IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **MAURICE BOYETTE,** On Habeas Corpus.	**CAPITAL CASE** S092356

Alameda County Superior Court No. 114009B
The Honorable Richard Haugner, Judge

INFORMAL RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

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DEATH PENALTY

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

On May 7, 1993, petitioner Maurice Boyette was convicted and sentenced to death in Alameda County for the May 1992 murders of Gary Carter and Annette Devallier.

In September 1999, petitioner filed an automatic appeal with this Court in *People v. Boyette,* S032736, appeal pending.[1/]

In October 2000, petitioner filed the instant petition with this Court raising 12 substantive claims of error. The Court has requested informal briefing in response.

We submit that eleven of petitioner's claims fail to establish a basis for habeas corpus relief, either because they are procedurally barred, because they fail to state a prima facie case, or both. Accordingly, as to those eleven claims, i.e., claims two through twelve, we need not attempt to rebut the specific factual allegations in those claims with counter-declarations, documentary evidence or

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1. Respondent asks this Court to take judicial notice of its own records, including all documents filed on behalf of petitioner and respondent in petitioner's automatic appeal. (Evid. Code, § 452; *In re Clark* (1993) 5 Cal.4th 750, 798, fn. 35.)

other materials. (*In re Romero* (1994) 8 Cal.4th 728, 737; cf. *People v. Duvall* (1995) 9 Cal.4th 464, 474.)

We believe the remaining claim, alleging juror misconduct, merits an evidentiary hearing. Material facts outside the trial record are in dispute, and until the facts are determined the claim cannot be resolved. (*In re Hitchings* (1993) 6 Cal.4th 97, 110 [referee appointed for evidentiary hearing on claim of juror misconduct].)

STATEMENT OF FACTS

The facts are set forth in detail in respondent's brief in response to petitioner's automatic appeal that is pending in this Court. Respondent incorporates herein by reference the statement of facts in that brief. Briefly stated, petitioner and his cohort, Antoine Johnson, planned to kill Gary Carter because they believed Carter had stolen Johnson's drug proceeds. Along with three friends, they waited at a residence for Carter and his girlfriend, Annette Devallier, to return home. Petitioner, Johnson, and three friends were waiting in Carter's room. Johnson hid a handgun behind him as he sat on the couch next to the door that he knew Carter would enter through. Although Johnson shot Carter four times as soon as Carter entered the room, Carter was able to run out of the house. Petitioner then took Johnson's gun, followed Carter outside, and shot him in the head, killing him. Petitioner then chased Devallier down the street and shot her twice in the head. The eyewitness promptly notified the authorities that petitioner and Johnson were the killers and gave statements to the police identifying petitioner and Johnson as the gunmen. One of the eyewitnesses testified against petitioner at trial. Petitioner made a series of incriminating statements that were admitted against him at trial. After the trials were severed, petitioner was convicted of both murders and sentenced to death. Shortly thereafter, Johnson pleaded guilty to the attempted murder of Carter, and was sentenced to life in state prison.

APPELLANT'S CONTENTIONS

1. Petitioner must receive a new trial because juror bias and misconduct fatally infected petitioner's convictions and death sentence.

2. Petitioner's trial counsel had an actual conflict of interest and petitioner was prejudiced.

3. Trial counsel rendered ineffective assistance of counsel at the guilt and special circumstance phases of petitioner's trial.

4. Petitioner was denied the effective assistance of counsel at the penalty phase of his capital trial.

5. The prosecutor committed prejudicial misconduct at the penalty phase.

6. Petitioner's statement to the police was involuntary and its admission violated his constitutional rights.

7. Petitioner's death sentence and confinement are unlawful because penalty phase instructions are unconstitutionally vague and incapable of being understood by jurors.

8. 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 disproportionate punishment.

9. 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.

10. 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.

11. Petitioner cannot be lawfully executed because the method of execution in California is forbidden by state, federal and international law.

12. Petitioner cannot lawfully be executed because his death sentence violates international law.

RESPONDENT'S ARGUMENT

1. General rules of habeas corpus in state court.
2. Petitioner is not entitled to discovery.
3. Procedural bars.
   A. Claims that were raised on appeal.
   B. Claims that could have been raised on appeal.
4. Certain accusations of juror misconduct warrant an evidentiary hearing.
   A. The accusation of juror misconduct during penalty phase deliberations warrants an evidentiary hearing .
   B. The remaining claims of misconduct during voir dire, guilt phase evidence and guilt phase deliberations.
5. Petitioner's claim that he did not knowingly waive cocounsel's alleged conflict of interest is procedurally barred and fails to state a prima facie case for relief.
   A. The record regarding cocounsel's federal prosecution.
   B. The record of petitioner's waiver of the alleged conflict of interest.
   C. Petitioner waived any alleged conflict of interest.
   D. Petitioner has not established prejudice from the conflict.
6. Petitioner's claim that he received ineffective assistance of counsel at the guilt and special circumstances phases is procedurally barred and fails to state a prima facie case for relief.
   A. The purported failure to litigate the motion to suppress.
   B. The purported failure to investigate mental state defenses.
   C. The purported failure to effectively employ investigators.
   D. The purported failure to call a criminalist.
   E. The purported failure to investigate and refute hypotheticals.

F. The purported failure to rebut evidence about the cole street house.

G. The purported failure to make appropriate objections.

H. The purported failure to argue the *Wheeler* motion.

I. The purported actual conflict with trial counsel.

7. Petitioner's claim that he was denied effective assistance of counsel at the penalty phase is procedurally barred and fails to state a prima facie case of relief.

A. The pretrial investigation and preparation of mitigating evidence.

B. The defense penalty phase case in mitigation.

8. Petitioner's claim of prosecutorial misconduct at the penalty phase is procedurally barred and fails to state a prima facie case for relief.

9. Petitioner's claim that his pretrial statement was improperly admitted at trial is procedurally barred and fails to state a prima facie case for relief.

10. Petitioner's attacks on the penalty phase instructions are barred and meritless.

11. Petitioner's claim that his sentence of death is based on inaccurate evidence and is disproportionate is procedurally barred and fails to state a prima facie case for relief.

12. Alleged cumulative errors in the guilt and penalty phases fail to make a prima facie showing for collateral relief.

13. Petitioner's claim that his execution after prolonged confinement constitutes cruel and unusual punishment is procedurally barred and fails to state a prima facie case for relief.

14. Petitioner's claim that execution by lethal injection is cruel and unusual punishment is procedurally barred and fails to state a prima facie case for relief.

15. Petitioner's claim that his death sentence violates international law is procedurally barred and fails to state a prima facie case for relief.

ARGUMENT

I.

GENERAL RULES OF HABEAS CORPUS IN STATE COURT

In a capital case, the trial is the main arena for determining guilt or innocence and whether death is the appropriate punishment. (*In re Robbins* (1998) 18 Cal.4th 770, 777.) The appeal "provides the basic and primary means for raising challenges to the fairness of the trial." (*Ibid.*; see *In re Clark, supra,* 5 Cal.4th at p. 764 [habeas corpus is an "extraordinary" remedy which seeks relief from a presumptively valid and final judgment of conviction].) "A habeas corpus petitioner bears the burden of establishing that the judgment under which he or she is restrained is invalid. [Citation.] To do so, he or she must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus." (*In re Visciotti* (1996) 14 Cal.4th 325, 351; *In re Avena* (1996) 12 Cal.4th 694, 730.) "[P]etitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them." (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

The purpose of an informal response is to assist the court in its determination whether the petition states a prima facie basis for relief and whether any of the claims are procedurally barred. (*In re Romero, supra,* 8 Cal.4th at p. 737; Cal. Rules of Court, Rule 60.) Habeas claims that fail to state a prima facie case are meritless and should be summarily rejected without formal pleading (i.e., return and traverse) or an evidentiary hearing. (*In re Romero, supra,* at p. 742.) Before habeas relief may be granted, the court must issue an order to show cause and permit respondent the opportunity to file a formal return. (*In re Romero, supra*, 8 Cal.4th at pp. 740-42; *People v. Duvall, supra,* 9 Cal.4th at p. 478.)

II.

PETITIONER IS NOT ENTITLED TO DISCOVERY

Contrary to petitioner's apparent understanding (see Pet. 47-58), the filing of a habeas petition does not trigger a right to discovery. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1257.) A habeas petition must first be verified and state a prima facie case for relief, i.e., avoid summary dismissal, before discovery might be appropriate. (*Id.*, at p. 1258; see *In re Avena, supra*, 12 Cal.4th at p. 730 [discovery may be available if order to show cause issues].) Since no order to show cause has issued here, petitioner's request for discovery is premature and should be denied. (See *People v. Gonzalez, supra,* 51 Cal.3d at p. 1257 [nothing pending in trial court to which discovery motion may attach].)

III.

PROCEDURAL BARS

Although each claim is discussed below, most of them are procedurally barred. Of the 12 entitled claims raised here, eleven are barred in their entirety because they either were or could have been raised on the direct appeal presently pending in this Court. (S032736, appeal pending.) Many rely on nothing outside the record on appeal and were or should have been brought, if at all, in the direct appeal.[2/] Petitioner has not justified his failure to have brought these claims in his appeal pending before this Court. Thus, Claims B, C, D, E, F, G, H, I, J, K, and L are not cognizable here.

As a general rule, a convicted criminal defendant may not use habeas corpus as a second appeal. Neither issues which were actually raised on appeal (*In re Terry* (1971) 4 Cal.3d 911, 927; *In re Waltreus* (1965) 62 Cal.2d 218, 225), nor issues which could have been but were not raised (*In re Dixon* (1953) 41 Cal.2d 756, 759; *In re Walker* (1974) 10 Cal.3d 764, 773), will be considered on habeas corpus absent strong justification or applicability of at least one of four narrow exceptions.[3/] (*In re Harris* (1993) 5 Cal.4th 813, 828.) Unless petitioner alleges sufficient justification, this rule bars habeas claims which were

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2. To the extent that petitioner relies upon declarations or other evidence provided by alleged attorney expert witnesses (i.e., *Strickland* experts) to support his petition here, respondent objects to each and every such document as irrelevant hearsay. (*In re Avena, supra,* 12 Cal.4th at p. 720 [court is not bound by attorney expert testimony; failure to object waives issue].)

3. The four exceptions are (1) a claimed constitutional error that is both clear and fundamental and strikes at the heart of the trial process; (2) a lack of fundamental jurisdiction; (3) that the trial court committed acts in excess of jurisdiction that do not require a redetermination of the facts; or (4) a change in the law affecting a defendant after the appeal. The final three exceptions clearly do not apply here, and petitioner has made no attempt to qualify under the first exception. (*In re Harris, supra,* 5 Cal.4th at p. 828.)

or could have been raised on appeal. (*Id.*, at p. 829; *In re Waltreus, supra,* at p. 225.)

Where petitioner raises a claim on habeas corpus involving the same factual contentions raised on appeal but relying on a different legal theory, the claim is also barred. (*In re Dixon, supra,* 41 Cal.2d at p.759.) Habeas corpus is not a device for investigating possible claims but a means of vindicating actual claims. (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1260.) The court reviewing a habeas corpus petitioner must determine whether the petition states a prima facie case for relief "and also whether the stated claims are for any reason procedurally barred." (*In re Romero, supra,* 8 Cal.4th at p. 737.)

Petitioner's Claims B through L are procedurally defaulted because they have already been raised or could have been raised on appeal. Petitioner generally fails to acknowledge that many of the claims were even considered on appeal. As to claims that could have been but were not brought on appeal, petitioner fails to demonstrate any basis for failing to do so at that time.

A. Claims That Were Raised On Appeal

The following claims were already raised in the appeal currently pending in this Court:

Claim E: (prosecutorial misconduct at the penalty phase), raised on appeal ("AOB"), in AOB Claims G and K;

Claim F: (the voluntariness of petitioner's pretrial statements), raised in AOB Claim A;

Claim G: (penalty phase instructions), raised in AOB Claims I and O;

Claim H: (insufficient evidence supported the sentence), raised in AOB Claims J and P;

Claim I: (cumulative error), raised in AOB Claim Q.

Petitioner here fails to acknowledge that these claims were even raised in his pending appeal. He is barred from reraising claims on habeas corpus

involving the same factual contentions raised on appeal, whether raised under the same or different legal theories. (*In re Dixon, supra,* 41 Cal.2d at p. 759; see Pet. 409, fn. 74.)

B. Claims That Could Have Been Raised On Appeal

The following claims could have been but were not raised on appeal:

Claim B: (conflict with cocounsel);

Claim C: (ineffective assistance of counsel at the guilt and special circumstances phases);

Claim D: (ineffective assistance of counsel at the penalty phase);

Claim J: (prolonged confinement is cruel and unusual punishment);

Claim K: (lethal injection violates the law);

Claim L: (death sentence violates international law).

These claims are based on the record of trial available to petitioner at the time his automatic appeal was filed. Petitioner provides no justification for his failure to raise these claims on appeal. For example, with respect to Claim B, regarding conflict with cocounsel, and Claims C and D, regarding ineffective assistance of trial counsel, petitioner has failed to provide declarations from either of his trial attorneys addressing these issues. In sum, all these claims should be barred on procedural grounds.[4/]

In addition, many subparts within these claims are independently barred because they rely solely on the record at trial. Claims which rely exclusively on the appellate record were known or reasonably should have been known earlier and should have been presented on direct appeal. (See *In re Robbins, supra,* 18 Cal.4th at p. 814.) In Claim C, regarding purported

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4. Respondent requests this Court rule on the application of procedural bars and explicitly invoke the bar as an independent basis for decision. (*Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 10.)

ineffective assistance of counsel, several subparts rely exclusively on the record below and fail to cite any collateral evidence, namely, C(3), regarding counsel's use of defense investigators; C(8), regarding counsel's purported failure to make objections at trial; and C(9), regarding the purported failure to make an adequate record at the *Wheeler*[5] motion. Since those claims could have been brought in the pending appeal, they are barred from consideration here. Likewise, in Claim E, regarding purported prosecutorial misconduct, six subparts rely solely on the trial record below, namely, E(1) the hypotheticals regarding priors; E(5) the evidence supporting the penalty phase hypotheticals; E(7) penalty argument regarding gang affiliation and future dangerousness; E(8) argument regarding petitioner's failure to testify; E(9) argument regarding other murders in the area; and E(10) argument that the jurors should excuse themselves. Since these claims rely solely on the record below and either were or could have been raised on direct appeal, they are barred from consideration on collateral review. (*People v. Jackson* (1973) 10 Cal.3d 265, 268.) Petitioner has proffered no justification for his failure to raise the allegations on appeal, and the claims should therefore be denied as untimely.

This Court should also decline to consider Claim F (voluntariness and admissibility of petitioner's pretrial statements) and Claim G (penalty phase instructions) because they present merely conclusory allegations. (See *People v. Duvall, supra,* 9 Cal.4th at p. 474 ["Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing."].) Petitioner has supported these allegations by simply incorporating by reference exhibits relied upon in other claims. Petitioner, however, fails to state how those exhibits specifically relate to these new, separate claims and he cites no unique collateral evidence to support the allegations.

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5. *People v. Wheeler* (1978) 22 Cal.3d 258 ("*Wheeler*").

For all of these reasons, the Court should find these claims are barred from collateral review.

IV.

CERTAIN ACCUSATIONS OF JUROR MISCONDUCT WARRANT AN EVIDENTIARY HEARING

Petitioner claims several instances of juror misconduct resulted in a conviction and death sentence, in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (Pet. 58.) He contends that a juror, Pervies Ary, Sr. ("Ary"), failed to reveal during voir dire that he had a prior felony conviction and that members of his family had prior arrests. (Pet. 97.) Petitioner also contends that Ary's list of questions to the trial court during the presentation of guilt phase evidence and statements made during deliberations show Ary was biased against him. (Pet. 102.) Petitioner further contends that Ary introduced extrinsic evidence during the penalty phase deliberations. (Pet. 105.) He argues the cumulative impact of the misconduct warrants reversal. (Pet. 107.) As we shall explain, these claims warrant an evidentiary hearing.

"Whether prejudice arose from juror misconduct . . . is a mixed question of law and fact subject to an appellate court's independent determination." (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) "[W]hether an individual verdict must be overturned for jury misconduct or irregularity is resolved by reference to the substantial likelihood test, an objective standard. Any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant." (*In re Hamilton* (1999) 20 Cal.4th 273, 296, internal citations and quotations omitted; see *Irvin v. Dowd* (1960) 366 U.S. 717, 723 ["The question thus presented [regarding voir dire of impaneled jurors] is one of mixed law and fact."].)

Respondent denies each and every one of the allegations of misconduct, but we cannot necessarily aver that, even if true, those allegations would not establish petitioner's entitlement to relief. Therefore, respondent respectfully submits that an evidentiary hearing should be held to resolve an otherwise irreconcilable factual dispute. The trial court has never had the opportunity to examine the allegations of misconduct raised here because the issue of juror misconduct was never raised at trial or in the motions for new trial after the guilt and penalty phases. (RT 1202, 1220.) Therefore, the proceedings we contemplate should be limited to issues that bear on juror misconduct and any prejudicial effect therefrom. For that reason, the facts underlying petitioner's claim of juror misconduct should be brought out at the earliest possible time and before our own judiciary. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 477 [the State and this Court share an interest in monitoring the fairness of its capital litigation and an automatic appeal under state law is a constitutional safeguard]; *People v. Sheldon* (1994) 7 Cal.4th 1136, 1139 [the state has an indisputable interest in the capital appeal].)

A. The Accusation Of Juror Misconduct During Penalty Phase Deliberations Warrants An Evidentiary Hearing

The centerpiece of the claim of juror misconduct is that during penalty phase deliberations, Ary, acting as the jury foreman, introduced extrinsic evidence by discussing a movie entitled *American Me*, which contained violent scenes of prison gangs. Petitioner contends Ary also encouraged several "hold-out" jurors to rent a videotape of that movie before rendering a verdict. Petitioner contends that two jurors, only one of whom is identified, rented the movie and voted for death as a result. (Pet. 105.)

In support of this claim, petitioner has provided declarations from seven of the twelve jurors who took part in the deliberations. Two of those declarations, namely, the statements of Ary, the penalty-phase jury foreman

(Pet. Exh. 53), and juror Christine Rennie (Pet. Exh. 102), raise an inference of misconduct that should be explored at an evidentiary hearing. Ary states:

> 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.

(Pet. Exh. 53.)

Rennie states:

> 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.

(Pet. Exh. 102.)

These declarations arguably raise some prospect that Ary and Rennie were actually biased against appellant. A court confronted with a colorable claim of juror bias must undertake an investigation of the relevant facts and circumstances. (*Remmer v. United States* (1956) 350 U.S. 377, 379.) Due process requires only that all parties be represented and that the investigation be reasonably calculated to resolve the doubts raised about the juror's impartiality. (*Smith v. Phillips* (1982) 455 U.S. 209, 217.) So long as the fact-finding process is objective and reasonably explores the issues presented, the state trial judge's findings based on that investigation will be entitled to a presumption of correctness. (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 974; see *Sumner v. Mata* (1981) 449 U.S. 539, 546 [state appellate court findings entitled to presumption of correctness].) We think it would be prudent to examine the full

nature of Ary's and Rennie's consideration of the movie *American Me* during penalty phase deliberations. (*People v. Marshall* (1990) 50 Cal.3d 907, 950.)

As for the declarations of the five jurors who did not rent or view the video (see Pet. Exhs. 95 [M. Orgain]; 86 [C. Lewis]; 70 [J. McLaren]; 106 [K. Salcido]; and 87 [B. Mann]), respondent submits they must be stricken in their entirety because they reflect solely the feelings, beliefs, and thought processes of the other jurors.

> [W]ith narrow exceptions, evidence that the internal thought processes of one or more jurors were biased is not admissible to impeach a verdict. The jury's impartiality may be challenged by evidence of "*statements* made, or conduct, conditions, or *events* occurring, either within or without the jury room, of such a character as is *likely* to have influenced the verdict improperly, but no evidence is admissible to show the *actual effect* of such statement, conduct, condition, or event upon a juror . . . or concerning the *mental processes* by which the verdict was determined. Thus, where a verdict is attacked for juror taint, the focus is on whether there is any *overt* event or circumstance, open to corroboration by sight, hearing, and the other senses [], which suggests a *likelihood* that one or more members of the jury were influenced by improper bias.

(*In re Hamilton, supra,* 20 Cal.4th at p. 295, internal citations and quotations omitted.)

B. The Remaining Claims Of Misconduct During Voir Dire, Guilt Phase Evidence And Guilt Phase Deliberations

Petitioner also raises three claims that juror Ary failed to reveal material information on his juror questionnaire and during voir dire. He contends that Ary failed to reveal that (1) he had a prior felony conviction; (2) he had relatives who had prior felony convictions; and (3) had friends and relatives who had prior drug convictions. (Pet. 97.)

Question 23 of the juror questionnaire stated, "Have you, a close friend, or relative ever been the **victim** of a crime?" Juror Ary circled "No" in response to that question on his questionnaire. (CT 5148.)

Question 24 stated, "Have you, a close friend or relative ever been a **witness** to a crime?" (CT 5148.) Ary circled "No" in response to that question.

Question 25 stated, "Have you, a close friend or relative ever been accused of a crime, even if the case did not come to court?" (CT 5148.) Ary circled "No" in response to the question.

Question 61 stated, "Have you, a close friend or relative ever had a problem involving the use of drugs or alcohol?" Ary circled "No" in response to that question.

During voir dire, Ary was not asked about his responses to any of the questions challenged here. (RT 1092-1098.) Ary should be questioned at the evidentiary hearing not only about the video but also about his responses to the juror questionnaire and voir dire. Although numerous bases appear for concluding that deliberate misconduct is not shown,[6/] the Court cannot easily resolve the issue of prejudice by reference to the record alone. An evidentiary hearing should be held to determine all relevant circumstances of Ary's alleged misconduct during voir dire. (See *In re Jackson* (1992) 3 Cal.4th 578, 584 [any necessary additional fact finding should be accomplished at an evidentiary hearing]; *In re Hamilton, supra,* 20 Cal.4th at p. 300 [no prejudice where juror's omissions during voir dire were inadvertent]; *People v. Green* (1995) 31 Cal.App.4th 1001, 1017 [by failing to reveal his felony conviction, the juror gave a false answer during voir dire, so prejudice is presumed and a new trial

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6. For example, with respect to Question 25, the record refutes a claim of deliberate misconduct because, before the prospective jurors were given the juror questionnaires, the trial court advised them, in relevant part, that the questionnaires were "highly personal, some would say downright intrusive. . . And remember also the questionnaires are public record, and you should be guided by that fact in answering the questions." (RT 150, 176.) It appears that Ary took that admonition to heart. Likewise, with respect to Questions 23 and 24, there is arguably no showing that Ary had "substantial knowledge of the information sought to be elicited." (*Wilsey v. Southern Pacific Transportation Co.* (1990) 220 Cal.App.3d 177,189.)

is required unless it is rebutted by other evidence]; *McDonough Power Equipment v. Greenwood* (1984) 464 U.S. 548, 556 [actual bias is the issue, not whether the juror lied on the juror questionnaire or voir dire].)

Likewise, Ary can be questioned at the evidentiary hearing about any purported bias shown by his failure to disqualify himself from jury service, his alleged concealment of his criminal record during voir dire, his list of questions to the trial court during the presentation of guilt phase evidence, and his purported statement during the guilt phase deliberations that petitioner may have committed another murder.[7/] (Pet. 76, 102.) Although arguments can be made that prejudice is not shown,[8/] Ary should be questioned at the hearing about these allegations.

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7. The list of questions was submitted to the court after petitioner testified and claimed he was homeless. (See the People's response on appeal, RB 95-104.) The list contained the following four questions: (1) "How can a homeless person obtain such private lawyers or are they court appointed?"; (2) "The neighbor who lived four houses up the street describe[d] the size of the person he saw standing in the street or over, near the body? Small, medium, large, short or tall."; (3) "This blind person [codefendant Johnson] tried also or what?"; and (4) Did the person on trial or [sic] is he willing to take a lie detector test?" (RT 1576-1577.) The court, with the parties' approval, declined to respond to questions 1 and 4, ordered further evidence regarding question 2, and read an instruction regarding question 3. (RT 1577.)

8. For example, with respect to the jury summons, there is no showing of deliberate concealment to support a finding of actual bias or prejudice. Examination of the summons form shows that the only part of the form that would have alerted Ary that he should disqualify himself appears in subpart (b), which is on the back of the form, typed in extremely small print, and is in the middle of a legal advisement entitled "STATUTES APPLICABLE TO JURY SERVICE." Subpart (b) is essentially buried in the middle of a list of qualifications otherwise inapplicable to Ary. Thus, it is reasonable to assume, without evidence to the contrary, that Ary either misread or simply misunderstood that part of the form. (See *McDonough Power Equipment, Inc. v. Greenwood, supra,* 464 U.S. at p. 556 [jurors may be uncertain as to the meaning of terms easily understood by lawyers].)

With respect to the list of questions during defense evidence, which is challenged as trial court error on the pending appeal (S032736, AOB F; RB 95), such questions fail to establish misconduct in general or bias in particular. Indeed, juror inquisitiveness is neither unusual nor improper. (See *People v. Anderson* (1990) 52 Cal.3d 453, 481 [questions from jurors to court during taking of evidence do not constitute juror misconduct]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1305.) There is no indication that any of the other jurors were even aware that Ary had submitted the questions. Ary was not the jury foreman at the guilt phase. (Pet. 78-79.) The record does not support petitioner's contention that Ary injected his own expertise into the guilt phase deliberations.

Finally, Ary can be questioned at the evidentiary hearing about his purported introduction of extrinsic evidence at the guilt phase deliberations when he allegedly revealed his knowledge of prisons and criminal acts. (Pet. 102.) However, for the same reasons stated above, the declarations from other jurors are improper and inadmissible under Evidence Code section 1150, which expressly bars the use of jurors' statements about their thoughts, beliefs, or mental process to demonstrate misconduct.[9/] (*People v. Romero* (1982) 31

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9. Petitioner fails to support his claim that the prosecutor's argument encouraged juror misconduct. (Pet. 82,106.) "The touchstone of due process analysis in cases of alleged prosecutorial misconduct [for failing to disclose known juror bias] is the fairness of the trial, not the culpability of the prosecutor." (*Smith v. Phillips, supra,* at p. 210.) Petitioner cannot make that showing because, as discussed at length in the People's response in the pending appeal, the prosecutor's penalty phase closing argument was based on her cross-examination of Dr. Rosenthal, the defense mental state expert, which in turn was based on court records showing numerous instances of petitioner's violent uncharged conduct, including petitioner's admission that he committed an unprovoked assault on an unsuspecting pedestrian, as well as reports that he had threaten to stab his grandfather during a dispute, and had threaten a judge during a hearing. (Contrast Pet. 82 ["Other than the capital crimes, there was no evidence of any violent activity by Petitioner."].)

Cal.3d 685, 695.) (See *In re Hamilton, supra,* 20 Cal.4th at p. 294 ["with narrow exceptions, evidence that the internal thought processes of one or more jurors were biased is not admissible to impeach a verdict"]; *In re Stankewitz* (1985) 40 Cal.3d 391, 397-398 [jurors may testify to overt acts but not subjective reasoning processes]; *People v. Hutchinson* (1969) 71 Cal.2d 342, 349-51 [California law precludes admitting evidence intended to disclose a juror's mental processes in reaching a verdict].)[10/]

Because petitioner has arguably come forward with "evidence demonstrating a strong possibility that prejudicial misconduct has occurred," this Court should issue an order to show cause returnable to the trial court or appoint a referee, directing that the court or referee take evidence and make finding of facts relating to petitioner's claims of juror misconduct. (*People v. Box* (2000) 23 Cal.4th 1153, 1222.) "This [High] Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." (*Smith v. Phillips, supra,* 455 U.S. at p. 215.) "[T]he trial judge [is] to `determine the circumstances, the impact thereof upon the juror, and whether or not [they were] prejudicial, in a *hearing* with all interested parties permitted to participate.'" (*Id.*, at p. 216, citing *Remmer v. United States, supra.*) "It seems to . . . follow "as the night the day" that if in the federal system a post-trial hearing . . . is sufficient to decide allegations of juror partiality, the Due Process Clause of the Fourteenth Amendment cannot possibly require more of a state court's system." (*Smith v. Phillips, supra,* 455 U.S. at p. 218.)

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10. The same is true under federal law. (*Tanner v. United States* (1987) 483 U.S. 107, 121-33.)

V.

PETITIONER'S CLAIM THAT HE DID NOT KNOWINGLY WAIVE COCOUNSEL'S ALLEGED CONFLICT OF INTEREST IS PROCEDURALLY BARRED AND FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Petitioner raises several claims regarding trial attorney Richard Hove ("Hove"), who acted as *Keenan*[11] counsel or cocounsel throughout his trial. Petitioner contends: (1) Hove had an actual conflict of interest that breached his duty of loyalty to petitioner in violation of petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments; (2) he was prejudiced by the "financial implications" of Hove's federal prosecution; (3) he was prejudiced by Hove's prior representation of petitioner's relatives; (4) his waiver of his right to two attorney's or to conflict-free counsel was neither knowing or intelligent; and (5) he was prejudiced because his primary trial attorney, Walter Cannady, let his friendship with Hove interfere with his loyalty to petitioner. None of the claims states a prima facie case for relief.

As discussed above, this claim is not cognizable on collateral review because it could have been but was not brought on the direct appeal currently pending in this Court. All of the documents provided in support of the claim were available at the time the appeal was filed. Petitioner has not provided a declaration from Hove on any issue raised on collateral review in general or on this claim in particular. Petitioner's documents are incomplete because they fail to show that Hove's federal conviction was reversed on appeal. There is no credible support for petitioner's allegations of conflict or ineffective representation as to Hove. This Court is in no better position on habeas corpus to evaluate the claim than it is on appeal, where it is not raised, and the claim

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11. *Keenan v. Superior Court* (1982) 31 Cal.3d 424 ("*Keenan*") [a capital defendant may have two appointed attorneys].)

should be summarily dismissed as insufficiently supported and not cognizable. (*People v. Cudjo* (1993) 6 Cal.4th 585, 623; *People v. Pope* (1979) 23 Cal.3d 412, 425.)

Even if the Court considered the merits, the claim fails to state a prima facie basis for relief. Petitioner knowingly waived any alleged conflict prior to trial and never objected to Hove's representation during trial. (*People v. Carpenter* (1997) 15 Cal.4th 312, 375.) Petitioner presents incomplete documentation regarding the outcome of Hove's federal prosecution, and any judgment based on petitioner's exhibits alone would amount to nothing more than pure speculation. As we will show, the trial court did not abuse its discretion when it accepted petitioner's waiver of conflict.

"The standard for obtaining relief under the Sixth Amendment based upon a conflict of interest depends upon whether the defendant objected to the conflict at trial." (*People v. Clark* (1992) 5 Cal.4th 950, 994.) Where, as here, petitioner failed to raise any objection regarding the alleged conflict at trial, he must show on appeal that "the record supports `an informed speculation' that [his] right to effective representation was prejudicially affected. Proof of an `actual conflict' is not required." (*Id.*, at p. 995 [state standard]; *People v. Bonin* (1989) 47 Cal.3d 808, 834.) Under federal law, petitioner must demonstrate "that an actual conflict of interest adversely affected his lawyer's performance." (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 350; *People v. Sanchez* (1995) 12 Cal.4th 1, 45.) Under both the state and federal formulations, petitioner must establish from the record "that the alleged conflict prejudicially affected counsel's representation . . . ." (*People v. Clark, supra,* 5 Cal.4th at pp. 995, 1002; *People v. Jones* (1991) 53 Cal.3d 1115, 1137.) Although petitioner need only show that counsel failed to represent him "as vigorously as he might have had there been no conflict" (*Clark, supra,* at p. 995; *People v. Easley* (1988) 46 Cal.3d 712, 725), speculation will not suffice and he must present "some `discernible' grounds to believe that prejudice (i.e., ineffective representation)

occurred." (*People v. Rodriguez* (1986) 42 Cal.3d 1005, 1014; *People v. Clark, supra,* 5 Cal.4th at p. 995.)

A capital defendant is not entitled to two defense counsel. (*People v. Clark, supra,* 5 Cal.4th at p. 997, fn. 22; Pen. Code, § 987(d).) The appointment of a second counsel in a capital case is not an absolute right protected by either the state or federal Constitution. (*People v. Clark, supra*, at p. 997; *People v. Carpenter, supra*, 15 Cal.4th at p. 375.) "The right to appointment of a second attorney in a capital case is not a constitutional right [citation omitted], but is permitted by statute in the discretion of the trial court (§ 987(d))." (*People v. Weaver* (2001) 26 Cal.4th 876, 950.)

A. The Record Regarding Cocounsel's Federal Prosecution

On May 20, 1992, the federal grand jury filed an indictment charging Hove with two counts of structuring transactions, in violation of 31 U.S.C., §§ 5324(3) and 5322(a). (Pet. Exh. 253.)

On July 27, 1992, Hove's first trial ended in mistrial resulting from deadlocked deliberations.

On November 30, 1992, Hove's retrial commenced and he was represented by attorney Patrick Hallinan. On December 8th, Hove was convicted as charged. (Petitioner's capital trial commenced in January 1993 and concluded on March 1993.)

On March 17, 1993, Hove was sentenced to probation and fines. (Pet. Exh. 253.)

On March 23, 1993, the California State Bar ordered Hove's license suspended for 30 days, effective April 29, 1993, with one year probation. (Pet. Exh. 255.)

On April 6 1995, the Ninth Circuit reversed Hove's conviction in a published decision entitled *United States v. Hove* (1995) 52 F.3d 233.

B. The Record Of Petitioner's Waiver Of The Alleged Conflict Of Interest

On January 15, 1993, at a pre-trial hearing, petitioner was represented by lead attorney, Walter Cannady ("Cannady"), and cocounsel Hove, who announced ready for trial. (RT 1.)

The trial court stated there was "the question of the attorney-client relationship of Mr. Boyette and Mr. Hove." (RT 13.)

Hove responded, "Yes, your Honor."

The court noted that Cannady was the "lead attorney" and asked for his "position on the matter?"

Cannady responded as follows:

> Yes, your Honor, our position is essentially Mr. Hove is familiar with this case, I do need him as back-up. He is familiar with our strategy, he is familiar with our investigation, he's also extremely familiar with the client and it's our position that I do need him as back-up.
>
> I have discussed this matter with Mr. Boyette this last Saturday, which would have been the 16th, at Santa Rita [jail]. I explained 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, but only part of the trial. Mr. Boyette is aware of that, and he is prepared to waive that, you Honor.

(RT 13.)

The trial court then ordered Cannady to "voir dire" petitioner about the waiver, and the following colloquy occurred:

> By Mr. Cannady:
> Q. Maurice, Mr. Boyette, do you understand that Mr. Hove is our back-up attorney in this case?
> A. [Petitioner] Yeah.
> Q. All right. You understand that he may not be able to complete the case. We don't know yet, but there is a possibility that he wouldn't be a back-up attorney all the way through the case?
> A. Yes.
> Q. And you're entitled, to have two attorneys there. Mr. Hove and I are presently working on the case, you understand that, there may

become a situation where Mr. Hove is not working on the case and can't work on the case, are you willing to waive his appearance on that?
A. Yes.
THE COURT: All right. You understand the problem Mr. Boyette?
THE DEFENDANT BOYETTE: Yeah.
THE COURT: That Mr. Hove faces a problem in the federal courts which may prevent him from completing this case, do you understand that?
THE DEFENDANT BOYETTE: Yeah.
THE COURT: All right. And that he physically may not be here for the completion of this case and your part in the case, do you understand that?
THE DEFENDANT BOYETTE: Yeah.
THE COURT: And knowing all that, you're willing to go ahead with Mr. Hove as your back-up attorney and if he's not able to be here to proceed with Mr. Cannady alone as your attorney, is that correct?
THE DEFENDANT BOYETTE: Yes.

(RT 13-15.)

The trial court subsequently announced "we will formally declare this trial in process." (RT 16.)

C. Petitioner Waived Any Alleged Conflict Of Interest

The record clearly shows that petitioner knowingly and voluntarily waived any potential conflict of interest with Hove, after declining the opportunity to voice any objections on the record to Hove specifically in order to obtain appointment of another attorney to act as cocounsel. Petitioner also waived representation by *Keenan* counsel in general when he waived Hove's physical presence "for the completion of this case" and agreed that Cannady "alone" would act as his attorney. (RT 16.)

"A waiver need not be in any particular form, nor is it rendered inadequate simply because all conceivable ramifications are not explained." (*People v. Carpenter, supra,* 15 Cal.4th at p. 375.) The trial court's duty is to conduct an adequate inquiry into the conflict, inform defendant of his rights, and

give defendant an opportunity to voice any objections on the record and to relieve counsel. (*People v. Sanchez, supra,* 12 Cal.4th at p. 48.)

The trial court here fulfilled its duty regarding the waiver of conflict because it carefully protected petitioner's rights at the time of his waiver, "while at the same time accommodating his wishes and those of his attorneys" to proceed with the case. (*People v. Carpenter, supra,* 15 Cal.4th at p. 374.) Hove's federal trial had already concluded before petitioner's trial commenced. Lead trial counsel Cannady informed the trial court that, in his opinion, Hove was essential to the defense, in part, because he was "extremely familiar" with petitioner. Cannady also informed the court that, during a private visit with petitioner several days earlier, he had informed petitioner about Hove's "unique predicament,"i.e., Hove's federal prosecution. Cannady also said that he had informed petitioner that Hove "would not be with us for the full trial, but only part of the trial." (RT 13-14.) Petitioner did not disagree with Cannady's representation regarding the substance of their prior meeting. Cannady then stated that petitioner was "aware" of Hove's personal problems and was "prepared to waive that." (RT 14.) Petitioner again did not disagree with that representation at that time. After voir dire on the issue, petitioner expressly waived the possibility that Hove might be absent from a significant part of the trial. Clearly implied in that waiver was the waiver of Hove's presence for "an extended and indefinite period of time." (*People v. Weaver, supra,* 26 Cal.4th at p. 951.) In light of this record, petitioner cannot show his waiver was involuntary.

Petitioner has provided documents regarding Hove's and his law partners' prior successful representation of numerous members of petitioner's immediate family against criminal charges, including murder. (Pet. Exhs. 114, 139, 154, 161.) Those documents do not support his claim of conflict, but instead establish that petitioner's waiver was both knowing and voluntary because they show that petitioner wanted Hove to remain as cocounsel,

notwithstanding Hove's personal problems. Hove had successfully defended several of petitioner's male family members against very serious criminal charges. It is reasonable to infer that petitioner reasonably believed, or at least hoped, that Hove would have the same success with this case. Moreover, Hove's success with petitioner's family confirms Cannady's representation to the court that Hove was "extremely familiar" with petitioner and thus crucial to this case. (RT 13-14.) Cannady's petition here does not state otherwise. (Pet. Exh. 59.)

Likewise, petitioner's other exhibits do not establish that Hove's federal prosecution gave Hove any incentive to finish petitioner's case as quickly as possible. (See *People v. Sanchez, supra,* at p. 46 [no incentive even though lead counsel, who was disbarred one month after completion of penalty phase, had hidden disciplinary action from cocounsel].) The declaration from another defense attorney regarding her knowledge of other capital trials (Pet. Exh. 107), is irrelevant to trial counsels' tactics for defending petitioner's trial. (See *People v. Carpenter, supra,* 15 Cal.4th at p. 374 [trial counsel is the "captain of the ship"]; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1253 [the court must accord deference to trial counsel's strategic choices regarding time and resources].)

Moreover, petitioner's exhibits indicate that Hove's absences were not due to his federal prosecution; rather, they show that during the time counsel would be preparing for petitioner's trial, Hove was represented in federal court by trial attorney Patrick Hallinan. (Pet. Exh. 253.) Nothing suggests that Hove was unable to devote the necessary amount of time to assisting Cannady during the preparations for petitioner's trial. Petitioner's exhibits also show that Hove's federal trial had concluded before petitioner's trial commenced, and Hove's sentencing hearing did not occur until after the conclusion of guilt phase of petitioner's trial. Finally, Hove's appeal in the Ninth Circuit was handled by attorney Sanford Svetcov (*U.S. v. Hove, supra,* 52 F.3d 233). By contrast,

nothing suggests that Hove was preoccupied with his own appeal during the penalty phase of petitioner's trial.

Petitioner has simply inserted the claim of attorney conflict, and an accompanying allegation of ineffective assistance of counsel, into a habeas petition without providing an explanation from trial counsel. Because Hove has had no opportunity to state whether a tactical decision existed for the pace of the trial or the reasons for his absences during petitioner's trial, the claim is no more meritorious on collateral review than it would have been had it been presented on appeal. (See *People v. Duvall, supra,* 9 Cal.4th at p. 474 [petitioner is required to provide reasonably available documentary evidence in support of his claims].) This Court has held that it is inappropriate for an appellate court to speculate about the possible tactical bases for an attorney's challenged acts or omissions when the record sheds no light on the issue. (*People v. Pope, supra,* 23 Cal.3d at p. 426.) It is no more appropriate for an appellate court to do so on habeas corpus when the record is similarly deficient on account of the absence of counsels' declarations. (*People v. Freeman* (1991) 8 Cal.4th 485.)

Even the pendency of a State Bar disciplinary proceeding does not automatically establish a conflict of interest in light of the record and, in any case, any conflict of interest was waived here. (*People v. Sanchez, supra,* 12 Cal.4th at pp. 45-47.) Even an order of suspension from the practice of law, which occurred after the trial had completed here, does not establish conflict or ineffective assistance of counsel. (*People v. Frye* (1998) 18 Cal.4th 894, 995-997.) It is ironic that petitioner, who is attempting to have his conviction overturned on appeal, ascribes no significance to the fact that Hove's conviction was reversed on appeal, that Hove was never retried, and that Hove has continued to practice law in this state. (See *United States v. Hove, supra* 52 F.3d 233.) Petitioner has failed to establish a prima facie basis for relief.

D. Petitioner Has Not Established Prejudice From The Alleged Conflict

"[T]he error, if any, of failing to ensure that defendant was represented by two *unconflicted* counsel must be judged under the standard enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836 [], i.e., whether it is `reasonably probable' a result more favorable to the defendant would have been reached had the error not occurred." (*People v. Clark, supra,* 5 Cal.4th at p. 997, fn. 22.) In *People v. Clark,* this Court rejected a claim of conflict under even more challenging circumstances than those found here. (5 Cal.4th at p. 997.) There, the lead defense attorney in a capital case was simultaneously running her campaign for election as the county's next district attorney. (*Ibid.*) The Court found the *Keenan* counsel, who was present throughout the trial, had adequately represented defendant and his representation had not been tainted by the lead attorney's alleged conflict. (*Ibid.*)

Likewise, the record of petitioner's trial here does not support a conclusion that Hove's alleged conflict of interest adversely affected petitioner's representation. Petitioner's lead attorney was Walter Cannady, who did not suffer from any alleged conflict of interest. Cannady was an experienced death penalty and criminal defense attorney who had appeared for petitioner throughout the pretrial motions and trial proceedings. Cannady's position as lead defense attorney supports the conclusion that the defense was neither constitutionally inadequate nor tainted by Hove's alleged conflict. Cannady was in a unique position to observe whether Hove's representation of petitioner was adversely affected as a result of his federal prosecution. Cannady's silence regarding any deficiencies in cocounsel's representation of their mutual client reinforces the conclusion, based on a review of the record, that Hove's representation of petitioner was not adversely affected by his personal interest in overturning his federal prosecution. (*People v. Clark, supra,* 5 Cal.4th at p. 997.)

Furthermore, the facts here are even stronger than in *Clark, supra,* because Hove was merely *Keenan* counsel and was simply Cannady's assistant from the outset. (See also, *People v. Weaver, supra,* 26 Cal.4th at p. 951 ["defendant adequately waived the presence of lead counsel until [he] was well enough to return to court"].) "Indeed, it is unclear whether a capital defendant has any right at all to expect that one of two appointed counsel will take the reins of a capital trial at any particular time." (*People v. Weaver, supra,* 26 Cal.4th at p. 951; see *People v. Hart* (1999) 20 Cal.4th 546, 632 [no error in cocounsel splitting duties with one handling the guilt phase and one the penalty phase].) That was precisely the plan outlined by Cannady at the start of trial based on their prior work together, i.e., that Cannady would conduct the guilt phase and Hove the penalty phase (RT 14), and that plan was substantially followed. (Pet. Exhs. 59, 252.) Petitioner cannot show prejudice on these facts. (See *People v. Frye, supra,* 18 Cal.4th at p. 995 [order of suspension from the practice of law, stayed during trial, does not establish ineffective assistance of counsel].) Nothing in the record supports petitioner's claim here that Cannady let his friendship with Hove interfere with his loyalty to petitioner. (Pet. 127.) There is also no support for petitioner's claim that the purported "financial implications" of Hove's federal prosecution affected his work for or handling of petitioner's case. (Pet. 141; see *People v. Sanchez, supra,* 12 Cal.4th at p. 47.)

This Court has declined to rely on *People v. Mroczko* (1983) 35 Cal.3d 86 (Pet. 127), in cases, such as here, where a single capital defendant is represented by two attorneys. There, one attorney represented two capital defendants jointly tried and there was no knowing waiver of the conflict. This Court found the rule enunciated there, which petitioner relies on here, "has no bearing on what a [trial] court should do when [as here] a possible conflict arises during a trial of a single defendant." (*People v. Carpenter, supra,* 15 Cal.4th at p. 375.) No order to show cause should issue on this claim.

VI.

PETITIONER'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND SPECIAL CIRCUMSTANCES PHASES IS PROCEDURALLY BARRED AND FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Petitioner claims he received ineffective assistance of trial counsel at the guilt and special circumstance phases of his trial. (Pet. 143.) He challenges nine instances of trial counsels' acts or omissions as follows: (1) counsel allegedly failed to effectively litigate the motion to suppress petitioner's statements; (2) counsel allegedly failed to investigate obvious defenses; (3) counsel allegedly failed to effectively employ investigators; (4) counsel allegedly failed to consult and present the testimony of a criminalist; (5) counsel allegedly failed to investigate or refute the prosecutor's hypotheticals at the guilt and penalty phases; (6) counsel allegedly failed to refute the prosecutor's claim that the house where the murders occurred, i.e., the Cole Street house, had been empty since the shootings; (7) counsel allegedly failed to obtain jury background checks; (8) counsel allegedly failed to make appropriated objections); and, (9) counsel allegedly failed to make an adequate record to establish a prima facie case for discriminatory use of peremptory challenges.

All of these claims are barred because they were known or could have been known at the time petitioner filed his brief on direct appeal. (*People v. Mayfield* (1993) 5 Cal.4th 220, 224.) Although a claim of ineffective representation is cognizable on habeas review whether raised on appeal or not (*People v. Jackson* (1992) 10 Cal.3d 268), merely inserting the claim into a habeas petition without providing an explanation from trial counsel does not make the claim any more meritorious than it would have been had it been presented on appeal. (See *People v. Duvall, supra,* 9 Cal.4th at p. 474 [petitioner is required to provide reasonably available documentary evidence in support of his claims].) The claims raised on collateral review should be

supported by a declaration from trial counsel regarding any tactical bases for his acts or omissions. Because this Court has held that it is inappropriate for an appellate court to speculate about the possible tactical bases for an attorney's challenged acts or omissions when the record sheds no light on the issue (*People v. Pope, supra,* 23 Cal.3d 426), it cannot be more appropriate for an appellate court to do so on habeas corpus when the record is similarly deficient due to the absence of counsels' declarations. (*People v. Freeman, supra,* 8 Cal.4th 485.)

In support of the claims, petitioner has simply included declarations of individuals known to him (his investigator, family members), or of whom he could have known (other defense attorneys), well before filing his brief on direct appeal. Most of the evidence relates to court records, transcripts, or other documents that were already available at the time his appeal was filed. Petitioner does not provide any justification for failing to timely raise these claims on direct appeal. Therefore, these claims are not without credible support to render them cognizable here. (*In re Harris, supra,* 5 Cal.4th at p. 829; *In re Clark, supra,* 5 Cal.4th at p. 775.)

Petitioner has failed to provide a declaration by Hove in support of this or any other claim, although Hove represented petitioner throughout his capital trial. Similarly, although petitioner has provided a declaration by Cannady, that statement addresses few of the issues raised here. Petitioner relies on Cannady's statement to support only one of the nine claims, namely, the attack on counsel's decision not to call psychologist Stephen Pittel to testify as a defense expert at the guilt phase. (Pet. Exh. 59.) Because petitioner does not proffer either of trial counsels' explanations regarding eight of the nine claims, this Court is in no better position on habeas corpus to evaluate the claim than it is on appeal and claims one through six, eight, and nine should be summarily dismissed as insufficiently supported. (*People v. Cudjo, supra,* 6 Cal.4th at p. 623; *People v. Pope, supra,* 23 Cal.3d at p. 425.)

Even if the Court considered the claims, they fail to provide a basis for relief. To establish ineffectiveness the defendant must show both deficient performance and prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 689, 694 ("*Strickland*").) Judicial scrutiny of trial counsel's performance must be highly deferential and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. (*Ibid.*.) Courts must exercise "deferential scrutiny in reviewing such claims," and assess counsel's conduct under the circumstances as they stood at the time. (*People v. Mincey, supra,* 2 Cal.4th at p. 449.) "It is not sufficient to allege merely that the attorney's tactics were poor, or that the case might have been handled more effectively. . . . Rather, the defendant must affirmatively show that the omissions of defense counsel involved a critical issue, and that the omissions cannot be explained on the basis of any knowledgeable choice of tactics." (*People v. Floyd* (1970) 1 Cal.4th 694, 709, overruled on other grounds, *People v. Wheeler, supra,* 22 Cal.3d 258.) A showing of prejudice requires more than "some conceivable effect on the outcome of the proceeding." (*Strickland, supra,* at p. 694.) Rather, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Ibid.*; *People v. Mincey, supra,* 2 Cal.4th at p. 449.) A reasonable probability is one "sufficient to undermine confidence in the outcome." (*Strickland, supra;* see *Lockhart v. Fretwell* (1993) 506 U.S. 364, 372 ["prejudice" focuses on whether counsel's performance rendered result of trial unreliable or proceeding fundamentally unfair].) "The constitutional standard of performance by counsel is `reasonableness,' viewed from counsel's perspective at the time of his challenged act or omission." (*People v. Gonzalez, supra,* 51 Cal.4th at p. 1243.)

As discussed below, none of petitioner's claims state a prima facie basis for relief.

A. The Purported Failure To Litigate The Motion To Suppress

Petitioner has failed to establish either error or prejudice from trial counsels' representation during the motion to suppress. As discussed above, petitioner has provided no statement from either counsel in support of this claim and thus it is not properly brought here. "The record offers no explanation for counsel's decision not to proceed in that manner [suggested on appeal], and thus is not a basis for concluding that counsel had no satisfactory reason." (*People v. Coddington* (2000) 23 Cal.4th 529, 654.)

Petitioner has failed to provide any statement from trial counsel regarding this claim. (*People v. Cudjo, supra,* 6 Cal.4th at p. 623.) His sole support for the claim is to incorporate by reference Claim F (Pet. 146), i.e., the generalized claim that his pretrial statements were involuntary. (Pet. 459.) The claim is therefore entirely without support and should be dismissed. (*In re Cudjo* (1999) 20 Cal.4th 673, 687 [petitioner must prove facts that establish a basis for relief].)

By contrast, the record on appeal overwhelmingly refutes the claim of ineffective representation at the motion to suppress because it shows that counsel vigorously litigated the admissibility of petitioner's pretrial statements. The record shows that on January 20, 1993, trial counsel had filed a "motion to suppress statements" and the hearing was set for the following week. (RT 9.) At that hearing, the trial court hearing the tape recordings of petitioner's statements, which showed that petitioner had waived his constitutional rights before making the incriminating statements. The trial court heard those tape recordings before making a determination that petitioner had understood and voluntarily waived his constitutional rights at that time. The taped statements reveal no hint of coercion. Moreover, petitioner testified at the suppression hearing, had no difficulty doing so, and admitted he had repeatedly lied to the police during those interviews in an attempt to escape prosecution, i.e., his will was clearly not overborne by the police. (RT 63-88.) The trial court's probing

questions and subsequent denial of the motion shows the court rejected petitioner's self-serving claim of coercion. (RT 89-90.) Petitioner's confident and crafty testimony at the hearing also showed that he was fully "able to comprehend and answer all the questions that were posed to him." (*People v. Jackson* (1989) 49 Cal.3d 1170, 1189.) The fact that the motion was denied because the statements were clearly admissible does not establish ineffectiveness of counsel. (See *In re Avena, supra,* 12 Cal.4th at p.728 [trial counsel was faced with a defendant who had confessed to two murders].) This Court has found that even the complete failure to challenge the voluntariness of a defendant's statements does not establish ineffective representation. (*People v. Lucas* (1995) 12 Cal.4th 415, 443.) Finally, petitioner testified at the guilt phase of trial, withdrew his claim that his pretrial statements were coerced (RT 1489), and said his waiver of rights prior to giving those statements was knowing and voluntary. (RT 1501.) Petitioner has not and cannot show prejudice from counsels' representation at the motion to suppress.

B. The Purported Failure To Investigate Mental State Defenses

Petitioner has failed to establish error or prejudice from counsels' purported failure to employ a mental health professional and to subject petitioner to a battery of psychological tests to determine whether a mental state defense could have been presented at the guilt phase, i.e., whether his psychological history and allegedly impaired mental functioning had left him incapacitated and incapable of forming the specific intent to kill. (Pet. 146-147.)

"To establish that investigative omissions were constitutionally ineffective assistance, defendant must show at the outset that `counsel knew or should have known' further investigation might turn up materially favorable evidence. [¶] Criminal trial counsel have no blanket obligation to investigate [every] possible `mental' defenses, even in a capital case." (*People v. Gonzalez, supra,* 51 Cal.4th at p. 1244; see *People v. Mayfield, supra,* 5 Cal.4th at p. 203

["That is not to say, however, that every possible defense must be investigated, no matter how evidently fruitless the results would be."].) "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, supra,* 466 U.S. at p. 690; *In re Jackson, supra,* 3 Cal.4th at p. 605.)

The documents that petitioner relies upon to support this claim do not establish error or prejudice. At most, the declarations by Drs. Watson and Pettis (Exhs.122, 99) "are but professional opinions of the kind which inherently generate expert debate." (*People v. Gonzalez, supra,* 51 Cal.4th at p. 1247.) The current opinions that petitioner, after a sentence of death and several years in prison, suffers from "generalized mild neuropsychological dysfunction" (Pet. 148-153) is simply "psychology-speak" for what was presented to the jury in layman's terms by Dr. Rosenthal, i.e., that petitioner appeared to be slow. Petitioner's documents do not provide credible evidence of a stronger defense than the one that was actually given. (See *People v. Frye, supra,*18 Cal.4th at p. 952 [expert testimony of defendant's inability to tolerate stressful situations and related difficulty in testifying was not substantial evidence of incompetence].)

As noted above, petitioner has failed to support this claim with declarations from either trial attorney. (*People v. Coddington, supra,* 23 Cal.4th at p. 654.) Since a psychiatrist and two psychologists testified at the penalty phase regarding petitioner's general mental deficiencies, petitioner cannot show it was inadequate performance no to introduce such testimony at the guilt phase of the trial. "It was reasonable for counsel to conclude that such [mental state] testimony would not be effective at that point." (*People v. Welch* (1999) 20 Cal.4th 701, 752.) Given the fact of the two murders and all of the evidence that petitioner had indeed deliberated, "counsel could have reasonably decided that generalized psychiatric testimony would have been unhelpful or

counterproductive." (*Ibid.*) Counsels' obvious tactical decision cannot be constitutionally ineffective.

Moreover, petitioner's exhibits in support of other claims refute the instant claim regarding the effectiveness of counsel's investigation of a mental defense at the guilt phase. For example, petitioner's Exhibit 260 shows that, on September 2, 1992, at a confidential hearing (Pen. Code, § 987.9 [confidential application for funds to prepare a capital defense]), trial counsel applied for and were granted preliminary funds for, in relevant part, "investigation expenses." (Pet. Exh. 260 [last page].) Shortly thereafter, i.e., on September 17, 1992, which was nearly five months before jury selection commenced, trial counsel had defense investigator Brian Oliver contact Dr. William Spivey, a psychiatrist who eventually examined petitioner and testified at the penalty phase. (Pet. Exh. 260 [Oliver's initial billing record].)

Furthermore, the declarations by Cannady and psychologist Stephen Pittel (Pet. Exhs. 99, 100), taken together, show that a mental state defense was investigated from the outset of petitioner's case, which is doubtless the reason petitioner neither relies on nor mentions these documents in support of this claim. (See *People v. Beagle* (1972) 6 Cal.3d 441, 458 [failure to call certain witnesses will usually be deemed trial tactics not subject to judicial hindsight].)

Cannady's declaration touches on this issue as follows:

> 5. I do not believe that I had used Dr. Fred Rosenthal in a case prior to Mr. Boyette's penalty phase. I think I had gotten a recommendation from another attorney who had used him to testify. I had originally contacted Stephen Pittel, but I decided to go with 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.
>
> * * *

> 8. I believed that Mr. Boyette was more like a 10-year old kid than like an adult. He had a hard time understanding what was going on and reacted to things like a[n] overgrown kid. I never believed that they jury would sentence a ten-year old to death.

(Pet. Exh. 59.)

Pittel's declaration expands upon Cannady's recollections. Pittel states that trial counsel retained him before the start of the guilt phase, provided him with preliminary documents about the case, and arranged for Pittel to interview petitioner in an effort to determine if there were "mental health aspects" to petitioner's case. (Pet. Exh. 100.) Counsel then had a lengthy meeting with Pittel to discuss his conclusions. Both declarations establish that at that final meeting, Pittel was completely unable to suggest any meritorious mental health aspects to this case and that was the reason that counsel made a tactical decision not to call Pittel as a witness at the guilt phase.

When read together, those documents show that before the guilt phase commenced, trial counsel had consulted with a mental state psychologists, had met with them to evaluate potential mental state defenses, and, based on the lack of credible support for such defenses, had then made a tactical decision to proceed with an alternative defense of innocence. (See *In re Fields* (1990) 51 Cal.3d 1063 [counsel could reasonably conclude after consultation with psychiatrists that further investigation would be pointless].) In light of the record of counsels' investigation, petitioner cannot show prejudice from their obvious tactical decision to not present a mental state defense at the guilt phase. (*In re Welch, supra,* 20 Cal.4th at p. 752; *In re Avena, supra,* 12 Cal.4th at p. 728 [petitioner cannot show prejudice even where counsels' investigation was, at most, minimal].)

This Court rejected the substance of the claims raised here in *People v. Mayfield, supra,* 5 Cal.4th 142. There, as here, the capital defendant had made several tape recorded statements to the police shortly after the double murders. On collateral review, he claim that trial counsel was ineffective for

failing to conduct relevant tests and present witnesses at the guilt phase to establish a mental state defense. (*Id.*, at p. 202.) After an order to show cause issued and an evidentiary hearing, the Court agreed with the referee's conclusion that trial counsel had reasonably chosen the best defense at the guilt phase - manslaughter based on an accidental shooting of the first victim - because success on that theory would have precluded a penalty phase. (*Ibid.*) The Court then stated:

> Focusing for now just on the guilt phase, all the discussion about [medical tests and experts] makes sense only if one concludes it would have been advantageous to suppress petitioner's statements. But looking at the case, as [trial counsel] saw it before the fact, it is not clear that it would been helpful to petition to suppress the statements. The prosecution could easily have proven [and did prove] that petitioner inflicted the fatal shots. . . .The best evidence and the only evidence [trial counsel] had of the first shooting being accidental, was petitioner's statements to the police, made, as [trial counsel] pointed out to the jury, shortly after the shooting and long before he had any opportunity to contact counsel. . . . As to the guilty phase . . . this court has a difficult time concluding that such exploration [of a mental state defense] would have led to anything of value. Anyone who listens to the audio tape or views the video tape is struck with how composed and rational petitioner seems to be. Even considering all the testimony produced by petitioner's experts at the reference hearing, it is very difficult for this court to conclude that any judge would have suppressed the confessions or that any jury would have accepted a diminished capacity [i.e., a lack-of-intent] defense.

(*People v. Mayfield, supra,* 5 Cal.4th at p. 203.)

Likewise, the record here supports trial counsels' decision to present a defense of innocence and third party culpability because petitioner's tape recorded statement to the police before his arrest and appointment of counsel had provided evidence of that theory, as counsel argued to the jury. (RT 1747, 1751, 1764.) Moreover, petitioner's claim of third party culpability was supported by the pretrial statements of one of the eyewitness to the killings. Counsels' tactical decision to focus the guilt phase defense on casting doubt on whether petitioner had lain in wait for the victims was reasonable. Indeed, it

was successful: the lying-in-wait special circumstance allegation was not sustained.

By contrast, a battle of mental state experts at the guilt phase would not have altered the outcome of the finding that petitioner had committed premeditated and deliberate first degree murder. Petitioner's performance during the taped statements, during his testimony at the suppression hearing, and during his testimony at trial revealed a composed, rational, and manipulative individual capable of holding his own during probative questioning by the police investigators, the district attorney, and finally trial court. Uncontested evidence also showed that petitioner was raised by a loving grandmother, had completed several years of high school, and could read at the level of a high school graduate. (Pet. 151; RT 1926, 1951.) When that strong and indisputable evidence is compared with the dubious nature of the alleged mental state evidence touted here, there is no reasonable probability that any trial court would have suppressed petitioner's statements or that any jury would have accepted a diminished capacity, a lack-of-intent defense. (See *People v. Bloyd* (1987) 43 Cal.3d 333, 363 [failure to present additional state of mind evidence did not deprive defendant of a defense or lighten the prosecution's burden]; *People v. Carpenter, supra,* 15 Cal.4th at p. 376 [trial counsel is the "captain of the ship" and can make all but a few fundamental decisions for the defendant].) Trial counsel made a reasonable tactical decision to reserve the psychiatric testimony for the penalty phase.

A defendant is mentally incompetent if, as a result of mental disorder or developmental disability, he is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of the defense in a rational manner. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1110; *People v. Howard* (1992) 1 Cal.4th 1132, 1163.) There is no evidence below or here that suggests that petitioner might fit either of these categories. Under these circumstances, there is no basis to conclude that any purported failure by trial counsel to further

pursue a mental defense investigation for the guilt phase was unreasonable or incompetent. (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1245; see *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059 [whether witnesses are presented is a matter of trial tactics and strategy which a reviewing court may not second guess].)

Petitioner has failed to carry his burden of showing inadequate performance or prejudice.

C. The Purported Failure To Effectively Employ Investigators

Petitioner has failed to establish either error or prejudice from counsels' purported failure to effectively employ defense investigators. (Pet. 154-156)

"While counsel in a capital case is often best advised to make use of supportive funding [for investigators] for which the client is eligible, the decision not to do so does not render counsel's assistance constitutionally deficient per se." (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1253) "[T]he range of constitutionally adequate assistance is broad, and a court must accord presumptive deference to counsel's choices about how to allocate available time and resources in his [] client's behalf." (*Id.*, at p. 1252, citing *Strickland v. Washington, supra,* 466 U.S. at p. 689.)

Petitioner has provided no credible evidence, including any declaration from Hove, to support this claim. Nor does the claim derive support from anything contained in Cannady's declaration. (See *People v. Coddington, supra,* 23 Cal.4th at p. 654.) Moreover, the degree to which counsel chooses to utilize the services of an investigator is a reasonable tactical decision not subject to collateral review.

Petitioner's exhibits refute the claim because they establish that counsel sought pretrial investigative funds, pursuant to Penal Code section 987.9 (Pet. Exh. 260 [Confidential hearings on 2/9/93 and 2/22/93 re: defense

application for authorization to expend funds for investigation services]), retained the services of a licensed investigator, Brian Oliver ("Oliver"), and made ample use of that investigator. (Pet. Exh. 260.) (*Contrast In re Jones* (1996) 13 Cal.4th 552, 565 [counsel failed to obtain any investigative funds, retain a licensed investigator, or even to make use of the investigator employed by the codefendant].) Oliver's records show that he commenced work on this case on August 12, 1992, shortly after petitioner's arrest and months before the charges were filed, and that he continued working on the case through the guilt and penalty phases of the trial, i.e., until March 23,1993 (Pet. Exh.. 260), when jury deliberations commenced in the penalty phase. One of Oliver's summaries of expenses, namely, the bill for services from August 1992 to March 1993, shows that Oliver billed 217.4 hours on this case during that time, consulted with two private expert services, conducted a DMV search, and transcribed numerous documents. (Pet. Exh.. 260.) In light of the evidence, petitioner cannot show counsels' investigation was "perfunctory" or that counsel failed to act as "a diligent, conscientious advocate." (*Id.*, at p. 566; *People v. Pope, supra,* 23 Cal.3d at p. 424.)

Petitioner also fails to describe any relevant evidence that was available to but not discovered by any investigator, and thus the claim is too vague and insubstantial to warrant further consideration. "Strategic choices based upon reasonable investigation are not incompetent simply because the investigation was less than exhaustive." (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1253, citing *Burger v. Kemp* (1987) 483 U.S. 776, 788.) The additional witnesses proposed for the first time here would not have provided critical evidence that could have affected the outcome of the case. (See *People v. Jackson* (1980) 28 Cal.3d 264, 289 [counsel have never been required to investigate all prospective witnesses].) For example, the statement of codefendant Johnson that he "would have testified for Maurice at his penalty trial" (Pet. Exh. 80), is belied by the record on appeal that, when subpoenaed by

trial counsel, Johnson invoked his constitutional right against self-incrimination and was declared unavailable. (RT 1397-1399.) No ineffectiveness or prejudice is shown here.

D. The Purported Failure To Call A Criminalist

Petitioner has not established error or prejudice from counsels' purported failure to consult and present the testimony of a criminalist to refute the prosecution's argument that the victims were "executed." (Pet. 156.) He has failed to provide a declaration from either trial attorney explaining the reasons for this omission. (*People v. Coddington, supra,* 23 Cal.4th at p. 654.) Counsel's obvious tactical decision not to further emphasize the cold-blood nature of the shootings of two unarmed, defenseless victims, one of whom was on her knees begging for her life, was not constitutionally deficient representation. (See *People v. Mitcham, supra,* 1 Cal.4th at p.1059 [whether witnesses are presented is a matter of trial tactics and strategy].)

Petitioner cannot show prejudice from the omission because there is absolutely no reasonable probability that the proposed witness would have altered the result of the guilty verdict. The uncontested evidence shows that both Carter and Devallier were shot in the head at close range, a classic indication of an execution-style killing, as the prosecutor argued. Eyewitnesses testified that the killer stood over the helpless and unarmed victims when firing the fatal shots to the head. Petitioner's pretrial statements and trial testimony admitted that he fired the final shot that killed Carter, but claimed he shot Carter in the stomach. Petitioner also acknowledged that Devallier was killed by shots to the head, but claimed a third party fired those shots. Whether a defense criminalist couched the execution-style shootings of unarmed victims in more defense-friendly terminology (see, e.g., Pet. Exh. 92) would not possibly have affected the jury's verdicts, and might have significantly alienated the jury, which still had to decide the penalty phase. Likewise, the proposed testimony

by yet another neighbor (Pet. Exh. 92), would not have significantly affected the overwhelming evidence that petitioner was the gunman who shot both victims in the head.

E. The Purported Failure To Investigate And Refute Hypotheticals

Petitioner has not established error or prejudice from counsels' purported failure to investigate or refute the prosecutor's hypotheticals at the guilt and penalty phases. (Pet.158.)

Petitioner has failed to support this claim with any evidence regarding an ineffective assistance of counsel claim in general or to assistance of counsel at the guilt phase in particular. He has provided no declaration from either trial attorney on this issue. The "mere failure to object to prosecutorial argument rarely establishes incompetence on the part of defense counsel in the absence of some explanation on the record for counsel's action or inaction." (*People v. Coddington, supra,* 23 Cal.4th at p. 654.) Petitioner merely incorporates by reference his more generalized argument regarding prosecutorial misconduct during the penalty phase raised in section E. That claim, however, does not challenge argument or hypotheticals made during the guilt phase as claimed here. In fact, no hypotheticals were made or argued during the guilt phase. (Pet. 409.)

This Court has previously rejected the substance of this claim. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 172 [counsels' failure to object to the prosecutor's guilt phase closing argument was not ineffectiveness because the prosecutor did not testify to facts not in evidence, the argument was "within the scope of evidence presented," and the reference to gangs was "fleeting"].) None of the prosecutor's questions, comments or argument, even those that might arguably be misconduct, were such as to deny petitioner a fair trial or divert the jury from its proper role. (*People v. Visciotti* (1992) 2 Cal.4th 1, 83.)

Petitioner has failed to establish a prima facie basis for relief.

F. The Purported Failure To Rebut Evidence About The Cole Street House

Petitioner has not established error or prejudice from counsels' purported failure to refute the prosecutor's argument that the Cole Street house had been empty since the shootings by calling two witnesses petitioner propounds for the first time here. (Pet. 158.) Had counsel presented the potential defense witnesses petitioner suggests here (Pet. Exhs. 54, 81), they would have established that several crucial defense witnesses, including petitioner, had lied to the jury. At trial, petitioner and three defense witnesses testified that the Cole Street house had been empty and/or boarded up by the city immediately after the murders as follows: (1) petitioner testified the house had been boarded up immediately after the murders (RT 1482); (2) neighbor David Brooks testified the house had been empty since that night (RT 1525); (3) and (4), Latonia and Betty Jackson, who owned the house, testified it had been empty from that time on. (RT 1532, 1534, 1574.) Counsel cannot be found ineffective for making the tactical decision not to impeach the credibility of critical witnesses, including petitioner, on an issue not related to guilt. (*People v. Mitcham, supra,* 1 Cal.4th at p.1059; *People v. Beagle, supra*, 6 Cal.3d at p. 458 [failure to call certain witnesses will usually be deemed "trial tactics" as to which reviewing courts will not exercise judicial hindsight].) The issue was also not a "critical portion" of the prosecution's guilt phase case against petitioner, since the central issue there was whether petitioner intentionally killed Carter and whether he shot Devallier under any circumstances. (Contrast *In re Jones, supra*, 13 Cal.4th at p. 562 [counsel failed to investigate evidence to refute a critical portion of the prosecution's case].) The claim fails to state a basis for relief.

G. The Purported Failure To Run Juror Background Checks

Petitioner has not established error from counsels' purported failure to obtain jury background checks. (Pet. 159.) In support of this claim, petitioner has provided a declaration from trial counsel Cannady, which states a tactical basis for the omission:

> 3. Based on my experience, I believe that the prosecutors in Alameda County always ran a criminal check on jurors. Although I do not know that the district attorney in this case did so, in my experience, it would be unusual if she did not.

(Pet. Exh. 59.)

Cannady's declaration establishes that, based on his extensive experience as a defense attorney practicing in Alameda County, he reasonably relied on the purportedly usual practice of the district attorney's office to run necessary background checks on prospective jurors. With respect to juror Ary in particular, however, there was no indication from his questionnaire or voir dire that he had any prior criminal history and so there was no basis for running such a check on him in particular. Moreover, even had counsel checked the jurors criminal histories, counsel would reasonably have limited the search to records for Alameda County, the venue of the instant capital trial and residence of the citizens called for jury duty. Petitioner's statement from a deputy public defender (Pet. Exh. 107) does not establish that the prosecutor in this case did not run a routine background check on the jurors. Because juror Ary had no prior felony convictions in Alameda County, a routine background check limited to arrests in Alameda County would not have revealed his felony conviction, which had occurred in Contra Costa County. (*In re Avena, supra,* 12 Cal.4th at p. 720; *In re Ross* (1995) 10 Cal.4th 184, 215.)

There is also no statutory or judicially-created requirement that either party run criminal history checks on prospective jurors, for the juror summons itself requires the prospective juror to affirm, under penalty of perjury, the absence of any such convictions before being included in the jury pool. Likewise the voir dire process itself, including the use of questionnaires like

those in this case, will generally touch upon that same matter. Defense counsel are not ineffective for failing to run random criminal checks on jurors absent any indication the effort would bear fruit.

H. The Purported Failure To Make Appropriate Objections

Petitioner has not established error or prejudice from counsels' purported failure, at the suppression hearing, to make objections to the prosecutor's cross-examination of his testimony. (Pet. 161.) (See *People v. Mendoza, supra,* 24 Cal.4th at p.172 ["A defense attorney's failure to object at trial rarely establishes ineffectiveness"].) Petitioner provides no collateral evidence in support of the claim, which is pending on another legal theory on appeal. (AOB 43-47; RB 48-52.) He has provided no explanation from either trial counsel and no explanation appears in the record for their alleged inaction. (See *People v. Coddington, supra,* 23 Cal.4th at p. 654 ["mere failure to object to prosecutorial argument rarely establishes incompetence . . . in the absence of some explanation on the record for counsel's action"].)

Petitioner has failed to establish prejudice. He has not shown that the objections proposed here would have had any effect on the trial court's denial of the motion to suppress, especially since petitioner admitted during direct questioning by the court that he was a liar who had repeatedly lied to the officers during the taped statements at issue. (See *People v. Stratton* (1988) 205 Cal.App.3d 87, 93 [evidence provided must have "great potential for prejudice" before failure to object is ineffectiveness].)

I. The Purported Failure To Argue The *Wheeler* Motion

Petitioner has not established error or prejudice from counsels' purported failure to make an adequate record to establish a prima facie case for discriminatory use of peremptory challenges at the *Wheeler* motion. (Pet. 162.)

In addition to his failure to provide counsels' statements explaining this issue, petitioner has presented no other evidence in support of the claim. Because the identical claim it is pending on appeal, it is not cognizable here. (See *People v. Freeman, supra,* 8 Cal.4th 485.)

The record also refutes the claim. It shows counsel vigorously litigated the *Wheeler* motion. The trial court suggested the prosecutor state the reasons for her challenges and she did so. The court, after a full examination of the allegations and the record of voir dire, found no bias had been shown. Had counsel expressly articulated what petitioner here claims he should have said, it still would not have led to a more expansive hearing than the one actually held, which was full and complete in every way, nor would it have altered the trial court's decision to deny the motion. The claim states no basis for relief because petitioner has not shown that counsels' purported failure was prejudicial. (*People v. Mendoza, supra,* 24 Cal.4th at p. 173.)

J. The Purported Actual Conflict With Trial Counsel

Petitioner has not established error or prejudice from counsels' purported conflict sufficient to establish a prima facie case for collateral relief. (Pet. 173.) This claim is not cognizable because it relies on evidence available at the time the appeal was filed and should have been brought at that time. Petitioner does not justify his failure to do so. Petitioner provides no independent evidence to support this claim and no statement from either trial counsel. He has merely incorporated his argument in Claim B, which alleges attorney conflict in general. (Pet. 112.) Petitioner has failed to particularize Claim B to address the ineffective assistance of counsel claim raised here.

As discussed previously, the record does not support the conflict claim because Hove performed as a reasonably competent defense attorney throughout the trial. This Court has previously held that even an order of suspension from the practice of law, which was stayed during the trial, does not establish

ineffective assistance of counsel. (*People v. Frye, supra,* 18 Cal.4th at pp. 995-997.) By contrast, Hove was never suspended from the practice of law in the State of California and thus petitioner cannot establish ineffective representation on this claim. The Court has also held that the fact that there were State Bar disciplinary proceedings pending against defense counsel during his representation of defendant does not, in and of itself, establish ineffective representation under the state or federal constitution. (*People v. Sanchez, supra,* 12 Cal.4th at pp. 42-44.) Petitioner's express waiver prior to trial of any alleged conflict, after careful voir dire by the trial court, shows that he cannot establish prejudice on this issue. The claim does not state a basis for relief.

In sum, the totality of the record shows that trial counsels' actions were not incompetent and did not adversely affect the outcome of this case. Because no prejudice appears, the claims are without merit and may be summarily denied. (*Strickland v. Washington, supra,* 466 U.S. at p. 697; accord *In re Ross, supra,* 10 Cal.4th at p. 204.) Counsel properly brought and vigorously litigated the pretrial motions, adequately investigated potential defenses, sought all favorable evidence, carefully considered each decision, and made certain tactical choices that were reasonable. Providing effective representation does not require producing every conceivable piece of evidence in support of a claim. Were that the standard, no attorney, including current appellate defense counsel, would be deemed effective. Post-trial attacks castigating trial counsel ignore the substantial work done by that attorney, most of which is relied upon here and in the pending appeal. Petitioner has failed to show he was denied his constitutional right to effective assistance of counsel or that any or all of these omissions warrant collateral relief against the guilty verdict.

VII.

PETITIONER'S CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE IS PROCEDURALLY BARRED AND FAILS TO STATE A PRIMA FACIE CASE OF RELIEF

Petitioner claims he was denied effective assistance of counsel at the penalty phase of his trial because trial counsel purportedly failed to investigate and introduce mitigating evidence. (Pet. 173.) Petitioner specifically alleges as follows: (1) counsels' pretrial investigation and preparation was perfunctory and (2) counsels' penalty phase presentation failed to demonstrate a purportedly "readily available" case in mitigation.

As discussed above, the claims are barred because the evidence relied upon here was known to petitioner at the time he filed his direct appeal in this Court and he does not provide any explanation for failing to raise these claims at that time. The Court has refused to consider newly presented grounds for relief which were known to the petitioner at the time of a prior attack on the judgment. (*In re Clark, supra,* 5 Cal.4th at pp. 767-768.) "The rule has been that the court will look to what petitioner and/or his counsel knew at the time of the appeal or the filing of the first habeas corpus petition, and demand that the failure to raise all issues in a single, timely petition be justified." (*Id.,* at p. 779.)

Even if the Court considers the claims, none states a prima facie basis for relief.

> The test for prejudice arising from incompetence of counsel at the penalty trial resembles that for incompetency of counsel at the guilt trial. The question is whether there is a reasonable probability that, absent the errors [of counsel], the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. [Citations omitted.] As in the guilt phase, reasonable probability is defined as one that undermines confidence in the verdict. [Citation omitted.]

(*In re Marquez* (1992) 1 Cal.4th 584, 606, internal quotations omitted.)

A. The Pretrial Investigation And Preparation Of Mitigating Evidence

Petitioner contends counsel failed to consult and prepare appropriate lay witnesses and experts for the penalty phase. (Pet. 173-190.) The documents in support of the petition actually refute the claims. Trial counsels' pretrial investigation of mitigating evidence included hiring a psychologist, Stephen Pittel, providing Pittel with documents about the case, and permitting Pittel to interview petitioner to "assess [him] as he was at the time of trial." (Pet. Exh. 59.) After discussing Pittel's conclusions during a meeting, however, counsel made a tactical decision solely to pursue a mental state defense at the penalty phase. Cannady obviously determined that he and Pittel were not "on the same page" regarding the case. Since counsel, and not Pittel, is the "captain of the ship," Cannady's tactical decision not to call Pittel as a defense expert in mitigation was not ineffective assistance.

Cannady's declaration also states that he decided to retain a different expert, Dr. Fred Rosenthal, to testify as an expert in mitigation at the penalty phase in order to have a single expert who was capable of testifying about mental state defenses as well as certain "alcohol or drug issues in the case." (Pet. Exh. 59.) Cannady's declaration, which petitioner does not rely on to support this claim, establishes counsel made an adequate investigation as follows:

> 5. I do not believe that I had used Dr. Fred Rosenthal in a case prior to Mr. Boyette's penalty phase. I think I had gotten a recommendation from another attorney who had used him to testify. I had originally contacted Stephen Pittel, but I decided to go with 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.

(Pet. Exh. 59.)

The declaration makes it abundantly clear that trial counsel had a tactical reason for choosing Rosenthal over Pittel. Pittel's declaration (Pet. Exh. 100) does not conflict with Cannady's recollections, and, as discussed in the preceding section, shows in greater measure the extent of counsels' pretrial investigation and preparation.

Petitioner cannot establish a basis for relief on this claim because he cannot show prejudice from the purported omission.

B. The Defense Penalty Phase Case In Mitigation

Petitioner contends counsel failed to present statutorily and constitutionally appropriate and readily available mitigation evidence in the penalty phase. (Pet. 173, 191-210, 284-347.)

The record on appeal shows that trial counsel presented nine witnesses in mitigation, the first three of whom were mental health experts who testified about petitioner's childhood, immaturity as an adult, and psychological history. (See *Darden v. Wainwright* (1986) 477 U.S. 168, 186 [the decision whether to present psychiatric testimony in the penalty phase of a capital trial is obviously a question of tactics].) The remaining six defense witnesses consisted of petitioner's school counselor and family members who corroborated the experts' testimony regarding petitioner's immaturity, passivity, and dysfunctional parents. By contrast, the prosecution's penalty phase consisted solely of nine members of the victims' families who gave very brief victim impact testimony, and no expert testimony. (RT 1847-1886.) Petitioner cannot show ineffectiveness on the record here.

Although petitioner acknowledges that trial counsel elicited favorable testimony from Dr. Rosenthal (Pet. 196), he complains that counsel failed to

"contextualiz[e]" Dr. Rosenthal's testimony by reference to specific events in petitioner's social history and that numerous additional witnesses and experts should have been called to do so at greater length. (Pet. 194, 196.) The record, however, shows that trial counsel made a legitimate tactical choice in presenting some but not every possible piece of evidence about petitioner's social history and alleged mental state.

This Court must judge "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." (*Strickland v. Washington, supra*, 466 U.S. at p. 690; *People v. Freeman, supra,* 8 Cal.4th at p. 513.) Where, as here, the totality of the record shows that trial counsel's actions did not affect the outcome, the claim is without merit and may be summarily denied. (*Strickland v. Washington, supra,* 466 U.S. at p. 697; accord *In re Ross, supra,* 10 Cal.4th at p. 204.) Providing effective representation does not require producing every conceivable piece of evidence in support of a claim. Were that the standard, no attorney, including current defense counsel, would be deemed effective. Post-trial attacks castigating trial counsel ignore the substantial work done by trial counsel, most of which is relied upon here and in the brief on appeal.

Petitioner has failed to state a claim for relief.

VIII.

PETITIONER'S CLAIM OF PROSECUTORIAL MISCONDUCT AT THE PENALTY PHASE IS PROCEDURALLY BARRED AND FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Petitioner claims that the prosecutor committed misconduct at the penalty phase of trial. (Pet. 408.) He raises the following eight allegations: (1) the prosecutor knowingly used false or unsupported hypotheticals based on petitioner's prior bad acts (Pet.411-430); (2) the prosecutor used argument as a substitute for evidence (Pet. 430-434); (3) the prosecutor improperly injected speculation concerning gang affiliation and future dangerousness (Pet. 434-446); (4) the prosecutor improperly commented on petitioner's failure to testify and his lack of remorse (Pet. 447-451); (5) the prosecutor improperly argued about society at large and other murders in the community (Pet. 451-454); (6) the prosecutor improperly argued the jurors should excuse themselves if they could not vote for the death penalty (Pet. 454-457); (7) the prosecutor knew or should have known that Juror Ary was a convicted felon and ineligible for jury service (Pet. 457-458); and (8) cumulative misconduct occurred. (Pet. 458-459.)

The first six claims are the same claims brought in his pending appeal and are not cognizable on collateral review. Petitioner has simply added two claims and, by his own account, some "extra-record facts" to support the claims. However, all of the claims and any purportedly new facts were available to petitioner at the time he filed his appeal. None of the claims are cognizable here. The *Waltreus/Dixon* bar applies to claims of prosecutorial misconduct, such as those raised here, because the claims are discernable from the record on appeal, are cognizable on appeal, and are already raised on the direct appeal pending in this Court. (*In re Robbins, supra,* 18 Cal.4th at p. 814, fn. 34.) As to the purportedly new facts added here, "issues that could be raised on appeal must be so presented, and not on habeas corpus in the first instance." (*In re Harris, supra,* 5 Cal.4th at p. 829; *In re Dixon, supra,* 41 Cal.2d at p. 759.) An

unjustified failure to present an issue on appeal "will generally preclude its consideration in a postconviction petition." (*In re Harris, supra,* 5 Cal.4th at p. 829.) In sum, habeas corpus is not available for relief on any of these claims.

With respect to allegations one through six, namely, (1) the prosecutor knowingly used false or unsupported hypotheticals based on petitioner's prior bad acts; (2) the prosecutor used argument as a substitute for evidence; (3) the prosecutor improperly injected speculation concerning gang affiliation and future dangerousness; (4) the prosecutor improperly commented on petitioner's failure to testify and his lack of remorse; (5) the prosecutor improperly argued about society at large and other murders in the community; and (6) the prosecutor improperly argued the jurors should excuse themselves if they could not vote for the death penalty, they are also not cognizable because petitioner failed to object to any part of that penalty phase argument below, as we explained in our response to petitioner's pending appeal. (See RB 138-166; see also AOB 151, fn 31.) Those claims are not preserved for review unless the purported misconduct is such that the harm could not have been cured by a timely admonition, had one been requested. (*In re Visciotti, supra,* 2 Cal.4th 79.) Petitioner suggests his failure to request an admonition should be excused because it would not have cured the harm, or that trial counsel was ineffective for failing to object and request an admonition. That exception, though often invoked, is rarely accepted. (See *People v. Ratliff* (1986) 41 Cal.3d 675, 690.) It is inapplicable here as well.

With respect to allegations seven and eight, namely, the prosecutor knew or should have known that Juror Ary was a convicted felon and ineligible for jury service and cumulative misconduct occurred, raised here for the first time, petitioner does not provide any explanation for failing to raise these claims on direct appeal. In support of these claims, petitioner has simply included declarations of individuals known to him, or of whom he could have known (other defense attorneys), well before filing his direct appeal. Most of the

evidence relates to court records, transcripts, or other documents that he already had at the time his appeal was briefed. (Pet. 409, fn. 74.) For example, petitioner provides declarations by petitioner's prior probation officers (Pet. Exhs. 98, 120), whose statements do not establish misconduct. Likewise, since petitioner admitted the prior random assault, the declaration from the victim of that assault (Pet. Exh. 89) does not raise a credible basis for relief.

Even if considered on the merits, none of the claims provide a basis for relief. For example, as discussed at length in the response on appeal, the prosecutor's argument and hypotheticals were based on reasonable inferences from the record known to the prosecutor, as petitioner acknowledges here. (Pet. 157, fn. 25; see also S032736, RB 138-166.) Court and probation records provide a basis for each of the prosecutor's statements challenged here and on appeal, and petitioner had admitted most of the acts described in the hypotheticals and argument. (See, e.g., Pet. Exh. 16 [6/7/91:petition to revoke probation based on petitioner's admission that, while standing on a corner with some older men, he jumped a white passerby and took his pager].) Moreover, the evidence proposed here would have "opened the door" to the actual police and court records describing the criminal acts that formed the bases of the hypotheticals. Admission of any of that evidence would have significantly undermined the defense theory that petitioner was a simple and sweet-natured and essentially non-violent child who had been briefly misled by bad company. Defense counsel also presented an extensive case in mitigation (Pet. 158), and made a tactical decision to avoid presentation of any damaging rebuttal evidence that would have conclusively established the fact of petitioner's prior assaultive conduct. (*In re Marquez, supra,* 1 Cal.4th at p. 605; *In re Fields, supra,* 51 Cal.3d at p.1077.) That decision was within the range of reasonable competence. (*People v. Gonzalez, supra,* 51 Cal.3d at p.1253.) Since there was no prosecutorial misconduct with respect to any of these issues, defense counsel cannot be found ineffective for failing to object to proper argument or

questioning. (See *People v. Mendoza, supra,* 24 Cal.4th at p. 172 ["A defense attorney's failure to object [to the prosecutor's allegedly improper argument] at trial rarely establishes ineffectiveness."].)

With respect to the seventh allegation, that the prosecution knew or should have known that Ary had been previously convicted of a felony, petitioner has not established that the prosecutor did not, in fact, run a check of his criminal history by checking either her office files or the records in the Alameda County Superior Court, the logical locations to conduct a search. Whether conducted or not, however, such an investigation would not have revealed any criminal history for either Ary or his family. Moreover, there was no reasonable basis for investigating Ary's history, in light of his presence on the jury commissioner's list of eligible voters residing in Alameda County, his failure to reveal his prior conviction on the return to his jury summons, and his failure of disclosure on the juror questionnaire. Misconduct cannot be shown on this purported omission

Petitioner's claim of "cumulative misconduct" fails because he has not established that any of his claims, individually or taken together, constitute misconduct. (*In re Visciotti, supra,* 2 Cal.4th at p. 83; *Romano v. Oklahoma.*(1994) 512 U.S. 1, 8-10.)

Petitioner has failed to establish a prima facie case for relief.

IX.

PETITIONER'S CLAIM THAT HIS PRETRIAL STATEMENT WAS IMPROPERLY ADMITTED AT TRIAL IS PROCEDURALLY BARRED AND FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Petitioner claims his pretrial statement to the police was coerced and should not have been admitted at trial. (Pet. 459.) He contends his waiver, pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, was involuntary.

For the reasons stated above, the claim is procedurally barred and thus fails to state a prima facie case for relief. Petitioner raised this issue in his direct appeal currently pending in this Court (see AOB A), and he fails to explain why this claim warrants separate consideration on collateral review. (*In re Clark, supra,* 5 Cal.4th at p. 825; *In re Dixon, supra,* 41 Cal.2d at p. 759.)

Even if the Court considered the merits here, the claim would still fail. The issue was extensively litigated at the suppression hearing, in pretrial motions, and again on appeal. Substantial evidence supports the trial court's denial of petitioner's motion to suppress. The trial court heard the tape recording of petitioner's statement, which tape clearly showed that he had waived his rights and signed a waiver form before he made the incriminating statement. (RT 23-29.) Petitioner testified at length at the suppression hearing (RT [1/25/93] 63-90), and admitted he had lied in each of the statements he gave to the police. (RT 78-90.) His testimony during cross-examination by the prosecutor and questioning by the trial court reveals a confident, articulate, and manipulative individual. The police officer who had questioned petitioner prior to his arrest also testified at the hearing, contradicted petitioner's self-serving claims, and ultimately proved more credible. (RT 17-63.) The trial court properly rejected petitioner's suppression motion.

Petitioner presents no grounds for reconsidering the claim here. His reliance here on a newspaper reporter's description of other police interviews (Pet. 465) fails to provide credible evidence refuting his admissions to the

police. In sum, petitioner's conclusory claims lack any evidentiary support and should be rejected.

X.

PETITIONER'S ATTACKS ON THE PENALTY PHASE INSTRUCTIONS ARE BARRED AND MERITLESS

Petitioner challenges three jury instructions based on Penal Code section 190.3 that were given here. He contends CALJIC Nos. 8.85, 8.87, and 8.88 are defective because they failed to guide the jury's discretion, are vague and incomprehensible, and resulted in an arbitrary, capricious, and unreliable sentencing. (Pet. 480.) Petitioner raised the substance of these claims in the direct appeal currently pending in this Court, as he notes here. (Pet. 481.) Petitioner's cursory reference here to trial counsel's representation presents no reason why the instant challenge to these instructions, i.e., under a single heading instead of under separate headings as on appeal, could not have been raised in this format and legal theory on direct appeal. The claim should be rejected as procedurally barred. (*In re Dixon, supra,* 41 Cal.2d at p. 759.)

Even if considered on the merits, the Court should reject the claims for the reasons stated in its previous cases:

1. The instructions based on Penal Code section 190.3 properly guide the jury's discretion. (See *People v. Frye, supra,* 18 Cal.4th at p.1029; *People v. Bolin* (1998) 18 Cal.4th 279, 345; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1265.)

2. Penal Code section 190.3(a) and (b), and the instructions based on it, are neither unconstitutionally vague nor incomprehensible. (*People v. Kip* (1998) 18 Cal.4th 349, 380-381; *People v. Bradford* (1997)15 Cal.4th 1229,.1384, citing *Tuilaepa v. California* (1994) 512 U.S. 967, 975.)

3. The instructions based on Penal Code section 190.3 do not result in a sentence that is arbitrary, capricious, or unreliable. (*People v. Bradford, supra,* 15 Cal.4th at p. 1384.)

Petitioner identifies no reason this Court should reach a different result.

XI.

PETITIONER'S CLAIM THAT HIS SENTENCE OF DEATH IS BASED ON INACCURATE EVIDENCE AND IS DISPROPORTIONATE IS PROCEDURALLY BARRED AND FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Petitioner claims the sentence of death was based on unreliable evidence and is disproportionate to his culpability. (Pet. 490.) He contends his death sentence was unlawful because (1) it was based on incomplete evidence in mitigation; (2) it was disproportionate to the offenses; and, (3) there was no meaningful proportionality review. (Pet. 493.)

The claim is barred because it is raised in the direct appeal currently pending with this Court, and petitioner has failed here to explain why the claim should also be considered on collateral review. (*In re Clark, supra,* 5 Cal.4th at p. 825; *In re Dixon, supra,* 41 Cal.2d at p. 759.)

Even if considered on the merits, the Court should reject the claims for the reasons stated in its previous cases:

1. The sentence of death was not arbitrary, capricious or unreliable because it was based on reliable evidence. (*People v. Bradford, supra,* 15 Cal.4th at p. 1384);

2. The sentence of death was not disproportionate to the offenses. (*People v. Frye, supra,* 18 Cal.4th at p. 1029; *People v. Millwee* (1998) 18 Cal.4th 164; *People v. Musselwhite, supra,* 17 Cal.4th at p. 1265);

3. This Court does not engage in intercase or intracase proportionality review. (*People v. Bradford, supra,* 15 Cal.4th at p. 1384; *People v. Bolin, supra,* 18 Cal.4th at p.345, citing *Pulley v. Harris* (1984) 465 U.S. 37, 50.)

Petitioner presents no reason why this Court should reach a different result and thus the claim has failed to state a basis for relief.

XII.

ALLEGED CUMULATIVE ERRORS IN THE GUILT AND PENALTY PHASES FAIL TO MAKE A PRIMA FACIE SHOWING FOR COLLATERAL RELIEF

Petitioner claims that the purported deficiencies in the guilt and penalty phases, as discussed in issues A through L, even if not considered prejudicial individually, had a cumulative substantial and injurious effect in determining the jury's verdict. (Pet. 495.)

As discussed above, with the possible exception of the juror misconduct claim, petitioner has failed to identify any colorable basis for relief. There is, accordingly, no prospect of "cumulative" prejudice. (*People v. Price* (1991) 1 Cal.4th 324, 491.) Petitioner is entitled to a fair trial, not a perfect one, even where, as here, his life is at stake. (*People v. Marshall, supra,* 50 Cal.3d at p. 945.) He has failed to show he was denied his constitutional rights to a fair trial or to a reliable penalty verdict. (*People v. Earp* (1999) 20 Cal.4th 826, 904; *People v. Samayoa* (1997)15 Cal.4th 795, 849; *People v. Carpenter, supra,* 15 Cal.4th 312, 421-422; *People v. Bradford, supra,* 14 Cal.4th at p.1057; *People v. Jackson, supra,* 13 Cal.4th at p.1245; *People v. Hamilton* (1988) 46 Cal.3d 123, 156; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1236-1237.)

XIII.

PETITIONER'S CLAIM THAT HIS EXECUTION AFTER PROLONGED CONFINEMENT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IS PROCEDURALLY BARRED AND FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Petitioner contends that executing him after a prolonged confinement under a sentence of death (which now totals nine years on death row) would be cruel and unusual punishment. (Pet. 500.) He failed to raise this claim on direct appeal and presents no reason for his failure to do so. For the reasons stated above, this claim is procedurally barred and fails to state a prima facie case for relief.

In any event, the claim affords no basis for relief. (See *People v. Frye, supra,* 18 Cal.4th at pp. 1030-1031 ["prolonged confinement prior to execution does not constitute a violation of the Eighth Amendment"], citing *Harrison v. United States* (1968) 392 U.S. 219, 221, fn. 4; cf. *People v. Hill* (1992) 3 Cal.4th 959, 1014-1016 [rejecting argument that delay inherent in capital appeals process constitutes cruel and unusual punishment]; *People v. Chessman* (1959) 52 Cal.2d 467, 499 [same].)

XIV.

PETITIONER'S CLAIM THAT EXECUTION BY LETHAL INJECTION IS CRUEL AND UNUSUAL PUNISHMENT IS PROCEDURALLY BARRED AND FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Petitioner contends that execution by lethal injection constitutes cruel and unusual punishment. (Pet. 507.) He failed to challenge such means in his pending direct appeal and presents no reason here why the claim should now be considered. For the reasons previously stated, the claim is procedurally barred.

Even if considered on the merits, the claim fails. (See *People v. Samayoa, supra,* 15 Cal.4th 864; *People v. Holt* (1997) 15 Cal.4th 619, 702; *People v. Bradford, supra,* 14 Cal.4th at p.1059; *People v. Berryman* (1993) 6 Cal.4th 1048, 1110.) Petitioner presents no reason why this Court should reach a different result and the claim should therefore be rejected.[12/]

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12. The Ninth Circuit has also rejected the claim that lethal injection violates the constitution. (*LeGrand v. Stewart* (9th Cir. 1998) 133 F.3d 1253, 1264 [defendant failed to demonstrate that the use of lethal injection as a method of execution violates his constitutional rights]; *Poland v. Stewart* (9th Cir. 1997) 117 F.3d 1094, 1105 [same]; *Kelly v. Lynaugh* (5th Cir. 1988) 862 F.2d 1126, 1135 [execution by lethal injection not cruel and unusual punishment, following *Woolls v. McCotter* (5th Cir. 1986) 798 F.2d 695, 698].)

XV.

PETITIONER'S CLAIM THAT HIS DEATH SENTENCE VIOLATES INTERNATIONAL LAW IS PROCEDURALLY BARRED AND FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Petitioner claims that his death sentence violates international law. (Pet. 521.) He contends his sentence was imposed without regard to international treaties and laws, he was denied a right to a fair trial by an independent tribunal and his right to the minimum guarantees for the defense under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration).

As discussed above, petitioner's claim is procedurally barred. Even if considered on the merits, however, the claim provides no basis for relief. (See *People v. Ghent* (1987) 43 Cal.3d 739, 779 [capital punishment does not violate international law].) Petitioner has no personal cause of action under those instruments. (*Ibid* [a treaty or international declaration or charter has no effect upon domestic law unless it either is implemented by Congress or is self-executing].) None of the instruments petitioner cites are self-executing and he has provided no authority for interpreting them as such. (See *Sei Fujii v. State of California* (1952) 38 Cal.2d 718, 722 [for a provision of a treaty to be self-executing without the aid of implementing legislation and to have the force and effect of a statute, it must appear the framers intended to prescribe a rule that, standing alone would be enforceable in the courts].)

Petitioner also has failed to state a cause of action under international law for the simple reason that, as previously demonstrated, his various claims of violations of due process in connection with his prosecution, conviction and sentencing are without merit. Hence, he fails to make any showing that his conviction and sentence violate any international law or treaty.

CONCLUSION

For all of the foregoing reasons, respondent respectfully requests that an order to show cause and evidentiary hearing in state court issue on the first claim, but that the remaining claims be denied.

Dated: March 27, 2002

Respectfully submitted,

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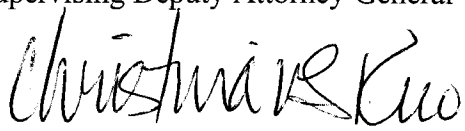

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DECLARATION OF SERVICE

Case Name: **In re Maurice Boyette** No.: **S092356**

I declare:

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

On **March 28, 2002**, I placed the attached **INFORMAL RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS** in the internal mail collection system at the Office of the Attorney General, 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **March 28, 2002**, at San Francisco, California.

L. SORENSEN
Typed Name

L. Sorensen
Signature