the charging stage, prior to trial, after the guilt phase, and during or even after the penalty phase. This range of opportunity, coupled with the absence of any standards to guide the prosecutor's discretion, permits reliance on constitutionally irrelevant and impermissible considerations, including race, ethnicity, sexual orientation, or economic status. Additionally, the prosecutor is free to seek death in

---

[49] The Governor's Commission on Capital Punishment, to ensure uniform standards for the death penalty across the state, recommends that a local state's attorney's decision to seek the death penalty be confirmed by a state-wide commission. Illinois Commission, Chapter 5 – Prosecutor's Selection of Cases for Capital Punishment.

virtually every first degree murder case on either a lying-in-wait theory or a felony-murder theory, or, as in petitioner's case, a financial gain theory, and to argue that death should be imposed based on nothing more than the same facts that substantiated a conviction for first degree murder.

896. Petitioner would not have been charged with the death penalty had he been charged with the same crimes in many other counties in California. The California statutory scheme, by design and in effect, improperly produced arbitrary and capricious prosecutorial discretion throughout the capital case process, in charging, prosecuting, submitting the case to the jury, opposing the automatic motion to modify the sentence, appealing the modification of the sentence, and seeking death again upon remand from the court of appeal.

The California Death Penalty Scheme Contains None of the Safeguards Common to Other Death Penalty Schemes to Guard Against the Arbitrary Imposition of Death

897. In addition to its failure to genuinely narrow the class of death-eligible defendants and its provision of unfettered charging discretion to individual prosecutors, the California murder/death penalty statutory scheme, as written and applied, contains none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death.

898. California does not require that a reasonable doubt standard be used to determine whether a death sentence should be imposed. However, this heightened standard is employed for matters of much less importance to an individual than life or death, i.e., being committed to a mental hospital, or having a conservator appointed to manage his or her affairs. In fact, California's failure to provide any standard of proof for aggravating or mitigating circumstances, or the weighing process, and failure to assign

such a burden to either party, is an additional unconstitutional failure of the statute.

899. In California, juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances outweigh the mitigating circumstances and that death is the appropriate penalty. Not only is inter-case proportionality review not required, it is not permitted.

900. In contrast to California, other jurisdictions that allow the death penalty to be imposed have at least one of the following safeguards, in order to avoid the imposition of random or vindictive death sentences:

a. a requirement that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution.[50]

---

[50] *See e.g.,* Ala. Code section 13A-5-45(e) (1975); Ark. Code Ann. section 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. section 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, section 4209(d) (1) (a) (1992); Ga. Code Ann. section 17-10-3-(c) (Harrison 1990); Idaho Code section 19-2515(g) (1993); Ill. Ann. Stat., ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. section 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. section 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann., art. 905.3 (West 1984); Md. Ann. Code, art. 27, section 413(d), (f), (g) (1957); Miss. Code Ann. section 99-19-103 (1993); *State v. Stewart*, 250 N.W.2d 849, 863 (Neb. 1977); *State v. Simants*, 250 N.W.2d 881, 888-890 (Neb. 1977); Nev. Rev. Stat. Ann. section 175.554(3) (Michie 1992); N.M. Stat. Ann. section 31-20A-3 (Michie 1993); Ohio Rev. Code section 2929.04 (Page's 1993); Okla. Stat. Ann., tit. 21, section 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. section 9711(c)(1)(iii) (1982); S.C. Code Ann. section 16-3-20(A), (C) (Law Co-op 1992); S.D. Codified Laws Ann. section 23A-27A-5 (1988); Tenn. Code Ann. section 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. section 37.071(c) (West 1993); *State v. Pierre*, 572 P.2d 1338, 1348 (Utah 1977); Va. Code Ann. section 19.2-264.4(C) (Michie 1990); Wyo. Stat. section 6-2-102(d)(i)(A), (e)(i) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no

b. a requirement that the jury must base any death sentence on a finding beyond a reasonable doubt that death is the appropriate punishment.[51]

c. a requirement of some form of written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment.[52]

---

mitigating circumstances exist sufficient to warrant leniency. Wash. Rev. Code Ann. 10.95.060(4) (West 1990). And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. Ariz. Rev. Stat. Ann. section 13-703(c) (West 1989); Conn. Gen. Stat. Ann. section 53a-46a(c) (West 1985).

[51] *See, e.g.,* Ark. Code. Ann. section 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. section 10.95.060 (West 1990); and *State v. Goodman*, 257 S.E.2d 569, 577 (1979). In addition, Utah has reversed a death judgment, because that judgment was based on the same standard of proof as applied in California, i.e., less than proof beyond a reasonable doubt. *State v. Wood,* 648 P.2d 71, 83-84 (Utah 1982).

[52] *See, e.g.,* Ala. Code section 12A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. section 13-703 (D) (1989); Ark. Code Ann. section 5-4-603 (a) (Michie 1987); Conn. Gen. Stat. Ann. section 53a-46a(e) (West 1985); *State v. White*, 395 A.2d 1082, 1090 (Del. 1978); Fla. Stat. Ann. section 921.141(3) (West 1985); Ga. Code Ann. section 17-10-30(c) (Harrison 1990); Idaho Code section 19-2515(e) (Michie 1987); Ky. Rev. Stat. Ann. section 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann., art. 905.7 (West 1993); Md. Ann. Code, art. 27, section 413(i) (1992); Miss. Code Ann. section 99-19-103 (1993); Mont. Code Ann. section 46-18-306 (1993); Neb. Rev. Stat. section 29-2522 (1989); Nev. Rev. Stat. Ann. section 175-554(3) (Michie 1992); N.H. Rev. Stat. Ann. section 630:5 (IV) (1992); N.M. Stat. Ann. section 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, section 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. section 9711 (1982); S.C. Code section 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann. section 23A-27A-5 (1988); Tenn. Code Ann. section 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. section 37.071(c) (West 1993); Va. Code Ann. section 19.2-264.4(D) (Michie 1990); Wyo. Stat. section 6-2-102(e) (1988). (Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six

d. where, as in California, the responsibility for death penalty sentencing is on the jury, a requirement that the jury unanimously agree on the aggravating factors proven, and unanimously agree that death is the appropriate sentence.[53]

901. Petitioner's jurors were never told that they were required to agree on which factors in aggravation had been proven. They could have made their decision to impose death using any of the improper considerations described above, or still other similar, improper matters. Absent a requirement of unanimous jury agreement as to the existence of any aggravating factors, and written findings thereon, the propriety of the judgment herein cannot be reviewed in a constitutional manner. Moreover, each juror could have relied on a factor which could potentially constitute proper aggravation, but was different from such factors relied on by the other jurors; i.e., there was no actual agreement on why petitioner should be condemned.

902. At least thirty-one of the states that sanction capital punishment require comparative, or "inter-case," appellate sentence review. By statute, Georgia requires that the state Supreme Court determine whether ". . . the

---

require a written finding as to at least one aggravating factor relied on to impose death).

[53] *See, e.g.,* Ark. Code Ann. section 5-4-603(a) (Michie 1993); Colo. Rev. Stat. Ann. section 16-11-103(2) (West 1992); Ill. Ann. Stat., ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann., art. 905.6 (West 1993); Md. Ann. Code, art. 27, section 413(i) (1993); Miss. Code Ann. section 99-19-103 (1992); N.H. Rev. Stat. Ann. section 630:5(IV) (1992); N.M. Stat. Ann. section 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, section 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. section 9711(c)(1)(iv) (1982); S.C. Code Ann. section 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann. section 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. section 37.071 (West 1993).

sentence is disproportionate compared to those sentences imposed in similar cases." Ga. Stat. Ann. section 27-2537(c). The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman v. Georgia, supra* . . ." *Gregg v. Georgia*, 428 U.S. at 198. Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." *Proffitt v. Florida,* 428 U.S. 242, 259 (1976). At least twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[54]

903. Penal Code section 190 does not require that either the trial court or this Court undertake a comparison between this and other factually similar cases to examine the proportionality of the sentence imposed, i.e.,

---

[54] *See, e.g.,* Ala. Code section 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. section 53a-46(b)(3) (West 1993); Del. Code Ann., tit. 11, section 4209(g)(2) (1992); Ga. Code Ann. section 17-10-35(c)(3) (Harrison 1990); Idaho Code section 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. section 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann., art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. section 99-19-105(30(c) (1993); Mont. Code Ann. section 46-18-310(3) (1993); Neb. Rev. Stat. section 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. section 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. section 630:5(XI)(c) (1992); N.M. Stat. Ann. section 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. section 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. section 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. section 9711(h)(3)(iii) (1993); S.C. Code Ann. section 16-3-25(C)(3) (1988); Tenn. Code Ann. section 13-206(c)(1)(D) (1993); Va. Code Ann. section 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. section 10.95.130(2)(b) (West 1990); Wyo. Stat. section 6-2-103(d)(iii) (1988). *See also State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973); *Alford v. State*, 307 So. 2d 433, 444 (Fla. 1975); *People v. Brownell,* 404 N.E. 2d 181, 197 (Ill. 1980); *Brewer v. State*, 417 N.E.2d 889, 899 (Ind. 1981); *State v. Pierre,* 572 P.2d 1338, 1345 (Utah 1977); *State v. Simants,* 250 N.W.2d 881, 890 (Neb. 1977); *State v. Richmond,* 560 P.2d 41, 51 (Ariz. 1976); *Collins v. State,* 548 S.W.2d 106, 121 (Ark. 1977).

inter-case proportionality review. The statute also does not forbid such review. This Court has made it clear, however, that neither trial courts nor reviewing courts are permitted in California to do inter-case proportionality review. Indeed, the trial court's grant of petitioner's 190.4(e) motion was reversed by the appellate court because it was considered to have been based on inter-case proportionality review. This blanket prohibition on the consideration of any evidence showing that death sentences are not being charged by California prosecutors or imposed on similarly situated defendants by California juries, regardless of the circumstances of a particular case, violates the United States Constitution.

904. Because almost all first degree murders in California fall within the special circumstances enumerated in Penal Code section 190.2, the individual prosecutors in California are afforded complete discretion to determine whether to charge special circumstances and seek penalties of death, and the California statutory scheme contains none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death, California's death penalty statute fails to genuinely narrow the class of death eligible murderers in violation of the Eighth and Fourteenth Amendments and permits the imposition of death sentences in an arbitrary and capricious manner.

905. Because petitioner was prosecuted under this overly-inclusive and unconstitutional statute, his death sentence is invalid and a writ of habeas corpus should issue reversing his penalty.

\\

\\

R. PETITIONER'S PROLONGED CONFINEMENT UNDER SENTENCE OF DEATH AND HIS EXECUTION FOLLOWING SUCH CONFINEMENT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS AND INTERNATIONAL LAW

906. Petitioner's confinement is unlawful in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their state constitutional analogs, and international law, covenants, treaties and norms because of his lengthy confinement under sentence of death (now nine years), as well as his confinement in county jail awaiting his capital trial, his confinement in county jail and state prison during the State's appeal of his life without possibility of parole sentence, remand and resentencing, and because his execution after such prolonged confinement would constitute cruel and unusual punishment.

907. Petitioner alleges the following facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

908. Petitioner was arrested in Connecticut on June 6, 1984. On March 20, 1985, petitioner was extradited from Connecticut and booked into the Santa Clara County Jail. A preliminary hearing was held in May, June and July 1985, and on August 5, 1985, an information was filed against petitioner in Santa Clara County Superior Court.

909. The case was assigned to Judge John Schatz on October 15, 1986, and the matter was continued several times because of the involvement of the Public Defender, the prosecutor and the trial court in other capital cases.

910. On July 7, 1987, the Public Defender was relieved as counsel,

and was replaced by private counsel, Joseph O'Sullivan. The case was further continued because the prosecutor was trying another capital case, and the trial court had begun another capital case. An additional six months continuance was granted because of the health problems of trial counsel, described above.

911. Thus, the trial did not commence until April 17, 1989, almost four years since petitioner began his confinement in the Santa Clara County Jail.

912. Petitioner was found guilty with a financial gain special circumstance found true on July 26, 1989. After a penalty phase, the jury rendered its death verdict on August 10, 1989.

913. The trial court granted petitioner's motion for modification of sentence under Penal Code section 190.4(e), on February 23, 1990.

914. On March 8, 1990, petitioner was transferred to San Quentin State Prison. On June 15, 1990, petitioner was transferred to New Folsom State Prison in preparation for his transfer to Old Folsom. On June 20,1990, petitioner was transferred to Old Folsom State Prison to serve his life without possibility of parole sentence.

915. On September 27, 1991, petitioner was transferred to the Special Housing Unit at Corcoran Prison.

916. On December 31, 1991, the California Court of Appeal, Sixth District, vacated the penalty judgment and remanded the case for the limited purpose of redetermining the modification motion. *People v. Crew*, 1 Cal.App.4th 1591.

917. On April 15, 1992, petitioner was transferred to the Santa Clara County Jail for resentencing.

918. On June 23, 1993, the motion to modify the verdict was denied and the judgment of death was entered.

919. Petitioner was transferred to San Quentin State Prison on July 28, 1993, where he continues to be confined.

920. Appellate counsel was not appointed until June 26, 1997, and the record on appeal was not certified until June 11, 1999.

921. Petitioner filed his opening brief on June 29, 2000, and respondent did not file the brief in opposition until August 10, 2001. Petitioner's reply brief was filed on March 28, 2002.

922. At the time of the present petition, petitioner has already been continuously confined for eighteen years since his arrest, nearly thirteen years since the jury imposed a death verdict, and nine years since the death judgment has been entered.

923. Petitioner's excessive confinement since the time of his arrest is through no doing of his own, but was due to several factors, including, but not limited to: a) the overload of capital cases in Santa Clara County which caused undue delay and put an undue burden on the Public Defender, the District Attorney's Office and the Superior Court; b) the health of his appointed counsel who required six months of rehabilitation prior to the commencement of trial; c) the pursuit of an appeal by the District Attorney following the imposition of a life without possibility of parole sentence; d) the alleged unavailability of the trial judge to hear the case upon remand and/or the actions of the District Attorney's Office and Superior Court bench in causing the removal of Judge Schatz from the bench and the assignment of the case to another judge who was unfamiliar with the case for purposes of redetermining the motion for modification of sentence; e) the delay in the appointment of appellate counsel; and f) the trial court's failure to assure a complete and accurate transcription of the proceedings.

924. Petitioner is indigent, unlearned in the law, and dependent on court-appointed counsel to investigate the facts of his case and present his

claims to the appropriate court of law. He is entitled to an automatic appeal as a matter of right, but was not responsible for the substantial delay in the process.

925. The appeal from a judgment of death is automatic (Cal. Penal Code § 1239, subd. (b)), and there is "no authority to allow [the] defendant to waive the [automatic] appeal." *People v. Sheldon*, 7 Cal.4th 1136, 1139 (1994), *relying on People v. Stanworth*, 71 Cal.2d 820, 833-834 (1969). Of course, full, fair and meaningful review of the trial court proceedings, required under the state and federal constitutions and state law, necessitates a complete record (*Chessman v. Teets*, 354 U.S. 156 (1957); Cal. Penal Code § 190.7; Cal. Rules of Court, Rule 39.50-39.56) and effective appellate representation. *See People v. Barton*, 21 Cal.3d 513, 518 (1978); *People v. Gaston*, 20 Cal.3d 476 (1978); *People v. Silva,* 20 Cal.3d 489 (1978); *In re Smith*, 3 Cal.3d 192 (1970); U.S. CONST. amends. VI, VIII, XIV.

926. The delays in petitioner's appeal have been caused by factors over which he has exercised no discretion or control whatsoever, and are overwhelmingly attributable to the system that is in place, established by state and federal law, which necessitates extremely time-consuming and exhaustive litigation.[55] The delays have nothing to do with the exercise of

---

[55] The "death row phenomenon" is particularly stark in California, where well more than 100 condemned men and women have yet to have counsel appointed on their automatic appeal. *People v. Sheldon*, 7 Cal.4th 1136 (1994); *see also* Kaplan, *Anger and Ambivalence*, Newsweek, August 7, 1995, at 29. Throughout the country, the number of death row inmates continues to rise, putting even more strain on the already overburdened appellate system. According to Ninth Circuit Judge Alex Kozinski, "[t]o eliminate the backlog, there would have to be one execution a day for the next 26 years." *See* Kozinski and Gallagher, *For an Honest Death Penalty*, N.Y. TIMES, Mar. 8, 1995.

any discretion on petitioner's part. The delays here have been caused by "negligence or deliberate action by the State." *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of cert., joined by Breyer, J.).

927. The condemned prisoner's non-waivable right to prosecute the automatic appeal remedy provided by law in this state does not negate the cruel and degrading character of long-term confinement under judgment of death.

928. Intense anxiety resulting in physical and psychological injuries, exposure to extreme violence, terror, depression, degradation, and dehumanization are inflicted through, and are prolonged and worsened by, the state's policies and practices.

929. Petitioner lives on death with almost 600 other condemned men. Petitioner lives in a cell which is an approximately 6 feet by 10 feet concrete box, consisting of three concrete walls and a fourth wall of metal bars and mesh screen. The cell is furnished with only a bed, a sink and a toilet. Both in and out of his cell, petitioner is under surveillance by one or more guards armed with loaded weapons. Petitioner is subjected to loud, almost incessant noise of inmates yelling and guards talking through amplified speakers. Like all death row inmates, petitioner eats his meals alone in his cell and is restricted in the amount and type of personal property that he is permitted to possess.

930. Petitioner's time outside his cell is restricted and, whenever he is transported to another location, he is handcuffed.

931. In response to political pressure over the past years to "get tough" with convicted criminals, the conditions for inmates on death row have become harsher and their already restricted lives have become even more circumscribed. These restrictions include, but are not limited to, elimination of physical fitness equipment, limitation of the amount of hobby

material and other personal property an inmate may possess, reduction of access to the prison library, and restrictions on personal clothes and hair length. Since 1998, inmates have been prohibited from bringing bibles to the exercise yard.

932. Since being incarcerated on death row, petitioner has suffered serious, debilitating medical conditions, including but not limited to, pain and numbness in his limbs, hypertension, rashes, back pain, adhesive capsulitis (sometimes referred to as "frozen shoulder"), tinnitus and diabetes. All of these medical problems cause petitioner continual pain and discomfort.

933. None of petitioner's medical problems has been adequately or properly treated during his incarceration.

934. Petitioner's prolonged confinement on death row has caused, and continues to cause, petitioner extraordinary psychological, emotional and spiritual distress.

935. Since petitioner's confinement on death row, critical witnesses have died (including Judge Schatz and Bergin Mosteller), disappeared, or have had their memories fade, and evidence has been destroyed or misplaced.

936. Carrying out petitioner's death sentence after the inordinate delay described in this claim would violate the Eighth and Fourteenth Amendments because: a) confinement of petitioner under a sentence of death for this extremely prolonged period of time constitutes cruel and unusual punishment in that it subjects petitioner to extraordinary psychological duress as well as the severe physical and social restrictions that inhere in life on death row; and b) execution of petitioner so long after his conviction and judgment of death would be excessive, since the penalty would no longer serve the penological purposes of either deterrence or

retribution, which are the only legitimate and constitutionally recognized justifications for capital punishment.

937. Confinement under a sentence of death subjects a condemned inmate to extraordinary psychological duress, as well as the extreme physical and social restrictions that inhere in life on death row; accordingly, such confinement, in and of itself, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

a. Over a century ago, the United States Supreme Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172 (1890).

b. In *Medley*, the period of uncertainty was just four weeks. As recognized by Justice Stevens, Medley's description should apply with even greater force in a case such as this, involving a delay that has lasted nine years. *Lackey v. Texas,* 514 U.S. 1045.

c. This Court reached a similar conclusion in *People v. Anderson*:

> The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.

People v. Anderson, 6 Cal.3d 628, 649 (1972).

938. The penological justification for carrying out an execution

disappears when an extraordinary period of time has elapsed between the conviction and the proposed execution date, and actually executing a defendant under such circumstances is an inherently excessive punishment that no longer serves any legitimate purpose. *See Ceja v. Stewart*, 134 F.3d 1368 (9th Cir. 1998)(Fletcher, J., dissenting); *see also Furman v. Georgia*, 408 U.S. at 312 (White, J., concurring).

939. The imposition of a sentence of death must serve legitimate and substantial penological goals in order to survive Eighth Amendment scrutiny. When the death penalty "ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernable social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman v. Georgia*, 408 U.S. at 312 (White, J., concurring); *see also Gregg v. Georgia*, 428 U.S. at 183 ("The sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.").

940. In order to survive Eighth Amendment scrutiny, "the imposition of the death penalty must serve some legitimate penological end that could not otherwise be accomplished. If 'the punishment serves no penal purpose more effectively than a less severe punishment,' *Furman v. Georgia*, 408 U.S. at 280 (Brennan, J., concurring), then it is unnecessarily excessive within the meaning of the Punishments Clause." *Ceja v. Stewart*, 134 F.3d at 1373 (Fletcher, J., dissenting).

941. The penological justifications that can support a legitimate application of the death penalty are twofold: "retribution and deterrence of capital crimes by prospective offenders." *Gregg v. Georgia*, 428 U.S. at 183. Retribution, as defined by the United States Supreme Court, means the

"expression of society's moral outrage at particularly offensive behavior." *Id.*

942. The ability of the State of California to further the ends of retribution and deterrence has been drastically diminished here as a result of the extraordinary period of time that has elapsed since the date of petitioner's arrest, conviction and judgment of death. *See Lackey v. Texas,* 514 U.S. 1045; *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981)(Stevens, J., respecting denial of cert.).

943. Because it would serve no legitimate penological interest to execute petitioner after this passage of time and because petitioner's confinement for 18 years, nine under threat of the death penalty and nine on death row, in and of itself, constitutes cruel and unusual punishment, execution of petitioner is prohibited by the Eighth Amendment.

944. Petitioner's confinement and execution after such confinement constitutes cruel, inhuman or degrading treatment or punishment in violation of international law under Article 7 of the International Covenant on Civil and Political Rights, which has the force and effect of federal law under the Supremacy Clause (article VI, clause 2) of the United States Constitution and customary international law.

945. Customary international law, which is part of United States federal law, includes the right against "torture or other cruel, inhuman or degrading treatment or punishment." Restatement (Third) of Foreign Relations Law of the United States § 702 (1987).

946. Article 7 of the International Covenant on Civil and Political Rights provides in part: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

947. In 1992, the United States ratified the International Covenant on Civil and Political Rights ("the ICCPR"). In giving its consent to the

ICCPR, the United States Senate made a declaration that several of the provisions of the ICCPR, including Article 7, are not self-executing. This declaration violates federal constitutional and separation-of-powers principles. It is also invalid because it conflicts with the object and purpose of the ICCPR and, therefore, violates the rule on reservations contained in the Vienna Convention on the Law of Treaties and because declarations that a provision is non-self-executing do not apply to persons who attempt to invoke a treaty provision defensively. *See* paragraphs 1010-1019, below.

948. Under the Supremacy Clause (article VI, clause 2) of the United States Constitution, the State of California is obligated to abide by and obey the provisions of the ICCPR.

949. Petitioner's confinement under threat of imposition of the death penalty and under a sentence of death, under the circumstances and conditions set forth in this claim constitutes cruel, inhuman or degrading treatment or punishment in violation of Article 7 of the ICCPR, which has the force and effect of federal law under the Supremacy Clause (article VI, clause 2) of the United States Constitution, and customary international law, which applies directly in the United States.

950. Execution of petitioner after his prolonged confinement under threat of imposition of the death penalty and under a sentence of death, under the circumstances and conditions set forth in this claim would constitute cruel, inhuman or degrading treatment or punishment in violation of Article 7 of the ICCPR, which has the force and effect of federal law under the Supremacy Clause (article VI, clause 2) of the United States Constitution, and customary international law, which applies directly in the United States.

951. Further, the process used to implement petitioner's death sentence violates international treaties and laws that prohibit cruel and

unusual punishment, including, but not limited to, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention), adopted by the General Assembly of the United Nations on December 10, 1984, and ratified by the United States ten years later. *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984).

952. The length of petitioner's confinement under threat of a death sentence and on death row, along with the constitutionally inadequate guilt and penalty determinations in his case and the reimposition of a death sentence after that sentence had been reduced, have caused him prolonged and extreme mental torture and degradation, and denied him due process, in violation of international treaties and law.

953. Article 1 of the Torture Convention defines torture, in part, as any act by which severe pain or suffering is intentionally inflicted on a person by a public official. *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984). Pain or suffering may only be inflicted upon a person by a public official if the punishment is incidental to a *lawful* sanction. *Id.* Petitioner has made a prima facie showing that his convictions and death sentence were obtained in violation of federal and state law.

954. In addition, petitioner has been, and will continue to be, subjected to unlawful pain and suffering due to his prolonged, uncertain confinement on death row. "The devastating, degrading fear that is imposed on the condemned for months and years is a punishment more terrible than death." Camus, *Reflections on the Guillotine*, in *Resistance, Rebellion and Death* 173, 200 (1961). The international community has

increasingly recognized that prolonged confinement under a death sentence is cruel and unusual, and in violation of international human rights law. *Pratt v. Attorney General for Jamaica,* 4 All.E.R. 769 (Privy Council); *Soering* v. United Kingdom, 11 E.H.R.R. 439, ¶ 111 (Euro. Ct. of Human Rights) (United Kingdom refuses to extradite German national under indictment for capital murder in Virginia in the absence of assurances that he would not be sentenced to death).

955. The violation of international law occurs even when a condemned prisoner is afforded post-conviction remedies beyond an automatic appeal. These remedies are provided by law, in the belief that they are the appropriate means of testing the judgment of death, and with the expectation that they will be used by death-sentenced prisoners. Petitioner's use of post-conviction remedies does nothing to negate the cruel and degrading character of his long-term confinement under judgment of death.

956. Further, in addition to the actual killing of a human being and the years of psychological torture leading up to the act, the method of execution employed by the State of California will result in the further infliction of physical torture, and severe pain and suffering, upon petitioner.

957. The United States stands virtually alone among the nations of the world in confining individuals for periods of many years continuously under sentence of death. The international community is increasingly recognizing that, without regard for the question of the appropriateness or inappropriateness of the death penalty itself, prolonged confinement under these circumstances is cruel and degrading and in violation of international human rights law. *Pratt v. Attorney General for Jamaica* (1993) 4 All.E.R. 769 (Privy Council); *Soering v. United Kingdom* 11 E.H.R.R. 439, ¶ 111 (Euro. Ct. of Human Rights). *Soering* specifically held that, for this reason,

it would be inappropriate for the government of Great Britain to extradite a man under indictment for capital murder in the state of Virginia, in the absence of assurances that he would not be sentenced to death.

958. In an earlier generation, prior to the adoption and development of international human rights law, this Court rejected a somewhat similar claim. *People v. Chessman*, 52 Cal.2d 467, 498-500 (1959). But the developing international consensus demonstrates that, in addition to being cruel and degrading, what the Europeans refer to as the "death row phenomenon" in the United States is also "unusual" within the meaning of the Eighth Amendment and the corresponding provision of the California Constitution, entitling petitioner to relief for that reason as well.

959. Petitioner's death sentence must be vacated permanently, and/or a stay of execution must be entered permanently.

S. PETITIONER CANNOT BE LAWFULLY EXECUTED BECAUSE THE METHOD OF EXECUTION IN CALIFORNIA IS FORBIDDEN BY STATE, FEDERAL, AND INTERNATIONAL LAW

960. Execution of petitioner by lethal injection – the method by which the State of California plans to execute him – and the procedures used to administer lethal injection constitute cruel and unusual punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution their state constitutional analogs, and international law, covenants, treaties and norms.

961. Petitioner alleges the following facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

962. Prior to 1992, lethal gas was the sole means of execution

provided for under California law. In 1992, California added as an alternative means of execution "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections." Cal. Penal Code § 3604.

963. The 1992 legislation allowed the inmate to select either lethal gas or lethal injection and if the inmate made no selection, execution would be by lethal gas. In 1996, section 3604 was again amended to provide that, in the absence of an election by the inmate, the default method of execution would be by lethal injection.

964. On October 4, 1994, the United States District Court for the Northern District of California ruled in *Fierro v. Gomez*, 865 F.Supp. 1387 (N.D.Cal. 1994) that the use of lethal gas is cruel and unusual punishment and thus violates the Constitution. In 1996, the Ninth Circuit affirmed the district court's conclusions in *Fierro*, concluding that "execution by lethal gas under the California protocol is unconstitutionally cruel and unusual and violates the Eighth and Fourteenth Amendments." *Fierro v. Gomez*, 77 F.3d 301, 309 (9th Cir. 1996). The Ninth Circuit also permanently enjoined the state of California from administering lethal gas. *Id.* Accordingly, lethal injection is the only method of execution currently authorized in California.

965. In 1996, the Ninth Circuit concluded, in *Bonin v. Calderon,* 77 F.3d 1155, 1163 (9th Cir. 1996), that because the use of lethal gas has been held invalid by the Ninth Circuit, a California prisoner sentenced to death has no state-created constitutionally protected liberty interest to choose his method of execution under Penal Code section 3604(d). Under operation of California law, the Ninth Circuit's invalidation of the use of lethal gas as a means of executions leaves lethal injection as the sole means of execution

to be implemented by the state. *Id.*; *see* Cal. Penal Code § 3604(d). Because Bonin did not argue that execution by lethal injection is unconstitutional, the Ninth Circuit concluded, with no discussion nor analysis, that the method of execution to be implemented in his case was applied constitutionally. *Id.*

966. There is a growing body of evidence, both scientific and anecdotal, concerning these methods of execution, the effects of lethal injection on the inmates who are executed by this procedure, and the many instances in which the procedures fail, causing botched, painful, prolonged and torturous deaths for these condemned men.

967. Both scientific evidence and eyewitness accounts support the proposition that death by lethal injection can be an extraordinarily painful death, and that it is therefore in violation of the prohibition against cruel and unusual punishment set forth in the Eighth Amendment of the United States Constitution.

968. The drugs authorized to be used in California's lethal injection procedure are extremely volatile and can cause complications even when administered correctly. The procedure exposes the inmate to substantial and grave risks of prolonged and extreme infliction of pain if these drugs are not administered correctly.

969. The California Department of Corrections has not complied with the mandate of section 3604, subdivision (a), to establish standards for the administration of lethal injection. As it is administered, in the absence of protocols ensuring the prisoner's right to be free from unnecessary suffering, the method of lethal injection violates the Eighth and Fourteenth Amendments, their state constitutional analogs, and international law.

970. The procedures by which the State of California plans to inject chemicals into the body are so flawed that the inmate may not be executed

humanely, so as to avoid cruel and unusual punishment.

971. The only information available from the California Department of Corrections is a document (hereafter "CDC Document") that provides nothing more than a vague description of the lethal injection procedures. It neither states the source of the information it contains, nor does it refer to any official regulations or rules. California Department of Corrections, *California Execution Procedures: Lethal Injection*, Exhibit 74.

972. The CDC Document states that at some unspecified time before an execution, syringes containing specified amounts of sodium pentothal, pancuronium bromide, and potassium chloride are to be prepared. It provides that the condemned prisoner will be strapped onto a table, and connected to a cardiac monitor which is connected to a printer outside the execution chamber. An intravenous injection ("IV") is started in two usable veins and a flow of normal saline solution is administered at a slow rate; one line is held in reserve in case of a blockage or malfunction in the other. The door to the execution chamber is closed, and the warden issues the order to execute. The sodium pentothal is first administered, then the line is flushed with sterile normal saline solution; pancuronium bromide then follows; finally, potassium chloride is administered. A physician "is present" to declare when death occurs. Exhibit 74.

973. The California Department of Corrections has not established any other standards for administering lethal injection pursuant to section 3604.

974. Sodium pentothal is an ultra short-acting barbiturate that induces brief general anesthesia, pancuronium bromide is a curare-derived paralyzing medication that serves no real purpose other than to keep the

inmate still while potassium chloride kills,[56] and potassium chloride stops the heart.

975. The combination of these drugs does not cause instantaneous unconsciousness and painless death. It is impossible for this Court to have confidence, in the absence of an evidentiary hearing, that the procedures and methods actually being employed by the execution personnel do not include a significant risk of inflicting severe and unnecessary pain and suffering upon petitioner.

976. There is therefore a real and substantial likelihood that the method of execution by lethal injection scheduled to be used on petitioner will cause such unnecessary and wanton infliction of severe pain and suffering, that his execution will be in violation of the Eighth and Fourteenth Amendments to the United States Constitution, their state constitutional analogs, and international law.

977. The risk of inflicting severe and unnecessary pain and suffering upon petitioner is particularly grave because the CDC protocols do not define a coherent set of procedures to ensure that the condemned prisoner would be free from unnecessary suffering. Prolonged suffering and pain are likely to occur in the ways explained below. *See* Declaration of Kim Marie Thornburn, M.D., F.A.C.P., attached hereto as Exhibit 75; Declaration of John Davis Palmer, M.D., Ph.D., attached hereto as Exhibit 76; Affidavit of Michael L. Radelet, attached hereto as Exhibit 77.[57]

978. California's procedures fail to include safeguards regarding the

---

[56] Pancuronium bromide creates the serene appearance that witnesses often describe of a lethal injection execution because the inmate is totally paralyzed.

[57] These declarations refer to a document dated January 1996, which is similar in relevant particulars to the document referred to herein.

manner in which the execution is to be carried out, fail to establish the minimum qualifications and expertise required of the personnel performing the critical tasks in the lethal injection procedure, and fail to establish appropriate criteria and standards that these personnel must rely upon in exercising their discretion during the lethal injection procedures.

979. There are no directions and no standards for the necessary training, education, or expertise of the personnel who will be exercising this critical discretion and performing these tasks and duties. California's procedures do not prescribe even a minimal level of training for the personnel involved in administering the lethal injection, thereby raising the substantial and unnecessary risk of causing extreme pain and suffering to petitioner before and during his execution.

980. California's procedures do not provide for properly trained personnel to insert the intravenous line or catheter. If the catheter is not properly inserted, there is a risk that the chemicals will be inserted into petitioner's muscle and other tissue rather than directly into his blood-stream, causing extreme pain in the form of a severe burning sensation. Furthermore, a failure to inject the chemicals directly into the bloodstream will cause the chemicals to be absorbed far more slowly, and the intended effects will not occur. Improper insertion of the catheter could also result in its falling out of the vein, resulting in a failure to inject the intended dose of chemicals. There is also the risk that the catheter will rupture or leak as pressure builds up during the administration of the chemicals unless the catheter has adequate strength and all the joints and connections are adequately reinforced. Without proper training, these problems that may arise will not be properly addressed.

981. California's procedures do not mandate that a physician or other trained medical expert be present to render treatment or assistance to a

prisoner in the event of an emergency; instead, the document mandates only that a physician be present to declare death.

982. The scenario that might arise in an emergency is even more critical in light of the ethical rules governing physicians. Medical doctors are prohibited from participating in executions pursuant to the ethical principles set forth in the Hippocratic Oath. The American Medical Association has issued a policy statement proscribing physician participation in executions, and the American Nurses Association also forbids members from participating in executions. This increases the chances of improper administration which could result in pain, an air embolism, the clotting of the catheter which would prevent injection, and heart failure. Furthermore, there is a risk that the dosages selected by untrained persons may be inadequate for the purposes for which they were selected, may result in unanticipated or inappropriate effects in a particular individual for medical or other reasons, and may inflict unnecessarily extreme pain and suffering.

983. California's procedures do not outline the proper guidelines for storage, mixing, and appropriately labeling the drugs, the minimum qualifications and expertise required for the person who will determine the concentration and dosage of each drug to give, and the criteria that shall be used in exercising this discretion.

984. Improperly stored and/or handled chemicals may cause unnecessary suffering.

985. Sodium pentothal is a barbiturate that does not necessarily cause instantaneous or rapid anesthesia. It wears off quickly; and if not given enough, it would paralyze the muscles of the prisoner and cause him to choke, making him unable to breathe. Drug manufacturers warn that without careful medical supervision of dosage and administration,

barbiturates can cause "paradoxical excitement" and can heighten sensitivity to pain. *See* Physicians Desk Reference, 50th Ed. 1996 at 438-440. Manufacturers warn against administration by IV unless a patient is unconscious or out of control. *Id.* A patient's weight, physical condition and age is critical when adjusting dosage. The protocols for lethal injection promulgated by the California Department of Correction do not take any of these issues into consideration. In fact, the guidelines are devoid of any mention of examination of the subject, supervision by an anesthesiologist, or other safeguards.

986. California's procedures fail in other material ways to answer critical questions governing a number of crucial tasks and procedures in the lethal injection procedure including but not limited to:

a. the manner in which the IV tubing, three-way valve, saline solution and other apparatus shall be modified or fixed in the event it is malfunctioning during the execution process, the minimum qualifications and expertise required of the person who shall have the discretion to decide to attempt such action, and the criteria that shall be used in exercising this discretion.

b. the manner in which the heart monitoring system shall be modified or fixed in the event it is malfunctioning during the execution process, the minimum qualifications and expertise required of the person who shall have the discretion to decide to attempt such action, and the criteria that shall be used in exercising this discretion.

c. the manner in which the IV catheters shall be inserted into the condemned prisoner, the minimum qualifications and expertise required of the person who is given the responsibility and discretion to decide when efforts at inserting the IV catheters should be abandoned and the cut down procedure begun, and the criteria that shall be used in exercising this

discretion.

d. the manner in which the condition of the condemned prisoner will be monitored to confirm that proceeding to the next procedure would not inflict severe and unnecessary pain and suffering on the condemned prisoner

e. the minimum qualifications and expertise required of the person who is given the responsibility and discretion to order the staff to divert from the established protocols if necessary to avoid inflicting severe and unnecessary pain and suffering on the condemned prisoner, and the criteria that shall be used in exercising this discretion.

f. the minimum qualifications and expertise required of the person who is given the responsibility and discretion to insure that appropriate procedures are followed in response to unanticipated problems or events arising during the lethal injection procedure, and the criteria that shall be used in exercising this discretion.

987. The condemned prisoner is entitled to an execution free from "unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. at 173, under the state and federal constitutions and international law, and the method of execution used in California fails to comport with this principle in that the risk of such pain is substantial. *See* Thornburn Dec., Exh. 75; Palmer Dec., Exh.76; Radelet Affidavit, Exh. 77.

988. If petitioner is given sodium pentothal followed by pancuronium bromide and regains consciousness before the potassium chloride takes effect, he will be unable to move or communicate in any way while experiencing excruciating pain. As the potassium chloride is administered, he will experience an excruciating burning sensation in his vein, like the sensation of a hot poker being inserted into the arm and traveling up the arm and spreading across the chest until it reaches the heart,

where it will cause the heart to stop. If the sodium pentothal, pancuronium bromide and potassium chloride are administered in the sequence described and petitioner's heart fibrillates but does not stop, he will wake up but be unable to breathe. The initial dose of sodium pentothal could sensitize petitioner's pharynx, causing him to choke, gag, and vomit. He would be at risk of aspirating his vomitus or swallowing his tongue and suffocating. If the flow of the solution during the initial injection of sodium pentothal is too fast, petitioner is likely to suffer a violent muscular reaction. It is very likely that an unskilled technician would fail to detect the improper flow rate.

989. Furthermore, it is likely that petitioner's heart activity will not be adequately monitored because the EKG monitoring pads attached to him will become detached because faced with imminent execution, it is likely that he will sweat, the moisture of the skin will cause the pads to come loose, and this circumstance will not be detected, causing the risk that any state of medical distress or other emergency will not be detected.

990. These risks increase significantly where proper comprehensive procedural safeguards are lacking.

991. In examining whether a method of execution is "unconstitutionally cruel," the court is to look at the "degree of risk" involved in its administration. *Fierro v. Gomez*, 865 F. Supp. at 1411 (discussing *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994)). Factors to be considered in this assessment include the amount of pain involved and the immediacy of unconsciousness. *Id.* at 1410-1411 (interpreting the authorities cited in *Campbell*.) The *Fierro* court interpreted *Campbell* to suggest that "the persistence of consciousness 'for over a minute' or for 'between a minute and a minute-and-a-half, but no longer than two minutes' might be outside constitutional boundaries." *Id.* at 1411.

992. Regardless of the manner in which "execution protocols" are drafted, the process of lethal injection, from start to finish, is entirely manual. The administration of these drugs has created numerous, and horrific, mistakes and errors in other cases. These mistakes include "blow-outs," prison personnel spending hours probing and sticking the condemned prisoner with various intravenous needles in efforts to start an IV catheter, improperly inserted catheters, kinks in the IV tubing or other problems restricting the rate at which the drugs flow into the condemned prisoner, and executions in which the condemned prisoner appeared to be conscious during the course of the execution and made unusual verbal noises or the condemned person's body jerked violently and moved against the restraint straps during the execution. In addition, there have been many instances where execution by lethal injection has been prolonged, extending the amount of psychological pain inflicted.

a. In 1982, in the case of Charles Brooks of Texas, the first person executed by lethal injection in the United States, the Warden of the Texas prison reportedly mixed all three chemicals into a syringe. The chemicals had precipitated; thus, the Warden's initial attempt to inject the deadly mixture into Brooks failed.

b. On March 13, 1985, in Texas, Stephen Peter Morin laid on a gurney for forty-five minutes while his executioners repeatedly pricked his arms and legs with a needle in search of a vein suitable for the lethal injection. *See* Graczyk, *Convicted Killer in Texas Waits 45 Minutes Before Injection is Given*, GAINESVILLE SUN, Mar. 14, 1985; *Murderer of Three Women is Executed in Texas*, N.Y. TIMES, Mar. 14, 1985.

c. Over a year later, on August 20, 1986, Texas officials experienced such difficulty with the procedure that Randy Wools had to help his executioners find a good vein for the execution. *See Texas*

Executes Murderer, LAS VEGAS SUN, Aug. 20, 1986.

d. Similarly, on June 24, 1987, in Texas, Elliot Johnson laid awake and fully conscious for thirty-five minutes while Texas executioners searched for a place to insert the needle. Because of collapsed veins, it took nearly an hour to complete the execution. *See Addict is Executed in Texas for Slaying 2 in Robbery*, N.Y. TIMES, June 25, 1987, at A24.

e. On December 13, 1988, in Texas, Raymond Landry was pronounced dead 40 minutes after being strapped to the execution gurney and 24 minutes after the drugs first started flowing into his arms. Two minutes into the execution, the syringe came out of Landry's vein, spraying the deadly chemicals across the room. The execution team had to reinsert the catheter into the vein. *See* Graczyk, *Landry Executed for '82 Robbery Slaying*, DALLAS MORNING NEWS, Dec. 18, 1988; Graczyk, *Drawn-Out Execution Dismays Texas Inmates*, DALLAS MORNING NEWS, Dec. 15, 1988.

f. On May 24, 1989, in Huntsville, Texas, Stephen McCoy had a violent physical reaction to the drugs (heaving chest, gasping, choking, etc.). The Texas Attorney General admitted that the inmate "seemed to have a somewhat stronger reaction," adding, "[t]he drugs might have been administered in a heavier dose or more rapidly." *See Man Put to Death for Texas Murder*, N.Y. TIMES, May 25, 1989; *Witnesses to an Execution*, HOUS. CHRON., May 27, 1989.

g. On January 24, 1992, in Varner, Arkansas, it took the medical staff more than 50 minutes to find a suitable vein in Rickey Ray Rector's arm. Witnesses were not permitted to view this scene, but reported hearing Rector's loud moans throughout the process. The administrator of the State's Department of Corrections Medical Programs said, paraphrased by a newspaper reporter, "the moans came as a team of two medical people,

increased to five, worked on both sides of Rector's body to find a suitable vein." The administrator said that may have contributed to his occasional outbursts. *See* Farmer, *Rector, 40, Executed for Officer's Slaying*, ARK. DEMOCRAT-GAZETTE, Jan. 25, 1992; Clinesmith, *Moans Pierced Silence During Wait*, ARK. DEMOCRAT-GAZETTE, Jan. 26, 1992.

h. On March 10, 1992, in McAlester, Oklahoma, Robyn Lee Parks had a violent reaction to the drugs used in the lethal injection. Two minutes after the drugs were administered, the muscles in his jaw, neck, and abdomen began to react spasmodically for approximately 45 seconds. Parks continued to gasp and violently gag. Death came eleven minutes later. *See Witnesses Comment on Parks' Execution*, DURANT DEMOCRAT, Mar. 10, 1992; *Dying Parks Gasped for Life*, DAILY OKLAHOMAN, Mar. 11, 1992; *Another U.S. Execution Amid Criticism Abroad*, N.Y. TIMES, Apr. 24, 1992.

i. On April 23, 1992, Billy Wayne White died 47 minutes after his executioners strapped him to the gurney in Huntsville, Texas. White tried to help prison officials as they struggled to find a vein suitable to inject the killing drugs. *See Man Executed in '76 Slaying After Last Appeals Rejected*, AUSTIN (TEX) AMERICAN-STATESMAN, Apr. 23, 1992; *Killer Executed By Lethal Injection*, GAINESVILLE SUN, Apr. 24, 1992; Graczyk, *Veins Delay Execution 40 Minutes*, AUSTIN (TEX) AMERICAN-STATESMAN, Apr. 24, 1992; Fair, *White Was Helpful at Execution*, HOUS. CHRON., Apr. 24, 1992.

j. On May 7, 1992, in Texas, Justin Lee May had a violent reaction to the lethal drugs. According to Robert Wernsman, a reporter for the *Item* in Huntsville, Texas, May "gasped, coughed and reared against his heavy leather restraints, coughing once again before his body froze . . . ." Reporter Michael Graczyk wrote, "He went into a coughing spasm, groaned

and gasped, lifted his head from the death chamber gurney and would have arched his back, if he had not been belted down. After he stopped breathing, his eyes and mouth remained open." *See* Graczyk, *Convicted Texas Killer Receives Lethal Injection*, PLAINVIEW, TEX. HERALD, May 7, 1992; *Convicted Killer May Dies*, HUNTSVILLE, TEX. ITEM, May 7, 1992; *Convicted Killer Dies Gasping*, SAN ANTONIO LIGHT, May 8, 1992; Graczyk, *Convicted Killer Gets Lethal Injection*, DENISON, TEX. HERALD, May 8, 1992.

k. On May 10, 1994, in Illinois, after the execution of John Wayne Gacy had begun, one of the three lethal drugs used to execute Gacy clogged the tube, preventing the flow of the drugs. Blinds were drawn to block the scene, thereby obstructing the witnesses' view. The clogged tube was replaced with a new one, the blinds were reopened, and the execution resumed. Anesthesiologists blamed the problem on the inexperience of prison officials who conducted the execution. Doctors stated that the proper procedure taught in "IV 101" would have prevented this error. It took fifty minutes to execute Gacy, after the mixed chemicals clogged the tube twice. *See* Karwath and Kuczka, *Gacy Execution Delay Blamed on Clogged T.B. Tube*, CHI. TRIB., May 11, 1994.

l. On May 3, 1995, Emmitt Foster was executed by the state of Missouri. Foster was not pronounced dead until twenty-nine minutes after executioners began the flow of lethal chemicals into his arm. Seven minutes after the chemicals began to flow, the blinds were closed to prohibit the witnesses' view. Executioners finally reopened the blinds three minutes after Foster was pronounced dead. According to the coroner who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the execution gurney. The coroner believed that the tightness stopped the flow of chemicals into the veins. Several minutes

after the strap was loosened death was pronounced. The coroner entered the death chamber twenty minutes after the execution began, noticed the problem, and told the officials to loosen the strap so that the execution could proceed. *See* Tim O'Neil, *Too-Tight Strap Hampered Execution*, ST. LOUIS POST-DISPATCH, May 5, 1995, at B1; *Witnesses to a Botched Execution*, ST. LOUIS POST-DISPATCH, May 8, 1995, at 6B; Jim Slater, *Execution Procedure Questioned*, May 4, 1995, at C8.

m. On January 23, 1996, Richard Townes, Jr., was executed in Virginia. This execution was delayed for 22 minutes while medical personnel struggled to find a vein large enough for the needle. After unsuccessful attempts to insert the needle through the arms, the needle was finally inserted through the top of Mr. Townes's right foot. *See Store Clerk's Killer Executed in Virginia*, N.Y. TIMES, Jan. 25, 1996, at A19.

n. On July 18, 1996, in Indiana, Tommie J. Smith was executed by lethal injection. Because of unusually small veins, it took one hour and nine minutes for Smith to be pronounced dead after the execution team began sticking needles into his body. For sixteen minutes, the execution team failed to find adequate veins, and then a physician was called. Smith was given a local anesthetic and the physician twice attempted to insert the tube in Smith's neck. When that failed, an angio-catheter was inserted in Smith's foot. Only then were witnesses permitted to view the process. The lethal drugs were finally injected into Smith 49 minutes after the first attempts, and it took another 20 minutes before death was pronounced. *See* Suzanne McBride, *Problem With Vein Delays Execution*, INDIANAPOLIS NEWS, July 18, 1996, at 1.

o. On May 8, 1997, in Oklahoma, Scott Dawn Carpenter was executed by lethal injection. Carpenter was pronounced dead some 11 minutes after the lethal injection was administered. As the drugs took

effect, Carpenter began to gasp and shake. "This was followed by a guttural sound, multiple spasms and gasping for air" until his body stopped moving, three minutes later. *See* Michael Overall & Michael Smith, *22-Year-Old Killer Gets Early Execution*, TULSA WORLD, May 8, 1997, at A1.

p. On April 23, 1998, in Texas, Joseph Cannon was executed by lethal injection. It took two attempts to complete the execution. After making his final statement, the execution process began. A vein in Cannon's arm collapsed and the needle popped out. Seeing this, Cannon lay back, closed his eyes, and exclaimed to the witnesses, "It's come undone." Officials then pulled a curtain to block the view of the witnesses, reopening it fifteen minutes later when a weeping Cannon made a second final statement and the execution process resumed. *See* Graczyk, *Texas Executes Man Who Killed San Antonio Attorney at Age 17*, AUSTIN AMERICAN-STATESMAN, Apr. 23, 1998, at B5.

q. On October 5, 1998, Roderick Abeyta was executed after it took 25 minutes for the execution team to find a vein suitable for the lethal injection. *See* Sean Whaley, *Nevada Executes Killer*, LAS VEGAS REVIEW- JOURNAL, Oct. 5, 1998, at 1A.

r. On June 8, 2000, in Florida, Bennie Demps was executed after it took execution technicians 33 minutes to find suitable veins for the execution. "They butchered me back there," said Demps in his final statement. "I was in a lot of pain. They cut me in the groin; they cut me in the leg. I was bleeding profusely. This is not an execution, it is murder." *See* Rick Bragg, *Florida Inmate Claims Abuse in Execution*, N.Y. TIMES, June 9, 2000, at A14; Phil Long & Steve Brousquet, *Execution of Slayer Goes Wrong; Delay, Bitter Tirade Precede His Death*, MIAMI HERALD, June 8, 2000.

s. On November 7, 2001, in Georgia, Jose High was

pronounced dead some one hour and nine minutes after the execution began. After attempting to find a useable vein for "15 to 20 minutes," the emergency medical technicians under contract to do the execution abandoned their efforts. Eventually, one needle was stuck in High's hand, and a physician was called in to insert a second needle between his shoulder and neck. *See* Rhonda Cook, *Gang leader executed by injection Death comes 25 years after boy, 11, slain,* ATLANTA JOURNAL CONST., Nov. 7, 2001, at B1.

993. In California, the Ninth Circuit has acknowledged "the execution team's difficulty in administering the procedure (i.e., insertion of the IV tubes)," during the February 23, 1996 execution of William Bonin at San Quentin Prison. *See California First Amendment Coalition v. Calderon*, 150 F.3d 976, 979 (9th Cir. 1998); *California First Amendment Coalition v. Woodford*, 2000 WL 33173913, at *2 (N.D. Cal. 2000).

994. On January 29, 2002, the execution of Stephen Wayne Anderson at San Quentin Prison took "a full 20 minutes to complete." K. Fagan, *Foes of Execution Criticize Slow Death*, S.F. CHRONICLE, Jan. 30, 2002. According to veteran execution witnesses, the execution of Robert Massie on March 27, 2001, also took about thirty minutes. *Id.*

995. The risk of such prolonged administration of the lethal injection is increased by California's lack of comprehensive standards in defining the procedures.

996. A swift, painless death cannot be ensured without standards in place to ensure that the lethal chemicals will be administered to petitioner in a competent, professional manner by someone adequately trained to do so. *See McKenzie v. Day*, 57 F.3d 1461, 1469 (9th Cir. 1995).

997. The Constitution prohibits deliberate indifference to the known risks associated with a particular method of execution. *Cf. Estelle v.*

Gamble, 429 U.S. 97, 106 (1976). As illustrated in the above accounts and will be demonstrated in detail at an evidentiary hearing, following discovery, investigation, and other opportunities for full development of the factual basis for this claim, there are a number of known risks associated with the lethal injection method of execution, and the State of California has failed to take adequate measures to ensure against those risks.

998. The Eighth Amendment safeguards nothing less than the dignity of man, and prohibits methods of execution that involve the unnecessary and wanton infliction of pain. *Trop v. Dulles,* 356 U.S. 86, 100 (1958).

999. When evaluating the constitutionality of a challenged execution method under the cruel and unusual punishment provision, courts must look at whether the method of punishment "involves torture or lingering death . . . something inhuman or barbarous – something more than the mere extinguishment of life." *In re Kemmler*, 136 U.S. 436, 447 (1890); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 445, 473-474 (1947) (plurality opinion). In addition, the execution method and the manner in which it is carried out must comport with evolving standards of decency. Thus, the cruel and unusual punishment clauses of the state and federal constitutions must be read in a "flexible and dynamic manner." *Gregg v. Georgia*, 428 U.S. at 171. "Whether a particular punishment is cruel and unusual is not a static concept, but instead changes in recognition of the 'evolving standards of decency that mark the progress of a mature society.'" *Trop v. Dulles*, 356 U.S. at 101.

1000. Central to this analysis is the *risk* of inflicting substantial and prolonged pain. *See Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (punishments are cruel when they entail exposure to risks that "serve[] no 'legitimate penological objective;'" prison official may be held liable under

the Eighth Amendment for denying humane conditions of confinement if he knows that inmates face substantial risk of serious harm) (citations omitted); *Helling v. McKinney*, 509 U.S. 25, 36 (1993) (Eighth Amendment analysis "requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency").

1001. To comply with constitutional requirements, the State must minimize the risk of unnecessary pain and suffering by taking all feasible measures to reduce the risk of error associated with the administration of capital punishment. *Glass v. Louisiana*, 471 U.S. 1080, 1086 (1985); *see also Zant v. Stephens*, 462 U.S. at 884-85 (state must minimize risks of mistakes in administering capital punishment); *Eddings v. Oklahoma,* 455 U.S. at 118 (O'Conner, J., concurring) (same)).

1002. It is impossible to develop a method of execution by lethal injection that will work flawlessly in all persons given the various individual factors which have to be accessed in each case. Petitioner should not be subjected to experimentation by the State in its attempt to figure out how best to kill a human being.

1003. California's use of lethal injection to execute prisoners sentenced to death unnecessarily risks extreme pain and inhumane suffering. Such use constitutes cruel and unusual punishment, offends contemporary standards of human decency, and violates the Eighth Amendment of the United States Constitution.

1004. The Eighth Amendment prohibits methods of execution that involve the "unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. at 173.

1005. The very real risk of such prolonged administration of the lethal injection also violates international law. A recent report by the

International Commission of Jurists noted that the trend in the United States towards lethal injection in an attempt to "humanise" the execution process in fact merely prolongs the "torture" of the death row inmate:

> Locating a suitable vein has, in several cases, prolonged the execution process by over an hour. Lethal injections are often inserted by non-medical, inexperienced correctional personnel since doctors are prohibited from participating in executions except to announce death.

International Commission of Jurists, *The Death Penalty: Condemned*, Sept. 2000. The report further noted that "[a]waiting death is a form of psychological torture evidenced by the fact that mock executions . . . are a common torture tactic. It is cruel and inhuman." *Id.*

1006. California's use of lethal injection in the administration of the death penalty fails to protect condemned prisoners from unnecessary pain and suffering, and the risk of inflicting such cruel and unusual pain is enhanced by the lack of established, comprehensive protocols. The Eighth Amendment's prohibition against cruel and unusual punishment "acquire[s] meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910). To kill petitioner by the lethal injection procedures used by the California Department of Corrections would be inhumane and is prohibited by the Eighth and Fourteenth Amendments to the United States Constitution, their state constitutional analogs, as well as international law.

1007. Accordingly, petitioner's death judgment must be vacated and/or a stay of execution entered permanently.

\\

T. PETITIONER CANNOT LAWFULLY BE EXECUTED BECAUSE HIS DEATH SENTENCE VIOLATES INTERNATIONAL LAW

1008. Petitioner's confinement is unlawful in that his conviction and sentence were illegally and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, their state constitutional analogs, and international law, covenants, treaties and norms. Petitioner's sentence of death was imposed without regard to international treaties and laws to which the United States is a signatory, and which obligate the United States to comply with human rights principles. In addition to being denied his right to the minimum international, federal and state law guarantees for a fair trial and a competent defense, petitioner has also been denied his right under customary international law to appeal and habeas corpus review by an independent, impartial tribunal.

1009. Petitioner alleges the following facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claim.

1010. The State of California is bound by international law and treaties to which the United States is a signatory: "[A]ll treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2. The United States Supreme Court has recognized that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly

presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900); *see also* Rest.3d Foreign Relations Law of the United States, § 111(1) ("International law and international agreements of the United States are law of the United States and supreme over the law of the several States"); and *id.* at § 702, comment c ("[T]he customary law of human rights is part of the law of the United States to be applied as such by state as well as federal courts").

1011. The body of international law that governs the State of California's, and the United States's, administration of capital punishment includes, but is not limited to, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention Against All Forms of Racial Discrimination, and the Vienna Convention on the Law of Treaties. The purpose of these and other treaties is to bind signatory nations, including the United States, to the protection of the rights of all humans, including petitioner and others who have been accused of capital crimes. Human rights treaties are different from other treaties in that parties to human rights treaties agree to protect individuals within their jurisdictions, while parties to other treaties agree how to act with respect to each other. The "object and purpose" rule keeps state parties from eliminating important aspects of human rights treaties by making reservations to them, leaving its own citizens as well as other state parties with no recourse. "[T]he true beneficiaries of the agreements are individual human beings, the inhabitants of the contracting states." Rest.3d Foreign Relations Law of the United States, §313, reporter's notes, at 184.

1012. As indicated above, the United States Senate has ratified the

ICCPR. International Covenant on Civil and Political Rights, June 8, 1992, 999 U.N.T.S. 171. The United States is therefore bound by the provisions of the Second Optional Protocol to the ICCPR, adopted by the United Nations General Assembly in 1989. The Second Optional Protocol provides for the total abolition of the death penalty, but allows state parties to retain the death penalty only in wartime, if a reservation to that effect was made at the time of ratifying or acceding to the Protocol. The United States was not at war at the time petitioner was sentenced to death, and his sentence does not arise from convictions for crimes committed during a war.

1013. The process by which the President of the United States and the United States Senate ratified the ICCPR, and the substance of the purported reservations and declarations placed upon its ratification, present important federal questions under the separation of powers doctrine as well as the Treaty Clause. The United States ratified the ICCPR on September 8, 1992 with five reservations, five understandings, four declarations, and one proviso. S. Res. 4783-84, 102d. Cong., (1992). One of the purported reservations was made to avoid the provisions of article 6 to the ICCPR, which guarantees the right to life and specifically prohibits the execution of juveniles. The United States's ratification of the ICCPR included a vague declaration "that the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein and otherwise by the state and local governments. The Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant." S. Treaty Doc. No. 95-2 (Dec. 16, 1966), International Covenant on Civil and Political

Rights.

1014. However, the federal Treaty Clause does not contain any language suggesting that the Senate can partially consent to a treaty or create a new one by placing conditions on it that materially alter the treaty which is proffered by other nations. Nor does the alleged "reservation power" survive analysis under the United States Supreme Court's recent decisions regarding the separation of powers, culminating in *Clinton v. City of New York*, 524 U.S. 417 (1998) (line-item veto held invalid because the Constitution does not authorize the president "to enact, to amend or to repeal statutes"); *see also Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983).

1015. President Clinton subsequently issued an executive order adopting a "policy and practice of the Government of the United States" to implement international human rights treaties. Executive Order No. 13107, "Implementation of Human Rights Treaties," attached hereto as Exhibit 78. President Clinton specifically referred to the ICCPR when ordering that the United States fully "respect and implement its obligations under the international human rights treaties[.]"[58]

---

[58] Exec. Order No 13107 states, in part:

"IMPLEMENTATION OF HUMAN RIGHTS TREATIES

By the authority vested in me as President by the Constitution and the laws of the United States of America, and bearing in mind the obligations of the United States pursuant to the *International Covenant on Civil and Political Rights* (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and other relevant treaties concerned with the protection and promotion of human rights to which the United States is now or may become a party in the future, it is hereby ordered as follows:

1016. In addition to violating federal constitutional and separation-of-powers principles, the United States's attempt to condition its consent to the treaty with a "reservation" to the prohibition against executions violates international law because the "reservation" is inconsistent with the "object and purpose" of the treaty. The Vienna Convention on the Law of Treaties states that a "reservation" is not valid if it "is incompatible with the object and purpose of the treaty." Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331, at 336-37; see also Rest.3d Foreign Relations Law of the United States, § 313(1)(c) ("A state may enter a reservation to a multilateral international agreement unless the reservation is incompatible with the object and purpose of the agreement.") This rule of international law has been adopted by the International Court of Justice and the United Nations General Assembly. *See Reservations to the Convention of the Prevention and Punishment of the Crime of Genocide*, U.N. GAOR, 6th Sess., 360th plenary meeting, at 84, U.N. Doc. A/L.37 (1952).

1017. The "object and purpose" of the ICCPR is to bestow and protect inalienable human rights to citizens: "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life." Article 6, para. 1, International Covenant on

---

> "Section 1. Implementation of Human Rights Obligations.
>
> "(a) It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD."

Exhibit 78 (Exec. Order No. 13107, 63 Fed.Reg. 68991 (emphasis added)).

Civil and Political Rights, June 8, 1992, 999 U.N.T.S. 171. The right to life is a fundamental human right which is expressed throughout the ICCPR. There is nothing more contravening to the "right to life" than the death penalty.

1018. In 1995, the United Nations Human Rights Committee concluded that the United States's reservation to Article 6, paragraph 5 was incompatible with the object and purpose of the ICCPR, and recommended that it be withdrawn. *See Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant*, U.N. Hum. Rts. Comm., 53rd Sess., 1413th meeting., at para. 14, U.N. Doc. ICCPR/C/79/Add.50 (1995). "The Committee [was] particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purposes of the Covenant." *Id.*

1019. Because the United States' "reservation" to Article 6, paragraph 5, violates the object and purpose of the ICCPR and its Second Optional Protocol, it is void. Since the "reservation" is void, the United States is bound by this treaty, and, pursuant to the Supremacy and Treaty Clauses to the United States Constitution and long established rules of international law, the State of California is prohibited from executing petitioner. U.S. CONST. art. VI., cl. 2; U.S. CONST. art. II, cl. 2; International Covenant on Civil and Political Rights, June 8, 1992, 999 U.N.T.S. 171; *The Paquete Habana*, 175 U.S. at 700; *Clinton v. City of New York*, 524 U.S. 417; *Bowsher v. Synar*, 478 U.S. 714; *INS v. Chadha*, 462 U.S. 919; Exec. Order No. 13107, 63 Fed.Reg. 68991 (December 10, 1998) [App. 137]; S. Treaty Doc. No. 95-2 (Dec. 16, 1966), International Covenant on Civil and Political Rights.

1020. For all of the reasons asserted herein, and in this Petition, the writ must issue.

WHEREFORE, Petitioner Mark Christopher Crew respectfully requests that this Court:

1. Take judicial notice of the record and all pleadings and exhibits filed in this Court in *People v. Crew,* No. S034110, all pleadings and exhibits filed in this Court in *In re Crew,* No. S084495, and in all other related filings as specified above;

2. Request that the original exhibits referred to in this Petition be transmitted to the Court by the clerk of the superior court (Cal. Rules of Court, Rule 10(d));

3. Allow petitioner a reasonable opportunity to amend or supplement this Petition to include legal and factual grounds for claims which become apparent from further investigation, from allegations made in the return or informal opposition to the Petition, or from this Court's decision on his pending direct appeal;

4. Issue a writ of habeas corpus or order respondent to show cause why petitioner is not entitled to the relief sought;

5. Grant petitioner who is indigent sufficient funds to secure investigative and expert assistance as necessary to prove the facts alleged in this Petition;

6. Grant petitioner the authority to obtain subpoenas for witnesses and documents which are not obtainable by other means;

7. Grant petitioner the right to conduct discovery including the rights to take depositions, request admissions, and propound interrogatories and the means to preserve the testimony of witnesses;

8. Grant petitioner relief on the merits of his claim(s) after determining that there are no material facts in dispute or order an evidentiary hearing at which petitioner will offer the herein stated, and further proof of, the factual allegations stated above;

9. Upon final review of the cause, order that petitioner's conviction, special circumstance finding, and death sentence be set aside;

10. Issue any stays of execution or proceedings necessary to protect this Court's jurisdiction; and

11. Grant petitioner such further relief as is appropriate and just in the interest of justice.

Dated: June 26, 2002

Respectfully submitted,

LYNNE S. COFFIN
State Public Defender

ANDREW S. LOVE
Assistant State Public Defender

BY: _____
Andrew S. Love

ATTORNEYS FOR PETITIONER
MARK CHRISTOPHER CREW

VERIFICATION

Andrew S. Love declares as follows:

I am an attorney admitted to practice law in the State of California. I am an Assistant State Public Defender and am assigned to represent Mark Christopher Crew on appeal and in any related habeas corpus proceedings.

Mr. Crew is confined and restrained of his liberty at San Quentin Prison, Tamal, California. He has reviewed the allegations in the petition. This petition was prepared with his knowledge and authorization.

I am authorized to file this Petition for Writ of Habeas Corpus on behalf of petitioner. I am making this verification because petitioner is incarcerated in Marin County and because these matters are more within my knowledge than his.

I have read the foregoing Petition for Writ of Habeas Corpus and know the contents to be true.

Executed under penalty of perjury this 26th day of June, 2002, at San Francisco, California.

Andrew S. Love

DECLARATION OF SERVICE

Re: People v. Mark Christopher Crew S034110

I, Glenice Fuller, am a citizen of the United States. My business address is: 221 Main Street, San Francisco, CA 94105. I am employed in the City and County of San Francisco where this mailing occurs; I am over the age of 18 years and not a party to the within cause. I served the within document:

PETITION FOR WRIT OF HABEAS CORPUS

on the following named person(s) by placing a true copy thereof enclosed in an envelope addressed as follows:

PEGGY S. RUFFRA
Office of the Attorney General
455 Golden Gate Ave., Ste. 11000
San Francisco, CA 94102-3664

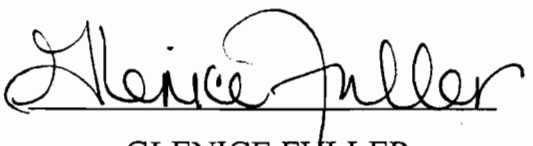
DISTRICT ATTORNEY
Santa Clara County
70 West Hedding Street, 5th Floor
San Jose, CA 95110

CLERK OF THE COURT
Santa Clara County Superior Court
190 West Hedding Street
San Jose, CA 95110
Attn: Judge Robert Ahern

MARK CHRISTOPHER CREW
P.O. Box E-48050
San Quentin State Prison
San Quentin, CA 94974
(by hand delivery)

and causing said envelope to be sealed and deposited in the United States mail, with postage thereon fully prepaid, at San Francisco.

I declare under penalty of perjury that service was effected on June 26, 2002, at San Francisco, California and that this declaration was executed on June 26, 2002, at San Francisco, California.



GLENICE FULLER