ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S065575

IN RE STEVE ALLEN CHAMPION PETITIONER, ON HABEAS CORPUS.	No. _____ (Related Appeal: *People* v. *Champion*, Crim. No. 22955.)

PETITION FOR WRIT OF HABEAS CORPUS

PETITION
VERIFICATION
PROOF OF SERVICE

(Volume 2 of 2 volumes)

KAREN KELLY
ATTORNEY AT LAW
California State Bar No. 118105
P.O. Box 520
Ceres, California 95307
Telephone: (209) 537-9270

Attorney for Petitioner
by Appointment of the California
State Supreme Court

DEATH PENALTY

TABLE OF CONTENTS

PETITION FOR WRIT OF HABEAS CORPUS

I. STATEMENT OF UNLAWFUL CONFINEMENT ..... Page -1-

II. STATEMENT OF JURISDICTION ..... Page -2-

III. PROCEDURAL HISTORY ..... Page -2-

IV. THIS PETITION IS TIMELY ..... Page -4-

V. INTRODUCTION TO PETITIONER'S CLAIMS FOR RELIEF ..... Page -17-

VI. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS RELATING TO THE TAYLOR HOMICIDE ..... Page -23-

VI. A. Defense counsel provided constitutionally ineffective assistance in failing to discover, present, and argue evidence that petitioner could not have been involved in the Taylor crimes as he was in the company of friends who were never considered viable suspects and were detained by Los Angeles County Sheriff's Department deputies at the time the Taylor crimes were being committed, did not match the description of any suspect who law enforcement saw exiting the suspect vehicle, and approached the officers from an area which would have made it very difficult, if not impossible for him to have been involved. ..... Page -25-

VI. B. Defense counsel provided constitutionally ineffective assistance in failing to discover, present, and argue evidence which indicated police and the prosecutor had reliable information that four other persons were actually responsible for the Taylor crimes. ..... Page -32-

Robert Simms was one of the four men who committed the Taylor crimes. ..... Page -33-

The forth man involved in the Taylor crimes was Michael Player. .... Page -36-

VI. C. Defense counsel provided constitutionally ineffective assistance in failing to discover, present, and argue evidence that the physical and clothing descriptions offered by witnesses did not fit that of petitioner on the night of the Taylor crimes. ..... Page -39-

VI. D. Defense counsel provided constitutionally ineffective assistance by failing to object to the prosecution's attempts to have witnesses identify petitioner as one of the men who entered the Taylor residence, in spite of the fact that the prosecution had assured both the court and counsel that it had no evidence that petitioner was present inside the Taylor home. . . . . Page -43-

VI. E. Defense counsel failed to discover and present evidence that there was no physical or other evidence of petitioner's involvement in the Taylor crimes and that to the contrary, numerous pretrial identification attempts failed to identify petitioner as a suspect, fingerprint analysis did not implicate petitioner, and a secretly taped conversation between Evan Mallet and petitioner failed to yield any evidence that petitioner was involved in the Taylor crimes. . . . . Page -48-

VI. F. Defense counsel failed to object to or impeach Cora Taylor's identification of petitioner. . . . . Page -52-

VI. G. Defense counsel provided constitutionally ineffective assistance in failing to discover, present and argue (1) evidence that the graffiti which proportedly implicated petitioner in the Taylor crimes was authored by someone other than petitioner and did not represent that petitioner had been or would soon be involved in the Taylor robbery or otherwise implicate him in that offense and (2) that Deputy Williams' opinion that petitioner was associated with the crime through his association with alleged Crips and particularly Craig Ross was based on false information . . . . . Page -54-

VI. H. Defense counsel provided constitutionally ineffective assistance in failing to discover, present and argue evidence that the motive for the Taylor killing was personal retribution, undercutting the prosecution theory that the killing was part of, and motivated by, an ongoing conspiracy to rob and kill marijuana dealers. . . . . Page -65-

Trial Counsel had not Tactical Reasons for the Acts and Omissions Complained of Above . . . . . Page -68-

VII. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS RELATING TO THE HASSAN HOMICIDE . . . . . Page -72-

VII. A. Defense counsel provided constitutionally ineffective assistance in failing to discover, present and argue evidence that the jewelry in petitioner's possession at the time of his arrest did not belong to Bobby Hassan. . . . . Page -75-

VII. B. Defense counsel provided constitutionally ineffective assistance in failing to discover, present and argue evidence that petitioner at the time of the Hassan crimes was at home or picking up his pay check . . . . . Page -80-

VII. C. Defense counsel provided constitutionally ineffective assistance in failing to discover, present, and argue evidence that the identifications by Elizabeth Ms. Moncrief were so diverse and conflicting so as to be inherently unreliable and that the descriptions by Ms. Moncrief do not match petitioner. . . . Page -83-

VII. D. Trial Counsel provided ineffective assistance of counsel by failing to introduce readily available and significantly exculpatory forensic evidence . . . . . Page -94-

VII. E. Trial counsel failed to request attorney, investigative, and expert support from the trial court, or utilize those funds authorized by the court prior to Skyers appointment.. . . . . Page -97-

VII. F. Failure to properly object to the use of a secretly taped conversation between petitioner and Mallet both at pretrial stages and when used by the prosecution during its cross-examination of petitioner . . . Page -100-

VII. G. Trial counsel failed to properly object to the use of a secretly taped conversation between petitioner and Mr. Ross. . . . . Page -105-

VII. H. Defense counsel provided constitutionally ineffective assistance in failing to discover, present, and argue evidence of significant mental impairments from which petitioner was suffering as of the date of the Hassan crimes which would have precluded the jury from finding petitioner, if present at the victims' residence, possessed the intent to kill required for special circumstance liability . . . . . Page -113-

VIII. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS RELATING TO THE JEFFERSON HOMICIDE . . . . . Page -122-

VIII. A. Defense counsel provided constitutionally ineffective assistance by failing to discover and produce evidence that the Jefferson case was not similar to either the Hassan or Taylor crimes which would have precluded admission of the Jefferson evidence and undercut the prosecution's theory that petitioner was a participant in or at least had knowledge of all three incidents and its theory that petitioner's alleged knowledge of the Jefferson homicide evidenced the required mental state for finding the special circumstances to be true. . . Page -125-

VIII. B Defense counsel provided constitutionally ineffective assistance in failing to object to introduction of the Jefferson crimes on grounds that the introduction of this other crimes evidence violated petitioner's due process rights, and Evidence Code §§ 352 and 1101. . . . . Page -131-

VIII. C. Trial counsel was ineffective in failing to object on the ground that the evidence was inconsistent with the prosecutor's offer of proof. . . . . Page -136-

VIII. D. Trial counsel was ineffective in failing to object to the prosecution's conspiracy evidence and argument. . . . . Page -137-

IX. PENALTY PHASE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL . . . . . Page -142-

IX. A. Trial counsel was ineffective in failing to object to the prosecutor's argument that petitioner would kill if sentenced to life without the possibility of parole and that his demeanor should be used as a factor in aggravation . . . . . Page -144-

XI. B. Trial counsel failed to object to the prosecution's argument that an alleged lack of a mitigating factor was , as to each factor, to be considered a factor in aggravation. . . . . Page -151-

XI. C. Defense counsel failed to discover and produce substantial mitigating evidence at the penalty phase of the trial. . . . . Page -155-

X. PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE PROSECUTOR IMPLYING THAT PETITIONER HAD A CRIMINAL RECORD AND BY THE TRIAL COURT'S REFUSAL TO GRANT A MISTRIAL . . . . . Page -220-

XI. DEFENSE COUNSEL'S CONFLICT OF INTEREST PREVENTED HIM FROM RENDERING EFFECTIVE ASSISTANCE OF COUNSEL ..... Page -222-

XII. THE UNCONSTITUTIONAL JOINDER OF PETITIONER'S CASE WITH THAT OF CRAIG ROSS DENIED PETITIONER DUE PROCESS OF LAW AND IN COMBINATION WITH PROSECUTORIAL BAD FAITH, INEFFECTIVE ASSISTANCE OF COUNSEL, AND ERRONEOUS TRIAL COURT RULINGS, RESULTED IN FUNDAMENTALLY UNFAIR GUILT AND PENALTY TRIALS .....-page -224-

XIII. CLAIMS OF PROSECUTORIAL MISCONDUCT ..... Page -247-

XIII. A. The prosecutor knowing committed prejudicial misconduct when he secretly, without notice to petitioner's counsel, applied to the trial court for permission to, and did, specially transport petitioner alone with Evan Mallet and then alone with Craig Ross for the purpose of inducing and tape recording self-incriminating conversations, and further manipulated the trial court's calendar with a bogus motion to carry out his plan ..... Page -249-

XIII. B. The prosecutor committed prejudicial misconduct by knowingly misrepresenting to the trial court the purported similarities between the Jefferson killing and the Taylor and Hassan crimes including alleged similarities as to weapon and motive. ..... Page -252-

XIII. C. The prosecutor knowing committed prejudicial misconduct in that after he had represented to both defense counsel and the court that he had "no direct evidence Mr. Champion was inside the [Taylor] house" he proceeded to elicit and 11th hour identification from Cora Taylor and the inference that petitioner was not only involved in the conspiracy, but was the tallest of the three individuals who entered the residence, from Mary Taylor, knowing the contrary to be true. ..... Page -255-

XIV. THE CALIFORNIA STATUTORY SCHEME UNDER WHICH PETITIONER WAS SENTENCED TO DEATH IS UNCONSTITUTIONAL ..... Page -256-

XV. THE CUMULATIVE EFFECT OF THE ERRORS ON THE ISSUES OF GUILT, SPECIAL CIRCUMSTANCES AND PENALTY WARRANT REVERSAL ..... Page -261-

XVI. EXECUTION AFTER PROLONGED CONFINEMENT UNDER SENTENCE OF DEATH ..... Page -263-

XVII. EXECUTION BY LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT . . . . . Page -265-

XVIII. PETITIONER'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW . . . . . Page -276-

PRAYER FOR RELIEF . . . . . Page -278-

VERIFICATION . . . . . Page -280-

TABLE OF AUTHORITIES

CASES

Adamson v. Ricketts (9th Cir. 1988) 856 F.2d 1011 257

Arizona v. Youngblood (1988) 488 U.S. 51 230

Beck v. Alabama (1980) 447 U.S. 625 154

California v. Ramos (1983) 463 U.S. 992 257

Campbell v. Blodgett (9th Cir. 1993) 997 F.2d 522 149

Chapman v. California (1967) 386 U.S. 18 147

Cuyler v. Sullivan (1980) 446 U.S. 335 222

Donnelly v. DeChristoforo (1974) 416 U.S. 637 137

Fetterly v. Paskett (1991) 997 F.2d 1295 150

Fierro v. Gomez (N.D. Cal . 1994) 865 F.Supp. 1387 . . . . . 265, 270

Fierro v. Gomez (9th Cir. 1996) 77 F.3d 301. 265

Furman v. Georgia (1972) 408 U.S. 238 . . . . . 150, 154, 256

Gardner v. Florida (19) 430 U.S. 358. 148

Gomez v. Fierro (1996) 519 U.S. _____ 265

Greenawalt v. Stewart (9th Cir. 1997) 105 F.3d 1268 9

Gregg v Georgia (1976) 428 U.S. 153 . . . . . 148, 150, 154, 269

Griffin v. California (1965) 380 U.S. 609 147

Hamilton v. Nix (8th Cir. 1987) 809 F.2d 463 137

Henry v. Estelle (9th Cir. 1993) 993 F.2d 1423 133

Herring v. Meachum (2d Cir. 1993) 11 F.3d 347 236

Hicks v. Oklahoma (1980) 447 U.S. 343 149

In re Clark (1993) 5 Cal.4th 750 . . . . . 5, 9, 11, 13, 14, 15, 16

In re Duvall (1995) 9 Cal.4th 464 12

In re Hall (1981) 30 Cal.3d 408 223

Johnson v. Mississippi (1988) 486 U.S. 578 148

Keenan v. Superior Court (1982) 31 Cal.3d 424 97

Kotteakos v. United States (1946) 328 U.S. 750 137

Lackey v. Texas (1995) 514 U.S. _____ 263

Martinez v. *Superior Court* (1981) 29 Cal.3d 574 223

McClesky v. Zant (1991) 499 U.S. 467 9

McKenzie v. Day (9th Cir. 1995) 57 F.3d 1461 274

McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378 . . . .133, 139

Panico v. United States (1963) 375 U.S. 29 147

People v. Bacigalupo (1993) 6 Cal.4th 457 259

People v. Boyd (1985) 38 Cal.3d 762. 148

People v. Chambers (1964) 231 Cal.App.3d 23 . . . . . 229, 235

People v. Champion (1995) 9 Cal.4th 879 . . . . . 2, 4, 5, 6, 56, 64, 109, 111, 136, 138, 149, 150, 226, 227-230, 234, 236, 239, 241, 244

People v. Chessman (1959) 52 Cal.2d 467 264

People v. Coleman (1985) 38 Cal.3d 69 53

People v. Hogan (1982) 31 Cal.3d 815 . . . . . .62, 63

People v. Jones (1954) 42 Cal.2d 219 146

People v. Ortiz (1978) 22 Cal.3d 38 . . . . . 101, 232, 250

People v. Ozuna (1963) 13 Cal.App.2d 338 139

People v. Poulin (1972) 27 Cal.App.3d 54 132

People v. Proce (1991) 1 Cal.4th 390 229

People v. Rivera (1985) 41 Cal.3d 388 132

People v. Sheldon (1994) 7 Cal.4th 1163 263

People v. Stanworth (1969) 71 Cal.2d 820 263

People v. Taylor (1990) 52 Cal. 3d 719. 144

People v. Terry (1970) 2 Cal.3d 362 146

People v. Sergill (1985) 138 Cal.App.3d 34 62

People v. Williams (1971) 22 Cal.App.3d 34 53

People v. Williams (1988) 44 Cal.3d 883 8

Rose v. Lundy (1982) 455 U.S. 509 9

Ruffin v. Dugger (11th Cir. 1988) 848 F.2d 1512. 146

Sanders v. Ratelle (9th Cir. 1994) 21 F.3d 1446 222

Sochor v. Florida (1992) 112 S.Ct. 2114. 153

Strickland v. Washington (1984) 466 U.S. 668 8

Taylor v. Kentucky (1979) 436 U.S. 478 139

Thiel v. Southern Pacific Co. (1972) 328 U.S. 217 154

United States v. Carroll (4th Cir. 1982) 678 F.2d 1208 147

United States v. Douglas (9th Cir. 1986) 780 F.2d 1472 229

United States v. Marion (1976) 404 U.S. 307 230

United States v. Solivan 937 F.2d 1146 (6th Cir. 1 62

Wade v. Calderon (9th Cir. 1994) 29 F.3d 1312 260

Williams v. *Superior Court* (1984) 36 Cal.3d 441 222

Winkler v. Keene (1995) 7 F.3d 304 222

Woodson v. North Carolina (1976) 428 U.S. 280 148

Zant v. Stephens (1983) 462 U.S. 862 . . . . . 257, 258

CODES

CALIFORNIA CODES

Evidence Code section 352. . . . . 122, 131, 134, 139

Evidence Code section 720, subdivision (a) 62

Evidence Code section 780. 146

Evidence Code section 801, subdivision (a) 63

Evidence Code section 1101. . . . . 110, 111, 122, 131, 134

Evidence Code section 1102. . . . . 110, 111

Evidence Code section 1220 . . . . . 64, 104

Evidence Code section 1223 . . . . . 64, 104

Penal Code section 187 2

Penal Code sections 189 . . . . . 166, 167, 256

Penal Code section 190.2, subd. (a)(3) 3, 129

Penal Code section 190.2, subd. (a)(17)(i) 3, 129

Penal Code sections 190.2, subd. (a)(17)(vii) 3

Penal Code Section 190.3 . . . . . 151, 152

Penal Code Section 190.3 . . . . . 151, 152

Penal Code section 211, ... 2, 3

Penal Code section 459 2

Penal Code section 987.9 97

Penal Code section 1098 232

Penal Code § 1239, subd. (b) 173

Penal Code section 1473, subdivision (a) 2

Penal Code section 1538.5. 100

Penal Code section 3604 . . . . . 175, 177, 179,180

Penal Code Section 12022 . . . . . 3, 4

UNITED STATES CODES

28 U.S.C. section 2244(b) 9

CONSTITUTIONAL PROVISIONS

CALIFORNIA

Article I, section 1 . . . . . .22, 23, 72, 122, 142, 224, 225, 247, 256, 263

Article I, section 7 . . . . . .22, 23, 72, 122, 142, 224, 225, 247, 256, 263

Article I, section 15 . . . . . .22, 23, 72, 122, 142, 224, 225, 247, 256, 263

Article I, section 17 . . . . . .22, 23, 72, 122, 142, 224, 225, 247, 256, 263

Article I, section 24 . . . . . .22, 23, 72, 122, 142, 224, 225, 247, 256, 263

Article VI, section 10 2

UNITED STATES

First Amendment 22, 23, 72, 122, 142

Fifth Amendment 22, 23, 72, 122, 142, 147, 247, 256, 263

Sixth Amendment 22, 23, 72, 122, 131, 134, 136, 141, 142, 147, 148, 150, 247, 256, 263

Eighth Amendment 22, 23, 72, 122, 134, 142, 148, 153, 154, 222, 246, 247, 256, 263

Fourteenth Amendment 22, 23, 72, 122, 142, 147, 153, 246, 247, 256, 263

OTHER

CALJIC No. 1.00 261

CALJIC No. 6.13 261

CALJIC No. 8.80 113

IX.

PENALTY PHASE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner's death sentence was unlawfully and unconstitutionally obtained in violation of petitioner's rights under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under article I, section 1, 7, 15, 16, 17, and 24 of the California Constitution and the statutory and decisional law of California, in that petitioner was denied effective assistance of counsel by various errors and omissions of his trial counsel relating to the penalty phase and as a result of those errors and omissions, also denied his rights to due process of law, to freedom of association, to equal protection, to confrontation, and to a fair and reliable guilt and sentencing determination. But for counsel's errors and omissions, which were not the product of any reasonable tactical decision and would not have been committed by competent counsel, it is reasonably likely that the result of the proceedings would have been more favorable to petitioner.

Specifically, defense counsel provided constitutionally ineffective assistance in (1) failing to object to the prosecutor's argument that petitioner would kill if sentenced to life without the possibility of parole and that his demeanor should be used as a factor in aggravation; (2) failing to object to the prosecution's argument that an alleged lack of a mitigating factor was, as to each factor, to be considered a factor in aggravation; and (3) failing to discover and produce substantial mitigating evidence at the penalty phase of the trial.

The facts supporting this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to the following:

1. During the penalty phase, the prosecution presented evidence concerning two juvenile

adjudications of petitioner. The adjudications concerned a 1977 theft charge and a 1978 assault charge. (RT 3532-3547.)

2. The defense presented evidence of Mr. Mallet's involvement as the gunman in the Taylor killing, Mr. Mallet's sentence of life without the possibility of parole for the crime (RT 3663), petitioner's juvenile parole officer's opinion of petitioner's satisfactory performance on parole (RT 3666-3672) , and the testimony of petitioner's mother that petitioner had aspirations of becoming a counselor or teacher. (RT 3681-3682.)

3. The prosecution offered evidence of prior crimes and acts of violence allegedly committed by Mr. Ross. Mr. Ross presented no penalty phase evidence in mitigation. (RT 3548, 3553-3554, 3579, 3633.)

IX. A. Trial counsel was ineffective in failing to object to the prosecutor's argument that petitioner would kill if sentenced to life without the possibility of parole and that his demeanor should be used as a factor in aggravation

1. During the penalty phase the prosecutor argued that to prove that if petitioner were sentenced to life without parole this would provide him the "hope" escape and then implied that he would kill his prison guards and escape. (RT 3699.) The prosecutor then argued that petitioner's demeanor also reflected his dangerousness when the guilt verdicts were read. (RT 3699.) A prosecutor can not argue that a defendant will kill in prison if given life without the possibility of parole unless defendant first puts on evidence that he will be peaceful in prison. (*People v. Taylor* (1990) 52 Cal. 3d 719.) Petitioner did not put on evidence that he would be peaceful in prison. Trial counsel failed to object to all of these arguments and the jury was compelled to believe that they had to render a death verdict to protect prison guards from being murdered by petitioner.

2. At the reading of the guilt verdicts, the defendants stood up, petitioner first, followed by Mr. Ross. Petitioner stated, "fuck this" or "fuck that." The trial court instructed the defendants to sit down. Petitioner indicated that there was no more to hear and began walking toward the lock-up area followed by Mr. Ross. Petitioner turned to the audience and indicated to his mother that "there was a railroad" or that they "were going to railroad him." Plainclothes officers came from the audience and approached the defendants. Mr. Ross gave some indication to the plain clothes officer that he was willing to get into a fight, but no fight ensued. The court bailiff then opened the courtroom door to the lock-up area and took the defendants out of the courtroom. (Settled Statement of July 8, 1985, 70-74.)

3. During the penalty phase arguments the prosecutor made reference to this incident as a factor for the jury to consider in determining whether or not to impose a sentence of death. He

approached the incident by first urging the jury to consider it in the context of petitioner's "future dangerousness," an impermissible argument. He then added:

> MR. SEMOW: And in that regard I ask you this, and I ask you to recall the display that was put on for you by the defendants, and particularly Mr. Ross, when the verdicts were rendered at the time when it should have been most important in his (sic) whole life to behave like a civilized person in front of the jury. Mr. Ross engaged in a confrontation with the guards here and almost got into a fight with them. Is that the kind of person from whom we can protect not only the society outside of prison but society inside prison by incarcerating him for the rest of his life? (RT 3699-3700.)

4. Semow returned to the incident twice again during his penalty phase argument. On both occasions he implied that the death penalty would be appropriate because of the apparent display of emotion by the defendants:

> MR. SEMOW: When you rendered those verdicts that you so carefully considered after listening to so much evidence, he (Mr. Ross) was the one who first got up in mock indignation started to walk toward the lockup, Mr. Champion followed. (RT 3712.)

And,

> MR. SEMOW: Did either of them show you any remorse when they did that mock display of indignation for you when you rendered the verdicts of guilty, verdicts which you rendered not because you delighted in doing so but because you had to, you had no choice based upon the law and the evidence. Did that show remorse on their part? (RT 3728.)

5. Following this last reference the prosecutor launched into his argument that a penalty of death should be based upon anger, another impermissible argument, "Don't be ashamed of your anger [against the defendants] and don't try to stifle it." (RT 3728-3729.) This was unobjected to.

6. A defendant's nontestimonial conduct in the courtroom does not fall within the

definition of "relevant evidence" as that which "tends logically, naturally (or) by reasonable inference to prove or disprove a material issue" at trial. (*People v. Jones* (1954) 42 Cal.2d 219, 222.) Neither can it be properly considered by the jury as evidence of defendant's demeanor since demeanor evidence is only relevant as it bears on the credibility of a witness. (California Evidence Code section 780.) If anything, focusing the jury's attention of a defendant's courtroom conduct distracts attention from, and may diminish, the weight the jury assigns to the permissible factors identified by the instructions as legitimately aiding in the determination whether the defendant committed the alleged offense. Authorizing the consideration of such demeanor in the determination of guilt or innocence also runs the serious risk of inviting the jury to use the character of the accused to prove guilt which is wholly improper. (*People v. Terry* (1970) 2 Cal.3d 362, 400.)

7. How the defendant comports himself -- or, more accurately, how he appears to be comporting himself -- at the counsel table within the highly structured and artificial world of the courtroom is the product of many factors. Moreover, regardless of what the defendant is really feeling, the way in which he appears to be acting is open to vast misinterpretation. Given the incident here at issue, it may be that Mr. Champion was, as Mr. Semow accused, "displaying mock indignation," then again, he may truly have felt indignant, or may honestly have felt that there had been a miscarriage of justice for him to be found guilty.

8. The point is that what the prosecutor really argued was not simply that the jurors take into account what actually occurred, but to draw inferences therefrom regarding petitioner's state of mind. In other words, the jury was asked to speculate, to infer a particular mental state from petitioner's appearance. That practice has been held improper. (*United States v. Carroll* (4th Cir.

1982) 678 F.2d 1208; *Panico v. United States* (1963) 375 U.S. 29.) Had counsel objected properly such evidence would not have been admitted.

9. Behavior of no rational probative value was used as the basis for an argument to the jury. Moreover, the argument was not just that the jury take the behavior into account, but that unreliable factual inferences should be drawn from the behavior, and that the inferences then be used to support a capital sentence. The defense had no opportunity to rebut such an argument, or could rebut it only at the cost of surrendering the defendant's right to remain silent.

10. Although petitioner did not testify at the penalty phase of his trial, the prosecutor argued that petitioner's lack of remorse was a factor which the jury should consider to impose the death penalty. Specifically he argued that the jury should take into account that there was no evidence "that to someone at sometime they displayed remorse about what they did." (RT 3723.)

11. The prosecutor's comment to the jury as to petitioner's demeanor, lack of remorse, and attempt to characterize petitioner as a "bad guy" was also a violation of petitioner's Sixth Amendment right to confrontation and cross-examination. Thus, the prosecutor's unobjected to statements in this regard not only constituted prosecutorial misconduct but also violated Petitioner's Sixth Amendment and Fifth and Fourteenth Amendment Due Process rights. Moreover, as trial counsel never raised the issue of remorse, the prosecution's argument was in violation of petitioner's right against self-incrimination and refusal to testify. (*Griffin v. California* (1965) 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229.)

12. A prosecutor's closing argument could be so improper as to create federal constitutional error. (*Chapman v. California* (1967) 386 U.S. 18, 25-26, 17 L.Ed.2d 705, 87 S.Ct. 824.) Reversal is also required because the prosecutor urged the jury to consider irrelevant

evidence as factors in aggravation. Evidence of a defendant's background, character, or conduct which is not probative of any specific factor listed in Penal Code Section 190.3 has no tendency to prove or disprove a fact of consequence to the determination of the penalty to be imposed, and is therefore irrelevant to aggravation. (*People v. Boyd* (1985) 38 Cal.3d 762.)

13. Since the admission of such evidence is irrelevant, it therefore follows that it is improper for a prosecutor to argue that the jury should consider such "factors" in determining penalty. The prosecutor's allegations of the "future dangerousness" of petitioner, as well as his exhortations to the jury to base its penalty decision on their anger and outrage, and petitioner's lack of remorse, were clearly improper appeals that the jury should reach beyond the factors enumerated under Section 190.3 to find other, non-statutory factors in aggravation to weigh into the equation.

14. Here the prosecutor's comment on petitioner's in-court demeanor, lack of remorse and future dangerousness and to use anger to render a death verdict not only violated petitioner's Sixth Amendment rights, it also violated the Eighth Amendment command that factors in aggravation be defined to narrow the class of persons eligible for the penalty of death. (*Gardner v. Florida, supra,* 430 U.S. 358; *Gregg v. Georgia, supra,* 428 U.S. at p. 188.) Further, by urging the jury to rely on an ambiguous and probably only partially witnessed nonevidentiary courtroom incident, his own uncross-examined characterization of the incident, and personal belief as to whether or not petitioner expressed remorse, the prosecutor committed misconduct that precluded the reliable capital sentencing determination that is required by the Eighth Amendment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 100 L.Ed.2d 575, 108 S.Ct. 1981; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.) Moreover, California's prohibition against

a capital sentencer's weighing nonstatutory aggravating factors on death's side of the scale establishes an important procedural safeguard. That safeguard is protected not only by state law, but by the Due Process Clause of the Fourteenth Amendment as well. (*Hicks v. Oklahoma* (1980) 447 U.S. 343; *Campbell v. Blodgett, supra,* 997 F.2d at p. 522; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.)

15. This Court opined, "Defendants also assert that other comments by the prosecutor in closing argument implied that they should be sentenced to death because they would be a danger to other prisoners and to prison guards if they were sentenced to life imprisonment without possibility of parole . . . . [D]efendants' failure to object to the prosecutor's comments bars them from complaining about the comments on appeal." (*People v. Champion, supra,* 9 Cal.4th at 940.) "Defendants contend the prosecutor's comments [at the penalty phase on their demeanor in court] were impermissible because a defendant's demeanor in court is not a factor that the jury in a capital case is entitled to consider in aggravation . . Neither defendant, however, objected to the prosecutor's comments at trial. Because a timely objection and admonition would have negated any harm arising from the prosecution's comments, defendants are barred from now attacking the propriety of the prosecutor's argument." (*Id.,* at 941.) Petitioner asserts that he was denied effective assistance of counsel by his failure to properly object. Reasonably competent counsel would have registered the above noted objections and recited the applicable constitutional and evidentiary law. The prejudicial arguments made by the prosecutor would not have been allowed.

16. It is urged that the prosecutor's impermissible comment upon petitioner's future dangerousness, in-court demeanor and lack of remorse are of sufficient magnitude as to require reversal of the penalty. It cannot be said that the prosecutorial misconduct did not contribute to

the verdict obtained. (*Chapman v. California, supra,* 386 U.S. at p. 24.) When taken in conjunction with the other errors noted throughout petitioner's case, which considered alone may or may not be so prejudicial as to amount to a denial of due process, the errors cumulatively produced a trial setting that was fundamentally unfair, and therefore a denial of due process. This type of evidence and argument injected arbitrariness into the sentencing proceedings in violation of (*Furman v Georgia, supra,* 408 U.S. 238 and *Gregg v Georgia, supra,* 428 U.S. 153.)

17. There was no tactical reason for defense counsel not to have objected to the arguments made by the prosecutor. Counsel's failure to do so was therefore a violation of petitioner's Sixth Amendment right to effective assistance of counsel. Trial counsel's unreasonable and prejudicial errors deprived petitioner of his right to the effective assistance of counsel. This failure fell below an objective standard of reasonableness under prevailing professional norms and had counsel done so, the arguments could not have been made and the outcome of petitioner's penalty verdict would have been different.

IX. B. Trial counsel failed to object to the prosecution's argument that an alleged lack of a mitigating factor was , as to each factor, to be considered a factor in aggravation.

1. Penal Code § 190.3 describes the factors in aggravation and mitigation that the jury may consider in deciding whether to impose the death penalty. A prosecutor may not argue that the absence of mitigating factors transforms those factors into factors in aggravation. That is exactly what the prosecutor did in petitioner's case and trial counsel did not object to it.

2. When discussing factor (d) of section 190.3 (whether or not the offense was committed while the defendant was under the influence of extreme emotional disturbance), the prosecutor argued that there was "no evidence, of course, of anything of that nature whatsoever, the only evidence is that these killing were brutal and cold blooded. So again as to both defendants we have a strong factor in aggravation." (RT 3709.)

3. Similarly, when discussing factor 190.3 (e) (whether or not the victim was a participant in the defendant's homicidal conduct or consented), the prosecutor argued: "Well what we are talking about here is something like the dual [sic] or mutual combat, the rare instance of a suicide compact. I don't mean to be funny. We have crimes where people engage in sadomasochistic relations and one of them goes too far and kills somebody. That is what we mean by the victim participating in or consent in the conduct. Of course, we have no consent in the conduct of this case. We have strong aggravation by the defendant." (RT 3710.)

4. With regard to factor (g) of section 190.3, (whether or not defendant acted under extreme duress or under substantial domination of another person), the prosecutor said: "Defendant Champion is bigger than Mr. Ross, first of all, and there is no evidence in this case presented at the guilt phase or at the penalty phase of this trial, [that] Mr. Champion was acting