IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE MAURICE BOYETTE	)	S092356
	)	No._____
Petitioner,	)	
	)	Related Appeal: S032736
ON HABEAS CORPUS	)	(Alameda County Superior
	)	Court No. 114009B
	)	Hon. Richard Haugner, Judge)

PETITION FOR WRIT OF HABEAS CORPUS

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

Petitioner, Maurice Boyette, through his attorney Lynne S. Coffin, State Public Defender, 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.

INTRODUCTION

Petitioner's trial was fatally infected with fraud, deception and misconduct from the moment that the Alameda County Superior Court Clerk summoned jurors to jury service. Petitioner stands before this Court convicted of capital murder and sentenced to death, not because an impartial jury properly received evidence of his guilt beyond a reasonable doubt of his worthiness of the most severe punishment, but because of extreme juror bias, repeated juror misconduct, egregious prosecutorial misconduct, and the conflicted and incompetent assistance of trial counsel.

Petitioner's convictions and death sentence must be vacated because a biased juror served on his jury – in spite of that juror's statutory ineligibility for jury service due to a prior felony conviction. When summoned to jury service by the Alameda County Jury Commissioner,

Pervies Lee Ary, Sr., failed truthfully to disclose his prior felony conviction for grand theft, which would have disqualified him from jury service. On voir dire, Juror Ary knowingly failed to reveal not only his own felony conviction and the fact that he had been incarcerated, but also, inter alia, the fact that both of his sons had criminal records – including drug-related convictions – and the fact that his eldest son, with whom he had recently resided, served a state prison sentence to the California Rehabilitation Center at Norco as a drug addict, where he claimed to have been forced to join a prison gang.

Juror Ary's bias against Petitioner was evident at both the guilt and penalty phases of the trial. Juror Ary introduced highly prejudicial extraneous evidence into both the guilt and penalty phase deliberations. In the guilt phase deliberations, Juror Ary told the other jurors that Petitioner had previously committed another murder. In the penalty phase deliberations, Juror Ary – who was the foreman at the penalty phase – introduced highly prejudicial extrinsic evidence into the deliberations by recounting experiences about prison and prison gangs in California. When this was not sufficient to convince several jurors who were holding out for a sentence of life without the possibility of parole to change their minds and vote for death, Juror Ary suggested that the holdout jurors were naive about

life in California state prisons and that they should educate themselves about this topic by watching the film *American Me*. At least two of the holdout jurors followed Juror Ary's suggestion and watched this movie in the midst of the penalty phase deliberations. *American Me*, which touts itself as being based on a true story and was largely filmed at Folsom State Prison, contains powerful and graphic scenes of violence and depicts the California state prison system as a breeding ground for gang violence and murders. After watching the film, the holdout jurors switched their votes and agreed that Petitioner should be sentenced to death.

Throughout Petitioner's trial, Juror Ary exhibited his bias against Petitioner by doing everything in his power to ensure that Petitioner would be convicted of capital crimes and sentenced to death. These structural errors alone require reversal of Petitioner's convictions and death sentence.

Moreover, Juror Ary's actions are thematically intertwined with the extensive misconduct committed by the prosecutor in this case. At the penalty phase of Petitioner's trial, the prosecutor presented a series of hypothetical questions based on facts that she knew to be false or unsupported by the evidence, relating numerous instances of alleged prior violent acts by Petitioner, including two incidents she claimed occurred while Petitioner was incarcerated at the county jail. Not a scintilla of

evidence was presented to support these allegations and the prosecutor was specifically aware that several of the "witnesses" – who she presented to the jury in the form of her hypothetical questions and arguments based thereon – would, if called to the stand, have offered testimony that directly contradicted her hypothetical "facts," was not aggravating and was in fact mitigating. The prosecutor's presentation of these false and unsupported violent acts was exacerbated by her repeated attempts to inflame and prejudice the jurors by racist comments and argument asking the jurors to speculate regarding gang affiliation and future dangerousness.

The cumulative effect of this misconduct was overwhelmingly prejudicial to Petitioner. In the courtroom, the prosecutor improperly told the jury that Petitioner had committed numerous prior acts of violence, including some in prison, encouraged the jury to speculate that Petitioner would join the Black Guerilla Family, a notorious prison gang, and argued Petitioner's "future dangerousness." Inside the jury room, Juror Ary stated that Petitioner had committed a prior violent crime – in this case, a murder – of which there was no evidence and which in fact was not true. At the penalty phase deliberations, Jury Ary caused the other jurors to be exposed to highly prejudicial extraneous evidence by sharing experiences of incarcerated felons and urging the holdout jurors to watch a film that

actually depicts the Black Guerrilla Family as a violent prison gang in California state prisons. Thus, the prosecutorial misconduct and the juror misconduct in this case were inextricably linked and operated to derail Petitioner's jury from their legally defined task to collectively weigh properly received aggravating and mitigating circumstances. Instead, they focused on the narrow issue of Petitioner's likely future dangerousness in the gang-ridden milieu of the California state prison system – an issue that was not properly before the jury in the first place.

Neither the Court nor defense counsel protected Petitioner from the impact of this cumulative misconduct. Petitioner was denied his constitutional right to the effective assistance of counsel and counsel that was free of conflicts of interest. Instead of being protected by zealous advocates, Petitioner was represented by defense counsel who were lifelong friends, and who acted in their own interests and ignored their duty of loyalty to Petitioner.

At the time of the commencement of Petitioner's trial, one of Petitioner's attorneys was a federally convicted felon awaiting sentencing, and facing possible incarceration, hundreds of thousands of dollars in fines, and the certain suspension of his licence to practice law in the state of California. His sentencing occurred in the midst of Petitioner's trial. The

financial self-interest arising from these circumstances created an actual conflict of interest that adversely affected counsel's representation of Petitioner. Essentially, counsel obtained appointment to Petitioner's case as a means of earning the money he desperately needed because of the expected imposition of a large fine at his upcoming sentencing and the impending collapse of his legal practice. Counsel could ill afford for Petitioner's case to proceed on a reasonable schedule. Accordingly, a complex capital case involving a double homicide and two special circumstances was rushed to trial in less than six months, thus ensuring that the penalty phase concluded only four days before the effective date of the suspension of counsel's license to practice law. This rush to trial adversely impacted the representation of Petitioner in innumerable ways, resulting in pervasive inadequacies in counsel's investigation, preparation, and execution of a coherent and competent defense at both the guilt and the penalty phases. Counsel's conflict also adversely impacted the case because it caused counsel to be absent from significant portions of Petitioner's trial and to be constantly coming into the courtroom late or not at all for some court sessions. The randomness of counsel's comings and goings could only have signaled to the jurors counsel's lack of interest in or respect for the proceedings in which Petitioner stood to lose his life.

Counsel's inadequacies constitute examples of both the adverse effects of counsel's conflicts of interest and of representation that failed to conform to prevailing standards of competence. Counsel failed to hire appropriate experts in the guilt phase of the trial, failed to heed the recommendations for investigation of the mental health expert that they did hire, and failed to present evidence. Counsel failed to conduct any significant penalty phase investigation, failed to prepare or present appropriate experts, and failed to provide the jury with an accurate picture of Petitioner's mental impairments and compelling life history. None of these failings are attributable to reasonable tactical choices.

This was not a case where there was substantial aggravating evidence. The only evidence that the prosecutor presented in her penalty case-in-chief as aggravation consisted of a stipulation to Petitioner's two prior drug convictions and victim impact evidence. Petitioner had no juvenile record. He was only nineteen years old at the time of the crime and twenty years old at the time of trial.

This *was* a case where there was compelling mitigation evidence available. Petitioner suffers from life long depression to which he was genetically predisposed. He has mild brain damage that contributed to his failures in school and is probably the result of childhood head injuries and

exposure in utero to drugs. Petitioner suffered from severe neglect. Both of Petitioner's parents were severely addicted to heroin and incapable of caring for him. He was raised in chaotic households by his grandmother and great-grandmother. The aunts and uncles who also served as Petitioner's intermittent and indifferent caretakers were engaged in rampant drug abuse and were frequently the perpetrators of violence. Numerous witnesses – including relatives, neighbors, school teachers and administrators, were available to testify that Petitioner was a lonely, depressed, neglected child, but who was nevertheless well behaved and respectful.

This was not the picture of Petitioner that defense counsel presented to the penalty phase jury that sentenced Petitioner to death. At the last moment, counsel threw together their presentation, switching psychological experts when the initial psychologist they consulted requested that investigation and record collection be conducted, and instead presented poorly planned psychological evidence that provided the prosecutor with fodder for her improper gang affiliation and future dangerousness arguments. Additionally, in presenting the extremely limited testimony of several of Petitioner's family members, defense counsel painted a false picture of Petitioner's upbringing, giving the jury the impression that apart

from having been raised by his grandmother instead of his mother, Petitioner had enjoyed many advantages in his childhood and adolescence, including extensive psychological counseling and the support and ethical guidance of a large, and loving family. Thus, the evidence presented by the defense penalty case gave the jury a grossly distorted image of Petitioner's family and social history.

The prejudice to Petitioner of the misconduct of Juror Ary, the misconduct of the prosecutor, and/or the failure of counsel to act effectively and in accordance with their duty of loyalty to Petitioner is clear. Petitioner respectfully urges this Court to grant him a new trial.

II.

UNLAWFUL RESTRAINT

1. Petitioner Maurice Boyette, through his counsel, respectfully petitions this Court for a Writ of Habeas Corpus and by this verified Petition sets for the following facts and causes for the issuance of said writ.

2. 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 S. Woodford and Director of the California Department of Corrections Terhune, pursuant to convictions and a death sentence imposed upon him by the Alameda County Superior Court on May

7, 1993.

3. Petitioner requests that this Court take judicial notice of the certified record on appeal and the pleadings on file in this Court in the case of *People v. Boyette,* S032736.

4. No previous Petition for Writ of Habeas Corpus has been filed on Petitioner's behalf in this Court.

5. This 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 analogues.

6. The claims asserted in this Petitioner 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 Appellant's Reply Brief.

III.

STATEMENT OF THE CASE

7. On November 20, 1992, the District Attorney of Alameda County filed an Information against Petitioner and Antoine L. Johnson. The Information charged both Petitioner and Johnson with: 1) the murder of Gary Carter on or about May 23, 1992 (Pen. Code § 187); 2) the murder of Annette Devallier on or about May 23, 1992 (Pen. Code § 187); 3) and

felon in possession of a handgun (Pen. Code § 12021). Both Petitioner and Johnson were charged with being armed with a firearm (Pen. Code § 12022(a)) and with personal use of a firearm (Pen. Code §§ 1203.06; 12022.5). As to the second count of murder, Petitioner was charged with personal use of a firearm (Pen. Code §§ 1203.06, 12022.5) and Johnson was charged with being armed with a firearm (Pen. Code § 12022(a)). Two special circumstances were alleged: 1) lying in wait with regard to the first murder count (Pen. Code § 190.2(a)(15)); and 2) multiple murder (Pen. Code § 190.2(a)(3)). Sentencing enhancements for prior convictions pursuant to Pen. Code § 667.5(b) were also alleged. It was further alleged that Petitioner was previously convicted on December 18, 1991, and on March 6, 1991, of possession for sale of cocaine base. Johnson was previously convicted on August 2, 1989, with assault with a deadly weapon. CT 532-37.[1]

8. On December 9, 1992, Petitioner was duly arraigned and entered a plea of not guilty to the charges set forth in this Information, denied the use and armed clauses, denied the special circumstance allegations, and denied the prior convictions. RT 1-2.

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[1] References to the Clerk's Transcript are designated "CT." References to the Reporter's Transcript are designated "RT."

9. On January 26, 1993, the trial court granted Johnson's motion to sever the two defendants for trial. CT 825.[2]

10. On February 1, 1993, jury selection in Petitioner's case commenced, CT 826, and on March 1, 1993, the jury was selected and sworn to try the cause. CT 839.

11. The guilt phase portion of the trial began on March 1, 1993, with the prosecution's presentation of its case-in-chief. On March 3, 1993, the prosecution rested, and the defense began its case-in-chief. CT 844. On March 8, 1993, the defense rested and the prosecution presented witnesses in rebuttal. CT 847. On March 9, 1993, both parties presented their arguments to the jury. CT 848. On March 10, 1993, the jury was instructed and commenced its deliberations. CT 849. On March 11, 1993, the jury rendered its verdicts, finding Petitioner guilty of two counts of first degree murder, with the attendant use and armed clauses, and guilty of felon in possession of a firearm. The jury found the multiple murder special circumstance to be true, but found the lying in wait special circumstance not true. CT 918-927.

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[2] On April 19, 1993, Antoine Johnson pleaded guilty to attempted murder of Gary Carter, that the attempted murder was willful, deliberate and premeditated, was with intent to cause great bodily injury, and that he was armed with a firearm. Johnson was sentenced to life in prison but would be eligible for parole after seven years. CT 1191-99.

12. On March 22, 1993, the penalty phase portion of the trial began, with the prosecution's presentation of its case-in-chief. CT 940. The prosecution rested, and the defense began the presentation of its case-in-chief on the same day. *Id.* On March 23, the defense rested, and both parties presented their arguments to the jury. CT 941. The jury was instructed and commenced its deliberations. *Id.* The jury rendered its verdict of death on March 25, 1993. CT 976.

13. On May 7, 1993, the trial court heard and denied Petitioner's motion for new trial and Petitioner's motion for modification of sentence pursuant to Pen. Code § 190.4(e). The prior convictions were stricken for purposes of sentencing. The court then pronounced the sentence of death. CT 1227-32.

IV.

STATEMENT OF FACTS

A. GUILT PHASE - PROSECUTION CASE-IN-CHIEF

14. **Donald Guillory** testified that on Saturday, May 23, 1992, he borrowed a yellow Lincoln Continental from a man named Bishop, who lived in West Oakland. RT 1203, 1243. He returned in the car to Bishop's house at about 5:00 p.m., where he was met by Antoine Johnson and Petitioner. Johnson asked for a ride to Cole Street in East Oakland. RT

1203-4, 1247. Guillory had known Johnson about three weeks and was associated casually with Petitioner. RT 1203-05.

15. Guillory drove Johnson and Petitioner to a house at 2501 Cole Street. Johnson and Petitioner went upstairs while Guillory waited in the car. RT 1206. According to Guillory, Johnson was blind and had to be helped up the stairs by Petitioner. RT 1207. Petitioner and a woman named Kenya subsequently came outside with a bag that Guillory believed contained clothes, and put the bag in the trunk of the car. RT 1206-07. They asked Guillory to come upstairs, which he did. RT 1208. Kenya and Petitioner continued to put bags in the car. RT 1209.

16. Guillory sat down in the living room in a chair next to the glass doors. RT 1208-09. Johnson was sitting on a yellow couch. Guillory was feeling nervous and was fidgeting. RT 1210-11. Johnson asked Guillory to move away from the glass doors. Petitioner and Kenya came into the room. Kenya and her sister Jasmeen sat next to Guillory, and Petitioner sat next to Johnson. RT 1211.

17. Guillory asked what was going on, and Johnson said they were waiting for someone. RT 1211-1212. After waiting approximately thirty minutes, a man, subsequently identified as Gary Carter, came into the house. He looked at Johnson and said, "What's up?" Johnson replied,

"Where's my stuff at?" Johnson remained on the couch, then pulled a black handgun from behind him and started firing. Guillory testified that he believed Johnson fired four shots and was about four feet from Carter. RT 1212-13. Guillory saw Carter grab his side. RT 1214-15.

18. After the shots were fired, Guillory jumped up and tried to leave through the back door of the house, but the door was locked. RT 1215-16. As he was going to the back of the house, Guillory testified that he looked back into the living room and saw Petitioner grab the gun. According to Guillory, Petitioner said, "Give me the gun, man." RT 1216.

19. Guillory walked back toward the front of the house and heard two more shots. RT 1217, 1219. Guillory then went out the front door, following Johnson and Kenya. RT 1217. There was a tree in front of the house which blocked Guillory's view of the street. RT 1217. A few seconds after hearing the two shots, Guillory heard a second set of two gunshots. RT 1219, 1255. The second set of shots sounded as if they came from a different location from the first set of shots. RT 1219.

20. Guillory walked around the tree, and saw Petitioner standing over Carter with the gun in his hands. RT 1217-18. The second set of shots sounded like they came from where Petitioner was standing over Carter. RT 1219. Carter was laying on the ground next to the car. RT 1218.

Guillory also saw a second person, later identified as Annette Devallier, laying in the street about seven feet away. RT 1219-20, 1234.

21. Petitioner then got into the car, as did the others. RT 1220. Guillory was nervous. He had trouble getting the car started and had trouble driving. At some point, Johnson slapped him with his hand and said, "Got to drive better than that, straighten up," or, Johnson threatened, the next bullet would be for Guillory. RT 1221. Guillory drove to Bishop's house, where they all got out of the car, took the bags of clothes from the trunk and went into the house. RT 1222. Guillory heard Petitioner and Johnson brag to Bishop about what happened, saying, "We smoked them." RT 1223.

22. Guillory testified that he was nervous when he first spoke to the police because Petitioner and Johnson were still on the streets. Guillory claimed that Petitioner threatened to kill him and his family if he talked to the police. RT 1224-26. While Guillory said he was afraid of Petitioner, he admitted that he went riding with Petitioner after the shooting. RT 1237.

23. On cross-examination, Guillory admitted to using rock cocaine on a daily basis. RT 1235. Guillory acknowledged that he had been to the Cole Street residence maybe twice before. RT 1236. Guillory denied giving Kenya rides or that he picked her up at her mother's house a couple

of times. He claimed not to know where Kenya's mother, Vivian Copes, lived, and stated that he never picked up Jasmeen there. RT 1241.

24. Guillory had not seen Petitioner with a gun before or after the incident. RT 1238. He had seen Johnson with a gun; the same gun that was used at Cole Street. RT 1252.

25. **David Cronin**, a police officer with the Oakland Police Department, was working patrol on May 23, 1992, and responded to the scene at 2501 Cole Street sometime after 11:00 p.m. RT 1270. When he first arrived, Officer Cronin saw a man laying on the sidewalk and a woman laying in the roadway. RT 1270-71. Neither victim showed any sign of life. RT 1271. The woman was also laying face down, with her feet in the direction of Cole Street. RT 1279.

26. Between fifteen-to-thirty minutes later, Sergeant Hollomon arrived at the scene. RT 1271-72. Officer Cronin and Sergeant Hollomon went inside the house. RT 1272. Officer Cronin did not see any blood inside the house. RT 1273. The clothes dryer, which was located towards the rear of the house, was on and the television in the foyer was on, with the sound turned down. RT 1274, 1283. Officer Cronin saw shell casings in the living room, as well as on the ground in the area around both victims. RT 1274, 1277. He also found a shell casing in the back yard. RT 1282.

27. Sergeant Edward Hollomon testified that he and Officer Cronin were the first officers to enter the residence after the shooting. RT 1436-37. The front door was open, and the back door was locked. RT 1437.

28. Ralph Lew, a Field Evidence Technician for the Oakland Police Department, recovered the shell casings from the area. In total, he found seven shell casings in front of the house, five inside the house and two in the rear of the house, for a total of fourteen shell casings. One live round was also found on the couch. RT 1288, 1295, 1305, 1307. All the casings were Winchester 9 mm shell casings. RT 1289, 1307. There was an area where it appears that a bullet had hit the wood sill and penetrated at a slight upward angle. RT 1299. There was also damage to the wall and glass china cabinet, consistent with a shot fired by a person sitting on the yellow couch. RT 1300.

29. Technician Lew also testified that the bodies of the two victims were approximately 20-to-25 feet apart. RT 1294.

30. Technician Lew dusted the light bulb that was in the porch light of 2501 Cole Street for fingerprints. RT 1307-1308.

31. John Iocco, a pathologist, performed the autopsies on the victims. RT 1335-36. He testified that Ms. Devallier's death was caused by two gunshot wounds to the head. CT 1336. One shot went through the

left cheek bone, and ended on the right side of the neck. The slug was recovered from the body. RT 1336-37. There was no stippling on this wound, meaning that the weapon was farther than one-and-one-half to two feet away from the victim. RT 1338-39. A second gunshot wound, an entry wound from the right side near the jaw, exited through the top of the mouth, and through the left frontal portion of the brain. RT 1339. There was no stippling with regard to this wound. RT 1340. Dr. Iocco testified that either of these wounds would have been fatal. RT 1339. Ms. Devallier also had scrapes and bruises which were consistent with her falling on the pavement. RT 1341. Ms. Devallier's blood had a significant amount of cocaine present. RT 1341.

32. Gary Carter's death was caused by multiple gunshot wounds. RT 1342. One of the gunshot wounds entered the right side of the head, into the right side of the brain. The slug was found in the parietal lobe. RT 1342. Dr. Iocco testified that it would have been unusual for a person with this type of wound to be able to crawl down a flight of stairs; the wound might not have been instantly fatal to Carter but it would have immobilized him. RT 1342-43. Carter received several other gunshot wounds, including to the right arm, RT 1345-46, through the right chest, RT 1346, the left front side chest, RT 1347, the left lateral thigh, RT 1349, the left lower

abdominal area, RT 1350, the right leg and knee, RT 1351, and the left chest and back. RT 1351. According to Dr. Iocco, the only injury that would have immobilized Carter was the head wound. RT 1352. There was no stippling on the wounds to Carter. RT 1352, 1357.

33. A small amount of cocaine and traces of morphine were found in Carter's blood. RT 1352. Carter had healed scars on his arms, over the veins, which could have been due to past intravenous drug use. CT 1354-55.

34. Lansing Lee, a criminalist with the Oakland Police Department, testified that when a semi-automatic like a Glock is fired the operation follows what is termed a cycle of fire which is a sequence going through loading, firing and reloading. RT 1403. According to Lee, the cycle of firing for a semi-automatic and an automatic are very similar except there is a "disconnect" missing in an automatic. RT 1406. With a semi-automatic, there would be one shot from a trigger pull, and with an automatic, the gun would keep shooting as long as the trigger was held down. RT 1406.

35. Lee concluded that all the casings recovered from the scene were fired from the same gun -- a Glock 9 mm Luger caliber semi-automatic. RT 1412. With regard to the slugs and bullet fragments, all were fired from a Glock, although it could not be determined whether they

were fired from the same Glock. RT 1414-15.

36. Sergeant David Kozicki was assigned to the case. RT 1315. Prior to June 3, 1992, Sgt. Kozicki received anonymous telephone calls that three-to-four people had been present at the shooting. The names mentioned were those of Jasmeen Banks, Lita Kenya Cook, Antoine Johnson and Petitioner. Sgt. Kozicki then began to contact the people named. RT 1317.

37. On June 3, 1992, Kozicki was called by Petitioner and Johnson. They had heard Kozicki wanted to talk with them, and they wanted to make an appointment to see him. Petitioner came down to the police department on his own on at 9:21 a.m., on June 4th, 1992. RT 1318. After advising Petitioner of his Miranda rights and after Petitioner waived those rights, Kozicki and his partner, Sgt. Thiem, interviewed Petitioner. RT 1319-20. At some point in the interview, Petitioner's statement was taped, which, according to Kozicki, was a "concise version" of the interview. RT 1321-22. The tape-recording was played for the jury. RT 1323; People's Exhibit 17.

38. In the taped-recorded interview, Petitioner admitted being in the house when the shooting occurred. He said that the others in the house were Johnson, Kenya, Jasmeen, a man named "Dee" and Dee's friend.

Petitioner said that it was Dee and his friend who were responsible for the murders, but that Johnson had also fired a gun at Carter. CT 86.

39. According to Kozicki, Petitioner said he was not a friend of Johnson's, but saw him only in passing. RT 1325. Petitioner also said he had never owned or handled a gun. RT 1326. Petitioner initially told Kozicki that only Dee had a gun that night, but later said that Johnson also had a gun and shot once. RT 1326. Petitioner also said he saw Dee's friend shoot the woman. He said she put her hands up and said, "Don't do it," and that Dee's friend then shot her, maybe twice. She fell, and was then shot a couple more times in the back of the head. RT 1327.

40. After this interview, Petitioner was released. RT 1327. Sgt. Kozicki eventually contacted Donald Guillory, who having first denied any knowledge of the incident, eventually inculpated Petitioner and Johnson. Kozicki also interviewed Jasmeen Banks. He then prepared arrest warrants for Petitioner, Johnson and Kenya. RT 1328-29. Kenya, however, was not charged. RT 1383.

41. Petitioner was arrested and taken into custody on July 30, 1992. Kozicki had an arrest warrant, but did not tell Petitioner he was under arrest. According to Kozicki, after advising Petitioner of his Miranda rights, Petitioner again agreed to talk to Sgt. Kozicki. RT 1331-32.

Kozicki testified that before the interview, he informed Petitioner that a warrant had been issued for his arrest. RT 1330. The tape recording of a portion of this interview was also played for the jury. RT 1333; People's Exhibit 16.

42. In this recorded interview, Petitioner stated that he and Johnson were driven to the house on Cole Street by someone named Donald. After they arrived, Johnson yelled at Kenya, accusing her of taking his drugs and money, Kenya said that it was Carter who was responsible. When Carter arrived, Johnson shot him four times, and then another four times, as Carter was going out the door. Johnson then handed the gun to Petitioner, and said, "Go get the girl." Petitioner ran after Carter's girlfriend, who turned around and said "Please don't do it." Petitioner pulled the trigger of the gun, which shot twice, and after she fell, he shot her one more time in the head. Petitioner said that he then went to the car, where Carter, who was laying on the ground, grabbed his leg. Petitioner shot him in the stomach. Petitioner said he did what Johnson told him to do because he feared for his life. He agreed, when asked by the interviewer, that Carter's girlfriend was killed to prevent her from being a witness. Petitioner then left the scene with the others. Petitioner said it was Johnson who made up the story about a man named Dee having been the perpetrator, and Johnson told Petitioner

to tell this story to the police. Petitioner stated that earlier in the evening he had taken two Valium, and one codeine and that he drank four Jack Daniels coolers, and still felt high at the time of the shootings. People's Exhibit 16.

43. A third tape recording was made of Petitioner's statements, "for legal reasons," RT 1364, in which Petitioner was instructed to only refer to his involvement and not the involvement of others. This tape-recording was also played for the jury. RT 1364; People's Exhibit 15.

44. Sgt. Kozicki testified that the police never recovered the murder weapon and had not been able to find the car. RT 1363.

45. On cross-examination, Kozicki denied telling Petitioner that he could go home if he gave a statement. RT 1371.

46. Sgt. Kozicki further testified that Betty (Trice) Jackson, who owned the house at 2501 Cole Street, identified Dee as a person who had been at residence previously. RT 1375. Dee, also known as Ronald Thomas, was wanted for escape from juvenile facilities. RT 1376.

47. Alvarez Devallier, Annette's father, identified a photograph of Annette that was taken two years previously. RT 1440-41. Mr. Devallier testified that he was very close to his daughter before she died. RT 1441. Annette had been living in a church recovery house, which was a drug rehabilitation program. RT 1441. However, she had left the recovery house

about a week before she was killed. RT 1441.

48. Reo Carter, Gary Carter's sister, identified a photograph of Carter. Carter had been living with her, although he had missed a few nights in the week before he was killed. RT 1444. On cross-examination, Ms. Carter stated she knew that Carter was using crack cocaine, but denied that he was staying at the Cole Street residence. RT 1447-48.

B. GUILT PHASE - DEFENSE CASE-IN-CHIEF

49. Petitioner testified on his own behalf. Petitioner was 19 years old at the time of the shootings. RT 1452. He had gone as far as the ninth grade in school, and prior to being arrested, was homeless. RT 1452. When he was growing up, he lived with his grandmother in Berkeley. He never lived with his father, who died when Petitioner was twelve. Petitioner's mother was a drug addict, who left Petitioner with his grandmother when he was two years old. RT 1452-53.

50. Petitioner admitted to having been convicted of a felony -- possession for sale of cocaine -- and that he was in jail in 1992. Petitioner was released from jail on February 14, 1992 . RT 1453.

51. Petitioner's mother, Marcia Surrell, was living at the Cole Street house in 1992. RT 1453. In May 1992, Petitioner stayed there for a couple of days. RT 1455. A few days before the shootings, Petitioner's mother

was taken to the hospital in an ambulance because "she was off heroin." RT 1456. Betty (Trice) Jackson and Kenya Cook were also living there. RT 1455. Petitioner met Antoine Johnson about a month before the offense. RT 1456.

52. On June 4, 1992, after learning that Sgt. Kozicki wanted to talk with him, Petitioner went down to the police department for questioning. RT 1457-58. Petitioner initially told Kozicki that he did not know anything about what happened on Cole Street because he was afraid for the safety of his family. RT 1458-59. After Sgt. Kozicki assured Petitioner that he would not tell anyone what Petitioner said, Petitioner gave a statement. RT 1459. However, after giving this statement, Petitioner's family started getting threatening phone calls. RT 1460.

53. On June 30, 1992, Petitioner was handcuffed and taken to the police station for further questioning. Petitioner testified that Kozicki did not tell him he was under arrest, RT 1461; rather, Kozicki assured him that if he gave a statement, Kozicki would let him go. RT 1462. Petitioner gave the statement because he thought he would be released if he did. Kozicki said if he "told on Antoine Johnson that he would let me go." RT 1463. Petitioner only knew he was under arrest after he had given the statement, when he was taken downstairs and booked. RT 1463.

54. Between the first interview and the second interview, Petitioner and his family were threatened, and Petitioner remained worried about the safety of his family. RT 1477-78. After the first interview, word had "hit the streets" that Petitioner had given information regarding Dee, and Dee had threatened him. RT 1478. Petitioner ensured that his mother moved from the Cole Street residence because of the threats. RT 1479. Petitioner testified he was afraid of both Dee and Johnson. RT 1479. Petitioner also testified he was moved into protective custody in the jail because he had been labeled a snitch. RT 1480.

55. On cross-examination, Petitioner agreed that the reason his mother moved out of the Cole Street residence was because it was boarded up. RT 1482. Petitioner denied he had been reclassified in the jail because he threatened one inmate and beat up another inmate. RT 1483-86.

56. Petitioner was also questioned on cross-examination about the testimony he gave during the suppression hearing, in which Petitioner stated that his second statement to the police was not true, and that he had memorized the facts from what the police had told him. RT 1487-88. Petitioner admitted that at the suppression hearing he testified that he shot Carter, but did not shoot Devallier. RT 1488. Petitioner also testified that he had lied at the suppression hearing because Johnson was in the

courtroom, and he was afraid of Johnson. RT 1489. Petitioner further testified that his statements on the second and third tape-recordings were all lies, but the first tape recorded statement was mostly true. RT 1490.

57. Petitioner refused to answer questions on cross-examination about Dee, stating that he would be killed if he did. RT 1491. He testified that his life was in danger because of the first statement he gave to the police in which he blamed Dee and Dee's friend. RT 1491. Petitioner refused to answer any questions regarding the first statement out of concern for the safety of his family. RT 1492. He stated he would rather be on trial for a double murder and face the death penalty than to have his mother and grandmother endangered. RT 1503-04.

58. Marcia Surrell, Petitioner's mother testified that in May 1992, she was living at 2501 Cole Street. RT 1624. Gary Carter stayed there sometimes with Annette, his girlfriend. RT 1625-26. Ms. Surrell had known Antoine Johnson for about six or seven months. RT 1626. Johnson and his girlfriend, Kenya, also stayed at the residence. RT 1626, 1627. Petitioner met Johnson when Petitioner came to visit Ms. Surrell. RT 1626. Petitioner did not live on Cole Street, but stayed with a friend of his or with her mother. RT 1629. Just before she went into the hospital in May 1992, three days prior to the shooting, she saw a person named Dee who came

there often, at the residence. RT 1627.

59. Prior to the shooting she saw Johnson with guns, but did not see Petitioner with a gun. RT 1628.

60. Latonya Jackson, Betty Jackson's niece, testified that she knew Gary Carter, who was a friend of the family. RT 1567-68. She went to school with Antoine Johnson. RT 1568. Ms. Jackson did not see Johnson with a gun in 1992. RT 1569.

61. Ms. Jackson testified that sometime after May 1992, she helped Marcia Surrell move from one location to another. RT 1569-71.

62. Betty Jackson, was the owner of 2501 Cole St in May 1992, and lived there at that time. RT 1528. Marcia Surrell, Petitioner's mother, also lived there. RT 1528. Ms. Surrell had one of her legs amputated. RT 1528. Antoine Johnson had been staying at the Cole Street residence off and on. RT 1529. Ms. Jackson had seen Dee at the residence a week before or perhaps two days before the shootings. RT 1529. Carter, Johnson and Petitioner were close, but Carter and Johnson were closer than Petitioner and Johnson. RT 1532. She testified that both Petitioner and his mother were threatened. RT 1533.

63. On cross-examination, Ms. Jackson testified that the house was closed down after the murders and no one lived there. RT 1534. She also

testified that Johnson was legally blind, but he could see out of one of his eyes. RT 1537. Johnson had two guns. RT 1543-44.

64. Ms. Jackson confirmed that Carter and Devallier also stayed at the house. They were sleeping on the couch when she left for the weekend before the shootings. RT 1541.

65. David Brooks lived across the street from 2501 Cole Street in May of 1992. RT 1515. At 11:20 p.m., on May 23rd, Brooks went outside to investigate some noise from a party. RT 1516-17. As Brooks was about to go back into his house, the sound of people struggling across the street attracted his attention. RT 1517. It sounded like punches were being thrown, and, what really got his attention, were some loud crashing sounds from 2501 Cole Street. RT 1517. He also heard kicking sounds that he believed were caused by struggling inside of the security gate and the gate being kicked open. RT 1518, 1521. It was dark, but Brooks saw possibly three people come out of the security gate, struggling and fighting. RT 1518. He saw "shadowy figures rolling down the stairs." RT 1518. Next, Brooks saw a person crawling to the middle of the street. RT 1519. He saw someone going back into the house, and then someone coming out of the house; it may have been the same person. RT 1519. The person who came out of the house fired the gun at point blank range into a male who

was on the sidewalk. RT 1523. Then the person with the gun went into the middle of the street, stood over the woman, who had crawled into the middle of the street and was on her hands and knees, and shot her. RT 1523-24. Brooks heard three or four gunshots, which did not appear to come from an automatic. RT 1519, 1523. After he heard the shots, Brooks went into his house and called 911. RT 1519-20.

66. Greg Martin, a school teacher in San Francisco, was on Cole Street on May 23, 1992. RT 1550. He arrived at 2498 Cole Street around 11:15 p.m. About ten minutes later he heard gunshots, which was not unusual at that location. RT 1551-52. After hearing the gunshots, Martin looked out the window and saw a large American model car parked in front of 2501 Cole Street. RT 1553. Within a few minutes, Martin looked out the window again, and the car was gone. RT 1555. Martin was fairly certain that the car was not in front of the house when he arrived. RT 1555.

67. Curtis Sato, a criminalist with the Oakland Police Department, and a fingerprint expert, testified that the fingerprints from the light bulb at 2501 Cole Street matched Gary Carter's prints. RT 1558-59.

68. Joe Chan, an inspector with the District Attorney's office, met with Donald Guillory on January 19, 1993. RT 1510. Guillory indicated that a few days before he was contacted by the police, he was driving the

Lincoln with Petitioner in the car, and had been stopped by the police. RT 1510-11. On cross-examination, Chan testified that Guillory had said that right after the police stopped the car, Petitioner threatened him. RT 1512.

69. Vivian Copes, the mother of Kenya Lita Cook and Jasmeen Banks, testified that she met Donald Guillory a couple of times. He was driving Kenya around. RT 1547. Kenya's boyfriend in April-May of 1992 was Antoine Johnson. RT 1547-48. Jasmeen's boyfriend was Dee. RT 1549. On cross-examination, Ms. Copes described Guillory as having grey hair and a beard, and stated that she knew him only as "Donald." RT 1548-49. According to Kenya, he was a friend of Bishop's. RT 1549.

70. Earl Turner and Antoine Johnson grew up together and were good friends. RT 1505. Johnson had been blind for about one-and-one-half years. RT 1505. Johnson was staying at the Cole Street house where Turner would visit him. RT 1505. Turner also saw Ronnie Thomas, known as Dee, at Cole Street, and saw him together with Johnson. RT 1505-06.

71. Andrew Barton, an Oakland Police officer, testified that he talked with Earl Turner in May 1992, about a car registered to Turner's girlfriend that was in Johnson's possession. Officer Barton encouraged Turner to file a report about the car but he refused to do so. RT 1579. When Barton became aware that Johnson was a murder suspect, he related

the information about Turner to Sgt. Kozicki. RT 1580. Barton also gave Kozicki a list of Johnson's known associates, which included "Ronnie." RT 1580.

72. Bernie Licata, a Hayward police officer, had contact with Ronald Thomas on May 28, 1992. RT 1582. Thomas was wanted for escaping from custody. There were attempted murder charges pending against him when he escaped. RT 1582.

73. David Lundgren, a Hayward police officer, was looking for Ronald Thomas on May 28, 1992, and was involved in a car chase with Thomas on that date. RT 1589-90. Thomas's nickname was Dee. RT 1590.

C. GUILT PHASE - PROSECUTION REBUTTAL

74. David Brooks was recalled and testified that the shooter was not a very large fat man or a very short man, and identified Petitioner as falling within this general description of the shooter. RT 1634-35.

75. Ronnie "Dee" Thomas was seventeen years old and in custody for attempted murder. In April 1992, he escaped from custody. He was picked up on May 27, 1992, and had been in custody at the California Youth Authority ever since. RT 1638-39. Thomas first found out the previous Friday, when he talked to D.A. Inspector Chan, that Petitioner was

seeking to blame him for a double murder. RT 1640. Thomas had never threatened Petitioner, and had no conversations with Petitioner since being in custody. RT 1640.

76. Thomas was an associate, not a friend of Johnson's. RT 1641. He was friends with Earl Turner, but they had a falling out because Turner snitched on him. RT 1641-42.

77. Thomas testified that after his escape he stayed mostly in Richmond at his mother's house, and was at his mother's house Memorial Day weekend, the week before he was picked up. RT 1642. He stayed at her house on the night of the shooting; he did not shoot two people on Cole Street. RT 1643.

78. Tonita Thomas, Dee's sister, testified that she was with her brother on Memorial Day weekend at their mother's house in Richmond. RT 1657-58. On Saturday night, they had a barbecue with friends and relatives. RT 1658. Dee was there the entire weekend. RT 1658.

D. PENALTY PHASE - PROSECUTION CASE-IN-CHIEF[3]

79. Alvarez Devallier, Sr., Annette Devallier's father, testified that

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[3] There was a stipulation that Petitioner's two prior convictions for possession for sale of cocaine were admissible under Pen. Code § 190.3(c). RT 1887-88.

he and his daughter were "very, very close." RT 1847. He would see her three times a week, or they would speak on the telephone if she was not around. RT 1847. She was a "companion," and they would talk over things, problems, and she was always willing to help him or anyone else. RT 1847. Annette had ten brothers and sisters. RT 1847.

80. Mr. Devallier testified that Annette's death particularly affected her eight year old son, who said he wanted to die so he could be with his mother. The boy was having nightmares and missed his mother terribly. RT 1847. Annette also had a six year old son, who also was having nightmares and asked where his mother was. RT 1848-49. Both children were identified in the courtroom. RT 1848. A photograph of Annette's four year old daughter was identified by Mr. Devallier. RT 1849.

81. Mr. Devallier testified that Annette had been in a drug rehabilitation program for three-to-four months, and had turned her life around. RT 1850. She was a great help to others, and helped take care of Petitioner's mother. RT 1850.

82. On cross-examination, Mr. Devallier acknowledged that Annette had a cocaine problem for two years time before going into the drug rehabilitation program. RT 1851-52. Annette left the program shortly before her death, and Mr. Devallier did not know where she went, and was

not aware that she was under the influence of cocaine when she died. RT 1853-54.

83. Alvarez Peter Devallier, Jr., Annette's brother, was very close to Annette until about a year before she died, when they went their separate ways. RT 1855. He testified that he dreamt about her a lot. RT 1855.

84. Moezelle Lake, Annette's grandmother, had a very good relationship with Annette. She partially raised her, and Annette lived with her for a number of years. RT 1859. Annette helped her out when her health failed. Annette was a very sweet person, a friend to all, and everyone loved her. RT 1859. Annette's loss was devastating, and Ms. Lake thought of her constantly. RT 1860.

85. Brad Elliot was Gary Carter's brother-in-law, by virtue of his marriage to Carter's sister, Yolanda Carter Elliot. Carter had seven siblings, and according to Elliot, it was the "tightest family I've ever seen." RT 1863. Carter's death was devastating to the family. Elliot's wife would wake up in the middle of the night crying and sometimes did not sleep at all. It "tore her up." RT 1864, 1866. One brother of Carter's moved away, and others became reclusive and angry. RT 1865.

86. Laveone Carter, Gary Carter's fifteen year old daughter, was very close to her father. RT 1869. She testified that her father's death gave

her nightmares, and caused her to be sad, to cry, and to not want to go to school. RT 1869. Her brother, Gary, Jr., was also very upset, and he did not want to come to court to testify. RT 1869. Her sister was irritable, and would stare at their father's obituary and cry. RT 1870.

87. Yolanda Carter Elliot, Carter's sister, testified that she was depressed all the time, and could not function as a whole person. She lost weight, had a hard time caring for her son and found it hard to be around her family. RT 1873.

88. Carrisa Carter, another of Carter's sisters, testified that she and Gary were "tight." RT 1881. She had a hard time accepting his death. She was in therapy and on medication. She could not sleep, and had nightmares and fits of crying. RT 1881.

89. Antonea Brown, another of Carter's sisters, testified that their father would not testify because of health problems and because he believed he was going to die. RT 1883. He was having a very hard time dealing with his son's death: "It's to the point where he can't even look at us, his kids any more, because he -- he said it was so painful for him to lose Gary, just the idea of losing another child, he just doesn't want to be around much any more, around us any more." RT 1883. Ms. Brown further testified that she had been drinking every night and was overwhelmed with sadness. RT

1883. Her other brothers and sisters were also having extreme difficulties with Carter's death. RT 1884-85.

90. Reo Carter, another of Carter's sisters, testified that she was very upset and missed her brother. RT 1886.

E. PENALTY PHASE - DEFENSE CASE-IN-CHIEF

91. Dr. Fred Rosenthal, a psychiatrist, testified that he interviewed Petitioner, and concluded that with the exception of drug and alcohol abuse, Petitioner did not have "a clear diagnosis of a mental disorder. He has some traits which may lead to a diagnosis at some time in the future." RT 1892-93. Petitioner was not psychotic, but did have emotional problems. He was quite immature, and emotionally and intellectually was more like an early teenager. RT 1893.

92. Dr. Rosenthal stated that Petitioner was a "fairly passive and dependent individual" and would lean towards a "dependent personality disorder." RT 1893. Someone with such a disorder would have difficulty making independent decisions, and would tend to rely heavily on, and be easily influenced by, others. RT 1893. They attach to people very quickly and try to get guidance from others. They have a hard time living independently, making judgments, seeing the world from an independent point of view. They are also very vulnerable and sensitive to criticism from

others, and try very hard to please others. RT 1893-94. However, Dr. Rosenthal testified that he could not reach a diagnosis of dependent personality disorder with regard to Petitioner because Petitioner was too young to have the full blown disorder, which would develop throughout adult life. RT 1894.

93. Dr. William Lane Spivey, a psychologist testified that he first became acquainted with Petitioner in 1983, when Petitioner was approximately eleven years old. Petitioner's grandmother brought him in for psychotherapy because he was not doing well in school and was having adjustment problems at home. RT 1922, 1924, 1926. Dr. Spivey last saw Petitioner as a patient in 1988. In Dr. Spivey's view, Petitioner "was a kid groping to grow up. Fairly low self-esteem, a lot of adjustment issues at school as well as in the family." RT 1923. Dr. Spivey found that Petitioner was very immature for his age. RT 1924.

94. George Barrett, with a masters degree in clinical psychology, worked for Alameda County Mental Health Services. RT 1930. On April 1, 1991, he examined Petitioner at a court's request because he was told that Petitioner had made death threats to others and to himself. RT 1931-32. Petitioner was eighteen years old at the time, but acted like a twelve year old. RT 1933. Mr. Barrett viewed Petitioner as essentially still an

adolescent and gave him a principle diagnosis of disruptive behavior disorder, which is more of an adolescent categorization. RT 1933. Petitioner was too young for a diagnosis of antisocial personality disorder, but he was heading in that direction. RT 1933, 1937.

95. Tamika Harris, Petitioner's seventeen year old cousin, testified that she had known Petitioner all her life. RT 1948. They lived together and went to school together. RT 1949. Ms. Harris stated that Petitioner was picked on at school because he was heavier and bigger than other kids but he would not do anything when he was teased, and would not start fights. RT 1949. Her father and their grandmother loved Petitioner, he was raised in a loving environment and he was not physically abused in any way. RT 1951-52.

96. Ernest Posey, Jr., was an administrative assistant at Willard Junior High, where he counseled Petitioner. RT 1953-54. Posey stated that Petitioner was an average student who was very overweight and passive. RT 1954-55.

97. Irma Surrell, Petitioner's grandmother testified that Petitioner lived with her since he was two years old because his mother was on drugs and was not able to take care of him. RT 1956. Petitioner's mother did not see Petitioner much when he was growing up, and his father died when

Petitioner was about fourteen years old. RT 1958. Ms. Surrell testified that Petitioner was always good to her. RT 1959. She took Petitioner to see Dr. Spivey because "he had trouble with his mind and he wasn't making good connections with his mind." RT 1957. Petitioner never really moved out of her house, but at some point would stay over infrequently. RT 1957-58.

98. On cross-examination, Ms. Surrell testified that she loved Petitioner, was a mother figure to him, and taught him values. RT 1960. She did everything she could to help him, and he was never physically abused when he was growing up. RT 1961.

99. Celeste Surrell, Petitioner's aunt, testified that she lived with Petitioner from the time he was two years old. RT 1965. Her sister, Petitioner's mother, had a problem with heroin. RT 1965. Ms. Surrell stated that she helped her mother raise Petitioner. RT 1966. Petitioner was not disruptive and did not cause any problems. Petitioner usually watched television. He was not a fighter, but was a passive individual. He was a follower, not a leader. RT 1966.

100. Petitioner would go see his mother on Cole Street because he was concerned about her. RT 1967. Ms. Surrell did not like Petitioner going there because it was a drug house, but Petitioner went anyway in order to see his mother. RT 1967. Petitioner's father was not around. He

would make a lot of promises to Petitioner, but never kept them. RT 1968.

101. Charmaine Adams, Petitioner's aunt, testified that she was involved in Petitioner's life when he was growing up. RT 1970. Petitioner did not pick fights, but was picked on himself. RT 1971.

102. Eugene Surrell, Petitioner's grandfather, claimed that he had been involved with Petitioner since Petitioner was born. RT 1973. At the time of Petitioner's birth, Petitioner's mother was a drug addict. His father was also a drug addict. RT 1973. In one incident, just after Petitioner was born, Petitioner's mother took him with her to Sacramento. She was under the influence of drugs and left him at someone's home, but forgot where the place was. Petitioner stayed there for a period of time before he was taken to the authorities. RT 1974. After this incident, Petitioner went to live with his grandmother, Mr. Surrell's wife. RT 1974. Mr. Surrell testified that he played with Petitioner, and took him to school. RT 1974. Petitioner used to throw tantrums when he was younger. RT 1975.

103. On cross-examination, Mr. Surrell recalled an incident in 1991, when Petitioner had a fight with his mother, and allegedly told his grandmother he was going to kill Mr. Surrell with a knife. This was one of Petitioner's "little tantrums." Mr. Surrell denied that Petitioner threatened him with a knife in this incident. RT 1977-78.

104. Marlon Surrell, Petitioner's first cousin, grew up with Petitioner. RT 1988. He testified that they got into only one fight in their lives, and that Petitioner was a follower. RT 1989-90.

V.

JURISDICTION

105. No other petition has been filed for Petitioner or on his behalf in this Court in connection with this judgment. This 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 First, Fourth, Fifth, Sixth, Eighth, Thirteenth, and Fourteenth Amendments to the United States Constitution, of sections 1, 4, 6, 7, 8, 15, 16, 17, and 27, of Article I of the California Constitution and of Penal Code section 1473, in that the crucial factual bases for these claims lie outside the record developed on appeal.

VI.

INCORPORATION

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

107. Petitioner hereby incorporates all exhibits appended to this

petition as if fully set forth herein. Petitioner requests that the Court take judicial notice of the certified record on appeal and all pleadings, briefs, orders, and exhibits on file in this Court in the case of *People v. Boyette*, S032636, to avoid the expense and time of duplicating those materials that are already in the possession of the Court and the Attorney General.

108. Because a reasonable opportunity for full factual development through discover, 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 the order to show cause and relieve.

VII.

ALLEGATIONS APPLICABLE TO EACH AND EVERY CLAIM

109. Petitioner makes the following allegations which apply to each and every claim and allegation in the Petition.

110. 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 Alameda County; the documents, exhibits, and pleadings in

People v. Maurice Boyette, S032736 on direct appeal; judicially noticed facts; and any and all other documents and facts that petitioner may develop.

111. 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.

112. 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 request "use immunity" for each and every disclosure he has made and may make in support of his Petition.

113. 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.

114. 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.

115. 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 and a fair trial under the state and federal constitutions have been violated and collateral relief is appropriate.

116. In addition to withholding and/or destroying material, exculpatory evidence, the prosecution also committed pervasive misconduct

throughout Petitioner's trial, in violation of the state and federal constitutions. The allegations and authority in Claim E and the facts contained in the exhibits attached thereto, are hereby incorporated by reference as if fully set forth in this paragraph. But for the misconduct of the state, the trial court's errors, and the incompetence of his defense counsel, Petitioner would not have been convicted of murder, the special circumstances would not have been found true, and he would not have been sentenced to death.

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

118. Petitioner's convictions and sentences, including the sentence of death, 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 effective representation of counsel, to procedural and substantive due process, and to reliable guilt and penalty convictions in a capital case. The entire judgment must be reversed. U.S. Const. Amends. V, VI, VIII & XIV; Cal. Const., art., I, §§ 1, 7, 15, 16, 17.

VIII.

PETITIONER IS ENTITLED TO DISCOVERY

119. Under compulsion of this Court's rulings, this Petition was

prepared without access to the discovery and subpoena power of this or any other court. *People v. Gonzalez*, 51 Cal.3d 1179, 1258-1261 (1990); *People v. Johnson*, 3 Cal.4th 1183 (1992). However, discovery is necessary for Petitioner to obtain a full and fair adjudication of his claims in furtherance of his constitutional rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; and under parallel provisions of the California Constitution.

120. The discovery that is necessary prior to the adjudication of this Petition includes, but is not limited to:

a. Any and all reports, memoranda, photographs, test results, charts, print-outs, writings, samples, portions of evidence, test or control samples, and actual evidence in the possession of the Oakland Police Department or in the possession of any laboratory used by the Office of the Alameda County District Attorney or by the State of California in the testing or processing of evidence collected in connection with this case or evaluated as possibly connected with this case.

b. Any and all documents or things contained in the files in the Office of the District Attorney of Alameda County pertaining to the prosecution of Petitioner, including, but not limited to, all notes, memoranda, reports, correspondence, lists, charts, photographs, videotapes,

or audiotapes.

c. Any and all documents or things contained in the files of the Oakland Police Department pertaining to the investigation, interrogation, arrest, and custody of Petitioner, including, but not limited to, all notes, memoranda, reports, correspondence, lists, charts, photographs, videotapes, or audiotapes.

d. Any notes or tape recordings of, and any information about, the substance of the interview conducted by the prosecutor, Therese Drabec, with several of the trial jurors following the penalty phase verdict in this case.

e. All notes, including bench notes, written by Oakland Police Department Criminalist Lansing Lee in connection with this case.

f. Any and all records from the Oakland Fire Department regarding their response to the scene at 2501 Cole St. in Oakland on May 23, 1992.

g. Any and all records from the Regional Ambulance, American Medical Response, and/or Bay Area Credit regarding Regional Ambulance's response to the scene at 2501 Cole St. in Oakland on May 23, 1992.

h. All criminal records for co-defendant Antoine Johnson.

i. All criminal records for prosecution witness Donald Guillory. including criminal records from the state of Louisiana.

j. Any and all records, memoranda, notes, tape recordings, writings, reports of contacts and/or interviews with Donald Guillory reflecting the nature of contacts with, representations made to, consideration offered to, and/or discussions with Guillory while he was a prospective witness in Petitioner's case.

k. Any and all documents or things, including, but not limited to, all notes, memoranda, reports, correspondence, lists, charts, photographs, videotapes or audiotapes that contain material, exculpatory, favorable, impeaching, or mitigating evidence related to Petitioner's crimes and sentence.

l. The complete probation files for Probation Officer Mei-Ling Pastor's supervision of Petitioner.

m. Any and all records from the Alameda County Public Defender's Office regarding their representation of Petitioner in previous cases.

n. The jury summonses and questionnaires issued by the Alameda County Superior Court Jury Commissioner and filled out by the jurors who served in Petitioner's trial.

o. The United States military personnel file for Pervies Lee Ary, Sr.

p. The complete prison files, including medical files, for Pervies Lee Ary, Jr., DOB 08/26/65, CDC # N51703, from the California Rehabilitation Center in Norco, California.

q. The complete parole files from the California Department of Corrections Parole and Community Services Division for Pervies Lee Ary, Jr., DOB 08/26/65, CDC # N51703.

r. Any and all records from the Richmond Police Department regarding the December 25, 1992, arrest of Pervies Ary, Jr., for corporal injury of a spouse.

s. Any records from the Alameda County Superior Court regarding the appointment of defense attorney Richard Hove to Petitioner's case on or about September 15, 1992, including, but not limited to, any written requests and/or affidavits or other pleadings filed by defense attorney Walter Cannady pursuant to Penal Code section 987(d) setting forth reasons why a second attorney should be appointed to Petitioner's case.

t. Any records from the Alameda County Superior Court regarding requests for payment for attorneys' fees by defense attorneys

Walter Cannady and Richard Hove, and any documentation of such payments being made, including all filings made pursuant to Penal Code section 987.2.

u. Any records from the Alameda County Superior Court of the appointment of Walter Cannady and Richard Hove to other criminal cases from January 1992 through March 1993.

v. Any reports, statistics, information, or records from the California Department of Justice regarding arrests in Alameda County from 1990 through 1995 for criminal cases where the defendant went to trial facing capital charges – or if that information is not available, then for all such alleged violations of Penal Code section 187 – that indicate the dates when the defendants were first arrested and when the case began trial and/or when the defendant was convicted and/or sentenced.

w. Any and all files and records, including billing records and calendar entries, in the possession of defense attorney Patrick Hallinan regarding his representation of Richard Hove both in the criminal case *United States v. Richard Hove*, CR 92-0234, and in disciplinary proceedings before the State Bar of California during 1992 and 1993.

x. The pre-sentence report for Richard Hove in the case *United States v. Richard Hove*, CR92-0234, in the Northern District of

California.

121. The holding of *People v. Gonzalez*, 51 Cal.3d 1179, 1258-1261 (1990), that discovery orders are not appropriate in a habeas corpus matter prior to the issuance of an order to show cause ("OSC"), was predicated on the assumption that "if the People's lawyers have such [disclosable] information in this or any other case, they will disclose it promptly and fully." *Id.* at 1261. It is axiomatic that "[w]hen the reason of a rule ceases, so should the rule itself." Civ. Code, § 3510. *Gonzalez* was also based on the conclusion that "there is no postconviction right to 'fish' through official files for belated grounds of attack on the judgment." *Gonzalez*, 51 Cal.3d at 1259. Petitioner's requests for discovery here are not a fishing expedition for new grounds of attack; they are focused requests for information relevant to known grounds of attack. Nor are they "belated"; this Petition is presumptively timely.

122. The law of federal habeas corpus presupposes that full factual development of habeas corpus claims will occur in the state courts. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992) ("the State must afford the petitioner a full and fair hearing on his federal claim"); *see also Williams v. Taylor*, ___ U.S. ___, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). Discovery and other mechanisms for factual development of claims are limited in

federal habeas corpus precisely because they are presumed to be available in the state courts. *See generally Calderon v. United States District Court (Nicolaus)* (9th Cir. 1996) 98 F.3d 1102; *see also* 28 U.S.C. § 2254(e)(2) (limiting the right to an evidentiary hearing in federal habeas corpus if the prisoner has "failed to develop the factual basis of a claim in State court proceedings.")

123. In light of these rules of federal law, denial of discovery in state habeas corpus proceedings would wrongfully impede the right to petition for federal habeas corpus, in violation of article I, section 9, of the United States Constitution. *Gonzalez* should therefore be reconsidered in light of the enactment of section 2254(e)(2), *Williams*, and *Nicolaus*.

124. Moreover, under the 1996 federal habeas legislation and the decisions applying it, fact development in habeas corpus is the responsibility of the state courts. The human, financial, and institutional cost is both great and unnecessary when the granting of discovery, an evidentiary hearing, and habeas corpus relief is deferred to federal court rather than occurring in state court as contemplated by federal law. In addition, a petitioner is ordinarily expected to raise all claims in a single, timely petition, and runs the risk of waiving even meritorious claims if he fails to do so. *Brown v. Vasquez*, 952 F.2d 1164, 1166-1167 (9th Cir.), *cert.*

denied, 503 U.S. 1011 (1992); *In re Clark*, 5 Cal.4th 750, 767-779 (1993).

125. The scope of habeas corpus investigation authorized by *In re Clark*, 5 Cal.4th at 783-784 and footnote 19, cannot be interpreted to be narrower than that required to fulfill counsels' duty to their client in light of the requirements of federal habeas corpus practice. For example, *McCleskey v. Zant*, 499 U.S. 467 (1991), imposes a very broad duty to investigate. *McCleskey v. Zant*, 499 U.S. at 498 (a "petitioner must conduct a *reasonable and diligent* investigation aimed at including *all relevant claims and grounds* for relief in the first federal habeas petition") (emphasis added); *compare In re Robbins*, 18 Cal.4th 770, 792-792 and n.12-14 (1998); *In re Clark*, 5 Cal.4th at 783-784. The standard set by the United States Supreme Court must override the rule stated in *People v. Gonzalez*, 51 Cal.3d at 1258-1261, prohibiting all pre-OSC discovery without regard to the particularized showing in an individual case.

126. The constitutional violation set forth in the instant claim could be avoided by either granting an order to show cause in this case and thereafter ordering discovery, or by authorizing pre-OSC discovery for Petitioner.

127. In any event, the present petition sets forth a prima facie case on all the stated claims. Therefore, Petitioner is 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.

128. Petitioner further moves for any discovery order issued to be a "continuing" discovery order, requiring Respondent to inform Petitioner's counsel of any of the materials, documents or information covered by the order herein which comes to Respondent's attention after the granting of said order.

129. Finally, Petitioner requests that this Court issue a protective order requiring Respondent to preserve all materials sought by Petitioner until such time as the present request for discovery has been fully litigated.

130. The holding of *People v. Gonzalez*, 51 Cal.3d 1179, 1258-1261 (1991) that discovery orders are not appropriate in a habeas corpus matter prior to the issuance of an order to show cause, is predicated on the assumption that "if the People's lawyers have such [discoverable] information in this or any other case, they will disclose it promptly and fully." *Id.* At p. 1261. 'Where the reason of a rule ceases, so should the rule itself." Civ. Code, § 3510. *Gonzalez* was also based on the conclusion that "there is no post-conviction right to 'fish' through official files for belated grounds of attack on the judgment." *Gonzalez*, 51 Cal.3d at p.

1259. The present request for discovery is not a "fishing expedition' for new grounds of attack; it is a request for information relevant to known grounds of attack. Nor is it "belated;" this Petition is presumptively timely.

131. The law of federal habeas corpus presupposes that full and fair factual development of habeas corpus claims will occur in the state courts. *Kenney v. Tamayo-Reyes*, 504 U.S. 1, 15 91992) ["the State must afford the petitioner a full and fair hearing on his federal claim"]; see also *Williams v. Taylor* __U.S.__, (2000), 120 S.Ct. 1479; 146 L.Ed. 2d 435; *cf. White v. Ragen,* 324 U.S. 760 (1944). Discovery and other mechanisms for factual development of claims are limited in federal habeas corpus precisely because they are presumed to be available in the state courts. See generally *Calderon v. United States District Court (Nicholaus)*, 98 F.3d 1102 (9th Cir. 1996); see also 28 U.S.C. § 2254(e) [limiting the right to an evidentiary hearing in federal habeas corpus if the prisoner has "failed to develop the factual basis of a claim in State court proceedings"].) Moreover, the reliability component of the Eighth Amendment in capital cases requires that a full and fair adjudication be afforded to all federal constitutional claims in at least one forum. California's post-conviction procedures afford the only forum for many such claims, particularly ineffective assistance of counsel under the Sixth Amendment and all other federal constitutional

claims involving facts outside the record on appeal.

132. In light of these rules of federal law, denial of discovery in state habeas corpus proceedings would wrongfully impede the right to petition for federal habeas corpus, in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, and Article 1, section 9, of the United States Constitution. *Gonzalez* should therefore be reconsidered in light of the enactment of section 2254(e)(2), *Williams*, and *Nicholaus*.

133. In any case, the present Petition sets forth a prima facie case of relief on these claims. Therefore, Petitioner is entitled to the issuance of an order to show cause, and hence entitled to conduct this and other discovery without regard to *Gonzalez*.

IX

CLAIMS FOR RELIEF

A. PETITIONER MUST RECEIVE A NEW TRIAL BECAUSE JUROR BIAS AND MISCONDUCT FATALLY INFECTED PETITIONER'S CONVICTIONS AND DEATH SENTENCE

134. Petitioner's convictions and death sentence were unlawfully and unconstitutionally imposed in violation of his rights to due process, to a fair and impartial jury, to confrontation and cross-examination, and to freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under

Article I, sections 1, 7, 15, 16, and 17 of the California Constitution as well as Petitioner's statutory rights, because they were based on juror bias and misconduct in that a juror gave materially false answers during voir dire which were designed to conceal and deceive, acted in a manner prejudicial to Petitioner during deliberations, and introduced extrinsic information into the deliberations at both the guilt and penalty phases.

135. In Petitioner's case, the system failed because one of the jurors was a convicted felon, legally disqualified from service, who repeatedly lied about material facts in his juror questionnaire, and introduced material and prejudicial extrinsic evidence into both the guilt and penalty phases of Petitioner's trial, fatally infecting both Petitioner's conviction and death sentence.

136. 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.

Facts

Jury Summons

137. Juror Pervies Lee Ary, Sr., received the standard "Summons for Jury Service." Exh. 238. In that summons, the jurors were clearly required

to certify that they were not disqualified from jury service by, inter alia, a prior felony conviction. Exh. 238; *see* Cal. Code Civ. Proc., section 203(a)(5) (persons who have been convicted of a felony are ineligible to serve on juries; Cal. Const. art. VII, § 8(b); *People v. Karis*, 46 Cal.3d 612, 633 (1988) (the legislature since 1851 has concluded that ex-felons are unfit for jury service.)

138. Juror Ary did not request disqualification even though he was a convicted felon. Exhs. 238, 239; CT 5144-67. Juror Ary's ineligibility to serve apparently was not discovered by the Jury Commission.[4]

Pre-instructions

139. Juror Ary was present for jury service on February 1, 1993. At that time, all jurors were instructed by the Court as follows:

a. It will be your duty to accept those instructions on the law without reservation, and you must do this even though you don't agree with the policy of the law or you have some doubts about the wisdom of the particular law involved.

---

[4] To the extent that the prosecutor was aware of Juror Ary's criminal record and failed to inform defense counsel, her actions constitute prosecutorial misconduct. Petitioner incorporates each and every allegation set forth in Claim E as if fully pled herein. To the extent that trial counsel was unaware of Juror Ary's criminal record because counsel failed to file a discovery motion to seek this information, trial counsel rendered ineffective assistance of counsel. Petitioner hereby incorporates each and every allegation set forth in Claim C as if fully pled herein.

RT 133.

b. We discuss [penalty] now because the decisions of choice which the jury may be called upon to make touches upon issues about which people have strong feelings which might interfere or prevent a juror from making a choice between the two possible punishments. ¶ The law requires that jurors who make the punishment determination be people who can actually make the choice between the two punishments . . . .

RT 143.

c. It is also vitally important that each juror maintain an open-minded attitude toward the case. You must not decide either phase of the case until all the evidence has been presented, the court's instructions on the law have been given and the case has been argued by the attorneys.

RT 146-47.

d. And the question arises, what do we mean by a fair, unbiased and unprejudiced juror? Basically they mean jurors with an open mind, jurors who have not made up their mind or are not so biased as to one particular position that they can sit with an open mind and listen to all the evidence, the instructions of the court and the arguments of counsel and then make the decision they must make.

RT 149.

140. The trial court had determined that many of the voir dire questions would be answered by potential jurors through use of a

questionnaire. The use of juror questionnaires is commonplace in capital and noncapital trials. The questionnaires allow for voir dire to be completed in less time than would be necessary if the jurors were to be asked the same questions on an individual basis. In the instant case, the questionnaire made clear that the answers were to be given under penalty of perjury. CT 5167.

141. The court instructed the jurors regarding the questionnaires as follows:

> In order to make more efficient use of your time and to minimize your inconvenience and to reduce the necessity of repetitious questioning, a written questionnaire has been prepared for you to answer which addresses your qualifications to serve as a juror in this case. Somewhat lengthy questionnaire, and some say highly personal, some would also say downright intrusive. ¶ It is, however, legally appropriate, designed to provide information necessary to assist the court and counsel in determining your qualifications to sit as a juror in this case. ¶ In the interest of fairness to both sides and the efficient use of your time, I urge you to be forthcoming and thorough in your answers. There are no right or wrong answers to many of the questions. We are interested in your attitudes and beliefs, especially on the questions relating to punishment and the death penalty. The more thought and consideration that you give to the questionnaire, the less time will be needed in court for oral questioning. ¶ Again, some of the questions touch on highly personal matters and/or beliefs, and if any of you feel the

> least bit uncomfortable answering any question, you may indicate your preference by writing "private" or "confidential" in the place reserved for the answer. If you do this, you will be questioned individually out of the presence of the other jurors . . . . And remember also the questionnaires are public record, and you should be guided by that fact in answering the questions.

RT 149-50; RT 176 [same.]

142. The trial court also explained to the jury what obstacles they faced to becoming jurors in this trial. The court explained potential challenges as follows:

> As a result of all this questioning by both court and counsel, there are two types of challenges that might be made to you to serve as [a] fair and impartial juror. One is referred to as a challenge for cause, and it's exercised by counsel and must be ruled upon by the court for its validity. ¶ An example of - for a challenge for cause if you were related to the defendant, you wouldn't be able to sit on his case and determine whether he's guilty or not guilty and the necessary punishment he should suffer, if necessary. Also, if you knew something about the case from another source and you formed an opinion upon the merits of the action, you wouldn't be able to sit as a fair and impartial juror. Counsel would make a motion to exclude you, and the court would have to rule that you may be excused.

RT 151; 177 [same].

> The second type of challenge is one referred to

> as a peremptory challenge. It's one that may be exercised by a party to an action, by both the attorneys without assigning any reason for the challenge itself. Don't feel embarrassed by the exercise of a peremptory challenge against you by counsel because it's the right of the parties within certain limits to obtain a jury of their own choosing, and the use of the peremptory challenge is a method by which they protect that right. ¶ So the exercise of a peremptory challenge should never be made the subject of surmise or conjecture on the part of the jury who is excused or the remaining members of the panel.

RT 151-52.

143. Further pre-instructions given by the court to the jurors included:

> What we're looking for as jurors in a case such that is [sic] are persons that could not only listen to the evidence in the guilt or innocence phase with an unbiased, unprejudiced mind, and make that decision of guilt or innocence, but if, in fact, the defendant were found guilty of murder first degree with a special circumstance, that they could listen to the evidence in the penalty phase of the trial with an open mind and then enter into this weighing process of weighing aggravation against mitigation with an open mind. And they, if they found that aggravation outweighed mitigation so substantially that death was warranted, they would actually have a choice between the two penalties at that time and would not every time choose one penalty and not the other.

RT 1064.

144. The jurors were also pre-instructed:

> You must decide all questions of fact in this case from the evidence in this trial and not from any other source. You must not make any independent investigation of the facts or the law or consider or discuss the facts as to which there is no evidence.

RT 1795.

Juror Questionnaire

145. Juror Ary completed and signed his questionnaire on February 3, 1993. Juror Ary failed to answer truthfully each of the following highly relevant and material questions.

146. In question #25, Juror Ary was asked the following:

> **"Have you, a close friend or relative ever been accused of a crime, even if the case did not come to court?"**

147. Juror Ary answered, "No." This statement was false on multiple material grounds. First, Juror Ary is, in fact, a convicted felon and misdemeanent, and has been charged with additional crimes. Second, Juror Ary knew at the time of Petitioner's trial that several of his relatives had been convicted of felonies.

148. Juror Ary had been charged with at least the following crimes prior to trial:

a. On March 18, 1964, Juror Ary was charged in Contra Costa County Superior Court violation of two counts of violation of Cal. Pen. Code § 211 (Robbery - felony), and violation of two counts of Pen. Code § 484 (Grand theft - felony). He was convicted of felony grand theft, imposition of sentence was suspended and he was placed on felony probation, including a condition that he serve a six month sentence to the Contra Costa County Jail. Exh. 239.

b. On December 30, 1971, Juror Ary was charged with seven counts of Robbery in violation of Pen. Code § 211 in the Superior Court of Los Angeles County. Exh. 240.

c. On May 7, 1982, Juror Ary pled guilty in the Pomona Municipal court to violating section 23152a of the California Vehicle Code (driving under the influence of alcohol or drugs). Juror Ary was placed on probation for three years with conditions, including but not limited to

attending 32 hours of drug and alcohol school and 12 Alcoholic Anonymous meetings. Exh. 241.

d. On September 17, 1982, Juror Ary was ordered to appear at a probation violation hearing on October 12, 1982. Juror Ary failed to appear and a bench warrant was issued and his probation was revoked. On October 13, 1982, Juror Ary waived his right to a hearing and admitted the probation violation. Juror Ary was found by the court to be in violation of his probation. However, his probation was reinstated. On July 17, 1984, Juror Ary's probation was terminated pursuant to Sec. 1203.3 Pen. Code. Exh. 241.

149. Juror Ary's eldest son, Pervies Lee Ary, Jr., also had a serious criminal record with numerous felony convictions for possession and sale of drugs, a sentence to state prison, and a restraining order issued against him due to domestic violence against the mother of his two children.

a. In Criminal Felony Complaint 86-31857, Contra

Costa County, on April 1, 1986, Pervies Lee Ary, Jr., was charged in a four-count indictment with violations of Pen. Code section 11352 (Sale or Transportation of Narcotic); possession and possession for sale of cocaine and marijuana, and pled guilty to all counts on October 15, 1986, and was placed on probation for three years. Exh. 243.

b. In Criminal Complaint 86-32871, Contra Costa County, Pervies Lee Ary, Jr., who was on probation, was charged again with possession for sale (Cocaine) and Felony Committed while on Bail or his own recognizance. Pervies Lee Ary, Jr., pled guilty in this case. Exh. 244. His probation for the prior case was terminated and he was sentenced to 150 days in county jail.

c. In Criminal Complaint 87-34552, also in Contra Costa County, Pervies Lee Ary, Jr., pled guilty to violation of California Health and Safety Code Section 11360(a) (Sale and Transportation

of Marijuana) and on November 4, 1987, probation was denied and he was sentenced to three years in state prison with execution of sentence suspended pursuant to Cal. Welf. & Inst. Code section 3051, the court finding that Ary, Jr., was addicted to narcotics and was amenable to treatment. Ary, Jr., was committed to the California Rehabilitation Center (Norco) for treatment for a maximum of three years. Exh. 245.

d. In Criminal Complaint 89-014752, Contra Costa County, Pervies Lee Ary, Jr., was charged with a misdemeanor in violation of Vehicle Code Section 14601.1(a) (driving when privilege suspended or revoked for other reason). Ary, Jr., pled guilty and was sentenced to the work alternative program. Exh. 246.

e. In Criminal Complaint 90-002221, Contra Costa County, Pervies Lee Ary, Jr., was charged with violation of Vehicle Code section 14601.1(a).

The case was consolidated with the aforementioned case. Exh. 247.

f. In Case # 92-05348, Contra Costa County, Beverly Miller, the mother of two of Pervies Lee Ary, Jr.'s, children, requested a restraining order from the Court. On November 3, 1992, a temporary restraining order was issued. On November 23, 1992, Pervies Lee Ary, Jr., was ordered to stay away from the residence, and legal and physical custody of the two children was granted to Beverly Miller. Exh. 248.

150. Juror Ary's second son, Pervies Lee Ary II, also had a criminal record at the time of Ary's jury service:

a. Pervies Lee Ary II was charged in the County of Los Angeles with committing a Misdemeanor Battery in violation of Pen. Code § 242. The battery was allegedly committed on February 8, 1993, and the case was filed on February 24, 1993, the same day Ary, Sr., was questioned on voir dire in Petitioner's case. RT 1092. On the

same date an arrest warrant was issued. The case was ultimately dismissed. Exh. 250.

151. Juror Ary also had a first cousin who had been sentenced to life in prison in the 1950s for a homicide. Ary Dec., Exh. 53.

152. Juror Ary was aware, at the time of Petitioner's trial, of his son, Pervies Ary, Jr.'s criminal convictions and sentence to the California Rehabilitation Center ("Norco"). Juror Ary lived with his son Pervies Ary, Jr., Beverly Miller, and their two children during approximately 1990-1991. This was after Pervies Ary, Jr., had been released from Norco. Miller Dec., Exh. 90.

153. Based on the foregoing information and additional facts detailed below, Juror Ary also lied when he answered "no" to question #24:

> **"Have you, a close friend or relative ever been a witness to a crime?"**

154. During deliberations, Juror Ary told the other jurors "stories" about crimes he had seen while driving his bus in Oakland. Graff (McLaren) Dec., Exh. 70.

155. In addition, Juror Ary witnessed his son beating Beverly Miller, the mother of Juror Ary's grandchildren. Miller Dec., Exh. 90. This occurred after Pervies Ary, Jr., was released from prison. Miller Dec., Exh. 90.

156. Juror Ary also failed to truthfully answer question # 61 which asked:

> **"Have you, a close friend or relative ever had a problem involving the use of drugs or alcohol?"**

157. Juror Ary answered, "No." This was a false answer in at least the following material respects:

a. Juror Ary's son, Pervies Ary, Jr., had been arrested on numerous occasions for criminal drug violations. Exhs. 243, 244, 245.

b. Juror Ary's son, Pervies Ary, Jr., was sentenced to the California Rehabilitation Center, "Norco," having been found to be a drug addict pursuant to Welf. and Inst. Code § 3051. Exh. 245.

c. Juror Ary had been convicted for driving under the influence; see 241 above.

d. Juror Ary's order of probation from his 1964 felony conviction specifically mandated that he "absolutely refrain from the use of alcoholic beverages during his period of probation." Exh. 239.

e. During 1990, when Juror Ary lived with his son, Pervies Lee Ary, Jr., and Beverly Miller, Juror Ary was "drunk much of the time . . . ." In Miller's opinion, Juror Ary "was a complete alcoholic." Exh. 90.

Voir Dire

158. It was clear from the questionnaire and the questions asked

during voir dire that the court and counsel considered the question of involvement with drugs and/or violence to be extremely relevant and material to whether a juror would be able to be fair and impartial during service in this case. During voir dire, Juror Ary was told "this, where the killing occurred was a drug house. And some of the people who may testify, you know, may have used drugs." RT 1097. He was then asked, "[i]s that going to cause you any bias or prejudice one way or the other?" Juror Ary answered, "I don't think so." RT 1097. There was no follow-up question because counsel and the court were unaware of Juror Ary's son's serious involvement in drugs, his felony drug possession and sales convictions or his status as an addict.

159. On voir dire, Juror Ary was also asked by the court if there was "[a]nything about this type of case that would cause you any bias or prejudice where you couldn't be fair to both sides?" Juror Ary answered, "[n]o." RT 1098.

160. One of Petitioner's trial counsel has subsequently stated that:

> I have been informed by present counsel for Mr. Boyette, Lynne Coffin, State Public Defender, that one of the jurors in Mr. Boyette's case had a prior felony conviction which he failed to reveal to the jury. Moreover, she has informed me that the juror's son also had felony convictions that involved the possession and sale of drugs. Had I been aware of this

> information I would certainly have voir dired the juror on this information and I believe, based on my experience with Judge Haugner, who tried this case, that Judge Haugner would have excused the juror for cause. If Judge Haugner had not excused the juror, I would have used a peremptory challenge to remove him.

Cannady Dec., Exh. 59.

161. With regard to the material facts relating to his jury service discussed *infra*, Juror Ary readily admits that he was convicted and jailed in 1963. He has stated, "I was arrested in the 1963s [sic] and spent some time in jail. *This experience made me better able to assist the undecided jurors who did not understand what life was like, in jail.*" Ary Dec., Exh. 53 (emphasis added.) Juror Ary also admits that he was aware of his son Pervies Ary, Jr.'s, criminal record. Juror Ary has stated, "my eldest son had spent time in prison. He told me about his time there. He told me how he had been forced to join a prison gang. You can't get along in prison if you don't join a gang for protection." Ary Dec., Exh. 53.

Guilt Phase

162. None of the information detailed above was known to trial counsel at the time of trial. Juror Ary was seated on the jury.

163. Juror Ary injected highly prejudicial, material and extrinsic evidence into the guilt phase of Petitioner's trial.

164. Juror Ary was demonstrably one of the most active jurors throughout the trial. Even before the close of evidence in the guilt phase, Juror Ary was asking numerous questions of the court.

165. On March 8, 1993, prior to guilt phase deliberations, the court announced to counsel that it had received a multi-question note from Juror Ary. RT 1576. The first question was "How can a homeless person obtain such private lawyer or are the [sic] court appointed" The court responded to counsel, "That's really none of his business, so we're not going to comment on that." RT 1576.

166. The second question was "[t]he neighbor who lived 4 houses up the street describe the size of the person he saw standing in the street or over (near) the body (sml, med, lrg) short or tall" RT 1576. The prosecutor ultimately reopened her case to provide this information. RT 1634-1635.

167. The third question was "[t]his blind person being tried also or what" RT 1576. To which the court responded to counsel, "[t]hey have been told and they would be told again in instructions not to worry about him." RT 1577.

168. The final question was "did the person on trial or is he willing to take a lie detector test." The Court replied, "which is really of no - none of their business as such." RT 1577.

169. These questions indicate a bias against Petitioner, as Juror Ary appears to be seeking information to use in arguing for a guilty verdict. The court failed to respond to Juror Ary's question.[5]

170. By his question regarding Petitioner's ability to retain two private attorneys when he was allegedly homeless, Juror Ary sought to exploit a perceived discrepancy in Petitioner's testimony. This question implicates Petitioner's credibility, as does Juror Ary's question regarding a lie detector test.

171. Juror Ary's question regarding Petitioner's co-defendant, Antoine Johnson, was also an indication that at least this juror was speculating about matters not before him.

172. The record indicates that the jury was confused about the scope of what it could consider in determining Petitioner's guilt. The court's failure to put an end to this speculation could only have encouraged the jurors to continue speculating and considering extrinsic and improper matters outside of the evidence.

173. The court's failure to respond to Juror Ary's four questions not only allowed, but invited the jury to discuss the case before it was submitted

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[5] Petitioner raised the impropriety of the court's failure to respond to Juror Ary's four questions in Appellant's Opening Brief, Issue F, pps. 85-90.

to them and to base its verdict on speculation about matters not properly before it.

174. The court's failure to answer Juror Ary's questions permitted the jury to speculate about irrelevant and prejudicial matters, which it was not permitted to consider in deciding either guilt or penalty.

175. After the presentation of the guilt phase evidence, the jury retired to deliberate. The record shows that the jury was divided as to Petitioner's guilt. It is apparent from Juror Ary's declaration that the jury was divided about whether to return a verdict of second vs. first degree murder. Ary Dec., Exh. 53.

176. The jurors requested extensive read-back of testimony and additional review of evidence presented at the trial. After two hours of deliberation, the jury sent down a note requesting an enormous amount of material, including a read-back of Donald Guillory's testimony, all the tapes and transcripts from Petitioner's police interviews; Tonita Thomas's testimony, photographs from inside the house, outside the house and of the victims; Bettye Jackson's testimony of her description of Donald [sic] Thomas, aka Dee; the nine millimeter Glock gun; David Brooks' testimony from the second day; and the school teacher's testimony regarding the

number of gunshots heard. CT 849; RT 1829.[6]

177. Subsequently, during the morning session of March 11, 1993, the court discussed another note sent by the jury. This note asked for the testimony of the neighbor, Mr. Brooks, from the first day, and the prosecutor's charts to describe the law of first and second degree murder. RT 1831-32. After it was explained to the jury that the chart was not evidence, the following exchange took place between the court and the foreperson for the guilt phase deliberations:

The Court: Do you want me to reinstruct you on first and second degree murder or do you want to make out another

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[6] Read-backs of testimony were a source of deep dissension within the jury room. "[T]here . . . was a protest anytime a juror wanted to ask the judge a question or look at a piece of evidence. On one occasion, after a female jury member asked for some piece of information from the record, another jury member said, 'maybe we should shoot her.' This kind of bullying was frequent from several strong-willed people." Karantzalis Dec., Exh. 83.

It is apparent that the Court added to these problems during the guilt phase deliberations. The jurors did ask for an unusual number of read-backs of testimony. This was clearly the product of their divisions. The trial court made its impatience with the lengthy process apparent to the jurors. "Approximately three-fourths of the jury didn't want to discuss the guilt evidence during deliberations. They wanted to immediately vote guilty and move on. Some of the jurors, including me, wanted some of the testimony read back to us. I remember the judge becoming very impatient with us and somewhat angry about our requests." Rennie Dec., Exh. 102. This display of impatience further discouraged and undermined the dissenting jurors.

Juror Orgain:	No, just if we may, I don't know if it is proper –
The Court:	Why don't you go upstairs and make out whatever –
Juror Orgain:	We want a clarification of the law.
The Court:	All right.
Juror Orgain:	And we're not –
Court:	[w]hy don't you write that out and tell me what it is and then we'll give it to you. All right. You may go back upstairs.

RT 1832.

178. Although there was absolutely no supporting evidence, Juror Ary raised the specter that Petitioner had committed additional murders to convince the other jurors that they had to find Petitioner guilty of first degree murder and find the special circumstances true in order that Petitioner would be sufficiently punished. Juror Ary has admitted that extrinsic evidence was injected into guilt phase deliberations with the purpose of convincing reluctant jurors to vote for first degree murder. Jury Ary has stated:

> [The jury] discussed the fact that this may have been the first murder for which Mr. Boyette had been caught but that he may have committed previous murders. If we found second degree murder, when he got out in seven years he would feel like he'd gotten away with these killings and would kill again.

Ary Dec., Exh. 53.

179. That Juror Ary inaccurately attributed at least one other murder to Petitioner is confirmed by one of the other jurors.

> There was one juror, a black male bus driver named Pervies, who was very much in favor of giving Maurice the death penalty. At one point, when it was becoming quite clear to Pervies and the others that I didn't want to vote for death, Pervies said, 'But remember the other murder.' Pervies told me that during the trial, another alleged murder was mentioned but that the judge told us not to consider it. I didn't remember the judge telling us this, but it stuck in the back of my mind after Pervies told me.[7]

Lewis Dec., Exh. 86.

180. Additional examples of juror misconduct include the fact that jurors read newspapers during the trial. "At one point during the trial, I remember reading in the paper that one of Maurice's attorneys, Richard Hove, was under indictment for something. I believed he was charged with money-laundering. I was not the only person who was aware of Mr. Hove's legal problems." Rennie Dec., Exh. 102; "At some point during the trial,

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[7] The juror's declaration is somewhat ambiguous as to when the juror believed she received this information and how it impacted her guilt phase deliberations. However, based on Juror Ary's statement, it is clear that he made these statements with regard to the guilt phase. The fact that they also influenced a juror in the penalty phase only adds to the prejudice of the misconduct.

the first alternate juror mentioned that one of Maurice's attorneys, the quieter dark haired one, was on trial for money laundering. This is the same juror who eventually replaced me." Karantzalis Dec., Exh. 83; see also Paul Grabowicz, *Former County Attorney Tried for Laundering Drug Money,* Oak. Trib., March 18, 1993, at B2, Exh. 256.

181. Knowledge that one of Petitioner's attorneys was accused of a crime prejudiced Petitioner's defense. The taint from counsel's alleged impropriety would have undermined the persuasive power of defense counsel and enhanced the credibility of the prosecutor's positions.

182. When the jury returned with their verdict for the guilt phase, the clerk read the verdict forms. The following revealing exchange took place:

Court Clerk:	We the jury further find the degree of murder to be second degree.
Juror Orgain:[8]	No, no, no.
The Court:	You signed the second degree.
Juror Ary:	He made a mistake.

RT 1834.

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[8] Juror Orgain was the foreperson for the guilt phase.

Penalty Phase

183. Juror Ary's determination to see Petitioner sentenced to death continued, with more force, if possible, and in an even more blatant manner in the penalty phase.

184. After the penalty presentation, the prosecutor gave her closing argument. A review of the facts demonstrates that the prosecutor's misconduct directly contributed to the juror misconduct committed at the penalty phase. See Claim E.

185. Other than the capital crimes, there was no evidence of any violent activity by Petitioner. The only *evidence* presented by the prosecution in aggravation was the stipulation of two prior nonviolent felony convictions for drug offenses and inflammatory victim impact evidence.

186. Both in cross-examining Petitioner's experts and in her opening and closing arguments, the prosecutor argued Petitioner's future dangerousness and, without any evidentiary support nor as rebuttal to evidence presented by the defense, her belief in the likelihood that Petitioner would kill again.

187. Even in the absence of any evidence that Petitioner was involved in gang activity, or that the two killings were gang-related, the

prosecutor questioned Petitioner's expert in a manner that implied that unless Petitioner were executed, Petitioner would likely become a gang member in prison who would kill innocent people. These actions would thus create more grieving families for whom the jurors would be personally responsible. The prosecutor then stressed this point in her closing argument. "Can you put another family through what they went through? That's what you have to decide." RT 2003.

188. These highly inflammatory tactics injected impermissible, arbitrary, and inaccurate factors into the jury's sentencing determination, unduly inflamed the jury and caused the jury to speculate about what might occur in the future. These improper tactics also completely diverted the jury from its legally defined task and formed the basis for the jury misconduct that followed. In fact, at least in part as a result of the prosecutor's misconduct, the jurors were more prone to believe that their speculation in this area was permissible, since the prosecutor had directed them to engage in exactly this type of behavior.

189. The prosecutor's cross-examination and argument strongly emphasized prison gangs. On cross-examination of the defense expert psychiatrist, Dr. Fred Rosenthal, she asked whether Petitioner could be influenced by a gang, RT 1897, or would do something in order to get into a

gang or to establish his status in gang. RT 1898. The prosecutor then asked the following questions, eliciting the following responses:

> Q. And you have interviewed inmates in prison, I guess, state prison as well as the different jails?
>
> A. I have, yes.
>
> Q. And you're aware that in these prison, there are prison gangs, right?
>
> A. Yes.
>
> Q. Have you ever heard of the Black Guerilla Family?
>
> A. I've heard of them.
>
> Q. Yeah. And isn't that a very powerful prison gang in the State of California?

RT 1898. After an objection to this question was sustained, the prosecutor asked, "[w]ould you say that the Black Guerilla Family would be the type of gang that might influence Maurice Boyette to commit other crimes?" RT 1898.

190. In her closing argument, the prosecutor returned to the theme of gang activity and future dangerousness, paraphrasing the cross-examination of the defense expert to draw her own unsupported conclusions and once again focusing on the Black Guerilla Family:

> Well, aren't there gangs in prison who would

> exert that type of control? Isn't that the personality of someone who is going to do anything for a gang? Ever hear of the Black Guerilla Family? And all of a sudden, he starts backing off. I asked him: In other words, if Mr. Boyette gets caught with a good group of people, he will do good things; if he gets caught up with a gang, he will do what they want him to do? A hit man?

RT 2001.

191. The prosecutor continued her prison-gang related theme: *"as soon as I start mentioning gangs, because you know what I'm getting at, his likelihood of killing again, his future dangerousness.* The perfect personality who could kill again." RT 2002; emphasis added.

192. The prosecutor went further: "they brought out all these things that he is a big follower. Think of prison life, can you imagine the stress of prison? *You have no idea.* And the gangs, and the pressures." RT 2018; emphasis added. Here the prosecutor also put forward her theme that the jurors did not have the information or knowledge that they needed to understand the true facts about prison life. Not only was this misconduct in that the prosecutor was testifying to facts not in evidence, but as can be seen by what followed, the prosecutor's actions invited the jurors to consider extrinsic evidence in deciding whether Petitioner should receive the death penalty.

193. Furthermore, the prosecutor's focus on gang affiliation, particularly a gang known as the "Black Guerilla Family," in the absence of *any evidence*, was a blatant appeal to racism, and was designed to further inflame the jury and divert it from its proper task.

194. The prosecutor stressed the theme of the "street smart" juror - a theme which lead directly to the misconduct which continued in the penalty phase:

> And I think in this part of the proceeding, it is a very different type of proceeding, it is a very different type of proceeding, it's emotional, you need street smarts, you can't be naive about these things. *I recommend you pick a very street smart foreman. A very street smart foreman who will lead you and guide you.*

RT 1994; emphasis added.

195. The prosecutor returned to this theme - in case the jury had forgotten its importance - near the end of her argument:

> What I want to do is just say a couple things to you. *First of all, for some of you, in your backgrounds, this is a very different world for you.* . . . We've taken you off the streets from different towns in the Bay Area and we've thrown you in here. And for some of you, you've seen some of the violence that goes on, you know. *You have street smarts.*
>
> *So those of you who aren't exposed to this, listen to your fellow jurors who know what's going on.* You listen and you be very patient.

> Don't have a set opinion right off the bat, you listen and you talk about it.

RT 2019.

196. The prosecutor asked the jurors to forego their responsibility for individualized sentencing and rely on the "street-smart jurors." The prosecutor was blunt - anyone who could not vote for death should leave the jury: "[n]ow, if you find that this is just too much for you and you cannot deliberate in a case like this, you must let us know. We have alternates."[9]

197. The jury then began penalty phase deliberations. It is axiomatic that penalty phase deliberations are extremely difficult for jurors. One of the difficulties is the conflicting instructions they are given regarding how their deliberations should be conducted, i.e., how long should an individual juror maintain his/her own personal opinion and at what point should he/she bow to the will of the majority. In this case, prior to the start of deliberations, the jurors had already been exhorted to follow "street wise jurors," and not to follow "naive" beliefs. Moreover, since Juror Karantzalis had been removed from the jury for being unable to be

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[9] In response to the prosecutor's argument, Juror Karanzalis left the jury because he did not feel he could vote for death. Karantzalis Dec., Exh. 84.

"fair" because he favored life without possibility of parole, it clearly follows that the remaining jurors who did not favor the death penalty would be extraordinarily reluctant to dispute the majority view point.[10]

198. As the prosecutor had urged, Juror Ary, a "street smart" juror was elected penalty phase foreperson. RT 2089. It is evident, not only from his election as penalty phase foreman, but from the comments of other jurors, that Juror Ary was already a leader of the jury. Numerous jurors expressed this feeling:

a. I was impressed by the juror who was a bus driver - he was very sharp. He knew the bus schedules so well that he could get to lunch on the busses faster than a taxi cab. Tallman Dec., Exh. 119.

b. I remember one of the natural leaders in the jury was a very large black man named Pervis [sic]. He worked a bus route in the Oakland-San Leandro area, including E. 14 St. Salcedo Dec., Exh. 106.

c. Pervies remembers what was said during the trial and presented it very accurately. He had a way of presenting evidence to each person which was its correct or accurate interpretation. This was very helpful during deliberations because a couple of college kids on the jury would interpret testimony way off the mark.

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[10] As previously noted, the trial court had also made it clear to the jury that it was impatient with the jury's failure to reach a quick unanimity in the guilt phase of the trial. *See* Footnote 6.

Salcedo Dec., Exh. 106.

d. Everyone was participating in the penalty deliberations. Pervis [sic] again proved to be a natural leader in the group. He was the biggest person in the jury, and the fact that he was black helped as far as my being convinced he was not prejudiced against Maurice because of his race. Salcedo Dec., Exh. 106.[11]

199. It was also apparent that the prosecutor's admonition to ignore the "naive" jurors and elect a "street smart" foreman was heeded by the majority of the jury:

a. The jurors came from different backgrounds and neighborhoods. It was fairly obvious who was from the rougher inner city of Oakland. I remember a bus driver from Oakland who had a lot of street smarts. He told us stories about crimes he had seen while driving his bus in Oakland. There was also a woman who told us she had been car jacked before the trial. I was living in Pleasanton at the time, and I guess I was pretty naive, so I definitely listened to what these jurors had to say. Graff (McLaren) Dec., Exh. 70.

b. I considered the college kids [who were holding out] to be the lowest group of jury members because they were negative about understanding the whole process. They didn't seem very knowledgeable about the law or the justice system even though they were in college. They

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[11] Juror Ary's important and divisive role is further confirmed by another juror who has stated, "[t]he foreman was not very helpful during our deliberations. He was not a good mediator." Mann Dec., Exh. 87.

just weren't with it. Salcedo Dec., Exh. 106.

200. From the beginning at least three jurors were "holding out" for a life without possibility of parole sentence. During deliberations, not only did the majority of jurors have disdain for these jurors, *see, e.g.*, Salcedo Dec., Exh. 106, but the holdout jurors became unsure of their own role based on the actions of fellow jurors and the prosecutor's improper comments. As one juror stated:

> I felt that the jury was deadlocked at that point and I didn't understand what the consequences would be if we didn't end up agreeing on one sentence. The three of us who were in favor of prison were all female and I didn't think we would have any luck in convincing the other nine jurors to change their vote. Compassion didn't appear to mean much to the other jurors.

Lewis Dec., Exh. 86.

201. Juror Ary agrees that these jurors were singled out and isolated by the other jurors who felt that the holdouts simply needed to be educated. He has stated the following in this regard: [t]here were three jurors who were hesitant at first to sentence Mr. Boyette to death. They were people who didn't understand what life was like on the streets. They had not experienced anything." Ary Dec., Exh. 53.

202. Other jurors confirm this situation:

a. During penalty phase deliberations, some jurors

were adamant about giving the death penalty right away. I and a few other jurors (no more than three) needed more time coming to a decision. Graff (McLaren) Dec., Exh. 70.

b. At the penalty phase deliberations, I remember there were two people holding out from giving Maurice the death penalty. It seemed like they didn't believe in taking someone's life at first. I don't know why they changed their minds. Mann Dec., Exh. 87.

c. I remember the penalty phase deliberations were very active, with lots of discussion. We were trying to convince the holdouts to change their minds. I had already made up my mind, and I wanted to get this trial over with. Mann Dec., Exh. 87.[12]

203. Thus, the jury began penalty deliberations divided not just numerically but also by the artificial boundaries created as a result of the prosecutor's elevation of "street smart" jurors over "naive" jurors. As defined by the prosecutor and Juror Ary, naive jurors were those jurors who questioned the inevitability of a death sentence and street smart jurors were those who believed that the necessary and only appropriate sentence was death.

204. Given the division among the jurors, Juror Ary took matters into his own hands. Although the jury had been instructed that they were

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[12] *See also* Lewis Dec., Exh. 86.

not to consider extrinsic evidence in their deliberations, Juror Ary injected just such highly prejudicial, material extrinsic evidence into the deliberations.

205. The information Juror Ary had failed to disclose in voir dire took on paramount importance in the sentencing deliberations. He used his personal experiences in jail to "assist the undecided jurors . . . ." Ary Dec., Exh. 53.

206. In order to convince the holdout jurors of the accuracy of his personal views about jail and prison, Juror Ary exhorted the jurors to rent the movie *American Me*.[13] "I told the holdout jurors that if they wanted to understand what it was like in prison, they should watch the movie, *American Me*. That is based on a true story. Two of the jurors rented the movie and watched it over the weekend. They finally understood that Mr. Boyette could kill again in prison if he was not sentenced to death. After they watched the movie, they changed their votes to death." Ary Dec., Exh. 53.

207. Confirmation of this highly prejudicial misconduct is found in the sworn statements of not only the holdout jurors but a total of five jurors who were willing to sign declarations concerning this misconduct:

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[13] A videotape copy of the movie is attached hereto as Exhibit 273.

a. I was not initially in favor of voting for the death penalty for Maurice. I remember one of the jurors - the black bus driver - suggesting to me and some of the other jurors that we watch the movie *American Me*. The bus driver told me that it would be an education for me about what prisons were really like. I rented the movie one night during the deliberations. *American Me* is about gangs in California prisons and it was based on a true story. Rennie Dec., Exh. 102.

b. During the penalty deliberations, there were a few jurors who resisted sentencing Maurice to death. One juror, whose identity I do not recall, suggested that those jurors who were against sentencing Maurice to death watch a particular movie. I do not remember what the movie was, but it had something to do with prisoners and prisons. The person who suggested that the jurors watch the movie said that the movie would show them the truth about prisons and that sending Maurice to prison was not a good enough punishment. I do not recall whether or not the jurors actually watched the movie, but I do remember that they changed their vote to death soon after the suggestion was made. Orgain Dec., Exh. 95.

c. The movie *American Me* was discussed during deliberations. Graff (McLaren) Dec. Exh. 70.

d. I remember the movie *American Me* being talked about during the penalty deliberations. A juror named Pervies recommended to several jurors that they watch it in order to educate themselves about what life was like inside of California prisons. Mann Dec., Exh. 87.

e. I remember there was some discussion of gangs

> with respect to how Maurice would do in prison. I also recall there being mention of a movie during the penalty phase, but I don't recall if anyone watched it. Salcedo Dec., Exh. 106.

208. The inherently prejudicial nature of the film *American Me*, watched by some jurors and discussed by all during penalty phase deliberations, is manifest. *American Me* was filmed at Folsom Prison in California. It is a movie of over two hours in length which was rated by the Motion Picture Association with an "R" rating for violence, profanity, nudity, and mature themes. The movie stars Edward James Olmos and was also produced and directed by Mr. Olmos.

209. One of the central points of the film maker in *American Me* is that a weak, easily led person who goes into prison will, whether he wants to or not, be forced to become part of a gang and do the gangs' bidding which includes murder. Moreover, the film depicts itself as being "a true story" and includes as one of the two primary prison gangs depicted, the Black Guerilla Family - the same prison gang named by the prosecutor.

210. Film reviewers in *Newsweek* have stated:

> The prison sequences are savage and sobering, starting with the rape of Santana [the central character] by an inmate, whom he promptly kills. Such scenes go beyond Hollywood sensationalism, detailing the confrontation of prison subcultures, the Mexicans, blacks, the

> white Aryan Brotherhood. *American Me* shows the fearsome logic that makes ethnic gangs the inevitable social structures that arise . . . *American Me* is a fiercely impressive film; it butts its way inside you and stays there long after you've seen it.

Jack Kroll and Lynda Wright, Eddie Olmos's East L.A. Story, Newsweek, March 30, 1992 at 66, Exh. 251.

211. According to a review in *Variety*, the movie industry newspaper, *American Me* contains:

> [a] long section detailing life at Folsom State Prison (where the company shot for three weeks) that is as fascinating as it is disturbing. ¶ Film sketches racial divisions within the pen, the rise of the so-called Mexican Mafia, how drugs are smuggled inside, the scams that can make life there safer . . . [n]ewcomers must commit brutal acts, preferably murder, to gain entree into the group . . .

Todd McCarthy, *American Me*, Variety, March 16. 1992, at 59, Exh. 251.

212. A review posted in the Internet Movie Database states:

> *American Me* is one of the darkest, grimmest, most unrelenting, and challenging movies I have ever seen . . . We are forced to face up to the horrors of rape (man-on-woman and man-on-man), stabbings, stranglings, burning alive, mutilation . . . . Santana is a ruthless killer who organizes a gang in Folsom state penitentiary. . . at times creates an almost unbearable tension, as in a sequence that cuts between Santana on the outside on his first romantic encounter and a group of inmates on the inside moving along to

> a nearly unsupportable and horrifying climax
> . . . .

Frank Maloney, *American Me* (1992), http://reviews.imd.com/Reviews/12/1227, Exh. 251.

213. The content of the film reinforced the prosecutor's improper and highly inflammatory remarks made during closing argument, in which she exhorted the jurors to return a death sentence for Petitioner because he would become a member of a gang in prison. In fact, she stated that he would become a member of the "Black Guerilla Family," the prison gang that is depicted in this film. As a juror herself stated, having watched the film, the jurors who had been holding out for a sentence of life without possibility of parole were convinced that they had no choice but to sentence Petitioner to death or be responsible for the death of someone in prison.

214. Juror Ary has aptly stated, "[t]wo of the jurors rented the movie and watched it over the weekend. They finally understood that Mr. Boyette could kill again in prison if he was not sentenced to death. After they watched the movie, they changed their votes to death." Ary Dec., Exh. 53.

215. Petitioner was prejudiced because evidence could have been introduced to counter the prejudicial extrinsic evidence. Petitioner was deprived not only of his rights to confrontation, cross-examination, and counsel but also he was deprived of a reliable sentencing determination.

Juror Ary Intentionally Concealed Material Facts

216. Juror Ary intentionally concealed material facts during the jury selection process, including, but not limited to, his prior felony conviction, his conviction for driving under the influence, his son's convictions for drug-related offenses, his son's incarceration in state prison, his cousin's incarceration on a life sentence for homicide, his own and his children's problems with drugs and alcohol, and his combat experience. This intentional concealment deprived Petitioner of his constitutional rights under both the California and United States Constitutions and his rights under California law.

217. A defendant in a criminal trial has a constitutional right to have the charges against him or her determined by a fair and impartial jury. U.S. Const. amends. VI, XIV; Cal. Const., art. I. § 16; *People v. Wheeler*, 22 Cal. 3d 258, 265 (1978). To this end, the defendant also has the statutory right to exercise peremptory challenges to prospective jurors whom the defendant believes cannot be fair and impartial, Code Civ. Proc. § 231, and to challenge for cause any juror harboring actual or implied bias. Code Civ. Proc. § 225.

218. Prospective jurors are examined under oath and are obligated to respond truthfully to the voir dire examination. The prosecution, the

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

219. Had Juror Ary not concealed his prior offenses and those of his children, Petitioner not only would have had a basis for a challenge for cause but the juror would have automatically been excused as ineligible to serve on the jury.

220. In *In re Hitchings*, 6 Cal.4th 97 (1993), this Court adopted the reasoning of the United States Supreme Court regarding the fundamental importance of voir dire:

> Voir dire examination serves to protect [a criminal defendant's right to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on voir dire may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.

In re Hitchings, 6 Cal. 4th at 109, quoting *McDonough Power Equipment,*

Inc. v. Greenwood, 464 U.S. 548, 554 (1984).

221. The *Hitchings* court further held, "[w]ithout truthful answers on voir dire, the unquestioned right to challenge a prospective juror for cause is rendered nugatory. Just as a trial court's improper restriction of voir dire can undermine a party's ability to determine whether a prospective juror falls within one of the statutory categories permitting a challenge for cause [citation], a prospective juror's false answers on voir dire can also prevent parties from intelligently exercising their statutory right to challenge a prospective juror for cause." *In re Hitchings,* 6 Cal.4th at 111.

222. Thus, "a juror who conceals relevant facts or gives false answers during the voir dire examination undermines the jury selection process and commits misconduct." *In re Hitchings*, 6 Cal.4th at 110, citing *People v. Castaldia*, 51 Cal.2d 569, 572 (1959); *People v. Galloway*, 202 Cal. 81, 92-93 (1927); *People v. Blackwell*, 191 Cal.App.3d 925, 929 (1987); *People v. Diaz*, 152 Cal.App.3d 926, 932 (1984).

223. If the voir dire questioning is sufficiently specific to elicit the information that is not disclosed, or as to which a false answer is later shown to have been given, the defendant has established a prima facie case of concealment or deception. *People v. Blackwell*, 191 Cal.App.3d. at 929, citing *Moore v. Preventive Medicine Medical Group, Inc.*, 178 Cal.App.

728, 742 (1986); *People v. Jackson*, 168 Cal.App.3d 700, 705-706 (1985).

224. The subject voir dire questions in the instant case were sufficiently specific and free from ambiguity so that the only inference or finding which can be supported is that Juror Ary was aware of the information sought and deliberately concealed it by giving false answers. *See People v.Blackwell*, 191 Cal.App.3d at 930.

225. Concealment is intentional if "the questions on voir dire clearly and fairly asked [a juror] to reveal [certain knowledge.]" *In re Hitchings*, 6 Cal.4th at 116. As a general rule, juror misconduct "raises a presumption of prejudice that may be rebutted by proof that no prejudice actually resulted." *In re Hitchings*, 6 Cal.4th at 118, *quoting People v. Cooper*, 53 Cal.3d 771, 835 (1991); *People v. Holloway,* 50 Cal.3d 1098 (1990). Here, as in *Hitchings*, the juror's concealment of his knowledge of the case was unquestionably intentional and material and therefore presents no obstacle to a finding of misconduct, which, if the presumption of prejudice is unrebutted, will result in reversal. *In re Hitchings,* 6 Cal.4th at 116.

226. A juror who lies her way onto a jury is not really a juror at all. *Clark v. United States*, 289 U.S. 1, 11 (1933). Dishonest answers undermine the impartiality of the jury. *Dyer v. Calderon,* 151 F.3d 970, 973 (9th Cir. 1998) (en banc). When a juror lies, it reflects an inability to render

an impartial verdict. *Smith v. Phillips,* 455 U.S. 209, 220 (1982); *Dyer,* 151 F.3d at 982.

227. A juror who lies about material facts after being instructed that he is under oath with regard to his answers on the jury questionnaire, cannot be trusted to follow any of the instructions from the court.

228. As the Ninth Circuit held in *Dyer:*

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

Dyer v. Calderon, 151 F.3d at 983.

229. The juror's concealment deprived Petitioner of his state and federal constitutional rights to a fair and impartial jury, to due process, and to a fair and reliable verdict and sentence. Since Juror Ary deliberately failed to answer material questions honestly where truthful responses would have provided a valid basis for a cause challenge - and indeed would have

required his disqualification - a new trial is warranted. *McDonough Power Equipment v. Greenwood,* 464 U.S. 548, 556 (1984); *Pope v. Man-Data, Inc.*, 209 F.3d 1161, 1163 (9th Cir. 2000). The juror's misconduct created a structural defect in the trial, resulting in a miscarriage of justice at both the guilt and penalty phases and requiring reversal of the death sentence. Cal. Const., art. V, VI, VIII, XIV § 13; *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927). At a minimum, the misconduct raises a presumption of prejudice that cannot be rebutted under the circumstances of this case.

Juror Ary Was Biased Under Actual and Implied Bias

230. The actions of Juror Ary, including: (1) his failure to disqualify himself on his jury summons as a convicted felon; (2) his deliberate concealment of material facts in voir dire; (3) his actions during the guilt phase prior to deliberations; and (4) his introduction of highly prejudicial extrinsic evidence in the guilt and penalty deliberations, demonstrate his actual and implied bias against Petitioner.

231. The Sixth Amendment "guarantees the criminally accused a fair trial by 'impartial,' indifferent jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *Dyer v. Calderon*, 151 F.3d at 986. "The bias or prejudice of even a single juror would violate [the defendant's] right to a fair trial."

Dyer v. Calderon, 151 F.3d at 973; *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir. 1977).

232. In *United States v. Allsup*, 566 F.2d 68 (9th Cir. 1977), the Ninth Circuit noted that while "[b]ias can be revealed by a juror's express admission of that fact . . . more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence." *Id.*

233. Here, the acts and omissions of Juror Ary establish both actual and implied bias. The fact that the juror lied repeatedly in voir dire gives rise to an inference of implied bias. *Dyer v. Calderon*, 151 F.3d at 979. Because Juror Ary lied repeatedly, the Court may consider whether "[his] lack of candor reflects an 'inability to render an impartial verdict.'" *Dyer v. Calderon,* 151 F.3d at 981, quoting *Smith v. Phillips*, 455 U.S. at 220.

234. Juror Ary's affirmative efforts to become foreperson of the jury at the penalty phase and his repeated efforts to convince other jurors of his "special" and "relevant" knowledge concerning their deliberations expose Juror Ary's actual bias towards Petitioner. As the Ninth Circuit stated in *Dyer v. Calderon* :

> There is a fine line between being willing to serve and being anxious, between accepting the grave responsibility for passing judgment on a human life and being so eager to serve that you

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

Dyer, 151 F.3d at 982.

235. The record contains further evidence of Juror Ary's "excess of zeal" above and beyond the multiple lies he told in order to become seated on the jury. Before the guilt phase had even been sent to the jury for deliberations, Juror Ary sent out a note with four questions, which themselves evince bias against Petitioner. RT 1576-77. During guilt phase deliberations, Juror Ary discussed with the other jurors the fact that "this may have been the first murder for which Mr. Boyette had been caught but that he may have committed previous murders. If we found second degree murder, when he got out in seven years he would feel like he'd gotten away with these killings and would kill again." Ary Dec., Exh. 53. When an apparent mistake was made with respect to the reading of the guilt verdicts, Juror Ary spoke up to try to correct the mistake, despite the fact that he was not the foreperson of the guilt phase jury and indeed, the foreperson, Juror

Orgain, had already spoken up to correct the situation. RT 1834.

236. In the penalty phase, Juror Ary presented extrinsic evidence of his personal and family experiences in custody - some of the very information he had concealed prior to being seated on the jury. Believing that he had not convinced all of the holdout jurors to vote for death, he exhorted them to watch the movie *American Me* in an effort to convince them that the only way to prevent Petitioner from committing another homicide was to sentence him to death.

237. Under these circumstances, actual bias is shown. Further, the Court may presume bias. *See McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. at 556-57 (Blackmun, Stevens and O'Connor, JJ., concurring) (accepting doctrine of implied bias in exceptional circumstances); *id.* at 558 (Brennan and Marshall, JJ., concurring in the judgment) (same); *Zerka v. Green,* 49 F.3d 1181, 1186 n.7 (6th Cir. 1995); *Amirsault v. Fair*, 968 F.2d 1404, 1405-06 (1st Cir. 1992); *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir. 1990); *Cannon v. Lockhart*, 850 F.2d 437, 440 (8th Cir. 1988); *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979); *United States v. Allsup*, 566 F.2d 68, 71-2 (9th Cir. 1977).

The Jury Considered Extraneous Facts In Reaching the Guilt and Penalty Determination

238. As is detailed above, the jurors considered extrinsic evidence in

both the guilt and penalty phases of Petitioner's trial. At the guilt phase, Juror Ary interjected the specter of additional murders. Lewis Dec., Exh. 86; Ary Dec., Exh. 53.

239. During penalty phase argument, the prosecutor's primary theme was that Petitioner would kill again unless the "naive" jurors bent to the will of the "street smart" jurors and voted to impose the death penalty. The prosecutor told the jurors, ". . . you talk about his likelihood of killing again. ¶ And it doesn't take much for him. It - they brought it out. They brought out all these things that he is a big follower. Think of prison life, can you imagine the stress of prison? ¶ *You have no idea.* And the gangs, and the pressures . . . ¶ Think what he's going to be exposed to in prison. Think of how easy that will be to kill." [sic] RT 2018; (emphasis added). The prosecutor went on: "[F]or some of you, in your backgrounds, this is a very different world for you. . . and for some of you, you've seen some of the violence that goes on, *you know. You have street smarts.* ¶ So those of you who aren't exposed to this, *listen to your fellow jurors who know what's going on.*" RT 2019; (emphasis added.)

240. At the penalty phase, the undisclosed prison experiences of Juror Ary's son, as well as Juror Ary's own jail experience became a key factor in deliberations. The jurors were exhorted to watch the movie

American Me, which allegedly was based on a "true story" of prison gangs at Folsom State Prison in California. Juror Ary has stated that: "[a]fter [two of] the jurors watched the movie, they changed their votes to death." Ary Dec., Exh. 53.

241. This Court has stated that "[w]e assess the effect of out-of-court information upon the jury in the following manner. When juror misconduct involves the receipt of information about a party or the case from extraneous sources, the verdict will be set aside only if there appears a substantial likelihood of juror bias." *People v. Nesler*, 16 Cal.4th 561, 578 (1997), *citing In re Carpenter*, 9 Cal.4th 634, 653 (1995).

242. This Court has further held that:

> Such bias may appear in either of two ways: when the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or even if the information is not inherently prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was actually biased against the defendant. If [a reviewing court] finds a substantial likelihood that a juror was actually biased, [it] must set aside the verdict, no matter how convinced [it] might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard.

People v. Nesler, 16 Cal.4th at 579; *In re Carpenter,* 9 Cal.4th at 653-54.

243. The facts set forth here meet this Court's standards of actual prejudice under any analysis. They also meet the federal standard. *See Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995).

244. Permitting a juror such as Juror Ary to serve allowed the introduction into the jury room of extraneous influences that materially colored the deliberations. The juror in question clearly lacked the quality of indifference which, along with impartiality, is the hallmark of the unbiased juror. *See Dyer v. Calderon,* 151 F.3d at 982.

245. The extraneous evidence of "other murders," of the prison experiences of Juror Ary and his son, and the movie *American Me* raise a substantial likelihood of actual bias by other jury members as well. This is true not only because of the inherently biased material but also based on the nature of the circumstances surrounding the misconduct, including the fact that jurors actually changed their votes after considering the extrinsic evidence.

246. Juror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias. *People v. Nesler*, 16 Cal.4th at 578; *People v. Marshall*, 50

Cal.3d 907, 949-951 (1990); *In re Carpenter*, 9 Cal.4th at 650-655. "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury . . . [¶] In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against the defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *People v. Nesler*, 16 Cal.4th at 578, *quoting Turner v. Louisiana*, 379 U.S. 466, 472-473 (1965). As the United States Supreme Court has explained: "Due process means a jury capable and willing to decide the case solely on the evidence before it." *People v. Nesler*, 16 Cal.4th at 578, *quoting Smith v. Phillips*, 455 U.S. at 217; *quoted in In re Carpenter*, 9 Cal.4th at 648; *accord*, *Dyer v. Calderon*, 151 F.3d at 935; *Hughes v. Borg,* 898 F.2d 695, 700 (9th Cir. 1990).

Cumulative Impact of Misconduct

247. A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. U.S. Const. amends. VI, XIV; Cal. Const., art. I, § 16; *People v. Nesler*, 16 Cal.4th at 578; *Irvin v. Dowd*, 366 U.S. at722; *In re Hitchings*, 6 Cal.4th at 110. A defendant is "entitled to be

tried by 12, not 11, impartial and unprejudiced jurors. 'Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced.' [Citations.]" *People v. Nesler,* 16 Cal.4th at 578, *quoting People v. Holloway*, 50 Cal.3d 1098, 1112 (1990), *disapproved on other grounds* in *People v. Stansbury*, 9 Cal.4th 824, 830 (1995).

248. A perjured juror is as incompatible with our truth-seeking process as a judge who accepts bribes. *Dyer v. Calderon*, 151 F.3d at 983; *cf. Bracy v. Gramley*, 520 U.S. 899 (1997).

249. As Justice Cardozo concluded, a juror who lies his way into the jury room is not really a juror at all:

> The judge who examines on the voir dire is engaged in the process of organizing the court. If the answers to the questions are wilfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only.

Clark v. United States, 289 U.S. 1, 11 (1933).

250. The misconduct of Petitioner's jury creates a presumption of prejudice. *Remmer v. United States*, 347 U.S. 227, 229 (1954); *In re Hitchings*, 6 Cal.4th at 119; *People v. Nesler*, 16 Cal.4th at 578.

251. Juror Ary's actions leave no doubt of his motivation for jury

service. His four questions to the court prior to guilt deliberations, his efforts to correct the inadvertent second degree murder verdict, his injection of extraneous and false information regarding other murders by Petitioner into deliberations, utilization of his own jail experiences, and his exhortation that the holdout jurors expose themselves to extraneous information in the form of the movie *American Me,* all demonstrate his actual bias toward Petitioner. It is no coincidence that the juror who concealed his own felony conviction and told numerous lies in order to become a member of the jury was the same juror who committed the misconduct detailed above.

252. To the extent that these acts of juror misconduct were not disclosed to Petitioner, his counsel, or the trial judge during the trial, Petitioner was also denied his right to counsel at a critical stage of the proceedings, denied a fair and impartial jury, denied his rights to confront and cross-examine witnesses and to present a defense to the evidence against him, and denied his right to a fair, reliable, and non-arbitrary determination of penalty untainted by extrajudicial information. U.S. Const. amends. V, VI, VIII & XIV; Cal. Const., art. I, §§ 1, 7, 15, 16 & 17.

B. PETITIONER'S TRIAL COUNSEL HAD AN ACTUAL CONFLICT OF INTEREST AND PETITIONER WAS PREJUDICED

253. Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated because trial counsel had an actual conflict of interest due to the financial implications of second counsel's representation of Petitioner while second counsel himself was being criminally prosecuted in federal court and/or by virtue of second counsel's prior representation of Petitioner's grandfather and other close relatives. Trial counsel breached their duty of loyalty to Petitioner. *Cuyler v. Sullivan*, 446 U.S. 348 (1980); *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

254. 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.

Factual Basis

255. On May 20, 1992, Richard Hove was indicted by a grand jury for the United States District Court of the Northern District of California for two counts of Structuring Currency Transactions in violation of 31 U.S.C. § § 5324(3) and 5322(a). Exh. 253. Essentially, Mr. Hove was charged with laundering money for one of his drug-dealer clients.

256. The first trial in *United States v. Hove* lasted from July 20 through July 27, 1992 and resulted in a mistrial due to a hung jury.

257. Three days later, on July 30, 1992, Petitioner was arrested. Walter Cannady was appointed to represent Petitioner on August 5, 1992. CT 30. It is not apparent from the record when Mr. Hove was appointed as counsel but a staff member at the court-appointed office of the Alameda County Superior Court has stated that according to her information, Hove was appointed on September 15, 1992, but that no documents are available to confirm this information. Gail Johnson Dec., Exh. 82. Thus, at the time of his appointment in Petitioner's capital trial, Hove was already aware that he would face the extraordinarily time consuming tasks of preparing for and facing his own federal trial while he was obligated to defend Petitioner.

258. Nevertheless, Hove, with Cannady, appeared on behalf of Petitioner at the preliminary hearing held on November 16, 1992. CT 368.

259. Status hearings in *United States v. Hove* were held on September 4, 1992 and November 6, 1992. Exh. 253. On November 16, Hove appeared with Cannady at Petitioner's preliminary hearing.

260. Hove's retrial was scheduled to begin on November 30, 1992. On November 20, 1992, another status hearing was held at which a joint request for a continuance of the trial date was denied. Exh. 253. The

second trial was held from November 30 through December 8, 1992. Mr. Hove was found guilty on both counts of structuring currency transactions, and his sentencing was scheduled for March 12, 1993. Exh. 253. Because the procedures for interim suspension in this state are essentially automatic, Mr. Hove and Mr. Cannady were clearly on notice on the date of Hove's conviction that his license to practice law would soon be suspended pending the finality of his convictions. *See* Bus. & Prof. Code §§ 6101-6102; Cal. Rules of Court 951(a).

261. Thus, prior to the start of Petitioner's trial, Hove was a federally convicted felon.

262. On December 7, 1992, both Cannady and Hove failed to appear in *People v. Boyette*. John Costain, who represented co-defendant Antoine Johnson, made a special appearance for Petitioner, noted that Cannady was ill, and asked for the case to be held over for two days. CT 620. Although no mention was made of Hove's whereabouts, in fact, he was in federal court for the fifth day of his second trial, which lasted the full day from 8:30 a.m. to 4:40 p.m. Exh 253.

263. On January 16, 1993, more than five weeks after Hove's conviction, Cannady claims to have finally discussed Hove's legal problems with Petitioner. On the morning of January 20, 1993, Judge Haugner met in

chambers with counsel for nearly one hour. CT 823. No record of this meeting was made. Petitioner was not present. Then, in open court, a purported waiver of the right to have two attorneys present at his entire trial was obtained from Petitioner. CT 823; RT 13-15. Cannady informed the trial court that Hove was "extremely familiar with the client" and that he needed Hove as back-up. During the entire colloquy, neither Cannady nor the court ever used the phrase "conflict of interest." Speaking about what he purportedly told Petitioner at the jail, Cannady referred to "Mr. Hove's unique predicament, shall we say, that there may be a possibility that he would not be with us for the full trial." RT 13. Similarly, the court merely made vague reference to Hove's "problem in the federal courts." RT 14. No one ever stated that Hove was a convicted felon.

264. There was no discussion of Hove's recent federal convictions, the fact that Hove faced possible incarceration or a large monetary fine. Nor was any mention made of the impact that Hove's federal convictions would have on his license to practice law. No one mentioned Hove's representation of Petitioner's grandfather and other close relatives. The court did not offer Petitioner any opportunity to speak with independent counsel to discuss the conflict-of-interest issues.

265. Petitioner's responses to the court's inquiries were limited to

monosyllabic: "yeah" and "yes." RT 14-15 . Overall, the apparent choice that was offered to Petitioner was one between continuing with Cannady and Hove as his two defense attorneys, going forward with one attorney, or having Hove replaced by another attorney who would not have known the case. This "waiver" occurred less than two weeks before jury selection in *Boyette* was scheduled to begin.[14]

266. The Clerk's Transcript succinctly characterized the "waiver" as follows: "Defendant, Maurice Boyette, waives his right to have two attorneys if counsel, Richard Hove, is unable to complete trial." CT 823.

267. The evidentiary hearing on the motion to suppress Petitioner's statements was held on January 25-26, 1993. Hove was absent from court on January 26th; Cannady informed the Court that Hove was in Sacramento that day. CT 825; RT 92.[15]

268. Throughout the trial, it was clear that not only was Mr. Hove's presence only an occasional occurrence, but that his co-counsel, Mr. Cannady had no clear idea when Mr. Hove would be present or even where Mr. Hove was on any given day during the trial. The significance of this is

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[14] At no time was any purported waiver of potential conflicts arising from Hove's prior representation of Eugene Surrell ever obtained from Petitioner.

[15] Petitioner hereby incorporates each and every allegation of Claims C and F.

clear. How could Mr. Hove be given a meaningful role in the trial if even his co-counsel did not know when he would be appearing in court.

269. Jury selection in Petitioner's trial began on February 1, 1993, and lasted through the morning of March 1, 1993. Court was in session on fifteen days between those dates. Hove was absent from court for the afternoon session of February 3rd, 10th, llth and 16th.[16] Additionally, Hove was absent for the morning session of February 18th, when Cannady again informed the court that Hove had to be in Sacramento. CT 835.1; RT 808. Hove then missed the afternoon sessions of court on February 22nd and 23rd. CT 836-837; RT 913, 1019A. On the morning of February 24th, Cannady waived Hove's presence for the entire day; however, Hove appeared about fifty minutes later that morning. CT 838; RT 1059, 1104. Thus, on ten out of the fifteen days of court time during which jury selection was conducted - a full sixty-six percent of the time - Hove was absent for some or all of the voir dire.[17]

270. In the midst of jury selection, on February 12th, a day on which

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[16] On the afternoon of February 3rd, Cannady stated with reference to Hove, "I would anticipate he is supposed to be here." RT 208.

[17] Petitioner hereby incorporates the information contained in Exh. 252, entitled "Defense Counsel Richard Hove's Absences from Maurice Boyette's Capital Trial" which contains all record documented absences of Hove from Petitioner's trial as well as significant events concerning *United States v. Hove*.

court was not in session in *Boyette*, Hove appeared in federal court for a hearing on his Motion for a New Trial and Motion for a Judgment of Acquittal Notwithstanding the Verdict, which was denied. Exh. 253.

271. On February 22nd, Cannady wrote a letter to Judge Taber regarding his section 987.9 requests that decreased the funds previously requested for Dr. Stephen Pittel and requested limited funds for Dr. Fred Rosenthal.

272. Cannady stated in his letter that based on his "discovery" of an evaluation of Petitioner made pursuant to Welfare and Institutions Code section 5150, he would reduce Dr. Pittel's hours to fifteen hours and would retain Dr. Fred Rosenthal for ten hours to interpret the 5150 report.

273. There was no further mention of Dr. Pittel for the remainder of the case.

274. Four days later, on February 26th, while jury selection was still ongoing in *Boyette*, the Review Department of the State Bar of California issued an order suspending Richard Hove from the practice of law pending the final disposition of his federal case. The effective date of the order - and thus Hove's temporary suspension - was March 29, 1993, only one

month later.[18]

275. The guilt phase of Petitioner's trial began on the morning of March 1, 1993. CT 839.[19] Hove was not present for Cannady's opening statement on the afternoon of March 1st. CT 839; RT 1198. Hove was also absent from the afternoon session of the guilt phase of trial on March 2nd. CT 841; RT 1334. In the middle of the morning session of trial on March 8th, Cannady stated that he would "*waive Mr. Hove's appearance wherever he may be.*" CT 847; RT 1610. Hove was absent for the afternoon session on March 9th, when Cannady delivered his guilt phase closing argument and the District Attorney gave her rebuttal argument. CT 848; RT 1737.

276. The Court instructed the jury on the morning of March 10th. Cannady waived Hove's presence at the beginning of the day; however, he asked that the record reflect that Hove entered the courtroom about ten minutes later, when the Court was instructing the jurors about expert witnesses. CT 849. Cannady waived Hove's presence at the beginning of

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[18] It is standard procedure for this type of State Bar order to become effective 30 days after they are filed, to give the attorneys an opportunity to wrap up their affairs. Doron Weinberg Dec., Exh. 125.

[19] During jury selection, on February 3, 1993, Judge Haugner had informed the jury that the guilt phase was scheduled to last from March 1 through March 19 and the penalty phase would begin 10 days later on March 29 through April 9th. RT 204. In fact, the guilt phase continued from March 1st through March 11th, and the penalty phase lasted from March 22nd through March 25th. CT 839, 918, 940, 976.

the afternoon session on March 10th, when the Court addressed certain requests for information made by the jurors. CT 849; RT 1828. However, Hove was present an hour later, and soon thereafter, the jury delivered its verdict for the guilt phase. CT 918.

277. The following day, March 12th, Hove appeared for his own sentencing hearing in *United States v. Hove*. The court granted a defense request for a continuance and the hearing was rescheduled to March 17th.

278. Hove was sentenced in federal court on March 17th, five days before the penalty phase was scheduled to begin in Petitioner's trial. At Hove's sentencing hearing, his attorney, Patrick Hallinan, recommended a probationary sentence and a fine of $25,000 (half that recommended by the probation officer who wrote the presentence report.) *United States v. Hove*, transcript of sentencing at 12; Exh. 253. Hallinan stated that there was no question that Hove would be disbarred. *Id.* at 6. He explained that Hove was the sole support for his family and the only person earning money to put his children through school and to support his wife. *Id.* While the court and Hallinan were discussing the impact of the state bar disciplinary proceedings on Hove's license to practice in the Northern District, Hove interrupted and twice stated, "I have ceased to practice." *Id.* at 11.

279. The Assistant United States Attorney ("AUSA") asked for a

sentence of incarceration of 46 months. *Id.* at 23. The government also criticized Hove for not having surrendered his bar card already, *id.* at 14-15, which undoubtedly led to the following portion of Hove's allocution:

> And I have to tell you that employment wise legally I'm dead. I am a dead man. My practice became a dying thing the day of my indictment. And my income over the last six months proves that. I virtually am just staying open to close the cases up that I have pending.
>
> And I have in fact indicated to this court in front of Judge Smith, earlier, in January of this year, maybe the first part of February, that I was no longer appearing in this court, that that was my last case. That's the last appearance I made. . .[20]
>
> I have been suspended as of a particular date, and I am, in fact, resigning. I have, unbeknownst to Mr. Hallinan, talked with counsel from the state bar. They have submitted to me a resignation form. It is my intention to do that. However, what I am doing now is I am completing a trial that has been in the works for the last month and a half, *fortunately on a court-appointed basis*, your honor. And I had to keep operating until this trial is completed; it will be complete by the 29th.
>
> I discussed with the state bar, asking permission to have an extension of time so we could complete this trial, but I found out that that wasn't needed. I am not petitioning for an

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[20] Thus, as of at the latest, early February, 1993, Hove could *only* practice in state court, thereby increasing dramatically the importance of Petitioner's case to Hove's financial situation.

> extension, I can represent that to the court, and I will resign before the 29th.
>
> I'm dead. I'm through legally, your honor . . . What I can indicate to this court is what information I have from talking with the state bar and other people, is that I'm out for a minimum of five years. . .
>
> That's the best I can indicate to the court from what information I have about that. But I am resigning. . .
>
> I just ask the court to consider that I do support three - actually four people. I'm the sole support for them right now. . .
>
> . . . My assets right now, with the exception of my house, virtually is my retirement. That's what I have; that's what we're living off of. Starting the 29th, I'm unemployed.
>
> *Id.* at 26-27; emphasis added.

280. Judge Vaughn Walker reasoned that the only motive he could imagine for Hove's crimes was a financial one; therefore, he gave Hove a punishment that was financial in nature: a suspended sentence and a $250,000 fine. *Id.* at 28, 31. He placed Hove on probation for six months, conditioned on his payment of $100,000 by May 17, 1993, and the remaining $150,000 by September 30, 1993. *Id.* at 31.

281. The penalty phase in Petitioner's trial, including argument and deliberations, lasted only *four days*, from March 22 through March 25,

1993.[21] Cannady waived Hove's appearance at the outset of the afternoon session on March 22nd; however, Hove arrived almost an hour later. CT 940. Deliberations began on the afternoon of March 23rd. CT 941.

282. Additional evidence of Hove's financial problems during 1993 include the following: On August 31, 1993, Hove filed a pro se motion to modify the conditions of his probation to reduce the amount of his fine from $250,000 to $100,000 (which he had already paid by that time), arguing that he lacked the ability to pay the remaining $150,000 balance. Exh. 253. In a declaration attached to this motion, Hove asserted, "[s]ince my indictment through trial I spent my liquid assets for my defense and living expenses. My law practice virtually stopped since my indictment." *Id.* Hove's motion to modify was denied, and on September 29, 1993, probation revocation proceedings were instituted against him due to his failure to pay the $150,000 balance of his fine. Exh. 253. In the course of admitting the violation and explaining his financial situation to the court, Hove submitted his 1992 IRS form 1040, which indicated that his adjusted gross income for that year was less than $21,000. Exh. 253. On January 27, 1994, Hove filed a financial affidavit with the Ninth Circuit estimating that his net

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[21] The case presented in mitigation by the defense is contained in just 30 pages of transcript. RT 1889-1990.

income for 1993 from all sources - including self-employment income and interest income - would be $23,000. This affidavit also calculated Hove's net worth at -$3,388. Exh. 254.

283. At the time of Petitioner's trial, Assistant District Attorney Drabec was aware of Hove's legal and financial situation.[22]

Conflict re Representation of Petitioner's Relatives

284. Eugene Surrell, Maurice's maternal grandfather, was arrested and charged with killing William Ashford in April 1980. Alameda County Criminal Case No. 70152, Exh.140. Eugene Surrell retained William DeBois of Sullivan, Nakahara, DuBois & Hove to represent him in this case. While the case was pending, Eugene Surrell was arrested and charged with felon in possession of a firearm, concealed firearm, firearm with serial number removed, and open container in vehicle. Alameda County Criminal Case. No. 73298, Exh. 139. Surrell was originally represented by the public defender on this case, but he retained DuBois early in the process to represent him in this case as well.

285. DuBois's partner, Richard Hove, stood in for DuBois in his

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[22] "During the meeting [of jurors with the prosecutor following the penalty phase verdict], several of the jurors told the DA she had done a great job. The DA also mentioned that Hove was in legal trouble and needed money. According to the DA, Hove was taking as many court-appointed cases as possible." Tallman Dec., Exh. 119.

representation of Eugene Surrell in these two cases on numerous occasions. In Case No. 70152, Hove appeared on August 10, 1981; December 2, 1981; March 1, 1982; January 10, 1983; October 26, 1983; January 26, 1984; and January 27, 1984. In Case No. 73298, Hove appeared on December 2, 1981; March 1, 1982; January 10, 1983; October 26, 1983; January 26, 1984; January 27, 1984; July 18, 1984; and July 25, 1984. See Exhs.139, 140. Thus, Hove represented Eugene Surrell over a period of three years. Therefore, Hove had actual and clear notice of Eugene Surrell's violent behavior and history of serious involvement with the criminal justice system.

286. Eugene Surrell has stated,

> In 1980, I was arrested for murder. I hired Bill DuBois to represent me. DuBois was a very busy defense attorney at that time, so he would sometimes have other attorneys from his firm appearing with or for me in court. Donald Clay and Richard Hove were two attorneys who worked with DuBois and they occasionally stood in for him. Dubois, Clay and Hove carried my case for almost five years. I got to know everyone in that law office by a first name basis. After my case ended in an acquittal, other people in my family also used DuBois and his firm for their own criminal cases. Some of my own kids - Michael, Celeste, Alvon, Alton - were represented by DuBois or Clay.

Eugene Surrell Dec., Exh. 114.

287. Hove also had constructive notice of the violent and criminal behavior of four of Petitioner's aunts and uncles.

288. In December, 1987, DuBois represented Celeste Surrell in a drunk driving case. Exh. 154. At this time Hove and DuBois were in the same office suite at Lakeside Plaza building with the same professional phone number. Exh. 257, 259.

289. In March 1990, Michael Surrell was arrested for assaulting two people and was represented by William DuBois. Exh. 161. In July of that year, Michael pleaded guilty to assault with a deadly weapon, and in August, he was sentenced to three years in prison. At this time, Hove and DuBois were both still at Lakeside Plaza. Exh. 257, 259.

290. In 1991, Alton Surrell was arrested and charged with several co-defendants for his participation in a July 4, 1990, shoot-out. Alton was initially charged with conspiracy to commit murder; he pled guilty to assault with a deadly weapon and use of a firearm, and in March 1992, he was sentenced to a total of seven years in prison. Alton was represented by David Dudley of Los Angeles. C. Don Clay represented one of Alton's co-defendants, Ricky Geeter. Exh. 196. Throughout this time period, Hove was in practice with Clay as Clay & Hove.

Petitioner's Purported Waiver Was Invalid

291. Petitioner did not knowingly or intelligently waive his right to have two attorneys present at his trial or his right to conflict-free counsel.

292. Petitioner's waiver was completely uninformed. The entire discussion of the implications of Hove's personal situation was held outside the presence of Petitioner. CT 823; RT 13-15. Petitioner's waiver gave no indication that he had any idea, let alone an informed idea of the consequences of his actions. His monosyllabic responses in no way indicated informed consent.

293. As this Court has stated:

> [W]aivers of constitutional rights must, of course, be "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." No particular form of inquiry is required but, at a minimum, the trial court must assure itself that (1) the defendant has discussed the possible consequences of joint representation in his case, (2) that he knows of his right to conflict-free representation, and (3) that he voluntarily wished to waive that right. Any waiver must be unambiguous and "without strings." We indulge every reasonable presumption against the waiver of unimpaired assistance of counsel.

People v. Mroczko, 35 Cal.3d 86, 110 (1983) (citations omitted); *see also People v. Sanchez*, 12 Cal.4th 1, 47-48, *as mod. on den. of reh'g* (1996) (same) (finding a valid waiver); *People v. Jones*, 53 Cal.3d 1115, 1136-38

(1991) (same) (finding a valid waiver); *People v. Bonin*, 47 Cal.3d 808, 841 (1989) (same) (finding no valid waiver); *People v. Easley*, 46 Cal.3d 712, 729 (1988) (same) (finding no valid waiver).

294. As is apparent from a review of the voir dire regarding waiver in this case, the only issue that Petitioner was made even arguably aware of was that Mr. Hove might at some point no longer be able to attend the trial apparently, and unbeknownst to Petitioner, either because he would be disbarred or sent to prison. *See e.g.,* "Mr. Hove's unique predicament, shall we say, that there may be a possibility that he would not be with us for the full trial. . . RT 13; "[Hove] may not be able to complete the case, we don't know yet. . ." RT 14; "Mr. Hove faces a problem in the federal courts which may prevent him from completing this case. . ." RT 14; "he physically may not be here for the completion of this case and your part in the case. . ." RT 14.

295. It is apparent from the record that an *in camera* discussion of Hove's federal conviction was held on January 20, 1993, just prior to the court session at which Judge Haugner obtained Petitioner's purported waiver of his right to have Hove present at his trial. CT 823. As a matter of due process both under the Fourteenth Amendment to the federal constitution and Article I, § 15 of the California Constitution, a criminal

defendant has the right to be personally present at his trial. *People v. Johnson*, 6 Cal.4th 1, 17 (1993). The United States Supreme Court has held that this right encompasses the right to be present at court proceedings if the defendant's presence has a reasonably substantial relationship to his ability to defend himself. *Id. citing United States v. Ganon*, 470 U.S. 522, 526 (1985.)

Petitioner Was Prejudiced by Counsels' Actual Conflict

296. Trial counsel Hove failed to act in any way as a competent advocate for Petitioner in either the guilt or penalty phases of his case. Because counsel's need for funds and attention to his own criminal matters took precedence over his duty to Petitioner, Petitioner was deprived of any second counsel in his capital trial.

297. Cannady was completely aware of Hove's legal and financial situation at the time Hove was appointed as second counsel in this case. Moreover, because lead counsel Cannady allowed his lifelong friendship with second counsel Hove, Declaration of Walter Cannady, Exh. 59, to interfere with his loyalty to Petitioner, he too was actually conflicted.

298. It is apparent from a review of the record that Petitioner's representation was adversely affected in at least the following ways.

299. Less than *six months* elapsed from the time that Cannady was

appointed to represent Petitioner and the beginning of jury selection. CT 30, 826. This extraordinarily brief time period is almost unprecedented when no other factor such as a refusal to waive time by the defendant is present. Sawyer Dec, Exh. 107. Petitioner's case not only involved a potential death sentence but it was a factually complex case involving a multiple murder and two special circumstance allegations. CT 532-537. As can be seen by the gross lack of preparation done in this case, see Claims C, D, this brief time was in no way sufficient to prepare adequately for trial.

300. Even the prosecutor commented on the unusual nature of the brief length of time in which this capital case with two special circumstances went to trial. In the course of discussing the appropriateness of the inclusion of numerous family members as witnesses in the penalty phase to "victim impact," she commented as follows:

> What I think - what I should point out in the record is *unusual about this case, is this only happened last May*, so these victims are still in a state of trauma and deep grief. And I think a pattern of how it has affected their life. In the *normal* case of several years after an incident, has of course, not developed yet. And in fact some of these family members are too grief stricken to even seek counseling at this point.

RT 221; Emphasis added.

301. There are extremely sound reasons why capital cases do not

come to trial in such a brief time. Susan Sawyer is an Assistant Public Defender with the Alameda County Public Defender's Office. She has been with the office since 1976 and has been trying capital cases since 1984. She has tried over one hundred cases to a jury, including two death penalty cases and seven homicide cases. From 1990 to 1993 and again from 1998 to 1999, she was the Death Penalty Coordinator for that office. In that capacity she participated in sixth death penalty cases. Sawyer Dec., Exh. 107.

302. Susan Sawyer has stated:

> Death penalty cases in Alameda County generally take four to five years from arrest to trial unless either the prosecutor or the defense makes a special effort to get the case to trial more quickly. This has been true since I started working on capital cases in 1984. For a capital case to proceed to trial in Alameda County after only six months following arrest would be highly unusual now and would have been highly unusual in 1992 or 1993.

Sawyer Dec., Exh. 107.

303. There are numerous reasons why it is unsound for trial counsel to proceed more quickly to trial.

> From a defense perspective, the time frame of four to five years of preparation is fully justified in all cases and required in others. Investigation of a capital case is quantitatively and qualitatively different than in a noncapital case

> because of the need to prepare not only a guilt defense but also a mitigation case for the penalty phase.

Sawyer Dec., Exh.107.

304. The rush to trial is particularly prejudicial for penalty phase preparation due to the nature of the evidence that should be presented at that stage of the trial. As Sawyer has stated:

> To effectively prepare the penalty phase of a capital case, it is essential to gather records about the client's life history, including school records, medical and psychiatric records, employment records, military records, criminal records, and records of any periods of incarceration. These records can take many months to obtain, depending on the age of the records, their location, and the institution where they are kept. Records are often misplaced or under different names. Sometimes they have been sent to different locations. Special release forms or court orders are often required in order to obtain records. In many cases, records are located out-of-state, which often requires travel by a member of the defense team. I cannot think of a single capital case I have worked on where there wasn't some problem obtaining some records.

Sawyer Dec., Exh. 107.

305. Obtaining records is merely one step in the process of developing a case for mitigation. As Sawyer has stated:

> Many times, capital defendants are unable to remember the names of former teachers,

> psychiatrist, or wardens who may be helpful to the defense at the penalty phase. In these circumstances, once the defense lawyer has obtained complete records of the client's life history, the lawyer needs to go over those records with the client to identify individuals who may possess mitigating information. Finding those people in their current locations and then arranging and conducting interviews with them can take several more months.

Sawyer Dec., Exh. 107.

306. Record collection is simply the first step in preparing for a penalty phase presentation. As in Petitioner's case, it is necessary to present these records for review by an appropriate mental health expert. This consultation is necessary to determine if there is mental health evidence that will be appropriate to present in the guilt and/or penalty phases. Early documentation of problems such as drug or alcohol addiction obviously enhances the weight of any expert's opinion regarding the existence of that condition.[23] Sawyer Dec., Exh. 107.

307. Moreover, reasonably competent trial counsel will coordinate their strategy with regard to guilt and penalty phases. This was not done

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[23] This is precisely the type of documentation that Dr. Pittel requested from counsel, that was available to counsel, and which counsel failed to provide to any expert. As discussed in Claim D, counsel has admitted that it was Dr. Pittel's insistence on such corroborating evidence that led them to forego his testimony. Petitioner was prejudiced to the actions of trial counsel in this regard.

here. As Sawyer has said:

> It is very important in the defense of a capital case for there to be a coordinated strategy between the guilt and penalty phases in order to avoid inconsistency. When positive information about a client exists, it is often useful for the defense attorneys to inject that into the guilt-phase case as much as possible. For there to be a coordinated strategy between the guilt and penalty phases of a capital trial, the defense must have fully investigated and strategically planned the defense for the penalty phase prior to the start of the guilt phase. I cannot think of any tactical reason why a capital defense team would postpone penalty-phase investigation until after the guilt phase had begun.

Sawyer Dec., Exh. 107.

308. Here, trial counsel failed to consult any mental health expert until the eve of trial. Moreover, the expert that did testify, Dr. Fred Rosenthal, did not even interview Petitioner until Petitioner had been convicted of capital murder in the guilt phase. Exh. 260.

309. Not a single expert was consulted regarding the guilt phase. See Claim C. The expert consulted for the penalty phase was summarily dismissed when he requested documentation and investigation to determine what mitigation could be presented in the penalty phase. Cannady Dec., Exh. 59. Counsel then substituted an expert who was willing to testify with little or no preparation and without any substantiation other than a history

taken from Petitioner to support his conclusions. Rosenthal Dec., Exh. 105.

***Keenan* Counsel**

310. In most capital trials in California, two counsel are assigned to represent a defendant. There is a universal recognition by the courts that because of the nature of capital trial, it is difficult, if not impossible, for one counsel to single-handedly shoulder the responsibility.

> The role of back-up counsel is an important one in the defense of a capital case. Different attorneys allocate responsibilities differently, with one overall strategy in mind. Occasionally, when there are real issues of guilt to be litigated, a defense team will split up the guilt and penalty phases so that, in the event of conviction of special circumstances, an attorney different from the one who just lost the guilt case can present the penalty case with more credibility. Although attorneys may choose to split up responsibility for parts of the trial, they work together to coordinate their strategy. When you are the lead attorney on the case, it can be invaluable to have a second attorney who knows as much about the case as you do. That way, the two of you can make sound strategic decisions based on two attorneys' opinions where both attorneys are fully informed.

Sawyer Dec., Exh. 107.

311. Cannady has claimed that he needed second counsel Hove as "backup." Cannady Dec., Exh. 59. However, even a cursory review of the record reveals that Hove could not possibly have played this role in the trial

since Cannady clearly had no idea if, or when, Hove would be present in court. *See, e.g.*, (2/8) CT 830, RT 307, 320-21; (2/17) CT 835; RT 777; (2/24) CT 838; RT 1059, 1104.

312. Cannady has recently stated that Hove's responsibility was for the penalty phase. Cannady states:

> The way Dick Hove and I usually divide capital cases, is that I would do the guilt phase with his assistance, but I would keep him more "in reserve" for the penalty phase. This way, if I lost the guilt phase, there would be someone who had more credibility with the jury to try the penalty phase. I believe that is what we had agreed to in Mr. Boyette's case.

Cannady Dec., Exh. 59.

313. However, Hove's role in the penalty phase was extremely limited. The penalty phase presentation was done primarily by Cannady. While Hove did cross-examine three out of the nine victim's family witnesses presented by the prosecution and provided the direct examination of two defense witnesses presented at the penalty phase, Cannady cross-examined two victim's family witnesses and presented the direct examination of the remaining seven defense witnesses.

314. Cannady also gave the opening statement which did nothing to explain to the jury either what evidence the defense would present or what would constitute mitigation in a capital case.

315. Although Dr. Pittel had suggested to counsel that they gather relevant records and conduct an investigation regarding Petitioner's family and background to obtain potential mitigation evidence, no such investigation was conducted.

316. Had Dr. Pittel's advice been followed, a wealth of mitigating evidence would have been available for presentation at the penalty phase. Tragically, because Mr. Hove's license was under suspension effective March 29, 1993, counsel could not spare the time to conduct even a cursory investigation of available mitigation.

317. Moreover, because of Hove's prior representation, potential future representation, and familiarity with Petitioner's family, he had not only a duty of loyalty to his former clients but a financial interest in not presenting the extensive family criminal background he was aware existed in Petitioner's immediate family. Rather than possibly injuring his own interests, Hove allowed a completely false picture of Petitioner's background to be presented to the jury whose responsibility it was to decide whether Petitioner should live or die.

318. Hove's dismal role in this case was apparent to the jurors. His comings and goings from the courtroom clearly were a distraction for the jurors. The jurors have said the following regarding Petitioner's attorneys:

a. "Maurice's second attorney, Richard Hove, was only there a few times. It seemed he only spoke on two occasions." Tallman Dec., Exh. 119.

b."[Petitioner] was represented by two attorneys who I did not feel ran a very good ship. One of the attorneys was always coming and going from the courtroom. Some days he was not even present in court." Orgain Dec., Exh. 95.

c. "Mr. Hove was absent from court quite often and seemed distracted when he was present. . . Overall, I thought Maurice's attorneys were not very forceful in their work on his behalf." Rennie Dec., Exh. 102.

319. Moreover, many of the jurors became aware of Hove's criminal problems during the course of the trial, which obviously would not inure to Petitioner's advantage. The following jurors have stated:

a. "At one point during the trial, I remember reading in the paper that one of Maurice's attorneys, Richard Hove, was under indictment for something. I believed he was charged with money-laundering. I was not the only one who was aware of Mr. Hove's legal problems." Rennie Dec., Exh. 102.

b. "At some point during the trial, the first alternate juror mentioned that one of Maurice's attorneys, the quieter dark haired one, was on trial for

money laundering. This is the same juror who eventually replaced me." Karantzalis Dec.

320. Hove's absences were prejudicial to Petitioner. As Sawyer has stated:

> For back-up counsel to be absent for significant portions of a capital trial, and/or for back-up counsel to be frequently in and out of the courtroom when court is in session on a capital case, is extremely unusual in [Alameda County]. Personally, I can only think of a single case that I know of where back-up counsel was not present the entire time in front of the jury. In that instance, the father of the back-up attorney died suddenly on the east coast, and the attorney missed a week of jury selection to attend the funeral and help with family affairs. The judge in that case informed the prospective jurors that the attorney was absent due to a sudden death in the family. Without an instruction similar to the one given in that case, I would be very concerned about what impression would be left with the jury due to the inconsistent presence of back-up counsel. In any criminal case, and especially in a capital case, it is crucial for the defense attorneys to demonstrate that they care about their client and that they take the defense of the client seriously. For back-up counsel to absent himself from significant portions of a capital case, particularly without any explanation by counsel or the court, would tend to send the message to the jury that counsel does not take the client or the case seriously. I can think of no tactical reason for an attorney to absent himself from court proceedings in a capital trial.

Sawyer Dec, Exh. 107.

321. Counsels' representation of conflicting interests adversely affected counsel's performance. *Id.* To establish that an actual conflict of interest adversely affected counsel's performance, Petitioner "need only show that some effect on counsel's handling of particular aspects of the trial was 'likely.'" *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992), *quoting Mannhalt v. Reed*, 847 F.2d 576, 583 (9th Cir. 1988).

322. Prejudice is presumed since the harm from the conflict of interest "may not consist solely of what counsel does, but of 'what the advocate finds himself compelled to *refrain* from doing, not only at trial but also' during pretrial proceedings and preparation." *Sanders v. Ratelle*, 21 F.3d 1446, 1452 (9th Cir. 1994), quoting *Holoway v. Arkansas*, 435 U.S. 490 (1978).

323. A criminal defendant's right to the assistance of counsel under Article 1, Section 15 of the California Constitution encompasses the right to conflict-free counsel. *People v. Frye*, 18 Cal.4th 894, 998 (1998); *People v. Jones*, 53 Cal.3d 1115, 1134 (1991). This Court applies what it describes as a "somewhat more rigorous standard of review" than the federal courts to conflict-of-interest claims:

> [W]e have held - regardless of whether there was an objection - that even a potential conflict

> may require reversal if the record supports 'an informed speculation' that appellant's right to effective representation was prejudicially affected. Proof of an 'actual conflict' is not required.

People v. Mroczko, 35 Cal.3d 86, 104 (1983). This Court has reiterated its "more rigorous" state standard in several recent capital cases. *See, e.g., People v. Frye*, 18 Cal.4th 894, 998 (1998); *People v. Sanchez,* 12 Cal.4th 1, 45 (1996); *People v. Kirkpatrick*, 7 Cal.4th 988, 1008 (1994); *People v. (Richard) Clark*, 5 Cal.4th 950, 995 (1993); *People v. Cox*, 53 Cal.3d 618, 654 (1991).

324. Hove had a direct financial incentive to remain involved in Petitioner's case and to have Petitioner's case move as quickly as possible. First, Hove clearly needed the money from this case to pay his attorney, Patrick Hallinan, and to pay the court ordered fine of $250,000. He could no longer practice in federal court after the beginning of February. Moreover, as Hove indicated in federal court proceedings, he had very little income during this period. Particularly during this period, Hove would not have been able to take on other appointed cases because they would not have concluded before his suspension would have become effective.

325. Hove also owed a duty of loyalty to his former clients and had a direct financial interest in not investigating, preparing or presenting

evidence of Petitioner's family's criminal activities since Hove's past, present, and future earnings would be dependent on the clients that he had successfully represented in the past.

326. Hove sought appointment in Petitioner's case to meet his own personal needs, presumably financial, and exploited the government as well as Petitioner to meet these needs. *See In re Gay*, 19 Cal.4th 771 (1998) (Werdegar, J., concurring.) At the time of his appointment, it is clear that Hove, and Cannady as well, were aware that Hove would not be able to function as second chair in this capital trial. Hove was merely present for the financial gain.

327. Hove engineered his appointment in a capital case "for the apparent purpose of quickly obtaining a fee while expending as little time and effort on the case as possible." *Gay*, at 832-35 (Werdegar, J., concurring).

328. Petitioner's convictions must be reversed because his counsel had an actual conflict of interest adversely affecting his performance. The conflict infected the entire trial, and thus, reversal is required not only as to the murders but also the special circumstances and the death sentence.

329. Petitioner hereby incorporates each and every allegation in Claims C and D.

C. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND SPECIAL CIRCUMSTANCE PHASES OF PETITIONER'S TRIAL

330. Petitioner's confinement is illegal and unconstitutional in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 13, 15, 16, and 17 of the California Constitution as a result of the unreasonable actions and inactions of his appointed trial counsel at the guilt and special circumstance phases of his trial. 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 the 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.

331. Petitioner alleges the following facts in support of his 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.

332. 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.

333. 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.

334. It is clear that "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).

335. While the inquiry into ineffective assistance employs a presumption that counsel's conduct is within the "wide range of professionally competent assistance," *id.* 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. *Hendricks v. Vasquez*, 864 F.Supp. 929, 942 (N.D. Cal. 1994), *aff'd* 70 F.3d 1032 (9th Cir. 1995), citing *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991).

336. To the extent that any of the errors and omissions alleged here were tactical decisions not to investigate, 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*, at 690-91; *see also Kenley v. Armontrout*, 937 F.2d at 1304.

337. Given trial counsel's decision to contest the identification of the shooter, trial counsel's tasks were straightforward.[24] The most important task was to convince the jury that Petitioner had not committed this crime. It was also important to establish that no matter who had committed these crimes, they did not occur as the prosecution contended, that is, these were not execution-style killings. Finally, it was important to

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[24] Petitioner does not concede that trial counsel's decision to put forth a case based on innocence was effective assistance of counsel but chooses not to contest that issue herein.

establish Petitioner's credibility. Counsel failed in each of these tasks.

Failure to Effectively Litigate the Motion to Suppress Petitioner's Statement

338. No physical evidence connected Petitioner to the commission of the crimes in question. At the time of the suppression motion there were no witnesses to the shooting of either victim. The only evidence against Petitioner was his statements to the police. Thus, it was important that counsel effectively litigate the Motion to Suppress Petitioner's Confession. Counsel failed to do so in at least the following respects.

339. Petitioner incorporates each and every allegation of Claim F as if fully pled herein.

Failure to Investigate Obvious Defenses

340. Trial counsel failed to investigate obvious defenses that could have been presented at trial. Trial counsel did not employ *any* mental health professional to determine if a mental state defense could have been presented.

341. Had trial counsel acted as a reasonably competent advocate, trial counsel would have discovered at least the following information.

342. Dr. Roderick Pettis, an experienced forensic psychiatrist, has concluded, based on his review of Petitioner's social history prepared by Dr. Craig Haney, additional documents provided by present counsel, and his

interviews with Petitioner the following.

343. Petitioner's history of neglect, depression, emotional problems, and impaired mental functioning left him incapacitated and overwhelmed in the face of a sudden stressful situation. Pettis Dec., Exh. 99.

344. Petitioner did not form the specific intent required to commit first degree murder. At the time of the offenses, Petitioner lacked the ability to plan, weigh considerations, and carry out a design of action and course of conduct aimed at achieving a specific goal. Accordingly, Petitioner did not premeditate and deliberate in that he did not have an ability to weigh and consider the question of killing and the reasons for and against such a choice. Petitioner was incapable of premeditation, deliberation and formation of the intent to kill. Petitioner's emotional impairments combined with his drug use precluded him from being aware of the duty imposed on him not to commit acts which involved the risk of grave injury or death and precluded formation of the mental state to understand meaningfully his actions and consequences. Pettis Dec., Exh. 99.

345. Dr. Pettis's conclusions are supported by Petitioner's neurological impairments. Trial counsel unreasonably failed to conduct any neuropsychological testing of Petitioner at the time of trial. Had trial

counsel not failed to do so, they would have discovered and presented the following expert opinion.

346. Dr. Dale Watson, a licensed psychologist in the State of California, whose expertise is in forensic psychology and neuropsychology and psychodiagnostic assessment, has examined Petitioner.

347. Clinical neuropsychological testing assesses the behavioral expression of an individual's brain function. Appropriately interpreted, neuropsychological assessment is a fundamental part of a reliable and comprehensive clinical evaluation of brain function. Each of the individual tests that make up a neuropsychological battery is designed to provide insight into the nature and extent of brain dysfunction. The testing of Petitioner provides evidence in his summary scores that he suffers mild neuropsychological impairment. Watson Dec., Exh. 122.

348. Petitioner's neuropsychological test data was assessed in a number of ways, including procedures to form a basis of comparison between Petitioner and cross-validated norms. The results of the testing and analysis indicate that Petitioner suffers from generalized mild neuropsychological dysfunction. This results in a slowing of Petitioner's ability to process information, disruption of auditory processing capacity, and poor fine motor control. These deficits would likely have a significant

impact upon his ability to succeed in school and are consistent with learning disabilities. Petitioner's neuropsychological impairments had a significant developmental impact upon him.

Testing Data

349. Petitioner's history includes multiple injuries to the head, including: a fall out of bed hitting his head on the floor as a toddler, resulting in vomiting and a "very dreamy" state; a skateboard fall resulting in loss of consciousness, vomiting and sleepiness at age four; and a fall off a 5-foot wall as a child but without loss of consciousness. This history of head traumas suggests a possible environmental etiology for Petitioner's impairments, and should be considered along with possible biological and genetic factors. Watson Dec., Exh. 122.

350. Neuropsychological summary measures, which have gained widespread acceptance in the neuropsychological community, and which were widely used in the period of 1992-1993, include the Halstead Impairment Index and the Average Impairment Rating. Using age and education adjustments, the Halstead Impairment Index falls within the mildly impaired range, though the Average Impairment Rating is within the low normal range. Petitioner's scores on these indices, along with a more detailed analysis of test findings, establish that he has underlying mild

neuropsychological dysfunction. Watson Dec., Exh. 122.

351. Petitioner's Neuropsychological Deficit Scale (NDS) score of 37 falls within the Mild Neuropsychological Impairment range. In Reitan's 1988 study, no non-brain damaged person scored higher than 34 on the NDS. That study found that a cutting score between 25 and 26 separated normal from brain-injured individuals with the greatest degree of accuracy. Petitioner, therefore, tests in the impaired range. The NDS is one of the most comprehensive of the neuropsychological indices available for the Halstead Reitan Battery. In addition, the NDS has been cross-validated as an effective means of identifying brain damage. In multiple, independent scientific studies, the NDS has proved to be a consistently valid measure of brain damage. Watson Dec., Exh. 122.

352. Petitioner's overall intellectual ability falls within the low average range. However, analysis of the underlying factors of the intelligence measures show Petitioner to have significant difficulties in his speed of information processing. Petitioner is very slow to process information and to transfer written information. His ability to process information is well below his other scores which is a common problem for individuals who have had any type of neuropsychological insult, including head injuries as has Petitioner. Watson Dec., Exh. 122.

353. Petitioner shows signs of microsmia, or the loss of the sense of smell. This may be an indicator of impairments within the orbital-frontal region of the brain – an area associated with personality functioning and when damaged, with impulsivity. His behavior often appears rather child-like and immature – consistent with this hypothesis.

354. Further, Petitioner has signs of lateralized impairment within the auditory processing centers of the left hemisphere. On a dichotic listening task, in which different words were simultaneously presented in each ear, Petitioner was able to correctly identify 35 of 50 words on the left but only 25 of 50 on the right – strongly suggesting left hemisphere disruption. This task is useful in identifying impairments that may or may not involve structural defects within the brain, particularly within the subcortical areas associated with the temporal regions. Watson Dec., Exh. 122.

355. Petitioner's oral reading abilities are also of note because, though he comprehends well (12th grade level), his reading speed is remarkably slow at less than the 1st percentile for his age (5th grade level). This performance again speaks to the slowness with which he processes information as well as his difficulties in learning. His performance is consistent with the reports of Petitioner being a "slow" learner. Watson

Dec., Exh. 122.

356. Likewise, on the California Verbal Learning Test, Petitioner was slow to orient to a new task. Watson Dec., Exh. 122.

357. An examination of the test results and Petitioner's school records show that he was a very slow student who clearly had a problem processing information. He related that he never adequately learned to write in cursive and this appears in part to be related to difficulties with fine motor control. His awkwardness, which is still evident, is not simply a function of his size but rather reflects subtle brain dysfunction. Watson Dec., Exh. 122.

358. There are several possible sources for Petitioner's neuropsychological impairments. He was exposed prenatally to alcohol and other drugs, both known to cause permanent brain damage in developing fetuses. He was at risk genetically for psychiatric illness and limited intelligence. His maternal grandmother was diagnosed with an affective mood disorder. Both his maternal grandmother and his maternal great-grandmother had problems with alcohol and both of his parents were chronic drug abusers. Moreover, all of his maternal aunts and uncles had very serious problems with drugs. Petitioner also experienced losses of consciousness from accidents. Any of these factors can cause impairments

or brain damage and all may exacerbate preexisting mental disabilities. Watson Dec., Exh. 122.

359. Petitioner's limited intellectual functioning as it relates to verbal comprehension and processing speed, combined with the unrelenting traumatic experiences he survived as a child, had devastating consequences for him during his developmental years. Under stress, and especially in circumstances when there is little time to think, the functional impact of his disabilities increases, he is less likely to think rationally and logically, to understand the long-term consequences of his actions, to reflect and weigh the impact of his responses, or to develop alternative strategies to follow instead of impulse driven actions. Watson Dec., Exh. 122.

360. Petitioner's Wechsler Adult Intelligence Scale – 3 Processing Speed Index score of 73 places him at the 4th percentile and indicates that he is very slow to process information. He will not perform well under time pressure. This ability to process information is well below any of the other test indices from the WAIS-3. This phenomenon is often found in people with neuropsychological dysfunction. Watson Dec., Exh. 122.

361. Petitioner suffers from mild generalized neuropsychological impairment. As many of the abilities assessed by these tests are not lost over time, the damage to Petitioner's cognitive functioning occurred at an

early stage in his life. These impairments are brain-related deficits. Watson Dec., Exh. 122.

362. In addition, polysubstance abuse would have exacerbated the effects of Petitioner's impairments to a significant extent. At the time of his arrest in 1992, the impact of his polysubstance abuse would have been significantly more marked than testing is able to identify this many years later. Watson Dec., Exh. 122.

363. A neuropsychological assessment of Petitioner reveals evidence of organic brain impairments. Such findings would have been made had Petitioner been evaluated by a competent neuropsychologist at the time of Petitioner's trial in 1992-1993. Watson Dec., Exh. 122.

364. The above findings would have supported a mental state defense. Counsel's failure to conduct a reasonably effective investigation, consult appropriate experts, prepare their testimony and effectively present it at trial, undermines confidence in the outcome of Petitioner's case at both the guilt and penalty phases of his trial.

Failure to Effectively Employ Investigators

365. Trial counsel also failed to effectively employ the services of the sole investigator in the case, Brian Olivier.

366. As detailed in Claim B, trial counsel failed to investigate,

prepare, and present an effective case for Petitioner at either the guilt or penalty phases because trial counsel hurried this case to trial in order to ensure that *Keenan* counsel, Richard Hove, would be able to collect his legal fees in this case prior to his disbarment.

367. An examination of Olivier's billing reveals the following information.

368. During the five month period from August 12, 1992 to January 25, 1993, Olivier, the sole investigator working on this case, billed a total of 62.75 hours. Olivier did not bill for the period of January 26, 1993 to February 15, 1993. However, jury selection began on February 1, 1993. CT 826. On February 15, 1993 -- after two weeks of jury selection -- Olivier resumed his efforts. According to Olivier's billing, the sole investigator in Petitioner's case billed *seventy-one percent* of the total work that occurred in a mere five weeks and after jury selection had commenced.

369. Olivier's billing also reveals that during the period of August 12, 1992, to January 25, 1993, the sole investigator in this case saw Petitioner, outside of the courtroom, a total of *three times*. These interviews occurred once in the month of August, once three months later in November, and once in January. After January, according to Olivier's billing, Petitioner never again met with the sole investigator in his case

unless it was in the courtroom.

370. In the final two weeks of the trial, from March 10, 1993, through March 23, 1993, Olivier billed only 15.15 hours. Oliver did not once meet with Petitioner's family members -- including those who testified at trial.

Failure to Consult and Present the Testimony of a Criminalist

371. The prosecutor argued in her closing argument at the guilt phase that Petitioner had "executed" the victims in a cold-blooded manner. *See, e.g.,* RT 1705, 1721-22, 1728, 1791.

372. Had a criminalist been consulted, at least the following could have been presented to establish that the crimes were not committed as the prosecutor suggested.

373. Charles V. Morton has been the Chief Forensic Scientist at the Forensic Science Division of Forensic Analytical Laboratories in Hayward, California since 1997. Mr. Morton has over thirty-five years of experience as a criminalist, including over nineteen years of experience as a crime laboratory director. He has extensive experience in laboratory and field examination of physical evidence, crime scene processing and reconstruction. Morton Dec., Exh. 92.

374. Mr. Morton has stated:

> [D]ue to the quantity of variables including the number and angles of the bullet wounds in the victims, it would have been impossible for any competent criminalist to opine with reasonable certainty as to the sequence of bullet wounds, locations of the victims, or the precise location of the weapon when the shots were fired. Thus it would not have been possible to opine, based on the physical evidence, that these were 'execution style' killings due to the number of variables present.

Morton Dec., Exh. 92.

375. Thus, had trial counsel consulted a criminalist to examine the crime scene evidence, testimony could have been presented to effectively refute the notion that Petitioner had committed a "cold-blooded" or "execution style" killing.[25]

376. Counsel also failed to call lay witnesses who could have confirmed that the victims were not shot "execution style." Johnnie Wright, Jr. who lived at 2497 Cole Street in Oakland in the house next door to 2501 Cole Street has stated the following regarding what he witnessed on the night of the shootings:

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[25] Petitioner acknowledges that his statement sets forth facts which could support the prosecutor's allegations. However, if trial counsel had rendered reasonably effective assistance either with regard to suppressing the statement and/or in establishing the likelihood that the crime was committed in a different manner, counsel would have supported Petitioner's contention that the confession was the result of facts that were supplied to him by the police rather than being based on what actually occurred.

> . . . I saw the woman go running into the street. She was running when she fell and landed face down. She did not change direction or turn before she fell. No one was standing near her so whoever shot her must have been some distance away. I did not see who shot her. I did not hear anyone say or yell anything. I continued to watch and no one approached her or shot at her after she was laying in the street.[26]

Wright Dec., Exh. 126.

Failure to Investigate and Refute Prosecutor's Hypotheticals at Guilt and Penalty Phases

377. Petitioner incorporates each and every allegation of Claim E as if fully pled herein.

Failure to Refute Prosecution Claim re: Cole Street House

378. Petitioner testified during the guilt phase that he and his family had been threatened after he gave his statements to the police. RT 1479. In support of this contention, he testified that he had asked someone to move his mother out of the Cole Street house for her protection. RT 1479. On cross-examination, the prosecutor impeached Petitioner's testimony by stating that the Cole Street house had been boarded up following the shootings. RT 1481. Trial counsel failed to refute the prosecutor or support

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[26] Wright's testimony would also have refuted the prosecution's theory that Devallier was shot as she begged for her life. This testimony should have, at a minimum, been presented in the penalty phase to mitigate the crime evidence vigorously argued by the prosecution in aggravation.

Petitioner's version of the facts thus undermining Petitioner's credibility with the jury.

379. In fact, the Cole Street house was not boarded up directly following the shootings. Persons who lived in the same neighborhood as 2501 Cole Street have stated:

> In the months after the shooting, people were still going in and out of 2501 Cole Street like they had been before. Four to six months after that, the house was finally boarded up by the city.

Edward Johnson Dec., Exh. 81.

380. Bill Ashley, another neighbor, has stated "[a]fter the shootings, people still went in and out of 2501 Cole Street for some time. It took some time before for the City took control of the house and boarded it up." Ashley Dec., Exh. 54.

Failure to Obtain Jury Background Checks

381. The policy of the Alameda County District Attorney's Office at the time of trial was to initiate criminal background checks of potential jurors. Sawyer Dec., Exh. 107.

382. Susan Sawyer, an Assistant Public Defender in the Alameda County Public Defender's Office and an expert in capital litigation has stated:

> In my experience, the district attorneys trying cases in Alameda County routinely run the criminal records of all prospective jurors in a criminal case. Moreover, it has been standard practice since at least 1980 for defense attorneys to file a motion requesting this information from the prosecution, and this information is routinely provided. I am fairly certain that I have obtained this information in every case I have tried since at least 1980, either because the judge ordered the information turned over or because the district attorney agreed to turn it over voluntarily.

Sawyer Dec., Exh. 107.

383. Trial counsel was aware of this policy. Cannady Dec., Exh. 59.

384. Reasonably competent trial counsel would have made discovery requests to obtain these background checks from the District Attorney's office. Sawyer Dec., Exh. 107.

385. The failure of counsel to request and obtain criminal background checks done by the District Attorney's Office was ineffective assistance of counsel. This failure prejudiced Petitioner because had this request been made, counsel would have become aware that Juror Ary was a convicted felon. Trial counsel has stated that had he known that Ary was a convicted felon, he would have used a peremptory challenge against Juror Ary if the trial court had failed to disqualify him for cause, Cannady Dec., Exh. 59, although he is confident that this would not have been necessary

since, in his opinion, the trial judge would have disqualified Juror Ary. Cannady Dec., Exh. 59.

Failure to Make Appropriate Objections

386. As raised on appeal, when Petitioner testified at the hearing to suppress his statements to the police, on cross-examination the prosecutor was permitted to ask questions regarding not the details and circumstances of the interrogations, but rather the substance and veracity of the underlying statements. To the extent that counsel failed to properly or fully articulate an objection that such cross-examination was beyond the scope of direct, was irrelevant, and violated Petitioner's Fifth Amendment rights, counsel rendered constitutionally ineffective assistance of counsel.

387. As raised on appeal, the prosecutor committed misconduct by cross-examining Petitioner during the guilt phase in a manner which improperly and unnecessarily alerted the jury that the Petitioner's prior testimony was from a suppression hearing and by reiterating this point in closing argument. To the extent that trial counsel's failure to object and request admonitions to the prosecutor's misconduct waives the issue on appeal, he rendered constitutionally ineffective assistance of counsel.

388. As raised on appeal, inflammatory evidence relating to the victims, including testimony and photographs, was introduced in violation

of Petitioner's state law and state and federal constitutional rights. To the extent that counsel's objections were not sufficient or timely to preserve the claim raised on appeal, counsel rendered constitutionally ineffective assistance of counsel.

389. As raised on appeal, the prosecutor committed misconduct in vouching for and expressing personal beliefs as to the credibility of witnesses, distorting the burden of proof, misstating the law and facts, inflaming the jury, and misrepresenting the nature of the deliberative process. To the extent that trial counsel's failure to object and request admonitions waives the issue on appeal, counsel rendered constitutionally ineffective assistance of counsel.

Failure to Make An Adequate Record to Establish Prima Facie Case for Discriminatory Use of Peremptory Challenges

390. The prosecutor exercised peremptory challenges on four of the first six African-American women who were called, using four of the first fifteen peremptory challenges: Jurors Alston (RT 1151); Davis (RT 1153); Wiggins (RT 1154) and Farwell (RT 1155). After Ms. Farwell was excused, trial counsel, raised a "*Wheeler*[27] motion" on the ground that the prosecutor demonstrated a systematic exclusion of African-Americans by

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[27] *People v. Wheeler*, 22 Cal.3d 258 (1978).

excluding four African-American women. RT 1155, 1162.

391. The court, noting that the prosecutor had permitted two African-American women to remain on the jury, stated it did not "think" a prima facie case had been made, but asked the prosecutor if she wished to explain her challenges. RT 1163. The prosecutor then indicated that these four jurors were "lifers;" the prosecutor stated that she believed that they could not vote for death. RT 1163. The prosecutor also indicated that in addition to the two African-American women noted by the trial court who remained on the jury, that there was an additional African-American male on the jury.[28] RT 1163.

392. After hearing the prosecutor's explanations, the court stated that no prima facie case had been shown, agreeing with the prosecutor "on her challenges of the four black African-American women, that I did not believe they were persons who would vote for the penalty of death based upon their questionnaires and their answers." RT 1164. The motion was therefore denied. RT 1164.

393. It is without question that a criminal defendant "does have the right to be tried by a jury whose members are selected pursuant to

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[28] A third African American woman ultimately remained on the jury, but she was called to the jury box after the prosecutor had exhausted all of her peremptory challenges. RT 1158-59.

nondiscriminatory criteria." *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986); *see also Powers v. Ohio*, 499 U.S. 400, 404 (1991). The use of peremptory challenges to excuse prospective jurors on the basis of race or gender violates the Equal Protection Clause of the Federal Constitution, *Batson v. Kentucky*, 476 U.S. 79; *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), as well as the right under the California Constitution to a trial by a jury drawn from a representative cross-section of the community. *People v. Wheeler*, 22 Cal.3d 258 (1978).

394. At the time of Petitioner's trial, to establish a prima facie case of systematic exclusion of jurors on the ground of group bias, Petitioner was required to demonstrate a "strong likelihood" that persons were challenged because of their group bias. *See People v. Howard*, 1 Cal.4th 1132, 1153-54 (1992).[29]

395. Group bias may be demonstrated by a showing that the prosecutor has struck most or all of the members of the identified group

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[29] The Ninth Circuit recently held that California state courts have been applying an incorrect legal standard in making its determinations whether a peremptory challenge is a race-based violation of the Equal Protection Clause. *Wade v. Terhune*, 202 F.3d 1190 (9th Cir. 2000). As raised on appeal, to the extent that California courts have created an inconsistency between *Batson* and *Wheeler* by insisting that a defendant show a "strong likelihood" of racial bias to establish a prima facie case rather than show a "reasonable inference" of bias, the higher standard established by California is unconstitutional. *Id.* at 1193.

from the jury panel, has exercised a disproportionate number of challenges against a cognizable group, and/or that those individuals excluded shared no characteristic other than their membership in the group. *People v. Wheeler*, 22 Cal.3d at 280. Once the court determines on the basis of this evidence that a prima facie case has been made, the burden shifts to the other party to show, if he can, that the peremptory challenges were not based on group bias alone. *Id.* at 281.

396. Here, the trial court initially indicated its view that a prima facie case had not been made,[30] but nevertheless invited the prosecutor to give nondiscriminatory reasons for the challenges. RT 1163. Although as argued on appeal, the prosecutor's reasons were not supported by the record, trial counsel unreasonably failed to go beyond merely indicating the number of excusals that were African-American, and therefore unreasonably failed to demonstrate that a prima facie case was made and that the reasons the prosecutor gave were pretextual.

397. At the time of the *Wheeler* motion, trial counsel stated that the

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[30] The trial court's determination that a prima facie case had not been made was apparently based on the fact that the prosecutor did not exercise a peremptory challenge as to every African-American prospective juror. RT 1162-63. It was improper for the trial court to rely on this fact as a "conclusive factor" in finding no prima facie case. *People v. Snow*, 44 Cal.3d 216, 225 (1987).

prosecutor had excused by peremptory challenges four African-American women. RT 1162. It is without question that the excluded jurors were members of a cognizable group;[31] the trial court agreed that four of the prosecutor's twenty challenges were African-American women. RT 1163.

398. However, aside from demonstrating that the prosecutor had excluded four African-American women, defense counsel did not make any additional showing that there was a "strong likelihood that such persons are being challenged because of their group association." *People v. Howard*, 1 Cal.4th at 1153-54.

399. The prosecutor gave explanations for the excusals – that each of the four women could not vote for death -- which trial counsel should have shown were not supported by the record. In fact, three of the four were clearly neutral on the death penalty.[32] Had counsel directed the trial court to the evidence described below, he would have established, in light of the prosecutor's false justifications for exercising peremptory challenges, a prima facie case and that the prosecutor did not have nondiscriminatory

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[31] African-Americans are a cognizable group for purposes of both *Wheeler* and *Batson*, and African-American women are a cognizable group under *Wheeler*. *See People v. Clair*, 2 Cal.4th 629, 652 (1992); *People v. Motton*, 39 Cal.3d 596, 605 (1985).

[32] Petitioner concedes that Gail Alston, one of the four prospective jurors, would arguably meet the prosecutor's purported criteria of being reluctant to impose the death penalty. RT 586-594.

reasons for excluding the African American female jurors.

400. Valette Farwell, on her juror questionnaire, indicated she was "neutral" in her attitude towards the death penalty. CT 1336. If the voters of California were presented with a proposition as to whether or not to have a death penalty in California, she would vote to have a death penalty law. CT 1336. She further indicated that she could vote to impose the death penalty depending on the circumstances, CT 1339, and "agree[d] somewhat" with the proposition that "anyone who intentionally kills another person should always get the death penalty." CT 1341.

401. During voir dire, Ms. Farwell reiterated her neutrality on the question of capital punishment, and that she could vote for death based on the circumstances of the case outlined by the court. RT 539. She agreed there was "nothing in the allegation of the murder of two persons which prevent[ed] [her] from returning a death verdict, depending upon the evidence." RT 540. Ms. Farwell indicated she could choose either death or life without possibility of parole, depending on the evidence, and would "have an honest choice" between the two penalties. RT 541.

402. Someone who would have difficulty voting to impose death, Ms. Farwell was of the belief that a sentence of life without possibility of parole was actually worse than death. CT 1338; RT 543. She agreed,

however, that she would be able to follow the law that the death penalty was a worse penalty. RT 543. She further agreed that she could be the foreman and sign a death verdict. RT 545.

403. Linda Davis, on her questionnaire, stated she was "moderately in favor" of the death penalty. CT 6761. She would vote for a proposition to have a death penalty in California if it were on the ballot. CT 6761. She further stated that she could vote to impose the death penalty depending on the circumstances, CT 6764, and "agree[d] somewhat" with the proposition that "anyone who intentionally kills another person should always get the death penalty." CT 6766.

404. On voir dire, Ms. Davis reiterated that she was moderately in favor of the death penalty. RT 697. Moreover, depending on the circumstances, she was capable of returning a death verdict and would "have an honest choice" between the two penalties. RT 697, 698.

405. Like Ms. Farwell, Ms. Davis believed that life without possibility of parole was a worse sentence than the death penalty. CT 6763. She also agreed, upon being informed that the death penalty was the most severe penalty under the law, that she could follow the instructions. RT 699. Ms. Davis asserted that she would have the strength to look Petitioner in the eye and say "yes, I vote for your death." RT 699-700.

406. Barbara Wiggins, on her questionnaire, stated she was "moderately in favor" of the death penalty. CT 4434. She would vote for a proposition to have a death penalty in California if it were on the ballot. CT 4434. She further indicated that she could vote to impose the death penalty depending on the circumstances. CT 443.

407. On voir dire, Ms. Wiggins reiterated that she was moderately in favor of the death penalty. RT 905. She further stated that, depending on the circumstances, she was capable of returning a death verdict, and would "have an honest choice" between the two penalties. RT 905-907.

408. Ms. Wiggins answered one question on the juror questionnaire that she could not vote for death if life without possibility of parole was an option. CT 4439. However, on voir dire, this was clarified, and Ms. Wiggins made clear that she could vote for either penalty if appropriate. RT 907-908. Ms. Wiggins stated that she could vote to impose death and state in open court that she had reached such a verdict. RT 908-909.

409. Trial counsel unreasonably failed to undertake a review of both the voir dire and juror questionnaires to demonstrate that the prosecutor's stated reason for excusing these jurors was false, and that the trial court's agreement with the validity of these reasons was erroneous.

410. Trial counsel also unreasonably failed to demonstrate that a

comparison of these prospective jurors' responses with the responses of those who sat on the jury, demonstrates that the prosecutor's reasons were pretextual.

411. Christine Rennie indicated on her questionnaire and on voir dire that she was "moderately against" the death penalty. RT 727; CT 5310. She further indicated it would be difficult to vote to impose the death penalty, and was unsure whether she could do so. CT 5313, 5315. She ultimately agreed that she could probably vote to impose death. RT 729-730.

412. Darlene Perez indicated on her questionnaire and on voir dire that she was "neutral" on the death penalty. CT 5635; RT 795-96. She also stated in her questionnaire that she believed that life without possibility of parole was a worse punishment than death before being informed that the law was to the contrary. CT 5637; RT 797.

413. Philip Karantzalis indicated on his questionnaire and on voir dire that he was "neutral" on the death penalty. CT 4985; RT 975. He also believed that life without possibility of parole was a worse penalty than the death penalty. CT 4987.

414. Marland Orgain indicated on his questionnaire and on voir dire that he was "moderately in favor" of the death penalty. CT 5785; RT 926.

He also stated that he believed that life in prison without possibility of parole was a worse punishment than death, but would follow the law that death is the more severe of the two punishments. CT 5787; RT 926-27. Although Orgain indicated on his questionnaire that he would not be able to vote for either penalty, CT 5789, he stated on voir dire that he, in fact, could choose either penalty. RT 929.

415. Carmen Garcia indicated in her questionnaire and on voir dire that she was "moderately in favor" of the death penalty. CT 4185; RT 995. As with the African-American jurors who were challenged by the prosecution, she indicated she could make an honest choice between the two penalties. RT 996-997.

416. Reasonably competent counsel would have argued that there was no meaningful way to distinguish these answers regarding attitudes toward imposing the death penalty by jurors actually seated from the prospective African-American jurors who were struck. Several of the seated jurors expressed similar if not identical views. Yet while the African-American jurors were excused, each of these other individuals was unchallenged and ultimately sat on the jury. A review of the prosecutor's justification for excusing the African-American women, compared to the statements provided on voir dire and in questionnaires by those jurors who

ultimately sat in this case, reveals nothing more than sham excuses belatedly contrived to avoid admitting acts of group discrimination. The disparate treatment of African-American jurors, particularly African-American female jurors, as compared to non-African-Americans was strongly demonstrative of bias.

417. Trial counsel's failure to undertake any meaningful attempt to evaluate the prosecutor's conduct and statements and review the record in an attempt to discern whether the prosecutor's basis for exercising peremptory challenges constituted bona fide reasons or sham excuses was unreasonable and constituted constitutionally ineffective assistance of counsel.

418. Had trial counsel acted reasonably in this regard, he would have demonstrated that the prosecutor's "reasons" failed to establish that the peremptory challenges against three of the four African-American women were exercised for motives other than specific group bias. Due to counsel's failures, Petitioner was tried, convicted, and sentenced to death by a jury selected using racially discriminatory criteria in violation of the Equal Protection Clause of the United States Constitution and the California Constitutional right to a trial by a jury drawn from a representative cross-section of the community.

419. Counsel's deficient performance in this regard was prejudicial and undermines confidence in the outcome of the case.

Trial Counsel's Ineffective Performance Was Based On An Actual Conflict of Interest

420. Petitioner hereby incorporates each and every allegation of Claim B as if fully pled herein.

D. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL

421. Petitioner's confinement and sentence are illegal and unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and California Constitution Art. I, §§ 1, 7, 14, 15, 16, 17, 24 because he was deprived of effective assistance of counsel due to trial counsel's failure to recognize, adequately investigate, consult and prepare appropriate lay witnesses and experts, and present statutorily and constitutionally appropriate and readily available mitigation evidence in the penalty phase of Petitioner's trial. The failure to develop and present such evidence was prejudicial to Petitioner.

422. Trial counsel's acts and omissions as set forth below denied Petitioner the right to effective assistance of counsel; the rights to due process and a fair trial, to present a defense and to present relevant evidence; the right to confrontation and cross-examination of witnesses; the

right to a jury determination of material facts; the right to compulsory process; and the right to a reliable, rational and accurate determination of death eligibility and death-worthiness, free from any constitutionally unacceptable risk that those determinations were the product of bias, prejudice, arbitrariness or caprice.

423. 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.

424. 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.

Analysis of Pretrial Investigation and Penalty Phase Preparation

425. Petitioner was arrested on July 30, 1992. Within a few days, on August 5, 1992, Walter Cannady was appointed to represent Petitioner. On September 15, 1992, Richard Hove was appointed as *Keenan* counsel. Gail Johnson Dec., Exh. 82. At the time of Hove's appointment, Hove was

already scheduled to be tried in federal district court on money-laundering charges beginning on November 30, 1992.[33]

426. Cannady and Hove represented Petitioner from their respective appointments in August and September, 1992 through trial in February - March, 1993.

427. In August, 1992, Cannady retained the services of Brian Olivier, a private investigator.

428. Between the time of Cannady and Hove's appointments, and January, 1993, on the eve of trial, Cannady took only one preliminary step with regard to the developing of mental state evidence either for the guilt phase or the penalty phase. On or about January 5, 1993, approximately five months after his appointment, Cannady finally contacted Dr. Stephen Pittel, a psychologist, to interview and evaluate Petitioner.

429. According to Dr. Pittel's billing records, he met only once with Cannady and/or Hove, and only spoke to Cannady or Hove by telephone for a total of approximately one hour.[34]

430. Cannady did not request funds for Dr. Pittel from the court

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[33] For the details of Hove's trial, see Claim B. Petitioner incorporates each and every allegation contained in Claim B as if pled herein.

[34] Dr. Pittel also spent approximately one hour talking by telephone with Olivier.

until February 8, 1993.

431. Dr. Pittel was given no records pertaining to Petitioner or Petitioner's family, by trial counsel or counsel's agents. The only documents Dr. Pittel reviewed were reports that appeared to have been given to counsel in discovery. Pittel Dec., Exh. 100.

432. On February 15, 1993, after eight days of jury selection had already been conducted, Dr. Pittel interviewed Petitioner. Dr. Pittel immediately wrote a letter to counsel outlining the results of his interview and requesting follow-up by counsel and/or counsel's investigator of certain areas of investigation that Dr. Pittel believed could provide relevant evidence documenting Petitioner's mental state at the time of the crime and/or for penalty phase mitigation evidence. Dr. Pittel's requests detailed the information that he believed could form the basis for a competent mental health evaluation of Petitioner. His recommendations included the following:

a. With regard to Petitioner's drug abuse history, Dr. Pittel asked that interviews be conducted with friends and relatives to document the history; Dr. Pittel asked to review the records of Dr. William Spivey who had previously treated Petitioner; Dr. Pittel asked to review any pre-sentence reports or other medical records. Dr. Pittel explained the reason

for his request as follows:

> I will need to corroborate the information that Mr. Boyette provided through interviews with friends and family members who he has indicated are aware of his use of drugs and his behavior when he is intoxicated. I will also need to meet with Dr. Spivey, and review the records of his psychiatric treatment of Mr. Boyette. I would also like to review pre-sentence reports and jail medical and psychiatric records that may include documentation of Mr. Boyette's drug abuse history.

Exh. 262.

b. With regard to Petitioner's psychosocial history, Dr. Pittel's interviews of Petitioner indicated to him that Petitioner's "father's death from cancer when he was 12 years old was a significant factor in his psychological development. [Petitioner's] use of drugs, involvement in criminal activities and decline in school performance all appear to have begun shortly after his father's death." Exh. 262. Dr. Pittel informed counsel of what he believed would be necessary to document his preliminary findings:

> I will need to review school records and investigative reports, and possibly conduct interviews with teachers, counselors, family members and peers who may be able to provide additional information in this regard. I would also like to review investigative reports, and to conduct interviews, if necessary, regarding Mr. Boyette's mother's heroin addiction, and his

> grandmother's role in his psychological development.

Exh. 262.

433. Reasonably competent counsel maintains responsibility for directing the investigation for both guilt and penalty phase. Here, trial counsel failed to do so even when their own expert requested information he believed could be the basis of compelling mitigation. Both Cannady and Hove simply read what few reports were given to them by the investigator and the discovery provided by the prosecution. Neither Cannady nor Hove instructed their investigator Olivier to obtain any of the information requested by Dr. Pittel.

434. With regard to his participation in this case, Dr. Pittel has stated:

> My first involvement in Mr. Boyette's case occurred on January 5, 1993. At that time I was consulted by telephone by Walter Cannady regarding the capital trial of Maurice Boyette. Mr. Cannady asked me to interview Mr. Boyette with regard to his capital case. I was not informed that the case was on the verge of going to trial. Had I known this, I probably would have refused to participate in the case, because in my experience it is not desirable to attempt to determine if there are mental health aspects to a case with so little time remaining prior to trial.

Pittel Dec., Exh. 100.

435. Dr. Pittel has confirmed that he was never provided with the records or investigative reports he requested:

> At no time was I provided with any records pertaining to Mr. Boyette such as school records, medical records, or defense investigative reports of interviews with witnesses, family members, neighbors, or teachers. I did not receive Dr. William Spivey's records regarding Mr. Boyette, nor did I receive any reports that had been made pursuant to Penal Code sections 4011.6 and 5150.

Pittel Dec., Exh. 100.

436. Dr. Pittel has also confirmed that his contact with Petitioner's counsel was perfunctory. "Before my interview with Mr. Boyette on February 15, 1993, I had a number of relatively brief phone conversations with Bryan Olivier, who I understood to be Mr. Cannady's investigator in this case, and Mr. Cannady. To the best of my recollection these phone calls, simply involved making arrangements for me to interview Mr. Boyette at the county jail." Pittel Dec., Exh. 100.

437. On February 15, 1993, Pittel interviewed Petitioner for less than 2.75 hours. Regarding this interview, Pittel has stated, "This was the only interview I conducted with Mr. Boyette. At all times, Mr. Boyette was forthcoming and cooperative. During our interview, Mr. Boyette related to me valuable information concerning his life history which I believed could

have formed the basis for testimony to be presented on his behalf at either the guilt and/or penalty phases of his trial." Pittel Dec., Exh. 100.

438. Based on this interview, as stated above, Pittel then wrote to Cannady on February 17, 1993. Regarding this letter Pittel has stated:

> I explained to Mr. Cannady that I would need to review pre-sentence reports, jail medical and psychiatric records, school records and investigative reports, and possibly conduct interviews with teachers, counselors, family members and peers of Mr. Boyette. These requests are the usual methods by which persons in my profession prepare an evaluation of potential issues related to an individual's mental health and social history.

Pittel Dec., Exh. 100.

439. Cannady did follow-up on Dr. Pittel's letter. On February 18, 1993, Cannady filed a request with the court pursuant to Penal Code section 987.9, authorization for an additional 40 hours of time for Dr. Pittel. Cannady stated that this authorization was necessary for Dr. Pittel to "review pertinent documents, conduct interviews and meet with the defense team and prepare for testimony with respect to the relatives that are involved in here." Exh. 261.

440. On February 19, 1993, Dr. Pittel met for over three hours with Mr. Cannady, Mr. Hove and Mr. Olivier.

> I believe we met for lunch. During our meeting

> I told them that I needed to be provided with underlying documentary records regarding my initial questions about Mr. Boyette's drug history, his traumatic relationship with his mother, the effect of Mr. Boyette's father's death on his development, the effect of alleged rape of Mr. Boyette's mother on him, and other issues relevant to the guilt and penalty phases. At no time during the meeting was I given the impression that I would not continue to be involved with Mr. Boyette's case. . . Although I did have a subsequent brief telephone conversation with Mr. Olivier, I was never informed that I would not be continuing my involvement in Mr. Boyette's case.

Pittel Dec., Exh. 100.

441. Although Dr. Pittel was never told by trial counsel that his services would no longer be needed in Petitioner's case, Cannady has now stated:

> "[I] had originally contacted Stephen Pittel, but I decided to go with [Dr. Fred] Rosenthal instead because Pittel continued to want to keep investigating the case even though I felt we had done enough. Pittel wanted me to keep getting records long after it was necessary and I wanted him to assess Mr. Boyette as he was at the time of trial. I also did not believe that Pittel would be able to testify regarding the alcohol and drug issues in the case."

Cannady Dec., Exh. 59.

442. At the time Dr. Pittel requested "records" he had been provided

with *none*.[35] Nor had he been provided with a single investigative report, family interview, or any other document related to potential mitigating evidence. Pittel had had only *one* interview with Petitioner, *one* meeting with counsel, and had been retained for only a brief time.

443. As stated, Cannady and Hove never discussed their decision with Dr. Pittel. It is apparent, however, based on counsel's subsequent statements, that Cannady and Hove concluded that not only was Dr. Pittel requesting "records," but that Dr. Pittel would be unwilling to testify regarding issues for which he had no corroboration such as drug and/or alcohol addiction. Dr. Pittel has stated that:

> Although the issue never arose, I would not, however, have been willing to reach conclusions or testify regarding Mr. Boyette's history of drug and alcohol abuse unless I had been provided with some corroborating information. In my opinion, it is professionally unsound to reach conclusions or testify regarding such issues based only on the history provided by the client because the patient is not always the best source of information about his or her own mental health and such reliance potentially leaves the mental health professional open to impeachment on cross-examination. While I fully expected that such corroboration was available, and in fact present counsel has

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[35] As far as Petitioner is able to determine, trial counsel made no effort to obtain even the school records for Petitioner's attendance in the Berkeley School District.

> now provided it to me, at the time of my meeting with Mr. Cannady, Mr. Hove and Mr. Olivier, no such corroboration had been provided.

Pittel Dec., Exh.100.[36]

444. Obtaining even the readily available corroboration, however, would require time, and time was not something that Cannady or Hove were willing to ask the court for. *See* Claim B. By the time Dr. Pittel interviewed Petitioner on February 15, 1993, the penalty phase was scheduled to begin in approximately one month.

445. On February 22, 1993, three days after the long meeting with Dr. Pittel, Cannady suddenly informed the court that he had changed his entire penalty phase plan. Rather than employing Dr. Pittel to compile a social history and then retaining a psychiatrist after Pittel completed his work, the plan Cannady had originally proposed to the court, Cannady now informed the court that he intended to "cut back" on the hours he had previously requested for Dr. Pittel only four days before, and, instead,

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[36] Dr. Pittel has further stated that "[b]ased on information given to me by Mr. Boyette's present counsel, I believe that the issues that I originally wanted to pursue in Mr. Boyette's case would have provided the basis for as rich a case in mitigation as I have ever seen. Moreover, this evidence would also have provided a basis for a guilt phase defense." Pittel Dec., Exh. 100.

requested "limited hours and funding" for another expert, Dr. Fred Rosenthal. Cannady informed the court that Rosenthal's tasks "will encompass review of the basic reports, not the full reports *due to the time limits and time consuming factor*, and an interview with the Defendant and a report to the defense counsel." Exh. 262; emphasis added.

446. Thus, based on Cannady's stated intentions, Dr. Rosenthal was not going to be asked to review even the minimal information given to Dr. Pittel.

447. Cannady further wrote that he had recently become aware of a psychiatric report rendered pursuant to Welfare and Institutions Code section 5150 and he now intended to use the testimony of the doctor who authored the report, Dr. William Spivey, who had treated Petitioner as an adolescent, and Dr. Rosenthal to "interpret" the report. Exh. 260.

448. It was not until February 22, 1993, that Dr. Fred Rosenthal was actually consulted and asked by trial counsel to interview Petitioner. By the time Dr. Rosenthal first met with Petitioner, Petitioner had already been convicted of murder and the special circumstance had been found to be true. CT 918-27. Dr. Rosenthal met with Petitioner on March 12 and March 18, 1993 for a total of four and a half to five hours. Rosenthal Dec., Exh. 105; RT 1897.

449. Dr. Rosenthal spent a scant one hour reviewing materials and/or preparing for his testimony. Rosenthal Dec., Exh. 105; Rosenthal Billing Records, Exh.260. The only materials he reviewed were the reports associated with the 5150 and the 4011.6 referrals. He did not review any other records, did not interview a single witness, nor was he provided with a single report of an interview with any witness other than what was contained in the 5150 and 4011.6 reports which had been written almost two years previously. He never met with trial counsel subsequent to his meetings with Petitioner. Rosenthal Dec., Exh. 105. And it is apparent from his billing that there was no consultation with trial counsel prior to his testimony.

450. Dr. Rosenthal does not have an independent recollection of his conversation with Mr. Cannady, but admits that several things are clear from his records and the timing of his interviews with Petitioner. First, Dr. Rosenthal was never asked to interview Petitioner regarding either his mental state or any other matters relating to the crimes in question. Second, Dr. Rosenthal believes that Cannady asked him to testify in this case as a "favor," given that he would be doing so on such short notice. Rosenthal Dec., Exh. 105. Dr. Rosenthal has stated:

> The documents that Mr. Cannady asked me to review consisted of a report made pursuant to

> Welfare & Institutions Code section 5150 (dated March 20, 1991) and a report made pursuant to section 4011.6 (dated April 1, 1991). At no time was I provided with any records pertaining to Mr. Boyette's background such as school records, medical records, or defense investigative reports of interviews with witnesses, family members, neighbors, or teachers. Nor did I receive Dr. William Spivey's records regarding his treatment of either Mr. Boyette or his treatment for depression of Mr. Boyette's grandmother, Irma Surrell.

Rosenthal Dec., Exh. 105.[37]

451. Dr. Rosenthal was never provided with Dr. Pittel's letter to counsel suggesting investigative avenues to pursue for potential mitigating evidence. Dr. Rosenthal states:

> Present counsel has provided me with a letter that psychologist Stephen Pittel wrote to Mr. Cannady on February 16, 1993, shortly before I was brought into this case. This is the first time I have seen that letter. When I consulted with Mr. Cannady about Mr. Boyette's case in February and March of 1993, Mr. Cannady did not tell me that he had previously consulted with Dr. Pittel about Mr. Boyette's case. I was

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[37] Dr. Rosenthal never received any of the information contained in the declarations of Mei-Ling Pastor, Diane Talsky, or Marva Smith. Thus, Dr. Rosenthal was not aware of the actual circumstances surrounding the incident leading to the 5150 referral as they are described in the declarations. However, had Dr. Rosenthal or trial counsel reviewed the report they would have been aware of the falsity of the prosecutor's allegation that Petitioner threatened people in Judge DeLucchi's courtroom.

> also unaware of the recommendations for further investigation of possible mitigation issues that Dr. Pittel provided to Mr. Cannady in his letter.

Rosenthal Dec., Exh. 105.

452. Trial counsel's investigator, Brian Olivier, did little or no investigation of potential penalty phase issues. Of all the possible family mitigation witnesses Olivier could have interviewed, he only interviewed Marcia Surrell, Petitioner's seriously drug-addicted mother, and Alvon Surrell, Petitioner's uncle.[38] With regard to any other potential mitigating witnesses, Olivier contacted Dr. William Spivey[39], a psychologist who had

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[38] Olivier may have spoken briefly to Celeste Surrell, Charmaine Surrell and Eugene Surrell in September, 1992. There is no indication that he interviewed them in any depth nor is there any indication that he spoke with them after September, 1992, which was some six months prior to their testimony at the penalty phase. Exh. 260.

[39] Although trial counsel was clearly aware of Dr. Spivey as early as September 1992, no effort was made to prepare him to testify. On March 19, 1993, a letter from Cannady was sent to Alameda County Auditor's Office stating, "The bill to William L. Spivey who is a psychologist who testified in the penalty portion . . . he was not authorized and *was subpoenaed at the last minute due to the fact he had seen Mr. Boyette.*" The fact that Spivey had seen Petitioner some years prior to trial had been known to counsel for at least six months. The total bill for Spivey's services was $187.50. Exh. 260.

Given that trial counsel was aware of Dr. Spivey's potential testimony as early as September 1992, the subpoening of this witness at the last possible moment combined with trial counsel's statements to the court confirm that the mitigation testimony presented was literally thrown together at the very last possible minute.

formerly treated Petitioner, and met with the two testifying witnesses, George Barrett and Ernest Posey.

453. The penalty phase investigation conducted in this case was at best preliminary, superficial, and omitted a series of basic investigative steps.

454. Defense counsel waited "until long after the very last minute" to begin preparation of the penalty phase defense. Critical tasks were being performed, expert assessments were being made and opinions were being formulated long after they could adequately be integrated into a meaningful and effective penalty case. Haney Dec., Exh. 71.

455. Many crucial tasks were never performed at all. Many extremely obvious, eminently feasible, and critically important investigative leads were never pursued. Haney Dec., Exh. 71.

456. In most capital penalty trials, expert mental health testimony of some sort is central to an effective case in mitigation. This is especially true in a case such as this one, where serious substance abuse related issues were present, where many members of the defendants family suffered from emotional and psychological problems and disorders, and where the defendant's medical and psychiatric records indicated that there was a history of long-term psychotherapeutic contact. Haney Dec., Exh. 71.

457. However, the most important reason mental health experts must be brought into capital cases early in the process of preparation is to insure that they have adequate time to develop and render the opinions that are typically elicited in capital penalty trials. Unlike other kinds of forensic settings, a capital penalty trial typically requires mental health experts to formulate opinions and be prepared to testify about a much broader range of issues extending over a much longer period of time—often an entire social history, including social historical information and data gleaned from the lives of other significant persons in the defendant's life. Haney Dec., Exh. 71.

458. In addition, because of the typically expanded scope of mental health testimony, such experts must be provided with adequate amounts of time with which to review and incorporate the social historical data and other information for which they are—or should be—responsible for analyzing and presenting to the jury. At the very least, mental health experts must be provided with documentation upon which to premise their opinions and test the tentative hypotheses they are in the process of developing about the broad range of issues presented in the case. This, too, can only be done well in advance of trial and under circumstances that afford experts with time to complete the range of tasks before them. Haney

Dec., Exh. 71.

459. Trial counsel were in possession of information that placed them on notice that powerful mitigating evidence existed in a vast array of categories.

460. Trial counsel failed to follow-up on any of the information in their possession.

461. Had trial counsel conducted a reasonable investigation, they would have discovered the extensive mitigating evidence that was readily available, including the history of extreme instability and violence in the immediate family, the extraordinary pattern of parental and familial neglect, the poverty Petitioner endured, his depression and isolation, the social ostracism, the exposure to familial and community violence, his neuropsychological deficits, and the adult psychological, emotional, and behavioral consequences of his history. This is exactly the kind of relevant mitigating evidence that a jury must consider in order to render an individualized assessment of the appropriate penalty.

462. Reasonably competent counsel would have directed or conducted the investigation needed to develop such evidence, employed appropriate experts, and presented the evidence to the jury in the penalty phase. As is demonstrated below, there is a reasonable probability that had

such an investigation been conducted and presentation been made, the outcome of Petitioner's penalty trial would have been different.

Penalty Phase Trial Presentation

463. Trial counsel Cannady has stated that: "[t]he way Dick Hove and I usually divide capital cases, is that I would do the guilt phase with his assistance, but I would keep him more 'in reserve' for the penalty phase. This way, if I lost the guilt phase, there would be someone who had more credibility with the jury to try the penalty phase. I believe that is what we had agreed to in Mr. Boyette's case." Cannady Dec., Exh. 59.

464. In contrast, however, the penalty phase presentation was done primarily by Cannady. While Hove did cross-examine three of the nine victim's impact witnesses presented by the prosecution and conducted the direct examination of two defense witnesses presented at the penalty phase, Cannady cross-examined two victim impact witnesses and presented the direct examination of the remaining seven defense witnesses.[40]

465. The penalty presentation of either counsel failed to demonstrate the compelling case in mitigation that was readily available. The defense portion of a capital penalty trial must provide jurors with clear and

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[40] Counsel chose not to cross-examine some of the victim impact witnesses.

consistent mitigating themes that are supported by credible testimony. Where possible, the penalty trial should also mitigate or place in context whatever aggravation the jury has already heard. Haney Dec., Exh. 71.

466. Although the defense does not need to present a single theory of mitigation, the various mitigating themes should not be mutually inconsistent or blatantly contradictory of one another. Haney Dec., Exh. 71.

Opening Statement

467. Cannady gave an extremely brief opening statement -- approximately one and one-half pages of transcript -- that did nothing to explain to the jury either what evidence the defense would present or what would constitute mitigation in a capital case.

468. An opening statement would have been particularly important in this case to explain to the jury how a determination of penalty would be made. Because trial counsel was aware that, except for a stipulation to two prior convictions for possession for sale of cocaine, the only evidence in aggravation would be the highly emotional testimony of numerous victim impact witnesses, he should have attempted to prepare the jury for what they were about to hear and thus lessen the impact of this evidence for the jurors. Counsel could have placed the emotional testimony in its appropriate context in terms of penalty determination. Instead, counsel

squandered the opportunity to mitigate this testimony and also failed to begin the process of humanizing his client before the jury heard the evidence in aggravation. By giving an opening statement, he should have set the stage for what the jury was about to hear and given the jurors a context more favorable to the defense in which to assess the evidence.

469. This failure left the prosecutor free to set the tone of the penalty phase.

470. In contrast, the prosecutor succinctly and powerfully conveyed her message to the jury. At the very outset of Petitioner's penalty trial, the prosecutor placed defense counsel, and the jury, on notice that she intended to raise the specter of future dangerousness and heighten whatever fears the jury might have had that Petitioner could and would commit a heinous murder in the future. Only a few minutes into her opening statement in the penalty trial, she told the jury:

> And what I want you to think about when I present this evidence, is do you want this to happen to another family?
>
> It is the People's position that the circumstances that presented to you, the cold, calculated manner in which Mr. Boyette executed two people shows you that there is a strong likelihood that he would kill again. And you have to ask yourselves, do you want to put more families through that?

RT 1844.

471. Thus, trial counsel knew from opening argument that future dangerousness would be the main focus of the prosecutor's case for the death penalty.

Prosecution Case in Aggravation

472. The prosecution's penalty phase case-in-chief consisted of a series of victim impact witnesses (including the father, brother, and grandmother of victim Annette Devallier, and the brother-in-law, daughter, and four sisters of victim Gary Carter) who gave highly emotional and inflammatory testimony regarding the loss they had suffered. RT 1846-1887.[41]

Defense Mitigation Testimony

473. The fact that penalty phase presentation was pulled together at the last possible moment was reflected in the evidence presented.

474. The defense case in mitigation consists of approximately 30 pages of transcript. In this brief time, nine witnesses, including three mental health experts were presented. Even a cursory review of the time devoted to each witness presented shows the shallow nature of the witness's

[41] The jury was also informed that Petitioner had been convicted of two separate felony drug priors which he admitted to. RT 1887-1888.

testimony.[42]

475. Defense counsel chose to follow the emotional testimony of the victims' family members by beginning his case-in-chief with an expert witness, Dr. Fred Rosenthal. Dr. Rosenthal's direct examination--excluding the portion that dealt with his qualifications -- consumed less than five full pages of trial transcript. RT 1892-1896.

476. Dr. Rosenthal's direct testimony failed to inform the jury of the amount of time he had spent with Petitioner, what, if any documents he had reviewed, or even the purpose for which he interviewed the Petitioner.

477. Counsel's first substantive question to Dr. Rosenthal about Petitioner was whether he had reached "any diagnosis with respect to him?" Dr. Rosenthal replied that, "as I discussed with you, I don't think he really has a clear diagnosis of a mental disorder." The jury learned instead that Dr. Rosenthal believed that Petitioner had "some traits which lead -- which may lead to a diagnosis at some time in the future." RT 1892. As would later become apparent, this opened the door for some very difficult exchanges with the prosecutor during cross examination, and even elicited some

[42] The 3 mental health witnesses were presented in a total of 11 ½ pages of which 4 pages were devoted to the witnesses's credentials. Five family witnesses were presented in less than 15 pages of testimony.

disparaging remarks about Dr. Rosenthal from the bench.[43] It raises questions about why defense counsel would have chosen to ask Dr. Rosenthal, as his first substantive question, about a diagnosis he knew, or should have known, Dr. Rosenthal did not have. Haney Dec., Exh. 71.

478. Then, with no contextualizing testimony whatsoever, the jury also quickly learned that, in Dr. Rosenthal's opinion, Petitioner had engaged in "drug and some alcohol abuse." RT. 1892. There was no sympathetic discussion of why Petitioner might have become addicted to drugs (for example, in terms of the number of drug addicts living in the household in which he grew up), no sympathetic discussion of the nature of addiction and the way in which it robs its victims of the capacity to resist the demand for the drug itself, or the failure of the mental health and criminal justice systems to provide Petitioner with drug-related treatment (despite the recommendation that he receive it). Haney Dec., Exh. 71.

479. To be sure, Dr. Rosenthal also told the jury that Petitioner was a "quite immature" and also a "dependent person." "I would lean more toward a dependent personality disorder, if a diagnosis were to be given". RT 1893. Counsel then elicited that a dependent personality -- which Dr. Rosenthal "leaned" toward using to describe Petitioner -- as someone who

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[43] "The doctor hasn't really said anything at all." RT 1918.

had a difficult time making independent decisions, was very easily influenced, attached to people quickly, and tried to get guidance from other people. *Id.* But there was really no explanation of why or how Petitioner could have developed these traits. Haney Dec., Exh. 71.

480. This was a perfect opportunity for defense counsel to develop the actual reasons for Petitioner's dependency — the history of chronic abandonment, psychologically unavailable caregiving to which he was subjected, the extreme levels of instability and unpredictability in the environment around him, and the traumatic consequences of his "war zone" upbringing. Counsel never pursued any of these avenues. All the primary mental health expert witness in the defense mitigation case could offer the jury to explain Petitioner's life was this: "[H]e has quite a disturbed childhood..."[44] RT 1896. There was no further or more detailed explanation. Haney Dec., Exh. 71.

481. Instead of providing an explanation rooted in Petitioner's destructive upbringing, and the accumulation of the many damaging risk factors to which he was exposed, Dr. Rosenthal volunteered an embellished

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[44] When pressed on cross examination, Dr. Rosenthal admitted that he knew little or nothing about the facts of the crime - at least had read no reports or testimony pertaining to it. "The only reports I've seen . . . was the emergency room record" from two years previous. RT 1903. Later he said: "I haven't seen any reports, except those two that we've been discussing," referring apparently to the 5150 and 4011.6 reports. RT 1909.

description saying that dependent people are:

> [P]eople who look desperately for guidance from the world outside, from other people... [S]ometimes people with this problem will pick anyone, almost anyone, anyone who seems to be independent or seems to have strength. They will attach themselves to those people and follow them. Unfortunately you see some of these cult situations where people follow a leader that has a lot of power and seems to be very aggressive, dependent people will attach themselves to those kind of people and have—have difficulty judging how destructive something may be, that they're told to do and they will go ahead and follow someone.

RT 1895.

482. Given the prosecutor's clearly expressed intention to vigorously pursue the issue of future dangerousness, this was predictably problematic and truly inadvisable. It created the image of Petitioner as a person who was so desperately seeking guidance from "any" strong person in his environment that, once he had found such a person, he would follow them anywhere and do anything they directed him to. It provided an inaccurate and distorted picture of Petitioner, one that was insufficiently nuanced, and lacked any real feel for Petitioner's actual social history -- a social history in which he was repeatedly described as a "loner," one who for most of his life had refused to follow the violent lead of many "strong" but destructive potential role models in his immediate environment, and

who had never become involved in the neighborhood gangs that surrounded him in the places he grew up. Haney Dec., Exh. 71.

483. On cross-examination, the prosecutor turned predictably and almost immediately to the issue she had earlier indicated she intended to focus on: "You're saying he can be easily influenced by peer pressure? ...And he's the type of individual that might be influenced by a gang, for example?" RT 1897. By the time the cross examination had been completed, the prosecutor had managed to imply through Dr. Rosenthal that Petitioner would very likely become a member of the violent Black Guerilla Family gang in prison, and was a remorseless, anti-social sociopath who was finding it "easier to kill." RT 1916. In large part because counsel had provided Dr. Rosenthal with so little background information about Petitioner and had given him such a short amount of time in which to prepare for his testimony, Dr. Rosenthal was hard pressed to rebut effectively or respond to these wildly misleading characterizations. Haney Dec., Exh. 71.

484. In the continuation of the defense mitigation case-in-chief, the inept and disastrous presentation of Dr. Rosenthal was rivaled by the way the next witness, Dr. William Spivey, was presented. Defense counsel's direct examination of Dr. Spivey, whose records indicated he had seen

Petitioner in some 70 counseling sessions that began at a time when he was just 11 years old and continued throughout the next several, crucial adolescent years, consumed approximately *two pages* of trial transcript.[45]

485. The few questions that defense counsel chose to ask elicited relatively superficial answers -- Petitioner was brought to see him because "he was not doing extremely well in school," and there were "some issues of his adjustment at home." RT 1922. Based on the questions defense counsel posed, Dr. Spivey's testimony left the jury with the impression that Petitioner was just a "kid groping to grow up," RT 1923, who had done drawings for Dr. Spivey that were "very immature for his age at that particular time." RT 1924. Cannady failed to elicit any significant mitigating testimony from Dr. Spivey about the range of potentially very damaging and destructive risk factors to which Petitioner had been exposed.

486. In cross examination the prosecutor elicited a whole series of very misleading statements from Dr. Spivey that were designed to convey to the jury that Petitioner had experienced, in essence, a relatively normal if not idyllic childhood. Thus, the following characterizations were admitted into evidence without any contradiction: that his grandmother seemed "very concerned about him," that "he had love in his family," that Petitioner

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[45] For Dr. Spivey's entire direct examination , excluding voir dire, see RT 1922-1924.

seemed to be "more or less" alright when their therapeutic relationship ended and he did not have "any major problems," and that Petitioner and his grandmother "got along well." RT 1926-1927. Technically, these statements were not outright falsehoods. But they represented no more than partial truths. They were just a tiny part of the life Petitioner had lived, and hardly a very important part. Taken out of context, as they were here, they presented the jury with an entirely inaccurate view of Petitioner's life and the range of problems from which he had suffered. Haney Dec., Exh. 71.

487. What Dr. Spivey was never asked by defense counsel to do was to place Petitioner's behavior in context. During cross examination, Dr. Spivey volunteered that Petitioner "would become frustrated at times, because so many things didn't go his way often" and he would "act out" or "pout" or "misbehave in some way" because of that frustration. RT 1927. Absent a context for this behavior -- and that was how the jury was left to interpret it -- this description conveyed an impression of Petitioner as willfully prone to acting out and easily frustrated. The accurate description of Petitioner's life -- as one in which he had good reason to be frustrated because there were so many disappointments, so much neglect, and so little genuine caring—was a description his capital jury never got. Haney Dec., Exh. 71.

488. Defense counsel then called psychologist George Barrett to the stand, the third expert witness in a row. Mr. Barrett was the county mental health worker who evaluated Petitioner at the court's request pursuant to Penal Code section 4011.6 to follow-up on Petitioner's threatened suicide attempt. Excluding the preliminary qualifying questions, counsel's direct examination of Mr. Barrett consumed just over two pages of trial transcript. RT 1931-1933. His extremely brief questioning elicited the opinion that, at the time of this evaluation, approximately two years earlier, Petitioner thought "in the style of a 12-year old," "was quite immature for his age," and would not be seen "as a leader." RT 1933. There were no follow up or clarifying questions to explain to the jury the most critical ways in which the thinking of a 12 year old differs from that of an adult, what Petitioner did or said or how he acted that led Mr. Barrett to the conclusion that he was immature, and why he was of the opinion that Petitioner was not likely to be perceived as a leader.

489. Cannady failed to elicit mitigating information reflected in Mr Barrett's report including that at the time of the report Petitioner's grandmother had recently suffered a stroke and was incapacitated and that Petitioner was "growing up in and around a destabilizing drug environment." Exh. 14.

490. On cross examination the prosecutor elicited opinions from Mr. Barrett -- who had spent approximately two hours with Petitioner two years earlier -- suggesting: (1) that Petitioner had been "in the fast life," RT 1934; (2) that Petitioner did not finish school because he would always "find a way to disrupt and cause trouble" in the classroom, RT 1935; and (3) that Petitioner had developed a pattern of behaving "certainly... at home" and "probably... at school" in which he would "step over the line a little bit" and then "step again and step again, step again." RT 1936.

491. This series of characterizations on Mr. Barrett's part is remarkable because there appears to be little or no actual factual basis for any of it. Petitioner, who had applied for public assistance not long after Mr. Barrett had seen him, and was described in the welfare agency contact form as having been homeless for most of the preceding year, could hardly be accurately described as "living the fast life." In addition, nowhere in his school records does it indicate that he did not finish school because he was constantly disruptive in the classroom. In fact, a number of school officials recalled him fondly and with some degree of sympathy, as a sweet if isolated and timid young boy. Finally, he was not described by any of his family members as someone who was constantly "stepping over the line." Of all the members of Surrell household where he lived (one inhabited by

drug dealers and abusers, violently predisposed men, and women engaged in hustling and prostitution), Petitioner was probably the one member of the family most respectful of whatever lines and boundaries were being drawn, such as they were. Haney Dec., Exh. 71.

492. When asked on redirect examination to provide an example of "how [his] mother was reacting toward him," Mr. Barrett talked about Petitioner's disappointment over the fact that his mother had promised him Easter clothes that she "didn't get . . ." for him. RT 1938. There was no mention of Petitioner's disappointment at the lifetime of abandonment he had experienced at his mother's hands, the fact that for many years the only way he could spend any time with her was to track her down in hospitals where she was recovering from drug-related medical problems, or that he was left in the house with her when she was going through painful drug withdrawals. Thus, the jury was left without any meaningful, accurate context in which to place Petitioner's behavior and begin genuinely to understand him. Barrett Dec., Exh. 55; Haney Dec., Exh. 71.

493. The remainder of the defense mitigation case consisted of lay witnesses, most of whom were family members testifying about their contact with Petitioner. None of these witnesses were interviewed by counsel or prepared to testify in any way. Tamika Harris Dec., Exh. 76;

Posey Dec., Exh. 101; Celeste Surrell Dec., Exh. 113; Eugene Surrell Dec., Exh. 114; Marlon Surrell Dec., Exh. 115. All of the direct examinations of these witnesses were shockingly brief, they developed few if any consistent themes, and developed none of them in adequate detail or in a particularly credible way. With virtually every witness who testified, defense counsel failed to elicit more than a tiny amount of the useful information the witness actually possessed. Haney Dec., Exh. 71.

494. In fact, even in the extremely brief direct examinations he conducted, counsel often elicited information that was harmful to the mitigation case and buttressed an obvious approach that the prosecution had immediately begun to neutralize the true story of horrible upbringing -- suggesting that Petitioner had a relatively normal if not idyllic earlier life. Haney Dec., Exh. 71.

495. In her cross-examination of Petitioner's family witnesses, the prosecutor was able to quickly shift the focus of questioning to whether or not Petitioner was "loved." This line of questioning diverted attention from the real issues in the mitigation case -- the profoundly dysfunctional life that Petitioner had been exposed to, the psychologically unavailable caregiving and other forms of neglect to which he had been subjected, the destructive role models that permeated his childhood and adolescent years, and the

"war zone"-like conditions that prevailed in the communities in which he grew up. Whether or not, in someone's opinion, Petitioner was "loved," his capital sentencing jury had a right to know how badly he was treated (sometimes by the very same people who professed to love him). Haney Dec., Exh. 71.

496. In many instances, defense counsel actually initiated the misleading line of questioning that resulted in a gross minimalization of Petitioner's mistreatment. Thus, for example, he asked the first of the lay witnesses, Tamika Harris, if her father "kind of adopt[ed] Maurice," a characterization that the prosecutor was able to quickly turn into acting "like a father figure to him." RT 1951. Of course, Robert Harris was no father figure to Petitioner and had hardly served as one to his own daughter, Tamika. When Petitioner was seven years old, Harris was arrested for using a gun to break a man's jaw and, when the man tried to run away, shooting him in the legs; when Petitioner was 11, Harris was arrested for being physically abusive toward his wife and threatening to kill or disfigure her if she left him; at the same time he was described in the related court proceedings as "decompensating" and referred for a mental health evaluation; in later years he was arrested on numerous occasions for possession of narcotics for sale. In fact, when Petitioner was trying to pull

his life together on the streets of Oakland and Berkeley in 1991, this particular "father figure" was of little help to him because he was incarcerated in the California Department of Corrections on a drug conviction. Defense counsel never explained any of this relevant and readily available context to the jury that sentenced Petitioner to death. Haney Dec., Exh. 71.

497. The fact was that Petitioner had no father figure in his life, and no one could remember Petitioner's actual father functioning as one to him for a single day in his childhood. When the prosecutor had concluded her examination of Tamika, the jury had heard that she herself "loved" Petitioner "very much," along with their grandmother and great grandmother, Tamika's own mother and stepfather, and her aunt, not to mention her father who had been described by defense counsel as "adopting" him. RT 1952. Indeed, he was said to have come from, as the prosecutor phrased it, "a loving family or environment." *Id.*

498. From the next family member to testify, Petitioner's grandmother, Irma Surrell, defense counsel elicited the opinion that she had "raise[d] him like he was [her] own son," and "encourage[d] him with school," RT 1957, that she "tried to help Petitioner throughout his life," RT 1958, and that she was even able to "get Maurice in Boy Scouts." RT 1960.

There was no mention of the chaos and disorganization in the homes over which Irma presided, no discussion of her having been so overwhelmed by the problems she was confronting that she sought counseling for depression and was prescribed psychotropic medications and authorized for disability, no mention of the fact that virtually every one of her own children suffered from serious drug addictions and had been arrested numerous times, often for violent crimes. Not surprisingly, the prosecutor immediately developed and emphasized the themes on which she had previously focused: that Mrs. Surrell loved Petitioner "very much" and "all his life," RT 1961, and that she did "everything [she] could to help Maurice when he was growing up." RT 1961. Haney Dec., Exh. 71.

499. Similarly, Petitioner's aunt, Charmaine Adams (Surrell) told the jury nothing about the neglect from which Petitioner had suffered, nothing about the drug use and criminal activity that was rampant in the Surrell household when he was growing up there, and nothing about the abusive men, including Grandfather Eugene, who not only failed to function as "father figures" but provided violent role models whom Petitioner, fortunately, had been largely successful in *not* emulating. Instead, the jury heard from Charmaine that she was "involved in his life," so much that, "[w]henever he needed me, I was there." RT 1970. His own mother's

heroin addiction — the same addiction that led her to inject drugs into the stump of her amputated leg and attempt to prostitute herself despite her disability, was described simply as a "drug problem." RT 1971. Cannady failed to ask a single follow up question of Charmaine about the true nature of this "drug problem." Haney Dec., Exh. 71.

500. The next witness, Petitioner's grandfather, Eugene Surrell, answered the same way -- Marcia's problem was merely a "drug addiction," RT 1973, a terse characterization that defense counsel let stand, without explanation or providing any of the painful, clarifying details. Remarkably, the jury then learned through defense counsel's own questioning that Eugene was "active in trying to help with Maurice in raising him," that he "took him to school all the time," "played with him a lot at home," "kept him... a lot," RT 1974, had "tried to help him out with his life" and had done so virtually "all through life," RT 1976, that Petitioner called Eugene asking for his advice "all the time," RT 1981, and that there were times when Eugene "was involved with [Maurice] on an every day basis" to help him avoid trouble in his life. RT. 1982.

501. Because Hove's law firm had represented Eugene Surrell on some of his past criminal charges and Hove had appeared in court with Eugene Surrell numerous time, there can be no question that he knew about

his unsavory past. Yet defense counsel chose to present Eugene as a loving and wise grandfather, and even allowed him to tell the jury a story about intervening on Petitioner's behalf with his "good friend" Officer Randall, who "heads the task force" in Berkeley, wherein he told Randall "to keep an eye on" Petitioner because he was hanging around the wrong people.[46] RT 1983.

502. There was no mitigating purpose defense counsel pursued with this line of questioning. If counsel hoped to somehow indirectly suggest to the jury that family members who cared deeply about Petitioner would be hurt by his execution, he failed to pursue even that limited goal in an effective manner. Virtually all of the questions that family members were asked focused on the past - had they loved him, had they tried their best to help him, and so on. No questions were asked about how the witnesses felt about Petitioner now, whether they would make any effort to maintain contact with him in the future, and how they would feel if he were to be executed. This limited and poorly pursued goal was certainly not worth the cost of the consistently misleading and distorted rendition of Petitioner's life through which it was attempted. Haney Dec., Exh. 71.

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[46] *See* Claim B.

Prosecutor's Closing Argument

503. The prosecutor's closing argument in Petitioner's penalty trial focused extensively on "future dangerousness," as her opening argument had indicated. Because defense counsel did not address this issue directly through lay or expert testimony, the prosecutor was able grossly to distort Petitioner's background and character almost at will. She was allowed to offer her own psychiatric diagnoses -- "he was labeled... a sociopath," RT 1996, "[t]he perfect personality who could kill again," RT 2002, this "is a sociopath who's going to kill again," RT 2003, and "he's a sociopath, he doesn't feel" RT 2010, without qualifying as an expert witness or having these unsupported views subjected to cross examination.

504. Similarly, the argument about future dangerousness -- a prediction that, because of its inherent unreliability, is permitted by law only under very limited circumstances[47] even as the subject of expert testimony, had no evidentiary basis, and was offered essentially without qualification:[48]

> [H]e doesn't feel any of those things that you're going through or feeling. And he's going to do it again. And that next victim is the intangible that you can't see. It is not sitting here. That's

[47] *See* Claim A.

[48] For example, the prosecutor continued to refer to "the fights in prison" (e.g., RT 2005), despite the fact that no evidence had been presented concerning any fights and, in any event, Petitioner had never been "in prison."

> what I represent. And those families are what you can't see. But I want you to be logical, and use the evidence and use the facts. And you evaluate that.
>
> And that's what I'm talking about right here, the likelihood he will kill again.
> It gets easier and easier.
>
> That's not going to be any different in prison...

RT 2016.

> That is your bottom line issue. Someone is going to die. The bottom line issue: Is it a sociopath, remorseless liar or is it his next victim? That's what you have to decide. That's the value you have to place on life.

RT 2017.

505. Because trial counsel had failed to contextualize any of Petitioner's behavior, explain the psychological roots of the desperation he was experiencing in the year or two preceding the crimes for which he was convicted, present expert psychological testimony disproving this diagnosis, and because family members or other potential witnesses had not testified about the extraordinary pressures that Petitioner had withstood as a child growing up in a neglectful and crime-ridden home and neighborhood, the prosecutor's inaccurate characterizations appeared plausible.

506. Indeed, in the absence of an alternative explanation for Petitioner's behavior — one that trial counsel simply did not provide —

many jurors no doubt felt that they had no choice but to accept the prosecutor's characterizations. Trial counsel gave them no reason to question or reject them. Haney Dec., Exh. 71.

507. The issue of future dangerousness on which the prosecutor placed so much emphasis was one that could have been straightforwardly rebutted. Petitioner had no record of convictions for violent felony offenses, either as a juvenile or adult. He had no juvenile record at all. Moreover, as the prosecutor undoubtedly knew, compared to many of the young men who grew up in and around the areas where Petitioner lived, his was a remarkable record of law abidingness, at least until the year or two that preceded the crime itself. The only two felony convictions that were introduced against him in aggravation were clearly drug-related, and Petitioner's involvement in the drug culture in which his whole family was immersed would have been relatively simple to place in context. Haney Dec., Exh. 71.

508. In comparison to other capital defendants, Petitioner's potential for future institutional violence could only be judged low. Haney Dec., Exh. 71. Yet, because counsel did not address any of these issues, the prosecutor was able to argue:

> Think of prison life, can you imagine the stress of prison?

> You have no idea. And the gangs, and the pressures....
>
> Well, think what he's going to be exposed to in prison. Think of how easy that will be to kill...

RT 2018.

> If you give him life, you give him a license to kill. You don't give him a lifetime of remorse. He has none. You give him a license to kill.

RT 2020.

509. In fact, no one is given a "license to kill" in the California prison system to which Petitioner would be sent. The factually unsupportable speculation by the prosecutor concerning Petitioner's future dangerousness contained another set of implicit assertions that were simply untrue, and untrue in a way that *anyone* experienced in and knowledgeable about the California Department of Corrections could have explained as such. Like virtually every state prison system in the country, the California Department of Corrections operated in 1992 (and for a century before that) with a system of disciplinary punishment that has always included disciplinary segregation, restricted housing, or solitary confinement. In fact, for more than a decade and a half preceding Petitioner's capital trial, the disciplinary segregation units in California were the subject of widely discussed, protracted constitutional litigation over the procedures used to

place inmates in them and the extremely harsh conditions that prevailed there. Haney Dec., Exh. 71.

510. There was no shortage of such places to place Petitioner or any other prisoner who misbehaved, and no lack of will and commitment on the part of the California Department of Corrections to do so in order to maintain the safety and security of their institutions. This was true by the 1990s, when several so-called "supermax" facilities had been opened at the state prisons at Pelican Bay and Corcoran. Haney Dec., Exh. 71.

511. It is hard to imagine a combination of a more inflammatory and more inaccurate line of argument -- a remorseless sociopath, lacking feelings or a conscience, with a license to kill in prison. Competent counsel would have precluded this extraordinarily prejudicial argument by presenting expert testimony that accurately informed the jury about their client's low potential for violence and high potential for positive prison adjustment, and educated them about the nature of the prison environment that he would enter under a sentence of life without parole. The failure to do this in the mitigation case-in-chief or in rebuttal to the prosecutor's argument added credibility to statements by the prosecutor that were not only prejudicial and improper but also lacking in foundation and validity.[49]

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[49] *See* Claim A.

Haney Dec., Exh. 71.

512. Finally, because trial counsel had failed to present the jury with an accurate and detailed picture of the nature of Petitioner's childhood and the neglect and trauma that he had suffered, the prosecutor was able to normalize Petitioner's life story and minimize (indeed, trivialize) the significant number of powerful psychological risk factors to which he was exposed. Haney Dec., Exh. 71.

513. Due to trial counsel's failures, the prosecutor was able to trivialize the significance of Petitioner's social history for his jury:

> If you give him a break because he only went through the 9th grade, it's his choice to drop out and he's 19, you better be ready for an onslaught. This is a turnkey society. People come—one out of two families come from divorces. What you heard was not that unusual any more. "Father Knows Best" doesn't exist any more. There's no more "Leave it to Beaver" in our society. And we can't expect that.
>
> Most of you are divorced or from divorced families, according to your questionnaires. You didn't kill anybody.

RT 2008.

514. Of course, the Boyette jury had a right and a need to hear the actual case in mitigation, the one they did not hear, amounted to much more than the trials and tribulations of a divorced family and the failure to meet

the expectations of "Father Knows Best." Haney Dec., Exh. 71.

Defense Argument

515. One of the most glaringly ineffective aspects of the penalty phase presentation was Cannady's closing argument. Given the lack of any significant content in his opening statement, closing argument was Cannady's sole opportunity to address the jury to explain their role in sentencing. Therefore, it was essential that he convey to the jury at least the following information: his theory of why Petitioner should receive a sentence less than death; why death was inappropriate in this case; how the evidence presented to them could legally be considered as mitigation; how the prosecutor's evidence in aggravation could be mitigated and why the prosecutor's argument was incorrect; why they did not have to be concerned that Petitioner would commit violent acts in prison; that sentencing Petitioner to death was each juror's individual responsibility; and that sympathy and mercy were appropriate considerations at this stage of the proceedings. Trial counsel failed in almost all respects in his responsibility to Petitioner.

516. Counsel began with an attempt to rebut the prosecutor's argument concerning the likelihood that Petitioner would kill someone in prison. However, this line of argument was ruled inadmissible because

"there is no evidence" regarding prison conditions.[50]

517. Counsel did begin a discussion about the factors that the jury should consider in determining penalty. He began with "factor (k)" which is the factor that allows the jury to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Penal Code section 190.3(k). However, with regard to factor (k), counsel only mentioned Petitioner's mother's heroin addiction, RT 2039, thus leaving the jury to conclude that there was no other evidence relevant to factor (k).

518. The remaining argument relevant to the additional factors that could be considered was one primarily conveying to the jury that there really was very little mitigating evidence of any significance to consider.

519. Counsel's argument relied instead on his oft repeated hypothesis that Petitioner was a young man, even younger than his chronological age, and a "throw away kid." Unfortunately, the testimony that had been offered had failed to give much support to this argument.

520. Counsel's argument did nothing to refute or rebut the

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[50] While it may be said that trial counsel, albeit belatedly, attempted to confront and refute the prosecutor's argument regarding future dangerousness through argument, once again trial counsel's efforts were much too little and much too late. Instead of asking the court for time to retain expert witnesses and to allow rebuttal testimony, counsel chose to rely solely on argument, which was predictably ruled inadmissible.

prosecutor's themes, particularly of future dangerousness. Counsel failed to counter the prosecutor's unsupported argument that Petitioner would join a gang and be a danger in prison. In fact, counsel continued to argue that Petitioner was a follower without distinguishing why this did not simply support the prosecutor's argument. Indeed, counsel even failed to rebut the prosecutor's version of Petitioner's life as not being so terrible after all. Counsel also failed to explain clearly to the jury why the prosecutor's attempts to inject evidence of other "violent" acts by Petitioner into the case – without proof – could not stand.

521. Since little or no affirmative mitigation evidence, or evidence which could be used by the jury to mitigate the aggravation evidence, had been presented by the defense, Cannady's argument ultimately was merely a plea to the jury to think of Petitioner as a twelve year old and remember that he had not killed before.[51] RT 2044-47.

522. Moreover, since the defense presented at the guilt phase was one of innocence, trial counsel should either have argued lingering doubt or presented evidence to mitigate the crime. Doing neither, particularly since counsel never mentioned the guilt verdict, could only signal to the jury that

[51] Given that the jury had been told by Juror Ary that Petitioner had killed before, see Claim A, his argument would certainly have had little impact.

Petitioner had tried to "pull a fast one" on them in the guilt phase.

523. Trial counsel's closing argument was free of any strategically significant content, lacked a focus and failed to convey why Petitioner should receive a sentence less than death. Petitioner was prejudiced by counsel's performance.

Compelling Mitigation Evidence Could have Been Presented by Reasonably Competent Counsel

Overview

524. There was a wealth of information that trial counsel could have presented to the jury had they conducted a reasonably adequate investigation. By simply interviewing family members, neighbors, and others whom counsel knew about, or should have known about, obtaining relevant family records, and retaining appropriate experts - or supplying those experts who were retained with appropriate information - they could have presented at least the following evidence in mitigation to the penalty phase jury.

525. Petitioner's life was filled with trauma, tragedy and a profound degree of neglect. He grew up under extraordinarily difficult circumstances, living in crime-ridden areas of Oakland and Berkeley, in a household that was characterized by chronic chaos, extreme poverty, rampant drug use and criminality, and extremely high levels of violence and psychological

dysfunction. As one longtime family friend would later aptly summarize: "While Maurice's grandmother and great-grandmother tried to help, they seemed to be totally overwhelmed by money problems and problems with Maurice's mother, uncle, and aunts. Maurice was a sweet, but sad and depressed, boy who grew up in a nightmare situation." Haney Dec., Exh. 71.

526. There are three concepts frequently used by scholars and researchers who study traumatic social histories and the developmental factors that help to explain adult criminal behavior. The terms apply so perfectly to Petitioner's life that they might have been coined simply to explain him. The first is "psychologically unavailable caregiving" – a pattern of parenting that entails unresponsiveness, lack of involvement, and passive rejection in which the needs of the child are chronically overlooked and ignored. Unlike outright abandonment and abject neglect -- and, to be sure, there are certainly many examples of both of these things in Petitioner's childhood -- psychologically unavailable caregiving occurs in an environment in which parents (most commonly, maternal caregivers) are simply overwhelmed by their own problems and the range of seemingly insurmountable day-to-day crises they confront. It is a pattern of dysfunctional parenting that has profound psychological consequences for

the children who are exposed to it. It was a form of maltreatment to which Petitioner was chronically subjected throughout his young life. Haney Dec., Exh. 71.

527. The term "criminal embeddedness" is used by criminologists to refer to the lives of children and adolescents that are rooted in criminal networks, that essentially immerse them in and around illegal activity, and that regularly place them in familial and social relationships that revolve in some way around crime. It is hard to imagine a young life more "criminally embedded" than the one Petitioner lived. The sheer number of criminal acts that were being committed in and around the Surrell household as Petitioner was growing up is staggering, matched only by the number of Surrell family members who were actually arrested, prosecuted, and incarcerated and the amount of illegal behavior that was taking place in the crime-ridden neighborhoods in which Petitioner lived and where his attempts to garner some small of amount of contact with his errant and absent mother took him. Haney Dec., Exh. 71.

528. Finally, the term urban "war zone" was coined by psychologist James Garbarino to convey the sense in which many inner city children in the United States are being raised in communities that expose them to levels of violent trauma comparable to those suffered by the children of war-torn

areas elsewhere in the world. The term accurately captures the feel of the violently traumatic events, experiences, and conditions that have been more elaborately depicted in numerous ethnographic studies of inner city life that have been published over the last several decades. As these studies show, the children who are raised in these urban war zones sometimes adopt the fearsome postures of the aggressive "role models" around them, they sometimes cower in fear and attempt to find safety in timid withdrawal from the environment, and they sometimes range back and forth between these extremes and attempt whatever strategies they can to survive the dangers around them. Petitioner grew up in such an urban war zone. He is, unmistakably, one of its casualties. The extraordinary amount of violence that took place in the Surrell household, in the immediately surrounding neighborhoods, and in the lives of the people who were close to Petitioner was truly "war-like" and goes a long way toward explaining the characteristic patterns of behavior in which Petitioner engaged throughout childhood and adolescence. Haney Dec., Exh. 71.

529. Properly told, stories like these carry tremendous mitigating significance. Capital jurors seek explanations for the lives of the people whose fates they determine. In Petitioner's case, his life history contained numerous explanatory themes, precisely the kind that capital jurors find

meaningful, persuasive, and mitigating in choosing life over death. The testimony through which these themes are conveyed to the jury must be properly prepared and effectively presented. Undertaking these basic but essential steps -- especially in a case like Petitioner's where there was such a substantial amount of powerful mitigation to be presented --is what influences the outcome of a capital penalty trial. Haney Dec., Exh. 71.

530. Moreover, in this case, especially, the evidence upon which such an effective penalty phase presentation could have and should have been premised was readily available. The investigation and preparation of Petitioner's penalty phase was straightforward and relatively uncomplicated. Haney Dec., Exh. 71.

531. In Petitioner's case, the key penalty phase witnesses were readily accessible to trial counsel and his investigator. Most lived within just a few miles of the courthouse where Petitioner's trial took place. Many of the people with the greatest amount of information were living exactly where they had lived during Petitioner's formative years and, even nearly a decade after the trial took place, they appear to be highly cooperative (indeed, eager to help). Moreover, there was a readily accessible documentary record in this case -- formed in part by the extensive medical, psychiatric, and, especially, legal contacts that the Boyette and Surrell

family members had with *local* Oakland and Berkeley agencies and officials. Competent counsel would have made extensive use of these accessible sources for the information they contained, for the clues to subsequent investigation they provided, and for the valuable objective record against which to evaluate the reliability and credibility of potential witnesses they represented. Haney Dec., Exh. 71.

532. Trial counsel failed properly to discharge these basic responsibilities. The penalty phase was ill-considered, poorly presented, and gave evidence of a lack of the most basic preparation. There were many potentially valuable witnesses that trial counsel neglected to find, interview, or present in the *Boyette* penalty trial. In addition, the few witnesses counsel *did* call were questioned in such a way that often: a) failed to surface much of the information they did possess about powerful mitigation themes in Petitioner's life; b) elicited information in needlessly unconvincing or incomplete ways; c) more than occasionally provided unexpectedly damaging information that was unnecessary, unhelpful, and even inaccurate and misleading; and d) provided unnecessary and unfortunate openings for the prosecution to develop and embellish obviously damaging and often inaccurate themes and characterizations that misportrayed Petitioner's background and character. Especially in light of the *substantial* case in

mitigation that was available for defense counsel to obtain and present, there can be no competent, legitimate, or tactical reason for failing to discharge these basic penalty-phase responsibilities. Haney Dec. Exh. 71.

533. Petitioner's life story could have been told through readily available lay and expert witnesses. 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.

Early Childhood History

534. Petitioner was born on December 2, 1972, to Marcia Surrell and Will "Dicky" Boyette. By all accounts, Petitioner was never really "raised" by his natural parents, neither of whom were able to stay away from drugs long enough to function as effective parents for any significant portion of Petitioner's life. Instead, he lived with his maternal grandmother, Irma Surrell. The two households in which they lived as Petitioner was growing up were shared by his maternal great grandmother, Geneva Jacobs, and variously occupied by numerous other relatives including, from time to time, Irma's four children -- Petitioner's mother (Marcia), aunts (Charmaine and Celeste), and uncle (Michael) -- who came and went more or less as they pleased. Petitioner lived under these circumstances during virtually his

entire life until he left to attempt to live on his own in the early 1990s. Haney Dec., Exh. 71.

535. As the oldest and seemingly most stable relative in the family, Geneva Jacobs functioned as its matriarch. Geneva's husband, Clark, died in 1974 and, for virtually Petitioner's entire life, he lived in a house in which Geneva and Irma were nominally in charge. There were literally no consistent, positive male role models of any kind around him. His grandfather, Eugene Surrell, was a notorious womanizer who managed to maintain residences with several different families at once -- indeed, actually maintaining simultaneous marriages for much of his adult life. Perhaps not surprisingly, "[e]ven when he was a teenager, Eugene had a bad reputation as a playboy and a troublemaker." Parker Dec., Exh. 97. As one of the women with whom he fathered children summarized:

> Eugene and I had twin boys together -- Bryant and Brent -- in 1980...Eugene was basically living with me at that time. Eugene and Irma [Petitioner's grandmother] had four children together. Eugene also had two sons with a woman named Michele. Eugene also [had] a few other children by different women... I doubt that Eugene was much help in raising [Petitioner's] family, since he had three families he was trying to support.

Frazier Dec., Exh. 69.

536. In addition to being chronically unfaithful, Eugene was

physically abusive. One longtime friend of the family recalled that: "Eugene was a big drinker and he would physically and mentally abuse [Petitioner's grandmother] Irma. I would see Irma with bruises or cuts from Eugene beating on her. Eugene even beat her when she was pregnant with their kids." Parker Dec., Exh. 97.

537. Geneva Jacobs, who was Eugene's mother-in-law and Petitioner's great-grandmother, reported that Eugene treated Irma "terribly." Geneva Jacobs Dec., Exh. 78. In fact, Geneva had a gun that she kept in her room that she called "Mr. Smith." She recalled that when Eugene "would be mean or rude to Irma or me, I would threaten to go get 'Mr. Smith'... There were many times when I was close to using 'Mr. Smith' on Eugene, since he never did an ounce of good for my or Irma's family." Geneva Jacobs Dec., Exh. 78.

538. The house where Petitioner spent his early years was extraordinarily chaotic, the Oakland neighborhood around 28th Street was notoriously crime-ridden, and Petitioner's immediate and extended families were deeply involved in drugs, crime, prostitution, and domestic abuse. One neighbor said that: "People would hang out in the street and at the Surrell house and there was always partying or something going on. The police were called a lot because of the noise or people gambling on the corner."

Beverly Harris Dec., Exh. 72. As Petitioner's Aunt Monica described it: "The Surrell's house was like the neighborhood hang-out. Marcia's mother, Irma, seemed to let her kids do anything they wanted... My mother didn't like me going over to the Surrells' house because she thought there was too much partying going on." Monica Boyette Dec., Exh. 56.

539. As another Oakland neighbor put it succinctly: "The Surrell kids were always out of control." August Dennis Dec., Exh. 65. Cela Maxwell, the mother of one of Michael Surrell's children, Marlon, was a frequent visitor at the house. She noted that Irma "ran a very loose household and all of her kids took advantage of that." Maxwell Dec., Exh. 88. Indeed:

> It seemed that everyday at the Surrell house someone was getting into trouble or having a fight. It was chaotic. The Surrells' house on East 28th had an upstairs attic where all the younger people hung out and where you could get away with just about anything.

Maxwell Dec., Exh. 88.

540. Yet another neighbor, Eloyce Packer, recalled that "Irma's children had been running wild at least since they were in high school." Packer Dec., Exh. 96. There did not appear to be any rules in the Surrell household, and the children never appeared to be disciplined: "The house always had lots of people running in and out and there was certainly a lot of

partying going on inside." Packer Dec., Exh. 96. Mrs. Packer also recalled that "the police [were] often stopping by the house to break things up," and that "drugs were a big thing for young people and those kids were into it all." Packer Dec., Exh. 96.

541. Petitioner's mother Marcia Surrell, was described by virtually everyone who knew her as especially unruly, out of control, and deeply involved in drugs. Marcia and her sister Celeste, one of the aunts who lived off and on in the house in which Petitioner grew up, were described by a neighborhood friend as "definitely part of the 'fast' crowd," and as "using cocaine and heroin while most everyone else was still only smoking marijuana." Ronald Adams Dec., Exh. 52. A school friend of Marcia's noted that "she quickly became too fast for me. You name it and Marcia would do it, even as a young girl. Marcia started getting into drinking and using drugs when we were just starting high school and, as a result, we stopped being as close of friends." Byrd Dec., Exh. 57.

542. Marcia got pregnant with Petitioner when she was still a senior in high school. She had already developed a serious drug habit, one in which she and Petitioner's father, Dicky, "were speedballing just about everyday..." Celeste Surrell Dec., Exh. 113. Speedballing, as Marcia's sister Celeste explained it, "was when you snorted heroin and cocaine

together. Because heroin is a downer and cocaine is an upper, speedballing is supposed to get you right in between and give you the perfect high. Once Marcia started using heroin and cocaine, she really never stopped." Celeste Surrell Dec., Exh. 113.

543. Another neighbor of the Surrell's who lived just a few houses away and who moved into the area just after Marcia graduated from high school, described her drug use this way:

> Celeste, Marcia [and two other neighborhood girls] were a pretty fast group—they smoked dope, or marijuana, used a lot of other drugs, partied all the time—and I didn't. Besides smoking dope, Marcia and the others mostly snorted 'hop,' or heroin, cocaine, and took mescaline. They would also take little red pills.

August Dennis Dec., Exh. 65.

544. Petitioner's father, Dicky Boyette, had grown up in the Oakland area and become addicted to drugs fairly early in his life as well. The woman with whom he had children, before meeting Petitioner's mother, was murdered in Oakland. His sister, Monica Boyette, believed that the tragic event "pushed my brother deeper into his drug use." Monica Boyette Dec., Exh. 56. Whatever the causes, Dicky Boyette was a serious drug user by the time he met Marcia, and his presence in her life only helped to intensify her drug use and exacerbate her rebelliousness and

instability.

545. Right after Petitioner was born, a friend recalled that Marcia and Dicky "both got very hooked on drugs together and could not take care of Maurice from the beginning." Adams Dec., Exh. 52. There were times when Petitioner was "barely old enough to speak" but was nonetheless left alone in the playground near the house where Marcia and Dicky lived, and other times when Petitioner's parents were "passed out in a drug haze on the couch" while Petitioner, "who was probably no older than three years old, was off by himself in another corner of the house." Adams Dec., Exh. 52. Indeed, it was clear to many people in the neighborhood that "[b]oth Marcia and Dicky were pretty strung out by the time they had Maurice..." Byrd Dec., Exh. 57.

546. Vivian Coit, who had prevented her own daughter from marrying Petitioner's uncle, Michael Surrell, just a year or so before Dicky and Marcia had Petitioner, concurred with this description: "[Grandmother] Irma raised Maurice from the time he was a baby because Marcia was always so drugged out. I don't think Marcia was sober one day in Maurice's life. Maurice's father, Dicky Boyette, was also addicted to drugs." Coit Dec., Exh. 60. Not surprisingly, perhaps, given the level of drug use that characterized it from the start, the relationship between Marcia and Dicky

was tumultuous, and it often entailed physical violence.

547. Dicky's stepbrother, Larry Murphy, acknowledged that Dicky and Marcia had many physical fights, that Marcia was "extremely unstable and [had] a violent temper..." and that, at the time of their break up, things "got pretty ugly." Larry Murphy Dec., Exh. 93. He also admitted that: "Dicky sold drugs, hustled, and, for a while, was Marcia's pimp. I remember Dicky telling me of his plans to go to Sacramento to make some money by selling drugs and pimping Marcia." Larry Murphy Dec., Exh. 93. According to her mental health records, Marcia made a "suicide attempt by overdose in 1973," when Petitioner was less than a year old. Haney Dec., Exh. 71.

548. There is overwhelming evidence that Petitioner was profoundly neglected throughout his childhood and adolescent years. Much of this evidence is based on the observations of numerous family members, neighbors, and friends who consistently recollect the chronic chaos and instability in the Surrell household and the characteristic way in which Petitioner was simply ignored, forgotten about, and overlooked by the adults around him. Rather than functioning as consistent, stable, and moderately attentive caretakers, family members were all struggling with their own psychological, economic, and legal problems; they had little or no

emotional resources left to invest in Petitioner. Haney Dec., Exh. 71.

549. Some evidence of the lack of supervision to which he was exposed also comes from Petitioner's medical records. For example, in December 1974, when Petitioner was 2 years old, he fell out of the bed and struck the frontal portion of his head. He became drowsy and vomited. He was treated at the hospital and released. Haney Dec., Exh. 71

550. When Petitioner was about 4 ½ years old, a Children's Hospital physician recommended that he have his tonsils removed. However, because they were unable locate his parents or "to have appropriate legal guardianship established for consent to surgery" the medical procedure was delayed another five months. About a month later, while still less than 5 years old, Petitioner fell off his skateboard and again hit his head, he also vomited and became drowsy and fell asleep. This time, however, the physician's notes indicated that hospital officials were "unable to reach mother for treatment permission." There were a number of similar entries in Petitioner's medical file confirming the fact that medical officials were often at a loss to know how to obtain the necessary consent to treat Petitioner because the adults who were needed to give their permission could not be found. Haney Dec., Exh. 71.

551. Indeed, by all accounts, Petitioner's mother, Marcia, was often

"strung out," and her whereabouts were typically unknown. Marcia continued to use drugs throughout Petitioner's childhood years and, as he grew older, her addiction intensified. One school friend reported:

> At some point in the late 1970s I bumped into Marcia at a club called the Screaming Eagle in Oakland. Marcia was completely wasted and high. Marcia didn't recognize me at all -- even though we had practically grown up together -- and Marcia offered to sell me some cocaine and heroin. I was shocked, not only because Marcia was so obviously under the influence of a lot of drugs and alcohol, but also because Marcia didn't even recognize me enough to remember that I didn't use drugs.

Byrd Dec., Exh. 57.

552. In November 1979, when Petitioner was six years old, Marcia was seen in a San Leandro Mental Health program to which she had been referred by a therapist from the San Francisco County Jail. The attending physician summarized her complaints:

> [Patient] says that she feels uncomfortable in unfamiliar surroundings, gets no calls or visitors from her family, she has headaches, is tired of being "locked up" (has been in one jail or another for five months). It appears hard for her to focus on specific issues, she speaks about "tripping out" on her family and her leg. Says she's afraid she'll lose her leg but can offer no medical evidence about why this should happen.

Haney Dec., Exh. 71.

553. By this time Marcia's life had deteriorated further, in part as a result of her involvement with a new man—Sonny Hill. Hill was described by neighborhood friends of Marcia's as "a drug addict and a pusher, as well as a thief." Adams Dec., Exh. 52. He had a very bad effect on Marcia's drug addiction --"[h]eroin became like food to Marcia" after she got involved with Sonny -- and he kept her actively involved in prostitution: "Marcia was selling her body while she was with Sonny. Sonny would physically abuse Marcia and she would sometimes come by the house looking bruised or beat up." Adams Dec., Exh. 52. Petitioner's Aunt Monica described Sonny as a "really bad guy who was even more into using and dealing drugs than Dicky was." Monica Boyette Dec., Exh. 56.

554. August Dennis, a contemporary of Marcia's, remembered that Marcia changed dramatically after she broke up with Dicky: "I didn't see much of Marcia... mostly because she was so hooked onto hop and was never at the house much. Marcia had become a real mess and even when I saw her, she wasn't the same person anymore." August Dennis Dec., Exh. 65. August's sister, Eva Mae used somewhat different words to describe very much the same thing:

> There is a big difference between calling someone a "drug addict" and saying someone is "real bad." Marcia was real bad. She would steal things from the house so she could get

> money to stay high. The only times Marcia would return home was when she was really sick and needed to be nursed back to health. Once she got a little better, Marcia would disappear, just when people were starting to get used to her being around.

Eva Mae Dennis Dec., Exh. 66.

555. Petitioner was aware of his mother's deteriorating lifestyle and, in a sense, was made painfully aware of her neglect of him:

> Marcia would always make lots of promises to Maurice about spending time with him or giving him money so he could do something... [but] Marcia would almost always let Maurice down...Even when Marcia did show up at home, which wasn't often, she would usually be high on something. Maurice would get real excited about seeing his mother and he would start talking real fast and pulling on her, but Marcia would kind of look past Maurice and not really respond.

Adams Dec., Exh. 52.

556. Vivian Coit observed a different aspect to his mother's neglect: "Marcia was always Maurice's weakest point. He would miss his mother terribly and was always worried about her, even when he was real little. Marcia might come by for a few days, but then she would up and leave again and Maurice would not see her for weeks at time." Coit Dec., Exh. 60. On the other hand, there were times when Grandmother Irma would lock Marcia in the house in an attempt to get her off drugs, and "Marcia

would go through withdrawal right there in the house, with Maurice practically sitting next to her." Eva Mae Dennis Dec., Exh. 66.

557. Petitioner had no other responsible adults in his life to whom he could regularly turn for guidance, or for support in times of emotional distress. Petitioner's father, Dicky Boyette, was no more of a parent to him than his mother. Both parents engaged in abject neglect that bordered on outright abandonment: "Maurice would see Dicky walk by the house and he would cry when his father wouldn't come by. Sometime Maurice didn't cry but would get very quiet and sort of stare off by himself." Adams Dec., Exh. 52. When Petitioner finally would get brief opportunities to spend time with Dicky, the experience was often rough and abusive:

> Maurice was always real shy and scared of things and wasn't used to being around Dicky. Dicky would say things to Maurice like, "you end up being a fag and I'll kill you," when he didn't like how Maurice was acting. When Dicky came around he would be very tough on Maurice and would call him a sissy, twist his ears, or slap him to try and toughen him up.

Robert Harris Dec., Exh. 75.

558. Petitioner's contact with his mother's next boyfriend, Sonny Hill, provided him with none of the male supervision he needed and plenty of experiences he did not. Indeed, contact with Hill and his lifestyle appears to have been damaging to Petitioner as well as Marcia. As Petitioner's

uncle, Bobby Harris, who was a contemporary of Sonny and Marcia recalled:

> Sonny was a bonafide dope fiend... Everybody in [the house that Sonny and Marcia lived in] used and dealt drugs, from the momma to the kids. Marcia would sometimes bring Maurice to Sonny's house with her. Maurice would sit downstairs in the basement while everyone in the house shot dope. I am sure Maurice saw a lot of drug using and selling in that house... One time, Maurice saw Marcia shoot herself up with heroin and he started crying so hard that he urinated on himself.

Robert Harris Dec., Exh. 75.

559. As Petitioner's aunt, Celeste Surrell, herself a drug addict who was frequently arrested for crimes that included drug sales and prostitution put it, "I don't know what Petitioner understood about what was happening over at Sonny's house, but none of it was good and most of it was illegal." Celeste Surrell Dec., Exh. 113. Yet, as his cousin Tamika observed, Petitioner would take advantage of any chance to go to Sonny's just to spend some time with his mother:

> Maurice would sometimes go with Marcia to Sonny's house... even though our great-grandmother thought it was too dangerous at Sonny's house. I don't think Maurice really cared that it was a drug house, since it was one of the few times Maurice actually got to do something with his mom. For Maurice, going to Sonny's meant spending time with his mom,

> even if it was just to watch television while Marcia and everyone got themselves high.

Tamika Harris Dec., Exh. 76.

560. The level of neglect Petitioner suffered at the hands of his mother and father was just a part of this unhappy story. In addition, Petitioner received "psychologically unavailable caregiving" at every turn inside the Surrell household. To be sure, the wide-ranging social, economic, emotional, and legal problems that plagued the Surrell family helped to account for Petitioner's neglectful upbringing. Nonetheless, it was fairly evident that, for much of Petitioner's young life, "[n]o one paid much attention to him." Adams Dec., Exh. 52. Indeed, one family friend said: "Growing up, Maurice always seemed to be forgotten in that household and he would usually end up being alone, watching television by himself or just standing off to the side. Maurice was always very quiet and it was difficult to get him to talk about things." Byrd Dec., Exh. 57. And: "Maurice was always very eager and happy to join me and my son, since there wasn't anyone in Maurice's family who actively tried to do things with him or who paid attention to him."

561. Although most of the other young children in the extended Surrell family also lacked careful, attentive parenting, they all had at least one parent who, from time to time, took responsibility for them, and to

whom they clearly "belonged." Not so Petitioner, whose mother and father were seemingly the most distant, damaged, and dysfunctional figures in an otherwise very troubled and problematic group of relatives. This was clearly evident to the people who watched Petitioner grow up from outside the Surrell family. As one neighbor put it: "Maurice was a kid on his own...Maurice didn't get the kind of affection and love that I gave my kids and grandkids and that I saw Marlon's mother give Marlon."[52] Beverly Harris Dec., Exh. 72. Because Petitioner had no one to defend him or who regarded him as their primary responsibility, he was hurt by his "outsider" status in the family, and sometimes that status was used to criticize him. Petitioner still remembers the time "Aunt Celeste told me I was a bastard child -- one without any parents -- people said she was drunk when she said it, but I wasn't drunk and I know what she said and it hurt." Haney Dec., Exh. 71.

562. Thus, although it was *generally* true in the Surrell household that "[w]ith so many of the adults in the family coming and going and in and out of trouble, the kids were often left to be by themselves," Adams

[52] Vivian Coit saw it much the same way: Petitioner "didn't have any other place to go besides Irma and it really hurt him. Maurice always wanted to be accepted, but in that house he was mostly ignored. I don't think his father's side of the family had much to do with him, either." Coit Dec., Exh. 60.

Dec., Exh. 52, unlike the other children, this pattern was virtually unbroken in Petitioner's case. And Petitioner himself understood it: "I was the only kid living there who didn't have a parent living there --other kids had parents who came and went -- mine never at all." Haney Dec., Exh. 71.

563. Eldora Robinson, a longtime friend of the Surrell family made a similar observation about the lack of care and affection Petitioner received growing up:

> Maurice was a very lonely child. There always seemed to be so many crises or problems going on in Maurice's family that he was always ignored and left to himself. Growing up, Maurice always seemed to have clothes to wear and food to eat. However, no one ever paid any attention to Maurice or gave him the emotional support that he clearly needed. As much as his grandmother loved him, Maurice always ended up being an afterthought -- or not a thought -- in his own house.

Robinson Dec., Exh.104.

564. Sometimes children who are severely neglected at home manage to compensate by receiving the needed attention from adults or even other children during the time that they are in school. This adaptation or "buffering" experience does not appear to have been available to Petitioner in elementary school, in part because his weight made him the object of some ridicule at the hands of other children and in part because he

was extremely shy and often so depressed that he simply kept to himself: "When kids would make fun of me -- I'd pull away from people, kind of stayed to myself, not get[ting] really close to people because I was afraid they'd make fun of me." Haney Dec., Exh. 71.

565. Eloyce Packer, one of the teacher's aides at Bella Vista Elementary School, recalled that she often tried to speak with Petitioner when he was a student there. He stood out in part because he seemed so alone and lost, even in a school setting where he was surrounded by other children from the same neighborhood. She remembered him this way:

> Maurice was always a heavy boy and he was made fun of quite a bit. Even though he was always getting picked on, Maurice was always very polite and sweet with me. Maurice was very quiet and when I would observe him at school in the yard or lunchroom, he was often alone. Other kids made fun of him and took advantage of him because of his weight and because he was slow and clumsy. Maurice was very sensitive and would cry a lot. I never saw Maurice lash out or get so upset where he fought another student.

Packer Dec., Exh. 96.

566. Vivian Jefferson, the assistant principal at Bella Vista had similar recollections. She recalled Petitioner as a "very quiet, slow moving, chubby little boy," Jefferson Dec., Exh. 79, as someone who was shy and seemed to stay by himself:

> Maurice was a loner who seemed to keep to himself most of the time. Maurice was certainly not outgoing or vocal like many of the other students his age at Bella Vista... I mostly remember Maurice standing alone with a sad look on his face... I do not recall Maurice being sent to my office for discipline... I do not recall meeting Maurice's mother, father, or any adult male from his family.

Jefferson Dec., Exh. 79.

Later Childhood Years

567. The issue of Petitioner's contact with "any adult male from his family," as Mrs. Jefferson put it, was problematic in his early life and it became more critical as he grew older. This issue is one that becomes especially important for children in later childhood, as they begin to approach their crucial adolescent years. Psychologically, later childhood represents a transitional period during which children begin to anticipate and grow into the social roles they will eventually occupy as adults. The presence of viable, positive same-sex role models in one's life are needed to lay the groundwork with which children will build "psychological road maps," so to speak, to those adult identities. In Petitioner's case, of course, it was not that he lacked male role models of any kind. Indeed, by all accounts, men were coming and going on a more or less constant basis at the Surrell home for most of his life. The problem was that virtually all of

these potential role models were confirmed drug addicts, deeply involved in criminal and other nefarious activities, and often openly abusive to their spouses and girlfriends. Many were extremely violent in other ways as well.

568. For example, the man around whom Petitioner probably spent the greatest amount of time as a young boy was his uncle, Michael Surrell. Michael was described by virtually everyone who knew him well as an extremely angry, violent man. Cela Maxwell, the mother of one of Michael's children, reported that he "had a terrible temper and that was part of the reason why we didn't stay together very long. Michael use to beat me..." Maxwell Dec., Exh. 88. Indeed: "I know that some years after he and I split up for good, Michael got into smoking crack and he ended up going to prison for killing someone. In fact, Michael, his father, and I believe his uncle Van, all killed somebody at some point." Maxwell Dec., Exh. 88.

569. Another of Michael's wives, Daphne Yeldell, reported that he threatened to kill her and, indirectly, also to kill her mother. She finally decided to leave Michael because his behavior was "erratic and he had violent tendencies that scared me." Daphne Yeldell Dec., Exh. 127. Another of Michael's wives, Regina Surrell, also reported on some of the "role modeling" that Michael provided for Petitioner: "In the late 1980s,

Michael and I had a fight where he put a shotgun in my face and threatened to kill me. Michael beat me very, very badly -- he was kicking me with his cowboy boots and I could hardly see afterwards -- and I ran back to Ohio and left him for good." Regina Smith Surrell Dec., Exh. 117. Regina was fond of Petitioner and she disagreed with the way Michael treated him:

> Maurice always seemed withdrawn and pretty depressed, which I always found strange for a kid his age. There wasn't really anyone ever paying Maurice much attention and I think he was real lonely. Michael was always very hard on Maurice because Maurice wasn't tough. Michael would say things like, "He cries like a little girl." I would tell Michael not to be so hard on Maurice, but he would say he was just trying to toughen Maurice up."

Regina Surrell Dec., Exh. 117.

570. Michael Surrell was by no means the only man in Petitioner's immediate environment who was openly abusive to his wife or girlfriend(s). Indeed, physical abuse may have been the rule rather than the exception for most of the men Petitioner was around as he was growing up. For example, the relationship between Bobby Harris and Aunt Charmaine Surrell has been described: "From what I could tell, Bobby and Charmaine's relationship was never very stable. Bobby had a real short temper and he would get into a lot of fights. It was pretty obvious that Bobby and Charmaine fought each other all the time and sometimes it could get real

ugly, with both of them throwing punches and clawing at each other." Adams Dec., Exh. 52.

571. In addition to the presence of violent male role models around him, there were other negative influences in Petitioner's life that were extremely difficult for him to avoid or ignore. For example, another one of Petitioner's uncles, Alvon Surrell, was only a few years older than Petitioner and attuned to the neighborhood pressures faced by people Petitioner's age. Alvon described the typical adaptations that were taken by young men in the environments in which Petitioner was raised:

> Growing up in East Oakland was a very scary and difficult experience. By the time Alton and I were teenagers, we were getting involved with gangs, which was a lot like playing cowboys and Indians, except with real guns. There was a lot of violence happening all around and if you were a teenager—especially an African-American male—you were going to get roped in or affected one way or another. As a teenager, I was faced with a lot of adult decisions and I saw a lot of horrible things, including death. I think things were even tougher for someone like Maurice, since he had trouble making even basic decisions and he was real slow to catch on to things.

Alvon Surrell Dec., Exh. 112.

572. Yet, in spite of the violent role models in his immediate environment and the violent subculture that surrounded him growing up,

there is no evidence that Petitioner channeled his frustration and disappointment into outward aggression as a young boy or adolescent. As one longtime Oakland neighbor, Anita Dennis put it: "Maurice was always a very quiet boy who never gave me or my husband any problems. Maurice was always somebody who kept to himself." Anita Dennis Dec., Exh. 64. Ronald Adams, who knew the Surrell family for many years and was married to Petitioner's aunt, Charmaine, recalled: "Maurice would get scared very easily and usually didn't stray far from school and home. Anytime there was an argument or fight on the school playground, which was only one block from the house [in Oakland], Maurice would run home." Adams Dec., Exh. 52.

573. There is no evidence that Petitioner sought to be the kind of predatory figure that so many of the men living in and around the Surrell's extended family had become. For example, as Alvon Surrell put it, "[u]nlike a lot of the guys I knew, Maurice wasn't really involved in the gang stuff as a teenager. Maurice seemed to mature real slowly and he always needed a lot of attention because he couldn't really do things on his own or for himself." Alvon Surrell Dec., Exh. 112.

574. Indeed, rather than predatory aggression of any kind, the record established the opposite pattern. Thus:

> Maurice was always a fat kid. People used to call him "Fat Reecie." Maurice would cry a lot and usually run home to Ms. Jacobs, who Maurice and some of the family always called "Mother." Even though Maurice was a lot bigger than most kids, little kids would pick on him and beat him up. Maurice was not independent or confident enough to go anywhere by himself and would often end up sitting in the house alone. Maurice was so slow that I sometimes felt that he was slightly retarded in some way. With the amount of drugs his parents used, I wouldn't be surprised if he was.

August Dennis Dec., Exh. 65.

575. Eldora Robinson, the mother of one of Petitioner's neighborhood friends also noted the way Petitioner tried to distance himself from the violence around him:

> There was always a lot of fighting going on with both kids and adults in our neighborhood. The police were often coming by to break up a fight or arrest someone. Unlike his peers and so-called role models, Maurice would become very quiet when he got upset. Maurice would also eat a lot when he was lonely or upset, which was quite often.

Robinson Dec., Exh. 104.

576. The nature of the fighting that took place in Petitioner's Oakland neighborhood and the pattern of drug use in which many of his peers were engaged were about to worsen at an especially unfortunate time

for Petitioner. There was a large-scale transition underway in many urban communities in the United States. It would radically transform not only the nature and pattern of drug use but also the very atmosphere and day-to-day social relations in the communities themselves. As one scholar described it:

> The 1980s witnessed the rediscovery of crack cocaine... There were the highs, binges, and crashes that induced addicts to sell their belongings and their bodies in pursuit of more crack; the high addiction liability of the drug that instigated users to commit any manner and variety of crimes to support their habits; the rivalries in crack distribution networks that turned some inner-city communities into urban "dead zone," where homicide rates were so high that police had written them off as anarchic badlands.

Haney Dec., Exh. 71; *See also*, Rivlin Dec., Exh. 103.

577. The crack epidemic also modified patterns of drug distribution in many neighborhoods. For the first time, many younger children were widely and systematically drawn into drug dealing enterprises, and felt direct pressure from local drug dealers. Thus, there was:

> [T]he involvement of many ghetto youths in the crack business, including the "peewees" and "wannabees," those street gang acolytes in grade school and junior high who patrol the streets with walkie-talkies in the vicinity of crack houses, serving in networks of lookouts, spotters, and steerers, and who aspire to be "rollers" (short for "high-rollers) in the drug distribution business...

Haney Dec., Exh. 71.

578. Just before Petitioner entered his teenage years, the crack epidemic came to the Oakland and Berkeley areas. It would transform the nature of the community in which he lived and the one to which he would soon move. As his Aunt Monica described it:

> Like most of my siblings, I had started using drugs in high school. By the early 1980s, crack was the drug of choice in Oakland and I knew so many people who were smoking it. I probably started smoking crack around 1982 or 1983. People's lives were getting really messed up because of crack. Lots of people I know went broke and turned to stealing and hustling in order to continue their habits.

Monica Boyette Dec., Exh. 56.

579. Just as it had elsewhere, the widespread crack use that permeated the African American communities in Oakland in the 1980s seemed to push drug addicts to greater extremes in order to survive. A sense of desperation spread throughout many of these neighborhoods. As one neighbor of the Surrell's observed:

> Crack started taking over Oakland in the early 1980s and things really changed for the worse. Most of the guys who lived in the neighborhood had a fatalistic attitude about the world anyway and got involved with drugs as a result. There weren't many decent jobs available for black guys in Oakland, so dealing and hustling drugs was seen by a lot of people as the only available

> option if they wanted to make any money... Guys were either hooked on the stuff or just trying to make a living.

Jeannette Deran Dec., Exh. 67.

580. Although Petitioner may have been able to distance himself psychologically from the violence and conflict and drug use that surrounded him, he was ultimately unable to escape the chaos, instability, and neglect that characterized his upbringing with the Surrells. Petitioner described life at his grandmother Irma's house as a kind of around-the-clock "Jerry Springer family, with the number of people on drugs, all the conflicts [and] problems." Haney Dec., Exh. 71. And his home life would soon take a significant turn for the worse. Just as Petitioner was about to enter his teenage years, a series of important events were set in motion that would further destabilize the Surrell family and the tenuous lifestyle that Irma Surrell and Geneva Jacobs had been able to maintain. The events would have especially important consequences for Petitioner, who had been completely dependent on Irma and Geneva for any semblance of stability and normality in his life.

581. Irma had purchased a liquor store with money that her mother, Geneva Jacobs, had loaned her. But the business quickly began to fail and lasted only a few years. By most accounts:

> Irma worked very hard at the store, but it didn't last too long because Irma's kids [Maurice's mother, aunts, and uncles] destroyed it. They stole as much money and liquor from the store as they pleased. Her kids either stole from her while they were working or they would go in late at night with a store key.

August Dennis Dec., Exh. 65.[53]

582. The stealing by her own family members obviously undermined Irma's ability to keep the enterprise profitable. But it combined with another unexpected debt to doom Irma's business and result in the loss of the store. Geneva Jacobs recalled that:

> A little while after we bought the store, Eugene got into some trouble after he shot and killed a man. Irma gave Eugene a lot of money to help him hire some lawyers, and we ended up going into debt and having tax problems. We first lost the store and a few years later the house was foreclosed on and we had to move. Irma was real upset about losing the store and the house. Irma was never the same again.

Jacobs Dec., Exh. 78.

583. Even before her liquor store business finally failed, the pressure from mounting economic and family problems (that included the legal costs she helped underwrite for Eugene Surrell's pending murder trial)

[53] Indeed, Beverly Harris recalled the same thing: "Irma's kids would take money straight from the cash register and take alcohol off the shelves just to keep them and their friends happy." Beverly Harris Dec., Exh. 72.

and her children's increasingly severe drug addictions and frequent difficulties with the law had begun to take a toll on Irma's physical and mental health. She sought psychological help from Dr. William Spivey, an Oakland psychologist. Dr. Spivey recalled that Irma "was so depressed that she had no desire to venture out of her house. She had problems sleeping at night and suffered from frequent crying spells." Spivey Dec., Exh. 111.

584. Irma did not immediately improve and several years after beginning treatment, Dr. Spivey recommended her for disability benefits. Spivey also reported that Irma began to miss appointments because she was so seriously depressed. Indeed, he recalled later that she "was often unable to leave home and pursue normal interests. Her affect was affected by thoughts and feelings of helplessness." Spivey Dec., Exh. 111. The source of this deep depression was not difficult for Spivey to discern: "It was clear to me during my treatment of Mrs. Surrell that her children and family life were causing her a great deal of stress and that this stress contributed to her depressed condition." Spivey Dec., Exh. 111.

585. In April 1984, when Petitioner was 11 years old, Irma took him to see the same psychologist who had been treating her.[54] Dr. Spivey

[54] According to Dr. Spivey's records, Petitioner visited him on a fairly consistent, twice a month basis for most of the next four years (a total of 72 visits are reflected in Spivey's billing records). Remarkably, however, Dr. Spivey does not appear to have kept any particularly detailed notes on

recalled the following short summary of Petitioner's presenting problems:

> At the time I first met Maurice he was an overweight boy of about eleven years of age who was always being picked on and beaten up by other children. He seemed to be a child who simply could not do anything right and was depressed by his circumstances. I recall that he was unable to focus on school. Maurice had serious self-esteem issues which he seemed unable to resolve. Maurice never had an opportunity to make life-decisions affecting him. He was always pushed or pulled into situations. He never was able to take control of his life because his home life would end up overwhelming him.

Spivey Dec., Exh. 111.

586. Petitioner's recollections of what he was feeling and why he went to counseling were consistent with Dr. Spivey's perceptions of him. Petitioner said: "I went because I was so unhappy -- I could see my future and it was bad; I'd just get upset about where I was and how I was living in my life -- the life I [was] going to live didn't look too good." Haney Dec., Exh. 71.

587. Spivey was also able to corroborate the effects that Marcia's

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these numerous sessions. Nor does he appear to have written any contemporaneous reports containing his professional assessment of Petitioner, a detailed description of Petitioner's problems, the causes for his psychological distress, or the professional recommendations Spivey might have given Petitioner or the Surrells in order to address his problems.

chronic drug problems had on her son. Spivey reported that Petitioner's "moods and behavior were often predicated on his mother's actions and whereabouts"—as well as the fact that she "constantly made promises to Maurice that she did not keep," and Spivey observed that this resulted in Petitioner being "devastated," no matter how many times it happened. Spivey Dec., Exh. 111.

588. Although Petitioner was receiving counseling for his depression, there was little Dr. Spivey could do to influence or alter the series of events in the Surrell household that were beginning to spiral out of control. Thus, when Irma became even more depressed over the loss of her liquor store, it affected her behavior in other ways: "Irma started drinking a lot, which I think was her way of dealing with her depression. Irma stopped showing her face as much as before and I think she spent a lot of time sitting in her room." August Dennis Dec., Exh. 65. Another neighbor described the consequences this way: "Once Irma lost her store, it was only a matter of time before she lost the house. Things all seemed to get a lot worse once the family realized they were losing their house. No one knew where they were going to live and it created a lot of animosity and turmoil in the family." Eva Mae Dennis Dec., Exh. 66.

Transitions in Early and Late Adolescence

589. The Surrells soon lost their house in Oakland. As Geneva Jacobs noted above, they lost the house on 28th Street a few years after the liquor store business failed. In 1985, when Petitioner was 12 years old, Irma was forced to move him and the rest of the family to a much smaller house on Boise Street in Berkeley. However, in order to stay close to her job at Bella Vista Elementary School in Oakland, Geneva Jacobs stayed behind, living with another family during the week and visiting her daughter and the rest of the Surrells on weekends. Haney Dec., Exh. 71.

590. The new Berkeley neighborhood would prove a much worse place for the Surrell family -- especially Petitioner -- to live. For one thing, the adults staying in the house continued their drug use and, for some, it intensified. They deteriorated even further. As Eva Mae Dennis put it: "When the Surrells moved to Boise Street in Berkeley, things really fell apart. Michael, Marcia, Charmaine and Celeste were all going through their own problems and going their own ways." Eva Mae Dennis Dec., Exh. 66.

591. In addition, of course, the move represented a major transition for Petitioner. He had spent literally his entire life in the same neighborhood in Oakland. Despite the problems to which he was exposed in Oakland, the neighborhood had become a familiar one for him. The school

that he attended in Oakland had been only a block from the Surrell residence and, when he became frightened or intimidated by what was taking place on the streets, Petitioner had been able to quickly seek the relative safety of home. For someone like Petitioner who had such tenuous connections to the people with whom he lived, being uprooted from his familiar neighborhood would prove especially problematic. "[E]ven though there were shootings and things, I knew Oakland and I liked it... [I]n Berkeley I was by myself." Haney Dec., Exh. 71.

592. By the time the Surrell family moved to Berkeley, the crack cocaine epidemic had transformed their new neighborhood as much as it had Oakland. Moreover, in the old 28th Street Oakland neighborhood, many residents knew firsthand about the problems Petitioner confronted at home and they understood the many difficulties he endured growing up there. These neighbors had a certain sympathy for Petitioner and a context into which to place his shyness, his timidity, and some of his other limitations. Petitioner also believed that the older kids around 28th Street had adopted something of a protective stance toward him, doing what they could to make sure that he was not exploited too badly or involved too deeply in any of the serious criminal activities that were taking place on a regular basis in the surrounding neighborhood. Haney Dec., Exh. 71.

593. Petitioner stated that "in Oakland, the older guys kind of treated me like a little brother -- in Berkeley they didn't know me so [they] drew me right into [the] scene." Haney Dec., Exh. 71. In Berkeley, of course, there was no such sympathetic view of his earlier life, no context for his slow, shy demeanor, and no informal protection from a neighborhood where he was virtually a stranger was forthcoming. Indeed, his slowness and vulnerability were more likely to be exploited than anything else. Haney Dec., Exh. 71.

594. Moreover, in May, 1986, shortly after the Surrell family moved to Berkeley, Petitioner's father died. Thirteen year-old Petitioner was still attached to his father, however little he had seen him and however badly he was treated when he did. His cousin Tamika reported that Petitioner "seemed to have a real hard time dealing with" his father's death, which occurred shortly after Petitioner and the rest of the family moved to Berkeley. "I don't think Maurice ever saw much of his dad, but Maurice would always talk about how he hoped his dad would quit using drugs and start spending more time with him." Tamika Harris Dec., Exh. 76. When his father died, Petitioner also lost a fantasy that he had used to sustain him during the worst of times with the Surrells – that somehow his father and his father's family, the Boyettes – would "save" him from the painful life in

which he had become immersed. Haney Dec., Exh. 71.

595. Psychologist Spivey also understood that the death of Petitioner's father had an important emotional impact on him: "I remember that when Maurice's father died when Maurice was about thirteen, Maurice tried to put up a psychological shield and seemed to be fronting off his real feelings," despite the fact (or perhaps because of the fact) that "Maurice never really had a chance to bond with his father." Spivey Dec., Exh. 111.

596. At the same time, the condition of Petitioner's mother, Marcia, continued to deteriorate. It became difficult to distinguish the accumulating effects of her extensive drug abuse from a possible underlying, serious psychological disorder. In November 1987, -- Petitioner was 14 years old -- Marcia was brought involuntarily into a psychiatric services unit. She was described as "confused and combative" and the intake report noted that restraints had to be used to control her and that she was "screaming and threatening." She was uncooperative, had a "vacant stare," and was "mildly depressed and tearful." The initial evaluation concluded that she suffered from "organic mental disorder" and suggested that she was "homicidal." Haney Dec, Exh. 71. In 1988, when Petitioner registered for 8th grade in the Berkeley Unified School District, his mother's occupation was listed as "disable" (sic).

597. Now that he had gotten a little older, however, Petitioner had figured out that one way he could see his mother was to visit her during her frequent visits to the hospital. She was at least required to stay in one place for a while and, for the time she was hospitalized, he at least knew where she was. "[It was] the only time I'd regularly see my mom... they'd say, 'your mom is in the hospital' -- I'd get on the bus and go see her." Haney Dec., Exh. 71. But even when she was hospitalized Marcia continued to use drugs, and this was apparent to Petitioner: "[P]eople would bring her drugs in [the] hospital, -- I could tell as soon as I saw her -- she'd act like my 'home girl' [saying] 'what's up?' rather than being my mother and say, 'this is my son.'" Haney Dec., Exh. 71. Nonetheless, Petitioner was undeterred, and he continued to visit his mother under these conditions.

598. It had been obvious to virtually everyone who knew Petitioner and who knew the Surrell family as Petitioner was growing up that "Ms. Jacobs [his great grandmother] basically raised Maurice since Marcia was no kind of mother and Irma [his grandmother] worked all the time. Celeste, Charmaine, and Michael [his aunts and uncle] were no substitutes as parents, either." August Dennis Dec., Exh. 65. But Geneva Jacobs was now getting very old, she was in poor health herself, and no longer lived with the Surrell family, visiting them only on weekends. Irma was

increasingly beset with serious psychological as well as economic problems of her own. And now Petitioner no longer had the familiar surroundings of his Oakland neighborhood to depend on, or the fantasy that someday his father would finally become the parent he had badly needed him to be. Haney Dec., Exh. 71.

599. Yet, there is still no evidence that Petitioner handled this growing list of personal problems by following the aggressive or violent role models that surrounded him. Reports from his junior high school years are very consistent with the earlier-cited observations from elementary school. For example, Marylin Davis was the administrative assistant at Willard Junior High School when Petitioner attended 8th grade there in 1988. She described Petitioner as "overweight and shy," and noted that he "kept a pretty low profile and was not too socially adept. Maurice always seemed pretty lethargic and a little slow to react." Davis Dec., Exh. 63. As administrative assistant at Willard, it was Ms. Davis's responsibility to call families of students who were behavioral problems or causing disruptions at the school. As she recalled: "I have no recollection of Maurice ever getting into serious trouble or getting suspended for a fight. I believe all of Maurice's detentions were for minor things, like not having his school books or for chewing gum." Davis Dec., Exh. 63. Ms. Davis had

Petitioner work in her office during some school periods because she felt "Maurice was the type of kid [who] needed more attention, since he wasn't very capable of being independent." Davis Dec., Exh. 63.

600. Petitioner was having a difficult time adjusting socially in school and also performing in his classes. While at Willard in 1988, Petitioner's performance on the Comprehensive Test of Basic Skills placed him at roughly the 4th grade level, even though he was currently enrolled in the 9th grade. Specifically, Petitioner scored in the 3rd percentile for the overall battery,[55] and the only portion of the test in which he scored above the 7th percentile was in mathematics (where his scores were consistently above average). He enrolled in the Emilio Zapata Street Academy in late 1989 and, although his teachers reported Petitioner was "making progress" while enrolled, at the end of April 1990, the Academy wrote to Petitioner's family informing them that he had not yet passed his Graduation Proficiency Tests required for graduation. Haney Dec., Exh. 71.

601. In the early 1990s, it was clear that Petitioner was beginning to experience a range of increasingly serious problems that he was simply not

[55] This test is nationally normed with a sample of students from across the country. A score at the 50th percentile is the national average score. A score at the 3rd percentile means that approximately 97 percent of the children in the country at his grade level scored better.

equipped to handle on his own. His Aunt Monica noted:

> At the time, it seemed to me that Maurice needed a lot of help. He always had on old clothes and always seemed to need [a] haircut. It didn't seem like he was taking care of himself all... Maurice was a teenager by then, although he was still very immature and slow for his age. I always believed that Marcia and Dicky's heavy drug use when Marcia was pregnant and when Maurice was a baby was a major reason why Maurice had so many problems understanding things.

Monica Boyette Dec., Exh. 56.

602. The chaos and instability that had characterized Petitioner's life was about to get much worse, along with the psychological unavailability of the adults on whom he depended. In August, 1990, some five years after she had moved her family to Berkeley, Irma Surrell suffered a major stroke. Petitioner was at home. His Uncle Michael (who was calling from jail) was on the telephone when it occurred. Petitioner called the ambulance for Irma.

603. Irma was hospitalized for three months. She initially suffered severe damage to her cognitive abilities that only gradually and partially returned. As her doctor put it: "She worked very hard in her speech therapy... and after a number of months she was able to formulate complete sentences, although she still struggled." Sherwood Dec., Exh. 109. In

addition, she was now wheelchair-bound:

> After an acute episode like the one Mrs. Surrell suffered, limited recovery in motor skills functioning is expected. She was completely wheelchair bound following her stroke. She could briefly stand and support her weight, although she basically lost complete functioning ability in the right side of her body.

Sherwood Dec., Exh. 109.

604. According to her physician and virtually everyone else who knew her at the time, Irma became extremely depressed and was again prescribed a variety of anti-depressant medications. In the past, Irma had resisted taking these drugs because, as the doctor reported, they "made Mrs. Surrell feel lethargic and slowed her down too much." Sherwood Dec., Exh. 109. But eventually she felt she had no choice. She took the anti-depressant drugs despite their side effects. Haney Dec., Exh. 71.

605. This was a period in Petitioner's life when, as a still immature 17 year-old boy, he was struggling to find himself. Irma's stroke was an especially difficult blow for him to overcome. As one of his friends reported: "The few times I saw Maurice after his grandmother's stroke, he told me how difficult it was for him now that both his grandmother and mother were sick." Eva Mae Dennis Dec., Exh. 66. A neighborhood friend of the family, Beverly Harris saw essentially the same thing: "Maurice was

a teenager when Irma had her stroke, but he was still very immature and he still depended on his grandmother to take care of him. There wasn't really anyone else in Maurice's life he could depend on. Maurice's mother was still heavily addicted to drugs and was having serious health problems herself." Beverly Harris Dec., Exh. 72. Indeed, as she put it: "after Irma's stroke, the Surrell family, which had always been so unstable, fell completely apart." Beverly Harris Dec., Exh. 72.

606. Petitioner's cousin, Tamika, described the impact of Irma's medical condition in similar terms: "My grandmother's stroke was very upsetting and painful for everyone in our family. While my mother and aunts and uncle were off getting into trouble and ruining everybody's lives, my grandmother was always the one person trying to keep it together." Tamika Harris Dec., Exh. 76. Of course, now that was no longer possible, and no one would suffer more from her absence than Petitioner, who was becoming increasingly lost, at just the time in his life when he needed more, rather than less, guidance. Petitioner's mother was battling increasingly serious addiction-related problems of her own, and Irma's other children (Petitioner's aunts and uncle) were in no position to provide any more help now than they had in the past. Petitioner said: "[T]here was nobody around to talk to—nobody sat down to talk with you about what to do or how to do

it. [They were] all worried about their own lives." Haney Dec., Exh. 71.

607. Eldora Robinson, the mother of one of Petitioner's childhood friends, was fond of Petitioner, and she had watched him grow up under the extraordinarily difficult circumstances he faced as a young boy in the Surrell household. She summarized the problems he faced in Berkeley after his grandmother's stroke:

> Maurice was left with absolutely nothing after his grandmother's stroke. Even though Maurice was a teenager at the time, he was still like a little boy inside. Maurice's great-grandmother, Ms. Jacobs, was not doing well with her own health either. [His mother] Marcia was continuing to go downhill and her own health was getting worse. Maurice's aunt Celeste was still in and out of the house depending on what was happening in her life. Maurice's other aunt, Charmaine, had become addicted to smoking crack and she was really out there, drugged out and basically on the streets. I believe that Michael, Maurice's uncle, was incarcerated at the time that Irma had her stroke.

Robinson Dec., Exh. 104.

608. Petitioner tried to stabilize himself by attending school: "I pretty much never did well in school -- I got forced to go, even though I did bad and [it] got to the point where I didn't like it." Haney Dec., Exh. 71. In light of the fact that he had never done particularly well in school and lacked basic educational skills, he would have needed a great deal of

guidance and discipline in his life to catch up after so many years of marginality in the classroom. It was guidance and discipline that he could not and would not get. Not surprisingly, he began to falter in school as well. Soon Petitioner would finally succumb to the lure of the streets -- a lure that, unlike virtually everyone else in his family, he had previously managed to resist.

609. Because both his grandmother Irma Surrell and great grandmother Geneva Jacobs were sick, Petitioner decided it was time for him to move out on his own and try to somehow fashion an independent adult life for himself.[56] He was little prepared for it. The streets into which he moved had become extremely dangerous. One of his friends at the time, and into whose home Petitioner moved for a while, reported:

> There was a lot of gun play and violence happening just down the street from where we lived. During the 1990s, around the same time when Maurice was staying with us, there was something happening just about every other day. People were getting kidnapped, pistol whipped, and shot at all the time. Even if you weren't directly involved in what was happening, there was a good chance that you could get caught in something.... Everyone who lived in my neighborhood and who was around my age at

[56] Petitioner also appears to have been pressured to move out of the Berkeley residence. "Maurice was spending less time in Berkeley - Celeste had actually kicked him out of the house - and was basically homeless." Tamika Harris Dec., Exh.76.

> that time knew that getting shot was a real possibility. At a certain point, when I was still a teenager, I bought a bullet-proof vest that I wore when I went out at night. I know of a lot of kids who did the same thing.

Jason Harris Dec., Exh. 74.

610. Petitioner lived for a while with his friends, Jason and Brian Harris. Their mother, Imelda Harris, remembered Petitioner fondly: "It was not an ideal time to have another person living with us. However, I quickly came to enjoy having Maurice live with us. In fact, he was a better house guest than most of my own children." Imelda Harris Dec., Exh. 73. Petitioner had few personal possessions when he moved in with the Harris family and did not ask for much. Haney Dec., Exh. 71.

611. According to Mrs. Harris, Petitioner was always respectful and helpful to her:

> When Maurice first moved in, he hardly ever came out from the back room unless one of my kids brought him out. Maurice was so timid and quiet that he seemed almost nervous to be around me... Maurice always offered to wash the dishes or clean up around the house. When I would have to leave the house to run an errand or pick up someone from school, I always felt very comfortable about leaving my young children Tiffany and Kyle home alone with Maurice. Maurice was good around little kids. If I asked Maurice to do something, I trusted that he would do it. I probably trusted Maurice to do something more than I did [my own sons] Jason

or Brian.

Imelda Harris Dec., Exh. 73.

612. But the same pattern of isolation, of having essentially no one to really care for or look after him that had characterized Petitioner's earlier life, continued in these later years. This was certainly apparent to Imelda Harris during the few months he lived with her. She recalled thinking "it was strange that Maurice's family never called or stopped by to see Maurice." Imelda Harris Dec., Exh. 73. Even though Petitioner was in his 18th year, Mrs. Harris wondered whether there was anyone in his life who could or would provide him with the love and guidance he appeared to still very much need:

> Maurice was still of school age and seemed much younger than his age, but it didn't seem like he really had a family at all. I was worried about Maurice, since I knew that young people in his situation didn't have very many choices or options beside the streets. I remember asking Maurice whether there was any place for homeless kids where he could get some help, but there didn't seem to be any place that he knew of where he could go to.

Imelda Harris Dec., Exh. 73.

613. Mrs. Harris also saw some of the same shyness and lack of sophistication that others had commented on during earlier times in Petitioner's life:

> Maurice was the kind of person who I felt could and would be taken advantage of. Maurice was always very heavy and large. People called him "Chunka" because of his size. He didn't seem very quick or sophisticated in being out on the streets and I think [my sons] Jason and Brian got bored with him pretty quickly.

Imelda Harris Dec., Exh. 73.

614. Imelda's son Jason reached essentially the same conclusions about Petitioner. He remembered that Petitioner's own relatives "used to pick on Maurice, calling him fat or scared." Jason Harris Dec., Exh. 74. Jason was friends with Petitioner during this period, and he knew that Petitioner "wasn't very tough or smart." Jason Harris Dec., Exh. 74. Indeed: "Maurice was the kind of kid who was easily taken advantage of by other people. Brian and I had been running the streets since we were little and it was pretty obvious to us that Maurice did not have any street education. Brian and I always assumed that Maurice was younger than us." Jason Harris Dec., Exh. 74.

615. Shortly after he left the Oakland Street Academy in December, 1990, where he was enrolled in the 9th grade, Petitioner got into trouble with the law. On January 24, 1991, Petitioner was arrested for possession of rock cocaine that he admitted he had intended to sell. It led to his first criminal conviction, at age 18.

616. The Probation Report filed in conjunction with that case noted that Petitioner had "no juvenile criminal history," and included Petitioner's explanation that "he had the drug for the purpose of selling it to provide for necessities, in that at the time he was homeless." The section on "Family Background" described Petitioner's mother this way: "The defendant's mother has a long-term drug problem and has led an unstable life. Several years ago, she suffered some type of paralysis as a result of drug use and is still disabled. The defendant knows little as to her circumstances." The Report acknowledged Petitioner's candor in speaking with the probation officer and the officer's feeling that his demeanor "betrays a certain lack of criminal sophistication." The Report recommended probation rather than incarceration: "It is felt that he would be amenable to probation, and, in fact, could profit from counseling in the area of drug use as well as his employment and educational plans." Exh 16.

617. There is no indication in the records that Petitioner ever got the counseling that the Probation Report recommended, and he does not recall having received it. However, he did know that he would need a plan for surviving in the Oakland and Berkeley areas -- the only places he had ever lived -- or some way of getting out of the area. Still relatively unsophisticated, Petitioner certainly perceived the changes in the street life

around him and the dangerousness of the world he had entered. In terms that capture the "war zone" like feel to the adult environment he was trying to survive, Petitioner stated that certainly by 1990-91:

> People were not just carrying guns but also began to use them—lots of people getting shot—you'd go visit them in [the] hospital, go to funerals. [There were] lots of neighborhoods that didn't get along—there were fights everyday, people getting jumped everyday [and] nobody went to school or left school by themselves.

Haney Dec., Exh. 71.

618. After he got out of Santa Rita Jail for his January 1991 offense, Petitioner again tried the only "straight" environment he really knew: "I went back to school after I got out of Santa Rita. I never fit in but I knew I would need school to do anything on my own. I knew it was so serious on the streets that I would have to get out of here to survive. I wanted out but I didn't know how to do it." Haney Dec., Exh. 71. But, again, he was unable to sustain himself in school, and unable to stay away from the drug culture that had enveloped virtually his entire family. And, again, there was no one in his family in a position to help. His probation officer at the time remembers that:

> Maurice had a lot of expectation on him that he was not capable of meeting because he was very immature. He seemed like a 12, 13, or 14 year

> old. He was incredibly needy for attention and needy for direction. Even more than just direction, he needed someone to take his hand and walk him through things. There was nobody in his family or in his life to do that for him.

Pastor Dec., Exh. 98.

619. Petitioner sensed his life was spinning out of control but he had no real idea how to stabilize it. On March 20, 1991, in an act of desperation, he called his probation officer, crying hysterically, and said, "I can't take it anymore... please help, I need help... please arrest me," and then threatened to kill himself. Petitioner recalls: "[W]hen I called asking for help, that's really all it was—I was hurting and I needed people to help me." Haney Dec., Exh. 71. And he was very clear about why he was hurting:

> I wanted to kill myself -- I didn't want to be here, didn't want to know about what my life was going to be -- nobody wants to live the life I was in. I wasn't going to hurt my grandfather. [I] wanted to hurt myself. [I] said "I'm going to cut my wrists." They asked me to come outside [and then] took me into custody and to Highland Hospital.

Haney Dec., Exh. 71.

620. Although it would be later characterized very differently in the prosecutor's cross examination and closing argument in Petitioner's penalty trial, it was clear to others that Petitioner was acting out of desperation at the complete chaos and lack of control in his life, and the sense of

helplessness that he felt as a result. Perhaps the most objective account of the event comes from his probation officer, Mei-Ling Pastor, the person who took Petitioner's original phone call and arranged to have him taken to Highland Hospital that day. She recalls that Petitioner left her "a very urgent message" in an "emotional voice" in which he asked her to call him back as soon as possible "because he really needed to talk to me and it was an emergency." Pastor Dec., Exh. 98. When she called back and got Petitioner on the phone:

> Maurice was not articulate enough at the time to say what was really wrong. He was upset because there were a lot of things going on with his family. He was crying hysterically and pleading to be arrested. He said he wanted to kill himself and his family, but he wasn't specific. I know that Maurice did not really want to kill anyone and his saying that was an expression of the extreme emotional stress he was under, the fact he had no one to turn to, and his inability to cope with it. He was moving around all the time from place to place, and he didn't have enough money. Maurice was in a really upsetting situation, and he did not have the emotional resources to deal with this situation himself. It was clear to me that Maurice wanted me to intervene and help him get to a safe place.

Pastor Dec., Exh. 98.

621. Ms. Pastor consulted with a more experienced probation officer, Diane Talsky. Ms. Talsky also talked briefly with Petitioner and

suggested to Ms. Pastor that by having him arrested she could "get Maurice to a safe place where he could stabilize." Talsky Dec., Exh. 120. Ms. Talsky felt that by having the police pick Petitioner up and take him into custody he would be removed from the difficult situation he was in. This was an approach Ms. Talsky had used in the past with her own probationers. Ms. Pastor asked Petitioner to stay by the phone while she made these arrangements. When she called Petitioner back, he had waited by the phone, as she had asked. But "[b]y the time of this call, he was hyperventilating on the phone and crying hysterically." Pastor Dec., Exh. 98.

622. It is clear from the two probation officers involved, as well as from Petitioner's own description of the sequence of events that transpired, that he was arrested because he was asking for help from perhaps the only person he knew who might be able to provide it -- Probation Officer Pastor -- and that her actions were directed at getting him the help she felt he needed. As Ms. Talsky put it: "From my experience with Maurice on the phone that evening and from talking to Mei-Ling [Pastor] subsequently, Maurice was put into custody in order to stabilize him and temporarily remove him from a difficult home situation." Talsky Dec., Exh. 120. Ms. Pastor believed that the hospital would provide that stabilization: "My

intention was to get Maurice to the hospital so he could sit down in front of a psychiatrist and get him some time away from his home situation. He needed a little time in a safe place away from the stress of his family." Pastor Dec., Exh. 98.

623. Unfortunately, the Highland Hospital staff held Petitioner for only a few hours and then released him to the streets. Several factors may have accounted for this decision. For one, the emergency room psychiatric unit in which Petitioner was evaluated may not have been equipped to conduct an especially careful examination. As Probation Officer Talsky put it:

> . . . Highland Hospital's Emergency Room psychiatric unit was cursory in its mental health evaluations in the early 1990s. It was not rare for patients released from this unit after a few hours or a few days to later be committed to a mental health detention facility, in Napa for example, for months at a time.

Talsky Dec., Exh. 120.

624. In addition, although "Maurice clearly needed help and counseling," as Ms. Pastor recalled, he also "did not have the verbal skills to articulate to the psychiatric staff of Highland Hospital the emotional turmoil he was experiencing." Pastor Dec., Exh. 98.

625. Once she learned that Petitioner was going to be released so

quickly from Highland Hospital, Ms. Pastor determined that she could "buy time for him to be away from his family and get him the counseling he needed" by revoking his probation. She did this not because she felt he had committed a criminal offense that justified his incarceration, but rather "for his own safety and... as a psychiatric measure." Pastor Dec., Exh. 98. Because Petitioner also understood that he needed help, he waited patiently in the lobby of the hospital for the police to come and take him to Santa Rita jail. Pastor Dec., Exh. 98.

626. After discussing Petitioner's problems with him in jail, Ms. Pastor decided to request a psychiatric evaluation under Penal Code section 4011.6. Her purpose was clear: she wanted to get Petitioner "the help he needed" and she knew that a 4011.6 evaluation was required "before you are eligible for mental health services." Pastor Dec., Exh. 98. Following Ms. Pastor's request, Petitioner was evaluated by Alameda County mental health worker George Barrett. Mr. Barrett concluded that Petitioner "thinks and speaks in the style of a 12 year old. He has been nearly his present size since he was that age and in some respects his 'emotional clock' remains there." Exh. 14. Petitioner was placed back on probation a week later and released to the streets. CT 1240.

627. Two months later, Petitioner was arrested for a physical

altercation with Max Schireson on an Oakland street. It was the only time he had ever been arrested for a crime involving any physical force. According to Schireson's subsequent account of the incident, Petitioner was still suffering from some of the psychiatric problems that had led to his earlier cries for help and brief hospitalization: "I had the definite impression that Mr. Boyette was out of it mentally, like he was mentally retarded or impaired in some way. He really didn't seem to know what was going on. He wasn't hostile in the least and didn't seem aware that he had done anything wrong." Schireson Dec., Exh. 108. Indeed, Mr. Schireson was surprised that Petitioner was prosecuted for something that he -- Schireson -- did not think it was "a big deal." In fact, Mr. Schireson remembered "telling people that I felt it was unfair that he was being punished so harshly for such minor thing. He seemed like someone who needed help, not punishment." Schireson Dec., Exh. 108.

628. Petitioner was prosecuted nonetheless, pled guilty in July, and was sentenced to 90 days in jail. He was released in August (after serving approximately 50 days) and his probation was restored. Later that month, on August 26, 1991, he filled out an application for aid at the Alameda County Social Services Agency in which he listed his home address as "homeless." He stated that he was applying for assistance because he had "no place to

live, no money for food, no money for transportation," and was living "friend to friend, anywhere someone will let him." The contact sheet indicated that Petitioner had been homeless since December 1990.

629. About a month later one final tragedy occurred in Petitioner's life that profoundly affected the final path he would take and helped lead him to the scene of the crime for which he received the death penalty. On September 20, 1991, after breaking her leg and foot numerous times, Petitioner's mother went to the hospital and was treated for an infection in her leg that she had apparently ignored. Her leg was amputated just below the knee. Petitioner was shocked and saddened by the event. His grandmother did not tell him about it when it happened and by chance he saw his mother on the street: "I was going down the street when we saw her -- shocked -- she was in a wheelchair!" Haney Dec., Exh. 71. After Petitioner's mother's leg was amputated, he tried to help her even more than in the past: "When my mom had her leg amputated, she was helpless, using drugs, fighting with her boyfriend -- I tried to just be there for her." Haney Dec., Exh. 71.

630. Marcia Surrell's amputation and increasingly deteriorating health unfortunately did not lessen her continuing drug addiction. In fact, it may have contributed to her desire to remain high in order to avoid

confronting her physical incapacity. Nor was her lifestyle appreciably affected: "Marcia's leg had been amputated, although it didn't really stop her from trying to prostitute and hustle to stay high." Jackson Dec., Exh. 77. However, Petitioner now came more often to the Cole Street house where Marcia was living and using drugs, hoping to help take care of her.

631. Bettye Jackson, the owner of the house, described Petitioner's gentle and unsophisticated demeanor:

> Maurice was like a baby in the jungle when he was hanging out at my house. Maurice was only at my house to spend some time with his mother... I think Maurice was trying to have a closer relationship with her. Marcia was a real mess and Maurice wanted to take care of her... It was pretty obvious how much Maurice worried about Marcia. There were a few times when Maurice called an ambulance to come get Marcia, since her condition kept getting worse and worse...At one point, I told Maurice that he should stop coming by my house. I didn't think Maurice belonged there, in that crowd of people, and I told him to stay away. Maurice got real upset and didn't understand why I told him that.

Jackson Dec., Exh. 77.

632. According to Bettye, Petitioner "was totally afraid of guns" and he "seemed pretty shaken and scared" when he told her about an incident in which a good friend of his had been shot in the face while they were both sitting in a car. Jackson Dec., Exh. 77.

633. Petitioner eventually succumbed to the pressures that most of the young men in his neighborhood had fallen prey to much earlier in their lives. "[I]t was hard not to sell drugs -- I got out of jail and came home to basically nothing. [I] had no way to eat -- didn't want to live at my grandmother's house because she was sick and I didn't want to bring hassles home to her." Haney Dec., Exh. 71. Indeed, Petitioner's grandmother had reached the conclusion that she could no longer really take care of him, and that he was adding to the family's already substantial burdens. Petitioner's probation officer at the time, Ms. Pastor reported:

> I had talked to Maurice's grandmother. She didn't want Maurice around. Nobody in the family did. The grandmother felt like Maurice was old enough to be working, to be getting through his education, and to be productive. Maurice's family was not well-off financially. They seemed down and depressed. It is very hard for a young person to be in an environment like that all the time.

Pastor Dec., Exh. 98.

634. Even though Petitioner began to associate with a rough crowd, his friends Brian and Jason Harris reported that he was still unsophisticated, immature, and easily taken advantage of. The social security check he received each month after his father's death was regularly given to his grandmother for "rent," so that he had no real money of his own. Moreover,

he lacked a high school diploma or any significant job experience -- except for selling newspaper subscriptions door-to-door and washing dishes. He has stated, "I got into selling drugs when I realized I wouldn't get any money otherwise." Haney Dec., Exh. 71.

635. But an additional motivation for this behavior was a common one: Maurice sold drugs because he had become addicted to drugs.[57] As he said, when he got addicted to heroin, he realized he "had to pay for it, so I sold drugs to do it." Haney Dec., Exh. 71. Just as it had with his mother, Petitioner's lifestyle began to revolve around the drug. Indeed, he even had conversations with his mother in which they discussed "the different ways of using heroin—she would always shoot, said it gave you a stronger rush—or [you could] snort it like me.[58] Haney Dec., Exh. 71. But Petitioner was involved in little more than the kind of small-time drug sales that addicts rely on to get by, selling just enough to get them to their next

[57] There is a vast social science literature on the relationship between drug use and crime. It establishes the basic, commonsense proposition that most people who become addicted to drugs eventually turn to crime to support their habits. It also demonstrates the various ways in which drug abuse places addicts in direct and continuing contact with a criminal culture and lifestyle. Haney Dec., Exh. 71.

[58] Petitioner also explained why seeing firsthand the way in which heroin had ravaged his mother's mind and body did not deter him from using it: "I saw heroin have a bad effect on my mom, then I figured that if I just smoked it, I'd be OK." Haney Dec., Exh. 71.

fix. He would sell drugs to "get money, buy heroin, clothes -- whatever you had in your pocket you'd use on drugs that day. I hardly had any money accumulated -- I'd spend it as soon as I got it." Haney Dec., Exh. 71.

636. By the time he was forced to begin to create an independent life for himself and to decide what kind of an adult he would become, he had only the examples from his extended family to draw upon and examples from the community that surrounded him. But he still saw these things through unsophisticated eyes:

> I only had drug dealers as role models—all around me—fancy cars, girls, money. You don't see the bad side of it. Then, when they'd disappear, you'd see them come back from [the] pen looking stronger, bigger. They also never tell you the bad side of prison. They just act like going to prison is just part of life. But there are worse things that go on that they don't tell you about.

Haney Dec., Exh. 71.

Longterm Consequences and the Mitigating Significance of Petitioner's Social History

637. The social historical factors summarized from Petitioner's life are crucial to any meaningful understanding of his criminal behavior. They are equally important to any overall assessment of moral culpability of the kind that is essential in capital jury penalty decision making. That is because of the widespread consensus that has existed for many years now

among psychologists and other mental health professionals that early experiences play an extremely important formative role in shaping the course of subsequent psychological development. They profoundly influence the direction of our lives, the choices that we make along the way, and the degree of moral culpability that rightly attaches to the actions we have taken. This particular approach to understanding human behavior -- what is sometimes called "the study of lives" -- is a long-established framework in psychology and related disciplines. Put simply, the past greatly affects present and future outcomes, and what happens to us as children often has a significant influence on our thoughts, feelings, and actions as an adult. No one's life course can be fully and meaningfully understood without paying special attention to these issues. Haney Dec., Exh. 71.

638. It is painfully clear that Petitioner was subjected to a wide variety of powerfully negative influences and experiences that, in turn, profoundly affected his development and subsequent life course. That is, Petitioner was exposed throughout his life to an extraordinary number of what developmental psychologists have termed "risk factors." This risk-factors model of understanding the effects of past experience on subsequent development and adult behavior applies a basic psychological framework

that was summarized in a widely-known and oft-cited published review by Ann Masten and Norman Garmezy in 1985, some seven years before Petitioner's trial took place. Among their list of the risk factors that were known then to predispose children to later delinquency are many of the very things that characterized Petitioner's early life: a social history marked by poverty, parental abandonment, chronic neglect that included grossly inadequate care and supervision, inappropriate parental and other adult role models, and repeated exposure to violence and the abusive treatment of others. Haney Dec., Exh. 71.

639. Over the last 25 years, extensive empirical research on childhood risk factors has established the fact that poverty, abandonment, neglect, the presence of negative role models, and exposure to violence and abuse in the family as well as the larger community function to predispose children to a whole series of significant problems. For many children, these problems persist as they mature into adulthood. The long-lasting negative effects include emotional and psychological dysfunction, poor academic performance, drug and alcohol abuse, delinquency, criminality, and violence. Haney Dec., Exh. 71.

640. Petitioner's social history provides very clear evidence of these risk factors at work. Petitioner was exposed to precisely those problematic

conditions and forms of childhood maltreatment that we know are destructive of normal development and that place children seriously at risk. His adolescent years provide corresponding evidence of many of the very problems that the risk factors literature suggests are likely to be created as a result. Indeed, Petitioner's social history illustrates many of the ways that these risk factors can interact over a life course to produce exactly the kinds of emotional and behavioral problems -- poor school performance, truancy, drug use, and eventual delinquency -- that the research indicates they will. Haney Dec., Exh. 71.

641. Petitioner's situation is a textbook example of "psychologically unavailable caregiving." His is an extreme example of this form of childhood maltreatment. This particular risk factor is recognized by experts to be rooted in an "environment of neglect" rather than "only an isolated incident." Indeed, in words that could have been chosen directly from descriptions of Petitioner's homelife, psychologically unavailable caregiving tends to occur in families that "are characterized by chaos, disruption, and disorganization. Drug and alcohol abuse are common, the mothers often are physically abused, and, in general, the homes provide a very aversive environment for raising the children." The long-term psychological effects of this form of parental maltreatment are cumulative

and can produce very dramatic destructive consequences that include depression, negative emotion, poor impulse control, and high levels of dependency. Many children who suffer this kind of chronically neglectful upbringing turn to drugs to ease the psychological pain and sense of worthlessness it produces, and a high percentage of them engage in adolescent and adult criminal behavior. Haney Dec., Exh. 71.

642. In Petitioner's case, there is clear evidence that his natural parents were both psychologically (as well as literally) unavailable as caregivers throughout virtually his entire life. Drug addicted at the time he was born, they never assumed appropriate parental responsibility for Petitioner's well-being. The two people who did attempt to serve as parent substitutes for Petitioner -- his great grandmother Geneva and his grandmother Irma -- were repeatedly described by neighbors and family members alike as "overwhelmed" by their financial and emotional obligations to their own children and to the numerous, serious personal and legal problems and dysfunctional relationships and problematic other people that these children and young adults brought into the household where Petitioner lived. Throughout his childhood, Petitioner was described as someone who was overlooked, ignored, and otherwise "on his own." To be sure, there seems to be little doubt that this chronic and extreme form of

neglect was primarily the result of the sheer number of seemingly insurmountable problems the Boyettes and Surrells faced over the course of Petitioner's life. Yet, the consequences of the kind of psychologically unavailable caregiving he received were painful and detrimental nonetheless. Haney Dec., Exh. 71.

643. Moreover, at precisely the time when Petitioner needed the most guidance in his life -- when he was preparing to enter young adulthood and move independently into the world -- whatever inadequate and ill-conceived support he may have received in the past was almost totally missing in his life. Psychologically unavailable caregiving had turned into none at all. Thus, by the time Petitioner began to commit drug-related crimes as an immature 18 year-old, his great grandmother no longer lived at the family home and had become too old and infirm to provide much if any guidance or supervision; his grandmother had suffered a stroke, was confined to a wheelchair, was taking psychotropic medications and had begun to drink; his grandfather was absent and co-habitating with one or another of the various families and wives and/or girlfriends with whom he had lived throughout Petitioner's life; his own father had passed away; his mother was still very much addicted to drugs and still engaging in prostitution, despite having had her leg amputated; his aunts, Charmaine

and Celeste, who had lived with him sporadically in the Surrell family home, were in the throes of drug addictions; and, his Uncle Michael was incarcerated, having pled guilty to an assault with a deadly weapon charge. There was literally no one to give him sound advice, meaningful guidance, or supportive care and concern. Haney Dec., Exh. 71.

644. "Criminal embeddedness" is the degree to which people living in criminogenic contexts become immersed in a network of interpersonal relationships that increase their exposure to crime-prone role models. In some instances this network includes people in their immediate family -- in extreme cases, parental figures or other important relatives whose own behavior teaches them lessons about illegal and even violent ways to deal with deprivation, frustration, and conflict. In other cases it refers to what are in essence "tutelage" relationships in which inexperienced young people are influenced in a direct way by more sophisticated criminal actors who are present in the neighborhoods or communities where they live. In Petitioner's case, the criminal embeddedness occurred both in and out of his home, and it was vast in scope and deep in nature.[59]

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[59] To illustrate just *some* of the ways in which Petitioner's day-to-day existence was immersed in criminality, long before he had the capacity to "choose" his own lifestyle or preferred courses of action, see appended chart depicting "Denizens of the Households Where Maurice Boyette Lived" (as Appendix B to Haney Declaration, Exh. 71). It is obvious from just this brief, schematic summary that Petitioner was surrounded for most

645. In addition to the appended chart depicting the negative and problematic role models living in the households in which he grew up, Appendix B to Haney Dec., Exh. 71, consider the following partial but more descriptive list of broad criminogenic influences present throughout most of Petitioner's development: he had (a) a mother who was a chronically drug-addicted prostitute who stole from the house where he lived, who was sometimes locked by her own mother inside the house -- with Petitioner sitting nearby -- and forcibly put through drug withdrawal, who herself gave Petitioner pointers on the different highs that were brought about by different ways of using heroin, and whose own drug addiction remained so powerful late in her life that, after she had one of her legs amputated, she shot heroin into the stump, Tamika Harris Dec., Exh. 76, and attempted to streetwalk as a one-legged prostitute, Robert Harris Dec., Exh. 75; (b) a father who was also a drug addict, who served as his mother's pimp, suffered numerous arrests and criminal convictions, and stuck marijuana cigarettes into Petitioner's mouth when he was still a young child, Robert Harris Dec., Exh. 75; (c) a great aunt who was nicknamed

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of his life with persons who themselves suffered from a variety of disabling problems and dysfunctional patterns of adjustment. These negative influences were immediate -- in the sense that these were people who occupied the same house in which he lived -- and their impact on him was long-term -- in the sense that these were people with whom he had contact over virtually his entire life.

"Betty 5150" because of the frequency with which she was committed to the mental health clinic, and was "always considered crazy...used a lot of drugs and mostly lived on the streets", Monica Boyette Dec., Exh. 56; (d) a great uncle who was a biker with the East Bay Dragons, Byrd Dec., Exh. 57, and who was reputed to have committed murder; (e) another uncle who did three California prison terms for drug sales and robbery, Alvon Surrell Dec., Exh. 112; (f) an aunt who "was arrested after the police saw her carrying a large rifle from her car into her mother's house on East 28th Street," Byrd Dec., Exh. 57; (g) a grandfather who "had a few other families beside [Petitioner's grandmother] and her kids," Coit Dec., Exh. 60, was referred to as a "ho-monger" who "had lots of other women and children," August Dennis Dec., Exh. 65, fractured the nose of at least one of the women with whom he fathered children, Frazier Dec., Exh. 69, beat Petitioner's grandmother when she was pregnant with their children, Parker Dec., Exh. 97, served time in prison for assault with a deadly weapon and later killed a man and was put on trial for murder, Marlon Surrell Dec., Exh. 115; (h) an uncle with whom he was raised who, when told to stop beating his girlfriend by his mother-in-law, "took a shovel from in front of the house on East 28th Street and hit her in the face with it," August Dennis Dec., Exh. 65, put a shotgun to the head of his wife during an argument,

and threatened to kill another of his wives and her mother, Daphne Yeldell Dec., Exh. 127, later went to prison for trying to cut someone's throat and, little more than a year after he was paroled for that crime, was arrested for killing someone else; and (i) an aunt with whom he was raised who taught the younger children how to steal by dropping sleeping pills into their drinks, who spent time in jail for selling drugs and was known around the house and neighborhood only as "Red," her "street name for when she was hustling and dealing." Tamika Harris Dec., Exh. 76.

646. Moreover, *every single member* of Petitioner's immediate family who regularly occupied the house in which he grew up appears to have had a substance abuse problem of one sort or another. In the case of the two most "stable" figures in his life, Irma Surrell and Geneva Jacobs, their alcohol problems did not appear to prevent them from working and maintaining the household in which Petitioner lived. However, in every other case the substance abuse problems — virtually all involving drug addictions — were often disabling, frequently forcing family members into criminal behavior and, as in the case of Petitioner's mother, completely dominating their life. It is not an exaggeration to say that it would have been nothing short of extraordinary if Petitioner had managed to avoid substance abuse problems as a young adult. Haney Dec., Exh. 71.

647. Urban "war zone" refers to the high level of violence to which Petitioner was exposed as a child and adolescent, both in the house in which he grew up and the surrounding community in which he lived. Indeed, Petitioner grew up in a family in which violence was a commonplace occurrence. Although he was not often the target of direct abuse, he witnessed it on numerous occasions. Virtually all of the men around whom he was raised were physically abusive to the women with whom they were involved. Petitioner's grandfather, his Uncle Michael, and his father were all arrested for violent crimes. And there were more subtle but direct acts of violence that he experienced at home. For example, his father would call Petitioner a "sissy" on those rare occasions when he saw him at all, he fired guns into the air to scare Petitioner and yelled at him when he cried, and told him he would kill him if he ended up "being a fag." Robert Harris Dec., Exh. 75. Even his great grandmother, despite being one of Petitioner's few points of stability earlier in his life, had a gun that she had named "Mr. Smith" that she would look for whenever she got into an argument that she could not handle, and would use sticks (which she also had named) to beat the children when they got out of line. Eva Mae Dennis Dec., Exh. 66.

648. In addition, Petitioner lived in two nearby communities —

Oakland and Berkeley — that were saturated with violent crime and decimated by the crack epidemic of the 1980s. At the time Petitioner was coming of age in Oakland and Berkeley, people were being shot so regularly that some young residents suffered from Post-Traumatic Stress Disorder, Imelda Harris Dec., Exh. 73, and others purchased bullet-proof vests so that they could more safely walk the streets. Jason Harris Dec., Exh. 74. Indeed, one of Petitioner's uncles analogized the gang activities in which he participated as "playing cowboys and Indians, except with real guns." Alvon Surrell Dec., Exh. 112. Petitioner had a close childhood friend who lost a leg after he jumped off the roof of a building to escape from a neighborhood gang that was chasing him, and who was later shot and killed in a separate incident while Petitioner was still a teenager. Marlon Surrell Dec., Exh. 115.

649. Given his exposure to violence — indeed, his immersion in an extremely violent household and subculture for most of his young life — it is noteworthy that Petitioner did not become much more aggressive much earlier. Petitioner's behavior stood in dramatic contrast to the other young men in the Surrell family as well as many of the young men who lived in the Oakland and Berkeley neighborhoods where he grew up.[60]

[60] In fact, turmoil, criminality, and violence occurred so often in Petitioner's childhood and adolescence that it was impossible to include all

650. Petitioner's emotional problems, his early timidity and depression, his loneliness and passivity, his seemingly irrational devotion to his mother, the low self esteem, eventual drug use, and involvement in crime as a relatively immature 18 and 19 year-old young man can only be understood in the context of this traumatic social history. The way in which these destructive events shaped Petitioner's development and warped his perspective on himself and the world around him represents a compelling summary of the available mitigation in his case. It is mitigation that was essential for trial counsel to carefully develop and effectively present at Petitioner's capital penalty trial.

Mental Health and Impairments

651. Significant evidence of Petitioner's mental impairments could have been presented in mitigation. The expert presented by counsel at trial, Dr. Fred Rosenthal, has admitted that Petitioner's history predisposed him for neuropsychological deficits. Rosenthal Dec., Exh. 105. Counsel did not have any neuropsychological testing of Petitioner done at any time prior to

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of it in this narrative, despite its length. To provide a more comprehensive list of the destabilizing events and criminal influences that shaped the atmosphere and environment in which Petitioner was raised, appended is a document entitled "Maurice Boyette: Traumatic, Destabilizing, and Criminogenic Events" (as Appendix C to Haney Declaration, Exh. 71). It is instructive to compare this detailed document with the more benign picture of Petitioner's family and upbringing that emerged through trial counsel's penalty phase presentation in Petitioner's capital trial.

or during his trial. Had such an evaluation been done, the results would have provided significant mitigating evidence to be presented at the penalty trial.

652. Dr. Dale Watson, a licensed psychologist in the State of California, whose expertise is in forensic psychology, neuropsychology and psychodiagnostic assessment, has examined Petitioner.

653. Clinical neuropsychological testing assesses the behavioral expression of an individual's brain function. Appropriately interpreted, neuropsychological assessment is a fundamental part of a reliable and comprehensive clinical evaluation of brain function. Each of the individual tests that make up a neuropsychological battery is designed to provide insight into the nature and extent of brain dysfunction. The testing of Petitioner provides evidence in his summary scores that he suffers mild neuropsychological impairment. Watson Dec., Exh. 122.

654. Petitioner's neuropsychological test data was assessed in a number of ways, including procedures to form a basis of comparison between Petitioner and cross validated norms. The results of the testing and analysis indicate that Petitioner suffers from generalized mild neuropsychological dysfunction. This results in a slowing of Petitioner's ability to process information, disruption of auditory processing capacity

and poor fine motor control. These deficits would likely have a significant impact upon his ability to succeed in school and are consistent with learning disabilities. Petitioner's neuropsychological impairments had a significant developmental impact upon him.

Testing Data

655. Petitioner's history includes multiple injuries to the head, including; (a) a fall out of bed hitting his head on the floor as a toddler, resulting in vomiting and a "very dreamy" state; (b) a skateboard fall resulting in loss of consciousness, vomiting and sleepiness at age four; and (c) a fall off a 5-foot wall as a child but without loss of consciousness. This history of head traumas suggests a possible environmental etiology for Petitioner's impairments and should be considered along with possible biological and genetic factors. Watson Dec., Exh. 122.

656. Neuropsychological summary measures, which have gained widespread acceptance in the neuropsychological community, and which were widely used in the period of 1992-1993, include the Halstead Impairment Index and the Average Impairment Rating. Using age and education adjustments, the Halstead Impairment Index falls within the mildly impaired range though the Average Impairment Rating is within the low normal range. Petitioner's scores on these indices, along with a more

detailed analysis of test findings, establish that he has underlying mild neuropsychological dysfunction. Watson Dec., Exh. 122.

657. Petitioner's Neuropsychological Deficit Scale (NDS) score of 37 falls within the Mild Neuropsychological Impairment range. In Reitan's 1988 study, no non-brain damaged person scored higher than 34 on the NDS. That study found that a cutting score between 25 and 26 separated normal from brain injured individuals with the greatest degree of accuracy. Petitioner, therefore, tests in the impaired range. The NDS is one of the most comprehensive of the neuropsychological indices available for the Halstead Reitan Battery. In addition, the NDS has been cross-validated as an effective means of identifying brain damage. In multiple, independent scientific studies, the NDS has proved to be a consistently valid measure of brain damage. Watson Dec., Exh. 122.

658. Petitioner's overall intellectual ability falls within the low average range. However, analysis of the underlying factors of the intelligence measures shows Petitioner to have significant difficulties in his speed of information processing. Petitioner is very slow to process information and to transfer written information. His ability to process information is well below his other scores, which is a common problem for individuals who have had any type of neuropsychological insult, including

head injuries as has Petitioner. Watson Dec., Exh. 122.

659. Petitioner shows signs of microsmia, or the loss of the sense of smell. This may be an indicator of impairments within the orbital-frontal region of the brain – an area associated with personality functioning and when damaged, with impulsivity. His behavior often appears rather child-like and immature – consistent with this hypothesis. Watson Dec., Exh. 122.

660. Further, Petitioner has signs of lateralized impairment within the auditory processing centers of the left hemisphere. On a dichotic listening task, in which different words were simultaneously presented in each ear, Petitioner was able to correctly identify 35 of 50 words on the left but only 25 of 50 on the right – strongly suggesting left hemisphere disruption. This task is useful in identifying impairments that may or may not involve structural defects within the brain, particularly within the subcortical areas associated with the temporal regions. Watson Dec., Exh. 122.

661. Petitioner's oral reading abilities are also of note because, though he comprehends well (12th grade level), his reading speed is remarkably slow at less than the 1st percentile for his age (5th grade level). This performance again speaks to the slowness with which he processes

information as well as difficulties learning. This is consistent with the reports of Petitioner being a "slow" learner. Watson Dec., Exh. 122.

662. Likewise, on the California Verbal Learning Test, Petitioner was slow to orient to a new task. Watson Dec., Exh. 122.

663. An examination of the test results and Petitioner's school records show that he was a very slow student who clearly had a problem processing information. He related that he never did adequately learn to write in cursive writing and this appears in part related to difficulties with fine motor control. His awkwardness, which is still evident, is not simply a function of his size but rather reflects subtle brain dysfunction. Watson Dec., Exh. 122.

664. There are several possible sources for Petitioner's neuropsychological impairments. He was exposed prenatally to alcohol and other drugs, both known to cause permanent brain damage in developing fetuses. He was at risk genetically for psychiatric illness and limited intelligence. His grandmother was diagnosed with an affective mood disorder. Both his grandmother and his great-grandmother had problems with alcohol and both of his parents were chronic drug abusers. Moreover, all of his maternal aunts and uncles had very serious problems with drugs. Petitioner also experienced losses of consciousness from accidents. Any of

these factors can cause impairments or brain damage and all may exacerbate preexisting mental disabilities.

665. Petitioner's limited intellectual functioning as it relates to verbal comprehension and processing speed, combined with the unrelenting traumatic experiences he survived as a child, had devastating consequences for him during his developmental years. Under stress, and especially in circumstances when there is little time to think, the functional impact of his disabilities increases and he is less likely to think rationally and logically, to understand the long-term consequences of his actions, to reflect and weigh the impact of his responses, and/or to develop alternative strategies to follow instead of impulse-driven actions. Watson Dec., Exh. 122.

666. Petitioner's Wechsler Adult Intelligence Scale – 3 Processing Speed Index score of 73 places him at the 4th percentile and also indicates that he is very slow to process information. He will not perform well under time pressure. This ability to process information is well below any of the other test indices from the WAIS-3. This phenomenon is often found in people with neuropsychological dysfunction. Watson Dec., Exh. 122.

667. Petitioner suffers from mild generalized neuropsychological impairment. As many of the abilities assessed by these tests are not lost over time, the damage to Petitioner's cognitive functioning occurred at an

early stage in his life. These impairments are brain-related deficits.

668. In addition, polysubstance abuse would have exacerbated the effects of Petitioner's impairments to a significant extent. At the time of his arrest in 1992, the impact of his polysubstance abuse would have been significantly more marked than testing is able to identify this many years later. Watson Dec., Exh. 122.

669. A neuropsychological assessment of Petitioner reveals evidence of organic brain impairments. Such findings would have been made had Petitioner been evaluated by a competent neuropsychologist at the time of Petitioner's trial in 1992-1993.

Psychological Evaluation

670. Trial counsel was informed by Dr. Stephen Pittel that he believed relevant mitigating evidence could be substantiated by investigation into at least the following areas: Petitioner's alcohol and substance abuse; review of the records of Dr. William Spivey who had previously treated Petitioner; pre-sentence reports or other medical records; psychiatric reports; information regarding Petitioner's father's death from cancer; school records and investigative reports; interviews with teachers, counselors, family members and peers who may be able to provide additional information; investigative reports, and interviews, if necessary,

regarding Petitioner's mother's heroin addiction, and his grandmother's role in his psychological development. Pittel Dec., Exh. 100.

671. Although trial counsel ignored Dr. Pittel's suggestions, regarding them as a demand for too many records, Cannady Dec., Exh. 59, such investigation would have produced significant results. Dr. Roderick Pettis, a psychiatrist, whose expertise is as a clinical psychiatrist, specializing in psychopharmacology, forensic psychiatry and psychodynamic psychotherapy, has examined Petitioner, reviewed relevant records and other documents, reviewed the Declaration of Dr. Craig Haney detailing Petitioner's social history, and the Declaration of Dr. Dale Watson.

672. A qualified psychiatrist would have been able to testify to at least the following compelling evidence in mitigation, placing Petitioner's social history in the context of the psychological ramifications that enured for Petitioner.

673. Dr. Pettis found during his interviews of Petitioner that Petitioner exhibited some outward manifestation of anxiety which appeared in the form of pressured speech and other body language, but he was extremely cooperative and pleasant during the interviews and earnestly attempted to answer all questions put to him. Petitioner's movements and

behavior were somewhat childlike, although at times he showed a remarkable insight into his life and his limitations. Pettis Dec., Exh. 99.

674. Petitioner is genetically predisposed to alcoholism, substance abuse and mental disease by his family history. As a young child he exhibited significant signs of depression, which went undiagnosed and untreated. Depression, as well as his predisposition to substance abuse, led Petitioner to self-medicate with alcohol, heroin, and Valium. Pettis Dec., Exh. 99.

675. Petitioner's childhood and adolescence experiences were affected and shaped by at least the following factors: (a) his aforementioned genetic predisposition to substance abuse, and mental illness; (b) his organic brain impairment; (c) his life-long history of depression; (d) his extraordinarily dysfunctional family, the chronic neglect he experienced and his mother's absence; (e) the violence of the community in which he lived; and (f) the failure of the public institutions to assist him in any meaningful way. Pettis Dec., Exh. 99.

676. Petitioner's deficits and impairments were worsened by the situation in which he lived, which was marked by violence, chaos, and chronic neglect. Petitioner was never able to get the attention he needed which would have assisted him in overcoming his problems. There was

never adequate or appropriate intervention by any institution to assist Petitioner in obtaining the help he desperately sought to modify his developmental, emotional, mental, psychological and educational problems. Pettis Dec., Exh. 99.

677. At the time of the commission of these crimes, Petitioner was tragically overwhelmed by his drug abuse and his emotional problems. The sudden occurrence of unplanned violence on the part of Antoine Johnson, a person Petitioner had come to trust and rely upon, propelled Petitioner into a state of extreme mental and emotional disturbance which governed his actions at that time. Pettis Dec., Exh. 99.

678. Petitioner's judgment was and is impaired. His social judgment is compromised. He does have an awareness of his own emotional limitations and capabilities. Because of his emotional and cognitive impairments, he was at times able to foresee some of the problems or difficulties he would develop in his life, but was unable to determine how to avoid them. Pettis Dec., Exh. 99.

679. Dr. Pettis found Dr. Watson's findings, see Paragraphs 652 to 669, consistent with his own conclusions. Pettis Dec., Exh. 99.

Predisposition to Drug/Alcohol Abuse And Mood Disorders

680. A review of the social and family history of Petitioner prepared

by Dr. Craig Haney reveals a family that for generations has a documented history of alcoholism, intra-familial physical abuse, violence, criminality and mental illness, which not only genetically predisposed Petitioner to certain mental illnesses but also greatly impaired his ability to develop to his full potential. Pettis Dec., Exh. 99.

681. Prior to birth, Petitioner was exposed in utero to cocaine and heroin, the drugs his mother was addicted to. Pettis Dec., Exh. 99.

682. Petitioner appears to have suffered as many as five head injuries prior to the time of the crimes in question. Pettis Dec., Exh. 99.

683. The in utero exposure, combined with the head injuries that Petitioner suffered, put him at risk for the organic brain impairments which he now has. Pettis Dec., Exh. 99.

684. Both Petitioner's maternal grandmother, Irma Surrell, and maternal great-grandmother, Geneva Jacobs, known as "Ms. Jacobs" abused alcohol. Pettis Dec., Exh. 99. Petitioner's father, Dicky Boyette, and Petitioner's mother, Marcia Surrell, were drug abusers throughout their adolescence and adult lives. Pettis Dec., Exh. 99. All of Petitioner's maternal aunts and uncles were drug and alcohol abusers. Pettis Dec., Exh. 99.

685. Irma Surrell, Petitioner's maternal grandmother, was diagnosed

as suffering from Major Depression over a period of at least four years. Michael Surrell, Petitioner's maternal uncle, has also been diagnosed as suffering from depression. Marcia Surrell, Petitioner's mother, has been diagnosed as suicidal. It is likely that other members of this family suffered from mood disorders that went undiagnosed because of their alcohol and/or drug addiction and the lack of social services provided. Pettis Dec., Exh. 99.

686. 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. The high comorbidity of alcohol and substance abuse disorders with mood disorders cannot be explained merely as the chance occurrence of two prevalent disorders. Self-medication for mood symptoms is commonplace but the diagnosis is often missed. Pettis Dec., Exh. 99.

687. At the time of Petitioner's trial in 1992-1993, it had been well established in the mental health community for many years that children born into families that either abused drugs and/or alcohol and/or where mood disorders were present were at greater risk to develop these same problems. Pettis Dec., Exh. 99.

Early Development

688. The mother-child interaction determines the organization and quality of thought and overall development of the child. Every mother creates a unique environment for her child. The nature of the early psychological environment created by the mother significantly influences the social, emotional, and cognitive development of her children. The development of intelligence progresses from immediate experience toward the development of understanding symbols and abstract concepts. When the mother suffers from a lack of normal emotional ranges the psychological environment of the home tends to be seriously impoverished and the child's cognitive development seriously restricted and damaged. Symbolic representation which plays a crucial role in the development of language and the higher levels of thinking is lacking and thus normal development does not occur. Pettis Dec., Exh. 99.

689. As a little boy, Petitioner was not shielded from what was going with his parents and he was exposed to Dicky and Marcia's fighting and to their drug use. Pettis Dec., Exh. 99.

690. Being the child of substance abusers, Petitioner was predisposed to have an increased vulnerability to visual problems inadequate fine motor coordination, heightened levels of motor activity and

attention deficits, particularly in structured interactions and learning problems. Pettis Dec., Exh. 99.

691. Older children of heroin-addicted parents suffer from emotional and cognitive problems; they express feelings of anxiety and insecurity and are characterized by shorter attention spans than their peers. They have increased problems in school and behavioral and adjustment problems at a greater rate than their peers. They are more likely to be involved in delinquent behavior and drug and alcohol abuse and have poor impulse control. Pettis Dec., Exh. 99.

692. Low self-esteem, anxiety, and depression are associated with being raised in an addicted family. Children of substance abusing parents often lack basic trust and ability to become attached as they hope for parental love and nuturance; as parents live in continually shifting states of intoxication and abstinence, the child learns self-care that interrupts development of intimacy and results in isolation and depression. Positive supportive trusting relationships are helpful in improving a child's self-image. Early intervention is critical. They need support to reduce isolation, depression and anxiety. Pettis Dec., Exh. 99.

693. The consequences for Petitioner of being raised for his first two years primarily by such an over-whelmed, depressed, dysfunctional and

absent individual was devastating. Pettis Dec., Exh. 99.

Life Long History of Depression

694. Petitioner was genetically predisposed to mood disorders. Indeed, Petitioner has suffered from a lifelong depressive condition. The documentation of Petitioner's life-long depression is overwhelming. Pettis Dec., Exh. 99.

695. A predisposing factor to depression may be an inadequate, disorganized, rejecting, and chaotic environment. Depression is more likely to occur if biologic relatives have Major Depression, as in Petitioner's case. Pettis Dec., Exh. 99.

696. The essential feature of depression is a chronic disturbance of mood involving depressed mood. Children with depression may exhibit low energy or fatigue, low self-esteem, poor concentration or difficulty making decisions, and feelings of hopelessness. Children with depression may also exhibit a decline in school performance, restlessness and pulling or rubbing hair, skin or clothing, outbursts of complaining, shouting or crying. They also will exhibit social withdrawal, isolation, sad mood, low motivation and overeating or anorexia. Emotionality is also a common feature of depression. Petitioner exhibited all of these characteristics. Pettis Dec., Exh. 99.

697. Mood disorders tend to be chronic if they begin early. Childhood onset may be the most severe form of mood disorder. Children suffering from depression are likely to have such secondary complications as alcohol and substance abuse as did Petitioner. Pettis Dec., Exh. 99.

698. Functional impairment associated with a depressive disorder in childhood extends to practically all areas of the child's psychosocial world: school performance and behavior, peer relationships, and family relationships – all suffer. Pettis Dec., Exh. 99.

699. Petitioner's feelings of being completely overwhelmed by his inability to affect his environment were, in part, due to his depression. Petitioner felt that he was always pulled back into isolation and depression. Pettis Dec., Exh. 99.

700. Petitioner was a sensitive, clumsy, shy boy who was ostracized because of his obesity throughout his life. Not only was his obesity probably the result of his depression, it caused him to become the object of ridicule, even more isolated from his peers and tragically, more depressed. Pettis Dec., Exh. 99.

Universally Regarded as "Slow"

701. The neurological tests done by Dr. Watson do not confirm that Petitioner is mentally retarded. They do confirm that Petitioner has mild

organic brain impairment. Thus, while Petitioner does have learning disabilities, it is more likely that the universally held view of Petitioner as "slow" is, in part, a function of the debilitating effect of life-long neglect and depression had on Petitioner's ability to function, and the secondary effects of prenatal exposure to drugs, than it is an indication of his actual intellectual functioning. Pettis Dec., Exh. 99.

702. Petitioner was well aware that others viewed him as "slow" which contributed to his lack of self-esteem and his depression. Pettis Dec., Exh. 99.

703. It is instructive that the emotional pressures on Petitioner were so profound as to cause everyone who came in contact with him to believe that he was seriously intellectually impaired to the point of retardation. Pettis Dec., Exh. 99.

Impact of Mother's Absence

704. One of the most profound influences in shaping Petitioner's mental health and emotional state was his mother's extraordinarily erratic, unreliable behavior and her extended absences from his life. Pettis Dec., Exh. 99.

705. Petitioner never really got to know his mother. Petitioner never saw his mother more that twice a year. She would rarely call. She would

only just show up. Petitioner has no memory of living with his mother. His mother was never there for family pictures, school events, or family events. Pettis Dec., Exh. 99.

706. Petitioner's mother would sometimes come and get him and take him to visit with her. But wherever they went, there were always other drug addicts like her boyfriend Sonny Hill around. Marcia would take Petitioner to drug houses. The visits usually ended early because the police would raid the house or a fight would break out. Marcia would then call Petitioner's grandmother, Irma, to come and get Petitioner. Pettis Dec., Exh. 99.

707. Once the police came and used a battering ram to get into the house. Petitioner and his mother escaped over a fence. After this incident, Petitioner's grandmother would not let Petitioner go with his mother any more. He did not see or hear from his mother for about a year after this and had no idea where she was. This really hurt him because he wanted to be with her and was very worried about her. Pettis Dec., Exh. 99.

708. Extended separations and absence of a maternal figure can create much anxiety which is overwhelming to the child who desperately tried to connect with its mother. The lack of contact and not knowing his mother's whereabouts certainly adversely impacted Petitioner's ability to

socialize with others and concentrate in school. These factors were in turn exacerbated by Petitioner's depression. Pettis Dec., Exh. 99.

709. Marcia would always make a lot of promises to Petitioner about spending time with him or giving him money so he could do something like join the Cub Scouts or go to a baseball game. Marcia would almost always let Petitioner down. When Marcia would finally show up to do something with Petitioner, it would usually end up being a quick trip to a fast food restaurant. Pettis Dec., Exh. 99.

710. Petitioner had been abandoned by both his parents. Not only did he have to cope with feelings of abandonment and the resulting low self-esteem but he was confronted by what others said to him about his situation. Pettis Dec., Exh. 99.

711. While Petitioner ached for his mother and was devastated by her failure to be involved in any way in his life, the consequences for him when she did come around were horrific. Petitioner saw his mother shoot herself up with heroin and began crying so hard he urinated on himself. At one point Marcia's arms had cysts all over them from shooting up, so she started shooting heroin into her neck. Pettis Dec., Exh. 99.

712. Petitioner remembers that his mother would occasionally come to his grandmother's house to attempt to quit drugs. In one instance,

apparently when Marcia was attempting to quit heroin, Petitioner saw his mother screaming and picking at her skin because she believed there were maggots crawling all over her. However, rather than actually kicking her habit, Marcia later stole guns from Irma Surrell's closet, threw them out the window to a waiting confederate and left, apparently to sell the guns for drugs. On other occasions, Marcia literally stole Petitioner's clothes, presumably to sell them to get drug money. Pettis Dec., Exh. 99.

713. Yet, in Petitioner's eyes, the worst thing his mother ever did was to tell him on numerous occasions that she was coming to get him to visit and then fail to show up or even to call. After a while Petitioner just would not even get ready. The "worst days" of Petitioner's life were seeing his mom on drugs and days when his mom let him down. Pettis Dec., Exh. 99.

Petitioner's Father and Other Male "Role Models"

714. Petitioner never had any positive male role models.

715. Petitioner's father, Dicky Boyette was as absent a parent as Marcia Surrell. In fact, since Petitioner did not perceive his father to be as impaired as his mother, it was even more painful for him that his father never played any role in his life. What is clear from the numerous declarants who have discussed this subject is that, on the few occasions that

Dicky Boyette did come around, he only sought to humiliate his son for his perceived inability to live up to the image of manhood that Dicky required. Pettis Dec., Exh. 99.

716. Petitioner's father would tell him, "You end up being a fag and I'll kill you," when he did not like how Petitioner was acting. When Dicky came around, he would be very tough on Petitioner and would call him a sissy, twist his ears, or slap him to try and toughen Petitioner up. Dicky was a great athlete in high school and he wanted Petitioner to be good in sports, too. Petitioner was always very slow and uncoordinated, and Dicky would get upset with Petitioner when he didn't catch a football or run fast enough, even though Petitioner was very young. If Dicky was throwing a football to Petitioner, he would just keep throwing harder and harder, yelling at Petitioner to catch it. Dicky would keep firing the ball at Petitioner, even after it hit him in the face and nose, and Petitioner would end up crying. Pettis Dec., Exh. 99.

717. Dicky would on occasion walk down the street in front of the house where Petitioner was living. Almost without fail, Dicky would be gone without ever stopping by to see Petitioner. Petitioner would see Dicky walk by the house and he would cry when his father would not visit him. Sometimes Petitioner did not cry but would get very quiet and sort of stare

off by himself. Pettis Dec., Exh. 99.

718. Petitioner's feelings regarding his father were also confused by what he heard about his absent father. Pettis Dec., Exh. 99.

719. Petitioner fantasized throughout his life about going to live with his father or his father's family. While he did not want to live with his mother because she was a drug addict, Petitioner does not seem to acknowledge that his father was a drug addict too. This may be because he saw him so infrequently or because it was necessary to his emotional survival to retain this rescue fantasy. Either way, one of the things that made him the saddest was "not being with my father's side of the family." This wish can only be appreciated as a reaction to the complete isolation and loneliness Petitioner experienced living in the chaos and violence of the Surrell household. Pettis Dec., Exh. 99.

720. The other "male role models" in Petitioner's life were not role models at all and in fact had profoundly negative influences on Petitioner. They all led criminal life styles, abused drugs and alcohol, were physically violent with the women in their lives and treated Petitioner with contempt and disdain even when he was just a little boy. Pettis Dec., Exh. 99.

721. Michael Surrell, Petitioner's uncle who lived with Petitioner at various times in Irma Surrell's house, was always very hard on Petitioner

because Petitioner was not tough. Michael would say, "He cries like a little girl." Pettis Dec., Exh. 99.

Chronic Neglect

722. The chronic neglect suffered by Petitioner, which extended well beyond his absent drug-addict parents, cannot be overstated. From birth to the time his mother "lost" him in Sacramento, throughout his childhood and adolescence, Petitioner was a boy who belonged to no one, who belonged nowhere, and who felt completely alone almost every day of his life. He did not believe that anyone really cared about him. He got no attention because there were so many people in the house. Petitioner knew if he was gone from home he would not even be missed. Pettis Dec., Exh. 99.

723. Petitioner also craved a "real family." The Surrell household in which Petitioner lived all of his life consisted for the most part of people, literally more than a dozen, who were related to each other but never functioned as a "family" in the way most of us understand the term. There were few family events. People did not look after one another. Adults constantly verbally and physically abused each other. Literally everyone was in and out of jail or prison. Pettis Dec., Exh. 99.

724. Petitioner's isolation and loneliness was exacerbated by the

fact that he lived primarily with two older women who were the only people other than Petitioner who consistently resided in the house. While obviously well-intentioned, they really could not understand what Petitioner was going through nor relate in any significant way to what his life outside of their house was like. It also meant that for much of his life he was the only male in the house on a consistent basis which, in itself, presented enormous pressures on Petitioner. Pettis Dec., Exh. 99.

725. Although Irma Surrell clearly loved Petitioner, she had so many competing problems that there was little energy or attention left over for him. Moreover, since Irma worked constantly prior to her stroke, Petitioner was very much alone. Pettis Dec., Exh. 99.

Adolescent Destabilizing Events

726. Petitioner had so few friends and no real family that when he did make a emotional connection with someone, that connection took on such major importance that the loss of the connection was devastating to Petitioner. Pettis Dec., Exh. 99.

727. One such relationship was between Petitioner and Paris Robinson, an older boy who lived across the street from Petitioner in his Oakland neighborhood. Pettis Dec., Exh. 99.

728. Paris was like a "big brother" to Petitioner. Petitioner was

devastated when Paris died. Paris's death left Petitioner even more alone. Pettis Dec., Exh. 99.

Move to Berkeley and Petitioner's Father's Death

729. In 1985, Irma Surrell was forced to file for bankruptcy and the Surrells lost their house on E. 28th Street in Oakland. They moved to Boise Street in Berkeley, California. This move was extremely traumatic for Petitioner. While Petitioner experienced profound neglect in Oakland, he at least had a sense of neighborhood. Now, at the age of twelve, Petitioner was forced to begin again. Such a move would be traumatic for any young adolescent, but for someone as insecure and depressed as Petitioner, it was devastating and marked the beginning of Petitioner's downward spiral. Pettis Dec., Exh. 99.

730. Tragically, just as Petitioner was forced to leave Oakland, his father suddenly died. Petitioner's father died just at the time at which he had started school at Malcolm X Elementary in Berkeley. Pettis Dec., Exh. 99.

731. Although Dicky Boyette was never a real father to Petitioner, Petitioner continued to harbor a fantasy that his father would come and reclaim him from the Surrells. Petitioner would then live with the Boyettes in a "real family." Dicky's death shattered this fantasy and plunged

Petitioner further into depression. Pettis Dec., Exh. 99.

732. In 1982, Irma Surrell began to seek help from Dr. William Spivey, apparently referred by her physician Dr. Wade Sherwood. Dr. Sherwood was an internal medicine specialist associated with Highland Hospital who had been treating Irma for years and recommended that she get further treatment for her depression. Pettis Dec., Exh. 99.

733. Dr. Spivey determined that Irma was suffering from severe depression at the time of her referral and had already been taking Valium for several months. When he first met Irma, she was so severely depressed that she had no desire to venture out of her house. She had problems sleeping at night and suffered from frequent crying spells. Pettis Dec., Exh. 99.

734. Dr. Spivey diagnosed Mrs. Surrell as suffering from Major Depression recurrent unspecified and Adjustment Disorder with depressed mood. Based on her severe depression, he attempted to assist Mrs. Surrell in securing Disability Insurance from the Department of Social Services. He believed that Mrs. Surrell's emotional problems were such that she was unable to work. After one year of treating Irma, Dr. Spivey found that she was still chronically depressed and was often unable to leave home and pursue normal interests. Her affect was affected by thoughts and feelings of

helplessness. Pettis Dec., Exh. 99.

735. From 1982 through 1985, Dr. Spivey reported that Irma continued to suffer from Major Depression and that her prognosis was poor to fair; her condition had not changed. As late as February 1986, she had not recovered enough to return to work. Pettis Dec., Exh. 99.; Spivey Dec., Exh. 111.

736. Thus, for over at least a four-year period when Petitioner was a young adolescent, his only emotional support was being provided by a woman who herself was so severely depressed that she was virtually unable to function. Pettis Dec., Exh. 99.

Irma Surrell's Stroke

737. Petitioner began to seriously deteriorate after his move to Berkeley. He was in a new school where he was even more ostracized and socially isolated. His father had died. The Surrell household was a shambles and Irma was severely depressed and taking drugs and drinking alcohol. Pettis Dec., Exh. 99.

738. Although Irma Surrell had few resources to cope with the problems facing her family and certainly had little left over for her grandson, she was throughout Petitioner's life the one caregiver who was at least consistently living in the same house with Petitioner and who, by all

accounts, very much loved her grandson. Pettis Dec., Exh. 99.

739. Tragically, in 1990, when Petitioner most needed her, Irma Surrell suffered a massive stroke right in front of Petitioner. Pettis Dec., Exh. 99.

740. Irma was on the telephone talking to her son Michael, who had called her from jail. Suddenly she fell backward and hit her head. Petitioner had to call the paramedics. Pettis Dec., Exh. 99.

741. After Irma's stroke, Petitioner's Aunt Celeste took over running the house. Irma couldn't take care of herself anymore -- she couldn't move one side of her body and her speech was slow and slurred -- and Celeste thought she was going to be in charge of the house. While Celeste wanted everyone to think that she was taking care of everything, she was not really any help to Irma or anyone else, especially Petitioner. Celeste wanted to be in charge of all the money in the house, even though she was not working herself. Instead of a real job, Celeste was selling cocaine from the house. The same people would stop by the house on their lunch breaks and they would go into Celeste's room and close the door for a long time. Everyone would come out looking like they had just gotten high. Both Petitioner and his cousin Tamika Harris found it difficult under the circumstances to view Celeste as an adult from whom they should take

instructions. Pettis Dec., Exh. 99.

Alcohol/Drug Abuse

742. Drug abuse and alcoholism are common responses to the mental illnesses and environmental stressors suffered by Petitioner. In Petitioner's situation, as mentioned earlier, this was compounded by a genetic predisposition. Petitioner's polysubstance dependence began in his early youth. He drank alcohol starting in elementary school and quickly graduated to snorting heroin and taking pills such as Valium in an effort to ward off the intense feelings of rejection, abandonment, shame, humiliation, low self-esteem, fear, terror, anxiety, loneliness and depression that he felt in response to the abuse and neglect in his life. As he became older, he developed an addiction to alcohol and drugs, especially heroin and Valium. It has been well documented that children who are subjected to severe 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. This is also true of children and adolescents like Petitioner who suffer from depression. Pettis Dec., Exh. 99.

743. Chronic use of heroin and drugs like Valium in the normal functioning brain results in sufficient impairment to render the user unable to conform their sense of reality and behavior to normative standards. The

combination of Petitioner's impaired cognitive function with polysubstance abuse in the amounts documented here compounds this effect. Watson Dec., Exh. 122; Pettis Dec., Exh. 99.

744. Petitioner's drinking, as early as age 10 or 11, was clearly an attempt to self-medicate his depression and trauma. He would go to school drunk as early as the 6th grade. He had to repeat the grade. Pettis Dec., Exh. 99.

745. Petitioner knew he was drinking too much but he drank something every day – whatever was around – even though he got sick to his stomach ever time he drank – but he just kept drinking. Pettis Dec., Exh. 99.

746. Petitioner also turned to heroin. He liked heroin best because it put him to sleep and that way he could escape from his circumstances. It was different from any other drug he had used before. He found himself dozing off in the middle of a conversation. After the first time he tried it, he tried it again the next day, even though it had made him sick to his stomach. Pettis Dec., Exh. 99.

747. At some point in his late teens, Petitioner switched from heroin to pills, primarily Valium and codeine. At first two pills would knock him out, but eventually he was taking pills in larger and larger quantities. Pettis

Dec., Exh. 99.

748. Valium and other benzodiazepines are commonly self-administered by drug addicts, sometimes to ameliorate withdrawal from heroin, alcohol or other drugs. Pettis Dec., Exh. 99.

749. While these drugs can be prescribed for panic attacks, anxiety, depression, and insomnia, current and ex-drug abusers may have different subjective responses to psychoactive drugs than non-drug abusers. Heroin addicts use Valium and other benzodiazepines to self-medicate opiate withdrawal symptoms. Pettis Dec., Exh. 99.

Chronic Exposure to Violence

750. Petitioner grew up in an isolated, threatening and dangerous community. At risk himself, he also experienced the loss of close friends and family members. This chronic exposure to violence left Petitioner even more depressed, chronically anxious and traumatized. He was under intense psychological distress. Pettis Dec., Exh. 99.

751. Even for a child and adolescent growing up in a crime-ridden neighborhood, Petitioner's exposure to violence was extraordinary. It began in his first few years when he lived with his mother and her drug-addicted boyfriends in what amounted to crack houses. It continued in the household of his grandmother Irma Surrell, where he witnessed his male

relatives physically abusing the women with whom they lived and bore children, his grandmother and great-grandmother's gun collections, and his grandfather's gun collection, part of which he kept at the Surrell house. Pettis Dec., Exh. 99.

752. Petitioner's exposure extended beyond his immediate family to his closest friends. His best friend Paris, whom Petitioner idolized, was chased and after an altercation following which Paris jumped from a roof for escape, lost his leg. Paris was ultimately shot and killed in a separate incident, which was devastating to Petitioner. Pettis Dec., Exh. 99.

753. On another occasion, Petitioner was walking past a store in Oakland when a man stumbled past him after being shot in the knee. The man was bleeding and trying to run away. Petitioner has been reported as terrified by the sight and almost hyperventilating on the spot. On another occasion, Petitioner was staying with one of his grandfather's other families when the next door neighbor's car was shot up with bullets. As soon as the shooting started, Petitioner hit the floor, probably believing that someone had come to kill one of his relatives. Pettis Dec., Exh. 99. Petitioner was also "jumped" and beaten up on occasion. Pettis Dec., Exh. 99.

754. The violence in the Oakland community during the time Petitioner lived there is well known and certainly well documented. Pettis

Dec., Exh. 99.

755. Petitioner's reaction to this exposure to violence is evidenced by his well-documented aversion to guns. Pettis Dec., Exh. 99.

756. Petitioner's response to his drug addiction, and chronic exposure to violence, must be viewed within the context of Petitioner's life. Had Petitioner come from anything resembling a stable family situation, had he not suffered from depression, had he not been chronically neglected throughout his life, or had he not had the mental deficits which profoundly impaired his ability to succeed, this exposure might have had a less dramatic impact. It is well established that children who are at risk, as Petitioner clearly was, can be assisted by positive factors in their lives. Petitioner had none. Pettis Dec., Exh. 99.

757. Thus, Petitioner's reactions, from a clinical standpoint, were tragically predictable. Petitioner did not want to repeat what he had seen in his own family – an endless cycle of crimes and violence – yet he saw no way out. He never received assistance from probation although he repeatedly requested it right after he was first placed on probation. He felt that no one understood the dangerousness or the seriousness of his situation on the streets. Pettis Dec., Exh. 99.

758. Petitioner was exposed to an extraordinary level of community

violence. Witnessing violence at the community level resulted in heightened anxiety, stress, depression, self-blame and hopelessness. The psychological and cognitive impact included an increased likelihood of acting out and self-destructive behaviors. Pettis Dec., Exh. 99.

Stressors at the time of the crime

759. In the months preceding the crimes at issue in this case, Petitioner's life was spinning out of control. He had recently been released from jail where he served time for a drug-related offense and was determined not to go back because he knew that the next time he was caught he would be sent to state prison. He was attempting to continue school, which for the first time in his life, he felt he was succeeding at, but had little money to even commute to the school facilities. He was essentially homeless since his grandmother had decided that he was old enough to take care of himself. He was self-medicating with prescription drugs, including Valium and codeine, as well as continuing to abuse alcohol, he had come under the influence of Antoine "Twan" Johnson and his mother's physical situation was seriously deteriorating. Pettis Dec., Exh. 99.

760. Petitioner originally began going to the house on Cole Street, a "crack house" because his mother was living there but also because it was

closer to his school, Adult Day. He sometimes stayed there particularly if he did not have the bus fare to return to Berkeley. Pettis Dec., Exh. 99.

761. Petitioner first met Antoine "Twan"Johnson at the Cole Street house. Twan treated Petitioner as a younger brother, felt sorry for him, believed he was emotionally really young, and, therefore paid for small things like haircuts. Pettis Dec., Exh. 99.

762. Ironically, Petitioner was enjoying school for the first time. He was doing relatively well and believed that school would help him stay away from the street – at least for a little. When he got out of jail, he wanted to do something different with his life even if it was "only a little different." Pettis Dec., Exh. 99.

763. He felt there was no way out of the life he was leading. He tried a number of things including telling his probation officer Mei-Ling Pastor that he wanted to get out of the area. He tried to stay off of the streets at least part of the time. Pettis Dec., Exh. 99.

764. Petitioner was extremely concerned about his mother. Her stump left from her amputation was badly infected. He felt she needed to go to the hospital. Pettis Dec., Exh. 99. Petitioner's desire to get Marcia to the hospital appears to be two-fold. First, he was genuinely concerned for her health and safety. Marcia's leg smelled so badly that you could smell it

even when you were not in the room with her. Pettis Dec., Exh. 99.

765. Second, Petitioner's experience with his mother had shown him that his mother was only a "mother" when she was in the hospital. It was the only time she was concerned and asked Petitioner what he was doing in his life. They could be alone together then – without Sonny or any of the people at the Surrell house. Pettis Dec., Exh. 99.

766. One day during the time when Marcia was living at Bettye Jackson's house on Cole Street, she paged Petitioner numerous times on his beeper. She had never done this before. Apparently, Marcia had gotten into an altercation with her boyfriend Sonny. Bettye's niece Tanya told Petitioner that Sonny had hit Marcia with a stick. Although Petitioner urged Marcia to go and stay at Irma's house, Marcia refused to leave the crack house. Pettis Dec., Exh. 99.

767. In the past, Petitioner had repeatedly witnessed Sonny and others beating and abusing Marcia. Now Petitioner went after Sonny. Petitioner had seen him hurt Marcia when he was young. Now he could do something about it. But his mother did not seem to want his help. Petitioner believed his mom feared Sonny. Pettis Dec., Exh. 99.

768. When Petitioner went to the Cole Street house, Garry Carter would be there. Petitioner really did not know much about Garry. He was

really there to see his mother. She was completely "drugged out" and her leg was literally putrefying. Marcia would sit in the living room of the Cole Street house all day doing nothing and often crying. Petitioner felt helpless and angry because his mother was getting worse, and she would not go to the hospital. He felt like he was "dealing with a kid." He would also get upset because he knew the people who were giving her these drugs, one of whom was Garry Carter. Pettis Dec., Exh. 99.

769. Before the shootings, Bettye Jackson had kicked Garry Carter out of her Cole Street house because he was stealing from the people that stayed there. Garry had stolen things from Bettye and Kenya's rooms. Even though they both had put locks on their doors, he still broke in. Before the shootings, Bettye had found it necessary to pull a gun on Garry because she was so afraid of him. The whole neighborhood was complaining about him. Pettis Dec., Exh. 99.

770. Garry would also take Marcia's money and push her around physically. Petitioner was aware of this. Petitioner also believed that Garry had raped his mother. Pettis Dec., Exh. 99.

771. Garry used to bully Petitioner and talk down to him. Antoine Johnson witnessed Petitioner sitting in the living room crying and very upset. When he asked Petitioner what was the matter, Petitioner told him

that Garry was picking on him and his mother. Antoine Johnson believes that Petitioner was probably too scared to go after Garry the way he himself would have. Pettis Dec., Exh. 99.

772. On the day of the shooting, Kenya called Antoine and told him that Garry had stolen more stuff from her. Antoine told her to pack her things and he would come and get her from Bettye's house. Petitioner and Antoine Johnson went to the Cole Street house to help Kenya move her stuff. Kenya still had stuff in the clothes dryer when they got there so they had to wait for them to be done. Kenya's sister Jasmeen was also there. Petitioner and Antoine sat down on the couch while waiting for Kenya's clothes to dry. Donald moved to the seat on the other couch only because he wanted to make a phone call and that was where the telephone would reach. Pettis Dec., Exh. 99.

773. Antoine Johnson kept a gun in the couch in the living room at Bettye's house because it was the only place in the house he could leave the gun without having Garry take it. Petitioner did not know Antoine had the gun in the couch. On the day of the shootings, Garry came to the house and let himself in. Antoine had a brief argument with Garry before the shooting started. He shot Garry five times while in the living room of Bettye's house. The shooting had nothing to do with drugs. Pettis Dec., Exh. 99.

774. Petitioner had no idea that Antoine had a gun. After the shooting, Petitioner was really upset and agitated, so Antoine gave him some Valium and codeine to calm him down. Pettis Dec., Exh. 99.

Dr. Pettis's Conclusions

775. There is a clear connection between the events of Petitioner's youth and his behavior as a young adult. Petitioner was the victim of ceaseless emotional neglect, chronic criminality and environmental chaos. From his earliest childhood, he suffered from depression and trauma. This history of childhood trauma, mental illness, neglect, deprivation and the absence of any resources with which to cope profoundly impacted the development of his adult functioning. Children are far more likely to develop normally with mentally healthy functioning and appropriate social responsibility if they grow up in environments that are safe, stable, disciplined and nurturant. Pettis Dec., Exh. 99.

776. Petitioner's life since birth has been a profoundly painful experience. He began life genetically predisposed to mental illness, drug addiction and alcoholism. He experienced very little that was positive in his home life, having been essentially abandoned by both his parents almost at birth. He was unsuccessful in school and the object of ridicule among his peers. Pettis Dec., Exh. 99.

777. The untreated effects of childhood mental illness clearly influence adult interpersonal relationships. The various continuing effects of these illnesses also severely negatively effected Petitioner's ability to deal with stress. Exceptional stressors often trigger in a person such as Petitioner the perceived loss of control and helplessness, fear of impending intense pain, dissociation and efforts to reduce or avoid the source of the stress. Petitioner's behavior at the time of the crimes in question reflected the inner state of stress and turmoil that he was experiencing. Pettis Dec., Exh. 99.

778. Although environmental deprivation, parental neglect, and the chronically violent and criminal atmosphere that surrounded him contributed to Petitioner's disabilities, they are not solely to blame for his deficits. He was born pre-disposed to mental illness and substance abuse. He was always considered slow, and his disabilities went untreated. He suffers from organic brain disorder. The etiology of Petitioner's mental deficits are genetic, organic and environmental. His disabilities are long-standing and leave him with impaired judgment, compromised intellectual functioning, and a greatly reduced ability to control his actions, conform his conduct to the requirements of the law and think logically and rationally when he is in stressful and potentially complex decision-making situations.

He does not perceive events around him realistically, and he becomes mentally confused easily. He is easily dominated by others. Petitioner's mental impairments clearly leave him less able than a normal person to understand and conform his conduct to the law. Pettis Dec., Exh. 99.

779. Petitioner experienced psychological abuse and neglect in the forms of rejection, humiliation, belittling, maladaptive socialization, parental failure to supervise, and a chaotic and criminalistic home environment. Pettis Dec., Exh. 99.

780. Petitioner learned to withdraw and to live a solitary life, even though he came into contact with numerous people daily. He had very few lasting relationships. Petitioner was clearly depressed and apparently so throughout his childhood, adolescence and early adulthood. Petitioner's alcohol and drug abuse are a common way children and adolescents cope with depression. Pettis Dec., Exh. 99.

781. One method Petitioner adopted very early on to cope with this situation was the use of alcohol and drugs to block out the pain. He did his best with his extremely limited capabilities to cope and contend with the realities of his home life. As with many abused and rejected children, he desperately sought out his mother even more but to no avail. His chronic substance abuse is fully consistent with his history of childhood physical

and psychological abuse. Pettis Dec., Exh. 99.

782. Petitioner's self-esteem was low and had been since early childhood. He felt stigmatized by his lack of parents, his parents' drug abuse, his father's preference for his other children and his own awkwardness and size. Pettis Dec., Exh. 99.

783. The psychological abuse Petitioner experienced, whether intentional or simply the product of severe neglect, went on essentially on a daily basis. No one comforted him or consoled him; no one sought to prevent or lessen the abuse. Pettis Dec., Exh. 99.

784. Petitioner's history of neglect, depression, emotional problems and impaired mental functioning, left him incapacitated and overwhelmed in the face of a sudden stressful situation. Pettis Dec., Exh. 99.

785. Petitioner did not form the specific intent required to commit first-degree murder. At the time of the offenses, Petitioner could not plan, weigh considerations, and carry out a design of action and course of conduct aimed at achieving a specific goal. Accordingly, Petitioner did not premeditate and deliberate. Petitioner's emotional impairments combined with his drug use precluded him from being aware of the duty imposed on him not to commit acts which involved the risk of grave injury or death and precluded formation of the mental state to understand meaningfully his

actions and consequences. Pettis Dec., Exh. 99.

786. Petitioner did not at the time of trial and does not at present suffer from an Antisocial Personality Disorder.[61] "The essential feature of Antisocial Personality Disorder is a pattern of irresponsible and antisocial behavior beginning in childhood or early adolescence and continuing into adulthood."[62] Criteria for a diagnosis of Antisocial Personality Disorder include a requirement that there be evidence of a Conduct Disorder before age fifteen and that the individual continue a pattern of irresponsible and antisocial behavior from age fifteen into adulthood. Pettis Dec., Exh. 99.

787. Petitioner plainly does not meet those criteria. Petitioner is universally described as slow and depressed. He is the child who was picked on, not the bully who used his size and weight to intimidate others. He was neglected, lonely and withdrawn, not the leader breaking rules and inspiring other children to follow his lead. There is no evidence of a reckless disregard for others in his past. Rather, Petitioner's past is marked by his life-long concern for his drug-abusing and neglectful mother and his yearning for a father who never paid him any attention. Adults who at

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[61] Trial counsel was ineffective for failing to present evidence to refute the prosecutor's repeated references to Petitioner being a sociopath.

[62] American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders,* Third Edition Revised. Washington D.C., American Psychiatric Association, 1987, pp. 342-346.

various points in Petitioner's life took him in consistently describe a polite, quiet, respectful young man who presented no problems. Pettis Dec., Exh. 99.

Institutional Adjustment

788. Trial counsel failed to consult an institutional adjustment expert even after the prosecutor raised the specter of future dangerousness in her opening statement and effectively implied through defense expert Dr. Rosenthal that Petitioner was likely to become a member of the prison gang the Black Guerrilla Family and to kill people in prison. With the possible exception of the prosecutor's repeated assertions that Petitioner had committed an "execution murder" and a "cold-blooded killing," no issue was presented with more vehemence as the compelling reason why Petitioner deserved to be sentenced to death. Thus, it was extremely important for the defense to investigate, prepare and present evidence to refute these assertions. Trial counsel unreasonably failed to investigate, prepare and present such evidence, even though it was available to them. They knew or should have known that Petitioner's history pointed directly to the conclusion that he was a person who would not be dangerous in confinement.

789. Had counsel investigated, prepared, consulted and presented

such an expert, the following highly relevant mitigation would have been available.

790. Whenever possible and in the appropriate case, it is important for defense counsel to at least consider affirmatively addressing the issue of positive future adjustment to prison. This is because capital jurors may become concerned about whether a capital defendant will pose a future danger and, therefore, whether by sentencing him to prison rather than death they are possibly endangering others.[63] Haney Dec., Exh. 71.

791. In conjunction with such testimony, and in addition to whatever can be said directly about a defendant's potential for positive adjustment, jurors need reassurance that maximum security prisons not only punish inmates but also maintain adequate security, protect against escapes, ensure the safety of the persons who work there, and have effective mechanisms for controlling the behavior of even highly disruptive prisoners. In cases in which capital defendants have something positive to contribute to prison life (such as work skills, religious commitment, artistic talent), in addition to simply not posing a problem, that too should be highlighted. This kind of information provides the jury with a sense of the positive contributions that a life sentence can accomplish and, conversely, one of the things that might

[63] *See*, Claim A regarding the jurors' consideration of extrinsic evidence directly relating to their concerns about future dangerousness.

be lost by a death verdict. Haney Dec., Exh. 71.

792. There were several factors arguing in favor of including such testimony on Petitioner's behalf. One, Petitioner *was* a good candidate for positive prison adjustment. He had not been a gang member despite living in two communities where gangs flourished. His prior crimes and lifestyle were nonviolent, and he had no history of aggressive confrontations with authority figures. For example, although his actual performance in school was marginal, he was not a behavior or management problem, had no record of fights or assaults in school, and was generally regarded as someone who was easy to get along with. Indeed, there were a number of school officials who had contact with Petitioner who had positive things to say about him, despite his poor academic record, and some who felt very sorry for him. Similarly, although he had not performed particularly well on probation, he did not have difficult or problematic relationships with his probation officers. Thus, Petitioner lacked the sort of confrontational history with teachers and probation officers that might be expected to translate into problems with prison authority figures. Haney Dec., Exh. 71.

793. Once the prosecutor implied that Petitioner's future in prison would be extremely troublesome and likely dangerous, it was incumbent upon defense counsel to rebut that allegation.

794. An expert on prison adjustment and prison conditions could have addressed the important distinction between prison and jail. That is, such an expert could have explained to the jury that, given the high security classification score that Petitioner's convictions in the instant case ensured he would receive upon entering the California Department of Corrections, he would be sent *only* to one of California's maximum security ("Level IV") prisons. These prisons are the harshest, most safety- and security-minded in the state. Haney Dec., Exh. 71.

795. Thus, even if the prosecutor had introduced testimony about an alleged altercation in jail that she claimed Petitioner was involved in (something that she alluded to in her cross examination of Dr. Rosenthal but never introduced testimony about[64]), an expert could have explained to the jurors that, unlike the Alameda County jail facility in which he had been housed, Level IV prisons in California were places designed for very long-term, ultra-secure confinement, where a much greater emphasis on security, surveillance, monitoring occurs and in which many more mechanisms for controlling and punishing the behavior of inmates had been instituted. These institutions were certainly adequate to the task of safely controlling Petitioner's behavior and, in the unlikely event that he did misbehave, had

[64] *See* RT 191; *but see* Claim E re actual facts of this incident.

numerous disciplinary procedures and sanctions at their disposal with which to effectively respond, including isolating him in what were then some of the most severe disciplinary segregation units anywhere in the country. Haney Dec., Exh. 71.

796. In addition, once the specter of prison gangs had been brought into the trial, it behooved defense counsel to consult with experts on this issue and consider seriously whether such a person should be called to testify. Such an expert would very likely have informed defense counsel, and the Boyette jury if asked, that Petitioner was not a probable candidate to join a prison gang, in part because he had grown up in areas of Oakland and Berkeley that were dominated by neighborhood gangs and had not previously become a gang member. Further, Petitioner's characteristic pattern as a "loner," of staying by himself, was not likely to change in prison. At one point, Dr. Rosenthal appeared to be suggesting precisely that defense counsel should have consulted an expert on gangs or prison gangs. He said on cross examination: "I'm not a student of prison gangs. There are people who study those — sociologically study those groups. I don't do that and I don't have much information about what these gangs are like." RT 1899. Because defense counsel chose not correct the misleading impression created through the prosecutor's cross-examination of Dr.

Rosenthal, the jury was not given much information about what such gangs were like either. The only "information" that arose in the course of the trial came in the form of the prosecutor's frequently expressed but inexpert opinions. Haney Dec., Exh. 71.

Institutional Failure

797. Trial counsel also failed to present evidence of institutional failure. Had trial counsel obtained and reviewed Petitioner's probation records and/or interviewed Mei-Ling Pastor, he would have discovered evidence that Petitioner was failed by the systems that were supposed to help him.

798. Trial counsel could also have presented rich information about the failure of the Berkeley school system to provide for Petitioner's needs.

Counsel's Failures were Prejudicial

Witnesses Presented at Trial

799. The defense penalty phase presentation had no thematic structure other than that Petitioner was a follower and functioned as a twelve year old, presented little or no evidence which could even be termed mitigating, and most importantly, was inaccurate and misleading. Thus, what should have been the presentation of evidence which created the basis for an argument that Petitioner be allowed to live, actually was inapposite,

and left the jury with the false impression that Petitioner, although he was the child of a drug addict, had lived in a loving home with numerous parental substitutes who sought to help him even to the extent of taking him to a psychologist. Once the main "theme" presented by trial counsel, that Petitioner was a follower, had backfired and had been used by the prosecutor as aggravation, counsel still failed to do anything to dispel the aggravating evidence or present an accurate picture of Petitioner's actual circumstances.

800. There were numerous avenues that reasonably competent counsel could have taken either separately or in conjunction to present a compelling and accurate case in mitigation. Even a minimal investigation would have uncovered many powerful mitigation witnesses. If counsel or counsel's investigator had simply gone to Petitioner's former neighborhood in Oakland, many of the mitigation witnesses whose testimony is detailed above would have been uncovered.

801. A legal investigator who conducted much of the investigation for present counsel drove to the blocks of East 28th Street and 12th Avenue in East Oakland, while standing on the curb in front of 1130 East 28th Street and looking in a 360-degree circle, he could see the following residences in plain view: 2738 12th Avenue, Eldora Robinson, 1136 East

28th Street, Helen Thomas, 1200 East 28th Street, Jeanette Deran, 1202 East 28th Street, the Dennis family, and 1220 East 28th Street, Eloyce Packer. Moreover, while standing in front of 1130 East 28th Street, he could also see Bella Vista Elementary School. Sussman Dec., Exh. 118.

802. Signed declarations containing powerful mitigation evidence were subsequently obtained from Eldora Robinson, Helen Thomas, Jeanette Deran, Eloyce Packer, and Anita Dennis, who were interviewed in their respective homes. After visiting the Bella Vista Elementary School office, the investigator confirmed that Vivian Jefferson had, in fact, been the Principal of Bella Vista during the years of Petitioner's attendance. Vivian Jefferson's name had been listed as a contact on some of Petitioner's records. Sussman Dec., Exh. 118.

803. In addition to knowledge about Petitioner and his family, the witnesses were able to provide information about the neighborhood and surrounding area of Oakland. Sussman Dec., Exh. 118.

804. Each of the declarants would have been excellent witnesses at Petitioner's trial. Eldora Robinson, Helen Thomas, Jeanette Deran, Eloyce Packer, and Anita Dennis have all lived in and around the neighborhood of East 28th Street and 12th Avenue since Petitioner's family lived there. Ms. Robinson and Ms. Thomas are currently employed. Ms. Deran, Ms. Packer,

and Ms. Dennis are all retirees. Vivian Jefferson is also a retiree. Each witness provided specific recollections of Petitioner and they all clearly continue to care about him. They were all easily reached and very willing to provide the necessary time to discuss Petitioner and his family. Sussman Dec., Exh. 118.

Witnesses Presented at Trial

Family Members

805. Six members of Petitioner's family testified at trial. The total number of transcript pages necessary to document the information these witnesses presented to the jury in mitigation was less than twenty pages.

806. Reasonably competent counsel would have prepared the lay witnesses they anticipated presenting so that they would be aware of the kinds of information that would provide evidence of the mitigating themes counsel intended to argue to the jury.

807. The inaccurate picture presented by the defense could have been dispelled with only the witnesses presented had counsel prepared these witnesses to testify. All of the family witnesses who testified[65] have stated

[65] Petitioner was unable to obtain a declaration from Irma Surrell due to her severe illness by the time Petitioner was appointed counsel. Petitioner was also unable to obtain a declaration from Petitioner's aunt Charmaine Surrell. Charmaine Surrell has been seriously addicted to cocaine since before her testimony at Petitioner's trial. Celeste Surrell Dec., Exh. 113.

that counsel failed to meet with them or prepare them for their testimony. Trial counsel failed to make even minimal efforts to prepare lay witnesses for their penalty phase testimony. The results were prejudicial.

808. Had counsel reasonably prepared these witnesses, they would have been able to present the following mitigation evidence.

809. Tamika Harris, Petitioner's cousin, has stated that: "At the time of my testimony in Maurice's trial, I had no idea what a penalty phase was. I had no idea what Maurice's attorney would ask me. I have reviewed my testimony and while I believe all of my answers were completely honest, I do not believe my testimony gave an accurate picture of my family and what life was like for Maurice growing up." Tamika Harris Dec., Exh. 76.

810. Tamika, who was only 17 years old at the time of trial, was never directly contacted by trial counsel or reasonably prepared for her testimony. Moreover, she was given the responsibility of finding witnesses to testify to save her cousin's life without any guidance as to how to accomplish this task.

> I believe that my grandmother, Irma Surrell, was the person who told me a few days before I testified that Maurice's attorneys wanted me in court. My grandmother also told me that Maurice's lawyer wanted me to find a teacher who might also be willing to come to court. Since my grandmother asked me, I contacted Ernest Posey, who had been Maurice's teacher

> in the past and was my teacher at the time. Mr. Posey said he would be willing to do whatever he could to help Maurice. I was given no instructions or guidance except to find a teacher.

Tamika Harris Dec., Exh. 76.

811. Tamika has further stated that:

> My only contact with Maurice's attorneys before my actual testimony was a short meeting with one of them outside the courtroom. I was told that I had to wait outside until I was called to the stand. When I was asked questions by Maurice's attorney, I gave very short answers, since I didn't know how much information he wanted. For example, when I was asked about my father, Bobby, and his relationship with Maurice, the attorney asked, "Did your father kind of adopt Maurice?" I said, "Yeah." Although my father tried to be good to Maurice and sometimes tried to include Maurice when my father and I did things together, "adopt" wouldn't exactly describe their relationship. My father had spent time in jail and he never lived with Maurice while Maurice and I were growing up. If Maurice's attorney or investigator had explained to me what a penalty phase was, and if they had actually interviewed me prior to testifying, I would have been very willing to tell them more about Maurice, our family, and our experiences growing up and would have known to provide more complete answers when I testified.

Tamika Harris Dec., Exh. 76.

812. Tamika Harris could have testified to at least the following

relevant, powerful mitigation evidence.

813. Tamika is Petitioner's cousin. Her mother, Charmaine, and Petitioner's mother, Marcia, were sisters. She was born on May 19, 1975, in Oakland, California. Tamika Harris Dec., Exh. 76.

814. Her parents, Charmaine Surrell and Bobby Harris, met when they were teenagers. They got to know each other because her mother's family, the Surrells, were living on East 28th Street and her father's family, the Harrises, were living nearby on 12th Avenue. Tamika Harris Dec., Exh. 76.

815. Tamika lived with her parents when she was little. Her parents split up when she was about three years old. From the age of three until she was in high school, she mostly lived with her grandmother, Irma Surrell, her great-grandmother, Geneva Jacobs, and Petitioner. Her mother stayed with her at Irma's house from time to time, as did her aunts Celeste and Marcia, and her uncle Michael. In 1982, when she was about six years old, her mother married a man named Ronnie Adams. At that time, her mother, Ronnie, and his daughters, Denee and Chanel, moved in with the other people living at East 28th street. Tamika Harris Dec., Exh. 76.

816. After Tamika began living with Irma, she would spend most of her summers and holidays with her dad's family, the Harrises. Even when

her mother Charmaine was not living with her at Irma's, she still saw both of her parents pretty regularly. Tamika Harris Dec., Exh. 76.

817. Her grandfather, Eugene Surrell, was never around much when she was growing up. He did not really play any important role in their family. Eugene might come by for a few hours or maybe a few days, but he never stayed for very long. She does not believe that her grandparents were ever officially divorced, although Eugene had been married to two other women besides Irma. Eugene also had other children from other relationships. In addition to spending time with his other families, Tamika's grandfather also spent some time in jail while she was growing up. Tamika Harris Dec., Exh. 76.

818. Eugene's brother, Van Surrell, would sometimes come around their house when Tamika and Petitioner were young. She remembers that he would drive up on his motorcycle. Van has been to prison on numerous occasions and Tamika believes that he had about fifteen children with a few different women. Tamika Harris Dec., Exh. 76.

819. Tamika has stated that Irma raised Petitioner because her aunt Marcia and Dicky Boyette, Petitioner's parents, were both drug addicts. Marcia was almost always high whenever she came by the house. Tamika does not have many memories of Marcia when she was not on high or sick

from drugs. Marcia would usually come to eat their food or borrow some money. If Marcia ever stayed over, she wouldn't usually stay more than a few days. Tamika does not have a clear memory of Dicky because she was very young when he was around, but she remembers being told that he was just as addicted to drugs as Marcia. Tamika Harris Dec., Exh. 76.

820. She does recall that Dicky didn't spend much time with Petitioner when they were growing up. She recalls that Petitioner would get very excited whenever there was a chance that he would get to hang out with his dad, but those plans did not usually occur. "Dicky died when Maurice was about thirteen years old and I don't think that Maurice met a lot of his father's family until Dicky's funeral. I remember Maurice met his half-sister LaMonica for the first time at the funeral. When Maurice was old enough to travel around by himself, he would sometimes go to Dicky's mother's house to see that side of his family. I don't remember any family from Maurice's father's side ever coming around the house to see Maurice." Tamika Harris Dec., Exh. 76.

821. Tamika also recalled that:

> Like my mother and aunt Marcia, my aunt Celeste used a lot of drugs. When I was young, I remember Celeste and Marcia bringing some of their friends around the house. They used to hang out with low life criminals and drug dealers. My mother warned me about a guy

> nicknamed Chicago, who Celeste went out with for a while. My mother told me that Chicago was a rapist and that I should stay away from him. Even though my mother told me those things about Chicago, he was always let in to our house. When I got a little older, my aunt Celeste told me how she used to steal from people by dropping sleeping pills or some kind of drugs into their drinks so they would get knocked out. She also told me how she had spent time in jail for selling drugs. Until I was about ten years old, I didn't know my aunt's name was Celeste. She had always gone by "Red," so I always called her Auntie Red. Celeste told me that Red was her street name for when she was hustling and dealing.

Tamika Harris Dec., Exh. 76.

822. Tamika has also stated that, "My uncle Michael always had a violent temper. Michael used to get into a lot of fights -- either yelling and screaming or with his fists -- and I remember the police having to come around our block to break things up. When I was seven or eight years old, Michael socked my mother -- his own sister -- in her face and busted her lip." Tamika Harris Dec., Exh. 76.

823. Tamika remembers Marcia's boyfriend Sonny Hill. With regard to Sonny Hill she has stated:

> Sonny's family lived on Foothill Boulevard in East Oakland. Everyone always talked about Sonny and how he and his entire family were into selling and using drugs. Sonny was a criminal and he got my aunt Marcia to work

> scams with him. Marcia didn't come around the house very often, but once in a while she and Sonny would stop by my grandmother's house. They never stayed very long, though. Maurice would sometimes go with Marcia to Sonny's house on Foothill, even though our great-grandmother thought it was too dangerous at Sonny's house. I don't think Maurice really cared that it was a drug house, since it was one of the few times Maurice actually got to do something with his mom. For Maurice, going to Sonny's meant spending time with his mom, even if it was just to watch television while Marcia and everyone else got themselves high.

Tamika Harris Dec., Exh. 76.

824. Tamika was also aware of Petitioner's relationship with Paris Robinson, a neighborhood boy who acted as a big brother to Petitioner:

> Maurice would sometimes spend the night at Eldora Robinson's house, who lived a few houses away on 12th Avenue. Eldora's son, Paris, was a few years older than Maurice. Paris was sort of like a big brother to Maurice. Maurice used to get picked on a lot and Paris was one of the only people who would look out for Maurice. In the mid-1980s, when we were still living on East 28th Street, Paris jumped off of a building while being chased by a gang of kids. Paris messed up his leg very badly and it had to be amputated. I remember Maurice being real upset when he heard about Paris and how he lost his leg. A few years after we moved from East 28th Street to Berkeley, Paris was shot and killed only a few blocks from where we had grown up. Maurice was very shaken up and upset by Paris' death.

Tamika Harris Dec., Exh. 76.

825. Tamika remembers that Petitioner was always "slower" than the other children:

> Maurice was always slower than kids his age. Kids younger than Maurice would pick on him, either because of his weight or because he was slow. I am over two years younger than Maurice, but I still had to protect him. I remember that Maurice was held back at least one grade at Bella Vista because he wasn't doing well in school. I don't believe that Maurice was ever placed in any special education classes or programs at Bella Vista when we were going to school there, although I am not sure if the school even had any such thing.

Tamika Harris Dec., Exh. 76.

826. Tamika was aware of habits that Petitioner exhibited which were unusual:

> Maurice used to have a habit of licking his lips. Maurice would be sitting by himself or staring out a window and he would be licking his lips. Maurice licked his lips so much that the skin around his mouth was raw and it formed a ring. Maurice also used to suck his tongue. Maurice would do these things while spacing out or watching television and it never seemed like he noticed he was even doing it.

Tamika Harris Dec., Exh. 76.

827. Tamika recounts the Petitioner's reaction to corporal

punishment:

> Maurice and I used to get our spankings and whippings from our great-grandmother, who we called "Mother." Mother used a switch to whip us and she had names for the types of switches she used: Dr. Green and Dr. Brown. Depending on what we did and what we were wearing, Mother would either pick a green switch or a brown switch from a tree or bush outside. Maurice used to get disciplined more than me, especially at school. Mother would sometimes smack Maurice in his head with her hand or a spoon in the cafeteria if Maurice got into trouble for anything. Maurice would usually cry after Mother smacked or whipped him.

Tamika Harris Dec., Exh. 76.

828. Tamika has stated the following with regard to Petitioner, Dr. Spivey and her grandmother's depression:

> When Maurice was about eleven years old, my grandmother sent him to see a therapist named Dr. Spivey. She was worried that Maurice had trouble concentrating and that he was depressed. Maurice ended up seeing Dr. Spivey for a couple of years. ¶ I believe my grandmother, Irma, had been seeing Dr. Spivey for herself before Maurice started going. I think my grandmother was seeing Dr. Spivey about depression. My grandmother would often keep herself shut in her room by herself with the door closed for long periods of time.

Tamika Harris Dec., Exh. 76.

829. Tamika Harris has related the following regarding the steep

decline her family suffered when they were forced to move to Berkeley.

> When I was still little, my grandmother owned a liquor store for a couple of years. I believe my grandmother lost her store because my grandfather was going to trial for murder around that time and my grandmother helped pay for his attorney with every dollar she had. My grandmother went into some serious debt because of my grandfather.
>
> A little while after my grandmother lost her liquor store, we moved from East 28th Street to Berkeley. My great-grandmother, Ms. Jacobs, moved to the Dennis family's house, who lived next door to us on East 28th Street. I think my great-grandmother stayed close to the school because she needed to keep her job at Bella Vista because my grandmother wasn't working anymore. My great-grandmother would come visit us in Berkeley on the weekends before she finally moved in.
>
> Things got even more out of hand for our family after we moved to Berkeley. Dicky, Maurice's father, died soon after we moved and Maurice seemed to have a real hard time dealing with it. I don't think Maurice ever saw much of his dad, but Maurice would always talk about how he hoped his dad would quit using drugs and start spending more time with him. Marcia was also getting worse because of her heroin problem, although we still didn't see too much of her.

Tamika Harris Dec, Exh. 76.

830. Other of Petitioner's relatives moved in with them after they moved to Berkeley.

When we first moved to Berkeley, my aunt Celeste was off living with other people, but would show up at the house when she needed money or a place to stay.

My uncle Michael had been married to Regina "Gina" Smith during the early 1980s, but by the time we moved to Berkeley, his marriage was falling apart. They had two kids together, Ronnell and Raquel, but Gina was a drunk and she and Michael would fight a lot. Gina moved home to Cleveland, Ohio, for a few years during the 1980s and Michael followed her there. After we moved to Berkeley, Gina left Michael for good and ended up moving to New Jersey.

Michael came to live with us in Berkeley after Gina left him. Michael was a mess after he and Gina split. Michael was smoking crack and was in and out of the house, always asking people for money. Maurice and Marlon, Michael's oldest son, used to complain that Michael would steal their sneakers or ask them for money. Marlon, who is about one year older than Maurice, would live with us from time to time. Marlon's mother and other grandmother lived up in Richmond and he would mostly live up there with them.

In the late 1980s, Michael started living with a woman named Lynette Daniels, who was a full blown crackhead. When I was about fourteen years old, I remember that Michael stabbed a man in a fight that had something to do with Lynette. I heard Michael stabbed the guy thirty-seven times. Michael ended up going to prison, although he was eventually paroled and came back to live with us in Berkeley. Less than one year after Michael was paroled from prison, he was arrested for killing a man in a fight. The

> fight happened just around the corner from my grandmother's house in Berkeley.

Tamika Harris Dec., Exh. 76.

831. Petitioner and Tamika started drinking alcohol when they were in the 5th or 6th grade. Although Petitioner is only approximately two and a half years older than Tamika, he was held back when they were at Bella Vista elementary school, so they were only one grade apart. They were going to Malcolm X elementary school in Berkeley when they started drinking. Tamika's step-father, Ronnie, worked for a wine distributer and he would always bring home a lot of wine, usually in small bottles. Tamika and Petitioner would pour some wine into cups and drink it on their way to school. Tamika has said, "I wouldn't see much of Maurice during the day, but I know that I would sometimes feel sick from drinking in the morning. Maurice and I would also drink wine after school. I remember getting sick from drinking after school and throwing up." Tamika Harris Dec., Exh. 76.

832. According to Tamika, "Petitioner wasn't the kind of kid who started trouble on his own. Everyone figured that any trouble Maurice was getting into was because of the people he was around. I remember our grandmother was upset with Maurice about him getting arrested, but she was not the type of person who would come down hard on Maurice or play the "tough love" game." Tamika Harris Dec., Exh. 76.

833. Tamika and Petitioner attended school together in Berkeley. "In Berkeley, Maurice and I both went to Malcolm X elementary school before going to Willard junior high school. Maurice had a difficult time at Willard and was held back another grade. I believe Willard had special education classes when we were going there, but I don't think Maurice was ever placed in one. Like at Bella Vista and Malcolm X, Maurice didn't do well at Willard. Maurice seemed pretty lost with the school work." Tamika Harris Dec., Exh. 76.

834. Following the move to Berkeley, Marcia's drug use worsened. Tamika was a witness to the devastating impact this had on Petitioner:

> My aunt Marcia's drug use continued to get worse and worse after we moved to Berkeley. Marcia started spending a lot more time in the hospital because her health was so bad from the drugs. One year I think Marcia broke her leg about twelve times. Apparently the drugs were causing her bones to become very brittle and her leg would break very easily. Marcia was high or coming off heroin almost all the time, so she would fall or trip a lot. Gangrene eventually set into her foot and she had to get part of her leg amputated. I think Marcia first had a piece of her leg amputated when Maurice was about seventeen years old. Marcia shot her heroin intravenously and after she had her leg amputated, she started shooting up through the stump of her leg. Another time, when Marcia was in the hospital because of heart problems, she had someone -- Sonny, probably -- shoot heroin directly into the IV hook-up that the

> doctors had been using for her heart. Before Marcia even turned forty years old, she had burned out most of her veins and had needle tracks all over her arms, feet, and neck. Marcia became so desperate for drugs that she once sneaked into the house in Berkeley that Maurice and I were living in and stole some stuff out of our grandmother's closet. Maurice worried about his mom all the time and when my mother or aunt Celeste would get angry with Marcia, it would make Maurice very upset.

Tamika Harris Dec., Exh. 76.

835. Petitioner's cousin Marlon is approximately one year older than Petitioner but according to Tamika, Marlon "always seemed much older." Tamika has stated:

> Maurice really looked up to Marlon and when Marlon started getting into dealing drugs when he was a teenager, I think Maurice started to follow down that road. Marlon would sometimes use Maurice's name and date of birth when he was stopped by the police, so Maurice started getting into trouble for stuff he never did. I remember Maurice got real upset when he finally figured out what Marlon was doing, but there wasn't anything he could tell Marlon.

Tamika Harris Dec., Exh. 76.

836. Tamika experienced problems in her immediate family after the move to Berkeley.

> My mother, Charmaine, Ronnie, and Ronnie's two daughters, also moved to Berkeley after we left East 28th Street. They lived with us at my

> grandmother's house on Boise Street for a while before getting their own house together. Ronnie drove a truck for a wine distributor, so he was often out on the road for a couple days at a time. My mother and Ronnie lived a couple of houses down from us on Boise Street until they moved to a place on 6th Street in Berkeley. I moved with them to 6th Street. It wasn't too long after we moved there that it became clear my mother was smoking crack. There was a man named Emmitt Gardner, who was a drug dealer, who lived upstairs from us. My mother started hanging out with Emmitt in his apartment and smoking crack with him after we moved in. One day, my mother just didn't come home. She left us completely. No one in the family saw my mother for days, until she finally showed up at my grandmother's house on Boise. I guess you could say that my mother moved back in with Irma after that, but she was still popping in and out all the time. My mother and Ronnie split up for good a few months after that.

Tamika Harris Dec., Exh. 76.

837. Tamika has related the crisis the family experienced after her grandmother had a stroke:

> After my grandmother, Irma, moved from East Oakland to Berkeley, she worked at a wholesale clothing company. Irma worked until August 1990, when she had a major stroke. Irma spent a few months in the hospital and was almost completely paralyzed. She wasn't able to speak for a while and had to undergo therapy to regain her speech. My grandmother's stroke was very upsetting and painful for everyone in our family. While my mother and aunts and uncle

were off getting into trouble and ruining everybody's lives, my grandmother was always the one person trying to keep it together.

After my grandmother had her stroke, Celeste came back to live in the house. Irma couldn't take care of herself anymore -- she couldn't move one side of her body and her speech was slow and slurred -- and Celeste thought she was going to be in charge of the house. While Celeste wanted everyone to think that she was taking care of everything, she wasn't really any help to Irma or anyone else, especially Maurice. Celeste wanted to be in charge of all the money in the house, all the while she wasn't working herself. Instead of a real job, Celeste was selling cocaine out of the house. The same people would stop by the house on their lunch breaks and they would go into Celeste's room and close the door for a long time. Everyone would come out looking like they had just gotten high. It was hard taking orders from someone like that.

Tamika Harris Dec., Exh. 76.

838. Tamika has also recounted the problems she and Petitioner experienced after her grandmother's stroke:

I got kicked out of Berkeley High School when I was seventeen years old. I was still having trouble dealing with my mom's situation, and everything that was happening with my grandmother and her stroke only made it worse. I wasn't going to classes and I flunked out. I was sent to East Campus Continuation, which is affiliated with Berkeley High. Maurice had gone to East Campus a few years before I got there. By the time I was at East Campus,

> Maurice had pretty much stopped going to school. He had been arrested a couple of times for dealing drugs and had spent about two short stints in jail. Maurice and I still spoke on the telephone, but we saw less of each other because I was living with my father's family in East Oakland. Maurice was spending less time in Berkeley -- Celeste had actually kicked him out of the house -- and was basically homeless.
>
> I believe it was around this time when Maurice mentioned to me that he wanted to move to New Jersey and live with our Aunt Gina. Maurice was having a hard time dealing with everything -- family, the people he hung out with, his mother -- and I think he wanted to get out of California. I believe that Maurice felt his only chance was to get far away from all these bad influences.

Tamika Harris Dec, Exh. 76.

839. Eugene Surrell, Petitioner's grandfather, also testified at the penalty phase. Surrell's testimony gave the false impression to the jury that he was very involved in Petitioner's life, acted as a firm, but kind, disciplinarian and saw Petitioner on a regular basis. To the contrary, Surrell has stated:

> I testified at Maurice's trial, although I do not recall who specifically asked me to appear in court. I had very minimal contact with Maurice's lawyers and investigator and no one from Maurice's defense prepared me for my testimony. When I first took the stand, I didn't have the slightest idea what my testimony would do for Maurice in his trial. I have since

> reviewed my testimony from Maurice's trial, and while my answers were all true, I don't believe that my testimony gave an accurate picture of Maurice or our family. For example, Maurice's attorney asked me whether I was active in trying to raise Maurice. I answered, "Yes," but was not given the opportunity to explain that I was unable to see Maurice everyday, or sometimes even every week or every month, because for all of Maurice's life I didn't live with him or his grandmother. I also would have explained that I had a huge number of people who depended on me for support and raising besides Maurice, including Michele, Shirley, and a number of my other children. In reviewing my testimony, I also notice that I started rambling on at a few different points. I recall feeling that although I didn't know what was going to be most helpful to Maurice, I felt that the jury was not getting a good sense of Maurice's background.

Eugene Surrell Dec., Exh. 114.

840. Surrell cannot recall having any direct contact with either of Petitioner's attorneys except in the courtroom during his testimony. Eugene Surrell Dec., Exh. 114. Although Surrell knew Richard Hove because Hove "had helped [Surrell] during [his] own murder trial back in the early 1980s, he and [Surrell] never had a face-to-face conversation during Maurice's trial."[66] Eugene Surrell Dec., Exh. 114.

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[66] Based on Hove's prior contact with Eugene Surrell and other members of the Surrell family, Hove was aware that the penalty presentation at Petitioner's trial was wholly inaccurate and misleading. Nevertheless, Hove failed to present any of the evidence of criminality,

841. Had Petitioner's attorneys provided reasonably competent assistance to Petitioner and prepared their witnesses to testify at the penalty phase of Petitioner's trial, Eugene Surrell would have related at least the following mitigation evidence:

842. Eugene was far from the family man portrayed at Petitioner's trial. Eugene himself has recounted:

> I met Irma Jacobs when we were both living in Richmond, CA. Irma got pregnant soon after we starting seeing each other. At that time, if you got a girl pregnant, you were supposed to marry her. Irma and I had a shotgun wedding, but it didn't keep me from leaving. I didn't want to have a family yet, so I went back to Oklahoma and lived with some of my family back there. A few months after Irma and I were married, my aunt told me that Irma had had a son back in California. I still didn't want to go back to California, but my aunt grabbed me around the neck and told me to get myself back to Irma and our new son, Michael. Irma and I ended up having three other children together -- all daughters -- named Marcia, Charmaine, and Celeste.
>
> In the late 1950s, when Celeste was just a baby, I was arrested and charged with robbery. I served about two-and-a-half years in prison.
>
> From the very beginning of my relationship with Irma, I always spent a lot of time away from home. My absence was partially due to

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abuse or neglect to which Petitioner was exposed because he had an actual conflict of interest. *See* Claim B.

> the type of jobs I kept. Since I was old enough to drive, there has always been the chance that I would be gone from home for anywhere from one day to ten days, usually to help someone out with a job they had going somewhere else, or to transport someone's car for them.

Eugene Surrell Dec., Exh. 114.

843. Contrary to the false impression that was left with the jury because of the lack of focus of trial counsel's direct examination, by the 1960s, Eugene was not living with Irma and his first family:

> In the mid-1960s, Irma, our kids, and Irma's parents moved into a house on East 28th Street. By that time, Irma and I weren't really spending much time together. I started seeing a woman named Michele during the late 1960s and we ended up having two sons together, named Alvon and Alton. I would stop by the house on East 28th from time to time, but I was basically living with Michele. The times that I would visit Irma and the kids was usually when something needed to be fixed, like the car or something in the house. I hoped that Irma would find someone new to spend her time with, but she never did. A few years after Michele and I got together, we bought a house on 62nd Avenue in East Oakland. I was basically living with Michele when Maurice was born.

Eugene Surrell Dec., Exh. 114.

844. Eugene was aware of the serious problems Petitioner's mother and father had:

> Marcia and Celeste were always with the fast crowd and the two of them were addicted to heroin by the early to mid-1970s. I remember they both got arrested a few times for drug related things, both in the East Bay and in San Francisco. When she was still in high school, Marcia started going out with Dicky Boyette, Maurice's father. Dicky was under the influence of drugs from the first time I met him. After Maurice was born, it wasn't too long before Irma and Ms. Jacobs started taking care of Maurice because Marcia and Dicky couldn't.
>
> I'm sure that Marcia and Dicky being hooked on drugs from before Maurice was born had something to do with Maurice being so slow. It was like Maurice's brain had no roots and there was just water sloshing around inside his head. The only thing Maurice was ever good at was video games. He wasn't a good athlete -- he would fall down or trip over himself all the time -- and he wasn't quick thinking. Maurice would spend a lot of his time just spacing out.

Eugene Surrell Dec., Exh. 114.

845. Eugene has provided additional details about his living situation:

> It was around the time of my arrest on murder charges that I started living with a woman named Shirley Frazier. I still spent some time with Michele, but I started spending most of my time with Shirley and our twin sons, Brent and Bryant. I saw less and less of Irma and our kids, although I would stop by once in a while.

Eugene Surrell Dec., Exh. 114.

846. Eugene has confirmed the escalating crisis faced by Irma's family after they were forced to move to Berkeley.

> In the mid-1980s, Irma, her mother, and Maurice moved to Berkeley. The financial troubles that Irma and I had faced kept getting worse and they lost the house on East 28th Street. Our kids were all over the place by the time Irma moved. Michael was married and spending some time back in Ohio with his wife. Celeste was in and out of the house, living with boyfriends or friends of hers. Charmaine was married by then to Ronnie Adams and they moved to Berkeley, too. Charmaine had broken up with her boyfriend, Bobby Harris, a few years before she married Ronnie Adams. Bobby and Charmaine had been going out since they were little, but it had always been a rocky relationship. Bobby was an extremely jealous person. He used to beat on Charmaine and stalk her wherever she went. I was glad when Charmaine and Bobby finally split up.

Eugene Surrell Dec., Exh. 114.

847. Eugene would also have confirmed his daughter Marcia's deterioration:

> Marcia only kept getting worse and worse over the years. She and Dicky had broken up when Maurice was still a little kid, but she eventually found a new boyfriend who was even worse. His name was Sonny Hill, and he and Marcia had a relationship that was based solely on drugs. Sonny's mother had a house on Foothill Boulevard and they would spend a lot of time there. Irma, Ms. Jacobs, and Maurice all used to worry about Marcia constantly. Marcia

> would stop by the house for a minute, and then disappear for days or weeks. One time Irma and Maurice were real upset about Marcia and wanted to see her, so I went looking for Marcia at Sonny's house. The house was full of people getting high. I guess Marcia heard me coming, since I found Marcia trying to climb over a fence in the back yard to get away from me. I grabbed her down and brought her back to Irma's house. I think Irma and Ms. Jacobs kept Marcia locked up in the house for a few days to try and clean her up. One day, Marcia stole all the coats from the house -- including Maurice's -- and took off. That's how Marcia was ever since she got hooked on drugs. Marcia would sometimes bring Maurice with her to Sonny's house. I didn't agree with Marcia bringing Maurice with her, but it was really the only time Maurice ever got to spend with his mother. Maurice saw a hell of a lot being with his mother.
>
> Besides being a drug addict, Sonny was a criminal and he would run scams with Marcia to make some cash. Marcia and Sonny would get arrested and spend time in jail, which was usually the time when Irma or I would hear from her. Marcia's drug addiction got worse and worse while she was with Sonny and she became totally dependant on him for drugs. Even when Marcia started going to the hospital as her body broke down, Sonny would sneak her drugs to her hospital bed.

Eugene Surrell Dec., Exh. 114.

848. Eugene was not involved in Irma's decision to take Petitioner to see Dr. Spivey. He believes it was because Petitioner was doing so badly

in school. He was also aware that Irma saw Spivey because of her depression. Eugene Surrell Dec., Exh. 114. According to Eugene, "Maurice was almost non-functional in school. He was held back at least once when he was in elementary school and just wasn't able to comprehend even the simplest things." Eugene Surrell Dec., Exh. 114.

849. Eugene was also aware of the problems that were caused for Petitioner by Irma's stroke:

> A few years after Irma moved her mother and Maurice to Boise Street, Irma had a terrible stroke. Irma had always had trouble with her health. She had a heart attack back when, I believe, she was even forty years old. This stroke on Boise Street really disabled her. Irma could hardly walk and her speech was impaired. She would struggle to walk to the corner. Irma went to therapy for a few months after the stroke and she would have to take a taxicab by herself because there was no one who could take her.
>
> After Irma's stroke, Celeste moved into the house on Boise Street. Celeste likes to run things when she's around and she and Maurice, who was a teenager at the time, started butting heads. Celeste tried to take control of everything in the house, including the finances. I remember one time Maurice got into an argument with his aunt and grandmother over something and Celeste called me to come over. Everyone knew that Maurice would do anything I told him. He would just about faint if I raised my voice to him. When I got to the house, I took Maurice out the back door and started

> talking to him. Maurice was all upset and wouldn't stop, so I popped him in the face with my fist. Maurice went down quickly and started crying. I told Maurice to get on his hands and knees and I made him crawl back into the kitchen and up the stairs, saying he was sorry with each step. By the time Maurice was done apologizing, I saw that he had peed all over himself.
>
> Although I didn't see him regularly, I could tell that Maurice was having a lot of trouble after his grandmother's stroke. Irma was the one who raised Maurice, and her stroke completely changed things. Celeste being back in the house wasn't a good match for Maurice, and he still didn't see much of Marcia. Charmaine was also started slip around that time. Charmaine's marriage to Ronnie Adams was breaking up and she was getting involved with a lot of drugs. Charmaine had started off as the "good" one, the daughter who wasn't getting into trouble when she was young. Since the early 1990s, though, Charmaine has only gone down hill. Now, she's the worst off of all of them.

Eugene Surrell Dec., Exh. 114.

850. Eugene also knew that Petitioner was not a young man who had many friends. And he was also aware of the signs of depression that Petitioner exhibited:

> When Maurice got to be a teenager, he started hanging out more often. Maurice was never a kid with many friends, so I think he tried to tag along with other people in hopes that they would accept him. Maurice was usually taken advantage of, however, whenever he was

> hanging out on the street. I recall one time Ms. Jacobs got Maurice a new winter coat, but it was stolen from Maurice the first day he wore it outside. Maurice's cousin, Marlon, who spent some time with the family on Boise Street, was the opposite side of the coin from Maurice. Marlon could take care of himself and I think Maurice always envied that. Probably the only thing Maurice was ever good at was video games, like Nintendo. Irma kept a Nintendo in the house because it was the only thing that seemed to keep Maurice's attention and he really enjoyed playing it. I actually started worrying about Maurice when he got to be an older teenager and still only wanted to play his video games. I thought Maurice should be outside, hanging with his friends, but he usually stayed inside and played by himself.

Eugene Surrell Dec., Exh. 114.

851. Eugene knew that Petitioner was deteriorating just prior to the crimes:

> In the spring of 1992, I remember Maurice stopped by to see me one day at the auto shop where I was fixing a car. I believe it was a few weeks before the shootings took place on Cole Street. Maurice told me that Marcia was doing real bad and he wanted me to help move her from the house she was staying in on Cole Street. Maurice was always real worried about his mom, but he wasn't capable of doing anything for her by himself. I was up to my neck in work that day and I told him it would have to wait. I believe Maurice came by once more to get my help, but I still wasn't able to go help him. I wasn't seeing Maurice or his grandmother too often during that time, so it

> wasn't until a few weeks later when I saw Maurice again and he told me that something happened at that house on Cole Street.

Eugene Surrell Dec., Exh. 114.

852. Marlon Surrell, Petitioner's cousin, attended some of Petitioner's trial, although Petitioner's attorneys never asked to speak with him about Petitioner or their family. Marlon Surrell Dec., Exh. 115.

853. As with the other family members, trial counsel made no attempt to consult with Marlon prior to his testimony. Marlon Surrell has stated:

> One day during the trial, someone from Maurice's defense asked me to find Marcia because they wanted her to testify. I imagine the person knew I was related to Maurice, but I had never spoken with him before. I finally found Marcia -- who was high and totally out of it -- and I brought her to court and Maurice's attorneys put her up on the stand without even speaking to her.

Marlon Surrell Dec., Exh. 115.

854. Marlon was only approached on one other occasion by trial counsel when they told him that they wanted him to testify for Petitioner. Trial counsel again failed to take even the most preliminary steps to prepare the witness to testify.

> As far as I could tell, Maurice's attorneys didn't know anything about me and I didn't know

> what they wanted me to talk about. Since then, I have reviewed my testimony from Maurice's trial and although my answers were all true, I do not feel they gave an accurate depiction of Maurice or our family. For example, Maurice's attorney asked me whether Maurice and I were raised in the same household. While I answered, "Yes," I was not given the opportunity to explain that my mother -- and my mother's mother -- were the ones who truly raised me and cared for me. Even though Maurice and I lived together in the same house from time to time, I always had my mother to look after me, while Maurice did not. Another example is when Maurice's attorney asked me whether Maurice ever listened to me when I tried to discourage him from hanging around Antoine Johnson. I answered, "No," that Maurice had not listened to me. However, I did not know I could give a further explanation and was not asked any follow up questions as to why Maurice didn't -- or couldn't -- follow my advice. The truth was that Maurice wanted to be with his mother, no matter what, and his only reason for hanging out on Cole Street was to see her. I would have also liked to explain to the jury that Maurice didn't really have any place else to go, and how protective Maurice was of Marcia and how upset he was about his mother's condition.

Marlon Surrell Dec., Exh. 115.

855. If trial counsel had provided reasonably effective assistance, Marlon could have testified to at least the following evidence in mitigation.

856. Petitioner is Marlon's cousin. Petitioner's mother, Marcia Surrell, and Marlon's father, Michael Surrell, were sister and brother.

Marlon's parents, Cela and Michael, separated soon after he was born. Marlon spent most of his life living with his mother and her mother in Richmond, California. Both his mother and grandmother always worked, so he would spend a lot of time at his grandmother's house in Oakland. For a few years while he was in elementary school and high school, he lived with Irma on a full time basis. However, even when he stayed with Irma, unlike Petitioner, he still saw his mother and other grandmother all the time. Marlon Surrell Dec., Exh. 115.

857. Marlon would have testified that Eugene Surrell spent little time with the family and that Marlon went to school with Petitioner, who was always very quiet and slower than the other children. Marlon Surrell Dec., Exh. 115.

858. Marlon would also have been able to inform the jury about the impact of Paris Robinson's death and Marcia's drug abuse and neglect had on Petitioner. Marlon Surrell Dec., Exh. 115.

859. Marlon also aware of the circumstances that led to the family's disastrous move to Berkeley:

> Grandma Irma owned a liquor store for a couple of years when I was still in grade school. I remember hearing that my aunts were taking liquor and money from the store. The store ended up going bankrupt and a few years after that, grandma Irma lost the house on East 28th

> Street. Irma, Ms. Jacobs, and Maurice ended up moving from Oakland to a smaller house in Berkeley. I was back living in Richmond with my mother by the time they moved to Berkeley.

Marlon Surrell Dec., Exh. 115.

860. Marlon would also have given testimony about the impact of Irma Surrell's stroke on Petitioner:

> In 1990, grandma Irma had a real bad stroke. My grandmother's stroke totally changed her life and the family. The stroke paralyzed one whole side of her body and she spent a long time in rehab and therapy. My grandmother couldn't work and had a hard time speaking after her stroke.
>
> Grandma Irma's stroke was tough on everyone, but I think Maurice had the most trouble dealing with it. Celeste moved into the house on Boise Street after grandma Irma's stroke and she and Maurice had a lot of problems between them. At some point, I believe Celeste kicked Maurice out of the house.

Marlon Surrell Dec., Exh. 115.

861. Marlon was also a witness to Petitioner's deterioration and the reasons underlying it.

> Marcia's condition kept getting worse and worse over the years. She started spending a lot of time in the hospital and always seemed to be in pain when she wasn't high. At one point, Marcia had her leg amputated because it got badly infected. Marcia shot heroin for so many years that she had track marks all over her arms

> and legs and neck. Marcia looked so bad after a while that I didn't ever want to touch her.
>
> Around the time of grandma Irma's stroke, Charmaine began smoking crack. Celeste stopped living on Boise Street after a little while and would come and go. My father had moved back to California after he and Gina broke up and he having a lot of problems. My father ended up serving two stints in prison, once for assault with a deadly weapon and another time for manslaughter.
>
> Maurice started getting into trouble after grandma Irma's stroke. I remember one time when Maurice called the police on himself after he got into an argument with some of the family. The police brought Maurice to the psychiatric ward at Highland Hospital.

Marlon Surrell Dec., Exh. 115.

862. Petitioner's aunt Celeste Surrell has stated: "I did not attend very much of Maurice's trial, but I do remember trying to talk with Maurice's attorneys about his case. I recall going to see the attorney named Cannady at his office in San Leandro, and he gave me some copies of the trial transcripts. I remember asking Cannady if there was anything I could do to help, but I don't recall him telling me anything." Celeste Surrell Dec., Exh. 113.

863. Celeste has further stated that her testimony at the trial did not reflect an accurate picture of Petitioner's life or home situation:

> My mother told me that Maurice's attorneys wanted me to testify in court on Maurice's behalf. My mother told some other members of my family the same thing. I didn't have any idea what a penalty phase was when I took the stand, and at no time did I ever talk with Maurice's attorneys or investigators about our family's background or about what purpose my testimony would serve. I have reviewed the transcript of my testimony at Maurice's trial and I do not believe that my testimony gave a clear picture of what Maurice's life was like. I believe all of my answers were completely truthful. However, some of my answers gave a false impression of our family's situation. For example, Maurice's attorney asked, "Do you remember what period that you lived with Maurice." I responded, "Since he was two." I never meant to imply that I had constantly lived with Maurice ever since he was two, since I had not. I was in and out of Maurice's life and my mother's house just like everyone else. However, Maurice's attorney never asked me any follow-up questions, so I never had a chance to be more specific. In another instance, Maurice's attorney asked me whether or not Marcia had a heroin problem, to which I answered, "Yes." I was never asked any more questions about Marcia's drug addiction, which I would have described as something much more devastating than just a "heroin problem.

Celeste Surrell Dec., Exh. 113.

864. Celeste talked with other members of the family prior to their testimony. They were unanimous in their concern that they were ignorant of what the purpose of their testimony was and had not been prepared to testify in any way by trial counsel.

> In speaking with my other family members right before and after our time in court, I remember

> that not one of us felt sure of what we were supposed to talk about on the stand. We were basically thrown up there and asked a few quick questions and that was it.

Celeste Surrell Dec., Exh. 113.

865. Celeste would have been able to testify about her parents relationship, her father's other families and the devastating impact her father's absence had on her and her siblings. Celeste Surrell Dec., Exh. 113.

866. Celeste also could have documented the extensive drug histories of all her siblings as well as her own arrest record. Celeste could further have offered testimony regarding the dangerous men she was involved with whom she brought to her mother's house during Petitioner's childhood. Celeste Surrell Dec., Exh. 113.

867. She would also have provided detailed testimony describing what it was like to live at Irma's house:

> Between my sisters' boyfriends, my brother's girlfriends, and their kids, my mother's house on East 28th Street could be very crowded with people. While sometimes the house was over-crowded with people, there would be other times when there was hardly anyone around. At any given time during the late 1970s and early 1980s, my mother's house could include her mother, Michael, any of Michael's kids, Michael's girlfriend or wife, Charmaine, her boyfriend or husband, Charmaine's daughter

> Tamika, Maurice, and me. On the flip side, because everyone, including me, was always moving around, there might only be my mother, my grandmother, or Maurice in the house.

Celeste Surrell Dec., Exh. 113.

868. Celeste was also a witnesses to the problems Irma had before and after she lost her liquor store including the fact that one of the reasons Irma lost the store was because she borrowed money to help Eugene after he was charged with murder. Celeste Surrell Dec., Exh. 113.

869. Celeste was aware of Irma's severe depression that led her to seek assistance from Dr. Spivey and to take Valium. Celeste Surrell Dec., Exh. 113.

870. Celeste has confirmed the stress Petitioner experienced after the move to Berkeley and the reasons why Petitioner was taken to see Dr. Spivey:

> We moved from East Oakland to Berkeley around the time that Dicky, Maurice's father, died. Marcia was still a real mess and wasn't coming around the house much. Maurice seemed to be having a real hard time dealing with his parents and the fact that they were never there for him. My mother and grandmother had also been getting concerned that Maurice was too slow and distracted in school, so my mother also started bringing Maurice to see Dr. Spivey. The two of them would sometimes see Spivey on the same day.

> Ever since he was little, Maurice had always moved slowly and been real clumsy. Maurice would fall down a lot -- it always seemed that his balance was off or something. Maurice would get picked on by kids much younger than him and always had trouble defending himself. His cousin, Tamika, who was younger than Maurice, would have to defend him against other kids. Maurice would watch a lot of television by himself and eat anything he could get his hands on. Even when he was very little, Maurice seemed sad. He would cry a lot, or sometimes he would just go off by himself and space out. Maurice had trouble saying what he wanted.

Celeste Surrell Dec., Exh. 113.

871. The chaos that was evident in the Berkeley house could have been described by Celeste as follows:

> In the late 1980s, my brother, Michael, split with his wife, Regina, and started living with our mother, grandmother, and Maurice on Boise Street. At that point, Michael was heavily involved with drugs and his life was out of control. Michael started going out with this woman who was a complete crackhead. I was not living at home at the time, but I would stop by and see Michael and his girlfriend in the house. I told Michael that he shouldn't let his girlfriend stay in the house and Michael threatened to blow up my car. We had an argument about it, but nothing ever happened. It was not a good situation with Michael and his girlfriend being around the house.

Celeste Surrell Dec., Exh. 113.

872. One lay witness who was not a family member, Ernest Posey, was presented. Mr. Posey's testimony took only two transcript pages. RT 1953-1955. The prosecutor apparently saw no reason to cross-examine him. RT 1955.

873. At the time of his testimony, trial counsel had not attempted to obtain Petitioner's school records from the Berkeley School District. Thus, Mr. Posey had to testify without that reference. In addition, Mr. Posey has stated the following about the complete lack of preparation he had for his testimony at Petitioner's penalty phase:

> I believe that Tamika was the person who informed me that Maurice had been arrested for murder. I recall Tamika asking me whether I would be willing to speak on Maurice's behalf in court. I, of course, told her I would do anything to help Maurice. I remember receiving a phone call at East Campus from someone working on Maurice's behalf[67], who asked me whether or not I had ever taught Maurice. That person asked me to show up in court on a particular date, which I did. At no time did I have an in-depth conversation with anyone about Maurice as a student or a person. I did not speak to anyone prior to my testimony in court. During my testimony, I recall being asked very general and superficial questions about Maurice. At no time was I asked to gather or review any of Maurice's school records. If I had been asked to do so, I could

[67] Olivier's billing records reflect a "contact" with Mr. Posey. Exh. 260.

> have testified about much more substantive issues regarding Maurice's school experience. When I testified I had no idea what role I was playing in Maurice's trial. Had I been informed about what information could have been helpful to Maurice's case, I would [have] been willing to provide the information . . .

Posey Dec., Exh. 101.

874. Not surprisingly, Mr. Posey presented little in the way of mitigation evidence. From 1986-1988, he was an administrative assistant at Willard Junior High School in Berkeley. RT 1953. He described Petitioner as a student who had minor problems, who was "kind of spacey at times." RT 1954-55. Petitioner never provoked fights. RT 1955. He believed Petitioner was an "average" student. RT 1955.

875. Had trial counsel been reasonably effective and prepared Mr. Posey to testify on Petitioner's behalf, he could have provided at least the following evidence in mitigation.

876. From 1986 to 1988, Mr. Posey was an Administrative Assistant at Willard Junior High School. Petitioner was a student at Willard during Posey's time there. In the Fall of 1988, Posey began teaching at East Campus Continuation. Petitioner transferred to East Campus a few months after Posey started there. Posey Dec., Exh. 101.

877. Mr. Posey was familiar with the lack of resources at Willard

during Petitioner's time there.

> [D]ue to the few resources and number of students at the school, there was not a lot of close monitoring of students who had trouble in the classroom. There was no psychological or counseling component set up at Willard that could really address many of the problems the students were having. If students were having problems at home, there was nothing at Willard that could adequately address those issues. As a result, kids often got labeled as underachievers or behavioral problems without anyone at the school really knowing what was happening in their lives besides how they did in the classroom.

Posey Dec., Exh. 101.

878. Mr. Posey has now reviewed Petitioner's files. Petitioner was not, in fact, an average student. Mr. Posey has stated, "I recall that Maurice had low skills in the classroom. I have reviewed portions of Maurice's school file from Willard and it indicates that in both 1987 and 1988, when Maurice was in the seventh and eighth grades, he scored well below the grade level." Posey Dec., Exh. 101.

879. Mr. Posey has admitted, "Maurice was a perfect example of a student who needed more help than he ever received and, as a result, he slipped through the cracks unnoticed." Posey Dec., Exh. 101.

880. Mr. Posey could have explained the following and placed Petitioner's learning problems in their appropriate context:

> Willard rarely held its students back to repeat a grade. The school usually passed its students, regardless of academic achievement, on the basis of social promotion. The school believed that social promotion was better for the students because students who were held back rarely, if ever, did any better academically their second year through a grade. Holding a student back at Willard was the ultimate way for the school to label a student a social failure. It was believed that any student who couldn't somehow make it out of the eighth grade usually did not have a chance making it in school, period. As Maurice's records show, he was the extremely unusual case of a student who was made to repeat the eighth grade at Willard.

Posey Dec., Exh. 101.

881. Mr. Posey also had contact with Petitioner at East Campus.

Posey Dec., Exh. 101. Mr. Posey has stated:

> I believe that Maurice's age finally forced Willard to transfer him to East Campus. East Campus is a continuation school, which means it enrolls students who are performing poorly in their regular schools or who are having behavioral or attendance problems. As opposed to Willard, where the student body came from the surrounding neighborhoods in Berkeley, East Campus students were specifically referred to the school because of some problem at their former school. Willard had a rather diverse, "Berkeley-esque" population of students. East Campus, however, was largely comprised of students of color.

Posey Dec., Exh. 101.

882. Mr. Posey has explained the nature of the student body at East Campus:

> Quite a few students from Willard ultimately wound up at East Campus. Mostly, the students were African-American males. I believe this occurred, in part, because of the Berkeley School District's view that many of the African-Americans who were not performing well in class were underachievers, as opposed to being students who needed extra support or who had learning problems. Unfortunately, students were often type-case very early on as underachievers or problem learners and their real learning or emotional problems were never addressed.
>
> In an ideal world, students at East Campus would spend approximately two semesters catching up with their credits and then transfer to a non-continuation school. However, in my experience at East Campus, only approximately one to five percent of all the East Campus students ever make it back to non-continuation school. Most of the students who end up at East Campus ultimately drop out because they stop going to class or they move. Many of the students at East Campus come from unstable families, where the student would often be moving from family member to family member, or house to house. East Campus, the way it was operating when Maurice was enrolled, was not a place for students to succeed in school.

Posey Dec., Exh. 101.

883. Mr. Posey would have been able to testify to additional examples of what can be called "institutional failure," i.e., public

institutions that were unwilling or unable to meets the needs of those who depended on them.

884. Mr. Posey has further stated about East Campus:

> [I]n terms of funding and attention, East Campus is the unwanted step-child of the Berkeley Unified School District. The students who are referred to East Campus are those students who, for a variety of reasons, aren't making it at the mainstream schools. Nonetheless, the school district doesn't give East Campus the funds and support it needs to help its students succeed. In the early 1970s, East Campus had about fourteen teachers and roughly two-hundred-and-twenty-five students. In the late 1980s, when I started at East Campus, the school was down to eight teachers and approximately one-hundred-and-fifty students. In order to keep students coming to East Campus, the school had flexible grading and evaluations to motivate student attendance.
>
> There was not adequate resources to address the needs of many students and particularly Maurice. One counselor was assigned to meet the needs of 200-225 students.

Posey Dec., Exh. 101.

Expert Witnesses

885. Reasonably competent counsel would have prepared the expert witnesses he intended to present. Had counsel done so, these witnesses could have testified as follows.

886. As detailed above, Dr. Rosenthal was given no materials other than the reports relating to the 5150 referral and the 4011.6 evaluation to review, had only one interview with Petitioner, and *no meeting with trial counsel prior to his testimony*. Thus, it is not surprising that Dr. Rosenthal's testimony failed to present relevant mitigation evidence, and, in fact, gave an inaccurate and damaging portrayal of Petitioner to the jury.

887. Dr. Rosenthal has now examined materials provided to him by present counsel documenting Petitioner's background and family history. Dr. Rosenthal has concluded that these materials

> constitute information that I believe could have formed the basis of important areas of mitigation testimony that I was unable to address at the penalty phases of Mr. Boyette's trial. For example, the fact that both Mr. Boyette's mother and father were heroin addicts points to a genetic predisposition underlying the substance abuse problems in Mr. Boyette's life. Moreover, there is also the possibility that Mr. Boyette was exposed to drugs in utero and that this exposure permanently affected the development of his brain.

Rosenthal Dec., Exh. 105.

888. Dr Rosenthal has further declared that had he been asked to do so, he could have provided at least the following additional mitigation evidence to the jury:

> Had I been asked to do so, I also could have

> described for the jury the particular characteristics of drug users who use opiates such as heroin. In my professional experience, opiates tend to produce sedation, depression, and a lack of motivation in the user. The effects of heroin stand in marked contrast to the effects of stimulants such as cocaine and amphetamines. Heroin users tend to be people who are not able to focus on the world or be clear about what is going on around them. In lay terms, they tend to be "spacey." Heroin is the kind of drug people take when they seek to numb themselves.

Rosenthal Dec., Exh. 105.

889. In addition, Dr. Rosenthal could have testified as follows:

> Dr. Spivey's records regarding his treatment of Mr. Boyette's grandmother for depression would have been highly relevant to my psychiatric assessment of Mr. Boyette and the substance of my mitigation testimony. The fact that Irma Surrell suffered from depression would have impacted my assessment of Mr. Boyette in two distinct ways. First, this information tends to suggest that Mr. Boyette had a genetic predisposition to depression. Second, the fact that the woman who served as Mr. Boyette's primary caretaker for many years suffered from depression would likely have had a negative impact on Mr. Boyette's development.

Rosenthal Dec., Exh. 105.

890. Based on the information provided to him by present counsel, Dr. Rosenthal has concluded that the jury received an incomplete picture of

the psychological implications of Petitioner's social and familial background. Rosenthal Dec., Exh. 105. "Had I had this information back in March 1993, and had I not been consulted under such time constraints, I would have been able to provide more extensive mitigation testimony." Rosenthal Dec., Exh. 105.

891. Dr. William Spivey presented very brief testimony at the penalty phase.[68] Nevertheless, the fact that Dr. Spivey had treated Petitioner for four years certainly gave the jury the impression that Petitioner had been fortunate enough to be afforded the benefit of psychiatric counseling that is rarely available to troubled teenagers.

892. Trial counsel's failure to elicit mitigating testimony from Dr. Spivey, even though Spivey had known Petitioner for so many years, is thus more damaging, since the jury would have reasonably believed that Dr. Spivey would be privy to mitigating evidence if it existed. Trial counsel's actions with regard to Dr. Spivey represents a stark example of counsel's failure to make reasonable efforts to prepare for trial. Given that Dr. Spivey had treated Petitioner over a significant period of time, it is inconceivable that trial counsel did not recognize the necessity of meeting with Spivey to determine, in detail, what information he had regarding Petitioner and his

[68] His testimony, absent his credentials, was seven pages of transcript.

family. Trial counsel unreasonably failed to make this effort.

893. Trial counsel failed to determine that Dr. Spivey had treated not only Petitioner but his grandmother, Irma Surrell. They also failed to determine that it was because Irma Surrell was already being treated by Spivey that she took Petitioner to see him. Spivey Dec., Exh. 111.

894. Trial counsel thus failed to investigate, prepare or present the relevant mitigating information concerning Irma's mental illness and her family circumstances. Had trial counsel conducted a reasonably effective investigation, Dr. Spivey could have testified to at least the following mitigation evidence.

895. Dr. Spivey was aware of relevant information concerning the underlying causes of Irma Surrell's depression: "[i]t was clear to me during my treatment of Mrs. Surrell that her children and family life were causing her a great deal of stress and that this stress contributed to her depressed condition." Spivey Dec., Exh. 111.

896. Further, Dr. Spivey states: "I recall that although Mrs. Surrell genuinely seemed concerned about her grandson, she was overwhelmed by her own problems, and I knew, from my separate treatment of her, that she was suffering from Major Depression. Mrs. Surrell was struggling with her own children's problems and spent quite a bit of the time that was

scheduled for Maurice's therapy talking about her own situation. " Spivey Dec., Exh. 111.

897. Dr. Spivey could also have testified that: "It was clear that there was tremendous instability in Maurice's family. The fighting between Maurice's aunts and Maurice's mother was one constant issue." Spivey Dec., Exh. 111.

898. Dr. Spivey also had information regarding Petitioner's depression. "At the time I first met Maurice he was an overweight boy of about eleven years of age who was always being picked on and beaten up by other children. He seemed to be a child who simply could not do anything right and was depressed by his circumstances. I recall that he was unable to focus on school. Maurice had serious self-esteem issues which he seemed unable to resolve." Spivey Dec., Exh. 111. He further states, "Maurice never had an opportunity to make life-decisions affecting him. He was always pushed or pulled into situations. He never was able to take control of his life because his home life would end up overwhelming him." Spivey Dec., Exh. 111.

899. Dr. Spivey could have testified regarding Petitioner's relationship with his mother.

> I was aware that Maurice's mother had severe drug and health problems. I was also aware that

> she was not a source of consistent support for Maurice and, in fact, constantly made promises to Maurice that she did not keep. Maurice's moods and behavior were often predicated on his mother's actions and whereabouts. On the rare occasions when his mother came to see Maurice, he was delighted. However, when she failed him, no matter how many times this happened, he was devastated.

Spivey Dec., Exh. 111.

900. Dr. Spivey also had significant information concerning Petitioner and Petitioner's father. "Maurice was not close to his father either. Maurice never really had a chance to bond with his father. I remember that when Maurice's father died when Maurice was about thirteen, Maurice tried to put up a psychological shield and seemed to be fronting off his real feelings." Spivey Dec., Exh. 111.

901. Dr. Spivey believes that he consulted with Petitioner's trial counsel and perhaps another person on a single occasion prior to testifying at Petitioner's trial. Dr. Spivey admits that he was ignorant of the function of his testimony. "At that time, I had little criminal trial experience and I certainly had no idea what a penalty phase in a capital case involved or what issues or aspects of my contact with Maurice would be beneficial to discuss during my testimony." Spivey Dec., Exh. 111.

902. Even though reasonably competent counsel, based on even a

preliminary investigation, should have been aware that there were myriad issues about which Dr. Spivey could contribute valuable detail and insight, trial counsel's only inquiry with Dr. Spivey related to the question of whether Petitioner was a leader or a follower. Spivey Dec., Exh. 111.

903. Although trial counsel was aware that Petitioner's mother had been raped by Garry Carter, one of the victims, they did not inform Dr. Spivey of this. They also failed to ask Dr. Spivey any questions regarding how Petitioner would have been affected by this information. Dr. Spivey has stated that "had I been asked, I certainly would have told Maurice's attorney that Maurice was very emotionally involved with his mother, that he felt very protective of her, and that if Maurice had known that someone hurt his mother, that would have been devastating for him emotionally." Spivey Dec., Exh. 111.

904. Trial counsel also presented the testimony of George Barrett who interviewed Petitioner when he was referred for a 4011.6 evaluation pursuant to Petitioner's probation officer, Mei-Ling Pastor's, request. Barrett's direct testimony, absent his credentials, is contained in less than three transcript pages. RT 1931-1933.

905. Apparently trial counsel presented Barrett to support trial counsels' penalty "theme" that Petitioner was immature. Barrett did testify

that Petitioner spoke and acted like a twelve year old. RT 1931. However, he also testified that he would give him a diagnosis of disruptive behavior disorder and antisocial personality disorder. RT 1933.

906. Trial counsel failed to present the testimony detailed in Claim E above that showed why this incident was actually mitigating – not aggravating as it was portrayed by the prosecutor.

907. Without the presentation of the testimony of Mei-Ling Pastor, Diane Talsky, and Marva Smith, there can be no reasonable tactical basis for presenting Barrett and opening the door to accusations that Petitioner was manipulative and dangerous. Barrett's testimony that Petitioner was immature was hardly worth incurring the damaging testimony that resulted.

908. Reasonably competent counsel would have collected easily obtainable records which could have, even without the testimony of lay witnesses, corroborated at least the mitigation themes detailed herein.

909. Finally, reasonably competent counsel would have attempted to mitigate the facts of the crime. Powerful testimony concerning Petitioner's mental state at the time of the crime, and the actual circumstances under which the crime was committed, should have been investigated, prepared and presented at either the guilt or penalty phases by reasonably competent counsel. Moreover, counsel should have consulted

with and prepared expert witnesses to testify regarding the crime. Counsels' failures in this regard were prejudicial.

910. In the guilt phase, counsel presented an identity defense in which counsel attempted to establish reasonable doubt that Petitioner committed the crimes in question.

911. Petitioner incorporates each and every allegation in Claim C, as if fully pled herein.

912. Whether or not the actions and/or inactions of counsel in the guilt phase of Petitioner's trial constituted ineffective assistance of counsel, once the jury had found Petitioner guilty of the crimes, and had found one special circumstance, multiple murder, true, and proceeded to a penalty determination, counsel was required to present statutorily appropriate mitigation evidence to the trier of fact in support of a penalty of life without possibility of parole.

913. In this case, the only significant evidence in aggravation before the jury were the circumstances of the crime and evidence of "victim impact."[69] The prosecution hammered on two themes in her closing. The first was that Petitioner would kill again in prison,[70] and the second

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[69] The prosecutor also impermissibly argued future dangerousness to the jury. *See* Claims A, E.

[70] *See* Claim E.

emphasized was that Petitioner was a cold-blooded killer who had killed in "execution style." *See, e.g.* RT 2002-2003 ["The perfect personality to kill again."], [. . .Because that is a very important consideration for you. You have to look at his future dangerousness. Is this a remorseful person who really blew it one night or is this a sociopath who's going to kill again?]; RT 2013 ["What you have to look at, that lack of remorse, and the facts of this killing, which show you a substantial likelihood of him killing again."]; RT 2013 ["They don't have a conscience. Who's a better hit man? When you talk about his future dangerousness, no conscience. It doesn't matter. He could look at a young woman who is begging for her life. He doesn't get it. It is not there."] RT 2014 ["I'm standing up here to save the life of the next victim and to avoid another family going through what these have gone through. We're both up here to save lives. Mine is the life of an innocent person who has done nothing. Theirs is the life of a sociopath."]; RT 1999 ["You found him guilty of two first degree, execution-style, premeditated murders."].

914. Thus, in order to rebut the argument regarding the circumstances of the crime, it was necessary for counsel to either continue to argue to the jury that Petitioner had not committed these crimes – i.e. argue "lingering doubt" – or to attempt to "mitigate the circumstances of the

crime." Counsel unreasonably failed to do either.

915. Nothing in trial counsel's closing argument suggested to the jury that they should not sentence Petitioner to death because there was some question that he had not committed the crime. However, trial counsel failed to present readily available evidence that would have convinced the jury that the circumstances of the crime were not as they were vigorously argued by the prosecution.

916. There was substantial, readily available, compelling evidence that trial counsel could have presented to rebut the prosecution's argument.

917. Petitioner incorporates each and every allegation of Claim C, as if pled herein.

918. First, counsel was aware that Petitioner believed that one of the victims, Garry Carter, had raped Petitioner's mother shortly before the crime. Costain Dec., Exh. 62; Antoine Johnson Dec., Exh. 80; Letter from Dr. Pittel to counsel, Exh. 262. Dr. Pittel and John Costain, attorney for Petitioner's co-defendant Antoine Johnson, had both informed counsel of this information prior to the penalty phase. It was also contained in the notes of the police interview with Antoine Johnson. CT 235. Yet counsel failed to present this information.

919. Counsel also failed unreasonably to investigate, prepare or

present evidence of Petitioner's mental state at the time of the crimes at either guilt or penalty. Had counsel investigated, prepared, and presented the evidence of Petitioner's mental state at the time of the crimes, at least the following information could have been presented.

920. As detailed above, the testimony of numerous mental health professionals – such as that presented herein by Dr. Craig Haney, Dr. Stephen Pittel, Dr. Fred Rosenthal, Dr. Dale Watson, Dr. William Spivey, Dr. Roderick Pettis – was available to document and explain Petitioner's deteriorated mental state at the time of the crime.

921. Reasonably competent counsel would have presented the testimony of criminalist Charles Morton regarding the circumstances of the crime. *See* Claim C.

922. Reasonably competent counsel would have presented the testimony of Gary Rivlin and Richard Leo concerning the lack of credibility of Petitioner's confession. *See* Claim F.

923. Reasonably competent counsel would have investigated, prepared and presented the testimony detailed in Claim E that would have conclusively established for the jury that the hypotheticals presented by the prosecutor were not based on facts.

924. Counsel failed to investigate, prepare, or present readily

available evidence which would have been relevant in numerous categories of statutory mitigation under Penal Code section 190.3, including but not limited to:

a) Factor (a): the circumstances of the crime of which the defendant was convicted in the present proceeding;

b) Factor (b): the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence;

c) Factor (c): the presence or absence of any prior felony conviction;

d) Factor (d): whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;

e) Factor (f): whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct;

f) Factor (g): whether or not the offense was committed under extreme duress or under the substantial domination of another person;

g) Factor (h): whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental

disease or defect, or the affects of intoxication;

h) Factor (i): the age of the defendant at the time;[71]

i) Factor (j): whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor;

j) Factor (k): any circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.[72]

925. To the extent that counsel's failure to object to the prosecutor's misconduct at the penalty phase waived Petitioner's claim on appeal, *see* Appellant's Opening Brief claim K, counsel rendered ineffective assistance of counsel.

926. The defense penalty phase presentation as a whole suffered from disorganization and an overall lack of focus that undermined the testimony of expert and lay witnesses alike. Indeed, few if any coherent mitigating themes were presented and then supported in a sustained, consistent way by counsel through witness testimony and argument. Mitigating themes started to be developed and then were abandoned without explanation, likely leaving the jury confused and skeptical about counsel's

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[71] Counsel did argue this factor in mitigation.

[72] Counsel mentioned factor (k) but only with reference to the fact that Petitioner's mother was a drug addict. RT 2039.

intended message. Others were only thinly and unconvincingly conveyed, while still others were counterproductive and likely did much more harm than good. Moreover, an extremely misleading and, at points, grossly inaccurate set of impressions was created concerning Petitioner's upbringing and home life. Either because defense counsel did not know, or chose on the basis of counsel's conflict, not to emphasize or even present key aspects of Petitioner's social history, the jury that decided his fate did so without the benefit of competent, accurate, and complete information about who Petitioner was, what kind of life he had led, and the ways in which many powerful, painful, and destructive forces that were well beyond his control had combined to influence and affect him from a very early age. *See* Haney Dec., Exh. 71.

927. There were extremely powerful mitigating themes rooted in Petitioner's traumatic social history that were ready accessible yet never pursued by his trial counsel. In large part because of an apparent failure of counsel to adequately investigate and then properly prepare these issues, the defense portion of Petitioner's penalty trial lacked a discernable and coherent penalty phase strategy. The few themes that were pursued were presented in unconvincing manner through the use of mental health experts who appeared to be unprepared and unfamiliar with key aspects of

Petitioner's social history, and with lay testimony that was superficial, distorted, and left out significant portions the important story Petitioner's capital jury had a right and a need to hear. Indeed, the mitigating significance of most of the evidence trial counsel chose to present was either unclear or nonexistent. At times counsel presented testimony that was contradictory or that buttressed the aggravating themes being pursued by the prosecution. And most of the important and central mitigating themes that were clearly present in Petitioner's life and that could have been persuasively presented on the basis of readily available information and witnesses were overlooked entirely.

928. The themes that could have been presented were straightforward, standard mitigating themes that all competent capital counsel who were practicing in the early 1990s (and well before) understood needed to be carefully investigated, elaborately prepared, and properly presented. Petitioner's case was distinguished from many other capital cases by the amount of mitigating information that was readily available but which was overlooked by counsel and, perforce, kept from Petitioner's jury. This information and the mitigating themes to which they spoke would have been essential in order for his jury to gain any real understanding of Petitioner's life. This is precisely the kind of information

that capital juries generally find important and persuasive in reaching life verdicts and without which they feel compelled to sentence capital defendants to death. Haney Dec., Exh. 71.

929. In addition to having a poorly conceived penalty phase strategy, counsel implemented it in an ineffective way. Witnesses appeared to be unprepared and counsel asked questions to which he appeared not know the answers (often with harmful results) and others that appeared designed to elicit answers that were not only not mitigating but were supportive of the prosecutor's aggravating themes. Although Petitioner's social history was replete with risk factors that help to explain the path his life took and the criminal behavior in which he was involved, his jury heard almost none of it, and the tiny portion they did hear was not presented in a clear and coherent fashion that would have allowed them to understand its overall mitigating significance. Because of the poorly prepared and ill-conceived testimony of the main mental health witness in the case, prejudicial issues were introduced by defense counsel that had a negative and counterproductive effect on the mitigation case.

930. Moreover, the prosecutor's closing argument was replete with prejudicial references to "sociopathy" and future dangerousness, none of which would have been supportable had the defense elected to

contextualize Petitioner's criminal behavior through social history testimony, and rebut her characterizations by presenting expert testimony about Petitioner's low violence potential in prison, that educated the jury about the difference between jail and prison, explained the elaborate security procedures that are followed in prison to control the behavior of far more institutionally violent persons than Petitioner, and discuss Petitioner's likely positive adjustment to the structured environment of prison.

931. Trial counsel's investigation, preparation and presentation for the penalty phase was not reasonably competent. The scant information in counsel's possession suggested at minimum a history of chronic abuse, predisposition to mental illness and substance abuse, institutional failure and exposure to violence. And yet trial counsel failed to conduct any investigation that would have developed these themes. Moreover, counsel failed to consult the most obvious of experts, including an institutional adjustment expert, even though it should have been apparent to counsel that Petitioner's future dangerousness could be an issue in this case.[73]

932. In presenting the case in mitigation, it was unreasonable for

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[73] Even assuming, arguendo, that it was reasonable for counsel to fail to anticipate this issue, it was not reasonable that once counsel was placed on notice that the prosecutor intended to pursue this question, that counsel did not seek a continuance to consult such an expert, prepare the expert to testify and present the testimony to the jury.

counsel to fail to conduct, develop or present the evidence cited above. A wealth of mitigating evidence was easily obtained. First, Petitioner and all of his extended family lived in the East Bay and had lived there all of their lives. This meant that family members were readily available to be interviewed and to testify to their observations had they been prepared by counsel to do so. Second, Petitioner's family history was well documented by social service agencies. These records were available to counsel at the time of trial. Third, dozens of neighbors and family friends, who had known the family for many years and were upstanding members of the community who could have spoken eloquently to the jury, were available simply by going to Petitioner's former neighborhood. And finally, consultation with mental health professionals and/or appropriate testing would have provided evidence of Petitioner's serious mental impairments.

933. Petitioner was prejudiced by counsels' ineffective assistance.

934. Petitioner incorporates by reference each and every allegation in Claims A, B, C, D, E.

E. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT AT THE PENALTY PHASE

935. Petitioner's confinement and sentence are illegal and unconstitutional under the 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 because the prosecutor and her agents committed misconduct throughout the penalty phase of Petitioner's trial.

936. The prosecutor's presentation of false evidence, including the use of hypotheticals not based on fact, her failure to disclose exculpatory evidence to the defense, and her prejudicial comments, during cross-examination and closing argument, particularly when combined with the elicitation of improper victim impact evidence presented to the jury without any appropriate legal framework, so skewed the jury's sentencing determinations by injecting false, irrelevant and inflammatory factors that Petitioner's trial was fundamentally unfair, his rights to due process, cross-examination and confrontation were violated, and his death sentence was rendered constitutionally unreliable, arbitrary and non-individualized. The prosecutor's improper conduct was not harmless beyond a reasonable doubt.[74]

937. The prosecutor in this case abused her 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 she performs in representing the interests, and in exercising the sovereign power, of the

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[74] Some of the facts alleged in this claim were presented to this Court on direct appeal, *People v. Maurice Boyette*, S032736, and are realleged herein with extra-record facts and allegations to demonstrate the pattern of pervasive prosecutorial misconduct.

State. *People v. (Shawn) Hill*, 17 Cal.4th 800, 665 (1998); *see also Berger v. United States*, 295 U.S. 78 (1935).

938. This pattern of prosecutorial misconduct, in which the prosecutor was allowed unfettered opportunities to overstep the bounds and duties imposed by her position, led in this case, and if allowed by this Court will lead in other cases, to more egregious levels of inflammatory, illegal, and unconstitutional methods employed by prosecutors in order to secure death verdicts in capital cases.

939. The claim presented herein demonstrates a pattern of misconduct by the State. The Alameda District Attorney's Office and its agents violated their proper role in the criminal justice system. The proper role of a criminal prosecutor is not simply attempt to obtain a conviction but rather to obtain a fair conviction. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The American Bar Association Code of Professional responsibility states, "In his representation of a client, a lawyer shall not knowingly use perjured testimony or false evidence." Disciplinary Rule 7-102(A)(4); American Bar Association Canons of Professional Ethics, Canon 30 (1980). Such conduct perverts the adversarial system and taints the results. *Napue v. Illinois*, 360 U.S. 264 (1959). 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*, 291 U.S. 97, 105 (1934).

940. 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.

The Prosecutor Knowingly Used False And/Or Unsupported Hypotheticals Concerning Alleged Crimes Committed by Petitioner

False and/or Unsupported Facts Regarding the Instant Case

941. Petitioner's rights to due process, a fair trial, to confront and cross-examine witnesses and to a reliable, individualized and non-arbitrary sentencing determination were violated by the prosecutor's use of improper hypothetical questions in cross-examining Petitioner's expert witness. The hypothetical questions were not only unsupported by the evidence, but were in most instances false and unreliable and were introduced without benefit of proof, confrontation, cross-examination, or any of the other processes designed to ensure reliability. By using these hypotheticals, the prosecutor created the false impression that extremely damaging aggravating information existed unknown to the jury but known to the prosecutor.

942. Dr. Rosenthal testified on direct examination on Petitioner's behalf at the penalty phase regarding Petitioner's mental state, generally,

but not about Petitioner's participation in the capital offense. On cross-examination, Dr. Rosenthal stated that he did not listen to the tape-recorded statements Petitioner had given to the police, did not talk to the eyewitnesses and did not read court transcripts. RT 1900. Following this testimony, the prosecutor asked a series of hypothetical questions which she knew, or should have known, were not based on fact, or were not supported by the evidence. These hypothetical questions were designed to convince the jury that the death penalty was necessary to deter Petitioner from future acts of violence. The improper hypotheticals put before the jury prejudicial information that was either demonstrably false or unsupported by the evidence and could not be rebutted. Because of the prosecutor's function as the State's representative, jurors most likely would conclude that she had access to extra-record information and that her statements could be trusted. *People v. Bolton*, 23 Cal.3d 208 (1979).

943. According to the prosecution's evidence at the guilt phase, the individuals other than Petitioner and Antoine Johnson who were present when the shooting occurred were Donald Guillory, who testified, and Jasmeen Banks and Kenya Lita Cook, who did not testify. The prosecutor asked Dr. Rosenthal hypothetical questions that required him to assume non-testifying witnesses Banks and Cook were credible and that they would

have testified to many facts which were never presented in evidence, in support of the prosecution's theory of the case:

> Q. I want to you [sic] to assume that you talked to these witnesses, you found them credible and that you found that the facts were that Mr. Boyette is in a house with a blind man by the name of Antoine Johnson. [¶] Mr. Johnson shoots a gun at an individual by the name of Gary Carter. Then Mr. Boyette is involved, somehow, with a struggle with the victim Annette Devallier, who is dragging Gary Carter out of the house. [¶] Mr. Boyette, then, on his own, goes to Mr. Johnson and says, "give me the gun." [¶] He goes outside, he fires some rounds into a person identified as Gary Carter, then he goes and he coldly executes a woman on her hands and knees who is saying "please don't." [¶] Then he's going to a car and he fires one last round into the body of Gary Carter . . . and you assume that you believe Kenya Cook in her statements that then that second victim also says "please don't." And Mr. Boyette exercising his, I guess you would say poor judgment, shoots a final shot into Gary Carter's head. [¶] Now, are you claiming somehow that he is not acting under his own free will?

RT 1902.

944. This is not the version of events presented by the actual evidence. The only purported eyewitness, Donald Guillory, saw Johnson shoot the gun at Carter, and later saw Petitioner with a gun in his hand standing near Carter. There was no testimony whatsoever that Petitioner was involved in a struggle with Devallier; that Devallier dragged Carter out of the house; that Petitioner fired shots at Carter, then executed a woman

who was saying "please, don't," and fired another round at Carter, who also said, "please, don't." The use of these improper hypotheticals allowed the prosecutor to expound at length on "evidence" that she did not present to the jury and that was not tested by cross-examination. While this is surely a more convenient method of placing a theory of the case before a jury, it is not permitted by the Constitution nor by state law.

945. The prosecutor asked additional hypothetical questions not based on the evidence that also effectively provided the jury with what might have been the "testimony" of witnesses who were not subject to cross examination. These hypotheticals involved facts relating to Petitioner's referral pursuant to Welfare and Institutions Code section 5150 and an evaluation pursuant to Penal Code section 4011. The prosecutor knew or should have known that these hypotheticals, which described violent acts that had not occurred and were not otherwise in the record, were untrue.

Facts Regarding the 5150 Referral and 4011 Examination

946. Although Dr. Rosenthal did not disagree that Petitioner had several of the characteristics required for a diagnosis of antisocial personality disorder, he testified that Petitioner did not meet the diagnostic criteria in large part because he was too young. RT 1904, 1906-1907, 1909. The prosecutor cross-examined Dr. Rosenthal, asking hypothetical

questions that assumed facts of additional "antisocial traits" that were based on facts the prosecutor knew to be false. This questioning began with the prosecutor making the following hypothetical assertion:

> Q. Assume that [Petitioner] had threatened others and himself in Judge DeLucchi's courtroom and he was brought over to Highland and they diagnosed him as Antisocial Personality Disorder.

RT 1903. Later, when referring to this unproven alleged violent conduct, the prosecutor asserted that the threats by Petitioner had been directed at Judge DeLucchi and his courtroom staff. RT 1914. There is no factual basis in the record for these prejudicial assertions by the prosecutor and the prosecutor knew or should have known that these statements were false.

947. Petitioner's probation officer has stated that:

> If Maurice had ever threatened anybody or caused a disturbance in Judge DeLucchi's courtroom, I would have heard about it. The Court Officer for the Probation Department kept me informed about what happened in court with my cases and I would have been told if anything like that had happened. Judge DeLucchi was really respectful towards clients and would never have said or done anything to make Maurice upset in his courtroom. Additionally, it would have been too out of character for Maurice. Maurice was very respectful of authority and too much of a follower to do anything like that.

Mei-Ling Pastor Dec., Exh. 98.

948. Marva Smith, a court probation officer for Alameda County appeared in Judge DeLucchi's courtroom with various probations every Monday in 1991. She was familiar with both Judge DeLucchi's courtroom and the probation process in Alameda County in general. Marva Smith Dec., Exh. 110.

949. Marva Smith does not believe that Petitioner caused any problems in Judge DeLucchi's courtroom. She has stated that "if [Petitioner] had threatened to kill himself or others in Judge DeLucchi's courtroom while I was with him, I would have reported this to his regular probation officer. This incident would have been serious enough that I believe any court probation officer at that time would have done the same." Marva Smith Dec., Exh. 110.[75]

950. The prosecutor's questioning included a hypothetical question which injected into the case the opinion of a non-testifying probation officer[76] that Petitioner was manipulative:

> Q. Assume you talked to [probation officer Maylene (sic) Pastor] and found her credible and she also told you that Mr. Boyette was extremely manipulative, he

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[75] The reporter's transcript from Petitioner's appearances in Judge DeLucchi's courtroom on Monday, March 25, 1991 and Monday, April 8, 1991 demonstrate that no violence or threats of violence occurred on either of these days. Exh. 17.

[76] Again referring to Mei-Ling Pastor.

> would say whatever he wants to say to get whatever he wanted. Would that change your opinion that he was manipulating you?

RT 1907.

951. In fact, the prosecutor had been in contact with Ms. Pastor. The prosecutor knew based on these conversations that Ms. Pastor did not believe that Petitioner was "manipulative" in any negative sense of that word. Moreover, the prosecutor was aware that Ms. Pastor was extremely sympathetic to Petitioner and believed that he was a young person who needed help that he was not getting from his extraordinarily dysfunctional family or the probation system. Ms. Pastor believed that the incident which resulted in a request for a 72-hour involuntary detention pursuant to Welfare and Institutions Code section 5150 was a cry for help from Petitioner, a person who was overwhelmed by his emotional frailties.

952. Later, the prosecutor returned to the incident which resulted in the 5150 referral, with the following "hypothetical:"

> Q. Did [counsel] show you the. . . . one page Berkeley Police Report, the reason he got into the hospital for this incident, where he had a fight with his mother because he wanted some money and wasn't given enough, grabbed a knife and threatened to kill his grandfather and himself, which is why he was brought to the hospital.

RT 1912; *see also* 1913, 1914.

953. Ms. Pastor has stated the following:

a. Therese Drabec [the prosecutor] and an investigator from the DA's office interviewed me about this 5150 incident and about revoking Maurice's probation in March of 1993. She subpoenaed me to testify at Maurice's trial about the shootings in East Oakland. I had a disagreement with Ms. Drabec about what I would say at trial. Ms. Drabec wanted me to testify about something that I just didn't see the way she wanted me to – about Maurice being manipulative, or something like that. Maurice was manipulative only in a positive sense of trying to get help for himself. The comments in Maurice's emergency psychiatric evaluation "clearly manipulative" and "not in need of mental health treatment" were referring only to Maurice's acute situation. He was not in need of treatment only in the sense that he had already calmed down by the time he was evaluated at the hospital. I told Ms. Drabec that Maurice did not have the resources to deal with stress and that he needed help. Ms. Drabec wanted me to talk about something regarding the current case, but I didn't know anything about Maurice's case that was on trial. I made it clear to Ms. Drabec that I thought Maurice was simply a kid who needed help which he wasn't getting from his family or from social services. She did not seem to want to hear this from me. Mei-Ling Pastor Dec., Exh. 98.

b. I said to myself that if the DA wanted to put me on the stand that was fine with me, but I would just tell it like I saw it and not change my opinion for her. Some probation officers will let the DA have a lot of influence on their opinions and conclusions. Sometimes they forget that they aren't supposed to be on one side or the other, but are supposed to try to explain the situation neutrally. In the end, I was never called to testify. I was pretty sure I would not be called by the DA to testify based on our disagreements about Maurice - I did not even reschedule my appointments with probationers on the day I was supposed to testify. If the DA or the defense attorneys had contacted me, though, I would have been happy to testify at Maurice's trial to any of the information contained in this declaration. Much of the information that is set forth here was in my files, including my handwritten notes from the telephone calls from Maurice on the night of the 5150 referral. Those notes confirm how upset Maurice was - and how he essentially called the police on himself. Mei-Ling Pastor Dec., Exh. 98.

c. I never understood why I was being subpoenaed by the DA instead of the defense attorneys to begin with. I felt that I should be a defense witness in Maurice's case. The 5150 incident as I saw it would be helpful to Maurice's defense, not the prosecution. Maurice's attorneys

never contacted me, and I had such a big caseload back then that it got lost in the shuffle and I did not contact them. Mei-Ling Pastor Dec., Exh. 98.

954. In addition to the testimony of Mei-Ling Pastor, Diane Talsky, another probation officer was a percipient witness to Petitioner's involvement in the events that led to the 5150 referral. Diane Talsky has stated:

a. I have been a probation officer for the Alameda County Probation Office since 1981. I have always handled a substantial mental health caseload for the adult probation department. Talsky Dec., Exh. 120.

b. One evening in the early 1990's, I was working in my office after most people had left the probation office. Mei-Ling Pastor, another probation officer, caught my attention. She was on the telephone and was motioning to me. She explained to me that one of her probationers, Maurice Boyette, was on the telephone and was very upset about something to do with his family. Maurice was afraid that he would do something to himself or someone else because he was so agitated. Maurice called Mei-Ling because he desperately wanted help. Mei-Ling introduced me to Maurice over the phone and had me talk to him while she called the police to go pick him up and take him to the hospital. Mei-Ling wanted to get Maurice to a safe place where he could stabilize. Talsky Dec., Exh. 120.

c. I often tell my probationers that if they find themselves in a situation that they cannot handle and they need some time out, to call me or any probation officer and we will get them into custody. Putting someone in custody can be a way to remove them from a bad environment and stabilize them. In these circumstances, I think of custody as part of a probationer's therapy. From my experience with Maurice on the phone that evening and from talking to Mei-Ling subsequently, Maurice was put into custody in order to stabilize him and temporarily remove him from a difficult home situation. Talsky Dec., Exh. 120.

d. From my experience as a probation officer, Highland Hospital's Emergency Room psychiatric unit was cursory in its mental health evaluations in the early 1990's. It was not rare for patients released from this unit after a few hours or a few days to later be committed to a mental health detention facility, in Napa for example, for months at a time. Talsky Dec., Exh. 120.

955. The prosecutor, by use of hypothetical questions attempted to place before the jury false information that Petitioner had an antisocial personality disorder and was dangerous to others including courtroom personnel and his own family. The prosecutor knew that had she called Ms. Pastor as a witness, Ms. Pastor would have provided mitigating, not

aggravating unsympathetic testimony. Instead, the prosecutor used hypotheticals which falsely portrayed Ms. Pastor's opinion and presented "facts" that were either demonstrably false or unsupported by the evidence.

False Facts Regarding Max Schireson Incident

956. The prosecutor also presented facts of unproven alleged violent activity by Petitioner that were found nowhere in the record, under the guise of yet another series of hypothetical questions:

> Q. Assume that you talked to a person by the name of Mat Shearson [sic] and that back on June 4th [objection to using name in hypothetical is sustained] . . . . I want you to assume to be true, that on June 4th, 1991, the defendant, with a group of several other males was standing on the sidewalk, and a white individual[77] walked by and the defendant went up and hit him for no apparent reason. Is that the kind of act you're talking about when you talk about antisocial behavior?

RT 1909-10.

957. In fact, someone from the prosecutor's office had been in contact with Max Schireson. Max Schireson has stated:

> A year or two later [after the 1991 incident], someone from the Alameda County District Attorney's Office telephoned me and told me about the death penalty case that was being

[77] What is most reprehensible about this particular hypothetical is the attempt by the prosecutor to inject racial considerations into the deliberative process. As in the prosecutor's argument regarding gangs, in particular the Black Guerilla Family, the reference to a "white individual" can only be seen as a blatant attempt to inflame racial prejudice.

> pursued against Mr. Boyette. We discussed both the June 1991 incident and the possibility of me testifying at Mr. Boyette's trial, but I never heard back from them and was not called to testify.

Schireson Dec., Exh. 108.

958. Mr. Schireson was not called to testify because, like Ms. Pastor, his testimony would not have provided evidence in aggravation, nor would it have supported the prosecutor's facts as set forth in her hypothetical.

959. Had Mr. Schireson testified, he would have stated the following *mitigating* facts with regard to this incident:

a. In June of 1991, I was walking toward a friend's house on Harrison Street in Oakland. As I walked by a group of young men, one of them hit me and my glasses fell off. Then one of the young men took my beeper. I said something to the effect of, "What'd I ever do?" and asked for my glasses back. One of them handed my glasses to me and I walked off. Schireson Dec., Exh. 108.

b. I continued on to my friend's house and told her what had happened. She thought that my beeper might turn up at the scene of a crime, so she suggested that I call the police just to be safe. Schireson Dec., Exh. 108.

c. I called the Oakland Police Department, and they came out to Harrison Street. They started walking along the street asking people if they had seen what happened. At one point, an older woman became angry at the cops because she thought they were harassing people. Schireson Dec., Exh. 108.

d. The cops continued asking people questions, and when they asked one young man if he knew what had happened, he said, "I hit him." I found out later that this young man's name was Maurice Boyette. I don't actually know if he is the person who hit me. When I got hit, my glasses fell off and I couldn't see anything clearly. Schireson Dec., Exh. 108.

e. I had the definite impression that Mr. Boyette was out of it mentally, like he was mentally retarded or impaired in some way. He really didn't seem to know what was going on. He wasn't hostile in the least and didn't seem aware that he had done anything wrong. Schireson Dec., Exh. 108.

f. I have no concrete reason to believe that whoever hit me did so because I was white. I really have no idea why it happened. Schireson Dec., Exh. 108.

g. A couple of weeks afterwards, I went to Europe for a few weeks. When I got back, I was surprised to find a message on my answering

machine saying that they had Mr. Boyette in jail awaiting trial. Schireson Dec., Exh. 108.

h. While it was very unusual and surprising I didn't think the whole incident was a big deal, but I basically went along with what the cops and prosecutor wanted to do. Mr. Boyette actually served time in jail for the incident, and I remember telling people that I felt it was unfair that he was being punished so harshly for such a minor thing. He seemed like someone who needed help, not punishment. Schireson Dec., Exh. 108.

Facts Involving Gregory McClain

960. The prosecutor's final hypothetical was also false.

> Q. Well, assume to be true that January of 1993, Mr. Boyette along with several other individuals, beat up an inmate by the name of McClain. Would that be consistent with antisocial personality disorder?

RT 1911.

961. Gregory McClain has declared as follows:

a. I was in the Santa Rita Jail in Alameda County around Christmas in 1992 for a parole violation. I was only there for a very short time before I was transferred to prison. McClain Dec., Exh. 89;

b. On December 30, 1992, there was a dispute in my pod where some guys did not want to let my cellee use the telephone. I was going to fight one of the guys in the cell, but he didn't want to fight me so he had

another guy jump me from behind. McClain Dec., Exh. 89;

c. Based on the description that Maurice Boyette was six feet tall and weighed over two hundred pounds, he could not have been one of the guys who jumped me. I am 5'11" and I weigh 200 pounds and none of the guys who jumped me were bigger than me. There were about four or five of them and most of them were small. McClain Dec., Exh. 89;

d. The whole thing was not a big deal and I was not even hurt. The guys who jumped me were more messed up than me. I flipped them every which way and I ran one guy's face into the wall. McClain Dec., Exh. 89;

e. I have always tried to mind my own business, keep quiet, and do my own time. I would not have reported this incident to anyone and I would not have told the cops the names of the people who jumped me. I was only in the pod a short time and I didn't even know anybody's name there. I wasn't afraid to tell, it just wasn't a big deal. I was moved to a different housing unit immediately after the incident and never saw any of the inmates who were involved again while I was at Santa Rita. McClain Dec., Exh. 89.

f. I was never contacted about this incident by anyone prosecuting or defending Maurice Boyette until now. I would have told anyone who contacted me what I have said here. I don't think it is fair that a prosecutor

would try to use this incident against Boyette. Like I said, it wasn't a big deal and no one of Boyette's description jumped me. McClain Dec., Exh. 89.

962. In case these explosive hypotheticals of violent activity, which had not been introduced in the prosecution's case, were not clear enough, the prosecutor summarized them all for the jury in the following question:

> Q. Now, if you had talked to him about all these incidents, and including the murder, and you found them all to be true, you've got an assault in jail, a battery in 1991, grabbing a knife and threatening his grandfather, threatening the court, courtroom staff over in Judge Delucchi's courtroom and a double murder, would you say that all these circumstances kind of point to antisocial personality disorder?

RT 1914.

963. The prosecutor knew, or should have known, that these hypotheticals were false and could not have been proved through testimony or other evidence. Moreover, the prosecutor was aware, or should have been aware, that had persons with knowledge of these incidents been called as witnesses they would not only have failed to confirm the hypotheticals set forth by the prosecutor but in fact would have testified to extremely compelling *mitigation* evidence.

964. It is well settled that hypothetical questions fall within the

scope of proper expert testimony only when they are supported by the evidence properly received at trial. *People v. Sims*, 5 Cal.4th 405, 437 (1993), *citing Mosesian v. Pennwalt Corp.,* 191 Cal.App.3d 851, 860 (1987) ("The expert should base the opinion upon facts personally observed or upon a hypothesis supported by the evidence."). Hypothetical questions "must be rooted in facts shown by the evidence." *People v. Gardeley*, 14 Cal.4th 605, 618 (1996) (citations omitted). "If an expert is asked to give his opinion based on an assumed set of facts, the assumption on which the hypothetical question is based must be supported by evidence in the record." *People v. Hayes*, 172 Cal.App.3d 517, 524 (1985), *citing Hyatt v. Sierra Boat Co.*, 79 Cal.App.3d 325, 338-339 (1978). While on cross-examination, there is a wider latitude for questioning expert witnesses, hypothetical questions must be "fair in scope and fairly relate to the state of the evidence in the case . . . ." *Dincau v. Tamayose*, 131 Cal.App.3d 780, 799 (1982).

965. None of the hypothetical questions posed by the prosecutor were based on the evidence. Indeed, most of the hypotheticals were based on facts the prosecutor knew, or should have known, were actually false. Moreover, the questions that asked the witness to assume the credibility of witnesses constituted improper vouching by the prosecution for testimony

she knew or should have known to be false and unsupported by the evidence.

966. The hypotheticals, which included both victims' alleged pleas for mercy purportedly based on eyewitness statements, were much more vivid and inflammatory than the actual evidence presented by the prosecution. Furthermore, the use of alleged additional violent acts through hypotheticals known to be false was highly prejudicial, particularly in this case where there was no violent criminal activity alleged except for the capital murder itself. In at least one instance, the prosecution emphasized race, blatantly appealing to any racist tendencies of jurors, although she knew or should have known that race was not a factor the jurors could properly consider in sentencing.

967. It is unquestionably misconduct for a prosecutor to argue facts that are known to be false and that are not in evidence. *People v. Hill*, 17 Cal.4th at 827-28, *citing People v. Pinholster*, 1 Cal.4th 865, 948 (1992). The prosecutor's misconduct in using hypotheticals not based on the evidence and that she knew or should have known to be false and/or unsupported by the evidence, rendered the trial fundamentally unfair in violation of due process. The prosecutor's excesses are especially egregious in a death case, where both the prosecutors and courts are

charged with an heightened obligation to ensure that the trial is fundamentally fair in all respects. Moreover, the trial court erred in overruling counsel's objections to the prosecutor's hypothetical questions. The court also erroneously rejected a motion for mistrial based on this conduct. RT 1984-1986. The court's failures and the prosecutor's misconduct violated Petitioner's rights to due process, to a fair trial, to confront and cross-examine witnesses and to a reliable, non-arbitrary and individualized sentencing determination.

The Prosecutor Used Argument As a Substitute for Evidence

968. It has long been established that a prosecutor may not use argument to the jury as a means of supplying additional testimony in support of the People's case.

969. A violation of these rules of professional and ethical conduct constitutes misconduct[78] and implicates basic constitutional rights. When a

[78] See also the following: ABA Model Rules of Professional Conduct (1989), Rule 3.4(e) ["A lawyer shall not . . . in trial . . . assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to . . . the credibility of a witness"]; ABA Code of Professional Responsibility (1980) DR 7-106(C) ['In appearing in his professional capacity before a tribunal, a lawyer shall not . . . (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness. ¶ (4) Assert his personal opinion as to . . . the credibility of a witness."]; ABA Code of Professional Responsibility, Ethical Considerations, EC -7-25 ["[A] lawyer should not by subterfuge put before a jury matter which it cannot properly consider"]; 1 ABA Standards from Criminal Justice, The Prosecution Function (2nd ed. 1980), Standard 3-

prosecutor uses her argument to present the jury with facts not in evidence but allegedly known to her, the accused is denied his rights to confrontation and cross-examination of witnesses. *Donnelly v. DeChristophoro*, 416 U.S. 637, 643, n.15 (1974). This in turn renders the accused's right to the effective assistance of counsel an "empty formality." *See Ungar v. Sarafile*, 376 U.S. 575, 589 (1964); *see also United States v. Cronic*, 466 U.S. 648, 659, n. 25 (1984). And because the accused is unable to employ the great truth-determining devices of cross-examination and the assistance of counsel, the resulting verdict is fundamentally unreliable. *See Beck v. Alabama*, 447 U.S. 625 (1980); *Johnson v. Mississippi*, 486 U.S. 578 (1988).

970. The trial court's error in refusing to rein in the prosecutor's use of hypotheticals was exploited by the prosecutor in closing argument when

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5.8(b) ["It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony"] and Standard 3-5.9 ["It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record . . . unless such facts are matters of common public knowledge . . . or matters of which the court may take judicial notice."]; National District Attorneys Association, National Prosecution Standards (1st ed. 1977), commentary to std. 17.17, p. 280 ["The courts are, in general, adamant concerning any suggestion from the prosecution that there is other convincing evidence of the defendant's guilt which is not before the jury."]; Rules of Professional Conduct of the State Bar of California (Jan 1989), rule 7-105 ["a member of the State Bar shall refrain from asserting his personal knowledge of facts at issue except when testifying as a witness."].

she referred to the hypotheticals as if they were proven facts which properly could be considered by the jury. This misconception was also fostered by the court's instruction, CALJIC 2.82, which informed the jury that in permitting such questions, the court had determined that the "assumed facts are within the probable or possible range of the evidence." CT 956. Under the circumstances of this case, that instruction further misled the jury, improperly informed the jurors that evidence existed to support the hypothetical questions, and wholly undermined the Eighth Amendment requirement of reliability in capital sentencing.

971. Additionally, in discussing sentencing factor (b), the presence or absence of other criminal activity involving violence, the prosecutor reminded the jury of some "facts" mentioned to the psychiatrist, and stated she did not "need [to] bring in those witnesses in order to ask a hypothetical to that witness," RT 1995, implying that the witnesses would have so testified if called. Although at defense counsel's request the jury was instructed that there was no prior violent activity for consideration,[79] RT 2022, RT 2055, the damage was already done. Furthermore, that instruction did not address the misleading hypotheticals or refute the suggestion that some of the hypothetical questions were relevant to factor (a), while others

[79] The court's instruction was oral. The written instructions contained no qualifier on factor (b).

sought to establish non-statutory aggravation. Nor were the jurors instructed according to CALJIC No. 8.87 that they were required to find criminal acts beyond a reasonable doubt before they could consider these incidents in aggravation.

972. The introduction of non-statutory aggravation without proper notice, and without providing the opportunity to rebut such evidence violated Petitioner's statutory and constitutional right to notice of aggravation that will be admitted against him, Pen. Code § 190.3; *Cole v. Arkansas*, 333 U.S. 196 (1948), as well as his due process liberty interest in having his sentence determined on the basis of properly noticed statutory factors, *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

973. The use of hypotheticals to inject false, inflammatory and unreliable information into the penalty phase violated Petitioner's constitutional rights to due process, a fair trial, confrontation and cross-examination, and a reliable determination of penalty. *Darden v. Wainwright*, 477 U.S. 168 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637; *Penry v. Lynaugh*, 492 U.S. at 328.

974. The State violated Petitioner's rights by knowingly presenting false testimony, *Money v. Holahan*, 297 U.S. 103 (1935), allowing witnesses to give false impressions of the evidence, *Alcorta v. Texas*, 355

U.S. 28 (1950), and/or allowing false evidence to go uncorrected, *Napue v. Illinois*, 360 U.S. 264 (1959).

975. Petitioner incorporates Claims C and D.

976. To the extent that trial counsel should have known that the hypotheticals were false, unsupported by the evidence and/or that the witnesses upon whom the hypotheticals were based possessed potentially mitigating evidence, counsel's failure to investigate, discover, and/or introduce the evidence cited in the preceding subparagraphs of this section of the petition, such failures were unreasonable and prejudiced Petitioner, and deprived him of the aforementioned constitutional rights to due process and equal protection, to the reasonably competent assistance of counsel, and to freedom from cruel and/or unusual punishment. Had trial counsel performed adequately, it is reasonably probable that the outcome of the penalty phase of the trial would have been different. *See* Claim D.

977. To the extent that the prosecutor failed to inform the defense of potential mitigation material, including impeachment material, Petitioner's due process rights were violated. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Improper Injection of Speculation Concerning Gang Affiliation and Future Dangerousness Into the Penalty Phase

978. Other than the capital crimes and the improperly injected false

other crimes evidence, there was no evidence of any other violent activity by Petitioner. The only evidence presented by the prosecution in aggravation was the stipulation to two prior felony convictions for nonviolent drug offenses and the inflammatory victim impact evidence discussed above. RT 1847-89. Nevertheless, the prosecutor, both in cross-examining Petitioner's experts and in her opening and closing arguments, stressed her opinion concerning Petitioner's future dangerousness and, her unsubstantiated belief in the certainty that he would kill again. The prosecutor essentially informed the jury that its choice was not the one authorized by the statute and demanded by the Constitution -- between sentencing Petitioner to death or life without possibility of parole -- but was instead between giving Petitioner death or ensuring death for some innocent victim that Petitioner was sure to kill in the future. Despite the total absence of evidence that Petitioner had ever been involved in gang activity or that the shootings were gang-related, the prosecutor questioned Petitioner's expert in a manner that implied that unless Petitioner were executed, Petitioner would likely become a gang member in prison who would kill innocent people, thus creating more grieving families for whom the jurors would be personally responsible. The prosecutor then stressed this point in her closing argument.

979. These highly inflammatory tactics injected impermissible, arbitrary, and inaccurate factors into the jury's sentencing determination, unduly inflamed the jury and caused the jury to speculate about what might occur in the future. These improper tactics completely diverted the jury from its legally defined task, which was to determine the appropriate penalty based on the circumstances of the crime and character of the defendant through the context of the statutory factors. As a result, Petitioner's trial was fundamentally unfair and the jury's sentencing determination was rendered unreliable, non-individualized and arbitrary in violation of Petitioner's Eighth Amendment and due process rights.

980. In her opening statement at the penalty phase, the prosecutor informed the jury that "[i]t is the People's position that the circumstances that I presented to you [at the guilt phase], the cold, calculated manner in which Mr. Boyette executed two people shows that there is a strong likelihood that he would kill again. And you have to ask yourselves, do you want to put more families through that?" RT 1844.

981. After the prosecution presented its victim impact evidence, the defense presented the testimony of Dr. Fred Rosenthal, who testified that Petitioner suffered from drug and alcohol abuse, had emotional problems, and was "operating emotionally and intellectually at a much younger age

than his actual age." RT 1892-93. Dr. Rosenthal further testified that Petitioner was a "fairly passive and dependent individual." RT 1893. Such characteristics, Dr. Rosenthal testified, might lead to a diagnosis of dependent personality disorder in the future. RT 1892-1893. Dr. Rosenthal described individuals with this disorder as those who "tend to rely very heavily and very easily get influenced by other people . . . they have a hard time living independently, making judgments, seeing the world from an independent point of view . . . [and are] very vulnerable and sensitive to criticism from other people." RT 1893-94.

982. On cross-examination, the prosecutor asked Dr. Rosenthal whether Petitioner could be influenced by a gang, RT 1897, or would do something in order to get into a gang or to establish his status in a gang. RT 1898. Dr. Rosenthal responded that Petitioner could be influenced by people he considered leaders and would more likely do something to please others, rather than get into a gang. RT 1897-98. The prosecutor then asked the following questions and elicited the following answers:

Q. And you have interviewed inmates in prison, I guess, state prison as well as the different jails.

A. I have, yes.

Q. And you're aware that in these prisons, there are prison gangs, right?

A. Yes.

Q. Have you ever heard of the Black Guerilla Family?

A. I've heard of them.

Q. Yeah. And isn't that a very powerful prison gang in the State of California.

RT 1898.

983. After an objection to this question was sustained, the prosecutor, asked, "Would you say that the Black Guerilla Family would be the type of gang that might influence Maurice Boyette to commit other crimes?" RT 1898. Dr. Rosenthal responded that he did not know anything about this gang and was not an expert on gangs, and that people like Petitioner did not need a gang to be led. RT 1898-99.

984. The prosecutor then attempted to elicit additional testimony on Petitioner's future dangerousness:

Q. But if it is the wrong type of personality, as far as committing crimes, then Mr. Boyette's going to get caught up with the wrong -- in more crimes, is that what you're saying?

A. I'm not saying that.

RT 1899.

985. In her closing argument, the prosecutor returned to the theme of gang activity and future dangerousness, paraphrasing the cross-

examination of the defense expert to draw her own unsupported conclusions:

> Then I had my opportunity to cross-examine him. And I went right to the issue of: could you describe this dependent personality? And he repeats, how dependent? How easily led? Then I asked him: "Well, aren't there gangs in prison who would exert that type of control? Isn't that the personality of someone who is going to do anything for a gang? Ever hear of the Black Guerilla Family?" And all of a sudden, he starts backing off. I asked him: "In other words, if Mr. Boyette gets caught with a good group of people, he will do good things; if he gets caught up with a gang, he will do what they want him to do? A hit man?" Then the good doctor backs off .

RT 2001. The prosecutor continued to disparage the expert's testimony, stating that the expert "talks out of both sides of his mouth . . . as soon as I start mentioning gangs, because you know what I'm getting at, his likelihood of killing again, his future dangerousness. The perfect personality who could kill again." RT 2002; *see also* RT 2018 ("They brought out all these things that he is a big follower. Think of prison life, can you imagine the stress of prison? You have no idea. And the gangs, and the pressures."); RT 2004 (regarding whether it is easier for sociopaths to kill); RT 2013 ("Who's a better hit man? When you talk about his future dangerousness, no conscience.").

986. The prosecutor further argued that the jury must vote to impose death to prevent Petitioner from being violent in prison or joining a gang. RT 2017 ("[I]f you give him life in prison, what are they going to do if he commits an assault or something? If he commits a murder I'm back here with him asking for the same thing. More grief, more trauma, another dead body or two."); *Id.* ("But what are they going to do to him if they're fighting, joining a gang? . . . There's nothing that they can do to him unless he commits another murder.").

987. The prosecutor exhorted the jury to speculate about the likelihood that Petitioner would kill again, and referring back to and interweaving the highly emotional victim impact evidence, urged the jury to vote for death on the basis of future pain that would be caused. Thus, the prosecutor argued that future dangerousness was "a very important consideration," RT 2002, and that the jurors "have to look at his future dangerousness. Is this a remorseful person who really blew it one night or is this a sociopath who's going to kill again? That's the bottom line. Can you put another family through what they went through? That's what you have to decide." RT 2002-2003; *see also* RT 2008 ("And what you have to remember is you have to weigh: do you want to put another family through that . . . Are you going to make the choice to put another family through that

if he kills again?").

988. The prosecutor continued: "*I'm standing here to save the life of the next victim and to avoid another family going through what these families have gone through.* We're both up here to save lives. Mine is life of an innocent person who has done nothing. Theirs is the life of a sociopath." RT 2014. (emphasis added.)

989. The prosecutor argued further:

> You found two cold-blooded, first degree murders. No remorse. No concern. What better evidence do you have that he would do it again? [¶] And that's the intangible. You see him sitting here and it's human nature to want to help preserve a life. That's the moral struggle you have, because you see in front of you a human being that you would like to help and you would like to avoid any trauma to the family. I know that. This is not an easy decision. [¶] But what you have to remember is he doesn't feel any of those things that you're going through or feeling. And he's going to do it again. And that next victim is the intangible that you can't see. It is not sitting here. That's what I represent. And those families are what you can't see . . . and that's where I'm talking about right here, the likelihood he will kill again. It gets easier and easier.

RT 2016.

990. The prosecutor again emphasized that the choice was not simply death or life without possibility of parole, the two sentencing

alternatives; instead, with no evidentiary support and contrary to California law and the mandates of the federal constitution, she insisted that the real choice the jury had was between death for Petitioner or death for other innocent victims for whom the jurors would be responsible if they did not fulfill their obligation to sentence Petitioner to death: "That is your bottom line issue. Someone is going to die. The bottom line issue: Is it a sociopath, remorseless liar or is it his next victim? That's what you have to decide. That's that value you have to place on life." RT 2017. *See also* RT 2018 ("So when you talk about his likelihood of killing again, it doesn't mean just because he's in prison it's going to be another bad guy. There's a lot of good people who have jobs in prison"); *id.* ("Well, think what he's going to be exposed to in prison. Think of how easy that will be to kill."); RT 2020 ("If you give him life, you give him a license to kill.").

991. The prosecutor's line of questioning and argument on future dangerousness and gang affiliation and her attempts to elicit expert testimony on future dangerousness was highly improper. The prosecutor argued facts not supported by the record, appealed to the passions and prejudice of the jury, incited racial animus, and improperly asked the jury to speculate about future victims and consider future dangerousness as an aggravating circumstance.

992. The prosecutor's argument that the death penalty was necessary to prevent future murders by Petitioner was clearly improper, *Darden v. Wainwright,* 477 U.S. at 180-181 & n. 10; was not based on the evidence, were highly inflammatory, caused the jury to unduly speculate about the future, and misinformed the jury about the nature of its sentencing choice (i.e., death or life without possibility of parole, not death of defendant or death of future victims). The prosecutor misled the jurors as to their task, and she did so in a manner calculated to achieve a verdict based, not on reason, but on passion. This Court has condemned such argument because it "might diminish [the jury's] sensitivity to its task." *People v. Morse*, 60 Cal.2d 631, 649 (1964); *see also Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985).

993. While argument regarding a defendant's future dangerousness has been held to be proper when based on the defendant's past conduct, *People v. Hayes*, 52 Cal.3d 577, 635 (1990), or in response to defense evidence that the defendant would not be a danger in prison, *People v. Taylor*, 52 Cal.3d 719, 752 (1990) (Mosk J., concurring), when there has been no properly admitted evidence of prior violence, the defense presented no affirmative evidence of Petitioner's prison conduct, and the prosecutor's argument is based solely on speculation without any evidentiary support,

and particularly here where the argument was based in part on false hypotheticals, such questioning and argument are completely inappropriate and are likely to lead to an unreliable sentencing determination. The prosecutor's comments -- warning the jurors that if they did not sentence Petitioner to death Petitioner would kill again -- improperly placed responsibility on the jury for future conduct and diverted the jury from its responsibility to determine the appropriate sentence based on Petitioner's background and character and the crime. *Penry v. Lynaugh*, 492 U.S. at 328.[80]

994. In addition, the prosecutor's argument constituted a misstatement of the law, since future dangerousness is not a proper aggravating factor under California law. *See* Pen. Code § 190.3; *Boyd,* 38 Cal.3d at 772-776. The jury's consideration of future dangerousness in determining sentence violated due process by arbitrarily depriving Petitioner of his state-created liberty interest in a sentencing determination based solely on the statutory factors. *Hicks v. Oklahoma*, 447 U.S. 343.

995. The prosecutor's focus on gang affiliation, particularly a gang known as the Black Guerilla Family, and particularly in the absence of *any evidence* of Petitioner's affiliation with that group, was a blatant appeal to

[80] As can be seen by the juror misconduct that followed, the jury was led to speculate wildly and wholly inappropriately. *See* Claim A.

racism, and was designed to further inflame the jury and divert it from its proper task. Moreover, even assuming there was evidence that Petitioner was in or would some day join a gang,[81] such evidence is not a statutory sentencing factor, and is therefore an improper consideration for the jury. *See People v. Gonzalez*, 51 Cal.3d 1179 (1990); *Boyd*, 38 Cal.3d 762.

996. Furthermore, while eliciting testimony on cross-examination regarding the possibility of gang activity in prison may be appropriate where the defense presents evidence of the likelihood of positive institutional adjustment, *People v. Malone*, 47 Cal.3d 1, 31 (1988); *People v. Morris*, 53 Cal.3d 152, 219 (1991), it is not permissible here, where no such evidence was presented and where the questioning and argument only sought to obtain expert opinion regarding the defendant's future dangerousness. *See People v. Murtishaw*, 29 Cal.3d 733, 767-75 (1981) (expert testimony may not be elicited in a capital case on the subject of a defendant's future dangerousness); *see also People v. Clark*, 3 Cal.4th 41, 161 (1992) (no misconduct because prosecutor did not solicit expert forecasts of future dangerousness).

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[81] In fact, defense counsel was ineffective for failing to rebut insinuations of gang affiliation with the uncontroverted fact that Petitioner had never joined a gang, despite having spent a vulnerable, isolated, and lonely adolescence surrounded by that sort of activity. Haney Dec., Exh. 71.

997. Evidence and argument about gang activity in this case were irrelevant and prejudicial. *See People v. Malone*, 47 Cal.3d at 30, *citing People v. Cardenas*, 31 Cal.3d 897, 904-05 (1982); *People v. Perez*, 114 Cal.App.3d 470 (1981); *see also Zant v. Stephens*, 462 U.S. 862 (1983); *Johnson v. Mississippi*, 486 U.S. 578. The jury's consideration of this improper and highly inflammatory factor arbitrarily deprived Petitioner of his due process liberty interest in a penalty determination based solely on statutory factors. *Hicks v. Oklahoma*, 447 U.S. 343.

998. The prosecutor's rhetoric and knowingly false speculation were not evidence, and had no place in a trial where Petitioner's life was at stake. The prosecutor worked and reworked the fears and prejudices of the jurors to the point where no court of law could have confidence in the verdict. The prosecutor's cross-examination of Petitioner's expert and her opening statement and closing argument were highly inflammatory and prejudicial, contained misstatements of law and fact, and inflamed the jury so as to divert it from making a reasoned moral response to Petitioner's background, character, and crime. This misconduct so infected the trial with unfairness as to make the resulting sentence fundamentally unreliable in violation of Petitioner's right to due process of law and his Eighth Amendment right to a reliable, non-arbitrary and individualized sentencing determination.

Darden v. Wainwright, 477 U.S. 168; *Donnelly v. DeChristoforo*, 416 U.S. 637; *Penry v. Lynaugh*, 492 U.S. at 328.

Improper Comments on Petitioner's Failure to Testify and Lack of Remorse

999. By improperly referring to Petitioner's failure to testify at the penalty phase, the prosecutor committed misconduct, which was exacerbated by her argument and cross-examination of Petitioner's expert regarding Petitioner's alleged lack of remorse. The prosecutor's comments violated Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, against self-incrimination, to a fair trial, and a reliable, individualized sentencing determination.

1000. In her closing argument, the prosecutor commented on Petitioner's failure to testify and to express remorse for the killings. In her discussion of aggravating factors, the prosecutor stated that Petitioner's prior convictions would have been relevant to Petitioner's credibility "if he were to -- somehow, God forbid take the stand and say he was sorry, which you didn't see." RT 1995. Later in her argument, the prosecutor returned to this impermissible theme, giving her definition of remorse and stressing Petitioner's alleged lack of remorse, including his failure to admit his guilt and say he was sorry for committing the crimes: "'A deep torturing sense of guilt felt over a wrong that one has done.' Which we know sociopaths can't

do. He shoots Carter, no remorse. Killed Annette, no remorse. Shoots Carter again, it's getting easier. No remorse. . . . Not once has he said he's sorry." RT 2102.

1001. In addition, during her cross-examination of Dr. Rosenthal, the prosecutor asked questions regarding whether Petitioner showed any remorse, RT 1908, 1916, despite her awareness or knowledge that Petitioner had denied committing the crime to Dr. Rosenthal, RT 1900, 1913.

1002. The prosecutor then explicitly argued that in determining sentence, the jury should consider the facts of the crime, Petitioner's lack of remorse and his future dangerousness: "What you have to look at, that lack of remorse, and the facts of this killing, which show you a substantial likelihood of him killing again." RT 2013.

1003. The prosecutor's comments regarding Petitioner's failure to testify and her argument on lack of remorse constituted error pursuant to *Griffin v. California*, 380 U.S. 609 (1965) because they focused on Petitioner's exercise of his privilege against self-incrimination, as reflected in his failure to testify at the penalty phase and express remorse. *See Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995). While it is true that the prosecutor is free to make "a logical comment on the defendant's lack of remorse"

based on the state of the evidence, a "reference to a defendant's failure to testify" is improper. *See People v. Breaux*, 1 Cal.4th 281, 313 (1991); *see also People v. Crittenden*, 9 Cal.4th 83 (1994). "Prosecutorial comment which draws attention to a defendant's exercise of his constitutional right not to testify, and which implies that the jury should draw inferences against defendant because of his failure to testify, violates defendant's constitutional rights." *People v. Murtishaw*, 29 Cal.3d 733, 757 (1981).

1004. Here, the prosecutor did not comment on Petitioner's lack of remorse based on inferences from the evidence, but clearly and unequivocally commented, not once, but twice, on the fact that Petitioner did not testify at the penalty phase to say he was sorry. RT 1995, 2012. Worse, the prosecutorial commentary was linked to improper argument that Petitioner would kill again if he were not sentenced to death.

1005. The prosecutor's comments also constituted *Boyd* error by invoking a nonstatutory aggravating factor, and *Davenport* error by misrepresenting the absence of mitigation as aggravation. *See Boyd*, 38 Cal.3d at 771-76; *People v. Davenport*, 41 Cal.3d 247, 288-90 (1985). In *Boyd*, this Court held that a prosecutor may not present evidence in aggravation that is not relevant to the statutory factors enumerated in Pen. Code § 190.3. *Boyd*, 38 Cal.3d at 773-74. It is well settled that lack of

remorse is not a statutory aggravating factor. *Crittenden*, 9 Cal.4th at 148. While the prosecutor "may suggest that an absence of evidence of remorse weighs against a finding of remorse as a *mitigating* factor," *id.* (emphasis in original), he or she may not argue or imply that lack of remorse is aggravating. *See also People v. Keenan*, 46 Cal.3d 478, 510 (1988). "Because remorse is not a statutory factor, comment on its absence is irrelevant and inappropriate in cases in which the defendant has not acknowledged responsibility for the killing or otherwise invited comment." *People v. Bell*, 49 Cal.3d 502, 548 (1989).

1006. The prosecutor did not argue that remorse was a factor in mitigation that was lacking in this case, *Davenport*, 11 Cal.4th at 1220, but strongly implied that lack of remorse, together with the prosecutor's speculation on Petitioner's future dangerousness and the facts of the crime as embellished by the prosecutor's knowing use of false hypotheticals in questioning and argument at the penalty phase, was an aggravating factor. This argument arbitrarily deprived Petitioner of his state law entitlement to have his sentence determined by statutory factors in violation of due process. *Hicks v. Oklahoma*, 447 U.S. 343. The prosecutor's argument rendered the trial fundamentally unfair, *Darden v. Wainwright*, 477 U.S. at 181, and created an unacceptable risk that the jury's weighing of factors

was based on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." *Johnson v. Mississippi*, 486 U.S. at 585, *quoting Zant v. Stephens*, 462 U.S. at 884-85.

Improper Arguments Regarding Society at Large and Other Murders in the Community

1007. As discussed above, the prosecutor appealed to the fears of the jury at the guilt phase by commenting on the increasing violence in society and the jury's obligation to do something to stop it. The prosecutor continued to emphasize this theme at the penalty phase, which infected the trial with unfairness, precluded an individualized and reliable sentencing determination and diverted the jury from a "reasoned moral response to the defendant's background, character and crime." *Penry v. Lynaugh*, 492 U.S. at 328, *quoting California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *Johnson v. Mississippi*, 486 U.S. at 585; *Darden v. Wainwright*, 477 U.S. at 181.

1008. The prosecutor's comments were as follows:

> What's interesting is we, as a society, are fascinated by our youth and their ability to kill. They don't feel anything and it's getting younger and younger. And what you have to remember, that's a different generation than us. That's a different T.V. generation, different lifestyle, drugs are younger, it is normal to carry a gun to junior high these days. Very different culture and we can't understand it. How many

> times do you pick up the newspaper and read about an 11-year-old killing, Time Magazine about a 15-year-old wants to stab their teacher and others placing bets on whether they'll do it. And we just can't believe it. [¶] We have to start believing it, Ladies and Gentlemen, we have to start believing it. Because it's reality. And it's not good enough any more that you're only 19. . . . If you give him a break because he only went through the 9th grade . . . and he's 19, you better be ready for an onslaught.

RT 2006-07; *see also* RT 1999 ("It's going on right now, front page. Cantina murders on Park Boulevard.").

1009. Such an extended appeal to the jury to vote to impose death because of the ills of society, particularly when considered with similar guilt phase arguments, cannot be characterized as "isolated, brief references to retribution or community vengeance," that have been deemed permissible by this Court. *See People v. Anderson*, 52 Cal.3d 453, 479-80 (1990); *People v. Ghent*, 43 Cal.3d 739, 771 (1987). On the contrary, as with so much of the prosecutor's argument, such comments were designed to – and surely did – have an inflammatory effect on the jury that would divert it from determining a sentence based on appropriate considerations; i.e., the circumstances of the crime and the character and background of Petitioner.

1010. The prosecutor went further, discussing other murders and comparing them in degree to this case:

> I thought it was very interesting that a few weeks ago while we were in this trial, what is on the front page of every newspaper in the Bay Area? And everyone is saying what a senseless, cold, double murder, execution-style senseless. That was the Cantina murders on Park Boulevard. Execution-style, shot in the head in the freezer. [¶] And you know what? There was a motive involved. It was robbery. In this case, you have cold-blooded, execution-style double murder and you don't even have a motive, except that they're witnesses. This is far more heinous. He killed for no reason.

RT 2010. The prosecutor continued to argue that the grief felt by the families of the victims in this case was just as important as in the Cantina murders. RT 2010-11. The prosecutor then argued the impact of this case on the community:

> And you don't read about these cases. But you know what? These are where the statistics of Oakland come from, in the streets and families and neighborhoods. Your verdict is very important to them. They move out of the neighborhoods because of a murder. These families, they get life sentences. Everyone does. The pain and the grief is everywhere, whether it is front page or it is a paragraph in the back.

RT 2011.

1011. It was completely improper for the prosecutor to compare this case to other cases. Not only would this have the likely effect of precluding an individualized sentencing determination based on the facts and

circumstances of this case, but it is fundamentally unfair to allow the prosecutor to make such arguments, when Petitioner is precluded, as a matter of law, from presenting evidence and arguing inter-case proportionality. *See People v. Bradford*, 15 Cal.4th 1229, 1383-84 (1997).

Improper Argument that Jurors Should Excuse Themselves If They Could Not Vote for Death and Defer to Other Jurors Who Had "Street Smarts"

1012. At the guilt phase, the prosecutor misrepresented the jury's deliberative process by encouraging any potential holdouts for acquittal to submit to the majority. RT 1720. By the time of penalty argument, the prosecutor was also aware that at least some of the jurors were speculating about extrinsic evidence. Juror Ary had already asked four questions that the court had determined were, for the most part, "None of his business." RT 1576.[82] The prosecutor also knew that the jury contained jurors who could be termed "street smart" like Ary, and others from different backgrounds who she termed "naive." RT 1994. Thus, the prosecutor made a similar appeal at the penalty phase, encouraging jurors who might feel sympathy for Petitioner or might be inclined to vote for life without

[82] Juror Ary asked: (1) How can a homeless person obtain such private lawyer or are the [sic] court appointed; (2) The neighbor who lived 4 houses up the street describe the size of the person he saw standing in the street or over (near) the body (sml, med, lrg) short or tall; (3) This blind person being tried also or what; (4) Did the person on trial or is he willing to take a lie detector test. CT 804.

possibility of parole to excuse themselves from the panel or to defer to other jurors who were not as naive. First, the prosecutor reminded the jurors that they all avowed during voir dire that they could return a death verdict. RT 1993. "And every one of you said you could." *Id.* The prosecutor then stated that if "this is just too much for you and you cannot deliberate in a case like this, you must let us know. We have alternates." RT 1993-94.[83]

1013. This argument was improper. At this point in the trial, the jurors had heard all the penalty phase evidence. It would be completely appropriate and indeed expected that some would have doubts about imposing the death penalty against Petitioner at this point in the trial. These doubts do not constitute a reason for disqualification and are not inconsistent with a juror's promise on voir dire that he or she had the capacity to impose the death penalty in general.

1014. The prosecutor instructed the jurors to defer to those jurors among them who had experienced violence, i.e., those with "street smarts,"

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[83] Juror Karantzalis informed the court that he had been influenced by the prosecutor's argument to believe that it was his duty to remove himself from the jury. RT 2024-2025. *See also* Karantzalis Dec., Exh. 84. Outside the presence of the other jurors, the trial court acknowledged that this comment was improper although it failed to make any clarifying comments to the jury. RT 2025. After Juror Karantzalis was excused for being unable to vote for death, a clear message was sent to the remaining jurors that someone who was unwilling to vote for death should not continue to serve on the jury. In fact, the court lacked the good cause necessary to properly excuse a sitting juror at that late stage of the trial.

and told them that they "can't be naive about these things," and that they should pick a "street smart foreman. A very street smart foreman who will lead you and guide you." RT 1994. The prosecutor urged the less savvy jurors to defer to the ones with "street smarts."

> What I want to do is just say a couple of things to you. First of all, for some of you, in your backgrounds, this is a very different world for you. And I think sometimes we in the criminal justice system forgets [sic] that. We've taken you off the streets from different towns in the Bay Area and we've thrown you in here. And for some of you, you've seen some of the violence that goes on, you know. You have street smarts. [¶] So those of you who aren't exposed to this, listen to your fellow jurors who know what's going on. You listen and you be very patient, don't have a set opinion right off the bat, you listen and you talk about it. . . . You've got to listen to your other jurors in this regard. You don't think for one second he's learning from this. He's just learning to be a better liar. . . . And I want you to always remember the victims. If someone starts to feel sympathy for him, you look at these [photographs] right here. You look at that. That's what he did. When you start to feel sorry for him.

RT 2019-20.

1015. These comments, in essence, told jurors who might have open minds about their penalty determination and who might feel sympathy for Petitioner to defer to other jurors who would not be swayed by sympathy,

including those who might have some bias due to the fact they had previously had experience with or been exposed to violence. The argument expressly urged jurors to go outside the evidence in deciding the penalty, to consider the extra-judicial experiences of jurors "who know what's going on." Particularly when considered with a similar appeal in guilt phase closing arguments, this argument unreasonably skewed the deliberative process, *Penry v. Lynaugh*, 442 U.S. 302 (1989), rendered the trial fundamentally unreliable, *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Darden v. Wainwright*, 477 U.S. at 181, and deprived Petitioner of a fair and impartial jury, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.[84]

The Prosecutor Knew or Should have Known that Juror Ary was a Convicted Felon and Not Eligible for Jury Service.

1016. It was common knowledge that the Alameda County District Attorney's Office would routinely run a criminal background check on potential jurors. Cannady Dec., Exh. 59, Sawyer Dec., Exh. 107.

1017. Had the prosecutor run such a check on Juror Ary, she would have discovered that he was a convicted felon and therefore disqualified for jury service.

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[84] It is now apparent that other jurors were also misled by the prosecutor's remarks which, arguably, led directly to the misconduct committed in the penalty phase deliberations. *See* Claim A.

1018. Thus, the Alameda County District Attorney's Office, including the prosecutor and her agents, knew or should have known that Juror Ary was disqualified to serve as a juror in Petitioner's case. The prosecutor failed to disclose this information to either the court or defense counsel.

1019. The State violated Petitioner's rights by failing to disclose this information to defense counsel. *Brady v. Maryland*, 373 U.S. 83 (1963). To the extent that trial counsel failed to move to receive this information from the prosecutor, *see* Sawyer Dec., Exh. 107, Petitioner was denied effective assistance of counsel.

1020. Had the information concerning Juror Ary been discussed, Juror Ary would have been deemed ineligible to serve as a juror. If he had not been deemed ineligible, trial counsel would have used a peremptory challenge to strike him. Cannady Dec., Exh. 59.

Cumulative Misconduct

1021. The claims presented herein demonstrate a pattern of misconduct by the State. The prosecutors and their agents in this case violated their proper role in the criminal justice system. 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. 83, 87 (1963). Prosecutorial

misconduct perverts the adversarial system and taints the results. *Napue v. Illinois*, 360 U.S. 264 (1959). 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).

1022. Petitioner incorporates Claims A, B, C, D.

F. PETITIONER'S STATEMENT TO THE POLICE WAS INVOLUNTARY AND ITS ADMISSION VIOLATED HIS CONSTITUTIONAL RIGHTS

1023. Petitioner's confinement and sentence are illegal and unconstitutional under Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and under Article I, sections 1, 7, 13, 15, 16 and 17 of the California Constitution because the Oakland Police Department deliberately prevented Petitioner from knowingly, intelligently and voluntarily exercising his Fifth Amendment and Fourteenth Amendment rights to counsel and to be silent, continued to interrogate Petitioner after he invoked his right to counsel, and used coercive interrogation techniques which were specifically designed to confuse Petitioner and overcome his will thereby obtaining unreliable statements which were used at trial to convict him and sentence him to death.

1024. Further, all fruits of the government's violations of

Petitioner's rights should have been suppressed by the trial court, including but not limited to statements that Petitioner made while in police custody.

1025. In addition, the Alameda District Attorney's Office and its agents, and the Oakland Police Department and its agents failed to disclose or preserve the evidence of the interrogation which would have established that the statements were coerced, and trial counsel failed adequately to investigate and present readily available evidence at the suppression hearing which would have resulted in a finding that Petitioner's statements were unconstitutionally obtained.

1026. Petitioner was deprived of his constitutional rights against self-incrimination, to be free of unreasonable searches and seizures, to representation by counsel at all critical stages of the proceedings against him, to effective assistance of counsel, to confrontation and cross-examination of witnesses, to fundamental fairness and due process of law, and to reliable guilt and penalty determinations in a capital case.

1027. Petitioner alleges the following facts in support of his 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.

1028. Petitioner was interrogated by Oakland Police Officers on

June 4, 1992, and on July 30, 1992. He was nineteen years old at the time, had only reached the ninth grade in school, and although he had been arrested for drug charges previously, he had never been interviewed by the police before. 1/25/93 RT 63; CT 728.

1029. As alleged in Claim D, Petitioner suffered from depression, isolation, and social ostracism, had neuropsychological deficits, and manifested psychological, emotional, and behavioral consequences of his exposure to extreme violence in his community, a family history of extreme instability and violence, and an extraordinary pattern of parental and familial neglect and poverty. Haney Dec., Exh. 71; Pettis Dec., Exh. 99; Watson Dec., Exh. 122.

1030. As detailed in the Statement of Facts, Petitioner was interviewed by Sgt. Kozicki and Sgt. Thiem of the Oakland Police Department on June 4, 1992. Petitioner voluntarily went to the police station. He was read his *Miranda* rights, and signed a waiver as to those rights. 1/25/93 RT 20-22. In the interview, Petitioner admitted that he was in the house when the shooting occurred, but stated that a man named Dee was responsible for the murders. 1/25/93 RT 23; CT 86. After giving this statement, Petitioner was released. 1/25/93 RT 35, 56.

1031. On July 28, 1993, an arrest warrant was issued for Petitioner.

Sgt. Kozicki asked Petitioner's grandmother and aunt to have Petitioner contact him, but did not inform them that an arrest warrant had issued. 1/25/93 RT 37-38. Sgt. Kozicki told them that Petitioner was "running with a bad crowd" and that he was going to try to help Petitioner. 1/25/93 RT 37. When he talked with Petitioner's mother, Sgt. Kozicki also left the impression that he was trying to help Petitioner. 7/5/93 RT 32. Petitioner called Sgt. Kozicki on July 30th, and arranged to come to the police station on August 3rd. Sgt. Kozicki did not inform Petitioner at that time that an arrest warrant had issued for him. 1/25/93 RT 38.

1032. Although Petitioner had agreed to be interviewed on August 3, 1992, Oakland police officers executed a search warrant on July 30th on Petitioner's grandmother's residence, where they believed Petitioner was staying. 1/25/93 RT 25, 39-40. That same day, Petitioner was handcuffed, taken into custody and transported to the Oakland Police Department for questioning. 1/25/93 RT 40, 70. He arrived at the station and was placed in an interview room at approximately 4:50 p.m. 1/25/93 RT 40-41. Although an arrest warrant had been issued two days earlier, Petitioner was not told he was under arrest. 1/25/93 RT 36, 57, 71.

1033. The interview room was a small room with just a table and chairs. 1/25/93 RT 34. According to Petitioner, he asked to speak with a

lawyer, but this request was refused. 1/25/93 RT 72. Beginning at 9:00 p.m., more than four hours after being placed in the interview room and left alone, the officers began to question Petitioner. 1/25/93 RT 41, 46. Petitioner was read his *Miranda* rights, and signed a waiver. 1/25/93 RT 26-27, 61. According to Sgt. Kozicki, it was not until that time that he finally told Petitioner he was under arrest. 1/25/93 RT 42. However, Sgt. Thiem stated that neither officer told Petitioner he was under arrest. 1/25/93 RT 61. Petitioner, confirming the statement of Sgt. Thiem, stated that he did not know he was under arrest when he gave the statement, and first learned he was under arrest when he was subsequently taken downstairs for booking. 1/25/93 RT 75, 77.

1034. Petitioner further stated that although he told Sgt. Kozicki he did not want to talk to him, Sgt. Kozicki raised his voice, telling him he needed to tell them what happened because they could help him. 1/25/93 RT 74. Petitioner claimed that Sgt. Kozicki said that as long as Petitioner informed on Johnson, they would let him go, and that Petitioner would not be able to see his grandmother or mother if he did not inform on Johnson. 1/25/93 RT 74. Petitioner testified that he only gave the statement because Sgt. Kozicki said Petitioner would be able to leave if he did. 1/25/93 RT 75. Sgt. Kozicki denied that he told Petitioner that Petitioner could go

home if he gave a statement or that they were interested in Antoine Johnson, not Petitioner. 1/25/93 RT 42-43.

1035. Sgt. Kozicki and Sgt. Thiem questioned Petitioner for approximately one hour before taking a taped statement from him. 1/25/93 RT 27. After giving a taped statement, in which Petitioner admitted that he and Antoine Johnson did the shooting, Petitioner was told by the police to give another taped statement, in which he was not to mention Johnson's name. 1/25/93 RT 27-29.

1036. On January 25, 1993, the trial court denied the motion to suppress the statements, RT 104, and they were thereafter introduced at the guilt phase of Petitioner's trial, and played repeatedly to the jury. RT. 1194, 1322, 1333, 1364, 1688-90, 1694, 1720.

1037. Petitioner's vulnerability and the tactics of the police, individually and in combination, resulted in a coerced, and therefore unreliable and inadmissible confession. At the time of his arrest and interrogations, Petitioner was a slow, uneducated, immature, unsophisticated, and inexperienced nineteen year old. Moreover, his mental deficits and the psychological, behavioral and mental consequences of his background and life history, as alleged herein, *see* Haney Dec., Exh. 71; Pettis Dec., Exh. 99; Watson Dec., Exh. 122, left him particularly

susceptible to the police tactics used. He was left alone in a small room for four hours, never told he was under arrest, was physically and psychologically intimidated, and was led to believe that if he gave the statement the police wanted he would be allowed to go home. Petitioner ultimately gave a statement to the police, involving himself and Antoine Johnson in the shooting.

1038. These coercive tactics were commonly used by the Oakland Police Department, and the officers who interrogated Petitioner.

1039. Gary Rivlin, an investigative reporter, wrote a book published in 1995, called *Drive-By*, involving a murder in Oakland, which described the interrogation techniques employed by the Oakland Police Department and Officer Brian Thiem in particular. Rivlin Dec., Exh. 103; Excerpt from Gary Rivlin, *Drive-By* (1995), Exh 263.

1040. In the course of researching his book in 1993-1994, Rivlin developed a relationship with some members of the Oakland Police Department, including Sgt. Thiem, who was the lead homicide investigator in the case discussed in *Drive-By*. Sgt. Thiem allowed Mr. Rivlin to follow him around and observe him in action. Mr. Rivlin conducted approximately one-half dozen interview sessions with Sgt. Thiem, all of which were taped and transcribed. Each interview with Sgt. Thiem lasted at least one hour.

Any quotes from Sgt. Thiem that are in *Drive-By* were taken from these taped interview sessions and are verbatim. Mr. Rivlin also took additional notes during the interview sessions and while he watched Sgt. Thiem do his job. According to Mr. Rivlin, all of the information and characterizations of Sgt. Thiem and/or his work on the homicide case are true and accurate. Indeed, Mr. Rivlin sent manuscript pages of the book to the main subjects involved, including, Sgt. Thiem, and received no corrections or complaints from him but rather compliments for accuracy. Rivlin Dec., Exh. 103.

1041. Mr. Rivlin devoted an entire chapter of *Drive-By* to the arrest and interrogation of the young suspects in the book. Rivlin's description of the interrogation techniques used by Sgt. Thiem and other officers mirrors the methods described by Petitioner but denied by the officers involved. RT 63-78, 85-88.

1042. In *Drive-By*, the suspect was not initially arrested or told that he was under arrest when he was being questioned since arresting him would have meant that an attorney would be assigned, making it difficult to extract incriminating statements. *Drive-By*, at 95, Exh. 263. Similarly, Petitioner was released after providing an initial statement to the police on June 4, 1992, and testified at the suppression hearing that he was not told he was under arrest until after the July 30th statement was given. RT 77-78;

Exh. 264.

1043. As noted above, Petitioner described being placed in a small room with a table and chairs where he was left for four hours until the interrogation commenced. In *Drive-By*, the Oakland Police referred to this as a "sweat room," which was described as the size of a prison cell, furnished with a bulky table and several chairs, making it even more claustrophobic. CT 251. As in Petitioner's case, the police often parked a suspect or reluctant witness inside one of these locked sweat rooms for hours at a time where the suspect or witnesss has nothing to do but stare at the walls. *Drive-By*, at 162. Exh. 263.

1044. As a matter of practice, the Oakland officers do not tape the entire interrogation but only the ultimate confession so that the techniques and tactics used by the officers to get a suspect to talk are a matter of the word of the officers against the word of the suspect. *Drive-By*, at 194, 199, 204; Exh. 263. In Petitioner's case, the first hour of the interrogation was not taped. Exh. 264; CT 242-251.

1045. In *Drive-By*, Sgt. Thiem admitted to using just about any bluff to get the job done. He would cajole and make promises of leniency, use verbal and physical intimidation, and make claims and state facts that were not true. *Drive-By*, at 199-200, 204; Exh. 263.

1046. As Petitioner testified at the suppression hearing, and as alleged above, all of the interrogation tactics described in *Drive-By* were used in the interrogation of Petitioner, RT 63-78, 85-88, and the description of these tactics in *Drive-By* corroborate Petitioner's testimony, which the trial court rejected.

1047. Richard A. Leo, Ph.D., an expert in police interrogations and false confessions, has reviewed documents and transcripts in Petitioner's case for indicia of police coercion. Leo Dec., Exh. 85.

1048. During the period from 1990 to 1993, Dr. Leo attended and participated in a number of formal police interrogation trainings and engaged in empirical research on interrogation practices at the Oakland Police Department. He viewed a total of 122 interrogations conducted by that department and is therefore familiar with the interrogation practices of the Oakland Police Department at the time of Petitioner's arrest and interrogation. Leo Dec., Exh. 85.

1049. Dr. Leo confirms the Oakland Police Department's practice to interrogate the suspect and develop a confession without recording it on audiotape, then turn the tape on after they are convinced that the suspect will record a rehearsed version of the confession. In Dr. Leo's professional opinion, the only reason Oakland Police Department investigators do not

make a complete audio or video recording of their interrogations is to avoid the scrutiny of the outside world and obscure interrogation practices which may not comport with constitutional requirements. Such practices, are more likely to occur in homicide cases. In Dr. Leo's professional opinion, the officers who questioned Petitioner intentionally destroyed the record of what occurred by failing to record the entire interrogation. Leo Dec., Exh. 85.

1050. The failure to create a complete objective electronic record of custodial interrogations maintains the advantage of the police in any "swearing contest" when their account of the interrogation differs from that of the suspect in court. Since they are almost always of higher status than defendants, and since they control the social production of knowledge about the interrogation and confession, police virtually always prevail in any "swearing contest." Complete taping of custodial interrogations therefore threatens to undermine police officers' superior control over the legal construction of facts about the suspect's interrogation. With videotaping, especially, no longer can two officers "cleanse" their notes to tell similar accounts that may contradict a suspect's testimony; instead, an objective record replaces the officer's testimony as the most authoritative account of the interrogation. Videotaping custodial questioning thus represents a threat

only to those officers who fear either receiving internal or external criticism about the legality of their interrogation methods or who fear losing a "swearing contest" adjudicated by an independent and objective record. Leo Dec., Exh. 85.

1051. Dr. Leo confirms that the interrogation techniques employed by Officer Brian Thiem in Gary Rivlin's book *Drive-By* are consistent with those he has seen employed by the Oakland Police Department. These techniques include the practice of only partial taping, softening the suspect by "sweating," using implied threats and promises, lying about the evidence or leniency, and physical and verbal intimidation. Leo Dec., Exh. 85.

1052. In Dr. Leo's experience, the more serious the crime, the more strenuous the interrogation, both in duration and number of tactics used. The seriousness of the crime also increases the likelihood that coercive techniques will be employed. Explicit or implicit threats and promises are far more likely to be used in high-stakes cases. Leo Dec., Exh. 85.

1053. At the time of Dr. Leo's research and Petitioner's interrogation, Oakland Police Department officers were trained to employ conditioning strategies throughout interrogation with the goal of structuring the environment so that the suspect is conditioned and positively reinforced to waive his *Miranda* rights and to respond favorably to the officers'

questions. The technique of "sweating" the suspect is an example of one such tactic that was used in an extreme form in Petitioner's case. He was held, alone, in two different interview rooms for four hours and eleven minutes, before he was formally interviewed. Leo Dec., Exh. 85; CT 251.

1054. According to Dr. Leo, the techniques described in *Drive-By* suggest clear coercion and are consistent with what Petitioner described during his suppression hearing testimony. Investigators are adept at using psychological methods to communicate coercive threats and promises by subtle, indirect and camouflaged means. The promises of leniency that Petitioner testified about (telling him he could go home if he implicated Antoine Jackson and that nothing would happen to him) and the threat such promises imply (that Petitioner will not be able to leave if he does not supply the police with that story) are tactics that Dr. Leo had seen used before, either explicitly or implicitly, in how interrogators frame benefits and rewards when trying to persuade a suspect to comply. Leo Dec., Exh. 85.

1055. Petitioner's description of his interrogation is consistent with Dr. Leo's research, with what Petitioner's aunt testified to, RT 93-98, and with the discussion in *Drive-By*. According to Dr. Leo, if what Petitioner describes is true, then Petitioner was clearly coerced and his statement was

improperly obtained. Moreover, the type of coercive tactics alleged to have been used in Petitioner's case would be the sort likely to result in a false confession. Leo Dec., Exh. 85.

1056. In Dr. Leo's professional opinion, there is no correlation whatsoever between lying and stuttering. A suggestion by a prosecutor to a jury that there was such a correlation would be false, inflammatory, and illogical. The scientific literature does not provide a basis to include stuttering among indicia of deception. Petitioner could have been stuttering during the course of his taped statements to the police for any number of reasons, such as being nervous or because he was innocent. It could just as easily have been because he was terrified and was being coerced to give the statement. Leo Dec., Exh. 85.

1057. Dr. Leo, or someone with comparable qualifications, would have been available in 1993, at the time of Petitioner's suppression hearing and trial, to evaluate Petitioner's statements and to provide testimony and consultation for the purpose of suppressing or otherwise attacking those statements. Leo Dec., Exh. 85.

1058. Petitioner's statements given on July 30th were involuntary under the Fifth Amendment of the United States Constitution which guarantees that "[n]o person . . . shall be compelled in any criminal case to

be a witness against himself . . . without due process of law." U.S. Const. Amend. V. A statement is voluntary under the Fifth Amendment only if it is voluntary under the meaning of the Due Process Clause. *See Oregon v. Elstad*, 470 U.S. 298, 304 (1985) *citing Haynes v. Washington*, 373 U.S. 503 (1963); *Chambers v. Florida*, 309 U.S. 227 (1940). The test for determining whether or not a statement is voluntary under the Due Process Clause "is whether the confession was 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however, slight, [or] by the exertion of any improper influence.'" *Hutto v. Ross*, 429 U.S. 28, 30 (1976) *quoting Bram v. United States*, 168 U.S. 532, 542-43 (1897).

1059. The United States Supreme Court held in *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960), that a confession must be the "product of a rational intellect and a free will" in order to be voluntary. The Court described "voluntary" in *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), stressing that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." Although a defendant's susceptible mental state is not enough to render an otherwise valid confession involuntary under the Due Process Clause of the Fourteenth Amendment, compounded by "coercive police activity," it will constitute such a

violation. *Id.* at 167.[85]

1060. "It is axiomatic that the use in a criminal prosecution of an involuntary confession constitutes a denial of due process of law under both the federal and state Constitutions." *People v. Jimenez*, 21 Cal.3d 595, 602 (1978); *see also Jackson v. Denno*, 378 U.S. 368 (1964). Use of such confessions in a criminal prosecution is prohibited because "it offends 'the community's sense of fair play and decency' to convict a defendant by evidence extorted from him . . . ." *People v. Atchley*, 53 Cal.2d 160, 170 (1959).

1061. The proper inquiry is whether the defendant's will has been "overborne" or his "capacity for self-determination has been critically impaired." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). The Government bears the burden of proving by a preponderance of the evidence that the statement was voluntary. *See Lego v. Twomey*, 404 U.S. 477 (1972); *People v. Jimenez*, 21 Cal.3d at 602; *People v. Markham*, 49 Cal.3d 63, 71 (1989). To determine whether a defendant's will has been overborne the totality of the circumstances must be considered. *Derrick v.*

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[85] A defendant's mental state may preclude him from being able to knowingly and intelligently waive his constitutional rights if he is unable to "understand the significance and consequences of a particular decision and whether the decision is uncoerced." *Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993).

Peterson, 924 F.2d 813, 817 (9th Cir. 1990). The totality of the circumstances include "both the characteristics of the accused and the details of the interrogation." *See Schneckloth v. Bustamonte*, 412 U.S. at 225-226.

1062. Characteristics of the accused include age, sophistication, prior experience with the criminal justice system and emotional state. *See Stein v. New York*, 346 U.S. 156, 185-86 (1953); *People v. Spears*, 228 Cal.App.3d 1, 27-28 (1991). Details of the interrogation include whether the confession is elicited by promises of benefit or leniency, in which case, the confession was inadmissible. *See People v. Carr*, 8 Cal.3d 287, 296 (1972).

1063. "It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied." *People v. Jimenez*, 21 Cal.3d at 611. This Court has explained the line to be drawn between permissible police conduct and conduct deemed to induce or to tend to induce an involuntary statement:

> When the benefit pointed out by the police to a suspect is merely that which flows from a truthful and honest course of conduct, we can perceive nothing improper in such police activity. On the other hand, if in addition to the foregoing benefit, or in the place thereof, the

> defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible.

People v. Hill, 66 Cal.2d 536, 549 (1967).

1064. The promise to Petitioner that he could go home if he gave a statement was an improper inducement because it "carries the implication that by cooperating and telling what actually happened he might not be accused of or found guilty of first degree murder (i.e., more lenient treatment by the court or jury)." *People v. Johnson*, 70 Cal.2d 469, 478-79 (1969). There is also an implication that unless Petitioner changed his story from his first statement, in which he denied involvement, he would be punished. *See People v. McClary*, 20 Cal.3d 218, 223 (1977).

1065. Petitioner's statements were obtained under the stress of false promises of leniency and deceptive practices during the interrogation, all while Petitioner was in a vulnerable mental state. *See* Haney Dec., Exh. 71; Pettis Dec., Exh. 99; Watson Dec., Exh. 122. Given Petitioner's immaturity, inexperience and lack of education these statements were coerced, involuntary, unreliable and therefore inadmissible.

1066. The admission of Petitioner's statements was not harmless

beyond a reasonable doubt with regard to conviction and sentence. *See Arizona v. Fulminante*, 499 U.S. 279 (1991). Petitioner's statements were the centerpiece of the prosecution's case. While one witness, Donald Guillory, testified that he saw Petitioner with a gun before and after the shootings, no one saw Petitioner shoot the two victims. Nor was there any physical evidence implicating Petitioner. The critical nature of Petitioner's confession is demonstrated by the prosecutor's reliance on that statement in her closing argument. She stressed Petitioner's statements and repeatedly played portions of the tape-recordings for the jury. *See, e.g.*, RT 1670 ("If you believe his taped confession, he's guilty as charged."); *see also* RT 1679-81, 1688-90, 1694-95, 1710, 1714, 1718.

1067. Trial counsel unreasonably and incompetently failed to investigate, obtain or seek to present readily available evidence regarding Oakland Police Department interrogation practices to corroborate Petitioner's suppression hearing testimony, failed to investigate and present evidence of Petitioner's background and mental state relevant to his susceptibility to such coercive interrogation practices, failed to establish adequately that the statement was the result of coercion and improper police tactics, and failed to move for suppression of all of the fruits of the government's violations of petitioner's rights in violation of Petitioner's

rights to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 688 (1984).

1068. These acts and omissions fell below an objective standard of reasonableness for defense counsel in a capital case under prevailing professional norms. *In re Gay*, 19 Cal.4th 771 (1998). No acceptable tactical reason exists for the acts and omissions of counsel. Counsel made no reasonable preliminary investigation that rendered any subsequent investigation unnecessary. No benefit inured or would reasonably be likely to inure to Petitioner from the various acts and omissions.

1069. Had counsel performed adequately in this regard, it is reasonably likely that the trial court would have found that the statement was involuntarily obtained in violation of Petitioner's constitutional rights, and would have suppressed the statement. For the reasons alleged above, had the statements been suppressed it is reasonably likely that the outcome of the case would have been different.

1070. The Alameda County District Attorney's Office, the Oakland Police Department and their agents failed to disclose material evidence related to Petitioner's interrogation and/or the fruits thereof, in violation of Petitioner's rights to due process and a fair trial. *Brady v. Maryland,* 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667, 682 (plurality)

(1985); *see also id.* at 685 (White, J., concurring); *In re Brown*, 17 Cal.4th 873, 879-880 (1998); *In re Sassounian*, 9 Cal.4th 535, 543-545 (1995). Moreover, the requirements of due process impose upon the prosecution an ongoing post-conviction duty to disclose information casing doubt on the correctness of a defendant's convictions and judgment of death. *Imbler v. Pachtman*, 424 U.S. 409, 472, n.25 (1976); *People v. Gonzalez*, 51 Cal.3d 1179, 1261 (1990); *see also Thomas v. Goldsmith*, 979 F.2d 746, 749-750 (9th Cir. 1992).

1071. To the extent that there is insufficient evidence to establish that Petitioner's statement was the product of coercive and improper techniques, the Alameda County District Attorney's Office, Oakland Police Department and their agents failed to preserve such evidence by purposefully and in bad faith failing to record the entirety of the interrogation in violation of Petitioner's rights to due process and a fair trial. *California v. Trombetta*, 467 U.S. 479 (1984); *Arizona v. Youngblood*, 488 U.S. 51 (1988).

1072. To the extent that the facts set forth above 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 undermine the prosecution's case

against Petitioner such that this rights to due process and a fair trial have been violated and collateral relief is appropriate.

1073. Petitioner incorporates each and every allegation of Claims B, C, and E.

G. PETITIONER'S DEATH SENTENCE AND CONFINEMENT ARE UNLAWFUL BECAUSE PENALTY PHASE INSTRUCTIONS ARE UNCONSTITUTIONALLY VAGUE AND INCAPABLE OF BEING UNDERSTOOD BY JURORS

1074. Petitioner's death sentence was unlawfully and unconstitutionally imposed in violation of his rights to due process, a fair trial by jury, and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under Article I, sections 7, 15, 16, and 17 of the California Constitution 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.

1075. 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.

1076. 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, he was deprived of the effective assistance of counsel and his death sentence is unreliable, requiring reversal.

1077. 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 due process of law under the state and federal constitutions. United States Constitution, Amendments V, XIV; Cal. Const., art. I, §§ 1, 7, 15; *Hicks v. Oklahoma*, 447 U.S. at 346;

1078. Petitioner hereby incorporates Claims O and P from the Appellant's Opening Brief in Case No. S032736.

1079. Prior to penalty phase deliberations in this case, the trial court issued CALJIC No. 8.85 to the jury. CT 958-960. This pattern instruction tracks 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).[86]

1080. Even when correctly instructed according to the law, jurors

[86] With respect to factor (b), the court verbally instructed the penalty jury that no such evidence of criminal activity had been produced. RT 2055. However, the written jury instructions provided to the jury failed to include a similar caveat. CT 958.

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).

1081. 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. 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.

1082. 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 deliberation. 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.

1083. 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).

1084. 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.

1085. 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 wide-ranging victim impact evidence 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).

1086. 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, combined with prosecutorial and juror misconduct, likely caused the jury to find aggravating factor (b) evidence in this case. Without presenting a scintilla of evidence and based on improper hypothetical questions and argument and without proper notice as alleged herein, the prosecutor informed the jury that Petitioner had committed no fewer than five acts that would fall under factor (b): (1) that Petitioner had once grabbed a knife and threatened to kill his grandfather; (2) that Petitioner had once threatened courtroom staff in Judge DeLucchi's courtroom; (3) that without any provocation, Petitioner had once beat up an unidentified "white individual" walking down the street; (4) that while incarcerated, Petitioner and others had beat up an inmate named McClain; and (5) that while incarcerated, Petitioner had threatened another inmate, James Webb. *See* Claims E; RT

1910-1914, 1994-95.

1087. The improper factor (b) crimes suggested to Petitioner's jury, despite the lack of evidence or notice, included two allegations of violence in an institutional setting, which compounded the prejudice of the prosecutor's improper arguments concerning the likelihood that Petitioner would join the "Black Guerrilla Family" gang in prison and would go on to commit further murders in prison unless the jury gave him the death penalty. *See* Claim E. In these circumstances, the trial court's perfunctory oral, but not written, instruction to the jurors that the prosecution had failed to produce evidence under factor (b) was insufficient to ensure that the jurors would not base their penalty decision on a finding that Petitioner deserved the death penalty because he had committed other prior violent criminal acts. Moreover, the court's issuance of CALJIC No. 8.85(b) without the accompanying instruction of CALJIC No. 8.87 – requiring the jury to be satisfied beyond a reasonable doubt that the defendant has committed other criminal acts before considering those acts as an aggravating circumstance – was insufficient to ensure that the jury would find that constitutionally-required restraint on themselves. Therefore, the use of this factor violated Petitioner's rights to due process under the Fourteenth Amendment to the United States Constitution and article I,

section 7 of the California Constitution, and to a fair, accurate and nonarbitrary sentencing determination under the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution.

1088. 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. *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

1089. The trial court also issued a modified version of CALJIC No. 8.88 to Petitioner's penalty jury. The court's alteration of the pattern instruction had the effect of broadening the crucial definition of what constitutes an "aggravating" factor. The pattern instruction reads:

> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences *which is above and beyond the elements of the crime itself.*

CALJIC No. 8.88 (emphasis added). In this case, the court modified the instruction by deleting the important qualifier emphasized in the quotation above. Thus, Petitioner's penalty jury was erroneously instructed that "[a]n aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences." RT 1945-1946, 2057. This instruction removed a critical component of the death penalty scheme, was unconstitutionally vague and

overbroad, and permitted the jury to consider aggravating circumstances in violation of state law, depriving Petitioner of his liberty interest in violation of due process.

1090. 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 – particularly since it received an erroneous and truncated definition of an "aggravating factor" – and that it sentenced him to die because of those misconceptions, in violation of 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 CALJIC No. 8.85 and the modified CALJIC No. 8.88 in an unconstitutional manner, vacation of Petitioner's death sentence is mandated under the Eighth and Fourteenth Amendments.

H. EXECUTION OF PETITIONER WOULD VIOLATE HIS RIGHT TO DUE PROCESS AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT BECAUSE HIS SENTENCE WAS BASED ON INACCURATE AND UNRELIABLE EVIDENCE AND IS A DISPROPORTIONATE PUNISHMENT

1091. Petitioner's death sentence was unlawfully and unconstitutionally imposed in violation of his rights to due process, a fair trial by jury, and freedom from cruel and unusual punishment under the

Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under Article I, sections 7, 14, 15, 16, and 17 of the California Constitution as well as Petitioner's statutory rights, because it was based on inaccurate, unreliable evidence and is disproportionate to petitioner's culpability.

1092. 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.

1093. 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).

1094. Petitioner's defense counsel failed to investigate, develop and present evidence relevant to both the guilt and penalty phases of his trial.

1095. Petitioner hereby incorporates by reference Claims B, C, D, E, and F of this Petition and the exhibits referenced therein, as if fully set forth

herein.

1096. The death sentence imposed on Petitioner was arbitrary, capricious and unreliable because it was based on inaccurate and unreliable evidence and was disproportionate to his guilt and moral culpability. It must therefore be vacated. U.S. Const., amends. V, VI, VIII, XIV; Cal. Const., art. I, § 17.

1097. 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. 68, 87 (1985) (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).

1098. 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 (1977); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

1099. A capital sentence that is "grossly disproportionate" to the offense constitutes cruel and unusual punishment under article I, section 17 of the California Constitution. *People v. Arias*, 13 Cal.4th 92, 193 (1996).

1100. 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; the failure of the trial court to ensure that Petitioner was represented by competent and conflict-free counsel and received a fair trial (*see* Claims B, C, D); prosecutorial misconduct (*see* Claim E); and rampant juror misconduct (*see* Claim A). The sentence of death was therefore imposed on Petitioner in violation of his right to a reliable sentence under the Eighth and Fourteenth Amendments.

1101. There was no meaningful intercase or intracase proportionality review conducted in this case. *See* Appellant's Opening

Brief, claim P. 8.

1102. 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.

1103. 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.

1104. The death sentence imposed on Petitioner was and is disproportionate to his moral culpability.

1105. In April 1993, Petitioner's co-defendant, Antoine Johnson, was allowed to enter a plea under an agreement with the State in which he was sentenced to life in prison and would be eligible for parole after seven years of incarceration. CT 1191-1199. Mr. Johnson's initial parole consideration hearing was held on January 14, 1998. Exh. 267.

1106. Petitioner's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his Fifth, 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 Alameda 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.

1107. Accordingly, Petitioner's death judgment must be vacated.

I. 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 AND THE AUTOMATIC APPEAL

1108. Petitioner's confinement is illegal and unconstitutional under the 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, because the errors complained of in this Petition compounded one another, resulting in a trial that was fundamentally unfair and in the imposition of cruel and unusual punishment.

1109. 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.

1110. All other allegations and supporting exhibits are incorporated into this claim by specific reference.

1111. 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 and the briefing submitted for the automatic appeal (No. S032736) compels reversal of the judgment and issuance of the writ. See, e.g., *People v. Holt*, 37 Cal.3d. 436, 458-459 (1984) (discussing cumulative error on direct appeal). 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.

1112. The prejudicial impact of each of the specific allegations of

constitutional error presented in this Petition and in the direct appeal must 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 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, *citing United States v. Wallace*, 848 F.2d 1464, 1476 (9th Cir.1988); *see also United States v. Green*, 648 F.2d 587, 597 (9th Cir. 1981) (combination of errors and lack of balancing probative value and prejudicial effect of testimony and lack of limiting instruction required reversal). "In other words, a column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts." *United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993); see also *Taylor v. Kentucky*, 436 U.S. 478, 486-488 & n.15 (1978); *Harris v. Wood*, 64 F.3d 1432, 1438-1439 (9th Cir. 1995); *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992); *United States v. Wallace*, 848 F.2d 1464, 1475-1476 (9th Cir. 1988); *In re Gay*, 19 Cal.4th 771, 826; *People v. Hill*, 17 Cal.4th 800, 844; *In re Jones*, 13 Cal.4th 552, 583, 587

(1996); *People v. Ledesma,* 43 Cal.3d 171, 214-227 (1987); *People v. Herring*, 20 Cal.App.4th 1066, 1075-1077 (1993).

1113. Petitioner hereby incorporates by specific reference the record on appeal, and each of the claims and arguments raised in his Opening Brief, Reply Brief, and Supplemental Brief(s) in his related automatic appeal (No. S032736) 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.

1114. Petitioner also incorporates by reference every Claim of this Petition, and the exhibits incorporated therein, as if fully set forth in this paragraph.

1115. If the state disputes any of the facts alleged herein, Petitioner requests an evidentiary hearing to resolve the factual disputes.

1116. Petitioner and his counsel believe that additional facts exist which would support this claim, but have been unable to adduce those facts because this Court has not provided Petitioner with adequate funding for investigation, access to discovery or subpoena power, or an evidentiary hearing. Counsel requests an opportunity to supplement or amend this Petition after Petitioner has been afforded discovery, the disclosure of material evidence by the state, the use of the Court's subpoena power,

funding, and an opportunity to investigate fully.

1117. 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 the selection of a biased and death-prone jury, the denial of his right to conflict-free counsel, 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 in the penalty phase, serious instructional error, and juror misconduct during penalty phase deliberations.

1118. Justice demands that Petitioner's convictions and sentence of death be reversed because the cumulative effect of all the errors and violations alleged in the present Petition and on his automatic appeal "was so prejudicial as to strike at the fundamental fairness of the trial." *United States v. Parker*, 997 F.2d 219, 222 (6th Cir. 1993) (citation omitted); see also *United States v. Tory*, 52 F.3d 207, 211 (9th Cir. 1995) (cumulative effect of errors deprived defendant of fair trial).

1119. This is also true of state law violations which may not independently rise to the level of a federal constitutional violation, *see, e.g.*, *Barclay v. Florida*, 463 U.S. 969, 951 (1983): 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. *See Walker v. Engle*, 703 F.2d 903, 962 (6th Cir. 1983).

1120. 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.

J. EXECUTION FOLLOWING LENGTHY CONFINEMENT UNDER SENTENCE OF DEATH WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF PETITIONER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND INTERNATIONAL LAW

1121. Execution of Petitioner following his lengthy confinement under sentence of death (now more than eight years) would constitute cruel and unusual punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; Article I, sections 1, 7, 15, 16, and 17 of the California Constitution; and international law, covenants, treaties and norms.

1122. 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.

1123. Petitioner was sentenced to death on May 7, 1993, after nine

months of imprisonment in the county jail. At the time of the present Petition, he has already been continuously confined for more than eight years and under sentence of death for more than seven years. His automatic appeal has been pending continuously during that time.

1124. Petitioner's excessive confinement on death row has been through no doing of his own. The appeal from a judgment of death is automatic (§ 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); Pen. Code § 190.7; Cal. Rules of Court, rule 39.5) 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.

1125. 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.[87] The delays have nothing to do with the exercise of any discretion on Petitioner's part. *Cf. McKenzie v. Day*, 57 F.3d 1461, 1466-1467 (9th Cir. 1995) (claim rejected because delay caused by prisoner "avail[ing] himself of procedures" for post-conviction review, implying volitional choice by the prisoner), *adopted en banc*, 57 F.3d 1493. The delays here have been caused by "negligence or deliberate action by the State." *Lackey v. Texas*, 514 U.S. 1045 (1995) (mem. of Stevens, J.). The information in this case was filed on November 20, 1992. Petitioner's judgement of death was imposed on May 7, 1993. Appellate counsel was appointed on May 8, 1996. The record on appeal was certified on June 22, 1998.

1126. 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.

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[87] 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*, New York Times, March 8, 1995.

1127. 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.

1128. 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.

1129. While the Ninth Circuit rejected a claim of this type in *Richmond v. Lewis,* 948 F.2d 1473, 1491-1492 (9th Cir. 1990), *rev'd. on other grounds,* 506 U.S. 40 (1992), vacated 986 F.2d 1583 (1993), that rejection was deprived of persuasive force when the Arizona Supreme Court subsequently reduced the death sentence of the defendant in that case to a sentence of life imprisonment, in part because he had changed during his excessively long confinement on death row. *State v. Richmond*, 180 Ariz. 573 [886 P.2d 1329] (1994).

1130. 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). The length of Petitioner's confinement on death row, along with the constitutionally inadequate guilt and penalty determinations in his case, have caused him prolonged and extreme mental torture and degradation,

and denied him due process, in violation of international treaties and law.

1131. 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.

1132. 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).

1133. 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.

1134. 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. *See* Claim J.

1135. Petitioner's death sentence must be vacated permanently, and/or a stay of execution must be entered permanently.

K. PETITIONER CANNOT BE LAWFULLY EXECUTED BECAUSE THE METHOD OF EXECUTION IN CALIFORNIA IS FORBIDDEN BY STATE, FEDERAL, AND INTERNATIONAL LAW

1136. 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 of the United States Constitution; Article I, sections 1, 7, 15, 16, and 17 of the California Constitution; and international law, covenants, treaties and norms.

1137. 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.

1138. 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. Pen. Code § 3604.

1139. 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.

1140. Forcing Petitioner to choose his method of execution, and the use of lethal injection as a default execution method, is a cruel and unusual punishment.

1141. The 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 Amendment, applicable to the states through the Fourteenth Amendment.

1142. The only information available from the Department of Corrections is a three-page document [hereafter "document"] dated March 1996 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 Execution Procedures: Lethal Injection*, Exh. 268.

1143. This 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 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 [sic] bromide then follows; finally, potassium chloride is administered. A physician "is present" to declare when death occurs.

1144. The California Department of Corrections has not established any other standards for administering lethal injection pursuant to section 3604.

1145. There is a real and substantial likelihood that the method of execution by lethal injection scheduled to be used on Petitioner will cause such pain and suffering that his execution will be in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 17 of the California Constitution.

1146. The document released by the Department of Corrections does 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 also* Thornburn Dec., Exh. 270; Palmer Dec., Exh. 271; Radelet Affidavit, Exh. 272.[88]

1147. The document does 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.

1148. The document does 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 bloodstream, 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

[88] These declarations refer to a document dated January 1996, which is similar in relevant particulars to the March 1996 document referred to in text.

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.

1149. The document does 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. In fact, 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.

1150. The document does not outline the proper guidelines for the storage or the handling of the chemicals involved. Improperly stored and/or handled chemicals may cause unnecessary suffering. Sodium pentothal 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.

1151. The condemned prisoner is entitled to an execution free from "unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) under the state and federal constitutions and international law, and the method of execution used in California fails to comport with this in that the risk of such pain is substantial. *See also* Thorburn Dec., Exh. 270; Palmer Dec., Exh. 271; Radelet Affidavit, Exh. 272.

1152. 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.

1153. 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.

1154. These risks increase significantly where proper comprehensive procedural safeguards are lacking.

1155. 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. 1387, 1411 (N.D. Cal. 1994) (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. There have been many instances where execution by lethal injection has been prolonged, extending the amount of psychological pain inflicted.

1156. 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. 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). Problems with the execution prompted Texas officials to review their lethal injection procedures for inmates with a history of drug abuse. *Id.* 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). 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. 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). 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). 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). 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*, The Daily Oklahoman (Mar. 11, 1992); *Another U.S. Execution Amid Criticism Abroad*, N.Y. Times (Apr.

24, 1992). 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). 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." 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). 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). 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.

1157. More recently, 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. *California First Amendment Coalition v. Calderon*, 138 F.3d 1298, 1300 (9th Cir. 1998).

1158. The risk of such prolonged administration of the lethal injection is increased by California's lack of comprehensive standards in defining the procedures.

1159. 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).

1160. 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 recently 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.*

1161. 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 as well as international law. *See also* Claim L.

1162. Accordingly, Petitioner's death judgment must be vacated

and/or a stay of execution entered permanently.

L. PETITIONER CANNOT LAWFULLY BE EXECUTED BECAUSE HIS DEATH SENTENCE VIOLATES INTERNATIONAL LAW

1163. Petitioner's death sentence was unlawfully and unconstitutionally imposed in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; Article I, sections 1, 7, 15, 16 and 17 of the California Constitution; 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.

1164. 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.

1165. 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").

1166. 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 p. 184.

1167. The United States Senate has ratified the International Covenant on Civil and Political Rights (hereinafter "International Covenant"). 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 International Covenant,

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.

1168. The process by which the President of the United States and the United States Senate ratified the International Covenant, 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 International Covenant 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 International Covenant, which guarantees the right to life and specifically prohibits the execution of juveniles. The United States's ratification of the International Covenant on Civil and Political Rights 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.

1169. 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 federal 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).

1170. 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. Exh. 269, Executive Order

No. 13107, "Implementation of Human Rights Treaties." President Clinton specifically referred to the International Covenant when ordering that the United States fully "respect and implement its obligations under the international human rights treaties[.]"[89]

1171. 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

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[89] 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:

"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."

Exh. 269, Exec. Order No. 13107, 63 Fed.Reg. 68991 (emphasis added).

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, pp. 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 p. 84, U.N. Doc. A/L.37 (1952).

1172. The "object and purpose" of the International Covenant 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 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 International Covenant. There is nothing more contravening

to the "right to life" than the death penalty.

1173. 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 International Covenant, 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.*

1174. Because the United States's "reservation" to Article 6, paragraph 5, violates the object and purpose of the International Covenant 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. 677, 700 (1900); *Clinton v.*

City of New York, 524 U.S. 417 (1998); *Bowsher v. Synar*, 478 U.S. 714 (1986); *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.

1175. For all of the reasons asserted herein, and in this Petition, the writ must issue.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that this Court:

1. Take judicial notice of all records and briefing in *People v. Boyette*, No. S032736, and of all other matters and documents of which judicial notice is requested elsewhere in the present Petition;

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. Order the custodians of records pertaining to Petitioner's case to produce the record or a certified copy to be filed with the clerk of this Court;

4. 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 or from allegations made in the return or informal opposition to the Petition;

5. Allow Petitioner a reasonable opportunity to amend or supplement this Petition to include legal and factual grounds for claims that become apparent from this Court's decision on his pending direct appeal;

6. Grant Petitioner, who is indigent, sufficient funds and the opportunity fully to develop and prove the facts and law relevant to the

claims raised herein;

7. Issue an order to show cause, returnable before this Court, why Petitioner's convictions, special circumstance findings, and death judgment should not be set aside;

8. Grant Petitioner an evidentiary hearing at which proof may be offered concerning the allegations of this and any supplemental or amended Petition;

9. Authorize Petitioner to conduct discovery and grant Petitioner the authority to obtain subpoenas for witnesses, documents and all matters with respect to the claims pleaded herein; and to reconsider *Gonzales* on this point;

10. Order that Petitioner has not waived any applicable privileges by the filing of this Petition and the exhibits; that he has not waived either the attorney-client privilege or the work-product privilege; that any waiver of a privilege may 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; that Petitioner is granted "use immunity" for each and every disclosure he has made and may make in support of this Petition;

12. Order a hearing and, if necessary, the taking of evidence, upon all allegations by Respondent of waiver and/or forfeiture by Petitioner;

13. Upon final review of the cause, order that Petitioner's convictions, special circumstance findings, other findings, and death sentence be set aside;

14. Issue any stays of execution or proceedings necessary to protect this Court's jurisdiction; and

15. Provide Petitioner such other and further relief as may be deemed appropriate in the interests of justice.

DATED: 10/19/00

LYNNE S. COFFIN
STATE PUBLIC DEFENDER

AUDREY CHAVEZ
Deputy State Public Defender

GAIL JOHNSON
Deputy State Public Defender

BY: _____
LYNNE S. COFFIN

Attorneys for Petitioner
MAURICE BOYETTE

VERIFICATION

I, LYNNE S. COFFIN, declare under penalty of perjury:

I am an attorney admitted to practice law in the State of California. I am the State Public Defender and represent Petitioner, who is unlawfully confined and restrained of his liberty at San Quentin State Prison, Tamal, California, in violation of state law, the state constitution, and the federal constitution.

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 18th day of October, 2000, at San Francisco, California.

LYNNE S. COFFIN
STATE PUBLIC DEFENDER
Attorney for Petitioner

DECLARATION OF SERVICE

Re: In Re Maurice Boyette No._____

I, Siobhan Noble, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, CA 94105. On this day, I served true copies of the attached:

PETITION FOR WRIT OF HABEAS CORPUS AND EXHIBITS

on each of the following, addressed (respectively) as follows:

Christina Kuo
Deputy Attorney General
455 Golden Gate Ave. #11000
San Francisco, CA 94102

Maurice Boyette **(hand delivery)**
H-76600
San Quentin State Prison
San Quentin, CA 94974

Office of the District Attorney **(hand delivery)**
1225 Fallon St. # 900
Oakland, CA 94612

Alameda County Superior Court
1225 Fallon Street, #209
Oakland, CA 94612-4293

Each said package was then, on October 19, 2000, sealed and mailed via United Parcel Service (UPS) at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty that the foregoing is true and correct.

Executed on October 19, at San Francisco, California.

_____
Siobhan Noble